

Spring 2011

## Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing

Margaret Ryznor

Samer Korkor

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Margaret Ryznor and Samer Korkor, *Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing*, 76 Mo. L. REV. (2011)  
Available at: <https://scholarship.law.missouri.edu/mlr/vol76/iss2/4>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

# Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing

Margaret Ryznar\*

Samer Korkor\*\*

## ABSTRACT

*Lawmakers and prosecutors continue to take aim at a major subset of global corruption – corporate bribery of foreign government officials. Specifically, while the enforcement of the Foreign Corrupt Practices Act in the United States has risen to new records, the United Kingdom has revolutionized its anti-bribery law following global criticism of its previously relaxed legal regime. Both U.S. and U.K. anti-bribery laws, furthermore, apply extraterritorially and have the capability to entangle even the largest multinational companies in their legal frameworks. These all-encompassing frameworks hold significant consequences for both corporations and their employees, but the increasing power of anti-bribery law raises important questions regarding the proper scope of legislation on the subject, as well as the sentencing approaches to these crimes.*

## I. INTRODUCTION

In an annual world economy of thirty trillion dollars, bribery – whereby one person influences the behavior of another through financial payment<sup>1</sup> – is

---

\* Attorney, Washington, D.C. J.D., Notre Dame Law School; M.A., Jagiellonian University; B.A., University of Chicago. The opinions, views, and observations in this Article are the authors' alone.

\*\* Attorney, Washington, D.C. J.D., Washington University in St. Louis; M.A., Case Western Reserve University; B.A., Case Western Reserve University. Thanks to the members of the *Missouri Law Review* for their editing assistance.

1. See Timothy W. Schmidt, Note, *Sweetening the Deal: Strengthening Transnational Bribery Laws Through Standard International Corporate Auditing Guidelines*, 93 MINN. L. REV. 1120, 1121 (2009) (“A bribe is the payment by a briber of something of value to the bribee in exchange for the bribee acting both in the briber’s interest and contrary to the bribee’s own duties.” (citing Stuart P. Green, *What’s Wrong with Bribery*, in *DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW* 143, 145 (R.A. Duff & Stuart P. Green eds., 2005))).

a trillion dollar business.<sup>2</sup> Acts of bribery range from the *mordidas* paid in Mexico<sup>3</sup> to the sums paid to American politicians for political favors.<sup>4</sup>

Recently, American prosecutors have begun targeting a particular subsection of bribery that accounts for much of the world's corruption – corporate bribery of foreign government officials to obtain or retain business.<sup>5</sup> For example, from 1994 to 1999, bribery of foreign officials facilitated the award of 294 contracts valued at approximately \$145 billion.<sup>6</sup> In 1998 alone, U.S. businesses collectively lost \$37 billion worth of contracts abroad due to foreign bribery.<sup>7</sup>

Although the prohibition of this type of bribery is not new in the United States,<sup>8</sup> its prosecution has recently undergone a renaissance to become one

2. Eric Holder, U.S. Att'y Gen., Remarks at the Organisation for Economic Co-Operation and Development (May 31, 2010), <http://www.justice.gov/ag/speeches/2010/ag-speech-100531.html>; see also Daniel Kaufmann, *Myths and Realities of Governance and Corruption*, in GLOBAL COMPETITIVENESS REPORT 2005-06 81, 83 (World Econ. Forum ed., 2005), available at [http://mpr.aub.uni-muenchen.de/8089/1/Myths\\_Realities\\_Gov\\_Corruption.pdf](http://mpr.aub.uni-muenchen.de/8089/1/Myths_Realities_Gov_Corruption.pdf).

3. See generally Rodrigo Labardini, *The Fight Against Corruption in Mexico*, 11 U.S.-MEX. L.J. 195 (2003) (discussing the mechanisms through which the Mexican government has attempted to fight corruption).

4. For a discussion of political bribery, see George D. Brown, *New Federalism's Unanswered Question: Who Should Prosecute State and Local Officials for Political Corruption?*, 60 WASH & LEE L. REV. 417 (2003). See also Barbara Crutchfield George & Kathleen A. Lacey, *A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks, and Non-Governmental Organizations: A Pivotal Complement to Current Anti-Corruption Initiatives*, 33 CORNELL INT'L L.J. 547, 567 (2000) (noting global interest in “confronting and eliminating perceived corruption in both the corporate and political arenas”).

5. See *infra* Parts II-III.

6. George & Lacey, *supra* note 4, at 551.

7. *Id.*

Transparency International (TI) estimates that the amount lost due to bribery in government procurement alone is at least \$400 billion per year worldwide. U.S. firms have reportedly lost 100 contracts worth a total of \$45 billion to foreign competitors due to graft in 1994-95. In a World Bank survey conducted of multinational companies located in OECD countries in 2000, 30 percent of respondents admitted that they paid bribes to public officials for obtaining contracts in former Soviet Union countries.

Venkata Rama Sastry Pidaparthy, *Supply Side Issues in Procurement Corruption: Is the Developed World Responding Adequately to the Needs of the Developing World?*, J. DEV. & SOC. TRANSFORMATION, Nov. 2005, at 109, 109, available at <http://www.maxwell.syr.edu/uploadedFiles/moynihan/dst/pidaparthy12.pdf?n=3725> (citations omitted).

8. See *infra* note 39 and accompanying text; see, e.g., 18 U.S.C. § 201 (2006); *id.* § 666; *id.* § 1951. Under the United States Constitution, “[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of . . . Bribery.” U.S. CONST. art. II, § 4. For the

of the most dynamic subsets of white-collar crime.<sup>9</sup> In the United States, these prosecutions often proceed under the Foreign Corrupt Practices Act (FCPA), a post-Watergate law mostly dormant for decades, and have increased dramatically in the wake of corporate misconduct in the last decade.<sup>10</sup>

By many measures, 2010 was a banner year for FCPA investigations.<sup>11</sup> Ongoing FCPA investigations implicate numerous Fortune 500 and other well-known companies, including Maxwell Technologies, Sun Microsystems, Morgan Stanley, Avon Products, Bridgestone, Aon, Johnson & Johnson, United Parcel Service, Bristol Myers Squibb Co., Alltel, ABB Ltd., Alcatel Lucent, Xerox, United Defense Industries, Chiquita Brands Int'l, Accenture Ltd., DaimlerChrysler AG (now Daimler AG), Petro-Canada, and Eli Lilly & Co.<sup>12</sup>

Generally, companies encounter FCPA-related issues in various circumstances. Some acquire them through the acquisition of a company with unknown bribery practices.<sup>13</sup> Others do so through their foreign subsidiaries, which, in addition to being managed by foreigners in a different culture, do business in corrupt environments, especially in comparison to Western standards.<sup>14</sup> Still others may be implicated under the FCPA by a single rogue

history of the FCPA, see *infra* Part II. The prosecution of bribery in other contexts is also not new. See G. Robert Blakey, *Bribes*, 60 NOTRE DAME L. REV. 1255, 1255 (1985) (book review) (noting that the practice of bribery has been occurring since Egyptian antiquity).

9. See *infra* Part II.

10. See Dionne Searcey, *U.S. Cracks Down on Corporate Bribes*, WALL ST. J., May 26, 2009, at A1, available at <http://online.wsj.com/article/SB124329477230952689.html>; see also Foreign Corrupt Practices Act of 1977, Pub. L. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C. § 78); *infra* Parts II, IV.

11. 2010: *All Signs Point to a Record-Breaking Year for FCPA Enforcement*, CLIENT ALERT (White & Case LLP, Washington, D.C.), Mar. 1, 2010, available at [http://www.whitecase.com/files/Publication/f467a377-4dc1-474c-8740-e613412595e4/Presentation/PublicationAttachment/c9a6dd05-6e02-48a1-83ff-efcc271e9722/Alert\\_2010\\_Record\\_Breaking\\_Year\\_FCPA\\_Enforcement.pdf](http://www.whitecase.com/files/Publication/f467a377-4dc1-474c-8740-e613412595e4/Presentation/PublicationAttachment/c9a6dd05-6e02-48a1-83ff-efcc271e9722/Alert_2010_Record_Breaking_Year_FCPA_Enforcement.pdf) (noting higher rates of enforcement, higher financial penalties, and increased international cooperation).

12. *Cases and Review Releases Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977*, FCPA DIGEST (Shearman & Sterling LLP, Washington D.C.), Mar. 4, 2010, at 292-370, available at <http://www.shearman.com/files/upload/FCPA-Digest-Spring-2010.pdf>.

13. Carolyn Lindsey, *More Than You Bargained For: Successor Liability Under the U.S. Foreign Corrupt Practices Act*, 35 OHIO N.U. L. REV. 959, 960 (2009).

14. Daniel Kaufmann, *Corruption: The Facts*, 107 FOREIGN POL'Y 114, 115 (1997) (“[Acts] viewed as corruption in the West would be interpreted differently within the customs of emerging economies.”); Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419, 449 (1999) (arguing that a universal law regarding a grey area such as bribery is offensive to some); see also Andrew White, *The Paradox of Corruption as Antithesis to Economic Development: Does Corruption Undermine Economic Development in Indonesia and*

employee.<sup>15</sup> Regardless of the source of FCPA problems, however, all these companies would be potential targets of aggressive government enforcement of the Act.

Commentators have been divided on the benefits of the aggressive prosecution of FCPA cases. Some have suggested that FCPA enforcements counterproductively chill investments in certain markets by discouraging corporate entry into transitioning economies.<sup>16</sup> Others have recognized the benefits to a clean business environment abroad,<sup>17</sup> noting that bribery entangles corporations in “extortionate relationships”<sup>18</sup> and increases transaction costs.<sup>19</sup> Not only is it the corporations that are disadvantaged by a corrupt business environment, but so too are the citizens of that country<sup>20</sup> – societal costs of corruption<sup>21</sup> include compromises to efficiency,<sup>22</sup> fairness, and transparency.<sup>23</sup>

*China and Why are the Experiences Different in Each Country?*, 8 ASIAN-PAC. L. & POL’Y J. 1, 7 (2006) (noting that corruption is universal but differs by country).

15. Eli Richardson et al., *Is That a Crime?: Understanding Risks and Obligations in the Foreign Corrupt Practices Act*, 45 TENN. B.J. 14, 21 (2009).

16. See, e.g., Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions against Emerging Markets*, 62 FLA. L. REV. 351, 371-74 (2010). But see *infra* note 17 and accompanying text.

17. Philip Segal, *Coming Clean on Dirty Dealing: Time for a Fact-Based Evaluation of the Foreign Corrupt Practices Act*, 18 INT’L L. 169, 172 (2006) (“[B]ribery of public officials abroad is, for the most part, harmful to the citizens of the particular country. The literature on corruption appears to have defeated the notion that bribery is efficient or desirable, and regime change in certain corrupt countries has helped debunk that myth as well.”); see also Thomas Fox, *FCPA Compliance and FCPA Enforcement: A Look Ahead to 2009 and Beyond*, CORP. COMPLIANCE INSIGHTS, May 19, 2009, <http://www.corporatecomplianceinsights.com/2009/fcpa-compliance-fcpa-enforcement-obama-mcnulty-ashcroft-comments-on-foreign-corrupt-practices-act/> (quoting Senator Barack Obama, *An Honest Government, A Hopeful Future* (Aug. 28, 2006) (transcript available at <http://wrageblog.org/2009/01/19/president-elect-obamas-2006-speech-at-the-university-of-nairobi/>)).

18. See Daniel Pines, Comment, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 210 (1994).

19. See Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT’L L. & COM. REG. 83, 86 (2007).

20. See, e.g., Schmidt, *supra* note 1, at 1121-22 (“When a person bribes a state official, the state suffers in a variety of ways. The poor of the society suffer since they cannot compete with the rich in the market for government services, be it road maintenance or criminal justice. The country as a whole breaks down when it works only for pay, not out of the interest of fairness. Government becomes inefficient and cannot provide social services at the same levels as less-corrupt governments. Finally, bribery burdens businesses and the economy of a nation in general and stands as a market entry barrier for corporations.” (footnotes omitted)).

21. President Barack Obama has noted:

No country is going to create wealth if its leaders exploit the economy to enrich themselves or if police . . . can be bought off by drug traffickers. . . . People everywhere should have the right to start a business or get an

In emerging economies, corruption is a particular problem, as it is one of the greatest obstacles to a market's transition to stability.<sup>24</sup>

For many such reasons, the U.S. Department of Justice (DOJ) and U.S. Securities and Exchange Commission (SEC) have recently renewed their commitment to the enforcement of the FCPA.<sup>25</sup> Assistant Attorney General Lanny Breuer of the DOJ's Criminal Division noted that the DOJ Fraud Section has successfully brought thirty-six corporate FCPA enforcement actions since 2005, resulting in the imposition of fines totaling more than \$1.5 billion.<sup>26</sup> Additionally, the DOJ charged seventy-seven individuals with FCPA violations.<sup>27</sup>

---

education without paying a bribe. We have a responsibility to support those who act responsibly and to isolate those who don't, and that is exactly what America will do.

President Barack Obama, Remarks to the Ghanaian Parliament (July 11, 2009) (transcript available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-to-the-Ghanaian-Parliament/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-the-Ghanaian-Parliament/)); see also Brian C. Harms, Note, *Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption*, 33 CORNELL INT'L L.J. 159, 165 (2000) ("The [International Monetary Fund] notes several consequences of corruption: (1) corruption lowers investment and retards economic growth; (2) corruption misallocates talent; (3) corruption reduces the effectiveness of aid flows; (4) corruption leads to adverse budgetary consequences; (5) corruption lowers the quality of the infrastructure and of public services; and (6) corruption distorts the composition of government expenditure.").

22. See George & Lacey, *supra* note 4, at 554 (noting that the economic distortions caused by nepotism "crippled Indonesia's intra-national competition and seriously curtailed foreign investment, contributing to Indonesia's 1998 economic crisis"); Krever, *supra* note 19, at 85.

23. One organization that fights global corruption by increasing transparency is Transparency International, which was founded to alleviate the devastating effects of corruption on people. See About Transparency International, [http://www.transparency.org/about\\_us](http://www.transparency.org/about_us) (last visited Jan. 19, 2011).

24. See, e.g., C. Raj Kumar, *Corruption, Development and Good Governance: Challenges for Promoting Access to Justice in Asia*, 16 MICH. ST. J. INT'L L. 475, 568 (2008) ("The empire of corruption has done seminal damage to good governance and the rule of law in countries in the Asia Pacific region."); Philip M. Nichols, *Corruption as an Assurance Problem*, 19 AM. U. INT'L L. REV. 1307, 1309 (2004).

25. Eric Holder, U.S. Att'y Gen., Remarks at the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity (Nov. 7, 2009) (transcript available at <http://www.justice.gov/ag/speeches/2009/ag-speech-091107.html>) (noting the continuing need for action against foreign bribery); see also John Hasnas, *Managing the Risks of Legal Compliance: Conflicting Demands of Law and Ethics*, 39 LOY. U. CHI. L.J. 507, 507 (2008). But see Lisa Brennan, *Breuer: DOJ May Rethink Costly FCPA Cases*, MAIN JUSTICE, May 7, 2010, <http://wordpress.tsgdomain.com/MainJusticeDemo/2010/05/07/breuer-doj-may-rethink-costly-fcpa-cases-like-bourke-giffen/>.

26. Brennan, *supra* note 25.

27. *Id.*

By the numbers, the United States, a member of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), prosecutes more bribery offenses than most other countries bound by the Convention.<sup>28</sup> This American prosecution is facilitated by the extraterritorial nature of the FCPA, which creates a powerful legal framework creating significant consequences, including prison sentences and significant fines, for multinational corporations and their individual employees.<sup>29</sup> This extraterritoriality aspect of the FCPA, combined with the Act's strict enforcement in recent years, has earned the United States a reputation as an aggressive prosecutor of bribery.<sup>30</sup>

While this reputation of the United States for anti-bribery enforcement is among the most notable, recent changes to the United Kingdom's bribery laws will soon provide the United States with a strong transatlantic partner in the quest against corruption. Once the new laws are in place, the U.K. will become increasingly strict on bribery as a result of its dramatic shift from a patchwork of common law to comprehensive legislation on the topic. The new laws are, in some ways, even more aggressive than the FCPA.<sup>31</sup>

The development of stringent U.K. anti-bribery law, however, has encountered many delays. In August 2010, the U.K. Ministry of Justice announced delays in the implementation of the Act, and in January 2011, the Ministry confirmed that the Bribery Act of 2010 will not come into effect until July 1, 2011, more than one year after receiving royal assent.<sup>32</sup> The official reason for this delay was that a short "consultation exercise" became

28. Nicola Ehlermann-Cache, *The Impact of the OECD Anti-Bribery Convention* (Org. for Econ. Cooperation & Dev., Paris, France), available at <http://www.oecd.org/dataoecd/24/30/39997682.pdf> (last visited Feb. 1, 2011); see also *infra* notes 35-37 and accompanying text.

29. See, e.g., Evan P. Lestelle, Comment, *The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction*, 83 TUL. L. REV. 527, 532-33 (2008).

30. See, e.g., Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1162 (2006) (noting increased FCPA enforcements); Ashish S. Joshi, *Britain's Fight Against the "Silver Lance": A Radical Overhaul of the U.K.'s Bribery Laws*, CHAMPION, Feb. 2009, at 36, 38 (noting the United States' "aggressive record of bribery prosecution"); *Another Sign of Aggressive FCPA Enforcement: The SEC Brings Anti-Bribery Charges Against a Non-Issuer*, FCPA UPDATE (Sidley Austin LLP, Washington, D.C.), Aug. 10, 2010, at 2, available at [http://www.sidley.com/files/News/4658c597-38ba-41a0-92234b3244f8027a/Presentation/NewsAttachment/1e7b9706-d27f-4acd-bea14c9170e006fa/FCPA\\_Update\\_08\\_09\\_10.pdf](http://www.sidley.com/files/News/4658c597-38ba-41a0-92234b3244f8027a/Presentation/NewsAttachment/1e7b9706-d27f-4acd-bea14c9170e006fa/FCPA_Update_08_09_10.pdf) (underscoring the aggressiveness of FCPA enforcements).

31. See *infra* Part IV.

32. News Release, Ministry of Justice, UK Clamps Down on Corruption with New Bribery Act (Mar. 30, 2011), available at <http://www.justice.gov.uk/news/newsrelease300311a.htm>. Royal assent is the final step in the U.K. legislative process.

necessary in order to publish guidance for corporations seeking compliance with the new law.<sup>33</sup> However, some commentators suspected that the new U.K. government, resulting from a change of administrations, bowed under pressure from the business lobby to delay and perhaps dilute the force of the legislation,<sup>34</sup> but this was unlikely.

Although the U.K. government has delayed the enforcement of its new anti-bribery law, it is important to understand this newly enacted legal framework. A comparison of U.S. and U.K. anti-bribery laws, in particular, offers insight into some of the world's most aggressive anti-bribery laws, triggering important questions on the proper scope of bribery legislation and sentencing. These issues are especially relevant given that the U.S. and U.K. anti-bribery legal regimes, as well as others around the world, almost inevitably will impact multinational companies, regardless of their country of origin.

This Article therefore begins by considering American anti-bribery law in Part II, focusing on the FCPA. Part III then analyzes British anti-bribery law, identifying its history and recent changes. Next, Part IV considers and contrasts the scopes of the U.S. and U.K.'s anti-bribery schemes, including their respective sentencing components and their wide-reaching consequences to businesses. The Article concludes that public policy goals and the costs of bribery prosecution will shape many of the characteristics of the anti-bribery legal landscape, which likely will be aggressive in targeting corporate bribery of foreign government officials.

## II. AMERICAN ANTI-BRIBERY LEGISLATION: THE FOREIGN CORRUPT PRACTICES ACT

Both the United States and the United Kingdom are parties to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), which was signed in 1997 by the members of the Organisation for Economic Co-operation and Development (OECD).<sup>35</sup> Under the OECD Convention, countries must "prohibit the bribing of foreign officials, set criminal and civil penalties for violations, and either extradite or prosecute its nationals who are accused of bribery by another signatory."<sup>36</sup> The OECD publishes its findings on the progress of implementation in various countries.<sup>37</sup> As signatories, both the U.S. and the U.K. must operate within this framework.

---

33. Samuel Rubinfeld, *UK Postpones Bribery Act Implementation for 9 Months*, DOW JONES NEWSWIRES, July 21, 2010, <http://www.automatedtrader.net/real-time-dow-jones/6634/uk-postpones-bribery-act-implementation-for-9-months>.

34. See, e.g., The British Question, <http://www.fcablog.com> (July 22, 2010, 07:28 EST).

35. Ehlermann-Cache; *supra* note 28, at 1 n.2; Schmidt, *supra* note 1, at 1126.

36. Schmidt, *supra* note 1, at 1126-27.

37. See Org. for Econ. Co-operation and Dev., Statistics from A-Z, [http://www.oecd.org/document/0,3746,en\\_2649\\_201185\\_46462759\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/0,3746,en_2649_201185_46462759_1_1_1_1,00.html)



Pursuant to the OECD Convention, Congress enacted the Foreign Corrupt Practices Act (FCPA) to prohibit the bribing of foreign officials.<sup>38</sup> The FCPA was enacted in 1977 on the heels of the post-Watergate corporate environment when more than 400 American companies admitted to making questionable or improper payments in excess of \$300 million to foreign government officials in return for business benefits.<sup>39</sup> The Act, signed by President Jimmy Carter on December 19, 1977,<sup>40</sup> aimed to prevent such improper conduct and to restore confidence and integrity in corporate America.<sup>41</sup> The Act amended the Securities Exchange Act of 1934<sup>42</sup> and underwent amendments itself in 1988 and 1998.<sup>43</sup>

In general, the FCPA prohibits: (1) the payment or offer to pay anything of value to a foreign official to obtain or retain business (anti-bribery provisions),<sup>44</sup> and (2) the inadequate keeping of books, records, and accounts (books and records and internal controls provisions).<sup>45</sup> The specific requirements prescribed by the FCPA have been illuminated by judicial interpreta-

(last visited Feb. 14, 2011). The OECD has recently increased its efforts to monitor countries' implementation of anti-bribery laws. *FCPA/Anti-Bribery Mid-Year Alert 2010* (Hughes Hubbard & Reed LLP, New York, N.Y.), 2010, at 14 [hereinafter *FCPA/Anti-Bribery Mid-Year Alert*].

38. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C. § 78), amended by Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 102 Stat. 1415 (codified at 15 U.S.C. §§ 78dd-1 to 78dd-3, 78ff) and International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified at 15 U.S.C. §§ 78dd-1 to 78dd-3, 78ff).

39. SEC. & EXCH. COMM'N, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, reprinted in [Jan.-Jun.] Sec. Reg. & L. Rep. (BNA) No. 353 Special Supp., at 36-41 (May 19, 1976); David Pauly et al., *Business Without Bribes*, NEWSWEEK, Feb. 19, 1979, at 63 (recounting that the SEC's investigations in the mid-1970s resulted in over 400 U.S. companies' admissions to having made questionable or illegal payments in excess of \$300 million to foreign government officials, politicians, and political parties).

40. Statement on Signing S. 305 Into Law, 2 PUB. PAPERS 2157 (Dec. 20, 1977) (recording that President Carter admonished bribery when the FCPA was signed).

41. U.S. DEP'T OF JUST. & U.S. DEP'T OF COMMERCE, FOREIGN CORRUPT PRACTICES ACT: ANTIBRIBERY PROVISIONS 2, <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> (last visited Feb. 1, 2011) [hereinafter FCPA: ANTIBRIBERY PROVISIONS].

42. Securities Exchange Act of 1934, Pub. L. No. 291, 48 Stat. 881.

43. Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, §§ 5001-5003, 102 Stat. 1415, 1415-25 (enacted as part of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302.

44. 15 U.S.C. §§ 78dd-1(a)(1)-(2), 78dd-2(a)(1)-(2), 78dd-3(a)(1)-(2) (2006).

45. *Id.* § 78m(b)(2)(A).

tions and by the enforcement actions of the Act's implementers, the SEC and DOJ.

The DOJ is primarily responsible for the criminal and civil enforcement of the anti-bribery provisions.<sup>46</sup> The SEC plays a coordinating role and is concerned primarily with civil enforcement of the anti-bribery provisions with respect to issuers, as well as matters related to the books and records and internal controls provisions.<sup>47</sup> The Office of General Counsel of the Department of Commerce, meanwhile, focuses its efforts on offering guidance to U.S. exporters.<sup>48</sup>

In general, this Part examines the substance of the FCPA by exploring its language, interpretation, and enforcement. This Part begins by considering the FCPA's vast jurisdictional reach and then examines the interpretation and enforcement of key statutory language. It next turns to the statute's limited exception, affirmative defenses, and proscribed penalties for violations. This discussion of the FCPA describes a legal framework to be compared with Part III, which addresses the U.K.'s anti-bribery laws that establish a scheme similar to the FCPA in some regards, but distinguishable in others.

### *A. Jurisdiction*

Prior to the 1998 amendments to the FCPA, jurisdiction was limited to "issuers" and "domestic concerns" and did not cover foreign nationals employed by domestic concerns.<sup>49</sup> The 1998 amendments expanded the jurisdiction of the FCPA to both non-U.S. persons acting within the United States and U.S. persons acting outside the United States.<sup>50</sup> As a result, the FCPA's jurisdictional reach is vast. In exploring this reach, it is important to separate the two general categories of prohibited conduct: (1) the anti-bribery provisions<sup>51</sup> and (2) the books and records and internal controls provisions.<sup>52</sup>

The anti-bribery provisions apply to citizens and residents of the United States, regardless of where the corrupt conduct occurred.<sup>53</sup> The provisions also extend to companies, foreign and domestic, that conduct business in the

46. FCPA: ANTIBRIBERY PROVISIONS, *supra* note 41, at 2.

47. *Id.*

48. *Id.* at 6.

49. See Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, § 5003(a), 102 Stat. 1415, 1415-19 (enacted as part of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107).

50. 15 U.S.C. § 78dd-1(g) (for issuers); *id.* § 78dd-2(i) (for domestic concerns).

51. Anti-bribery provisions apply to "issuers," "domestic concerns," and "persons other than issuers or domestic concerns." *Id.* §§ 78dd-1 to 78dd-3.

52. *Id.* § 78m (applying accounting provisions to "issuers").

53. See *id.* §§ 78dd-1(a), (g), 78dd-2(a), (i) (delineating prohibited conduct of both issuers and non-issuers without requiring the conduct to have occurred in the United States).

United States, as well as their subsidiaries.<sup>54</sup> Also implicated are companies whose shares are traded on any U.S. exchange or that are registered with the SEC.<sup>55</sup> Finally, the FCPA anti-bribery provisions cover foreign persons, including corporations, who perform any act within the territory of the U.S. in furtherance of an offer, promise to pay, or payment to a foreign government official.<sup>56</sup> Indeed, many significant enforcement actions have been taken against foreign companies such as Siemens AG, BAE Systems PLC, and Panalpina.<sup>57</sup>

The other category of provisions – those related to the books and records and internal controls – apply to “issuers.”<sup>58</sup> Issuers include entities with “a class of securities” registered pursuant to the securities laws or entities otherwise required to file reports pursuant to the securities laws.<sup>59</sup> In practice, the companies implicated are the ones whose shares publicly trade on a U.S. stock exchange.<sup>60</sup>

### B. Prohibited Conduct Under the FCPA

The FCPA’s anti-bribery provisions prohibit the payment or offer to pay “anything of value” to a “foreign official” to “obtain[] or retain[] business.”<sup>61</sup> The books and records and internal controls provisions of the FCPA require issuers to maintain accurate books, records, and accounts.<sup>62</sup> Companies may be charged under both provisions.<sup>63</sup>

54. See *id.* §§ 78dd-1(a), (g), 78dd-2(a), (i).

55. See *id.* §§ 78dd-1(a), 78dd-2(a), 78dd-3(a); FCPA: ANTIBRIBERY PROVISIONS, *supra* note 41, at 2-3.

56. See sources cited *supra* note 55.

57. Press Release, Sec. & Exch. Comm’n, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), available at <http://www.sec.gov/news/press/2008/2008-294.htm>; Press Release, U.S. 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>; Press Release, U.S. Dep’t of Justice, Freight Forwarder Panalpina Pays U.S. \$375,000 to Settle False Claims and Kickbacks Allegations (July 30, 2010), available at <http://www.justice.gov/opa/pr/2010/July/10-civ-884.html>.

58. 15 U.S.C. § 78m(a).

59. *Id.* § 78m(b)(2).

60. See Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 395 (2010).

61. 15 U.S.C. §§ 78dd-1(a).

62. *Id.* § 78m(b)(2)(A).

63. For example, in 2007, York International Corporation, a subsidiary of Johnson Controls, entered into a settlement agreement with U.S. prosecutors relating to bribes paid under the United Nations oil-for-food program and kickbacks to various government officials. Press Release, U.S. Dep’t of Justice, Justice Department Agrees to Defer Prosecution of York International Corporation in Connection With Payment of Kickbacks Under the U.N. Oil For Food Program (Oct. 1, 2007), availa-

The specific nature of the conduct prohibited by both provisions requires a strong understanding of the specific meaning of key terms. Various sources provide insight into these provisions. These sources include guidance statements from the DOJ, limited amounts of case law, and, most significantly, the enforcement practices of the DOJ and the SEC.<sup>64</sup>

### 1. Anti-Bribery Provisions

The anti-bribery provisions make it illegal to either directly or indirectly offer, make, promise, or authorize an offer to pay money or anything of value to an official of another government, political party, political candidate, or intermediary acting on behalf of a government official.<sup>65</sup> Payments are considered improper under the FCPA if they are made “in order to assist . . . in obtaining or retaining business for or with, or directing business to, any person.”<sup>66</sup>

The FCPA does not expressly define what it means to pay “anything of value”<sup>67</sup> to a government official, although the phrase has been interpreted to be far-reaching. Past practice by government regulators suggests that the phrase includes both tangible and intangible objects and services, whether payment of such objects or services is direct or through intermediaries, such as agents, consultants, and contractors.<sup>68</sup> Things of value have included college scholarships,<sup>69</sup> sexual favors,<sup>70</sup> and offers of future employment.<sup>71</sup>

---

*ble* at [http://www.justice.gov/opa/pr/2007/October/07\\_crm\\_783.html](http://www.justice.gov/opa/pr/2007/October/07_crm_783.html). The company violated the anti-bribery provisions of the FCPA and failed to accurately record in its books and records the kickbacks to Iraqi officials, bribes in the UAE, and unusual consultancy payments made in various countries. *Id.*

64. See Koehler, *supra* note 60, at 395-416 (describing trends in FCPA enforcement for 2009).

65. 15 U.S.C. § 78dd-1(a)(1)-(2).

66. *Id.* § 78dd-1(a)(1)(B).

67. The legislative history surrounding the phrase “anything of value” is not particularly helpful. See S. REP. NO. 95-144 (1977); H.R. REP. NO. 95-831 (1977) (Conf. Rep.).

68. See, e.g., Press Release, U.S. Dep’t of Justice, Lucent Technologies Inc. Agrees to Pay \$1 Million Fine to Resolve FCPA Allegations (Dec. 21, 2007), *available* at [http://www.justice.gov/opa/pr/2007/December/07\\_crm\\_1028.html](http://www.justice.gov/opa/pr/2007/December/07_crm_1028.html) (noting that Lucent violated the FCPA by paying for sightseeing trips for Chinese government officials); Press Release, U.S. Dep’t. of Justice, UTStarcom Inc. Agrees to Pay \$1.5 Million Penalty for Acts of Foreign Bribery in China (Dec. 31, 2009), *available* at <http://www.justice.gov/opa/pr/2009/December/09-crm-1390.html> (noting that UTStarcom Inc. employees and agents violated the FCPA by arranging for Chinese government officials to visit popular U.S. tourist destinations).

69. *United States v. McDade*, 827 F. Supp. 1153, 1162 (E.D. Pa. 1993) (recognizing a college scholarship as “anything of value” in the context of 18 U.S.C. § 201), *aff’d in part*, 28 F.3d 283 (3d Cir. 1994).

The SEC applied the most expansive interpretation of “anything of value” in its 2004 enforcement action against Schering-Plough Corporation.<sup>72</sup> The company allegedly violated the FCPA when its wholly owned Polish subsidiary improperly recorded a bona fide donation to S-P Poland, a Polish charitable foundation that restored historic sites in Poland.<sup>73</sup> The founder and president of the foundation was the director of a government health fund and was thus considered a “foreign official” under the FCPA.<sup>74</sup> Although the company recorded the payments to the bona fide foundation as donations, the SEC alleged that they were made to improperly influence the director to purchase the company’s products.<sup>75</sup> Importantly, the scope of the term “anything of value,” as employed by the SEC in this enforcement action, did not require the Polish official to receive any concrete financial benefit. Instead, the “thing of value” constituted the intangible benefit of enhanced reputation or prestige. These intangible benefits fell within the FCPA’s reach.<sup>76</sup>

Another term that merits further elaboration is “foreign official.” The FCPA defines “foreign official” as

any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency or in-

---

70. *United States v. Marmolejo*, 89 F.3d 1185, 1193 (5th Cir. 1996) (finding that conjugal visits were a thing of value in the context of 18 U.S.C. § 666); *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979) (noting that “[s]exual intercourse . . . is a thing of value under a bribery statute” in the context of 18 U.S.C. § 641 (citing *McDonald v. State*, 329 So. 2d 583, 587-88 (Ala. Crim. App. 1975))).

71. *Girard*, 601 F.2d at 71 (noting that a promise to reinstate an employee is a thing of value in the context of 18 U.S.C. § 641 (citing *People ex rel. Dickinson v. Van de Carr*, 84 N.Y.S. 461, 463-64 (N.Y. App. Div. 1903))).

72. See *Schering-Plough Corp.*, Exchange Act Release No. 49,838, 82 SEC Docket 3644 (June 9, 2004); *SEC v. Schering-Plough Corp.*, Litigation Release No. 18,740, 82 SEC Docket 3732 (June 9, 2004); Complaint ¶ 1, *SEC v. Schering-Plough Corp.*, No. 1:04CV00945 (D.D.C. June 9, 2004), available at <http://www.sec.gov/litigation/complaints/comp18740.pdf>.

73. *Schering-Plough Corp.*, Exchange Act Release No. 49,838, *supra* note 72.

74. *Id.*

75. *Id.*

76. See *United States v. Liebo*, 923 F.2d 1308, 1311 (8th Cir. 1991) (discussing airline tickets); *United States v. Metcalf & Eddy, Inc.*, No. 99-12566 (D. Mass. 1999) (implicating accommodation upgrades); *Dow Chem. Co.*, Exchange Act Release No. 55,287, 89 SEC Docket 3092 (Feb. 13, 2007) (“Although the payments were in small amounts – well under \$100 per payment – the payments were numerous and frequent.”); Complaint ¶ 43, *SEC v. Titan Corp.*, No. 05-0411 (D.D.C. 2005), available at <http://www.sec.gov/litigation/complaints/comp19107.pdf> (payments included a \$1,850 pair of earrings as a gift to the President of Benin’s wife).

strumentality, or for or on behalf of any such public international organization.<sup>77</sup>

Notably, in addition to traditional government employees, such as elected or appointed officials, and employees in the executive, military, legislative, judicial, and administrative branches, the definition of “foreign official” includes “instrumentalit[ies] thereof.”<sup>78</sup> This is significant because instrumentalities of the state encompass a wide range of actors that must not be overlooked as being out of the FCPA’s reach.

In June 2008, for example, Florida-based Faro Technologies, Inc. settled an FCPA enforcement action stemming from improper kickback payments to employees of a Chinese state-owned enterprise (SOE) in return for a competitive advantage.<sup>79</sup> The same month, AGA Medical Corporation, a privately held Minnesota company, settled FCPA charges for using a Chinese distributor to make improper payments to doctors employed by Chinese government-owned or -controlled hospitals in exchange for the doctors’ purchase of AGA’s medical products.<sup>80</sup> Lucent Technologies, Inc. also allegedly improperly recorded things of value given to employees of a Chinese SOE.<sup>81</sup> Finally, in the enforcement action against GE InVision, Inc., the SEC premised its action on the “high probability” that the company’s local distributor intended to use monies to pay travel expenses and other benefits of Chinese foreign officials.<sup>82</sup> Thus, foreign officials include officials of enterprises performing

77. 15 U.S.C. § 78dd-1(f)(1)(A) (2006).

78. *Id.*

79. See Press Release, U.S. Dep’t of Justice, Faro Technologies Inc. Agrees to Pay \$1.1 Million Penalty and Enter Non-Prosecution Agreement for FCPA Violations (June 5, 2008), available at <http://www.justice.gov/opa/pr/2008/June/08-crm-505.html>; see also Faro Technologies, Inc., Exchange Act Release No. 57,933, 93 SEC Docket 1124 (June 5, 2008) (reporting that Faro settled the case for \$2.9 million).

80. See Press Release, U.S. Dep’t of Justice, AGA Medical Corporation Agrees to Pay \$2 Million Penalty and Enter Deferred Prosecution Agreement for FCPA Violations (June 3, 2008), available at <http://www.justice.gov/opa/pr/2008/June/08-crm-491.html>.

81. See Press Release, U.S. Dep’t of Justice, Lucent Technologies Inc. Agrees to Pay \$1 Million Fine to Resolve FCPA Allegations (Dec. 21, 2007), available at [http://www.justice.gov/opa/pr/2007/December/07\\_crm\\_1028.html](http://www.justice.gov/opa/pr/2007/December/07_crm_1028.html); see also SEC v. Lucent Technologies Inc., Litigation Release No. 20,414, 92 SEC Docket 867 (Dec. 21, 2007), available at <http://www.sec.gov/litigation/litreleases/2007/lr20414.htm> (announcing that Lucent settled the case for \$2.5 million in response to the SEC’s complaint, which alleged that Lucent spent over \$10 million for SOE employees to take thousands of trips that had a disproportionate amount of sightseeing, entertainment, and leisure).

82. SEC v. GE InVision, Inc., Litigation Release No. 19,078, 88 SEC Docket 2206 (Feb. 14, 2005); Press Release, U.S. Dep’t of Justice, InVision Technologies, Inc. Enters Into Agreement with the United States (Dec. 6, 2004), available at

governmental functions, public international organizations, wholly- and partially-owned government businesses, and government-controlled businesses.

Notably, the FCPA does not always prohibit payments made to foreign governments, as opposed to individuals, even if the intent of the payments is to influence decisions. In one instance, a U.S.-based utility company sought to donate \$100,000 to help build a school in the country where the donor intended to build a plant.<sup>83</sup> According to the DOJ, because the “donation [would] be made directly to a government entity – and not to any foreign government official – the provisions of the FCPA [did] not appear to apply to this prospective transaction.”<sup>84</sup>

Finally, with regard to the phrase “obtain or retain business,” the Fifth Circuit explained the phrase’s broad application in the 2004 case *United States v. Kay*.<sup>85</sup> The *Kay* court concluded that improper payments made to Haitian officials to decrease corporate taxes and custom duties could satisfy the “obtain or retain business” element by creating an unfair advantage to the payor.<sup>86</sup> The court reasoned that “little difference” existed between improper payments such as these and an improper payment to a foreign government official in exchange for a government contract or commercial agreement.<sup>87</sup> The Fifth Circuit was guided by Congress’ desire for the statute to cover a wide range of improper payments.<sup>88</sup>

## 2. Books and Records and Internal Controls Provisions

The books and records and internal controls provisions of the FCPA deter companies from making corrupt payments by requiring companies to maintain accurate corporate books.<sup>89</sup> The law anticipates that corrupt payments may be logged as ordinary expenditures to give the false impression that a payment was intended for some legitimate expense. For example, in January 2010, the SEC charged that the Texas-based oil and gas services firm

---

[http://www.justice.gov/opa/pr/2004/December/04\\_crm\\_780.htm](http://www.justice.gov/opa/pr/2004/December/04_crm_780.htm). See also generally Complaint, SEC v. GE InVision, Inc., No. C05 0660 (N.D. Cal. 2005), available at <http://www.sec.gov/litigation/complaints/comp19078.pdf> (companion case filed by the SEC to impose civil penalties).

83. FCPA Blog, <http://www.fcpublog.com> (Sept. 14, 2008, 19:56 EST).

84. U.S. Dep’t of Justice, FCPA Opinion Procedure Release No. 97-02 (Nov. 5, 1997), <http://www.justice.gov/criminal/fraud/fcpa/opinion/1997/9702.pdf>; see also U.S. Dep’t of Justice, Opinion Procedure Release No. 06-01 (Oct. 16, 2006), <http://www.justice.gov/criminal/fraud/fcpa/opinion/2006/0601.pdf> (approving a company to donate \$25,000 to a regional customs department in an African country to improve local enforcement of anti-counterfeiting laws).

85. 359 F.3d 738 (5th Cir. 2004).

86. *Id.* at 749.

87. *Id.*

88. *Id.*

89. See 15 U.S.C. § 78m(b)(2)(A) (2006).

NATCO Group, Inc.'s wholly owned subsidiary, TEST Automation & Controls, Inc., "accepted false documents while paying extorted immigration fines and obtaining immigration visas in the Republic of Kazakhstan."<sup>90</sup> The TEST employees in Kazakhstan used personal funds to make the illicit payments and then obtained reimbursement from TEST.<sup>91</sup> The company "inaccurately described the payment as a 'Payroll Advance.'"<sup>92</sup> TEST then falsely "recorded the payment in its books and records as a salary advance."<sup>93</sup>

Meanwhile, the books and records and internal controls provisions of the FCPA require issuers to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."<sup>94</sup> The statute defines "records" to include "accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type, whether expressed in ordinary or machine language."<sup>95</sup> While the inclusion of the terms "books" and "accounts" broadens the FCPA's reach, the SEC has limited the scope of the books and records provisions to exclude records that are unrelated to internal or external audits, but to include the internal control objectives set forth in the FCPA.<sup>96</sup>

Under the statute, keeping the books and records in "reasonable detail" means "such level of detail . . . as would satisfy prudent officials in the conduct of their own affairs."<sup>97</sup> In practice, the standard is probably akin to one of reasonableness.<sup>98</sup> Congress intended to "make clear[] that the issuer's records should reflect transactions in conformity with accepted methods of recording economic events and effectively prevent off-the-book slush funds and payments of bribes."<sup>99</sup> While the provisions also require that the books, records, and accounts of issuers "accurately and fairly reflect the transactions and disposition of the assets," Congress did not intend the word "accurately" to mean "exact" precision.<sup>100</sup> Rather, "it means that [the] [i]ssuer's records

90. SEC v. Natco Group, Inc., Litigation Release No. 21374, (Jan. 11, 2010), available at <http://www.sec.gov/litigation/litreleases/2010/lr21374.htm>.

91. Complaint ¶ 7, SEC v. NATCO Group Inc., No. 4:10-CV-98 (S.D. Tex. Jan. 11, 2010).

92. *Id.* ¶ 8.

93. *Id.*

94. 15 U.S.C. § 78m(b)(2)(A).

95. *Id.* § 78c(a)(37).

96. See Statement of Policy Regarding the Foreign Corrupt Practices Act of 1977, Interpretive Release No. 34-17500, 46 Fed. Reg. 11544, 11546 (Jan. 29, 1981).

97. 15 U.S.C. § 78m(b)(7).

98. See Statement of Policy Regarding the Foreign Corrupt Practices Act of 1977, Interpretive Release No. 34-17500, 46 Fed. Reg. 11544, 11546 (Jan. 29, 1981). SEC Release No. 34-17500 is the codification of SEC Chairman Harold Williams' speech on January 13, 1981 to the American Institute of Certified Public Accountants Annual Conference. *Id.* at 11544.

99. H.R. REP. NO. 95-831, at 10 (1977) (Conf. Rep.).

100. *Id.*



should reflect transactions in conformity with accepted methods of recording economic events.”<sup>101</sup>

Additionally, the FCPA’s books and records and internal controls provisions require issuers to “devise and maintain a system of internal accounting controls.”<sup>102</sup> This system is sufficient when it provides reasonable assurances that transactions are executed in accordance with management’s general or specific authorization and are recorded as necessary to permit the preparation of financial statements in conformity with generally accepted accounting principles.<sup>103</sup>

In 2008, for example, the SEC filed a civil complaint against car manufacturer Fiat and CNH Global (a majority-owned subsidiary of Fiat) for failing to maintain adequate systems of internal controls to detect corrupt payments made by its subsidiaries.<sup>104</sup> In addition to the SEC settlement’s civil penalty of \$3,600,000 and disgorgement of \$5,309,632 in profits and \$1,899,510 in pre-judgment interest, the companies were permanently enjoined from future violations of the internal controls and books and records provisions.<sup>105</sup>

### C. Penalties

Violators of the FCPA face significant penalties. In December 2008, the DOJ and SEC announced that Siemens AG had agreed to pay approximately \$1.6 billion in sanctions to U.S. and German law enforcement.<sup>106</sup> In February 2009, the DOJ and the SEC reported that Kellogg Brown & Root LLC (now known as KBR, Inc.) agreed to pay \$579 million in criminal fines and dis-

101. Mike Koehler, *The Unique FCPA Compliance Challenges of Doing Business in China*, 25 WISC. INT’L L.J. 397, 411 (2007) (second alteration in original) (citing S. REP. NO. 94-1031, at 11 (1976)).

102. 15 U.S.C. § 78m(b)(2)(B).

103. SEC Notice of Withdrawal of Proposed Rules Regarding Statement of Management on Internal Accounting Controls, 45 Fed. Reg. 40,135, 40,139-40, 40,143 (1980); *see also, e.g.*, Complaint at 16, SEC v. York Int’l Corp., No. 1:07-cv-01750 (D.D.C. Oct. 1, 2007), *available at* <http://www.sec.gov/litigation/complaints/2007/comp20319.pdf> (alleging that internal controls were insufficient).

104. Complaint at 12, SEC v. Fiat S.p.A., No. 1:08-cv-02211 (D.D.C. 2008), *available at* <http://www.sec.gov/litigation/complaints/2008/comp20835.pdf>

105. SEC v. Fiat S.p.A., Litigation Release No. 20,835, 94 SEC Docket 3092 (Dec. 22, 2008), *available at* <http://www.sec.gov/litigation/litreleases/2008/lr20835.htm>.

106. Press Release, U.S. Dep’t of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008), *available at* <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>; Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), *available at* <http://www.sec.gov/news/press/2008/2008-294.htm>.

gorged profits.<sup>107</sup> On March 1, 2010, the DOJ disclosed that BAE Systems PLC agreed to pay fines to law enforcement authorities of approximately \$400 million in the United States.<sup>108</sup>

The FCPA allows for a broad scope of sanctions to deter potential violators of the statute. The U.S. can raise both civil<sup>109</sup> and criminal claims<sup>110</sup> against those who face FCPA enforcement action, as well as suspend or revoke the benefits of conducting business in the U.S.<sup>111</sup> Within the various types of penalties that may be sought under the Act, the actual imposition of those penalties varies depending on whether the violator is a corporation or an individual.

Corporations that violate the statute may face a criminal fine per violation of up to \$2 million for violations of the books and records and internal control provisions, or twice the bribe paid or benefit sought or received – whichever is greater – for violations of the anti-bribery provisions.<sup>112</sup> The SEC and DOJ also can seek disgorgement of profits.<sup>113</sup> Finally, corporations

107. Press Release, U.S. Dep't of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine (Feb. 11, 2009), *available at* <http://www.justice.gov/opa/pr/2009/February/09-crm-112.html>; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges KBR and Halliburton for FCPA Violations (Feb. 11, 2009), *available at* <http://www.sec.gov/news/press/2009/2009-23.htm>.

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

109. The FCPA provides for civil penalties of up to \$10,000 for violations of the bribery provisions, and the Attorney General may file a civil injunction action to enjoin a domestic concern from violating the FCPA. 15 U.S.C. § 78ff(c)(1)(B) (2006) (civil penalties for violations by issuers); *id.* § 78dd-2(g)(2)(B) (individual civil penalties against domestic concerns); *id.* § 78dd-2(d)(1) (permanent injunctions and temporary restraining orders are available).

110. *Id.* §§ 78dd-3(e), 78ff (stating penalties for violations of the FCPA).

111. U.S. DEP'T OF STATE, FIGHTING GLOBAL CORRUPTION: BUSINESS RISK MANAGEMENT 28 (2001) ("The President has directed that no executive agency shall allow any party to participate in any procurement or nonprocurement activity if any agency has debarred, suspended, or otherwise excluded that party from participation in a procurement or nonprocurement activity.").

112. 18 U.S.C. § 3571(d); 15 U.S.C. § 78dd-2(g)(1)(A) (penalties for domestic concerns); *id.* § 78ff(c)(1)(A) (penalties for issuers); *see also, e.g.*, Press Release, U.S. Dep't of Justice, Micrus Corporation Enters into Agreement to Resolve Potential Foreign Corrupt Practices Act Liability (Mar. 2, 2005), *available at* [http://www.justice.gov/opa/pr/2005/March/05\\_crm\\_090.htm](http://www.justice.gov/opa/pr/2005/March/05_crm_090.htm) (announcing that Micrus entered into a deferred prosecution agreement to pay \$450,000 in penalties and establish a FCPA compliance program).

113. For example, Titan Corporation paid a fine of \$28.5 million, \$15.5 million of which was in disgorgement, for making improper payments to a foreign official in Benin. *SEC v. Titan Corp.*, Litigation Release No. 19107, 84 SEC Docket 3413 (Mar. 1, 2005).

that willfully violate the books and records and internal controls provisions can be punished with a criminal fine of up to \$25 million.<sup>114</sup>

When corporations are found guilty under the FCPA, sentencing occurs under chapter eight of the U.S. Sentencing Guidelines, which permit them to receive credit for compliance and ethics programs.<sup>115</sup> While compliance programs are not a defense to liability, an effective compliance program can mitigate as much as 95% of a potential fine.<sup>116</sup> Specifically, a corporation qualifies for the credit if its compliance and ethics program: (1) requires those with operational responsibility of the compliance and ethics program to report directly to government authority or its subgroup, such as an audit committee of the board of directors; (2) detects the offense before its discovery outside the organization or before such discovery was reasonably likely; (3) requires the organization to promptly report the offense to the proper government authorities; and (4) is such that “no person with operational responsibility in the compliance program participated in, condoned, or was willfully ignorant of the offense.”<sup>117</sup>

Individuals who violate the anti-bribery provisions may receive a criminal fine of up to \$100,000 and up to five years in prison per violation.<sup>118</sup> Individuals who willfully violate the FCPA books and records and internal controls provisions may be fined up to \$5,000,000 and imprisoned for up to twenty years.<sup>119</sup> Sentences for individuals who violate the anti-bribery provisions are determined under section 2B4.1 of the Guidelines,<sup>120</sup> while violators of the books and records and internal controls provisions are determined under section 2B1.1 of the Guidelines, which includes fraud sentencing provisions.<sup>121</sup> An individual’s offense level increases when a substantial part of

114. 15 U.S.C. § 78ff(a); SEC v. BellSouth, Litigation Release No. 17,310 (Jan. 15, 2002) (describing that BellSouth Corporation settled FCPA charges with a \$150,000 civil penalty for violating the FCPA’s books and records provisions); SEC v. Chiquita Brands Int’l, Inc., Litigation Release No. 17,169 (Oct. 3, 2001) (recording that Chiquita agreed to a \$100,000 fine for violations of the accounting provisions).

115. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 & ch.8, introductory cmt. (2008).

116. PAULA DESIO, U.S. SENTENCING COMM’N, AN OVERVIEW OF THE ORGANIZATIONAL GUIDELINES, *available at* [http://www.ussc.gov/guidelines/organizational\\_guidelines/orgoverview.pdf](http://www.ussc.gov/guidelines/organizational_guidelines/orgoverview.pdf).

117. Compliance Building, <http://www.compliancebuilding.com/2010/04/14/revisions-to-u-s-sentencing-guidelines-for-compliance-programs> (Apr. 14, 2010, 08:00 EST).

118. 15 U.S.C. § 78ff(c)(2)(A) (2006).

119. 15 U.S.C. § 78ff(a). Sarbanes-Oxley increased the maximum penalties to their current levels. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, sec. 1106, 116 Stat. 745, 810 (codified as amended at 15 U.S.C. § 78ff(a)).

120. U.S. SENTENCING GUIDELINES MANUAL § 2B4.1.

121. *Id.* §§ 2B1.1(b)(14)(B), 2B4.1(b)(2)(B).

the scheme occurs outside of the U.S. or substantially jeopardizes the safety and soundness of a financial institution.<sup>122</sup>

#### D. Exception and Affirmative Defenses

The FCPA expressly permits for one exception to the anti-bribery provisions. “Facilitating” or “grease” payments may be made to foreign officials, so long as no payments made to a foreign official are used to encourage that official to award new business or to continue business with a particular party.<sup>123</sup> Under this exception, the payments must be made for “routine governmental actions” and must be in exchange for non-discretionary actions that a foreign official ordinarily performs in his daily business.<sup>124</sup> However, excessive facilitation payments have been the subject of prosecutions, guilty pleas, fines, and monitorships.<sup>125</sup>

The 1988 amendments to the FCPA created two previously unavailable affirmative defenses: (1) the “local law defense” and (2) the “reasonable and bona fide expenditure[s]” defense.<sup>126</sup> The narrow “local law” defense allows a “payment, gift, offer, or promise of anything of value” to a foreign official, so long as the payment is in accordance with the written laws of the country in which it occurred.<sup>127</sup> The reasonable and bona fide expenditures defense, on the other hand, allows for a “payment, gift, offer, or promise of anything of value” that is considered a “reasonable and bona fide expenditure.”<sup>128</sup> The availability of this defense is limited to defendants who can prove that the expenditures lacked a corrupt purpose.<sup>129</sup> Notably, the defendant must also show that the expenditure is “directly related” to “the promotion, demonstration, or explanation of products or services” or to “the execution or performance of a contract with a foreign government or agency.”<sup>130</sup> Despite the availability of these defenses, in practice, companies infrequently rely on

122. *Id.* §§ 2B1.1(b)(9)(B), (b)(14)(B), 2B4.1(b)(2)(B).

123. 15 U.S.C. § 78dd-1(b).

124. *Id.* § 78dd-1(f)(3)(A)(i)-(v).

125. *See, e.g.*, Press Release, U.S. Dep’t of Justice, Aibel Group Ltd. Pleads Guilty to Foreign Bribery and Agrees to Pay \$4.2 Million in Criminal Fines (Nov. 21, 2008), available at <http://www.justice.gov/opa/pr/2008/November/08-crm-1041.html> (noting that Aibel Group pled guilty to conspiracy to pay \$2.1 million to Nigerian customs service officials in an effort to induce preferential treatment during the customs process).

126. 15 U.S.C. § 78dd-1(c). For a criticism of the effectiveness of these defenses, see Kyle Sheahen, *I’m Not Going to Disneyland: Illusory Affirmative Defenses Under the Foreign Corrupt Practices Act*, WIS. INT’L. L.J. (forthcoming 2011).

127. 15 U.S.C. § 78dd-1(c)(1).

128. *Id.* § 78dd-1(c)(2)(A)-(B).

129. *See id.*

130. *Id.*

them to mitigate liability under the FCPA, being left to deal with the strict American anti-bribery law in the form of the FCPA.

### III. ANTI-BRIBERY LAW IN THE UNITED KINGDOM

In 2010, the United Kingdom enacted a comprehensive legal framework to combat bribery.<sup>131</sup> In so doing, the U.K. may have shed its relatively lax reputation<sup>132</sup> for bribery enforcement and embraced the potential to become one of the world's most aggressive prosecutors of bribery. Among the reasons for this shift may have been global public pressure, partially resulting from the U.K. government's poor handling of the investigation into BAE System's bribery of foreign officials.<sup>133</sup> Although the subsequent changes in the U.K.'s anti-bribery law were dramatic, it will be some time after this law takes effect for caselaw to develop concerning the extent of its actual application. The history of the development of U.K. anti-bribery law, however, sheds light on the context and implications of the new legal framework.

#### A. The Historical Anti-Bribery Framework

Among the defining characteristics of U.K. anti-bribery law prior to the 2010 reform was its hodgepodge nature. Although the U.K. had two statutory offenses and a common law offense that applied to foreign bribery, none of these offenses expressly referred to the bribery of foreign officials. One statutory offense, based on an agent/principal concept, was codified in the Prevention of Corruption Act 1906.<sup>134</sup> Specifically, the Act 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.<sup>135</sup> The other statutory offense was codified in the Public Bodies Corrupt Practices Act 1889.<sup>136</sup> This provision made it a crime to corruptly give, promise, or offer any gift or advantage to officials of a public body.<sup>137</sup> In addition to these two statutory offenses, there was a common law offense. It prohibited the receipt or offer of an undue reward by or to any person in a public office to influence such a person's behavior in office and incline him or her to act contrary to the known rules of honesty and integrity.<sup>138</sup>

---

131. U.K. Bribery Act, 2010, c. 23, § 1, *available at* <http://www.legislation.gov.uk/ukpga/2010/23/contents>. Although this framework has been adopted, it has not yet been given legal effect. *See supra* notes 32-34 and accompanying text.

132. *See infra* note 166 and accompanying text.

133. *See infra* Part III.B.

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

135. *Id.*

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

137. *Id.*

138. *See, e.g., R. v. Whitaker*, (1914) 3 K.B. 1283 (formulating the common law offense of bribery as giving or offering a bribe to induce a public official to fail to act

In 2001, the U.K. government adopted Part 12 of the Anti-terrorism, Crime and Security Act, which expressly addressed the bribery of foreign public officials.<sup>139</sup> The 2001 Act amended the 1906 Act and expressly codified the common law offense 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.<sup>140</sup> The 1889 Act was also amended to extend the definition of public bodies to reach equivalent institutions outside the U.K.<sup>141</sup> By these enactments, the U.K. codified its obligation under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997).<sup>142</sup>

As for the investigation and prosecution of bribery of foreign officials, section 1(3) and (5) of the Criminal Justice Act 1987 provided that the director of the Serious Fraud Office (SFO) “may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud” and “may . . . institute and have the conduct of any criminal proceedings which appear to him to relate to such fraud.”<sup>143</sup> “In performing [these] functions, the [d]irector is subject to the superintendence of the Attorney General.”<sup>144</sup> The courts have recognized the independence of the director, as well as the director’s significant prosecutorial discretion under the statutory framework.<sup>145</sup>

The international community, however, strongly criticized this anti-bribery legal framework, drawn largely from statutes enacted in the late nineteenth and early twentieth centuries, for its limited impact in policing bribery

---

in accordance with his duty); *see also* Crown Prosecution Service, Bribery and Corruption, [http://www.cps.gov.uk/legal/a\\_to\\_c/bribery\\_and\\_corruption/](http://www.cps.gov.uk/legal/a_to_c/bribery_and_corruption/) (last visited Mar. 12, 2011) (citing *R v. Gurney*, (1867) 10 Cox CC 550 (holding the mental element of common law bribery to include an intention to produce any effect at all on the decision of a public officer); *Woodward v. Maltby* (1959) VR 794 (noting that entertainment and treats, when of small value, are not prohibited by the common law on bribery because they cannot be regarded as having been conferred in order to influence a person)).

139. Anti-Terrorism, Crime and Security Act, 2001, c. 24, § 108(1) (Eng.).

140. *Id.* § 109.

141. *Id.* § 108(3).

142. *R (On The Application of Corner House Research and Others) 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>; *see also supra* notes 35-37 and accompanying text.

143. Criminal Justice Act, 1987, c. 38, § 1(3), (5) (Eng.).

144. *R (On The Application of Corner House Research and Others)*, [2008] UKHL 60 [3].

145. *See, e.g.*, *Corner House Research & Campaign Against Arms Trade, R (on the application of) v. Director of the Serious Fraud Office & Anor* [2008] EWHC (Admin) 714, [50]-[51], available at <http://www.bailii.org/ew/cases/EWHC/Admin/2008/714.html>.

and corruption at British companies.<sup>146</sup> As one commentator noted, this regime made “it very difficult for prosecutors to bring an effective case against a company for alleged bribery offenses.”<sup>147</sup>

### *B. The Ineffectiveness of the Historical Legal Framework*

One of the results of the ineffective anti-bribery regime was the British government’s ill-fated investigation into alleged bribery by the British company BAE Systems PLC, one of the largest defense contractors in the world.<sup>148</sup> The end of the investigation, in many ways, marked the beginning of the reform of anti-bribery law.

A whistleblower’s 2004 claim that the company had a \$120 million bribery fund to facilitate defense contracts triggered the U.K. Serious Fraud Office’s investigation into BAE.<sup>149</sup> Specifically, BAE was accused of paying \$2 billion in bribes to Saudi royalty and officials to secure an \$85 billion arms deal signed in 1985 – the Al Yamamah deal.<sup>150</sup> Despite the severity of the bribery allegations, the Serious Fraud Office dropped its investigation in December 2006 due to a blatant threat from Saudi Arabia’s representatives that important intelligence and diplomatic relationships between the countries would end if the investigation continued.<sup>151</sup>

The Serious Fraud Office’s decision to end the investigation and the legality of the director’s decision were ultimately challenged in court.<sup>152</sup> The Divisional Court justified its intervention “in fulfilment of [its] responsibility

146. See, e.g., Joshi, *supra* note 30, at 38-39 (“In October 2008, the OECD’s Working Group released a 75-page report slamming the U.K. for its abysmal failure to stop bribes being paid by its companies dealing in foreign markets.”).

147. Richard Lloyd, *A Dose of Reform for British Bribery Laws*, AM. LAW., Nov. 24, 2008, <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202426211827/>.

148. Joshi, *supra* note 30, at 36.

149. *Id.* at 37.

150. *Id.*

151. *Id.*

What determined the decision [to drop the case] was the Director’s judgment that the public interest in saving British lives outweighed the public interest in pursuing BAE to conviction. It was a courageous decision, since the Director could have avoided making it by disingenuously adopting the Attorney General’s view (with which he did not agree) that the case was evidentially weak.

R (On The Application of Corner House Research and Others) v. Director of The Serious Fraud Office, [2008] UKHL 60 [35], available at <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080730/corner-2.htm>; see also Corner House Research & Campaign Against Arms Trade, R (on the application of) v. Director of the Serious Fraud Office & Anor, [2008] EWHC (Admin) 714 [4], available at <http://www.bailii.org/ew/cases/EWHC/Admin/2008/714.html>.

152. Joshi, *supra* note 30, at 38.

to protect the independence of the Director and of [its] criminal justice system from threat.”<sup>153</sup> The court, in concluding that it “has a responsibility to secure the rule of law,” ruled against the director who dropped the investigation on account of the Saudi threat.<sup>154</sup> The court stated:

The Director was required to satisfy the court that all that could reasonably be done had been done to resist the threat. He has failed to do so. He submitted too readily because he, like the executive, concentrated on the effects which were feared should the threat be carried out and not on how the threat might be resisted. No-one, whether within this country or outside is entitled to interfere with the course of our justice. It is the failure of Government and the defendant to bear that essential principle in mind that justifies the intervention of this court.<sup>155</sup>

Accordingly, the court quashed the director’s decision to abandon the investigation and remitted it to him for reconsideration.<sup>156</sup>

The House of Lords, however, reversed the Divisional Court, finding that the director had adhered to Article 5 of the OECD Convention in believing that the Convention “permitted him to take account of threats to human life as a public interest consideration.”<sup>157</sup> Additionally, Lord Bingham of Cornhill noted that courts should be reluctant to interfere in these matters because (1) the powers in question are entrusted only to the officers identified; (2) it is neither within the constitutional function nor the practical competence of the courts to assess the merits of policy and public interest considerations which are not susceptible of judicial review; and (3) “the powers are conferred in very broad and [non-]prescriptive terms.”<sup>158</sup> The House of Lords therefore upheld the director’s decision to abandon the investigation.

Nonetheless, the OECD Working Group condemned the U.K.’s handling of the BAE investigation.<sup>159</sup> Thereafter, the United States Department

153. *Corner House Research & Campaign Against Arms Trade, R (on the application of)*, [2008] EWHC 714 [171].

154. *Id.*

155. *Id.*

156. *Id.*

157. *R (On The Application of Corner House Research and Others) v. Director of The Serious Fraud Office*, [2008] UKHL 60 [47], available at <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080730/corner-1.htm>. Furthermore, the Lords found that the Director would have reached the same decision to abandon the investigation “even if he had believed . . . that it was incompatible with article 5 of the OECD Convention,” which he did not. *Id.*

158. *Id.* at [31].

159. ORG. FOR ECON. CO-OPERATION & DEV., REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 4 (2008), available at



of Justice 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.”<sup>160</sup>

On March 1, 2010, BAE pleaded guilty in American federal district court “to conspiring to defraud the United States by impairing and impeding its lawful functions, to mak[ing] false statements about its [FCPA] compliance program, and to violat[ing] the Arms Export Control Act (AECA) and International Traffic in Arms Regulations (ITAR).”<sup>161</sup> The court sentenced BAE to pay a \$400 million criminal fine, among the most significant criminal fines in DOJ’s history.<sup>162</sup> Under the eventual deal reached with U.K. authorities, BAE also reportedly agreed to plead guilty to one charge of breach of duty in failing to keep accounting records in relation to payments made to a former marketing adviser in Tanzania.<sup>163</sup> In connection with this plea, BAE paid a fine of 30 million pounds,<sup>164</sup> following a U.K. court’s approval of the plea agreement.<sup>165</sup>

The U.K.’s investigation of BAE damaged popular opinion of U.K. anti-bribery law arguably more than it damaged BAE, yielding significant criticism of the law and bringing attention to its inadequacies.<sup>166</sup> The result was an overhaul of U.K. bribery law in 2010.

### C. The U.K. Bribery Act 2010

The 2010 changes in U.K. anti-bribery law, in the form of the Bribery Act 2010,<sup>167</sup> were dramatic. Notably, the new anti-bribery law explicitly addressed, for the first time, bribery of foreign officials by corporations.<sup>168</sup> It

---

*ble at <http://www.oecd.org/dataoecd/23/20/41515077.pdf> (urging the adoption of effective foreign bribery legislation in the United Kingdom) [hereinafter REPORT ON THE APPLICATION OF THE CONVENTION]; see also *supra* notes 35-37 and accompanying text.*

160. Lestelle, *supra* note 29, at 527-28; see also *supra* Part II.A.

161. Press Release, U.S. Dep’t of Justice, BAE Systems plc Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine (Mar. 1, 2010), available at <http://washingtondc.fbi.gov/dojpressrel/pressrel10/wfo030110.htm>.

162. *Id.*

163. Rosalba O’Brien & Jeremy Pelofsky, *BAE Reaches \$450 Mln Settlement with U.S., Britain*, REUTERS, Feb. 5, 2010, <http://www.reuters.com/article/idUSTRE6143UZ20100205>.

164. *Id.*

165. See *id.*; Alex Spence & David Robertson, *BAE Systems Bribery Deal Delayed Over Legal Fears*, TIMES, Aug. 16, 2010, <http://www.theaustralian.com.au/business/news/bae-systems-bribery-deal-delays-over-legal-fears/story-e6frg90o-1225905680450>.

166. See, e.g., Joshi, *supra* note 30, at 38 (noting the international community’s outrage at the termination of the high-profile foreign bribery investigation).

167. U.K. Bribery Act, 2010, c. 23, § 1.

168. See Joshi, *supra* note 30, at 39-40.

has been described as “a clear echo of America’s Foreign Corrupt Practices Act (FCPA).”<sup>169</sup> The Bribery Act also specifies penalties for the various offenses – individuals convicted under the anti-bribery provisions face imprisonment for up to ten years and a fine.<sup>170</sup>

The new U.K. anti-bribery legislation resulted from many years of work by various organizations, including the OECD Working Group on Bribery in International Business (Working Group) and the Law Commission.<sup>171</sup> The Working Group initially became involved by reviewing the U.K.’s bribery law in order to assess whether the law complied with the Convention requirements, to which the U.K. is a party.<sup>172</sup>

Following a Phase I review on December 14-15, 1999, the Working Group concluded it could not find that the U.K. laws were in compliance with the standards under the Convention.<sup>173</sup> The Group recommended that a new anti-corruption statute define and ban the offering, promising, or giving of a benefit “that reflects ‘any undue pecuniary or other advantage.’”<sup>174</sup> It also recommended for U.K. law to clarify that the offense of foreign bribery may be committed for the benefit of a third party.<sup>175</sup> Finally, the Group recommended that U.K. law explicitly prohibit the bribery of foreign public officials.<sup>176</sup>

Following the 2001 amendments to U.K.’s anti-bribery law,<sup>177</sup> the Working Group demanded further changes to the U.K.’s laws for purposes of compliance with the OECD Convention. In March 2007, the Working Group decided to conduct an on-site visit and a Phase 2 bis report – a follow-up to the initial report on the U.K.’s implementation of the OECD Convention.<sup>178</sup> The Phase 2 bis report concluded that there was “lack of meaningful progress with regard to reform of foreign bribery law” in the U.K.<sup>179</sup>

Given the problems of the former anti-bribery legal regime,<sup>180</sup> as well as the calls for reform from both the private and public sectors,<sup>181</sup> the influential

169. Lloyd, *supra* note 147.

170. Bribery Act § 11(1). Nonindividual entities, such as partnerships, are subject to fines. *See id.* § 15; *see also infra* notes 249-50 and accompanying text.

171. *See* Joshi, *supra* note 30, at 38 (“In October 2008, the OECD’s Working Group released a 75-page report slamming the U.K. for its abysmal failure to stop bribes being paid by its companies dealing in foreign markets.”).

172. *See supra* notes 35-37 and accompanying text.

173. ORG. FOR ECON. CO-OPERATION & DEV., UNITED KINGDOM REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION, PHASE I BIS REPORT 1 (2003), *available at* <http://www.oecd.org/dataoecd/12/50/2498215.pdf>.

174. *Id.* at 18.

175. *Id.*

176. *Id.* at 11.

177. *See supra* notes 139-42 and accompanying text.

178. REPORT ON THE APPLICATION OF THE CONVENTION, *supra* note 159, at 5-6.

179. *Id.* at 11.

180. *See, e.g., supra* Part III.B.

181. Lloyd, *supra* note 147.

Law Commission of England and Wales Law Commission released a report on bribery on November 19, 2008.<sup>182</sup> The Law Commission, a statutory independent body created by the Law Commissions Act 1965, is tasked with keeping the law under review and recommending necessary reform.<sup>183</sup> Its relevant report, titled *Reforming Bribery*, laid the groundwork for the subsequent U.K. legislation that reformed bribery law.<sup>184</sup>

The Law Commission's report recommended replacing U.K. common law on bribery<sup>185</sup> with two general offenses: one concerned with giving bribes and one concerned with accepting them.<sup>186</sup> An additional offense would concern bribing foreign public officials.<sup>187</sup> Finally, the report recommended a corporate offense of "negligently failing to prevent bribery by an employee or agent."<sup>188</sup>

The legislative process resulted in a draft bribery bill that the U.K. Ministry of Justice published on March 25, 2009 for pre-legislative review by a joint committee of both Houses of Parliament.<sup>189</sup> The draft bill was introduced in the House of Lords on November 19, 2009<sup>190</sup> and was intended to be a comprehensive legal framework on bribery, replacing and modernizing historic U.K. bribery law.<sup>191</sup> Following further revisions, the bill received royal assent on April 8, 2010 and became an Act of Parliament.<sup>192</sup>

The final Act, entitled "Bribery Act 2010," followed the Commission's recommendations closely.<sup>193</sup> In essence, the Act specifies two general offenses: bribing another person and accepting a bribe.<sup>194</sup> The Act also defines a distinct offense of bribery of foreign public officials.<sup>195</sup> Finally, the Act

182. THE LAW COMM'N, REFORMING BRIBERY (2008) *available at* <http://www.lawcom.gov.uk/docs/lc313.pdf> [hereinafter REFORMING BRIBERY].

183. The Law Commission, <http://www.lawcom.gov.uk/> (last visited Feb. 1, 2011).

184. REFORMING BRIBERY, *supra* note 182.

185. For background on the common law of bribery, see *supra* note 138 and accompanying text.

186. REFORMING BRIBERY, *supra* note 182, at xiii.

187. *Id.*

188. *Id.*

189. Ministry of Justice, Bribery Act 2010, <http://www.justice.gov.uk/publications/bribery-bill.htm> (last visited Feb. 1, 2010).

190. The Scottish Government, Bribery and Corruption, <http://www.scotland.gov.uk/Topics/Justice/law/briberyandcorruption/history> (last visited Feb. 1, 2011).

191. Ministry of Justice, *supra* note 189.

192. *Id.*

193. For the Commission's recommendations, see *supra* notes 185-88 and accompanying text.

194. See U.K. Bribery Act, 2010, c. 23, §§ 1-2.

195. See *id.* § 6.

creates the new corporate crime of failure of a commercial organization to prevent bribery.<sup>196</sup>

The offenses are extraterritorial in nature – they apply if any act or omission forming part of the offense occurred within the U.K., or if a British corporation, citizen, or person ordinarily resident in the U.K. committed the offense, even if outside the U.K.<sup>197</sup> The corporate offense additionally applies if the company conducts any business in the U.K.<sup>198</sup>

Specifically, the first general offense under the U.K. Bribery Act 2010 is offering, promising, or giving a financial or other advantage in any of the three following circumstances: (1) to induce a person to improperly perform a relevant function or duty; (2) to reward a person for such improper activity; or (3) to know or believe that the acceptance of the advantage would itself be an improper performance of a function or duty.<sup>199</sup> The second general bribery offense relates to being bribed. In particular, it prohibits requesting, agreeing to receive, or accepting a financial or other advantage while consequently intending that a relevant function or activity be performed improperly.<sup>200</sup> Third, based on the OECD's recommendations,<sup>201</sup> the U.K. Bribery Act also explicitly criminalizes the bribery of foreign officials in provisions similar to those of the FCPA. Specifically, a person is guilty of this offense when he or she bribes a foreign public official with the intention of influencing the foreign official in his or her capacity as a foreign public official.<sup>202</sup> The person bribing must intend to obtain or retain either business or an advantage in the conduct of the business.<sup>203</sup>

Additionally, there is the new strict liability corporate offense of failure to prevent bribery.<sup>204</sup> A company is guilty of this offense when a person associated with the company bribes another person, intending to obtain or retain business for the company or to obtain or retain an advantage in the conduct of business for the company.<sup>205</sup> This provision applies to any company that partially conducts its business in the U.K. – and is thus not limited to U.K. companies – even if no part of the bribery occurred in the U.K.<sup>206</sup> Importantly, however, it is a defense to this offense if the company can show that it has

196. *See id.* § 7; *see also* *FCPA/Anti-Bribery Mid-Year Alert*, *supra* note 37, at 19-20.

197. Bribery Act § 12.

198. *Id.*; *see also* *infra* note 206 and accompanying text.

199. Bribery Act § 1.

200. *Id.* § 2. There is no “books and records” counterpart to the FCPA. *See supra* Part II.B.2. On the other hand, the FCPA does not criminalize the receipt of a bribe.

201. *See supra* notes 173-76 and accompanying text.

202. Bribery Act § 6(1).

203. *Id.* § 6(2).

204. *Id.* § 7.

205. *Id.* § 7(1).

206. *FCPA/Anti-Bribery Mid-Year Alert*, *supra* note 37, at 19; *see also* Bribery Act § 12.

“adequate procedures” in place to detect and deter such conduct.<sup>207</sup> This defense provides significant incentives for corporations to formulate and enforce strict compliance policies.

The U.K. Bribery Act 2010 mandates that the Secretary of State publish guidance on the “adequate procedures” to prevent bribery that would qualify for this defense.<sup>208</sup> The Serious Fraud Office previously published similar guidance, which is “consistent with [both] the U.S. Sentencing Commission’s guidance on effective compliance programs and the DOJ’s guidance on the FCPA.”<sup>209</sup> In the fall of 2010, however, the Ministry released its draft guidance, which consisted of six principles intended to recognize bribery risks and to promote the implementation and use of anti-corruption policies to identify and prevent bribery.<sup>210</sup> These principles emphasized that “adequate procedures” of companies to detect and deter bribery include: (1) risk assessments;<sup>211</sup> (2) top level commitment;<sup>212</sup> (3) due diligence;<sup>213</sup> (4) clear, practical, and accessible policies and procedures;<sup>214</sup> (5) effective implementation,<sup>215</sup>

207. Bribery Act § 7.

208. *Id.* §§ 7, 9.

209. *FCPA/Anti-Bribery Mid-Year Alert*, *supra* note 37, at 20; *see also* SERIOUS FRAUD OFFICE, APPROACH OF THE SERIOUS FRAUD OFFICE TO DEALING WITH OVERSEAS CORRUPTION 7-8 (2009), *available at* <http://www.sfo.gov.uk/media/107247/approach%20of%20the%20serious%20fraud%20office%20v3.pdf> [hereinafter APPROACH OF THE SERIOUS FRAUD OFFICE] (Factors suggesting adequate guidance within a “corporate” include “a clear statement of an anti-corruption culture fully and visibly supported at the highest levels in the corporate,” “a Code of Ethics,” and “individual accountability.”).

210. MINISTRY OF JUSTICE, CONSULTATION ON GUIDANCE ABOUT COMMERCIAL ORGANISATIONS PREVENTING BRIBERY (SECTION 9 OF THE BRIBERY ACT 2010) 11 (2010), *available at* <http://www.justice.gov.uk/consultations/docs/bribery-act-guidance-consultation1.pdf>.

211. *Id.* The draft Guidance describes risk assessment to be “about knowing and keeping up to date with the bribery risks” that companies face within their business sectors and markets. *Id.*

212. *Id.* The draft Guidance encourages the establishment of company culture “in which bribery is unacceptable.” *Id.*

213. *Id.* The draft Guidance describes due diligence to be “about knowing who [companies] do business with; knowing why, when and to whom [they] are releasing funds and seeking reciprocal anti-bribery agreements; and being in a position to feel confident that business relationships are transparent and ethical.” *Id.*

214. *Id.* The draft Guidance expects companies to apply policies and procedures “to everyone [they] employ and business partners under [the company’s] effective control and covering all relevant risks such as political and charitable contributions, gifts and hospitality, promotional expenses, and responding to demands for facilitation demands or when an allegation of bribery comes to light.” *Id.*

215. *Id.* The draft Guidance instructs companies to go “beyond ‘paper compliance’ to embedding anti-bribery in [the] organisation’s internal controls, recruitment and remuneration policies, operations, communications and training on practical business issues.” *Id.*

and (6) monitoring and review.<sup>216</sup> The Ministry of Justice released its final guidance in March 2011, significantly following its draft guidance.<sup>217</sup>

Interestingly, there soon also may be changes to the enforcement structure. A new government agency, instead of the Serious Fraud Office, may eventually enforce the Bribery Act.<sup>218</sup> On May 20, 2010, the new U.K. government released its five-year policy program, which included references to the creation of “a new enforcement agency that would combine the work currently undertaken by various other agencies, including the SFO.”<sup>219</sup>

Although the U.K. courts have not yet had the opportunity to interpret the legislation given its newness, sufficient legislative details and guidance permit a comparison between U.K. bribery law and U.S. bribery law. A comparison of these two anti-bribery regimes not only results in an understanding of the strictest and most expansive anti-bribery laws in place, but also raises questions regarding the proper legislative scope and appropriate sentencing of such laws.

#### IV. A COMPARATIVE ANALYSIS

Several issues arise in the pursuit of eliminating corruption, including questions regarding the ideal scope of bribery legislation and the appropriate severity of white-collar crime sentencing. Any anti-bribery legal regime must weigh these questions after it appropriately recognizes the trade-offs between the various legislative scopes and sentencing schemes.

##### *A. Legislative Scope*

Understanding the scope of anti-bribery laws in the U.S. and U.K. informs the substantive considerations for corporate compliance with each. While the legislative scope of the U.K. Bribery Act differs from that of the FCPA in certain areas, the two legal regimes share some characteristics.

As a general matter, both the U.S. and U.K. legal regimes proscribe bribery that intends to influence a foreign public official in order to obtain or retain a business advantage.<sup>220</sup> Both sets of laws also encourage companies

216. *Id.* This concerns “auditing and financial controls that are sensitive to bribery and are transparent, considering how regularly [companies] need to review . . . policies and procedures, and whether external verification would help.” *Id.*

217. MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE (2011), available at <http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>; see also *supra* notes 210-16 and accompanying text.

218. For background on the Serious Fraud Office, see *supra* Part III.A-B.

219. *FCPA/Anti-Bribery Mid-Year Alert*, *supra* note 37, at 18; accord CABINET OFFICE, THE COALITION: OUR PROGRAMME FOR GOVERNMENT 9 (2010), available at [http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition\\_programme\\_for\\_government.pdf](http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition_programme_for_government.pdf).

220. See *supra* Parts II, III.C.

to take an active role in self-regulating corruption by adopting robust compliance programs. Specifically, compliance with the U.S. anti-bribery regime can only benefit companies charged under the FCPA.<sup>221</sup> Likewise, in the U.K., a company's anti-corruption policies can mitigate the potential charges against the company, even if those very policies failed to prevent the alleged corruption in the first place.<sup>222</sup>

The exact treatment of corporate compliance programs under U.S. and U.K. law, however, differs. While the U.S. Sentencing Guidelines encourage compliance programs by allowing them to mitigate potential sanctions,<sup>223</sup> the FCPA does not permit compliance programs to shield a company from liability. In contrast, a proper compliance program is a defense in the U.K. for the limited offense of failing to prevent bribery.<sup>224</sup> Thus, while U.K. law, in prohibiting the failure to prevent bribery, proscribes a more significant range of bribery conduct, it also allows a compliance program to serve as a shield from liability. This distinguishing provision of the U.K. Bribery Act likely will encourage global companies to proactively create compliance programs in order to decrease liability exposure in the U.K., if they have already not done so due to the FCPA.

Another noteworthy difference between the scopes of the two anti-bribery regimes is that, unlike the FCPA, the U.K. Bribery Act does not include a books and records provision. Instead, other legal mechanisms in the U.K. exist to punish companies that fail to maintain the reasonable accuracy of books and records.<sup>225</sup> A books and records provision is particularly important to the regulation of bribery, however, because corrupt payments are likely to be logged in the corporate books to give the false impression that the payment was intended for a legitimate expense.<sup>226</sup>

The scope of the anti-bribery legal frameworks in the U.S. and U.K. also differs due to the differences in defenses or exceptions made under each legal framework. For example, the U.K., unlike the U.S., does not allow "grease payments" – those made to expedite or secure the performance of a routine governmental action. However, the U.K. Bribery Act does permit an exception that is akin to the "local law" exception under the FCPA,<sup>227</sup> which, in the

221. See *infra* Part IV.B.

222. See *supra* notes 204-17 and accompanying text.

223. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 & ch. 8, introductory cmt. (2008); see also *supra* notes 115-17 and accompanying text.

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

225. See, e.g., Companies Act, 2006, c. 2, §§ 386-387 (U.K.).

226. See David E. Dworsky, *Foreign Corrupt Practices Act*, 46 AM. CRIM. L. REV. 671, 676 (2009) ("The [FCPA] record-keeping provisions are designed to prevent three types of improprieties: (i) the failure to record illegal transactions; (ii) the falsification of records to conceal illegal transactions; and (iii) the creation of records that are quantitatively accurate, but fail to specify qualitative aspects of the transaction."); see also *supra* Part II.B.2.

227. See *supra* notes 126-27 and accompanying text.

U.K., mandates that the local law be written and either require or permit the foreign official to be influenced in his official capacity.<sup>228</sup> The narrowness of this exception is similar to the FCPA's local law exception and attempts to balance the desire to outlaw bribery with the desire not to hinder competition in the global marketplace. In practice, however, it is unlikely that a local law would permit the kind of payments that the anti-bribery laws otherwise prohibit.

Although the nuances of the U.S. and U.K. anti-bribery regimes differ, both legal frameworks are characterized by their broadness and extraterritoriality.<sup>229</sup> This implicates the issue of national sovereignty,<sup>230</sup> as illustrated by the DOJ's prosecution of the British company BAE Systems PLC after U.K. prosecutors halted their investigation due to political pressure.<sup>231</sup> While the extraterritorial reach of anti-bribery law therefore permits more opportunities for the prosecution of corruption, delicate questions arise regarding the proper role of countries in the prosecution of their corruption cases. On the one hand, it may be uncomfortable for one country to monitor and prosecute another's corporations, but on the other, business environments have become international, making the consequences of local corruption more widely felt. After an examination of these various factors, it seems that both the U.S. and U.K. legislatures have chosen more aggressive anti-bribery enforcements against foreign corporations, despite the potential political costs. Interestingly, the result seems to be increased international cooperation between the prosecutors of these cases.<sup>232</sup>

Company employees based outside the U.S. or U.K. may view broad anti-bribery laws with significant jurisdictional reach<sup>233</sup> as a significant competitive disadvantage in regions of the world where bribery is prevalent, and even necessary, to compete with companies not governed by anti-bribery laws.<sup>234</sup> The debate regarding the proper extent of corporate regulation only heightens when such control is exerted from abroad by virtue of an extraterritorial anti-bribery law.

While the debate regarding the proper scope of anti-bribery legislation continues, the current broadness of the U.S. and U.K. anti-bribery regimes

228. Bribery Act § 5.

229. *Id.* § 7(5); see also *supra* Part II.A and notes 197-98 and accompanying text.

230. Lestelle, *supra* note 29, at 528; see also Marie M. Dalton, Note, *Efficiency v. Morality: The Codification of Cultural Norms in the Foreign Corrupt Practices Act*, 2 N.Y.U. J.L. & BUS. 583, 618-19 (2006) (noting this issue arose during congressional debates).

231. See *supra* Part III.B.

232. See Richard Craig Smith et al., *Congress Examines FCPA Enforcement*, FULBRIGHT BRIEFING (Fulbright & Jaworski L.L.P., Washington, D.C.), Dec. 3, 2010, available at [http://www.fulbright.com/index.cfm?fuseaction=publications.detail&pub\\_id=4736&site\\_id=494&detail=yes](http://www.fulbright.com/index.cfm?fuseaction=publications.detail&pub_id=4736&site_id=494&detail=yes).

233. See *supra* Parts II.A, III.C and note 229 and accompanying text.

234. See *supra* note 14 and accompanying text.



threatens multinational companies with significant financial costs and reputational damage for violations.<sup>235</sup> Indeed, recent financial DOJ and SEC FCPA settlements have been significant – the ten largest settlements, criminal fines, and civil disgorgement and prejudgment interest judgments have together totaled \$3 billion, with almost fifty percent coming from the top two settlements.<sup>236</sup> Five of the six largest settlements involved non-U.S. companies.<sup>237</sup> While the scope of bribery law plays an important role in influencing corporate action in this area, sentencing of defendants for bribery-related convictions, considered next, also influences corporate behavior<sup>238</sup> and is therefore an important aspect of FCPA enforcements.

### B. Sentencing

An important characteristic shared by both the U.S. and U.K. anti-bribery regimes is a severity in sentencing – the U.K. through its new legislation<sup>239</sup> and the U.S. through its Sentencing Guidelines.<sup>240</sup> However, questions emerge regarding the necessity of the harsh penalties and their purposes, including their deterrent value. Additionally, issues arise regarding whether there should be legal incentives for companies to self-report and internally self-police, even if doing so comes at the cost of incriminating employees and softening the adversarial system.

Although they are no longer strictly mandatory,<sup>241</sup> the United States' Federal Sentencing Guidelines apply as a starting point for the sentencing of bribery offenses, which are federal violations.<sup>242</sup> Under various amendments

235. Veronica Foley & Catina Haynes, *The FCPA and Its Impact in Latin America*, 17 CURRENTS: INT'L TRADE L.J. 27, 27 (2009) ("FCPA enforcement actions can materially affect a company's reputation . . ."). *But see* Mike Koehler, *The FCPA and Reputational Damage*, CORP. COMPLIANCE INSIGHTS, May 20, 2010, <http://www.corporatecomplianceinsights.com/2010/the-fcpa-and-reputational-damage/> (noting that FCPA problems may not necessarily result in reputational damage but do occasionally hurt companies such as Avon).

236. The FCPA Blog, <http://www.fcpablog.com> (Jan. 5, 2011, 07:07 EST).

237. *Id.*

238. *See, e.g.*, Robert W. Tarun & Peter P. Tomczak, *A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 154 (2010) (noting that massive penalties may have a deterrent effect on bribery). Resultant corporate action may include instituting a strict compliance program or terminating employees that caused bribery. *See infra* Part IV.B.

239. U.K. Bribery Act, 2010, c. 23; *see also supra* Part III.C.

240. *See supra* Part II.C.

241. For background on the legal transition of the Guidelines from mandatory to discretionary, *see* S. Patrick Morin, Jr., Note, *Wherefore Art Thou Guidelines? An Empirical Study of White-Collar Criminal Sentencing and How the Gall Decision Effectively Eliminated the Sentencing Guidelines*, 7 PIERCE L. REV. 151, 155-56 (2008).

242. *See supra* note 38 and accompanying text.

to these Guidelines, the sentencing of white-collar crime defendants has become severe.<sup>243</sup> The Guidelines initially arose in part to remedy the previously lenient and relatively inconsistent treatment of white-collar criminals,<sup>244</sup> which often stemmed from the view that white-collar crime lacked violence and identifiable victims.<sup>245</sup> Several strict Sentencing Guidelines amendments – particularly in the wake of American corporate scandals and the attendant Sarbanes-Oxley Act of 2002<sup>246</sup> – subsequently increased these sentences in order to address the public outcry for retribution for such criminal conduct.<sup>247</sup>

Accordingly, under the current sentencing system, many American white-collar criminal defendants, including those who bribed and accepted bribes, receive prison sentences and pay hefty fines.<sup>248</sup> England has also imposed harsher sentences on white-collar criminal defendants during its recent overhaul of anti-bribery law. Specifically, in the U.K., depending on the cir-

243. See, e.g., Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 741-42 (2007) (underscoring the heavy sentences of white-collar defendants, even one-time offenders). The Guidelines are particularly harsh in several other areas, such as drug offenses. See, e.g., Whitman Knapp, *The War on Drugs*, 5 FED. SENT. REP. 294, 295 (1993); Eric J. Miller, *Role-Based Policing: Restraining Police Conduct "Outside the Legitimate Investigative Sphere"*, 94 CAL. L. REV. 617, 632-33 (2006). Specifically, "the Sentencing Commission departed from the empirical approach when setting the Guidelines range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for such crimes." *Gall v. United States*, 552 U.S. 38, 46 n.2 (2007). The Sentencing Commission is also particularly tough on child pornography. See, e.g., Ian N. Friedman & Kristina W. Supler, *Child Pornography Sentencing: The Road Here and the Road Ahead*, 21 FED. SENT. REP. 83, 83 (2008). But see Morin, *supra* note 241, at 163 (arguing that the sentences for white-collar criminals have been decreasing since the Guidelines became discretionary).

244. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 22 (1988) ("First, the Commission considered [previous] sentencing practices, where white-collar criminals receive probation more often than other offenders who committed crimes of comparable severity, to be unfair. Second, the Commission believed that a short but definite period of confinement might deter future crime more effectively than sentences with no confinement condition.").

245. Morin, *supra* note 241, at 152-53.

246. Derick R. Vollrath, Note, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 DUKE L.J. 1001, 1010 (2010).

247. Podgor, *supra* note 243, at 732, 743-44; see also, e.g., White-Collar Crime Penalty Enhancement Act of 2002, Pub. L. No. 107-204, 116 Stat. 804, 804-06 (codified in scattered sections of 15, 18, and 29 U.S.C.); Note, *Go Directly to Jail: White Collar Sentencing After the Sarbanes-Oxley Act*, 122 HARV. L. REV. 1728, 1732 n.27 (2009) (noting higher fraud sentences following the passage of the Sarbanes-Oxley Act). For an excellent discussion of the development of the Sentencing Guidelines on white-collar crime, see generally Vollrath, *supra* note 246.

248. See Morin, *supra* note 241, at 162; *supra* notes 26-27, 236 and accompanying text.

cumstances of the conviction, individuals may be fined and imprisoned for up to ten years,<sup>249</sup> which represents an increase in severity by three years from the previous treatment of these offenses.<sup>250</sup>

Many commentators have criticized the white-collar crime sentencing scheme, suggesting that it is unfairly harsh.<sup>251</sup> One argument for the severity, however, is that prosecutors cannot reach every act of corruption, requiring severe consequences in order to deter those who may not be caught.<sup>252</sup> Another argument offered is retribution – in theory, the Guidelines tie the sentence to the amount of the loss attributed to a particular white-collar defendant.<sup>253</sup> Both the U.K. and the U.S. have therefore used their respective sentencing schemes for both retributive and deterrence purposes – traditional uses of criminal sentencing that have often resulted in relatively severe sentences.<sup>254</sup>

However, sentencing also has the power to incentivize companies to act in particular ways when dealing with corruption. In the U.S., for example, recent amendments to the Sentencing Guidelines have encouraged proper compliance programs.<sup>255</sup> Since 1991, “the Guidelines ha[ve] permitted a reduction of the culpability score – and therefore the sentence – for convicted

249. U.K. Bribery Act, 2010, c. 23, § 11.

250. Explanatory Notes, Bribery Bill, 2010, H.L. Bill [107], available at <http://www.publications.parliament.uk/pa/ld200910/ldbills/003/en/10003x-a.htm> (“The increase in the maximum sentence of imprisonment for these offences should have a negligible impact in terms of prison places based on the current low levels of offending.”). Previously, the maximum sentence of imprisonment for these offenses was seven years. Arondo Chakrabarti et al., *UK Bribery Act 2010* (Allen & Overy, London, United Kingdom), Feb. 2, 2011, <http://www.allenoverly.com/AOWEB/Knowledge/Editorial.aspx?contentTypeID=1&itemID=55579&prefLangID=410>.

251. See, e.g., *United States v. Ebbers*, 458 F.3d 110, 129 (2d Cir. 2006) (“Twenty-five years is a long sentence for a white collar crime, longer than the sentences routinely imposed by many states for violent crimes, including murder, or other serious crimes such as serial child molestation.”); Sandeep Gopalan, *Skilling’s Martyrdom: The Case for Criminalization Without Incarceration*, 44 U.S.F. L. REV. 459, 503-04 (2010); Podgor, *supra* note 243, at 745.

252. See, e.g., Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 979 (2003) (“One wants the total punishment cost to be high enough to deter the potential offense and, as we have already established, the probability of punishment is an important determinant of the total punishment cost. This creates the necessity, within a deterrence analysis, to increase the punishment on a low capture-rate offense.”). “We can expect greater deterrent possibilities when dealing with more rational target audiences, such as whitecollar offenders.” *Id.* at 956. *But see* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 957 (2006) (noting that the certainty of a sentence is more important to deterrence than severity).

253. Vollrath, *supra* note 246, at 1012.

254. See *supra* notes 248-50, 252-53 and accompanying text.

255. See U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (2010).

organizations if they had an effective compliance and ethics program in place at the time of the offense.”<sup>256</sup> Recent changes in the Sentencing Guidelines have made it even easier for companies to receive compliance credit because the wrongdoing of high-level personnel no longer serves as a bar to the compliance credit.<sup>257</sup> This incentivizes corporations to implement strong compliance programs.

Sentencing law also influences the nuances of corporate compliance programs. Although sentencing modifications and incentives occur after conviction,<sup>258</sup> many companies proactively use the sentencing mitigating factors as guidance for their compliance program.<sup>259</sup> The U.K. also offers such incentives for proactive corporate measures by allowing a defense to a bribery offense if the company’s compliance program is adequate and provides guidelines for such adequacy.<sup>260</sup>

Furthermore, some have understood the DOJ and SEC to use leniency to encourage companies to self-report, or self-disclose, FCPA problems.<sup>261</sup> This would require the company to alert the DOJ about suspected misconduct within its ranks.<sup>262</sup> The company might hire outside counsel to conduct an investigation of the misconduct, resulting in cooperation with the government. Self-reporting might result in tangible benefits, such as reduced sanctions, but self-reporting does not necessarily secure a particular result.<sup>263</sup> However, the benefits of corporate self-reporting are currently being debated, with at least one commentator questioning whether any benefits accrue to those corporations who self-report, suggesting that there is no difference between those companies and those who are independently targeted by the

256. Posting of Raymond Banoun & Margaret Ryznar to White Collar Crime Prof Blog, [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2010/04/guest-blog-gers---raymond-banoun-margaret-ryznar--earlier-this-month-the-united-states-sentencing-commission-voted-to-chang.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2010/04/guest-blog-gers---raymond-banoun-margaret-ryznar--earlier-this-month-the-united-states-sentencing-commission-voted-to-chang.html) (Apr. 20, 2010).

257. *Id.*

258. *See supra* note 115 and accompanying text.

259. Greg Husisian, *Compliance Strategies for Multinational Corporations: A Risk-Based Approach to Coping with the FCPA*, CORP. COMPLIANCE INSIGHTS, June 18, 2010, <http://www.corporatecomplianceinsights.com/2010/risk-based-approach-fcpa-compliance/>.

260. U.K. Bribery Act, 2010, c.23 § 7(2); *see also supra* notes 208-17, 224 and accompanying text.

261. *See, e.g.,* Tarun & Tomczak, *supra* note 238, at 155.

262. *See* Bruce Hinchey, *Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements* 5-6 (July 15, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1650925>.

263. Tarun & Tomczak, *supra* note 238, at 154 (“While self-reporting corrupt payment activities results in indeterminate benefits, it does assure that law enforcement will know of the misconduct and, thus, in many instances, some sanction will be imposed.”).

DOJ.<sup>264</sup> Nonetheless, the sentencing of bribery offenses in the United States may be more lenient on self-reporting companies in order to incentivize companies to not only self-report misconduct, but also to implement internal protections against corruption.<sup>265</sup> The U.K. Serious Fraud Office offers similar encouragement.<sup>266</sup>

Although companies may proactively use sentencing factors to shape their compliance program, even if they fail to prevent corruption, they do not often face trial and sentencing, instead settling their FCPA cases with the DOJ and SEC.<sup>267</sup> In the process, the DOJ and SEC may utilize deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs).<sup>268</sup> Under each type of agreement, the DOJ or SEC agrees not to prosecute a particular case, even after filing a criminal charge against a company in federal district court, if the company meets the terms of the agreement.<sup>269</sup>

These agreements may require a company to hire and pay for an independent monitor to oversee and report on the company's compliance.<sup>270</sup> Over the years, commentators have noted that monitors are difficult to oversee and keep accountable, are expensive, and trigger potential favoritism by the DOJ in their selection, such as preference for people previously affiliated with the DOJ.<sup>271</sup> Nonetheless, the retention of a corporate monitor is typically part of

264. Hinchey, *supra* note 262, at 84. Tarun and Tomczak argue for increased leniency on self-reporting companies. Tarun & Tomczak, *supra* note 238, at 236.

265. *See supra* notes 255-64 and accompanying text.

266. *FCPA/Anti-Bribery Mid-Year Alert*, *supra* note 37, at 20-21; *see also* APPROACH OF THE SERIOUS FRAUD OFFICE, *supra* note 209, at 1-2.

267. *See, e.g.*, The FCPA Blog, *supra* note 236 (noting ten significant FCPA settlements, most occurring in 2010).

268. From 2003 to 2006, nineteen U.S. Attorneys entered into a total of thirty-nine DPAs and NPAs, with twenty-two requiring outside monitors. Kathleen M. Boozang & Simone Handler-Hutchinson, "Monitoring" Corporate Corruption: DOJ's Use of Deferred Prosecution Agreements in Health Care, 35 AM. J.L. & MED. 89, 96 (2009) (citing Memorandum from Paul J. McNulty, Deputy Att'y Gen., to U.S. Att'ys, Regarding Principles of Federal Prosecutions of Business Organizations (Dec. 12, 2006)). From 2006 to 2008, government prosecutors entered into twenty-four DPAs and twenty NPAs; seventeen of these required monitors and twenty-eight required compliance programs. *Id.*

269. Peter Spivack & Sujit Raman, *Regulating the "New Regulators": Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 160 (2008). For further background on DPAs and NPAs, see generally *id.*

270. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 10-110, REPORT TO CONGRESSIONAL REQUESTERS: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 1 (2009), available at <http://www.gao.gov/new.items/d10110.pdf>.

271. *Id.* at 3-4. In response, the DOJ issued the Morford Memo and the Grindler Memo. *See* Memorandum from Craig S. Morford, Acting Deputy Att'y Gen., to Heads of Dep't Components and U.S. Att'ys, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (Mar. 7, 2008), available at <http://www.justice.gov/dag/morford-useofmonitors>

a settlement that is more favorable to a company than a prosecution would be, allowing for the opportunity to assure compliance and avoid a harsher sentence.<sup>272</sup>

The frequent result – whether under the Sentencing Guidelines or under DPAs and NPAs – is the shift of the burden of corruption prevention to corporations. In this process, companies might focus on the employees allegedly at the source of FCPA problems, which the government might accept as an indication of cooperation.<sup>273</sup> To prevent negative legal consequences for themselves, employees in this position might choose to retain their own legal representation.<sup>274</sup> In order to clarify to such employees, and in particular to low-level employees, that generally the corporation alone holds the corporate attorney-client privilege,<sup>275</sup> company counsel routinely give *Upjohn* warnings to employees before speaking to them.<sup>276</sup>

Such cooperation between corporations and the government, however, softens the adversarial system despite its benefits.<sup>277</sup> Although one of these

memo-03072008.pdf.; Memorandum from Gary G. Grindler, Acting Deputy Att’y Gen., to Heads of Dep’t Components and U.S. Att’y’s, Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (May 25, 2010), available at <http://www.justice.gov/dag/dag-memo-guidance-monitors.html>.

272. For further background on corporate monitors, see generally Boozang & Handler-Hutchinson, *supra* note 268.

273. See, e.g., Tarun & Tomczak, *supra* note 238, at 156-57.

274. See, e.g., H. J. Aibel, *Corporate Counsel and Business Ethics: A Personal Review*, 59 MO. L. REV. 427, 438 (1994) (“There has been a good deal of discussion among corporate counsel as to whether an employee should be given ‘Miranda’ type warnings before being questioned in an internal investigation, or if not that, be given an opportunity to consult his or her own lawyer before submitting to interrogation.”).

275. This principle stems from the United States Supreme Court case *Upjohn v. United States*, 449 U.S. 383 (1981). In *Upjohn*, a pharmaceutical company, as part of an internal investigation over potentially illegal payments, sent a questionnaire to various employees asking for any information about the payments. *Id.* at 386-87. When the IRS began an investigation, the company refused to disclose the questionnaires, citing attorney-client privilege. *Id.* at 388. The court of appeals applied the “control group” test and found that if the employee who filled out the questionnaire was in a position of control in the corporation, the privilege would apply. *Id.* at 390. The U.S. Supreme Court reversed and held that because the employees were providing information at the direction of their superiors and because the employees knew they were answering so the company could get legal advice, the questionnaires were protected by the privilege. *Id.* at 394-95.

276. Am. Coll. of Trial Lawyers, *Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations*, 46 AM. CRIM. L. REV. 73, 95 n.67 (2009); see also *supra* note 274.

277. See, e.g., Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 517 (2009) (noting that the adversarial system requires a dialectical exchange on the issues in a case in front of an impartial judge); Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 891-92 (2010) (arguing for the

benefits is the opportunity for exoneration, corporations may be incentivized to cooperate with the government and settle a case rather than proceed to trial,<sup>278</sup> even if the prosecution cannot prove bribery beyond a reasonable doubt.<sup>279</sup> Such cooperation may also lead to government intervention in corporate governance, particularly through DPAs and NPAs.<sup>280</sup> This is problematic for several reasons, including that fiduciary duties do not constrain monitors and that the remainder of the industry is not privy to the government's legal advice, which would help them minimize legal liability.<sup>281</sup> Finally, cooperation and self-policing impose significant financial costs on companies, sometimes to the point to which a company faces bankruptcy<sup>282</sup> despite being innocent of the government's allegations.

In sum, although American anti-bribery law has reached new levels of enforcement and white-collar sentences remain harsh, federal prosecutors often opt to cooperate with corporations, incentivizing corporations to better monitor themselves and fight more proactively against internal corruption. The advantage to these methods is that they spare many of the government's resources by shifting the burden of bribery prevention and detection to corporations in exchange for sentencing leniency. On the other hand, close government cooperation creates the opportunity for inappropriate government intervention in corporate governance and softens the U.S. adversarial system with regard to the enforcement of anti-bribery laws. Nonetheless, the U.K., having considered these problems and issues, opted for a powerful anti-bribery framework similar to that of the United States, despite some of these potential drawbacks.<sup>283</sup>

---

benefits of the adversary system in family law). Of course, there are some drawbacks to the adversarial system. *See, e.g.*, Lawrence M. Friedman, *Access to Justice: Some Historical Comments*, 37 *FORDHAM URB. L.J.* 3, 6 (2010) (noting that the American system is slow and inefficient compared to other countries).

278. *See supra* notes 261-66 and accompanying text.

279. *See, e.g.*, Spalding, *supra* note 16, at 374.

280. Boozang & Handler-Hutchinson, *supra* note 268, at 93-94 ("In both Bristol-Myers Squibb and [The University of Medicine and Dentistry of New Jersey], the monitor and the U.S. Attorney attended board meetings and were involved in the termination of several executives – including the president and general counsel – as well as the selection of their replacements.").

281. *Id.* at 95.

282. FCPA Compliance and Ethics Blog, <http://tfoxlaw.wordpress.com/> (Dec. 5, 2010, 19:35 CST) ("[I]n addition to a \$2 million fine, eLandia also disclosed that its purchase price for Latin Node 'was approximately \$20.6 million in excess of the fair value of the net assets' mostly due to the cost of the FCPA investigation, the resulting fines and penalties to which it may be subject, the termination of Latin Node's senior management and the resultant loss of business. eLandia eventually wrote off the entire investment by placing Latin Node into bankruptcy and shuttering the acquisition.").

283. *See supra* Part III.

## V. CONCLUSION

The corporate bribery of foreign government officials has become increasingly targeted on the international stage. While the United States has intensified prosecutions under the FCPA, the United Kingdom has comprehensively overhauled its anti-bribery law following global criticism of its leniency. Furthermore, both sets of laws apply extraterritorially and have the ability to entangle multinational companies in a legal framework holding significant consequences for them and their employees.

The growing power of anti-bribery law raises important questions regarding the scope of the legislation on the subject, as well as the sentencing approaches to these crimes. Currently, the scope of these laws in both the U.S. and U.K. is relatively broad, while sentencing is stiff. These characteristics have varied in degree throughout the decades, but with new anti-bribery laws and enforcements, their predominance has reached new levels.

Ultimately, the public policy goals and practical costs of bribery prosecution will determine the future of this area of law and its application, as it has in the past. However, the continued success of increased prosecutions under broad anti-bribery legislation, as measured by the significant penalties levied against multinational companies, suggests that a new era of anti-bribery prosecutions is under way, characterized by aggressive enforcement of the relevant laws.



