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Lawyers, Guns, and Money: The Bribery Problem and the U.K. Bribery Act*

LAWRENCE J. TRAUTMAN** AND KARA ALTENBAUMER-PRICE***

Abstract

With expanding U.S. business operations around the globe, the potential for significant exposure to international corruption increases along with the increased risks associated with anti-bribery laws. Companies who employ citizens of the United Kingdom, maintain an office in the United Kingdom, or are service providers to any United Kingdom organizations, are subject to the U.K. Bribery Act and may be held liable for unlimited fines and jail terms that increase to ten years. Regardless of their countries of origin, multinational companies will inevitably be impacted by the U.K. and U.S. anti-bribery statutes. The United States' Securities and Exchange Commission (SEC) and the United Kingdom's Serious Frauds Office (SFO), Financial Conduct Authority (FCA), and Prudential Regulation Authority (PRA) are increasing their coordination to work together in the areas of common regulatory interest, including cross-border enforcement cases. Any attempt to assess corporate risk for a U.K. Bribery Act violation requires an understanding of how the statute operates and is enforced.

At its core, the U.K. Bribery Act creates four distinct "categories of offenses: (1) bribing another person; (2) taking bribes; (3) bribing foreign public officials; and (4) the failure of a commercial organization to prevent bribery."¹ We begin with a brief discussion of the international bribery

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1. COVINGTON & BURLING LLP, ANTI-CORRUPTION MID-YEAR REVIEW (July 2011), available at <http://www.cov.com/files/Publication/01a3d761-b8ca-421f-9932-b0fef03c4219/Presentation/PublicationAttach->

problem. Next, because the U.K. Bribery Act is relatively new, we provide an explanation and analysis of the act, along with a description of the SFO's revised policies published on October 9, 2012. An analysis of many of the key differences between the Foreign Corrupt Practices Act (FCPA) and U.K. Bribery Act is then presented. Now that more than two years have passed since implementation, an assessment of this law's impact is presented. As the world continues to grow smaller and commerce increases, corporate officers and directors must necessarily become familiar with the provisions of the U.K. Bribery Act.

I. Overview

With U.S. business operations expanding around the globe, the potential for significant exposure to international corruption increases along with the increased risks associated with anti-bribery laws. Companies who employ citizens of the United Kingdom, maintain an office in the United Kingdom, or are service providers to any United Kingdom organizations are subject to the U.K. Bribery Act and may be held liable for unlimited fines and jail terms that increase to ten years.² Regardless of their countries of origin, multinational companies will inevitably be impacted by the U.K. and U.S. anti-bribery statutes. The SEC and the United Kingdom's SFO, FCA, and PRA³ are increasing their coordination to work together in the areas of common regulatory interest, including cross-border enforcement cases.⁴ Tracey McDermott, Director of Enforcement & Financial Crime at the FCA, states, "we continue to look at the way in which firms manage the risk that staff or agents of firms may accept or offer bribes to secure new deals."⁵ Any attempt to assess corporate risk for a U.K. Bribery Act violation requires an understanding of how the statute operates and is enforced.

"The [U.K.] 'Bribery Act' replaces a patchwork of statutory and common law offenses dating back to 1889 and is designed to modernize and simplify the current anti-bribery restrictions in the United Kingdom."⁶ At its core, the U.K. Bribery Act creates four distinct "categories of offenses: (1) bribing another person; (2) taking bribes; (3) bribing foreign public officials; and (4) the failure of a commercial organization to prevent bribery."⁷

ment/68ac553e-2122-49fa-b270-b38b69ff5215/Anti-Corruption%20Mid-Year%20Review%20-%20Beijing.pdf.

2. Bribery Act, 2010, c. 23, §§ 7–8, 11–12 (U.K.), available at http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf.

3. See *UK's FCA Wastes No Time in Setting Priorities; 15% Budget Increase*, INS. J. (Apr. 10, 2013), <http://www.insurancejournal.com/news/international/2013/04/10/287819.htm> (observing that the new Financial Conduct Authority and the Prudential Regulation Authority replaced the Financial Services Authority on April 1, 2013).

4. AARON STEPHENS & WILLIAM DEVANEY, *US AND UK WHISTLEBLOWING PROGRAMMES: IMPLICATIONS FOR US AND UK FINANCIAL INSTITUTIONS AND OTHER COMPANIES* 1, 13 (2013), available at <http://us.practicallaw.com/resource/9-525-9018>.

5. Tracey McDermott, Dir. of Enforcement & Fin. Crime, Fin. Conduct Auth., Keynote Address: Financial Crime in the FCA World (July 18, 2013), available at <http://www.fca.org.uk/news/speeches/financial-crime-in-the-fca-world>.

6. JONES DAY, *A NEW WEAPON IN THE ARSENAL FOR THE FIGHT AGAINST CORRUPTION: THE U.K. BRIBERY ACT OF 2010* (Apr. 2010), available at <http://www.jonesday.com/files/Publication/79cd836f-6829-4b74-bc38-f0cfl1ec49ec/Presentation/PublicationAttachment/f77034b9-035e-45a3-bf41-f11708369196/New%20Weapon.pdf>.

7. COVINGTON & BURLING LLP, *supra* note 1. See Bribery Act, 2010, c. 23, §§ 1–2, 6–7 (U.K.).

We begin with a brief discussion of the international bribery problem. Next, because the U.K. Bribery Act is relatively new, we provide an explanation and analysis of the act, along with a description of the SFO's revised policies published on October 9, 2012. An analysis of many of the key differences between the Foreign Corrupt Practices Act⁸ and U.K. Bribery Act is then presented. Now that more than two years have passed since implementation, an assessment of this law's impact is presented.

As the world continues to grow smaller and commerce increases, corporate officers and directors must necessarily become familiar with the provisions of the U.K. Bribery Act, as well as the FCPA; failure to do so may put their companies and themselves at grave risk. Any attempt to assess corporate risk for a U.K. Bribery Act violation requires an understanding of how the statute operates and is enforced.

II. The Bribery Problem

In any of its various forms, bribery, corruption, or extortion takes an unacceptable toll on all citizens of the world. This research was conducted to provide an analysis of the U.K. Bribery Act that will hopefully benefit entrepreneurs, business executives, and corporate directors as they seek to conduct business around the world. A deeper dive into research and thinking about the difficult issues surrounding corruption produced a realization that the global and domestic culture of bribery, extortion, and corruption is an amorphous cancer eating away at our societies with the very real potential to destroy commerce between nations and produce destructive global civil unrest. This is not an original thought; it seems apparent that following the global financial crisis of 2008-09, bribery does not seem to be a plague likely to go away at any time during the near future. Richard Alderman, who was Director of the U.K.'s Serious Fraud Office (SFO) until April 2012, has observed,

I have been following . . . the events of the Arab Spring with the very greatest of interest. I have also been looking at what has been happening recently in India, China, Russia, and other countries. When I look, in particular, at the Arab Spring I see that corruption is one of the top issues raised by the citizens of these countries as one of their main grievances against the government or, indeed in some cases, the former government. Some say that bribery is part of the culture of those countries and that we must respect it. The citizens of those countries have demonstrated very clearly to my mind that this is not part of the culture that they are prepared to accept any longer.⁹

8. We discuss the FCPA in greater detail in a separate article. See generally Lawrence J. Trautman & Kara Altenbaumer-Price, *Foreign Corrupt Practices Act: An Update on Enforcement and SEC and DOJ Guidance*, 41 SEC. REG. L. J. 241 (2013), available at <http://ssrn.com/abstract=2293382> (discussing the FCPA in greater detail than in this article) [hereinafter Trautman & Altenbaumer-Price, *FCPA Update*]; see also Virginia G. Maurer & Ralph E. Maurer, *Uncharted Boundaries of the U.S. Foreign Corrupt Practices Act*, 20 J. FIN. CRIME 355 (2013).

9. Richard Alderman, Dir., Serious Fraud Office, U.K., Address at the Risk Advisory's DC Dinner (Oct. 5, 2011), available at <http://www.riskadvisory.net/analysis/story/serious-fraud-office-director-alderman-speaks-at-risk-advisorys-dc-dinner>.

Transparency International has observed, “recent events in the Middle East have brought into stark relief the desperation people felt about levels of corruption in their countries.”¹⁰ These events confirmed Transparency International’s research “that Egypt, Lebanon, Morocco and Palestine all suffer from unchecked executive power and lack access to information laws and whistleblower protection legislation, greatly hindering citizens’ ability to report and stop corrupt practices.”¹¹ Alexandra Wrage, international attorney and President of Annapolis, Maryland-based TRACE International, has written that, when it comes to bribery, international competitors must play by the same rules to “minimize the ‘prisoners’ dilemma” because “bribery is wrong . . . uneconomical, inefficient, costly, distorting of proper incentives and outcomes, risky, and generally unprofitable. It is, in short, a poor way to do business.”¹² Several years have now passed since implementation of the U.K. Bribery Act. Accordingly, within the next few pages, an attempt is made to document the act’s impact to date and discuss likely future developments.

Much has been written during recent years about the FCPA.¹³ But, because the U.K. Bribery Act 2010 is relatively new, less has been written on it, and it may take years to understand how and to what extent the United Kingdom authorities enforce the act.¹⁴ Since practitioners tend to focus on the requirements mandated by these statutes and germane compliance mechanics, even less focus tends to be given to the subjects of bribery and extortion, the extent to which it is encountered, and the economic analysis of the law of bribery. In 2011, Yockey observed that “[b]ribery blights lives, undermines democracy, and distorts markets.”¹⁵ Donnelly and Kellogg state that the scourge of corruption “stretches from multinational firms in the United States, to manufacturers in China, to farmers in Latin America. It has led to water scarcity in Spain, child labor in China, illegal logging in Indonesia, unsafe medicine in Nigeria and poorly constructed buildings in Turkey, where collapses have killed people.”¹⁶ Transparency International states that

10. TRANSPARENCY INT’L, ANNUAL REPORT 2010 84 (Alice Harrison & Michael Sidwell eds., 2011), available at http://archive.transparency.org/publications/annual_report (follow “Transparency International Annual report 2010” link).

11. *Id.*

12. ALEXANDRA ADDISON WRAGE, *BRIbery AND EXTORTION: UNDERMINING BUSINESS, GOVERNMENTS, AND SECURITY* 124 (2007). See also STEPHEN YAN-LEUNG CHEUNG, P. RAGHAVENDRA RAU & ARIS STOURAITIS, *HOW MUCH DO FIRMS PAY AS BRIBES AND WHAT BENEFITS DO THEY GET? EVIDENCE FROM CORRUPTION CASES WORLDWIDE* (Mar. 30, 2012), available at <http://ssrn.com/abstract=1772246> (Analysis of 116 prominent bribery cases, involving 107 publicly listed firms from 20 stock markets that have committed bribery of government officials in 52 countries worldwide during 1971–2007, concluding that their results have the following “policy implications”: “[m]easures that promote shareholder monitoring of managers (director liability, shareholder lawsuits) may help reduce bribery. Institutions that promote transparency (democracy, freedom of the press, education, disclosure of politician sources of income), institutions that promote enforcement (police reliability), and measures that eliminate regulatory rigidities may also help reduce bribery.”). *Id.* at 32.

13. See Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1; see also Lawrence J. Trautman & Kara Altenbaumer-Price, *The Foreign Corrupt Practices Act: Minefield for Directors*, 6 VA L. & BUS. REV. 145 (2011) [hereinafter Trautman & Altenbaumer-Price, *FCPA: Minefield*].

14. See Bribery Act, 2010, c. 23 (U.K.); Trautman & Altenbaumer-Price, *FCPA Update*, *supra* note 8, at 273.

15. Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 783 (2011), available at <http://ndlawreview.org/wp-content/uploads/2013/05/Yockey.pdf>.

16. Francis X. Donnelly & Sarah Kellogg, *Understanding Corruption*, GW BUS., Fall 2011, at 9, available at <http://business.gwu.edu/magazine/fall2011/understanding-corruption.cfm>.

"[r]ecent high-profile scandals have shown that corruption does not always make for lucrative profits, but rather hefty fines, damaged reputations and jail sentences. Corruption also distorts markets and creates unfair competition."¹⁷ But, "bribery in business persists, and is perceived as widespread. Almost a fifth of more than 1,000 executives surveyed by Ernst & Young claimed to have lost business due to a competitor paying bribes; more than a third felt that corruption was getting worse."¹⁸ Moreover, "[i]t is not uncommon for domestic firms and multinationals to pay bribes to secure public procurement contracts Given the enormous influence that private interests wield in many public spheres" ¹⁹

As governments devote "huge sums to tackle the world's most pressing problems, from the instability of financial markets to climate change and poverty, corruption remains an obstacle to achieving much needed progress."²⁰ Huguette Labelle, chairwoman of Transparency International, says, "[c]orruption has a devastating effect on people, especially the poor."²¹ Ms. Labelle observed that "[e]xperts surveyed for our 2011 Corruption Perceptions Index saw public sector corruption as a serious problem in the vast majority of 183 countries."²²

Non-profit membership association TRACE International provides multinational companies and their sales intermediaries "consultants, representatives, suppliers, distributors, agents, etc." with cost-effective training and other anti-bribery compliance solutions.²³ TRACE International reports that since 2002, "[t]he United States has pursued approximately 2.5 foreign bribery enforcement actions for every enforcement action pursued by all other countries combined The United Kingdom continues to rank second" ²⁴

A. A FEW THOUGHTS ABOUT BRIBERY AND EXTORTION

Bribery and extortion are closely related concepts. Black's Law Dictionary defines bribery as "[t]he corrupt payment, receipt, or solicitation of a private favor for official action;"²⁵ commercial bribery as "(1) [t]he knowing solicitation or acceptance of a benefit in exchange for violating an oath of fidelity, such as that owed by an employee, partner, trustee, or attorney; . . . (3) [c]orrupt dealing with the agents or employees of prospective buyers to secure an advantage over business competitors."²⁶ Others have defined bribery as those "instances where public officials (mis)use their authority."²⁷ In addition, "govern-

17. TRANSPARENCY INT'L, ANNUAL REPORT 2010, *supra* note 10, at 31.

18. *Id.*

19. *Id.*

20. *Id.* at 78.

21. Donnelly & Kellogg, *supra* note 16, at 9.

22. TRANSPARENCY INT'L, ANNUAL REPORT 2011 (Rachel Beddow & Michael Sidwell eds., 2012), available at http://issuu.com/transparencyinternational/docs/annual_report_2011_en/1?e=2496456/1960061.

23. TRACE: ANTI-BRIBERY COMPLIANCE SOLUTIONS, GLOBAL ENFORCEMENT REPORT 2012 11(2013), available at http://www.traceinternational.org/data/public/GER_2012_Final-147966-1.pdf.

24. *Id.* at 2.

25. BLACK'S LAW DICTIONARY 217 (9th ed. 2009).

26. *Id.*

27. Seung-Hyun Lee & David H. Weng, *Does Bribery in the Home Country Promote or Dampen Firm Exports?*, 34 STRAT. MGMT. J. 1472, 1473 (2013) (citing Daniel Treisman, *What Have We Learned About the Causes of Corruption from Ten Years of Cross-National Empirical Research?*, 10 ANN. REV. POLITICAL RES. 211 (2007)).

ment corruption refers to circumstances where officials demand money for their own benefit rather than the state's purposes."²⁸ Extortion is defined as "(1) [t]he offense committed by a public official who illegally obtains property under the color of office; esp., an official's collection of an unlawful fee (2) [t]he act or practice of obtaining something or compelling some action by illegal means, as by force or coercion."²⁹

While anti-bribery statutes encourage firms to adopt vigorous compliance programs to combat bribery and corruption, Yockey reports that "the problem is that no matter how elaborate a firm's compliance efforts might be, they can do little to curb the market for bribe demands. Firms report that they continue to receive demands for bribes from foreign officials on a daily basis."³⁰

1. *Types of Bribery*

The Transparency International 2008 Bribe Payers Survey, conducted by Gallup International "examine[d] the frequency of three different types of corruption used by companies when operating abroad," "the bribery of high-ranking politicians or political parties; the bribery of low-level public officials to 'speed things up'; and the use of personal or familiar relationships to win public contracts."³¹

Exhibit 1 depicts the results from the TI Bribe Payers Survey 2008 when "senior business executives were asked how often companies that they were familiar with and that were headquartered in one of the twenty-two ranked countries engaged in each form of bribery."³²

Juanita Riaño finds that many significant economies are greatly compromised, with Transparency International appealing to "governments and the private sector to renew their efforts to curb the supply side of corruption."³³

Although bribes can be requested from anyone, "the majority of firm bribes are paid to government officials."³⁴ In economies undergoing transition, where legal systems are less developed and corruption by government officials is prevalent, bribes appear to be commonplace.³⁵ The factors that prior research suggests influence bribery include "national culture, a country's institutional features, and top management characteristics."³⁶

The Transparency International 2011 Bribe Payers Survey questioned more than 3,000 global business executives regarding their assessment of the extent of bribery requested by

28. *Id.*

29. BLACK'S LAW DICTIONARY 664 (9th ed. 2009).

30. Yockey, *supra* note 15, at 783.

31. Juanita Riaño, Transparency Int'l, *Bribe Payers Index 2008*, in GLOBAL CORRUPTION REPORT 2009, 402, 404 – 05 (2009), available at http://archive.transparency.org/publications/gcr/gcr_2009.

32. *Id.* at 405. "From the BPI 2008 list of twenty-two countries, business executives from the twenty-six countries surveyed were asked to select up to five countries with which they had the most business contact when working in their region during the past five years. Only these countries were then evaluated. 0.6 percent of respondents answered the question for more than five countries, and their responses were also used for the analysis as they did not alter the results." *Id.* at n.4.

33. *Id.* at 406.

34. Lee & Weng, *supra* note 27, at 1472.

35. *Id.*

36. *Id.*

Exhibit 1

Types of Foreign Bribery

Source: TI Bribe Payers Survey 2008. The figures were calculated as a percentage of respondents answering 4 or 5 to the question 'How often do companies from these countries engage in...'; 'Don't know' responses were excluded (1 = never, 5 = almost always).

companies from twenty-eight of the world's leading economies.³⁷ Unfortunately, the results for 2011 show no improvement over the results for 2008. For example, "[i]n 2008, the average score across the 22 countries was 7.8, which is not significantly different from the score of 7.9 for the same 22 countries in 2011 . . . entering the index for the first time were Argentina, Indonesia, Malaysia, Saudi Arabia, Turkey, and the United Arab Emirates."³⁸

Common corruption takes many forms, including "being solicited for bribes from customs officials in exchange for moving goods in or out of the country . . . [or] falling victim to extortion, where paying a ransom to a foreign official becomes the only way to avoid harm to one's person, property, or existing economic interests."³⁹ As an outsider to local customs, laws, and relationships, it seems to be the retention of local agents who prove difficult to monitor and "often go to great lengths to hide bribe and ransom payments from the firms that hired them. Firms are then exposed to vicarious liability (civilly and criminally) for the wrongs committed by their agents, even when the firms made every effort to prevent the wrongdoing."⁴⁰

37. DEBORAH HARDOON & FINN HEINRICH, TRANSPARENCY INTERNATIONAL, *BRIBE PAYERS INDEX 2011* 4 (2011), available at http://issuu.com/transparencyinternational/docs/bribe_payers_index_2011/1?e=0.

38. *Id.*

39. Yockey, *supra* note 15, at 783.

40. *Id.* at 784.

D'Souza and Kaufmann observe that "[b]ribery can occur at several stages during the procurement process, such as during the feasibility study, during tendering, or when determining bid eligibility; in assessing and awarding the bid; or during project implementation and/or in re-contracting."⁴¹ Moreover, this corruption has the potential to "distort the overall structure of government expenditures if officials skew the allocation of resources toward sectors where graft is more lucrative and/or less prone to detection, e.g., from social services to defense."⁴²

2. *Who Bribes?*

D'Souza and Kaufmann examine data from a 2006 survey of 11,232 business managers located in 125 countries conducted by the World Economic Forum.⁴³ This survey pre-dates the U.K. Bribery Act 2010 and the acceleration during recent years of FCPA enforcement activity. This *Global Competitiveness Report*, consists of 146 questions (14 corruption-related) designed to monitor bribery-related issues across the globe and allow for a comparison of "reports of bribery across firms within the same country, as well as across countries."⁴⁴ The report reveals that many global managers "admit that 'firms like theirs' pay illicit payments in order to secure government contracts."⁴⁵ Survey results also reveal that "approximately 32 percent of managers report that firms like theirs bribe to secure a government contract; this percentage ranges from 13 percent of firms based in high-income OECD countries that report bribery . . . [to] 50 percent in low-income countries."⁴⁶ "The OECD has estimated that between 5 and 25 percent of international business transaction total contract value may consist of bribes."⁴⁷

B. MOST DIFFICULT COUNTRY BUSINESS ENVIRONMENTS

The Transparency International Corruption Perceptions Index 2012 (CPI) presents an indication of domestic and public sector corruption and reveals that the vast majority of the 176 countries covered score below a fifty, on a scale from zero (perceived to be highly corrupt) to 100 (perceived to be very clean).⁴⁸ Johann Graf Lambsdorff states that the CPI "ranks countries in terms of the degree to which businesspeople and country analysts perceive corruption to exist among public officials and politicians."⁴⁹

41. Anna E. D'Souza & Daniel Kaufmann, *Who Bribes in Public Contracting and Why: Worldwide Evidence from Firms*, ECON. OF GOVERNANCE, Nov. 2013, at 3, available at <http://www.ssrn.com/abstract=1563538>.

42. *Id.*

43. *Id.* at 8.

44. *Id.*

45. *Id.* at 3.

46. *Id.*

47. *Id.* at 2.

48. TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2012 2 (2012), available at http://www.transparency.org/whatwedo/pub/corruption_perceptions_index_2012.

49. Johann Graf Lambsdorff, *Corruption Perceptions Index 2008*, in GLOBAL CORRUPTION REPORT 2009: CORRUPTION AND THE PRIVATE SECTOR 395, 395 (2009), available at http://www.transparency.org/whatwedo/pub/global_corruption_report_2009. Lambsdorff further observed "[t]he data sources include the Asian Development Bank, the African Development Bank, the Bertelsmann Transformation Index, the World Bank's Country Policy and Institutional Assessment, the Economist Intelligence Unit, Freedom House's Nations in Transit, Global Insight, IMD International World Competitiveness Center, Merchant International Group, Political and Economic Risk Consultancy and the World Economic Forum. The statistical work is

So, according to TI's Corruption Perceptions Index 2012, which countries comprise the most difficult business environments for corruption? Of the 176 countries listed for 2011, Denmark, Finland, New Zealand, Sweden, and Singapore (in that order) are considered to be "very clean."⁵⁰ Of countries having major economic commerce or otherwise particularly significant to the United States (ranked 19th) are the United Kingdom (ranked 17th), Brazil (69th), China (80th), Mexico (105th), Argentina (102nd), Nigeria (139th), Pakistan (139th), Kenya (139th), Russia (133rd and perceived to be most corrupt), Iraq (169th), Afghanistan (174th), Myanmar (172nd), and Somalia (174th).⁵¹ TI's *Global Corruption Barometer 2013*, representing the views of more than 114,000 people in 107 countries and territories, disclosed that one in four of the individuals surveyed reported paying bribes in the last year.⁵² Furthermore, "reported bribes to the police have almost doubled since the 2006 Barometer, and more people report paying bribes to the judiciary and for registry and permit services than five years ago. Trust in governments and politicians is also low"⁵³

To put this into further perspective, 56 percent of respondents reported paying a bribe during 2009 to at least one of nine service providers in Liberia, Uganda, Sierra Leone, Nigeria, Senegal, Cameroon, Kenya, or Ghana.⁵⁴ Regarding the link between poverty and corruption, Lambsdorff observes that "a simple plot reveals a close association between a good performance in the CPI 2008 and income per head. This is in line with academic research."⁵⁵

Timothy Fort and Cindy Schipani conducted research, finding "a nearly perfect correlation between corruption and violence in countries around the world. The more corrupt a regime, the more likely it was to resolve disputes through violence."⁵⁶ Furthermore, "the violence doesn't just flow from rulers, said Fort. Sometimes the populace is so frus-

carried out at the University of Passau, and . . . [t]he strength of the CPI lies in its combination of multiple data sources in a single index, so that erratic findings from one source can be balanced by at least two other sources. This reduces the probability of misrepresenting a country's perceived level of corruption. Involving local business people and country analysts alongside non-resident experts is also an advantage. It makes it possible to recognize the specificities of local customs through the views of local experts, while at the same time enhancing the consistency of judgment across countries by involving non-residents. The high correlation between the different sources used in the CPI indicates that methodological differences between sources have only a minor impact on the findings. In an area in which objective data is not available, such an approach helps our understanding of real levels of corruption." *Id.*; see also Seung-Hyun Lee, et. al., *Why Do Firms Bribe?*, 50 *MGMT. INT'L REV.* 775 (2010).

50. TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2012, *supra* note 48.

51. *Id.*

52. TRANSPARENCY INT'L, GLOBAL CORRUPTION BAROMETER 2013 3 (2013), available at http://www.transparency.org/whatwedo/pub/global_corruption_barometer_2013.

53. TRANSPARENCY INT'L, ANNUAL REPORT 2010, *supra* note 10, at 83.

54. *Id.* at 82.

55. Riaño, *supra* note 31, at 395.

56. Timothy L. Fort, *Corruption Spawns Violence*, GW BUS., Fall 2011, at 11, 11, available at <http://business.gwu.edu/magazine/fall2011/understanding-corruption.cfm>; see generally Cindy A. Schipani & Timothy L. Fort, *Adapting Corporate Governance for Sustainable Peace*, 36 *VAND. J. TRANSNAT'L L.* 377 (2003), available at <http://ssrn.com/abstract=373182>; Cindy A. Schipani & Timothy L. Fort, *The Role of the Corporation in Fostering Sustainable Peace*, 35 *VAND. J. TRANSNAT'L L.* 389 (2002), available at <http://ssrn.com/abstract=303316>; Cindy A. Schipani & Timothy L. Fort, *Ecology and Violence: The Environmental Dimensions of War* (William Davidson Institute, Working Paper No. 698, 2004), available at <http://ssrn.com/abstract=555824>.

trated by corrupt leaders that their resentment finally explodes in a physical act. The uprising that has spread across Arab countries began [during 2010] with resistance against the corrupt leadership of Tunisia.”⁵⁷ Weiner and Jeong find that “for countries that have criminalized foreign bribery on their own or by adopting the international convention, regardless of enforcement activities, their firms were less likely to pay bribes.”⁵⁸ Weiner and Jeong also found that “private companies were more likely to pay bribes than public corporations. ‘I thought the type of firm wouldn’t make a difference, but it did,’ Weiner said.”⁵⁹ Weiner continues, “‘Companies listed on stock exchanges . . . get a lot more scrutiny. Privately-held companies don’t have to provide the same breadth of information and face the same scrutiny and are more likely to pay bribes’ . . . quality research on corruption is difficult . . . it requires data about activities that happen in the shadows.”⁶⁰ A few thoughts about the operating environment in several particularly significant countries follow.

a. China

China may be considered “the new frontier for entrepreneurship . . . perceived to be a logical primary source of economical manufacturing, raw materials, component parts . . . [and as] a major end market. China may also represent the most likely future competition for many American industries as well as our major trading partner.”⁶¹ “Increased commerce between the United States and The People’s Republic of China (PRC) demands”⁶² that those wishing to conduct business there understand that the business environment is fundamentally different in the PRC because

the Chinese environment differs from that familiar to those experienced in the ways of American or European governance. For example . . . there is no law protecting private property as we know it, and the functions of true “free economic markets” (securities or goods and services) have neither been understood nor embraced by officials having a natural cultural instinct for governmental control of economic enterprises.⁶³

Increasingly closer economic relations make the co-dependence between China and the remainder of the world inevitable. China is now the largest trading partner with the United States, in terms of trade balance, and ranks first in terms of imports into the United States.⁶⁴ China is the world’s second largest economy, with annual growth averag-

57. Timothy L. Fort, *supra* note 56, at 11.

58. Robert J. Weiner, *International Law Can Deter Corruption*, GW BUS., Fall 2011, at 12, 12, available at <http://business.gwu.edu/magazine/fall2011/understanding-corruption.cfm>.

59. *Id.* at 13.

60. *Id.*

61. Lawrence J. Trautman, *American Entrepreneur in China: Potholes and Roadblocks on the Silk Road to Prosperity*, 12 WAKE FOREST J. BUS. & INTELL. PROP. L. 425, 427 (2012).

62. *Id.*

63. *Id.*

64. See Press Release, U.S. Census Bureau & U.S. Bureau of Econ. Analysis, U.S. Dep’t of Commerce, U.S. International Trade in Goods and Services December 2013 (Feb. 6, 2014), available at http://www.census.gov/foreign-trade/Press-Release/current_press_release/ft900.pdf; see also Angel Gonzalez & Ryan DeZember, *Sinopec Enters U.S. Shale*, WALL ST. J. (Jan. 4, 2012), <http://online.wsj.com/news/articles/SB1000142405297>

ing 10 percent during the past three decades.⁶⁵ During 2010, “China surpassed Japan as the world’s second largest economy.”⁶⁶ China’s growth rate and its potential for wealth creation “still stands out against other major economies in the world, and it will remain a key engine for world economic recovery from a middle and long term perspective.”⁶⁷ Nobel laureate and Columbia University economics professor, Robert Mundell, predicts that, during late 2012, “China’s annual future growth would average 7 to 8 percent, rather than the 10 to 11 percent of recent years.”⁶⁸ The World Bank and Development Research Center of the State Council, the People’s Republic of China report during 2013 that “[e]ven if growth moderates, China is likely to become a high-income economy and the world’s largest economy before 2030, notwithstanding the fact that its per capita income would still be a fraction of the average in advanced economies.”⁶⁹

China’s recent “dramatic economic growth . . . makes it difficult to understand that the beginning of relevant, modern Chinese legal development dates back only to 1979, with the *Law of the People’s Republic of China* (“Chinese Company Law”) adopted in 1993.”⁷⁰ “Even more astounding, the modern roller-coaster development of Chinese securities markets is an economic experiment materially just twenty-something years old.”⁷¹ Professor Donald C. Clarke highlights the important need for scholarly research about comparative corporate governance, given that “the last thirty years have seen a startling rise in the economic importance of other countries, particularly China and the rest of non-Japan Asia.”⁷²

Of concern, “[a] series of alleged accounting frauds . . . at little-known Chinese companies listed in the U.S. has triggered a sharp shift in sentiment among investors, who are now worried about hidden business risks or financial problems.”⁷³ The *Wall Street Journal*

0203550304577138493192325500 (example of almost daily announcements illustrating increased investment by Chinese in U.S.).

65. THE WORLD BANK & DEV. RESEARCH CTR. OF THE STATE COUNCIL, CHINA, CHINA 2030: BUILDING A MODERN, HARMONIOUS, AND CREATIVE SOCIETY xxi (2013), available at http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2013/03/27/000350881_20130327163105/Rendered/PDF/762990PUB0china0Box374372B00PUBLIC0.pdf; see generally PETER NOLAN, CHINA AND THE GLOBAL ECONOMY: NATIONAL CHAMPIONS, INDUSTRIAL POLICY AND THE BIG BUSINESS REVOLUTION (2001); BARRY NAUGHTON, THE CHINESE ECONOMY: TRANSITIONS AND GROWTH (2007); C. FRED BERGSTEN, ET. AL., CHINA: THE BALANCE SHEET, WHAT THE WORLD NEEDS TO KNOW NOW ABOUT THE EMERGING SUPERPOWER (2006); Luca Zan & Qingmei Xue, *Budgeting China: Macro-Policies and Micro-Practices in Public Sector Changes*, 24 ACCT., AUDITING & ACCOUNTABILITY J. 38 (2011).

66. Trautman, *supra* note 61, at 428 (citing Chester Dawson & Jason Dean, *Rising China Bests A Shrinking Japan*, WALL ST. J., Feb. 14, 2011, at A1).

67. *Economy Slows to Improve Endurance, Quality*, CHINA DAILY (July 31, 2013, 9:25 AM), http://www.chinadaily.com.cn/business/2013-07/31/content_16855367.htm.

68. Wie Tian, *China ‘Essential to European Recovery’*, CHINA DAILY (Nov. 27, 2012, 9:23 AM), http://www.chinadaily.com.cn/business/2012-11/27/content_16059659.htm.

69. THE WORLD BANK & DEV. RESEARCH CTR. OF THE STATE COUNCIL, CHINA, *supra* note 65, at xxi.

70. Trautman, *supra* note 61, at 428 (citing GU MINKANG, UNDERSTANDING CHINESE COMPANY LAW 5 – 8 (2006)).

71. *Id.* (citing CARL E. WALTER & FRASER J.T. HOWIE, PRIVATIZING CHINA: INSIDE CHINA’S STOCK MARKETS 5–43 (2006)). See also William Kazer, *China Tightens, But Bank Credit Weathers Crunch*, WALL ST. J., July 15, 2013, at C5.

72. Donald Clarke, “*Nothing but Wind?*” *The Past and Future of Comparative Corporate Governance*, 59 AM. J. COMP. L. 75, 77 (2010).

73. Owen Fletcher & Dinny McMahon, *Investors Spooked by China—Small-Stock Accounting Scandals are Breeding Deeper Fears*, WALL ST. J., Oct. 1, 2011, at B1.

reports that “[m]any Chinese who have profited from the country’s growth also express increasing concerns in private about social issues such as China’s one-child policy, food safety, pollution, corruption, poor schooling, and a weak legal system.”⁷⁴ We have previously observed that China provides a useful example of the difficulty of navigating corruption in an environment the sheer size of China’s economy, further complicated by the growth in the business and economic relationship between the United States and China.⁷⁵ Larcker and Tayan note that “individual shareholders who invest in Chinese companies are effectively minority owners in partnership with the Chinese government, and they face uncertain legal remedies if controversies arise.”⁷⁶ It is the “[f]ailure to contain endemic corruption among Chinese officials [that] poses one of the most serious threats to the nation’s future economic and political stability,” reports the Carnegie Endowment for International Peace, in its October 2007 study by Minxin Pei.⁷⁷ Pei, an expert on economic reform and governance in China, argues that corruption

not only fuels social unrest [and] contributes directly to the rise in socioeconomic inequality, but holds major implications beyond its borders for foreign investment, international law, and environmental protection . . . and roughly 10 percent of government spending, contracts, and transactions is estimated to be used as kickbacks and bribes, or simply stolen.⁷⁸

Pei warns, “[c]orruption has not yet derailed China’s economic rise, sparked a social revolution, or deterred Western investors. But it would be foolish to conclude that the Chinese system has an infinite capacity to absorb the mounting costs of corruption . . . Eventually, growth will falter.”⁷⁹ Writing in the *New York Times*, journalist David Barboza reports “prominent corruption cases in China are often the outgrowth of power

74. Jeremy Page, *Many Rich Chinese Consider Leaving*, WALL ST. J. (Nov. 2, 2011), <http://online.wsj.com/news/articles/SB10001424052970204394804577011760523331438>; see also Laurie Burkitt, *China Halts Sale of Some Drugs—Move Over Capsules’ Chromium Content Highlights Continued Safety Issues, Cost Pressures for Makers*, WALL ST. J., Apr. 17, 2012, at A8; Lingling Wei & Dinny McMahon, *Chinese Investigate Spending in Scandal*, WALL ST. J., Apr. 19, 2012, at A1.

75. Trautman, *supra* note 61, at 491. See also Mike Koehler, *Why Compliance with the U.S. Foreign Corrupt Practices Act Matters in China*, CHINA L. & PRAC. (Feb. 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1396267; Jessica Tillipman, *The Foreign Corrupt Practices Act & Government Contractors: Compliance Trends & Collateral Consequences*, BRIEFING PAPERS, No. 11-9, Sept. 2011, at 1, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1924333.

76. DAVID LARCKER & BRIAN TAYAN, CORPORATE GOVERNANCE MATTERS: A CLOSER LOOK AT ORGANIZATIONAL CHOICES AND THEIR CONSEQUENCES 53 (2013). See also Seung-Hyun Lee & Kyeungrae Kenny Oh, *Corruption in Asia: Pervasiveness and Arbitrariness*, 24 ASIA PAC. J. MGMT. 97 (2007), available at http://download.springer.com/static/pdf/773/art%253A10.1007%252Fs10490-006-9027-y.pdf?auth66=1392603516_58c739e1fe4145942012f95bf51d40ea&ext=.pdf; Seung-Hyun Lee & Sungjin Hong, *Corruption and Subsidiary Profitability: US MNC Subsidiaries in the Asia Pacific Region*, 29 ASIA PAC. J. MGMT. 949 (2012), available at http://download.springer.com/static/pdf/851/art%253A10.1007%252Fs10490-010-9214-8.pdf?auth66=1392603596_e64b60702ada9f89deb5b5d54e52daef&ext=.pdf.

77. Trautman, *supra* note 61, at 491–92 (citing MINXIN PEI, CORRUPTION THREATENS CHINA’S FUTURE (2007), available at http://carnegieendowment.org/files/pb55_pei_china_corruption_final.pdf).

78. Trautman, *supra* note 61, at 492.

79. Trautman, *supra* note 61, at 492; see also Polly Hui & Chester Yung, *Another Arrest for Family in Hong Kong Graft Probe*, WALL ST. J. (May 4, 2012, 3:32 PM), <http://online.wsj.com/news/articles/SB10001424052702304743704577382890980237480>; Joseph Sternberg, *Falling Out of Love With China*, WALL ST. J., Nov. 17, 2011, at A19, available at <http://online.wsj.com/news/articles/SB10001424052970203611404577042052509983734>.

struggles within the Communist Party, with competing factions using the 'war on corruption' as a tool to eliminate or weaken rivals and their corporate supporters."⁸⁰ Barboza continues, "[t]his may help explain one of the enduring contradictions of China's political and economic system: the government regularly publicizes an astonishing number of corruption cases, yet little progress seems to be made in uprooting corruption."⁸¹ The eighth amendment to the Criminal Law of the People's Republic of China took effect on May 1, 2011, making "it a criminal offence for Chinese companies and nationals to bribe foreign government officials."⁸² The amendment provides that "[i]ndividuals may face criminal detention of between three and ten years, while companies may receive fines, and managers directly responsible for an offence may also face criminal detention of up to ten years."⁸³ For those desiring more on this topic, James Heffernan explores some of the obligations, both legal and ethical, facing U.S. corporations and the American attorneys representing them when faced by authoritarian regimes such as China.⁸⁴

2. India

In India, large anti-corruption demonstrations and vows taken by many to no longer pay bribes are reported.⁸⁵ The *Wall Street Journal* reports of one Indian entrepreneur that explained "the most frustrating problem on his path to entrepreneurship in India was the bands of thugs who assaulted the workers at his factory site. They would 'throw stones at the workers, beat up the supervisor . . . We lost one and a half years.'"⁸⁶ Ernst & Young reports in their 2013 survey of over 3,000 board members, executives, managers, and their teams across thirty-six countries that "[i]n India, over a third of respondents feel offering cash payments to win or retain business can be justified—triple that of Western Europe."⁸⁷

3. Russia

David Larcker and Brian Tayan observe that "[c]orporate governance in Russia is characterized by concentrated ownership of shares, insider control, weak legal protection for

80. David Barboza, *Politics Permeates Anti-Corruption Drive in China*, N.Y. TIMES, Sept. 4, 2009, at B1, available at http://www.nytimes.com/2009/09/04/business/global/04corrupt.html?_r=2&hp=&pagewanted.

81. *Id.*

82. HARDOON & HEINRICH, *supra* note 37, at 12.

83. *Id.*

84. James Heffernan, *An American in Beijing: An Attorney's Ethical Considerations Abroad with a Client Doing Business with a Representative Government*, 19 GEO. J. LEGAL ETHICS 721, 721 (2006).

85. Jim Yardley, *Protests Awaken a Goliath in India*, N.Y. TIMES, Oct. 30, 2011, at A1, available at <http://www.nytimes.com/2011/10/30/world/asia/indias-middle-class-appears-to-shed-political-apathy.html?pagewanted=all>; see also Vikas Bajaj & Jim Yardley, *Scandal Poses a Query: Will India Ever Be Able To Tackle Corruption?*, N.Y. TIMES, Sept. 15, 2012, at A6, available at <http://www.nytimes.com/2012/09/16/world/asia/scandal-bares-corruption-hampering-indias-growth.html?pagewanted=all>. See also TRANSPARENCY INT'L, GLOBAL CORRUPTION BAROMETER 2013, *supra* note 52, at 3 (observing that millions of people marched in India during 2011 "to demand the establishment of an independent anti-corruption commission").

86. Amol Sharma, *Bribes, Bureaucracy Hobble India's New Entrepreneurs*, WALL ST. J., Nov. 1, 2011, at A1, available at <http://online.wsj.com/news/articles/SB10001424052970204479504576639233537716542>.

87. ERNST & YOUNG, NAVIGATING TODAY'S COMPLEX BUSINESS RISKS: EUROPE, MIDDLE EAST, INDIA AND AFRICA FRAUD SURVEY 2013 12 (2013), available at [http://www.ey.com/Publication/vwLUAssets/Navigating_todays_complex_business_risks/\\$FILE/Navigating_todays_complex_business_risks.pdf](http://www.ey.com/Publication/vwLUAssets/Navigating_todays_complex_business_risks/$FILE/Navigating_todays_complex_business_risks.pdf).

minority shareholders, modest disclosure, inefficient capital markets, and heavy government involvement in private enterprise.”⁸⁸ Unsavory tactics used by controlling shareholders often include squeezing-out minority shareholders thru sham bankruptcy proceedings, transfer pricing manipulation, bribery of registrars to falsify shareholder ownership, and diluting minority shareholders by issuing additional shares to the majority shareholders via a private offering.⁸⁹ The Russian government is believed to appropriate assets by asserting unfounded claims of unpaid taxes and intervene to prevent mass layoffs and maintain employment.⁹⁰ In addition, “lack of transparency restricts the influence of shareholders. Disclosure requirements are weak, obscuring the nature of interparty transactions.”⁹¹

Transparency International reports that “[i]t is of particular concern that China and Russia are at the bottom of the index,” and that, therefore, “companies from China and Russia are perceived to be most likely to engage in bribery abroad.”⁹² In addition, “[t]he business people surveyed perceived bribery by companies from these countries to be most widespread, resulting in scores for China and Russia which are substantially lower than the other surveyed countries.”⁹³

The OECD Working Group on Bribery has been working with Russian officials since 2009 “to strengthen Russia’s legal framework against bribery of foreign public officials in international business transactions. Legislation passed in Russia in May 2011 criminalizes foreign bribery with monetary sanctions for companies and individuals who bribe foreign public officials.”⁹⁴

C. RESULTS FROM THE GLOBAL COMPETITIVENESS REPORT

D’Souza and Kaufmann observe that “[t]ransparency, freedom of press, and voice and accountability directly affect the detection of malfeasance, whereas strong rule of law, including well-functioning courts and police, directly affects the likelihood of enforcement and penalties associated with the legal and judicial process”⁹⁵ As might be expected, because of better corporate governance in OECD nations and perhaps because of “cross-national legal covenants such as the OECD Anti-Bribery Convention, it would be expected that firms based in these countries would report less bribery, since they face higher expected costs of bribery stemming from large penalties and reputational risks and a higher probability of detection and conviction”⁹⁶ Furthermore, “[t]he OECD Convention created large penalties for firms and individuals caught bribing a foreign public official. Until the advent of the OECD Convention, bribing a foreign public official was only illegal for US firms (following the 1977 Foreign Corrupt Practices Act).”⁹⁷

88. LARCKER & TAYAN, *supra* note 76, at 57.

89. *Id.* at 57–58.

90. *Id.* at 58.

91. *Id.*

92. HARDOON & HEINRICH, *supra* note 37, at 4, 12.

93. *Id.* at 4.

94. *Id.* at 13.

95. D’Souza & Kaufmann, *supra* note 41, at 6.

96. *Id.* at 7.

97. *Id.* at 7 n.8.

1. *Company Size*

It should be no surprise that firm size is a major determinant of relative economic and political prowess. Size differences among firms also influences the cost/benefit analysis logic employed in deciding whether to make a bribe.⁹⁸ D'Souza and Kaufmann observe that "by obtaining monopoly rights, large firms in general may have more alternatives to bribery available to them than small firms, for example, offering employment opportunities to family members of public officials and political clout."⁹⁹ Because they are more visible, larger firms may believe they stand to lose more in the way of damaged reputation and lost sales, increasing their perceived risk of making a bribe.¹⁰⁰ Therefore, it appears that smaller firms seem more likely to bribe than their larger counterparts.¹⁰¹

2. *Foreign or Domestic Ownership & Headquarters Location*

From the World Economic Forum Global Competitiveness Report survey, D'Souza and Kaufmann find that different bribery behavior may exist between foreign and domestic firms.¹⁰² Decisions to bribe may be influenced by foreign firm ownership characteristics.¹⁰³ Ties to the home country may influence those subsidiaries with headquarters offshore, "whereas joint ventures with local headquarters may have closer ties with domestic partners."¹⁰⁴

3. *Corporate Call to Action*

There can be little doubt as to the importance of devoting time, attention, and resources to the issues surrounding global anti-bribery compliance. Risk consultant Kroll advocates in its 2011/2012 Global Fraud Report Survey that "[p]rocedures for ensuring that business practices are compliant with the UK Bribery Act or the FCPA should already be in place: a well-run business is already operating comfortably within the requirements of these laws and the only additional requirement the laws bring may be the need to document."¹⁰⁵

The 2011 Fulbright & Jaworski Annual Litigation Trends Survey of 405 participants who carry the title Head of Litigation or General Counsel (130 individuals in the United Kingdom and 275 in the United States) found that 8 percent of respondents that year reported engaging counsel for an investigation of bribery or corruption, compared with 16 percent during the prior year.¹⁰⁶ A trend of increasing investigations had been found in

98. *Id.* at 7.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 8.

104. *Id.*

105. Tommy Helsby, *Compliance: Why 'By the Book' is Good for the Books*, in KROLL, GLOBAL FRAUD REPORT ISSUE 13 2, 3 (May 2011), available at http://fr.krolladvisory.com/media/pdfs/KRL_FraudReport2011.pdf.

106. *Fulbright's Litigation Trends Survey: A Little Less Litigation; More Regulation*, NORTON ROSE FULBRIGHT (Oct. 18, 2011), available at http://www.fulbright.com/index.cfm?fuseaction=ne=news.detail&site_id=286&article_id=9902.

each of the preceding three years, while one-quarter of all firms surveyed reviewed procedures as a result of the act.¹⁰⁷

4. *Significant Cost of Bribery*

What is known about the high costs experienced by those firms who must defend against bribery charges? Between 1978 and 2011, data from 115 SEC-reporting firms subjected to anti-bribery-based enforcement actions supports a finding that the costs of these actions were substantial, with direct costs (legal fees, investigation expenses, private settlements, penalties, and fines) averaging 2.11 percent of firm market capitalization.¹⁰⁸ Those firms prosecuted for foreign bribery also experienced a market decline in share values of “3.11%, on average, on the first day that news of the bribery enforcement action is reported, and by 8.98% over all”¹⁰⁹

5. *Unanticipated Consequences of Anti-Bribery Legislation*

While this article is focused on the practical aspects of anti-bribery regime compliance, a number of commentators raise important policy concerns about possible unintended consequences from anti-bribery legislation. Spalding observes that “although the purpose of international anti-bribery legislation, particularly the [FCPA], is to deter bribery, empirical evidence demonstrates a problematic collateral effect. In countries where bribery is perceived to be relatively common, the present enforcement regime goes beyond the deterrence of bribery, and ultimately deters investment.”¹¹⁰ It appears that the developing nations’ efforts to fight bribery are producing the unexpected consequences of “sacrificing poverty reduction opportunities to combat bribery.”¹¹¹

III. The U.K. Bribery Act

The U.K. Bribery Act 2010 became effective on July 1, 2011, after its implementation date was postponed twice “to allow companies to put in place what the U.K. Ministry of Justice describes as ‘adequate procedures’ for preventing bribery.”¹¹² Lord Peter Goldsmith, former United Kingdom attorney general, has said of the new U.K. Bribery Act that “[i]t’s wider ranging even than the [U.S.’ Foreign Corrupt Practices Act] [and] [i]t’s going to affect all companies with business in the U.K., even if they’re not incorporated here.”¹¹³ In addition, “[t]he enforcement agencies have greater powers and the penalties are much tougher than under previous U.K. law. Boardrooms throughout

107. *Id.*

108. JONATHAN M. KARPOFF, D. SCOTT LEE & GERALD S. MARTIN, THE IMPACT OF ANTI-BRIBERY ENFORCEMENT ACTIONS ON TARGETED FIRMS 30 (Feb. 28, 2012), available at <http://perc.tamu.edu/perc/Publication/workingpapers/1202.pdf>.

109. *Id.* at 1.

110. Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 351 (2010).

111. *Id.*

112. Chris Johnson, *U.K. Bribery Act Finally Takes Effect*, AM. LAW. (July 1, 2011), available at <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202499108839&slreturn=1>.

113. *Id.*

America and beyond should have this on their agenda.”¹¹⁴ The failure of a commercial enterprise to prevent a bribe is the new corporate crime created by the U.K. Bribery Act, according to Professors Bruce W. Bean and Emma H. MacGuidwin.¹¹⁵ Requiring neither mens rea nor actual knowledge of the offending bribe, non-U.K. companies will likely find the act troublesome because it contains an expansive concept of what constitutes a bribe, the act has an unparalleled jurisdictional reach, and “the offending act of bribery need not be committed by an officer or employee of the company, but rather, any ‘associated person’ may trigger the new strict liability crime of ‘failing to prevent bribery.’”¹¹⁶ Let us first look at the events leading up to adoption of the act.

A. THE OECD CONVENTION

Congress directed the President to actively encourage the nation’s trading partners to enact their own anti-bribery laws as a result of criticism that complying with the FCPA would hinder the ability of U.S. businesses to compete globally.¹¹⁷ This effort resulted in creation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).¹¹⁸ Engle observes that the OECD Convention “in large part tracked the normative aspects of the FCPA.”¹¹⁹ While progress was made by the OECD and others during the 1990s in adopting anti-bribery measures, the WTO made no such progress.¹²⁰ Abbott attributes the WTO’s lack of action to “the political incentives facing major actors . . . [with] structural characteristics of the WTO, its approach to legalization, and its negotiating processes also play[ing] significant roles.”¹²¹

The organization issues guidance for countries that have international business transactions, including anti-bribery guidelines and polices that have anti-corruption enforcement

114. *Id.*

115. Bruce W. Bean & Emma H. MacGuidwin, *Unscrewing the Inscrutable: The UK Bribery Act 2010*, 23 IND. INT’L & COMP. L. REV. 63, 65 (2013), available at <http://ssrn.com/abstract=2150256>.

116. *Id.*; see also Alun Milford, Gen. Counsel, U.K. Serious Frauds Office, Remarks Before World Bribery and Corruption Forum 2013 (Oct. 15, 2013), available at <http://www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2013/world-bribery-and-compliance-forum-2013.aspx>.

117. Trautman & Altenbaumer-Price, *FCPA: Minefield*, *supra* note 13, at 157; see also Eric Engle, *I Get By With A Little Help From My Friends? Understanding the UK Anti-Bribery Statute, by Reference to the OECD Convention, and the Foreign Corrupt Practices Act*, 44 INT’L L. 1173, 1178 n.37 (2010), available at <http://www.ssrn.com/abstract=1702470> (“The prime mover for the OECD to take steps to combat corruption of foreign public officials was pressure applied by the United States . . . which took almost two decades to bring about the intended result.”). Indira Carr & Opi Outhwaite, *The OECD Anti-Bribery Convention Ten Years On*, 5 MANCHESTER J. INT’L ECON. L. 3, 6 (2008), available at <http://epubs.surrey.ac.uk/578/1/fulltext.pdf>.

118. Trautman & Altenbaumer-Price, *FCPA: Minefield*, *supra* note 13, at 157; see generally Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Feb. 15, 1999, 37 ILM 1, available at http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

119. Engle, *supra* note 117, at 1178.

120. Kenneth W. Abbott, *Rule-Making in the WTO: Lessons From the Case of Bribery and Corruption*, 4 J. OF INT’L ECON. L. 275 (2001), available at <http://www.ssrn.com/abstract=1402964>.

121. *Id.*

programs.¹²² Accordingly, “the number of countries with active enforcement of anti-corruption programs increased from four to seven from mid-2009 to mid-2010.”¹²³

B. HISTORY OF U.K. ANTI-BRIBERY FRAMEWORK

The U.K. Bribery Act of 2010 “replaces a patchwork of common law and statutory offenses dating back to 1889,¹²⁴ and it is designed to simplify and modernize the United Kingdom’s [then existing] restrictions on bribery.”¹²⁵ This 1889 statute “made it a crime to corruptly give, promise, or offer any gift or advantage to officials of a public body.”¹²⁶ The Prevention of Corruption Act of 1906¹²⁷ “made it an offense to give consideration to any agent as an inducement for doing any act to show favor or disfavor to any person, in relation to his or her principal’s affairs or business.”¹²⁸ Korkor and Ryznar describe the formative events during the last decade that culminated in the 2010 Bribery Act as follows:

- (1) Part 12 of the Anti-terrorism, Crime and Security Act, expressly addressing the bribery of foreign public officials, was adopted during 2001¹²⁹ and “expressly codified the common law offense by amending the 1906 Act to make it a triable offense for a U.K. national or company to make a corrupt payment or pay a bribe to a public officer abroad;”¹³⁰
- (2) The definition of public bodies was extended by this amendment to the 1889 Act to reach equivalent institutions outside the United Kingdom;¹³¹ and
- (3) These U.K. enactments, served to codify U.K. obligation under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997).¹³²

C. BAE SYSTEMS PLC CASE

BAE Systems plc (BAES) is one of the world’s largest global defense, aerospace, and security contractors, with approximately 88,200 employees worldwide, delivering “a wide range of products and services for air, land and naval forces, as well as advanced electronics, security, information technology solutions and support services.”¹³³ BAES is head-

122. Susan S. Muck, Catherine Kevane, Emily Cohen, & Theis Finlev, *FCPA Update: Recent Prosecutions and New Enforcement Tools*, FENWICK & WEST (Apr. 6, 2010), available at https://www.fenwick.com/FenwickDocuments/Sec_Litigation_Alert_04-06-10.pdf.

123. Trautman & Altenbaumer-Price, *FCPA: Minefield*, *supra* note 13, at 157–58.

124. Public Bodies Corrupt Practices Act, 1889, 52 & 53 Vict., c. 69, § 1 (Eng.).

125. JONES DAY, *supra* note 6.

126. Margaret Ryznar & Samer Korkor, *Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing*, 76 MO. L. REV. 415, 434 (2011).

127. Prevention of Corruption Act, 1906, 6 & 7 Edw., c. 34, § 1 (Eng.).

128. Ryznar & Korkor, *supra* note 126, at 434.

129. *Id.* at 435.

130. *Id.*

131. *Id.*

132. *Id.* (citing R v. Director of the Serious Fraud Office, [2008] UKHL 60 [2], available at <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080730/corner-1.htm>).

133. *BAE Systems at a Glance*, BAE Sys., <http://bae-systems-investor-relations-v2.production.investis.com/bae-systems-at-glance.aspx> (last visited Feb. 25, 2014).

quartered in the United Kingdom and has a U.S. subsidiary—Rockville, Maryland-based BAE Systems, Inc.¹³⁴ Allegations surrounding the BAE Systems case surfaced during June 2007, “suggesting that the British arms manufacture . . . had paid more than \$2 billion in bribes to a Saudi Arabian public official over a 22 year period.”¹³⁵ This allegedly involved the U.K. Ministry of Defense (MOD) processing quarterly invoices from a Saudi official that resulted in deposits into accounts held at the Washington, DC-based Riggs National Bank.¹³⁶ Largely as a result, the OECD’s Working Group peer review process reached a critical juncture “with the United Kingdom’s very embarrassing public struggles prosecuting the BAE case from 2003 to 2010.”¹³⁷ The U.S. Department of Justice (DOJ) reports,

[A]ccording to court documents, BAES began serving as the prime contractor to the U.K. government in the mid-1980s, after the U.K. and the Kingdom of Saudi Arabia (KSA) entered into a formal understanding. According to court documents, the “support services” that BAES provided according to the formal understanding resulted, in part, in BAES providing substantial benefits to a foreign public official of KSA, who was in a position of influence regarding sales of fighter jets, other defense materials and related support services. BAES admitted it undertook no adequate review or verification of benefits provided to the KSA official, including no adequate review or verification of more than \$5 million in invoices submitted by a BAES employee from May 2001 to early 2002 to determine whether the listed expenses were in compliance with previous statements made by BAES to the U.S. government regarding its anti-corruption compliance procedures. In addition, in connection with these same defense deals, BAES agreed to transfer more than £10 million plus more than \$9 million to a bank account in Switzerland controlled by an intermediary, being aware that there was a high probability that the intermediary would transfer part of these payments to the same KSA official BAES admitted that, as part of the conspiracy, it knowingly and willfully failed to identify commissions paid to third parties for assistance in soliciting, promoting or otherwise securing sales of defense items in violation

134. Press Release, Dep’t of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine (Mar. 1, 2010), *available at* <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html> [hereinafter Justice Dep’t Press Release].

135. THOMAS SIMEON OBIDAIRO, AFR. DEV. BANK, A FRAGILE CONSENSUS ON REGULATING TRANSNATIONAL CORRUPTION – A CASE STUDY OF THE OFFP AND BAE SCANDAL 46 (Nov. 5, 2008), *available at* <http://ssrn.com/abstract=1295903>.

136. Jeffrey Steinberg, *Scandal of the Century Rocks British Crown and the City*, EXECUTIVE INTELLIGENCE REV. (June 22, 2007), *available at* http://www.larouchepub.com/other/2007/3425scandal_of_cntry.html; *see also* Bruce W. Bean, *Further to Professor Alldridge’s “Caffeinated” Article: What “Stuff” Did the Professor Have in Mind?*, 73 OHIO ST. L.J. FURTHERMORE 77, 86 n.44 (2012), *available at* <http://moritzlaw.osu.edu/students/groups/oslj/files/2012/11/Furthermore.Bean.pdf> (observing that “The Al Yamamah transaction, for example, extended over several decades and involved BAE supplying military aircraft, air defense, and other systems to the Kingdom of Saudi Arabia. The Financial Times referred to this transaction as the ‘biggest sale ever, of anything, to anyone.’” *See* David White & Robert Mauthner, *Britain’s Arms Sale of the Century: The 10 Billion Pounds UK-Saudi Deal*, FIN. TIMES, July 9, 1988, at 7).

137. Elizabeth Spahn, *Multi-Jurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 VA. J. INT’L L. 1, 23 (2012); *see also* *The BAE Files*, THE GUARDIAN, <http://www.guardian.co.uk/world/bae> (last visited Feb. 25, 2014) (documenting, starting in 2003, reports of David Leigh and Rob Evans regarding bribery of foreign officials by the BAE); Frontline, *Black Money*, PUB. BROADCASTING SERVICE (Apr. 7, 2009), *available at* <http://www.pbs.org/wgbh/pages/frontline/blackmoney/etc/script.html> (detailing some of the various bribery schemes).

of the AECA and ITAR. BAES failed to identify the commission payments paid through the BVI entity . . . in order to keep the fact and scope of its external advisors from public scrutiny.¹³⁸

It now appears that these developments set the stage for ultimate passage of the U.K. Bribery Act. But several additional steps first took place. First, the handling of the BAES investigation by the United Kingdom was condemned by the OECD Working Group.¹³⁹ Next, the DOJ “took action, focusing on the Al Yamamah deal in a 2007 FCPA investigation. Jurisdiction was rooted in ‘the allegation that the illicit payments were funneled through U.S. banks.’”¹⁴⁰ Thereafter,

BAE Systems plc (BAES) pleaded guilty [on March 1, 2010] in U.S. District Court in the District of Columbia to conspiring to defraud the United States by impairing and impeding its lawful functions, to make false statements about its Foreign Corrupt Practices Act (FCPA) compliance program, and to violate the Arms Export Control Act (AECA) and International Traffic in Arms Regulations (ITAR) . . . BAES was sentenced . . . to pay a \$400 million criminal fine, one of the largest criminal fines in the history of DOJ’s ongoing effort to combat overseas corruption in international business and enforce U.S. export control laws. . . . According to court documents, BAES made a series of substantial payments to shell companies and third party intermediaries that were not subjected to the degree of scrutiny and review to which BAES told the U.S. government the payments would be subjected. BAES admitted it regularly retained what it referred to as “marketing advisors” to assist in securing sales of defense items without scrutinizing those relationships. In fact, BAES took steps to conceal from the U.S. government and others its relationships with some of these advisors and its undisclosed payments to them. For example, after May 2001, BAES contracted with and paid certain advisors through various offshore shell companies beneficially owned by BAES.¹⁴¹

As the U.K. investigation by the SFO gained traction during 2006, “Saudi officials and their political allies pressured the director of the SFO with threats of cutting off the steady stream of military intelligence it was supplying to the U.K., placing ‘British lives on British streets . . . at risk.’”¹⁴² Professor Bruce Bean reported on the “alleged direct involvement of three successive Prime Ministers—Margaret Thatcher, John Major and Tony Blair. . . .”¹⁴³ Memories of terrorist bombings in London were still vivid memories, prompting national security concerns as a rationale by Prime Minister Tony Blair to prod the SFO to drop the BAES investigation.¹⁴⁴ Prime Minister Blair had the following comments at the G8 Summit about suspending the BAES investigation:

138. Justice Dep’t Press Release, *supra* note 134.

139. Ryznar & Korkor, *supra* note 126, at 437.

140. *Id.* at 438 (citing Evan P. Lestelle, Comment, *The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction*, 83 TUL. L. REV. 527, 528 (2008)).

141. Justice Dep’t Press Release, *supra* note 134.

142. Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 FORDHAM L. REV. 775, 799 (2011).

143. Bean, *supra* note 136, at 86.

144. Stevenson & Wagoner, *supra* note 142, at 799.

[L]et me make one thing very clear to you—I don't believe the investigation, incidentally, would have led anywhere except to the complete wreckage of a vital strategic relationship for our country in terms of fighting terrorism, in terms of the Middle East, in terms of British interests there, quite apart from the fact that we would have lost thousands, thousands of British jobs.¹⁴⁵

The 2007 OECD Working Group, citing “serious concerns” about “deficiencies” previously found during 2003 and 2007, issued a critique “in combination with significant internal British domestic, legal, and political criticism,¹⁴⁶ as well as hard law criminal enforcement by the United States,¹⁴⁷ [which] proved effective.”¹⁴⁸ As a result, the U.K. Bribery Act became law in 2010.

D. THE MACMILLAN CASE

The SFO reached a civil settlement during mid-2011 with Macmillan Publishers wherein “Macmillan agreed to pay just over £11 million in respect of profits earned unlawfully at Macmillan’s textbook business in Rwanda, Uganda and Zambia.”¹⁴⁹ While not brought under the U.K. Bribery Act 2010, “[t]he settlement was agreed under Part 5 of the Proceeds of Crime Act 2002 (“POCA”) This is the largest civil settlement made in the United Kingdom in a matter of overseas corruption and shows once again the SFO’s willingness to use the civil asset recovery provisions of the POCA”¹⁵⁰ for these cases. The SFO’s discovery of the Macmillan illegal conduct resulted from the World Bank apparently becoming “aware of bribes paid by a Macmillan agent in an unsuccessful bid to win a contract to supply primary school textbooks to a project in Southern Sudan funded by the World Bank’s Sudan Multi-Donor Trust Fund.”¹⁵¹ Seeger and Getz observe, “[t]he final point to be made about this case is one that is less welcome: the lack of transparency. As noted above, the Consent Order providing the terms of the settlement is confidential and thus even many of its most basic terms are unavailable to the public.”¹⁵²

E. THE U.K. BRIBERY ACT

At its core, the U.K. Bribery Act 2010 creates “four categories of offenses: (1) bribing another person; (2) taking bribes; (3) bribing foreign public officials; and (4) failure of a commercial organization to prevent bribery. With its expansive scope and jurisdictional reach, the Bribery Act significantly reshapes the UK’s anti-corruption regime.”¹⁵³ At only

145. Frontline, *supra* note 137; *see id.*

146. Spahn, *supra* note 137.

147. *Id.*

148. *Id.*

149. Karolos Seeger & Matthew H. Getz, *The U.K. Proceeds of Crime Act and the SFO’s Latest Bribery-Related Settlement*, FCPA UPDATE (Debevoise & Plimpton LLP, New York, NY), Aug. 2011, at 5, available at <http://www.debevoise.com/files/Publication/9d56da80-1da1-4e29-bc27-4288643df3cc/Presentation/PublicationAttachment/ea922c2f-78d8-46ea-ad2d-69638418a04e/FCPAUpdateAugust2011.pdf> [hereinafter Seeger & Getz, *U.K. Proceeds of Crime Act*].

150. *Id.*

151. *Id.*

152. Seeger & Getz, *U.K. Proceeds of Crime Act*, *supra* note 149, at 7.

153. COVINGTON & BURLING LLP, *supra* note 1.

seventeen pages and containing just four substantive offenses, the scope of two of those offenses in particular prompted business leaders to voice concerns to ministers and others.¹⁵⁴ These offenses involved Section 6 (Bribery of Foreign Public Officials) and Section 7 (Failure of Commercial Organisations to Prevent Bribery) of the U.K. Bribery Act 2010.

Of particular concern, the U.K. Bribery Act of 2010 “applies extraterritorially, reaching any individual ‘closely connected’ with the United Kingdom and, with respect to the corporate offense of failing to prevent bribery, any commercial organization that carries on a business or part of a business in the United Kingdom.”¹⁵⁵ In addition, “[p]enalties for violations of the Bribery Act include unlimited fines for companies and individuals and a term of imprisonment of up to 10 years for individual defendants.”¹⁵⁶ For financial service firms subject to regulation authority by the U.K.’s FSA (recently replaced by the FCA and PRA), “adequate internal controls reasonably designed to prevent bribery of non-U.K. officials are not just an affirmative defense to the UKBA’s so-called corporate offense, but an affirmative requirement for all firms authorized by the FSA in accordance with the Financial Services and Markets Act of 2000 (“FSMA”).”¹⁵⁷ Moreover, “in a short note, the FSA reminded FSA-authorized firms that underlying acts of making corrupt payments or an offer to make corrupt payments need not exist for a company to be subject to regulatory action for lacking sufficient anti-bribery internal controls.”¹⁵⁸ The FSA note, in its entirety, follows:

Corruption and bribery are criminal offences under the Bribery Act 2010, which came into force on 1 July 2011. The Act consolidated and replaced previous anti-corruption legislation and introduced a new offence of commercial organisations failing to prevent bribery. Firms have a full defense for this offence if they can show that they had adequate procedures designed to prevent bribery. The Government has published guidance on these procedures.

The FSA does not enforce the Bribery Act. FSMA-authorized firms are under a separate, regulatory obligation to identify and assess corruption risk and to put in place and maintain policies and processes to mitigate corruption risk. We can take regulatory action against firms who fail adequately to address corruption risk; we do not need to find evidence of corruption to take action against a firm.

We have consolidated our expectations of firms’ anti-bribery and corruption systems and controls in Chapter 7 of our proposed Financial Crime: a Guide for Firms. Our Guide is consistent with, but separate from, the Government’s Bribery Act guidance. This is because the scope of the Bribery Act is different from our rules and Principles;

154. Bribery Act, 2010, c. 23 (U.K.).

155. GIBSON DUNN, 2010 YEAR-END FCPA UPDATE (Jan. 3, 2011), available at <http://www.gibsondunn.com/publications/pages/2010Year-EndFCPAUpdate.aspx>.

156. *Id.*

157. Karolos Seeger & Matthew H. Getz, *The U.K. FSA Reminds Financial Services Firms of Anti-Corruption Compliance Obligations*, FCPA UPDATE (Debevoise & Plimpton LLP, New York, NY), Sept. 2011, at 7, available at http://www.debevoise.com/files/Publication/ccf8c29f-9f86-47ac-95f5-05c65c607046/Presentation/PublicationAttachment/a83e70dc-a1b5-4d6d-ac22-2c7034d175b5/FCPA_Update_Sept_2011.pdf.

158. *Id.*

firms should bear this in mind when reviewing the adequacy of their anti-corruption policies and procedures.¹⁵⁹

Brown, Airey, and Baker report that guidance was finally supplied by the Ministry of Justice on March 30, 2011, by publishing a “43-page document offering guidance to commercial organizations seeking to implement adequate procedures (the Guidance).”¹⁶⁰ The Guidance relevant to Section 7 enforcement indicated that “a ‘common sense approach’ would be applied . . . and set out six key compliance principles that ought to be taken into account, namely: (1) the need for proportionate procedures; (2) top (board) level commitment; (3) risk assessment; (4) due diligence; (5) communication and training; and (6) monitoring and review.”¹⁶¹

F. U.K. BRIBERY ACT DIFFERS FROM FCPA

A number of key differences exist between the U.K. and U.S. anti-bribery laws. The U.K. Bribery Act goes farther than the FCPA, criminalizing the payment, offer, or promise of a bribe, as well as the request, acceptance, or agreement to accept a bribe.¹⁶² The U.S. law only criminalizes the former.¹⁶³ The U.K. law also includes a corporate offense of failing to prevent bribery and contains no facilitating payment exception, as is found in the FCPA.¹⁶⁴ The Bribery Act has broad jurisdiction in that it expands coverage from bribes paid in the public sector (under the FCPA) to include those bribes paid in the private sector. In addition, the Bribery Act potentially extends to those corporations that have any U.K. presence or contact with a citizen of the United Kingdom. Unlike the FCPA, there is no exception for “facilitation payments.”¹⁶⁵ Potential penalties under the Bribery Act may generally be considered far more draconian than those under the FCPA.¹⁶⁶ Smaller companies are likely to be more heavily reliant on third-party consultants and agents than larger enterprises.¹⁶⁷ Because of their greater reliance upon others for assistance as they seek to conduct international business, smaller companies may have greater risk under the U.K. Bribery Act because it covers bribes made by “any individual associated” with the enterprise.¹⁶⁸ Chris Johnson observes that “a company’s only defense

159. *Id.*

160. Simon Airey & Mitka T. Baker, *The First UK Bribery Act Enforcement Case: A Sign of Tougher Things to Come?*, DLA PIPER (Sept. 16, 2011), available at <http://www.dlapiper.com/the-first-uk-bribery-act-enforcement-case-a-sign-of-tougher-things-to-come/>.

161. *Id.*

162. JONES DAY, *supra* note 6.

163. CRIMINAL DIV. OF THE U.S. DEP’T OF JUSTICE & THE ENFORCEMENT DIV. OF THE U.S. SECS. AND EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 10 (Nov. 14, 2012) available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

164. JONES DAY, *supra* note 6.

165. See generally Robert F. Amae & John P. Rupp, *Keeping Current: Anti-Corruption, The Bribery Act 2010 Guidance: Countdown to Implementation*, BUS. L. TODAY (Am. Bar Assoc., Chicago, Ill.), June 2011, at 1, available at <http://www.cov.com/files/Publication/b5bdef2d-c3ef-4d5d-94de-c96458fac452/Presentation/PublicationAttachment/ff24dd9a-0520-41fc-a9eb-cb7b40205263/Anti-Corruption%20-%20The%20Bribery%20Act%202010%20Guidance%20-%20Countdown%20to%20Implementation.pdf>.

166. *Id.*

167. Johnson, *supra* note 112.

168. *Id.*

under the Act is to prove that it has adequate anti-bribery procedures in place.”¹⁶⁹ Determining the steps necessary for Bribery Act compliance will require a separate focused analysis because compliance with Sarbanes-Oxley or the FCPA will not ensure Bribery Act compliance.¹⁷⁰

The Ministry of Justice has provided six guiding principles, “intended to be flexible and outcome focused, allowing for the huge variety of circumstances that commercial organizations find themselves . . . [recognizing that] small organizations will . . . face different challenges [than] those faced by large multi-national enterprises.”¹⁷¹ Moreover, eleven case studies are provided to illustrate application of the six principles in various hypothetical scenarios.¹⁷²

The Six Principles are:

1. Proportionate Procedures

“A commercial organisation’s procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale, and complexity of its activities. They are also clear, practical, accessible, and effectively implemented and enforced.”¹⁷³

2. Top-Level Commitment

“The top-level management of a commercial organization (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.”¹⁷⁴

3. Risk Assessment

“The commercial organization assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.”¹⁷⁵

4. Due Diligence

“The commercial organization applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organization, in order to mitigate identified bribery risks.”¹⁷⁶

169. *Id.*

170. Amae & Rupp, *supra* note 165, at 1.

171. MINISTRY OF JUSTICE, THE BRIBERY ACT 2010 20 (Mar. 31, 2011), available at <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

172. *Id.*

173. *Id.* at 21.

174. *Id.* at 23.

175. *Id.* at 25.

176. *Id.* at 27.

5. Communication (including training)

"The commercial organization seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organization through internal and external communication, including training, that is proportionate to the risks it faces."¹⁷⁷

6. Monitoring and Review

"The commercial organization monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary."¹⁷⁸

G. U.K. SERIOUS FRAUD OFFICE

Many outside the United Kingdom may not be familiar with the role and function of the U.K. Serious Fraud Office and the SFO's enforcement of bribery and corruption laws. According to SFO Director Richard Alderman, the SFO "is the lead agency in the UK for investigating and prosecuting cases of overseas corruption . . . responsible for enforcing the current law and . . . responsible for enforcing the provisions of the Bribery Act concerning overseas corruption."¹⁷⁹ Alderman continues, "The SFO is an integrated office consisting of investigators, prosecutors, IT specialists, and support. We deal with both the investigation as well as the prosecution of cases. The office has about 300 staff and a budget for 2010/11 of \$52.3 million."¹⁸⁰ Moreover, while "anti-corruption is one of the main areas of work covered by the SFO, [also covered are] serious and complex fraud. In the year 2009/10, 91% of defendants charged by the SFO were convicted," says Alderman.¹⁸¹

H. DIRECTOR LIABILITY

Regarding the question of personal liability for senior officers and/or corporate directors, Alderman states,

Let me turn . . . to the question of personal liability. I know that this is exercising the minds of a number of people. The Bribery Act creates an offence of consenting to or conniving at bribery in respect of senior officers. It is an offence I am very interested in. I want to see suitable senior executives brought to a criminal trial where they know about bribery and have permitted it to continue.

Some have asked me what this means for Directors more generally and indeed non-executive Directors. What does it mean, for example, for US citizens based in the UK who are Directors or non-executive Directors of corporations based in some very difficult countries? Will the Act apply to them? What about UK based senior execu-

177. *Id.* at 29.

178. *Id.* at 31.

179. Interview by Mike Koehler with Richard Alderman, Dir., U.K. Serious Fraud Office (Oct. 4, 2010), available at <http://www.ssrn.com/abstract=1687299>.

180. *Id.*

181. *Id.*

tives of US corporations? What is their exposure? The Act says that they are within the scope of the offence if they have a close connection with the UK (for example, if they are UK citizens or ordinarily resident in the UK).

These individuals need to consider their own personal liability in respect of what their corporations do. Ultimately, I believe that this is absolutely right. They are responsible individually and with their fellow Directors for the ethical conduct of the corporation. If they are unhappy then they need to consider their position. If they cannot change the corporation's approach then they may have to resign. If they continue then they run the serious risk of committing a criminal offence under the Bribery Act.¹⁸²

I. SECTION 7 ADEQUATE PROCEDURES DEFENSE

Debevoise & Plimpton observes that Section 7 of the U.K. Bribery Act provides a defense against a Section 7 bribery charge "by showing that [the company] had in place 'adequate procedures' to prevent bribery."¹⁸³ Accordingly, the Ministry of Justice guidance, discussed above,

incorporates Transparency International's (TI) Business Principles for Countering Bribery and is underpinned by three considerations: (i) *proportionality*: the level of anti-bribery due diligence should be proportionate to the scale of the transaction and the risk of bribery; (ii) *timing*: if the information necessary for due diligence is not wholly or partly available pre-acquisition, the due diligence may need to be undertaken or completed post-acquisition; and (iii) *effectiveness*: the company should follow a good practice approach.¹⁸⁴

J. THE ALCOA CASE

On October 24, 2011, in an action brought under the old law and not the new U.K. Bribery Act, "two key figures in a bribery investigation of aluminum maker Alcoa Inc.'s activities in Bahrain [were] arrested, three years after law-enforcement officials began looking at millions of dollars allegedly paid to gain aluminum contracts."¹⁸⁵

K. FIRST U.K. BRIBERY ACT ENFORCEMENT CASES

Brown, Airey, and Baker report that the first prosecution under the new Act is against a U.K. court official.¹⁸⁶ "Less than two months after the Act came into force, the Crown

182. Barry Vitou & Richard Kovalevsky Q.C., *Beware: Partners, Directors, Managers & Company Secretaries of Corporates in the Cross Hairs*, THEBRIBERYACT.COM (Oct. 13, 2011, 12:21 AM), <http://thebriberyact.com/2011/10/13/beware-partners-directors-managers-company-secretaries-of-corporates-in-the-cross-hairs/>.

183. Karolos Seeger, Matthew H. Getz & Lucy Grouse, *Transparency International UK's Anti-Bribery Due Diligence Guidance*, FCPA UPDATE (Debevoise & Plimpton LLP, New York, NY), June 2012, at 8, available at <http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=c97a52f6-8d35-425d-ac8a-a222d7f2c8af> (follow the "View the Update" link).

184. *Id.* at 9.

185. Dionne Searcey, *Kickback Probe at Alcoa Heats Up*, WALL ST. J., Oct. 25, 2011, at B1, available at <http://online.wsj.com/news/articles/SB10001424052970204644504576651261805908494>.

186. Airey & Baker, *supra* note 160.

Prosecution Service (CPS) has charged a Magistrates' Court clerk, Munir Yakub Patel, with violating Section 2 of the Act for allegedly accepting £500 for fixing a motoring offense (traffic violation).¹⁸⁷ The CPS in announcing the prosecution stated that it was "satisfied there is sufficient evidence to charge Munir Patel with requesting and receiving a bribe on 1 August 2011 intending to improperly perform his functions."¹⁸⁸ Airey, and Baker contend,

[t]his case demonstrates that the Act is fully operational and that UK prosecutors are actively looking for anti-bribery cases to prosecute. As the first prosecution under the Act, the CPS's decision to charge a court official for fixing traffic tickets may create the impression that prosecutors will use the Act to go for low-hanging fruit . . . [a]necdotal evidence suggests that significant matters are already under active investigation.¹⁸⁹

On August 14, 2013, the SFO charged three men connected to Sustainable Agroenergy Plc with "offenses of making and accepting a financial advantage contrary to section 1 (1) and 2 (1) of the Bribery Act of 2010," the first bribery charges to be brought by the SFO under the act.¹⁹⁰

L. SFO PUBLISHES ENFORCEMENT "REVISED POLICIES"

On October 9, 2012, the SFO announced revised policies regarding facilitation payments, business expenditure (hospitality), and corporate self-reporting . . . to: (1) restate the SFO's primary role as an investigator and prosecutor of serious complex fraud, including corruption; (2) ensure there is consistency with other prosecuting bodies; and (3) meet certain OECD recommendations."¹⁹¹

Accordingly, the revised statements of policy are as follows:

(1) Facilitation payments

A facilitation payment is a type of bribe and should be seen as such. A common example is where a government official is given money or goods to perform (or speed up the performance of) an existing duty. Facilitation payments were illegal before the Bribery Act came into force and they are illegal under the Bribery Act, regardless of their size or frequency.

Whether or not the SFO will prosecute in respect of a facilitation payment (or payments) will be governed by the Full Code Test in the Code for Crown Prosecutors and the Joint Prosecution Guidance of the Director of the SFO and the

187. *Id.*

188. *Id.*

189. *Id.*

190. Press Release, Serious Fraud Office, Four Charges in 'Bio Fuel' Investigation (Aug. 14, 2013), *available at* <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2013/four-charged-in-'bio-fuel'-investigation.aspx>.

191. Press Release, Serious Fraud Office, Revised Policies (Oct. 9, 2012), *available at* <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/revised-policies.aspx>.

Director of Public Prosecutions on the Bribery Act of 2010. Where relevant, the Joint Guidance on Corporate Prosecutions will also be applied.

If on the evidence there is a realistic prospect of conviction, the SFO will prosecute if it is in the public interest to do so.¹⁹²

(2) Business expenditure

Bona fide hospitality or promotional or other legitimate business expenditure is recognised as an established and important part of doing business. It is also the case, however, that bribes are sometimes disguised as legitimate business expenditure.

Whether or not the SFO will prosecute in respect of a bribe presented as hospitality or some other business expenditure will be governed by the Full Code Test in the Code for Crown Prosecutors and the Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions on the Bribery Act 2010. Where relevant, the Joint Guidance on Corporate Prosecutions will also be applied.

If on the evidence there is a realistic prospect of conviction, the SFO will prosecute if it is in the public interest to do so.¹⁹³

(3) Corporate self-reporting

Whether or not the SFO will prosecute a corporate body in a given case will be governed by the Full Code Test in the Code for Crown Prosecutors, the joint prosecution Guidance on Corporate Prosecutions and, where relevant, the Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions on the Bribery Act 2010. If on the evidence there is a realistic prospect of conviction, the SFO will prosecute if it is in the public interest to do so. The fact that a corporate body has reported itself will be a relevant consideration to the extent set out in the Guidance on Corporate Prosecutions. That Guidance explains that, for a self-report to be taken into consideration as a public interest factor tending against prosecution, it must form part of a “genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice.” Self-reporting is no guarantee that a prosecution will not follow. Each case will turn on its own facts. In appropriate cases the SFO may use its powers under proceeds of crime legislation as an alternative (or in addition) to prosecution; see the Attorney General’s guidance to prosecuting bodies on their asset recovery powers under the Proceeds of Crime Act 2002. If the SFO uses its powers under proceeds of crime legislation, it will publish its reasons, the details of the illegal conduct and the details of the disposal. In cases where the SFO does not prosecute a self-reporting corporate body, the SFO reserves the right (i) to prosecute it for any unreported violations of the law; and

192. *Facilitation Payments*, SERIOUS FRAUD OFFICE (Oct. 9, 2012), available at <http://www.sfo.gov.uk/bribery—corruption/the-bribery-act/facilitation-payments.aspx>.

193. *Business Expenditure*, SERIOUS FRAUD OFFICE (Oct. 9, 2012), available at <http://www.sfo.gov.uk/bribery—corruption/the-bribery-act/business-expenditure.aspx>.

(ii) lawfully to provide information on the reported violation to other bodies (such as foreign police forces).¹⁹⁴

Lawyers at Morgan Lewis warn that “the revised policies change the equation for potential self reporters because they can no longer expect voluntary disclosed Bribery Act violations to be resolved “civilly whenever possible.”¹⁹⁵ Moreover, those considering self-reporting “must also weigh the risk of UK authorities reporting their conduct to foreign regulators.”¹⁹⁶ In the revised policies, “the SFO [expressly] reserves the right . . . [to] lawfully . . . provide information on the reported violation to other bodies (such as foreign police forces).”¹⁹⁷

IV. How the SFO Differs from the DOJ

Richard Alderman explains that a number of significant differences exist between the powers conveyed to the SFO and those of the U.S. Department of Justice.¹⁹⁸ Among these differences, the DOJ has the ability to enter into deferred prosecution agreements, while the SFO currently lacks this power.¹⁹⁹ In the United Kingdom, it is necessary “to prove that the directing mind of the corporate (the Board or people close to the Board) was involved in the criminal activity. This is unnecessary in the U.S.”²⁰⁰ Alderman has also observed that penalties imposed in the United Kingdom for bribery and corruption have been lower historically than in the United States.²⁰¹ In addition, the United Kingdom double jeopardy laws (based on European and English jurisprudence) means that corporations and individuals “cannot be punished twice for the same conduct.”²⁰²

A. U.K.’S ANSWER TO THE FCPA “BOOKS & RECORDS” PROVISIONS

Mike Koehler has reported that in the United States, “the DOJ and the SEC (if an issuer is involved) cooperate in and coordinate FCPA enforcement actions. For instance, the DOJ will bring a criminal action and the SEC will bring a civil action, often charging violations of the FCPA’s books and records and internal control provisions.”²⁰³ In the United Kingdom, Richard Alderman reports that

[t]he SFO works closely with the FSA [Financial Services Authority] on investigations and . . . exchange material regularly. Co-ordinated action of the sort seen by the DOJ and SEC has not featured in the UK in the sense of concurrent civil and crimi-

194. *Corporate Self-Reporting*, SERIOUS FRAUD OFFICE (Oct. 9, 2012), available at <http://www.sfo.gov.uk/bribery—corruption/corporate-self-reporting.aspx>.

195. Eric Kraeutier, David Waldron, Nicholas Greenwood, Lain Wright & Benjamin D. Klein, *Serious Fraud Office Gets Tough in UK Bribery Act Enforcement Guidelines*, MORGAN LEWIS (Oct. 17, 2012), <http://www.morganlewis.com/index.cfm/publicationID/aafc7908-eda0-4377-812b-1c0cf88fd926/fuseaction/publication.detail>.

196. *Id.*

197. *Id.*

198. Interview by Mike Koehler with Richard Alderman, *supra* note 179, at 1.

199. *Id.* at 1.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 2.

nal outcomes by the FSA and the SFO. The position in the UK is that the SFO will take the lead if there is a criminal case (whether the eventual outcome is a criminal or civil one) and the FSA will take the lead if the outcome is to be a regulatory one. The FSA has power to bring criminal prosecutions but normally leaves it to the SFO to investigate and prosecute in bribery cases and in cases of serious and complex fraud.

There is a provision in UK legislation (section 221 Companies Act 1985 and now Section 386 to 389 Companies Act 2006) which deals with the subject of inadequate books and records. This is a criminal sanction. This provision has been used in the BAE case.²⁰⁴

The SEC and the U.K.'s FSA are increasing coordination as they undertake to "restate their commitment to working together and continue discussions in the areas of common regulatory interest including cross-border enforcement cases, the oversight of dually-regulated firms, and the global regulatory agenda."²⁰⁵ A long and close relationship has been enjoyed between the SEC and FSA. During 1986, the FSA's predecessor agency first entered into an enforcement information-sharing agreement with the UK's FSA.²⁰⁶ This working arrangement was enhanced and refined during 2006, as "the SEC and FSA executed a supervisory information-sharing memorandum of understanding in which the two regulators laid out how they would share information relating to the financial health and regulatory compliance of regulated entities operating in both countries."²⁰⁷ Former SEC Chairman Mary L. Shapiro has said,

[t]he ongoing dialogue between the SEC and the UK FSA demonstrates both agencies' commitment to aligning interests with the goal of achieving regulatory consistency. As Europe and the U.S. continue to enhance regulation in the wake of the financial crisis, working with all of our counterparts is essential to help prevent regulatory arbitrage

FSA CEO [Hector] Sants said, "Close cooperation between the FSA and the SEC is important as we seek to meet the G20 commitment to enhance transparency, mitigate systemic risk, and protect against market abuse. The strategic dialogue is key to this and gives the two agencies the opportunity to find common ground, built on areas of mutual interest, and identify potential regulatory gaps."²⁰⁸

V. Increased Cost of Anti-Bribery Compliance

In our recent FCPA update, we wrote that according to Sharie A. Brown, "the apparent lack of FCPA compliance attention and employee awareness can be exceptionally costly to companies with respect to officer, director, and employee time and resources, financial

204. *Id.*

205. Press Release, SEC No. 2011-206, SEC and FSA Hold Strategic Dialogue Meeting (Oct. 13, 2011), available at <http://www.sec.gov/news/press/2011/2011-206.htm>.

206. *Id.*

207. *Id.*

208. *Id.*

and accounting personnel time and resources, and negative press.”²⁰⁹ Stefan Zeume examines the unexpected adoption of the U.K. Bribery Act of 2010 “as an exogenous shock” to firm’s cost of bribing in order to study how unobserved bribes affect firm value. Among Zeume’s findings are (1) U.K. firms that operate in regions where corruption is more prevalent are indeed more negatively affected by the U.K. Bribery Act; (2) firms that operate in concentrated industries experience more negative abnormal returns, and these negative abnormal returns are more pronounced in firms with high exposure to corrupt regions; and (3) some U.K. firms cross-listed in the United States already subject to the FCPA are less negatively affected by the Bribery Act.²¹⁰

A. LAW FIRMS BOLSTER U.K. BRIBERY ACT PRACTICE AREA

A clear result of the increased anti-bribery statute enforcement is the new anti-bribery consulting and compliance industry. Consisting of accounting, consulting, and law firms, compliance and preventative measures come at a steep price. Writing in 2006, Brown contends that firms with major FCPA issues will face expenditures of “substantial resources for legal counsel and representation in connection with FCPA enforcement actions . . . and face substantial fines and penalties (with individuals also facing imprisonment) for violations.”²¹¹

B. INCREASED AUDIT COSTS

For those conducting business in perceived high-risk locations, Maher and Lyon find that anti-bribery legislation compliance means a likely increase in audit fees by extending the prior research regarding the relationship between audit fees and perceived business risk.²¹² Maher and Lyon observe that “much of the prior literature on business risk has focused on litigation risk . . . of incurring liability payments and the risk of damaged reputation for the quality of its services.”²¹³ Maher and Lyon find that “clients who engage in behavior that is viewed by some as misconduct incur higher audit fees than those who do not. The particular alleged misconduct [they] examine was the payment of bribes

209. Trautman & Altenbaumer-Price, *FCPA Update*, *supra* note 8, at 271; Sharie A. Brown, *Steps to an Effective Foreign Corrupt Practices Act Compliance Program*, ABA COMMITTEE ON CORPORATE COUNSEL NEWSLETTER (Am. Bar Assoc., Chicago, Ill.), Summer 2006, at 1 – 2.

210. STEFAN ZEUME, *BRIBES AND FIRM VALUE 2* (Dec. 24, 2013), available at <http://ssrn.com/abstract=2179437>.

211. Brown, *supra* note 209.

212. Michael W. Maher & John D. Lyon, *The Importance of Business Risk in Setting Audit Fees: Evidence from Cases of Client Misconduct*, 43 J. OF ACCT. RES. 133, 136 (Mar. 2005), available at <http://www.ssrn.com/abstract=613121> (citing K.M. Johnstone, *Client-Acceptance Decisions: Simultaneous Effects of Client Business Risk, Audit Risk, Auditor Business Risk, and Risk Adaptation*, 19 AUDITING: A J. OF PRAC. & THEORY 1 – 25 (2000); J. Morgan & P. Stocken, *The Effects of Business Risk on Audit Pricing*, 3 R. OF ACCT. STUDIES 365 (1998); T.B. O’Keefe, D.A. Simunic & M.T. Stein, *The Production of Audit Services from A Major Public Accounting Firm*, 32 J. OF ACCT. RES. 241 (1994); J. Pratt & J.D. Stice, *The Effects of Client Characteristics on Auditor Litigation Risk Judgments, Required Audit Evidence, and recommended Audit Fees*, 69 THE ACCT. R. 639 (1994); A. Seetharaman, F.A. Gul & S.G. Lynn, *Litigation Risk and Audit Fees: Evidence from U.K. Firms Cross-Listed on U.S. Markets*, 33 J. OF ACCT. & ECON. 91 (2002).

213. Maher & Lyon, *supra* note 212, (citing Z. Palmrose, *An Analysis of Auditor Litigation and Audit Service Quality*, 63 THE ACCT. R. 55 (1988); D.A. Simunic & M.T. Stein, *The Impact of Litigation Risk on Audit Pricing: A Review of the Economics and the Evidence*, 15 AUDITING: A J. PRAC. & THEORY 119 (Supp.) (1996)).

to high-level foreign government officials before such payments became illegal under the Foreign Corrupt Practices Act.”²¹⁴

C. AVAILABILITY OF NEW INSURANCE COVERAGE

The demand for insurance to transfer risk associated with the high costs of defending against an enforcement action has increased, commensurate with the increase in enforcement. Major insurance carriers have responded with products aimed at covering investigation costs, including the FCPA and U.K. Bribery Act.²¹⁵ In a speech to the National Association of Corporate Directors, Kara Altenbaumer-Price, Vice President and Management & Professional Liability Counsel for insurance broker USI, cautioned that companies should closely consider whether such policies are worth their price.²¹⁶ She observed that many of these products have smaller sub-limits than traditional public company D&O policies and carry significant price tags.²¹⁷ Some products designed to pay certain portions of the fines and penalties that may be assessed against individuals in FCPA prosecutions appear to cover only a very narrow portion of potential FCPA investigation costs and penalties that could be assessed.²¹⁸ More importantly, she observed, the SEC and DOJ will often require in settlement documents that fines not be paid by insurance proceeds.²¹⁹

Instead, Altenbaumer-Price recommends that companies consider manuscripting their traditional D&O policies to take advantage of newly available language that more closely matches traditional A-B-C policies with how claims related to government investigations actually arise.²²⁰ She advises negotiating the definition of “claim” within D&O policies to trigger coverage earlier in an investigation—such as changing from a “Wells Notice” as the triggering point for coverage for an SEC investigation to a Formal Notice of Investigation or simply a written request for documents or testimony.²²¹ She also advises to be aware of outs within policy language that may exclude significant costs, such as those associated with document production in investigations.²²²

214. Maher & Lyon, *supra* note 212.

215. See, e.g., Press Release, Chartis, Chartis Introduces Investigation Edge, Insurance Coverage for SEC Investigations (Mar. 2, 2011), available at http://www.aig.com/ncglobalweb/internet/US/en/files/PR_Investigation_Edge_03_02_11_tcm295-330316.pdf [hereinafter Chartis Press Release].

216. Kara Altenbaumer-Price, Address Before the National Association of Corporate Directors North Texas Chapter: Global Anti-Corruption Enforcement and Trends (Nov. 1, 2011).

217. *A Q&A Regarding FCPA Insurance*, FCPA PROFESSOR (Apr. 10, 2012), available at <http://www.fcpaprofessor.com/a-qa-regarding-fcpa-insurance-2>; Kara Altenbaumer-Price, *supra* note 216; Client Memorandum, Wilkie, Farr & Gallagher, LLP, New Insurance Products Protect Against Costs of FCPA Investigations (Aug. 9, 2011), available at http://www.willkie.com/files/tbl_s29Publications%5CFileUpload5686%5C3851%5CNew-Insurance-Products-Protect-Against-Costs.pdf; see, e.g., Chartis Press Release, *supra* note 215.

218. *A Q&A Regarding FCPA Insurance*, *supra* note 217; Kara Altenbaumer-Price, *supra* note 216; Client Memorandum, *supra* note 217; see, e.g., Chartis Press Release, *supra* note 215.

219. Kara Altenbaumer-Price, *supra* note 216.

220. *Id.*; see also Lawrence J. Trautman & Kara Altenbaumer-Price, *D & O Insurance: A Primer*, 1 AM. U. BUS. L. REV. 337 (2012), available at <http://ssrn.com/abstract=1998080>.

221. Kara Altenbaumer-Price, *supra* note 216.

222. Kara Altenbaumer-Price, *Guest Post: Internal Investigation Costs: How Investigations Coverage May Fail*, D & O DIARY (Mar. 2, 2012), <http://www.dandodiary.com/2012/03/articles/d-o-insurance/guest-post-internal-investigation-costs-how-investigations-coverage-may-fail/>.

VI. U.K. Bribery Act: Post-Implementation Assessment

After initial concern about what appears to be legislation more draconian than the FCPA, post-implementation of the U.K. Bribery Act has produced only three “convictions under the Bribery Act 2010 in just under two years, so far all involving individuals. There [have] yet to be any corporate convictions or any cases offering guidance on the corporate offense under Section 7, in particular on the meaning of ‘carrying on business’ in the United Kingdom.”²²³ Mr. Yang Li, a student, was convicted on April 23, 2013, of offering a bribe of £5,000 to his University of Bath tutor in an attempt to increase his dissertation grade (reportedly three percent deficient of a passing grade).²²⁴ Rejected by his tutor, Mr. Li subsequently pleaded guilty (under Section 1 of the Bribery Act of 2010) to the bribery charge in Bristol Crown Court and was sentenced to pay £4,880 in costs and twelve months of prison sentence.²²⁵ Accordingly, Judge Michael Longman observed that “any form of corruption or incitement to a person in any manner amounts to a serious offense which must be taken seriously by the court.”²²⁶

The lack of prosecutions to date “is hardly a surprise to those familiar with the demands of an investigation into complex economic crime,” writes Robert Amaee, former Head of Anti-Corruption and Head of Proceeds of Crime at the U.K. Serious Fraud Office and now of counsel at the law firm of Covington & Burling.²²⁷ It is estimated that the SFO spends

an average of three and a half years and £1.5 million (\$2.25 million) investigating each bribery case . . . [and] . . . [i]n spite of the undoubted challenges that confront the SFO in the year ahead, it is important for companies and senior individuals to guard against complacency.²²⁸

During the first twelve months of the U.K. Bribery Act’s effectiveness, Alderman resigned as Director of the SFO and was replaced by veteran prosecutor David Green on April 23, 2012.²²⁹ Rob Morris believes that “the SFO’s ‘carrot approach’ contrasts with what may be considered a ‘stick approach’ that has historically been taken by the Department of Justice and SEC, where compliance is encouraged by the impetus to avoid significant fines.”²³⁰

Mid-2012 statements by Mr. Green “follow closely on the heels of publication of an Organisation for Economic Cooperation and Development working group report highly critical of the UK’s implementation of the Bribery Convention, and critical as well of Mr.

223. Rosanne Kay & Kimberly Davies, *A Fiery Dissertation—The Third Conviction Under the UK Bribery Act 2010*, REED SMITH L.L.P. (Apr. 30, 2013), available at <http://www.globalregulatoryenforcementlawblog.com/2013/04/articles/government-investigations/a-fiery-dissertation-the-third-conviction-under-the-uk-bribery-act-2010/>.

224. *Id.*

225. *Id.*

226. *Id.*

227. Robert Amaee, *UK Bribery Act—Year One*, FCPA PROFESSOR (Jul. 3, 2012), <http://www.fcprofessor.com/uk-bribery-act-year-one>.

228. *Id.*

229. Press Release, Serious Fraud Office, New SFO Director David Green (Apr. 23, 2012), available at <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/new-sfo-director-david-green.aspx>.

230. Rob Morris, *The UK Bribery Act: Will David Green Shift SFO Approach?*, THE ASSET (Sept. 17, 2012), available at <http://www.theasset.com/article/22727.html>.

Alderman's enforcement of the Bribery Act."²³¹ Raymond L. Sweigart warns that Mr. Green has stated, "[w]e are primarily a crime-fighting agency and we've got to remember that." Mr. Green has further indicated that he is looking for 'significant strategic' cases which threaten confidence in the City and British business and that he is eager to bring the first 'big' Bribery Act case."²³² Michael Volkov says that "in some respects, the SFO is having trouble defining itself as a prosecution agency or a regulatory agency dedicated to continuing consultations to companies falling under UK Bribery Act 'regulation.'"²³³

Professor Bruce W. Bean and Emma H. MacGuidwin conclude that The Bribery Act of 2010 represents "the unintended consequences of Parliament's apparent need to enact . . . a truly draconian anti-bribery law in order to overcome the embarrassment of the government's role in the BAE scandal . . . years of procrastination . . . and its own Allowances and Expenses scandal."²³⁴

VII. Importance of the Tone at the Top

To stand a chance of being successful, any corporate anti-bribery and anti-corruption program requires significant enterprise commitment at the very top. In their adoption of the *Good Practices Guidance on Internal Controls, Ethics, and Compliance*, the OECD has recognized that "[c]ompanies should consider . . . strong, explicit and visible support and commitment from senior management to the company's internal controls, ethics and compliance programmes or measures for preventing and detecting foreign bribery."²³⁵

A. COMPLIANCE PROGRAMS: PRIORITY A MUST

We have seen previously that bribery, extortion, and corruption in many forms is more prevalent than not in many countries. Inadequate anti-bribery efforts result in companies and individuals being subjected to unlimited fines for and imprisonment of up to ten years for individual defendants under the U.K. Bribery Act of 2010, increased legal and audit costs, disgorgement of ill-gotten gains, and the threat of massive fines under the FCPA.²³⁶

Ernst & Young conducted a thirty-six-country survey during 2013 of more than 3,000 board members, executives, and top managers and their teams.²³⁷ These survey results reveal that an alarming number of respondents "appear to be comfortable with or aware of unethical conduct. This includes recording revenues early, underreporting costs or en-

231. Raymond L. Sweigart, *UK Bribery Act—There's a New Constable in Town*, PILLSBURY, WINTHROP, SHAW, PITTMAN, L.L.P. (May 17, 2012), available at <http://www.pillsburylaw.com/index.cfm?pageid=34&itemid=40557> (citing OECD WORKING GROUP ON BRIBERY, ORG. FOR ECON. COOPERATION AND DEV., PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED KINGDOM (Mar. 2012), available at <http://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf>).

232. *Id.*

233. Michael Volkov, *Whither the UK Bribery Act?* (Oct. 4, 2012), <http://corruptioncrimcompliance.com/2012/10/whither-the-uk-bribery-act/>.

234. Bean & MacGuidwin, *supra* note 115.

235. ORG. FOR ECON. COOPERATION AND DEV., *GOOD PRACTICE GUIDANCE ON INTERNAL CONTROLS, ETHICS, AND COMPLIANCE* (A)(1) (Feb. 18, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/docs/oecd-good-practice.pdf>.

236. See generally Maher & Lyon, *supra* note 212.

237. ERNST & YOUNG, *supra* note 87, at 1.

couraging customers to buy unnecessary stock. This is coupled with the perception that bribery and corruption remain widespread in several markets.”²³⁸

The loud and clear message that bribery and extortion will not be tolerated must be communicated by senior management and the board to everyone within the company and any agents acting on its behalf. Establishing the proper tone, consistently conveying the significance of anti-bribery compliance, and openly advocating compliance at all levels of the organization is a special responsibility of top managers, not just those domiciled in the United States. Middle and in-country managers cannot be expected to have adequate motivation to conduct their activities within the confines of the FCPA and U.K. Bribery Act in the absence of a strong commitment from those above. Anti-bribery compliance must be elevated toward the top of enterprise priorities. These priorities must be more than mere words, which means that compliance efforts must receive adequate budgeting resources.

Ann Bruder, General Counsel at Commercial Metals Corporation says, “[o]ur job as general counsel is to ensure the predictability of results and predictability of cost to produce those results.”²³⁹ Finding “a significant perception gap between senior management and employees when it comes to the effectiveness of compliance programs,” the 2013 Ernst & Young survey suggests that the following four issues need to be addressed by those responsible for compliance programs: (1) “[s]enior management thinks programs are more effective than they actually are”; (2) “[p]rograms are too narrow or not seen as relevant”; (3) “[p]rograms are perceived as constraining competitiveness in this market”; and (4) “[t]he increased risk due to current market conditions has not been matched by increased compliance efforts.”²⁴⁰

B. SIX STEPS TO PROTECTING AGAINST BRIBERY AND CORRUPTION

Observing that “bribery and corruption issues around the globe continue to challenge even the most robust compliance organizations” and that “fifty-seven percent [of survey respondents] believe bribery and corruption are widespread in their country,” consultant Ernst & Young notes, “we have observed common features among those who manage it most effectively.”²⁴¹

1. Own the problem.
2. Deal with the issues- make compliance relevant.
3. Communicate the risks.
4. Communicate the benefits.
5. Focus resources.
6. Ask questions, demand answers.²⁴²

238. *Id.*

239. Elizabeth Jacobs, Jay Martin, Stanley Sporkin & Carey O'Connor, Panel Discussion at 20th Annual SMU Corporate Counsel Symposium: Foreign Corrupt Practices Act (Oct. 5, 2012).

240. ERNST & YOUNG, *supra* note 87, at 16.

241. *Id.* at 20.

242. *Id.* at 20–21.

C. EMPLOYEE EDUCATION AND AWARENESS

It is a constant challenge to foster and maintain anti-bribery law awareness among employees and any third-party agents acting on behalf of the company. Yormark observes that violations may take place "simply because employees were not aware that what they were doing was wrong."²⁴³ Particularly in those troublesome global jurisdictions where bribery is culturally ingrained as a way of life, consultant Protivity contends that there appears to be no one best way to conduct employee and agent education because of the difficulties resulting from language, culture, and geographical considerations. As a result, many companies are now employing a "multi-method" approach, including in-person, CD-ROM, and Internet-based training available in appropriate languages.²⁴⁴ Particularly where computer access to internal communications is not readily available, managers will need to be creative in their outreach to rank-and-file employees.

Anti-bribery compliance training (U.K. Bribery Act, FCPA, and local government anti-bribery laws) should include important coverage about the company's ethical values, education about the various types of offending conduct, and warnings about the resulting serious individual and corporate liabilities associated with related violations.²⁴⁵ Sharie Brown warns, "it has been my experience that newer public companies that expand overseas, as well as companies with in-house counsel, are especially vulnerable to . . . anti-bribery and internal controls violations involving their overseas business units."²⁴⁶

The OECD provides the following guidance regarding essential elements necessary for compliance and ethics programs designed to detect, educate, and prevent "foreign bribery applicable, where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners."²⁴⁷ These essential elements are

- (i) properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular oversight of business partners;
- (ii) informing business partners of the company's commitment to abiding by laws on the prohibitions against foreign bribery, and of the company's ethics and compliance programme or measures for preventing and detecting such bribery; and
- (iii) seeking a reciprocal commitment from business partners.²⁴⁸

Brown further recommends that in-house counsel should incorporate with training a plan "to conduct a risk assessment of the high-risk areas or operations within the business units that can expose the company to serious . . . [anti-bribery] liability and enforcement action."²⁴⁹ Sharie Brown also recommends that when conducting field anti-bribery training, counsel should try to meet with marketing and area managers and auditing and accounting personnel to attempt to flush out troublesome activities that may result in anti-

243. KEN YORMARK, INVESTIGATIONS AND THE FOREIGN CORRUPT PRACTICES ACT 4 (2006).

244. *Id.*

245. Brown, *supra* note 209, at 3.

246. *Id.*

247. ORG. FOR ECON. COOPERATION AND DEV., *supra* note 235.

248. *Id.*

249. Brown, *supra* note 209, at 6.

bribery violation issues.²⁵⁰ These widespread discussions should help with risk assessment and create anti-bribery compliance buy-in among all relevant individuals. Counsel should seek to present a focused discussion based on a previously prepared “risk assessment template,” tailored to the particular business risk concerns.²⁵¹ Prior preparation should provide for a more efficient and productive meeting.²⁵² Officers and directors, employees having international responsibility and prospective, and existing international consultants and agents should receive initial training.²⁵³

General Counsel Bruder stresses that in addition to commitment by the CEO, the attitude and focus of business unit leaders set the tone for the organization. The best way to ensure compliance is to have business leaders who believe firmly that the paying of even one bribe distorts profitability. It’s a slippery slope, any bribery is not OK and it makes no business sense to do it.²⁵⁴

VIII. Conclusion

Bribery and corruption remain unfortunate obstacles to economic growth and prosperity. The diversion of scarce resources through corruption thwarts efforts to create jobs and erase poverty. Companies that employ citizens of the United Kingdom, maintain an office in the United Kingdom, or are service providers to any United Kingdom organizations are subject to the U.K. Bribery Act and may be held liable for unlimited fines and jail terms that increase to ten years. Any attempt to assess corporate risk for a U.K. Bribery Act violation requires an understanding of how the statute operates and is enforced.

250. *Id.*

251. *Id.* at 7.

252. *Id.*

253. *Id.*

254. Jacobs, Martin, Sporkin & O’Connor, *supra* note 239; E-mail from Ann Bruder, Senior Vice President of Law, Gov’t Affairs and Global Compliance, Gen. Counsel, and Corp. Sec’y, Commercial Metals Co., to Lawrence J. Trautman (June 12, 2013, 9:06 AM) (on file with authors).