

*IMPLICATIONS OF THE U.K. BRIBERY BILL FOR
INDIVIDUALS AND CORPORATIONS ALREADY SUBJECT TO THE FCPA*

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*The views expressed here are those of the authors and do not necessarily
reflect the views of the firm or any of its clients¹*

I. INTRODUCTION

Much ado has been made about the United Kingdom's Draft Bribery Bill² (hereinafter the "Bribery Bill" or the "Bill"), an ambitious piece of legislation designed to bring Britain's anticorruption and bribery laws into conformity with international standards, most notably the Organisation for Economic Co-operation and Development's ("OECD") Anti-Bribery Convention. The Bill replaces bribery offenses at common law and under the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916 with four discrete bribery-related crimes. The first covers the offering, promising or giving of an advantage to another person, *i.e.*, bribing another person. The second deals with the requesting, agreeing to receive, or accepting of an advantage; *i.e.*, being bribed. The third prohibits bribery of foreign public officials. The fourth, and most novel offense, makes it a crime for corporate entities to fail to prevent bribery: if a person associated with the corporate entity is or would be guilty of the offense of bribing another person or bribing a foreign public official, then so too is the corporation, unless it can prove it had in place "adequate procedures" to prevent bribery.³ The Serious Fraud Office ("SFO") has primary enforcement authority under the Bill.

Britain's fraught history with the OECD Working Group on Bribery in International Business Transactions, particularly after a similar piece of draft legislation failed to gain traction in Parliament in 2003, is well documented,⁴ as is a renewed push for reform in the wake of

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² As of April 2, 2010, the Bill has made its way through the House of Lords and is expected any day out of public committee in the House of Commons. The House of Commons will then have an opportunity to consider any amendments proposed by the committee before approving its version of the Bill. Both houses will then engage in a process to reconcile the two versions of the Bill before it is eligible for Royal Assent.

³ See U.K. Parliament, Bribery Bill [HL], Explanatory Notes, *available at* <http://www.publications.parliament.uk/pa/cm200910/cmbills/069/en/10069x--.htm>.

⁴ See OECD WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, 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 (2005), *available at* <http://www.oecd.org/dataoecd/62/32/34599062.pdf>. See also Peter B. Clark and Catherine L. Razzano, *How Will the U.K.'s Draft Bribery Bill Affect the International Business Community?*, WHITE COLLAR CRIME, Mar. 2010, at H-1 *available at* <http://www.cadwalader.com/assets/article/030310ClarkRazzanoWCC.pdf>.

Britain's aborted investigation of BAE Systems in December 2006.⁵ The focus of this article is not on the legislative history or policy imperatives behind the Bill but on its practical implications for individuals and corporations with a connection to the U.K. The key sections of the Bill examined in this discussion are Sections 6 and 7. The former contains the prohibition on bribing "foreign public officials." The latter outlines strict criminal liability for "commercial organisations."

The jurisdiction of the Bill is broad in terms of covered individuals and corporations and will overlap significantly with the coverage of the Foreign Corrupt Practices Act ("FCPA"). Yet it would be a mistake for covered persons or corporations to assume that extant FCPA compliance policies will be sufficient under the Bribery Bill. As discussed further below, even at the draft stage, the Bill diverges from the FCPA in numerous material respects. Thus, prudent businesses and business people will undertake a separate risk assessment to determine what additional steps to take before the Bill becomes law. To illustrate some of the key differences between the Bribery Bill and the FCPA, this article posits a hypothetical fact pattern and then proceeds to analyze anticorruption issues under each law.

II. ILLUSTRATIVE HYPOTHETICAL

A publicly traded U.S. private equity group has just acquired all of the stock of a small Canadian company that sells water filtration equipment and technology around the world. After the acquisition, the Canadian company becomes a portfolio company wholly owned and controlled by one of the private equity group's funds. The private equity group has long had in place a sophisticated anticorruption compliance program covering all of its portfolio companies. Prior to the acquisition, the Canadian company had in place a policy prohibiting bribes and required its employees to sign a code of conduct. The private equity group plans to integrate the new Canadian portfolio company into its compliance program, but the process is expected to take some time. Meanwhile, the Canadian company carries on its sales activity much as it did before.

One of the company's sales employees is an English citizen who resides in London (the "Employee"). His sales territory includes West Africa, and he has a contact living in Freetown (the "Agent"), with connections to the Ministry of Health and Sanitation in Sierra Leone. About three months after the acquisition, the Agent hears that the Government of Sierra Leone is considering funding construction of a water purification plant near Makemi. The Agent conveys this information to the Employee who is immediately interested in making a sale. The Agent gathers more information on the specifications of the project and learns that it will be at least a

⁵ BAE, Europe's largest military defense contractor, was suspected of making improper payments to Saudi Arabian officials in order to secure a £40 billion contract to supply the Royal Saudi Air Force with fighter jets. In December 2006, under pressure from Prime Minister Tony Blair and amidst concern about protecting British revenue and jobs, the Serious Fraud Office abandoned its inquiry. In a public announcement of the decision, Attorney-General Lord Goldsmith referenced a need to balance the rule of law against the wider public interest. See Sue Reisinger, *In BAE Probe, U.S. Steps In Where Brits Fear to Tread*, CORPORATE COUNSEL, Nov. 20, 2008 available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202426158402>. See also OECD WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS (2007), available at <http://www.oecd.org/dataoecd/43/13/38962457.pdf>.

\$3 million procurement. Although he is under contract with at least two other companies that might be interested, the Agent offers to “exclusively represent” the Canadian company in the deal. The Agent demands a \$200,000 fee up front for an “introduction” to the Deputy Minister supervising the procurement. If a sale is made, the Agent will also collect a 25% “commission.” The Employee agrees to these terms and has the \$200,000 wired from a corporate account in New York to the Agent’s account. The expense is booked as “consulting services” in the Canadian company’s books. Shortly thereafter the Agent arranges for the Deputy Minister to travel to Canada to meet the Employee and get a demonstration of the equipment the company hopes to sell to Sierra Leone. All of the Agent’s and the Deputy Minister’s travel expenses are paid by the company.

During the trip, the Deputy Minister explains how the bidding for the project will work. The Employee is to prepare two bids and give them to the Agent. One bid will include the Agent’s 25% commission; the other will not. The Agent will submit the bids to the Ministry. At one point, the Deputy Minister tells the Agent that he will “keep him in the loop” about other bids and states that the last bidder might have “certain advantages.” The Employee hears these remarks but says nothing.

About a month later, the Agent helps the Employee prepare and submit the bids. The Government awards part of the contract to the Canadian portfolio company and it begins shipping equipment to Makeni. The company is paid upon delivery. All seems to be going according to plan until word gets back to the Employee that some of the local residents are protesting the new water plant. Fearful of the plant’s impact on farming, the locals want the plant to be smaller and moved farther downstream. The Employee is told that the deal is still on but that no further shipments should be made until the controversy is resolved. The Employee prefers to have the revenue from the sale in the current quarter, so he instructs the Agent to investigate and “take care of” the problem. The Agent makes a trip to Makeni and submits a non-itemized expense reimbursement form for \$22,000, which is paid from the same New York account and booked as “travel expenses.” Shortly after the Agent’s trip, construction resumes without further incident. The Canadian portfolio company makes \$800,000 profit on the sale, net of the Agent’s commission.

III. POTENTIAL LIABILITY UNDER THE FCPA AND BRIBERY BILL

A. **Jurisdiction**

A threshold question is whether both the FCPA and Bribery Bill reach the conduct described above. The FCPA applies to the U.S. private equity group because it is an “issuer.” Based upon recent settlements with the Department of Justice (“DOJ”), the government would likely contend that the Canadian company and English employee are covered as well. The DOJ liberally construes the FCPA to include foreign non-residents who cause, either directly or through an agent, acts in furtherance of a corrupt payment in U.S. territory.⁶ The DOJ has

⁶ See DOJ, LAY-PERSON’S GUIDE TO THE FCPA, <http://www.justice.gov/criminal/fraud/docs/dojdocb.html>. (“A foreign company or person is now subject to the FCPA if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States. There is, however, no requirement that such act make use of the U.S. mails or other means or instrumentalities of interstate commerce.”)

prosecuted foreign subsidiaries of U.S. companies based on a jurisdictional hook as minimal as the subsidiary mailing budgets that included line items for corrupt payments to the U.S. parent.⁷ In this example, the DOJ would likely contend that by submitting its financial books and records containing descriptions of the payments at issue to the private equity fund in the U.S., the Canadian company has submitted itself to FCPA jurisdiction. For the English employee, causing money to be wired from a New York bank account to the agent may also be sufficient to support jurisdiction.

The Bribery Bill's "territorial application" may be even broader than the FCPA's. Under Section 12(2) an individual can be guilty of the offense of bribery even if no act or omission takes place in the U.K., so long as two conditions are satisfied: one, the acts or omissions done abroad would have been illegal had they been done in the U.K., and two, the individual has a "close connection" with the U.K. Citizens, residents, and entities incorporated under the law of any part of the U.K. are deemed to have a "close connection" under Section 12(4). As for corporations, per Section 7(5) the Bribery Bill will cover all "commercial organisations," wherever incorporated, that carry on a business or part of a business in the U.K. It is irrelevant where the acts or omissions which form part of the offense take place. In theory at least, this jurisdiction goes beyond the territorial or nationality jurisdiction principles of the FCPA. The Bribery Bill could reach a private foreign company with employees in the U.K. even if the U.K. employees were not factually connected to the bribery. Under this expansive interpretation, the Canadian portfolio company is covered by the Bill due to its U.K. employee. The SFO might also argue that the U.S. private equity group is covered, on the theory that "part of" its business (the wholly owned Canadian portfolio company) operates in the U.K.

B. Underlying Violations

There are at least four payments embedded in the hypothetical that warrant analysis: (1) the \$200,000 up front fee paid to the Agent, (2) the expenses related to the Deputy Minister's trip to Canada, (3) the 25% "commission" paid to the Agent, and (4) the \$22,000 expense reimbursement for the Agent's trip to Makeni.

1. Commercial Bribery of a Foreign Person

From an FCPA perspective, the \$200,000 fee paid to the Agent presents a risk only if the Employee knew⁸ that a portion of it was passed along to the Deputy Minister or another official in Sierra Leone in order to secure the first meeting. There is no FCPA issue if the Agent was merely being greedy and potentially violating his contractual obligations to other entities.

The same is not true under the Bribery Bill. Unlike the FCPA, the Bribery Bill also covers bribes to private citizens, wherever located. Thus, if the Employee paid the \$200,000 to the Agent believing that the Agent's acceptance constituted a violation of the Agent's duty of good faith to the other companies that he represents, the Employee could be guilty of the offense defined in Section 1. The criminalization of foreign commercial bribery significantly expands

⁷ See *United States v. Syncor Taiwan, Inc.*, No. CR 02-1244 (C.D. Cal. 2002). This theory though is not without its critics. See DONALD ZARIN, *DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT* § 3.3 (2009) (arguing that Congress did not intend the FCPA to reach foreign subsidiaries of U.S. companies).

⁸ The applicable legal standard for knowledge under the FCPA is discussed at Section III.B.3 *infra*.

the Bribery Bill's scope relative to the FCPA. Many types of payments exchanged between business people are potentially subject to scrutiny by zealous prosecutors. In addition, corporations face corresponding additional risk, as an offense under Section 1 can be a predicate for corporate liability under Section 7 of the Bill. Corporations that will be subject to the Bribery Bill now have an added incentive to closely monitor all payments to and from consultants, commercial representatives, agents, and other third parties.

2. *Potential Liability for Promotional Activity*

There is a strong argument the expenses the portfolio company incurred in connection with the Deputy Minister's trip to Canada were reasonable, bona fide business expenditures. The purpose of the trip was for the Deputy Minister to learn more about the Company's products and observe the filtration technology in person. There are no indicia of lavish entertainment or other improper expenses. Under the FCPA, these facts would most likely be enough to prove an affirmative defense under 15 U.S.C. § 78dd-1(c).⁹

The Bribery Bill contains no corresponding provision, however. In fact, the House of Lords considered and rejected a suggestion that the word "corrupt" or a similar adverb be added to the offense specifically to exclude legitimate commercial conduct. As Lord Denis Tunnicliffe, Government Whip and Government Spokesperson for the Ministry of Justice, explained in an open letter, the Joint Committee that scrutinized the Bill "concluded in its review that the lack of clarity surrounding the concept weakened the effective application of the law."¹⁰ Lord Tunnicliffe acknowledged that technically an offense might be predicated on nothing more than corporate hospitality, but he expressed a belief that prosecutors would be able to "differentiate between legitimate and illegitimate corporate hospitality and to decide whether or not it would be in the public interest to bring a prosecution."¹¹ This aspect of the Bill makes it important for corporations to review their travel and entertainment expense policies to ensure they clearly draw a line between acceptable and unacceptable corporate hospitality. The uncertainty left by the Bill, however, is unfortunate.

3. *Payments Through An Intermediary*

The 25% commission payment to the Agent raises the most obvious red flags. The fact that the Employee was asked to create two bids for the Ministry is suspicious, as are the Deputy Minister's cryptic comments about "certain advantages." Under both the FCPA and the Bribery Bill, payments made through third parties can form the basis of an offense, so long as the payor had the requisite corrupt state of mind.

⁹ "It shall be an affirmative defense [to a potential violation of the antibribery provisions]...that...the payment, gift, offer or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof."

¹⁰ Letter from Lord Tunnicliffe to Lord Henley, House of Lords, Jan. 14, 2010, *available at* <http://www.justice.gov.uk/publications/docs/letter-lord-henley-corporate-hospitality.pdf>.

¹¹ *Id.*

For the FCPA, this means that the individual paid the third-party “while knowing”¹² that all or a portion of the payment would go to a foreign official.¹³ Knowledge is the issue upon which many FCPA prosecutions turn, with prosecutors arguing the evidence supports an inference of actual knowledge of the corrupt payments, and defense counsel countering that the evidence shows the defendant was at most negligent in failing to spot a potential corrupt payment. Although the issue is raised with some frequency, few courts have addressed it. A notable exception is the federal district court in the Southern District of New York during the recent trial of Frederick Bourke. There, the court explained to the jury as follows:

When knowledge of the existence of a particular fact is an element of the offense, such knowledge may be established if a person is aware of a high probability of its existence and consciously and intentionally avoided confirming the fact. Knowledge may be proven in this manner if, but only if, the person suspects the fact, realized its high probability but refrained from obtaining final confirmation because he wanted to avoid knowledge.¹⁴

Congress incorporated the conscious avoidance standard into the FCPA in 1988 to combat the so-called “head-in-the-sand” problem. Congress did not want management and officers to “take refuge from the act’s prohibitions by their unwarranted obliviousness to any action (or inaction), language or other ‘signaling device’ that should reasonably alert them of the ‘high probability’ of an FCPA violation.”¹⁵ Notwithstanding language in the legislative history emphasizing contrived ignorance, the DOJ has taken the position that a failure to investigate, for whatever reason, leads to FCPA culpability.¹⁶ This fuels critics’ arguments that the availability of the conscious avoidance doctrine under the FCPA creates an unacceptably high risk of criminal liability based on mere negligence.

It is unclear whether these distinctions and arguments will have a place in the eventual Bribery Bill jurisprudence. Section 6 of the Bill does not use the terms “knowledge” or “knowing.” While subsection (3) of that section makes clear that payments, offers, or promises may be made “directly or through a third party,” subsection (1) states that a person (“P”) is guilty of the offense of bribing a foreign public official (“F”) “if P’s intention is to influence F in F’s capacity as a foreign public official.” The language itself is both narrow—it sounds nearly like specific intent is required—and broad—the intention characterizes any salesperson’s state of mind when trying to obtain business, regardless of the identity of the customer. English and American law generally follow the same principles of criminal *mens rea*, so in all likelihood, the

¹² 15 U.S.C. § 78dd-3(a)(3).

¹³ The statute provides that “[a] person’s state of mind is ‘knowing’ with respect to conduct, a circumstance, or a result if—(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.” 15 U.S.C. § 78dd-3(f)(3).

¹⁴ Jury Charge, *United States v. Bourke*, No. 05-CR-518 (S.D.N.Y. 2009). See also Opinion and Order, *United States v. Kozeny*, 664 F.Supp.2d 369, 389 (S.D.N.Y. 2009).

¹⁵ H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess. H2115, at 919-20 (1988), available at <http://www.usdoj.gov/criminal/fraud/fcpa/history/1988/tradeact-100-418.pdf>.

¹⁶ See Kenneth Winer and Gregory Husisian, *The ‘Knowledge’ Requirement of the FCPA Anti-Bribery Provisions: Effectuating or Frustrating Congressional Intent?*, WHITE COLLAR CRIME, Oct. 2009, at 9.

question of whether to import a knowledge and/or conscious avoidance standard into Bribery Bill prosecutions involving third-parties will likely devolve to the English courts.

4. *Expense Reimbursement*

The legal consequences of the \$22,000 “expense reimbursement” to the Agent in the hypothetical are murky, especially without more information about what happened during the trip. Suppose that an internal investigation reveals that prior to leaving Freetown, the Agent withdrew a large amount of local currency, all in relatively small bills. He then traveled to the proposed construction area with the Deputy Minister. After gathering some intelligence about the most vocal opponents of the plant, the Agent and the Deputy Minister made a series of house calls and visited the local police station. At each stop, they explained the benefits of the project. Before leaving, they gave small cash payments to the opponents to “compensate” them for the inconvenience caused by the construction. Recipients included some police officers, an officer of a government-subsidized utility, and a Local Council member. These actions effectively quelled the discontent and allowed the project to proceed much faster than it otherwise would have. Do the small payments run afoul of the FCPA or Bribery Bill?

There are three main pieces to the analysis under each law: first, were the recipients of the payments foreign officials? Second, was there an adequate business nexus between the payments and the Canadian portfolio company? And third, is there an applicable defense?

From an FCPA perspective, at least some of the payments likely went to “foreign officials,” broadly defined in the FCPA as any person acting in an official capacity for or on behalf of any such government or department, agency or instrumentality, or for or on behalf of any such public international organization.”¹⁷ The police officers and Local Council member certainly fall within these parameters; so too does the utility officer on the theory that the utility is an “instrumentality.”¹⁸

The more difficult question under the FCPA is business nexus. The payments arguably did not help the portfolio company “obtain or retain business” because the deal had already been made with the Ministry of Health and Sanitation and the threat was delay, not cancellation. In *United States v. Kay*, the U.S. Court of Appeals for the Fifth Circuit considered whether the FCPA is limited to payments intended to secure a government contract. Pointing to the addition of the words “improper advantage” to the statute in 1998, the court concluded that “Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person.”¹⁹ Thus, liability may attach to

¹⁷ 15 U.S.C. §78dd-3(f)(2)(a).

¹⁸ In numerous cases the DOJ has taken the position that state-owned enterprises are instrumentalities and, as a result, all of its employees are foreign officials. So far, there are no court decisions on this point. Obviously, it becomes more complicated when the government does not own 100% of the entity.

¹⁹ 359 F.3d 738, 754-56 (5th Cir. 2004). However, while the court was clear that payments to reduce taxes could fall within the scope of the statute, it was equally clear that paying bribes to reduce taxes “does not automatically constitute a violation of the FCPA: It must still be shown that the bribery was intended to produce an effect here, through tax savings, that would “assist in obtaining or retaining business.” *Id.*

payments made to reduce tax liability or obtain favorable regulatory treatment.²⁰ Some of the language in *Kay* can be read to suggest that the relevant test is whether the payor received something it was not clearly entitled to in exchange for the payment.²¹ In the hypothetical, the Canadian company had a desire to recognize revenue from the sales to the Ministry in the current quarter; the cash payments to local residents made that possible. Since this is a benefit that the company was not clearly entitled to, the government would likely contend that the business nexus element was satisfied.²²

The portfolio company may suggest that the payment falls within the FCPA's exception for routine governmental action.²³ The FCPA does not prohibit so-called facilitating or "grease" payments intended to secure the performance of routine governmental action by a foreign official. Obtaining local residents' consent to a construction project cannot easily be analogized to a ministerial act, however, so this argument is unlikely to succeed.

It is important to note that even if the payments by the Canadian portfolio company were permissible under the FCPA, the U.S. private equity group could still be at risk of violating the accounting provisions of the FCPA if the payments were not accurately recorded. For many years, the SEC has brought cases alleging false books and records where the elements of an anti-bribery charge were lacking. The most recent example is the NATCO settlement, where payments arguably made under duress were booked incorrectly and the SEC charged violations of the books and records and internal controls provisions of the FCPA.²⁴

The analysis of the small cash payments under the Bribery Bill is quite different, not least because there are no accounting provisions in the Bill, nor is there civil enforcement authority.²⁵ In the absence of such provisions, the analysis centers on the meaning of "foreign public official" and "advantage in the conduct of business." Section 6(5) states:

"Foreign public official" means an individual who--

- (a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the U.K. (or any subdivision of such a country or territory),
- (b) exercises a public function--

²⁰ See e.g., *SEC v. Dow Chem. Co.*, No. 03-12567 (D.D.C. 2007); *United States and SEC v. KPMG Siddharta Siddharta & Harsono and Sonny Harsono*, No. H-01-3105 (S.D. Tex. 2001).

²¹ 359 F.3d at 754.

²² The contrary argument would be based on the court's observation in *Kay* that "[t]here are bound to be circumstances in which such a cost reduction [attributable to the reduction in taxes from the bribe] does nothing other than increase the profitability of an already profitable venture or ensure profitability of some start-up venture. Indeed, if the government is correct that anytime operating costs are reduced the beneficiary of such advantage is assisted in getting or keeping business, the FCPA's language that expresses the necessary element of assisting is obtaining or retaining business would be unnecessary, and thus surplusage -- a conclusion that we are forbidden to reach." *Id.* at 760. In this case, the bribe merely moved income from one quarter to another and a strong argument can be made that no business was obtained as a result of the revenue being recognized earlier.

²³ 15 U.S.C. § 78dd-1(b).

²⁴ *SEC v. NATCO*, No. 4:10-CV-98 (S.D. Tex. 2010).

²⁵ The absence of civil liability provisions in the bill is discussed further at Section III.C, *infra*.

- (i) for or on behalf of a country or territory outside the U.K. (or any subdivision of such a country or territory), or
 - (ii) for any public agency or public enterprise of that country or territory (subdivision), or
- (c) is an official or agent of a public international organization.

This definition is puzzling in that it is unclear whether (a) and (b) are conjunctive or disjunctive. If the former, low-level bureaucrats, like the police officer recipients, are arguably excluded as they are neither “appointed” or “elected” as those terms are commonly understood. If the latter, as suggested by the “or” that separates (b) and (c), (a) is essentially reduced to surplusage because any person who “holds a legislative, administrative or judicial position” by definition “exercises a public function.”

There is also a separate question about whether “public enterprise” as used in (ii) above is coextensive with “instrumentality” under the FCPA. “Instrumentality” does not connote direct government management in the same way that “public enterprise” arguably does. This distinction may matter at the margins; for example, with respect to the utility officer. If 85% of the utility is privately owned, is it still a “public enterprise”?

While the Bribery Bill’s definition of “foreign public official” is arguably narrower than the FCPA’s definition of “foreign official,” the business nexus language is almost certainly broader. The phrase “advantage in the conduct of business” more easily encompasses benefits like timely revenue recognition and favorable tax treatment than “obtain or retain business” does. Moreover, since the Bribery Bill has no exception for facilitating or expediting payments it would seem that almost any payment to a foreign public official with a rational business purpose potentially will satisfy this element of the offense.

In fact, the only potential defense provided for in Section 6 of the Bill²⁶ is for situations where the foreign public official is permitted or required by “written law” to be influenced by the bribe. Written law, in turn, is defined in Section 6(7) as U.K. law or the rules of a public international organization, if applicable, and if not, local law. To qualify for purposes of the defense, the applicable provision of local law must be contained in a written constitution, piece of legislation or published judicial opinion. While the language of Section 6(3)(b) is somewhat ambiguous, the conservative interpretation is that, in order to be exculpatory, the applicable written law must affirmatively state that a payment is lawful. In other words, the absence of a local law prohibiting the payment is not sufficient to make out the defense. This is also the predominant view of the local law defense under the FCPA. In the example, there is nothing to suggest the presence of a U.K. or local law provision stating that the cash payments are lawful.

In sum, the four types of potentially problematic payments in the hypothetical give rise to four likely offenses under the Bribery Bill but only two likely violations of the FCPA. The

²⁶ A separate defense for payments necessary for the proper exercise of any active intelligence service or armed force is described in Section 13 of the Bill. That defense is obviously not relevant here.

Bribery Bill offenses are punishable by up to 10 years imprisonment, a fine, or both.²⁷ Maximum penalties under the FCPA are five years imprisonment and a \$250,000 fine for each violation.²⁸ The differences in how the two laws apply to the same course of conduct highlight the necessity of separate risk assessments.

C. Corporate Liability

Having fleshed out some of the key issues with respect to potential underlying violations, the question then becomes what is the resulting corporate liability?

Here, it makes sense to start with the Bribery Bill because, as noted above, its most novel aspect is that it imposes strict liability on commercial organizations that fail to prevent bribery. Under Section 7 of the Bill, if a person “associated with” a commercial organization—*i.e.* anyone who performs services for or on behalf of the commercial organization—bribes another person in violation of Sections 1 or 6, the commercial organization is criminally liable *unless* it had in place “adequate procedures designed to prevent persons associated with it from undertaking such conduct.”

Many have wondered about the threshold that the Secretary of State will set when publishing guidance about adequate procedures as required by Section 9. During debate in the House of Lords, Lord Willy Bach, Parliamentary Under Secretary of State and one of the Bill’s sponsors, wrote a public letter indicating that “the guidance will not be regulatory in nature as we do not wish it to create prescriptive standards. . . . Rather, we intend Government guidance to be flexible and indicative by setting out relevant principles backed up by illustrative good practice examples.”²⁹ Lord Bach also noted that the Ministry of Justice had already begun consulting with interested groups, including Transparency International and the Federation of Small Businesses. When the guidance is released it will surely draw upon previously published information from organizations such as the OECD “Good Practice Guidance on Internal Controls, Ethics and Compliance” and the “Effective Compliance and Ethics Program” section of the U.S. Federal Sentencing Guidelines. A few other sources mentioned by Lord Bach in his letter are the Transparency International and the Global Infrastructure Anti-Corruption Centre anti-bribery strategies.

These materials all emphasize the following components of an effective compliance program:

- Individualized risk assessments
- Clear policies regarding bribery, gifts, hospitality, entertainment expenses, other business expenses, political contributions, charitable donations, facilitation payments, solicitation and extortion
- Tone at the top
- Formal compliance function and responsible compliance officer
- Proper vetting of business partners, agents, representatives, etc.

²⁷ Bribery Bill 2010, Section 11(1)(b).

²⁸ 18 U.S.C. § 3571(b).

²⁹ Letter from Lord Bach to Lord Henley, House of Lords, Dec. 2009, *available at* <http://www.justice.gov.uk/publications/docs/bach-letter-adequate-procedures-guidance.pdf>.

- Training
- Reporting mechanisms
- Disciplinary consequences
- Financial and accounting procedures
- Effective monitoring and periodic re-assessment

Unlike in the U.S. where having a compliance program is merely one factor taken into account by the government in an FCPA prosecution or settlement, in the U.K., adequate procedures provide a complete defense. Thus, in the hypothetical, if prosecuted under Section 7, the U.S. private equity group might escape liability if its compliance program is robust. The Canadian portfolio company's minimal procedures, on the other hand, would likely not be sufficient to prove the defense. While the portfolio company's anti-bribery policy and corporate code of conduct are necessary parts of an effective compliance program, they are probably not sufficient under the Bribery Bill. Given the costs associated with developing a full-blown compliance program and the relative novelty of the concept for some companies subject to the Bill, the Ministry of Justice may evaluate adequate procedures on something of a sliding scale, with the bar gradually being raised over time.

The analysis of corporate liability under the FCPA is completely different in large part because a U.S. issuer is subject to the books and records and internal control provisions of the act. A corporation cannot be held criminally liable for FCPA violations unless they are committed knowingly. In the hypothetical, there is no suggestion of deliberate falsification of business records, at least on the part of the U.S. private equity group. There is the possibility that the Canadian portfolio company could face criminal liability because it recorded the \$200,000 payment to the Agent as "fees for consulting services," the 25% payment to the Agent as a "commission," and reimbursed the \$22,000 "travel expenses" without requiring receipts.

A more probable corporate consequence, however, is corporate civil liability, which does not exist under the Bribery Bill. The SEC has civil enforcement authority under the FCPA, and civil penalties for violations can be quite severe, ranging from \$50,000 to \$500,000 per accounting provision violation. The books and records component requires "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."³⁰ The records of the payments to the agent in the hypothetical, particularly the 25% "commission" and the \$22,000 "travel expenses" are likely to be seen by the SEC as falling short of this standard.³¹ The FCPA also requires issuers to have sufficient internal accounting controls to provide "reasonable assurances" that transactions and dispositions are accurately and fairly recorded.³² The Act directs issuers to "devise and maintain a system of internal accounting controls" that is sufficient to ensure that "transactions are recorded as necessary" to "permit preparation of financial statements in conformity with generally accepted accounting principles" and to "maintain accountability for assets."³³ The SEC takes the position that in practice this means that public companies must

³⁰ 15 U.S.C. § 78m(b)(2)(A).

³¹ See e.g., Litigation Press Release No. 20414, *SEC v. Lucent Tech. Inc.* (Dec. 21, 2007), available at <http://www.sec.gov/litigation/litreleases/2007.htm>

³² 15 U.S.C. § 78m(b)(2)(B).

³³ *Id.*

devise and maintain a system of internal accounting controls sufficient to prevent and detect improper payments. In the hypothetical, the U.S. issuer's compliance program, however expensive and impressive on paper, might be judged ineffective because it was not adhered to and/or enforced.

In sum, notwithstanding the fact that our hypothetical gave rise to more potential individual liability under the Bribery Bill than the FCPA, corporate consequences are likely more severe under the FCPA. This is due in large part to civil liability predicated on violations of the accounting provisions. While the absence of such provisions in the Bribery Bill will likely streamline corporate prosecutions, it may also decrease the amounts collected through corporate fines.

IV. CONCLUSION

This article has attempted to illustrate key similarities and differences in the draft U.K. Bribery Bill and the FCPA vis-à-vis application of each to a hypothetical scenario. The somewhat surprising conclusion is that the Bribery Bill will proscribe more individual conduct but may be more lenient towards corporations, so long as the corporations have adequate compliance procedures in place. As a practical matter, corporations that do business in the U.K., and will therefore be subject to the Bribery Bill, are well advised to conduct a separate Bribery Bill risk assessment to evaluate existing compliance controls against the risks identified and supplement or modify elements of the program such that it comports with the provisions of the Bill itself and extant literature about effective compliance programs (the latter to be superseded by guidance published by the Secretary of State).

In the event a corporation subject to both U.S. and U.K. bribery laws discovers potential violations after the Bribery Bill has entered into force, the company, after appropriate investigation of the factual circumstances surrounding the potential violations, should carefully weigh the advantages and disadvantages of self-reporting in each jurisdiction. Though undoubtedly interrelated, the reporting potentially has very different consequences in each country. Because adequate procedures to prevent bribery will constitute a complete defense under the Bribery Bill, one could argue there is less incentive to disclose if a corporation is relatively confident its compliance program will pass muster should the violation come to light. On the other hand, there may be more incentive for a corporation with a strong compliance program to disclose given there would be a reduced risk of corporate liability. A factor that may tip the balance in favor of non-disclosure, however, is the potential collateral consequences to the corporation for the associated person that committed the predicate offense. If the associated person is an employee and the corporation has advancement or indemnification obligations to him or her, immediate costs could potentially be avoided through non-disclosure. Since there is no equivalent defense under the FCPA, and the DOJ and SEC hold out the promise of leniency for voluntary cooperation, there will continue to be some pressure to self-report in the U.S. However, as shown by many recent cases there is often little tangible benefit to voluntary disclosure beyond a potentially reduced fine. Of course other facts, such as independent disclosure obligations, timeliness, and the extent and severity of the violation enter into the equation as well.

Both parallels and tensions exist between the FCPA and Bribery Bill. How the two laws will function together over time will depend on the degree of cooperation and coordination between enforcement authorities and on courts' willingness to harmonize the two laws or at least acknowledge the sometimes complicated pressures they exert on corporations that are subject to both.