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## Recent Changes in U.S. and U.K. Overseas Anti-Corruption Enforcement Under the FCPA and the U.K. Bribery Law: Private Equity Compliance

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# RECENT CHANGES IN U.S. AND U.K. OVERSEAS ANTI-CORRUPTION ENFORCEMENT UNDER THE FCPA AND THE U.K. BRIBERY LAW: PRIVATE EQUITY COMPLIANCE

Isaac A. Binkovitz\*

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### I. INTRODUCTION

Recently reformed overseas anti-corruption laws are changing the landscape of international business, particularly in the booming emerging market economies. Investors in countries such as Brazil and India now consider corruption prevention strategies an increasingly important component in their investment plans. New legislation and renewed prosecutorial zeal come just as private equity increasingly looks abroad for lucrative investment opportunities.<sup>1</sup> In the United Kingdom (U.K.), The United Kingdom Bribery Act of 2010 (U.K. Bribery Law) creates a strict liability corporate offense, holding corporate management responsible for corrupt practices by employees, subsidiaries, and joint venture partners anywhere in the world.<sup>2</sup> Notably, jurisdiction extends not only to British companies, but also to any entity carrying on “a part or all of a business” in the U.K.<sup>3</sup> Meanwhile, in the United States (U.S.), the Obama adminis-

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1. Steven M. Davidoff, *Private Equity Looks Abroad, but May Be Blind to the Risks*, N.Y. TIMES DEALBOOK (Dec. 21, 2010, 6:03 PM), <http://dealbook.nytimes.com/2010/12/21/private-equity-looks-abroad-but-may-be-blind-to-the-risks/> (explaining the risks facing private equity firms as they turn abroad, including deficiencies in rule of law).

2. U.K. MINISTRY OF JUSTICE, THE BRIBERY ACT 2010 GUIDANCE 16-17 (2011) [hereinafter BRIBERY ACT 2010 GUIDANCE], available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> (describing the meaning of “associated parties” under the Act).

3. *Id.* at 15 (describing the extent of jurisdiction over foreign entities conducting a part of their business in the U.K.: “As regards bodies incorporated, or partnerships formed,

tration has increased anti-corruption enforcement efforts under the Foreign Corrupt Practices Act (FCPA).<sup>4</sup> The combination of these two developments make investments and acquisitions in developing economies, where corruption is most widespread, a veritable minefield—if it were not already.<sup>5</sup>

Which activities are prohibited? Who can be held liable? How is private equity responding to avoid getting caught in the crosshairs? The following discussion provides a preliminary guide for those tasked with steering private equity firms through the shifting obstacle course of overseas anti-corruption compliance. Section I briefly reviews the centrality of overseas anti-corruption enforcement and its role in creating a more hospitable business climate in emerging markets. Section I also examines the American and British enforcement regimes in general before analyzing the most recent changes—specifically, changes as to the scope of liability and expansion of their jurisdiction. This section is designed to help determine whether investments or acquisitions fall within the purview of either enforcement regime. Section II discusses various strategies that may be implemented to prevent overseas corruption and minimize liability under the U.K. Bribery Law’s “adequate procedures” provision.<sup>6</sup> Given how recently and significantly the enforcement efforts have changed, Section III identifies some areas of remaining ambiguity.

## II. BACKGROUND

Thirty-nine nations are signatories to the Organization for Economic Co-operation and Development (OECD) Anti-Bribery Convention.<sup>7</sup> This Convention represents a growing global consensus to reduce the preva-

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outside the United Kingdom, whether such bodies can properly be regarded as carrying on a business or part of a business ‘in any part of the United Kingdom’ will again be answered by applying a common sense approach.”).

4. Richard Blackden, *The New Head of the SEC Has to be More than a Tough Cop*, TELEGRAPH (Feb. 8, 2013, 6:45 AM), <http://www.telegraph.co.uk/finance/comment/9856560/The-new-head-of-the-SEC-has-to-be-more-than-a-tough-cop.html> (“SEC . . . has already stepped up its investigations under the FCPA, with prosecutions more than tripling to 80 over the past six years.”).

5. For one such example, in the case of East Asia, see Ashley Lee, *The Cost of Compliance: Due Diligence Issues in Asia M&A Deals*, INT’L FIN. L. REV. (Mar. 4, 2013), <http://www.iflr.com/Article/3163469/Corporate/The-cost-of-compliance-due-diligence-issues-in-Asia-M-A-deals.html> (describing diligence and compliance costs for foreign investors in East Asia, including risks under the FCPA).

6. The adequate procedures provision provides a defense from the strict liability corporate offense where companies have undertaken reasonable efforts to prevent bribery.

7. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS: RATIFICATION STATUS AS OF 20 NOVEMBER 2012 (2012), available at <http://www.oecd.org/daf/anti-bribery/antibriberyconventionratification.pdf> (listing those state parties that have signed and ratified the Convention).

lence of bribery in international business.<sup>8</sup> In 2009, the OECD issued guidance via the OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Recommendation).<sup>9</sup> The Recommendation urges greater vigilance in enforcement of existing anti-corruption laws, and calls for the enactment of more stringent provisions to curtail bribery. This international soft law has inspired many countries to develop domestic hard law measures aimed at combatting global corruption.<sup>10</sup> Pursuant to the Recommendation, a growing number of countries have enacted such hard law measures and have pursued prosecutions under these newly enacted laws.<sup>11</sup>

The U.S., Germany, and Italy are among the nations with the highest total number of sanctions imposed for violations of bribery laws.<sup>12</sup> In recent years, the U.K. has imposed far fewer sanctions than the U.S.<sup>13</sup> However, this is expected to change rapidly, as the U.K. has ramped up its enforcement efforts over the past year.<sup>14</sup> The U.K. Bribery Law has joined the American FCPA as a global leader in anti-bribery legislation.<sup>15</sup> With two of the largest financial and commercial hubs in the world economy stepping up enforcement, it is important to know which entities must fol-

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8. For the English text of the Convention, see OECD, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 6 (2011), available at [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf) (requiring contracting states to undertake the enactment of legal reforms to prevent international bribery of foreign public officials in business transactions).

9. For the English text of the Recommendation, see *id.* at 20.

10. See generally K.W. Abbot, *Rule-making in the WTO: Lessons from the Case of Bribery & Corruption*, 4 J. INT'L ECON. L. 275 (2001) (contrasting the success of OECD soft law on corruption in facilitating the creation of domestic hard law with the relative failure of the WTO to achieve comparable success in the area of corruption law).

11. See Romit Guha, *India Plans Changes in Anti-Corruption Law*, WALL ST. J. (Oct. 10, 2012, 9:45 AM), <http://online.wsj.com/article/SB10000872396390444799904578048312508806652.html>; Ilya Kharlamov, *Putin Seeks Tough Anti-Corruption Law*, VOICE OF RUSS. (Feb. 12, 2013, 7:16 PM), [http://voiceofrussia.com/2013\\_02\\_12/Putin-seeks-tough-anti-corruption-law/](http://voiceofrussia.com/2013_02_12/Putin-seeks-tough-anti-corruption-law/); Colin Simpson, *Federal Anti-Corruption Law in UAE Expected in Six Months*, NATIONAL (Jan. 20, 2013), <http://www.thenational.ae/news/uae-news/federal-anti-corruption-law-in-uae-expected-in-six-months>; Thomas Firestone, *New Russian Law Goes beyond FCPA, Bribery Act*, FCPA BLOG (Mar. 5, 2013, 8:02 AM), <http://www.fcpablog.com/blog/2013/3/5/new-russia-law-goes-beyond-fcpa-bribery-act.html>.

12. OECD WORKING GROUP ON BRIBERY, 2010 DATA ON ENFORCEMENT OF THE ANTI-BRIBERY CONVENTION 4 (2011), available at <http://www.oecd.org/dataoecd/47/39/47637707.pdf>.

13. *Id.*

14. See John Bray, *UK Anti-Corruption Efforts are Getting Serious*, FORBES (Sept. 9, 2013, 10:16 AM), <http://www.forbes.com/sites/riskmap/2013/09/19/uk-anti-corruption-efforts-are-getting-serious/>.

15. Press Release, OECD, UK Increases Enforcement of Foreign Bribery, but Concerns Remain About Transparency and Resources (Mar. 30, 2012), available at <http://www.oecd.org/newsroom/ukincreasesenforcementofforeignbriberybutconcernsremainabouttransparencyandresources.htm>.

low these two statutes, what behaviors are prohibited, what penalties may be imposed, and how to reduce bribery-related liability.

### A. *The Problem of Corruption*

Corruption and bribery affect not only major political decisions or the actions of the largest corporations, but also millions of private-sector commercial transactions (such as contract bids and permit applications). Such behavior is socially wasteful for a variety of reasons. First, the value paid in the bribe is value not allocated to some more productive use.<sup>16</sup> Second, the benefit conferred upon the bribing party may incentivize socially counterproductive behavior or crime.<sup>17</sup> For example, a less qualified contractor or a contractor who has entered a less competitive bid ought not win a contract by virtue of a bribe alone.<sup>18</sup> Bribery may cause the job to be completed poorly or at too high a cost, directly and detrimentally affecting the public. Third, bribery undermines the legitimacy of the government in the eyes of its citizens and others who interact with it.<sup>19</sup> This could reduce public willingness to cooperate with officials for other useful purposes. And, finally, corruption leaves the bribing party unable to enforce the bargain after the fact.<sup>20</sup> For example, a land registry official could take a bribe to grant title to a specific plot of land. However, when an adverse claimant offers a competing, larger bribe, the official is in a position to renege on the original bargain or raise the price for a counterbid bribe. Thus, bribery does not represent a one-time cost, but the ongoing problem of uncertainty, which can stifle business planning and increase financing costs. Where cost projections are perceived to be inaccurate, imprecise, or unstable due to corruption, lenders will charge an additional risk premium to finance the project. Thus, even for those projects that remain free from corruption-related cost increases, financing remains more costly, due to the prospective risk of corruption from the outset.

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16. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 275 (1999) (explaining how corruption distorts efficient market development).

17. *Id.* (explaining how corruption not only diverts funds from useful pursuits, but actually fuels the development of criminal organization and a culture of entrenched corruption in other spheres).

18. *See id.* at 276-77 (explaining that bribery cannot be controlled simply by the provision of material incentives, but that it also requires the development of normative codes of conduct rooted in solidly founded cultural understanding of what is right). “Ought not” is deliberately used in both the reductively economic sense and the normative ethical sense.

19. *Id.* (explaining the entrenchment of bad governance in contexts with pervasive bribery, as well as the incentive a bribery culture produces for the development of an overly-regulatory rent-retracting state).

20. ALEXANDRA WRAGE, *BRIBERY AND EXTORTION: UNDERMINING BUSINESS, GOVERNMENTS, & SECURITY* 69-70 (2007) (discussing the unenforceability of the reciprocal benefit to be received in exchange for a bribe).

Somewhat paradoxically, such inefficient behavior is most common in some of the most rapidly growing economies in the world.<sup>21</sup> Public perception of public sector corruption is a good indicator of the prevalence of the problem in a given country. Booming markets like Brazil, Russia, India, and China (the so-called BRIC countries) have some of the highest corruption perception indices in the world.<sup>22</sup> Improved market efficiency and better governance stemming from reduced corruption could further bolster the already intense pace of economic growth in these nations. The global economy as a whole could experience a strong buoying effect from such a surge.

Conversely, other countries that are high on the corruption perceptions list are some of the poorest nations on the planet.<sup>23</sup> Though improving market-based allocation of resources and capital in these countries may not be as meaningful to the world economy as a whole, such improvements present a strong humanitarian interest. Indeed, to the extent that corruption can be curtailed in places like Somalia, Myanmar, and Afghanistan—three of the nations with the highest corruption perception indices—poorly performing economies may well improve.<sup>24</sup> While it is doubtful that anti-corruption reform alone would be sufficient to significantly improve economic conditions in these least-developed nations, it is surely an important factor, and one that is very likely to boost nations like Brazil, Argentina, Russia, and India into the club of more highly developed market economies.

Corruption is a serious source of inefficiencies in both advanced and emerging economies.<sup>25</sup> The diversion of funds in the form of bribes (both to public officials and to private commercial actors) for an unfair (read: unwarranted by the law or market forces) advantage inhibits accurate cost projections, raises the cost of doing business, frustrates the efficient administration of governmental regulation, and inhibits market-based allocation of capital and resources to their highest value uses.<sup>26</sup> In some countries, corruption represents a significant drain on the national economy, crippling the rule of law, limiting government accountability, and hindering economic development.<sup>27</sup>

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21. *Corruption Perceptions Index 2012*, TRANSPARENCY INT'L, <http://cpi.transparency.org/cpi2012/results/> (last visited Nov. 13, 2013) (indicating that China, Russia, India, and Mexico are highly corrupt, while France, the U.S., Japan, and the U.K. are relatively uncorrupt).

22. *Id.*

23. *Id.*

24. *Id.*

25. See generally INST. FOR INT'L ECON., CORRUPTION & THE GLOBAL ECONOMY (Kimberly Ann Elliott ed., 1997) (describing the high global costs of corruption).

26. See JONG-SUNG YOU, CORRUPTION AS INJUSTICE 20-25 (2007), available at <http://irps.ucsd.edu/assets/001/503060.pdf>.

27. *Id.*; see also SEN, *supra* note 16, at 275-78.

Countries such as India struggle to curb the pernicious effects of widespread corruption and bribery in both the private and public sectors. Last year, the Indian parliament failed to muster the political will to enact a significant piece of anti-corruption legislation.<sup>28</sup> Even where local will is found and translated into legislation, it remains highly questionable how effectively such measures will be enforced without any means of insulating the prosecutor and judiciary from the very same culture of corruption.<sup>29</sup>

Given the clear difficulties of local enforcement for the time being, it falls to well-established democracies to provide a mechanism to regulate global corruption to the extent they are able to extend jurisdiction, as in the FCPA and the U.K. Bribery Law. An external means of corruption regulation could help undermine the local entrenchment of corruption in certain contexts where bribery is common. This is not simply the rallying cry of development activists. Businesses have also sought ways to reduce the prevalence of corruption, which acts as a significant drain on investments and creates an element of uncertainty.<sup>30</sup> Whether the efforts of these democracies are rooted in humanitarian altruism, a moral abhorrence of the impropriety of profiting from such practices, or the desire to create better business climates for global firms seeking to operate or invest in booming emerging markets, there has been a recent rise in efforts to curb corrupt practices perpetrated abroad, to the benefit of companies and investors based in countries like the U.S. and U.K.

Traditionally, the U.S. has been the most active in this field.<sup>31</sup> In recent years, the Obama administration has overseen a significant uptick in Department of Justice (DOJ) and Securities and Exchange Commission (SEC) FCPA enforcement.<sup>32</sup> The U.K., too, has joined in the increased anti-corruption vigilance, enacting the U.K. Bribery Law, which came into force July 1, 2011.<sup>33</sup> With these changes, the British law is now the most extensive, both in the range of practices prohibited and geographic scope.

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28. Ronak D. Desai, *How Will India Confront its Corruption Crisis?*, HUFFINGTON POST (Feb. 25, 2013, 5:39 PM), [http://www.huffingtonpost.com/ronak-d-desai/how-will-india-confront-i\\_b\\_2756670.html](http://www.huffingtonpost.com/ronak-d-desai/how-will-india-confront-i_b_2756670.html) (explaining that India's parliament is still only "considering enactment of a robust, but highly contentious piece of anti-corruption legislation known as the Jan Lokpal Bill" more than a year after massive protests called for reform).

29. SEN, *supra* note 16, at 276 (addressing "the complex question of providing the right incentives for the thief catchers (so that they are not bought off)").

30. Steve Lodge, *Ask the Expert: Risk Check for Emerging Markets*, FIN. TIMES (Dec. 2, 2010), <http://www.ft.com/intl/cms/s/0/9f15c122-fd60-11df-b83c-00144feab49a.html#axz.zliidQoMeb>.

31. *U.S. Leads Anticorruption Efforts at the OECD*, U.S. MISSION TO THE OECD (Aug. 23, 2013), <http://usoecd.usmission.gov/mission/combating-corruption.html> ("For years, the United States has led the fight against corruption") (describing the American role in pushing the OECD to follow its lead in anti-corruption efforts).

32. *SEC Enforcement Actions: FCPA Cases*, SEC. EXCH. COMM'N, available at <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last updated Jan. 9, 2013) (listing FCPA prosecutions by year).

33. See BRIBERY ACT 2010: JOINT PROSECUTION GUIDANCE OF THE DIRECTOR OF THE SERIOUS FRAUD OFFICE AND THE DIRECTOR OF PUBLIC PROSECUTIONS c.23 (2010)

However, both the U.K. Bribery Law and the FCPA seek to incentivize compliance with similar bribery-preventive measures. Part III provides a brief summary of the origins and provisions of the two acts, highlighting some significant differences.

### III. AMERICAN AND BRITISH REGIMES FOR COMBATING OVERSEAS CORRUPTION

#### A. *The U.S. Foreign Corrupt Practices Act*

The U.S. Congress first enacted the FCPA in 1977, creating what was then the broadest global anti-corruption enforcement regime.<sup>34</sup> Its jurisdictional reach is broad, extending to bribes made anywhere in the world by domestic businesses or foreign companies with a merely tangential relationship to the U.S., such as stock listings on a U.S. exchange.<sup>35</sup> In recent years, the DOJ and SEC have pursued an increasing number of prosecutions under the FCPA.<sup>36</sup> The largest settlement to date was with Siemens, for \$800 million in 2008.<sup>37</sup> Bloomberg News reported at the time that the \$800 million sum came as a relief to investors, who had expected the DOJ to announce an even larger settlement.<sup>38</sup> To date, there have been eight settlements of over \$100 million.<sup>39</sup>

The FCPA establishes penalties for payments made to foreign public officials or candidates for office for the purpose of influencing their decisions or obtaining their business.<sup>40</sup> Unlike its British counterpart, the FCPA does not extend to payments made in the private commercial sector (though caution is warranted given recent DOJ efforts to regulate such payments under the Travel Act, discussed briefly in Part V). The FCPA

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[hereinafter BRIBERY ACT 2010], available at [http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga\\_20100023\\_en.pdf](http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf).

34. *U.S. Leads Anticorruption Efforts at the OECD*, *supra* note 31.

35. DEP'T OF JUSTICE & SEC. EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 11 (2012), available at <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.

36. *SEC Enforcement Actions*, *supra* note 32.

37. Sheenagh Matthews, *Siemens Rises as Size of Bribery Fine Brings Relief*, BLOOMBERG (Dec. 15, 2008, 4:57 AM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a1VTUr9mflH8>; Erin Fuchs, *The Largest Ever Corporate Payouts to the US over Foreign Bribery Charges*, BUS. INSIDER (Aug. 14, 2012, 6:59 PM), <http://www.businessinsider.com/the-largest-fcpa-settlements-2012-8?op=1>.

38. Matthews, *supra* note 37.

39. Richard Cassin, *J&J Joins New Top Ten*, FCPA BLOG (Apr. 8, 2012, 3:43 PM) <http://www.fcpablog.com/blog/2011/4/8/jj-joins-new-top-ten.html> (listing the top ten settlements under the FCPA: Kellogg Brown & Root LLC settled for \$579 million in 2009, BAE for \$400 million in 2010, Snamprogetti Netherlands B.V. and its parent company ENI S.p.A for \$365 million in 2010, Technip S.A. for \$338 million in 2010, JGC Corporation for \$218.8 million in 2011, Daimler AG for \$185 million in 2011, and Alcatel-Lucent for \$137 million in 2010). For a complete list of all FCPA prosecutions, see *SEC Enforcement Actions*, *supra* note 32.

40. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(a) (2012).



offers a carve-out for routine payments.<sup>41</sup> While this exception applies to formal expediting fees and other processing charges, it also allows a broader range of so-called facilitation payments that are barred under the U.K. Bribery Law.<sup>42</sup> Beyond this limited exception, the FCPA provides a series of affirmative defenses. First, one may raise the defense of legality under the local laws, a defense notably lacking from the U.K. Bribery Law.<sup>43</sup> Additionally, the FCPA exempts payments made as reimbursement for bona fide expenses incurred in the performance of business on behalf of one's firm, such as travel.<sup>44</sup> Permissible reimbursements also include a number of expenses incurred in promotional activities or in the offering of samples.<sup>45</sup> Such reimbursement payments are similarly allowed under the U.K. Bribery Law.<sup>46</sup>

### B. *The U.K. Bribery Law*

The U.K. Bribery Law provides criminal and civil penalties for those who offer, pay, receive, or solicit favors or payments for an unfair advantage.<sup>47</sup> This prohibition on bribery goes beyond its American counterpart to include payments made in the private sector, in addition to those made to foreign public officials.<sup>48</sup> Notably, the U.K. Bribery Law extends to facilitation payments and provides no defense in the form of legality under local custom, law, or practice.<sup>49</sup> The Serious Fraud Office (SFO) has indicated that it will exercise discretion in determining whom to prosecute, suggesting that it will hold larger and more sophisticated firms to a higher standard.<sup>50</sup>

More remarkable even than the broad range of public and private sector payments prohibited under the U.K. Bribery Law is the breadth of its jurisdiction and its strict liability corporate offense provision. The only re-

41. *Id.* § 78dd-1(b).

42. *Facilitation Payments*, SERIOUS FRAUD OFFICE (Oct. 9, 2012), <http://www.sfo.gov.uk/bribery—corruption/the-bribery-act/facilitation-payments.aspx> (explaining prohibition on facilitation payments under the Act).

43. 15 U.S.C. § 78dd-1(c)(1).

44. *Id.* § 78dd-1(c)(2).

45. *Id.* § 78dd-1(c)(2)(A).

46. *See* BRIBERY ACT 2010 GUIDANCE, *supra* note 2, at 12-14 (explaining that, though not specifically exempted under the language of the Act, such reimbursements for *bona fide* business expenses will not be prosecuted).

47. BRIBERY ACT 2010, *supra* note 33, § 11 (listing penalties).

48. *See id.* § 1 (defining the bribe-offering portion of the offense as prohibiting the offer or payment of a bribe to another “person” generally, rather than to a “foreign public official,” in contrast to the U.S. FCPA).

49. *See id.* § 14 (listing affirmative defenses); *Facilitation Payments*, *supra* note 42 (indicating the lack of any carve out for facilitation payments).

50. *See* SERIOUS FRAUD OFFICE, BRIBERY ACT 2010: JOINT PROSECUTION GUIDANCE 9 (2012), available at [http://www.sfo.gov.uk/media/167348/bribery\\_act\\_2010\\_joint\\_prosecution\\_guidance\\_of\\_the\\_director\\_of\\_the\\_serious\\_fraud\\_office\\_and\\_the\\_director\\_of\\_public\\_prosecutions.pdf](http://www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf) (listing factors in decision to prosecute under the Act).

quirement for jurisdiction is that the firm carry on all or a part of its business within the U.K.<sup>51</sup> Thus, under the strict liability corporate offense, the SFO may prosecute any firm that does business in the U.K. for prohibited payments made anywhere in the world, regardless of whether those payments were made directly by the firm, its employees, third parties on its behalf, contractors, associated joint ventures, or business partnerships.<sup>52</sup> The Act also holds management to a strict liability standard under the corporate offense.<sup>53</sup> The firm may face unlimited fines and management may face a jail term of up to ten years.<sup>54</sup> While official published guidance suggests that a company's stock listing on the London exchanges will not suffice as grounds for jurisdiction,<sup>55</sup> foreign firms with even minimal British operations should be careful not to consider themselves beyond the reach of the U.K. Bribery Law.

The U.K. Bribery Law has been called draconian by some and is widely seen as the most far-reaching and severe of anti-corruption laws globally.<sup>56</sup> However, unlike the FCPA, the statute explicitly provides an affirmative defense in the form of so-called adequate procedures. The establishment and implementation of adequate procedures to avoid corruption shields a firm and its management from criminal and civil liability.<sup>57</sup> While the statutory language does not define what procedural safeguards may suffice, the government has offered some general guidance on the matter.<sup>58</sup> The suggested procedures draw upon precautions similar to those required by the U.S. SEC and DOJ in non-prosecution agreements under the FCPA (see Part IV.A for more on the inclusion of mandatory procedures in non-prosecution agreements, and see Part IV for more on the specific steps that private equity firms can take to institute adequate procedures.).

The Law avoids legislating specific standards, instead leaving the field open for experimentation and good-faith industry efforts to create adequate standards. For firms that fail to implement adequate procedures, the U.K. Bribery Law offers to stay criminal prosecution in exchange for self-reporting and cooperation with investigators.<sup>59</sup> The message to international business is clear: adopt formal procedures to prevent and report corruption at all levels within the firm and among all related parties

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51. See BRIBERY ACT 2010, *supra* note 33, § 7(5) (defining “relevant commercial organisation” for purposes of the corporate offense).

52. See BRIBERY ACT 2010 GUIDANCE, *supra* note 2, at 9.

53. See BRIBERY ACT 2010, *supra* note 33, § 7.

54. *Id.* § 11.

55. BRIBERY ACT 2010 GUIDANCE, *supra* note 2, at 15-16.

56. Kirstin Ridley, *Companies Brace for Bribery Act Wake-up Call*, REUTERS (Nov. 4, 2010, 12:23 PM), <http://uk.reuters.com/article/2010/11/04/uk-britain-bribery-idUKTRE6A32U720101104>.

57. BRIBERY ACT 2010, *supra* note 33, § 7(2).

58. See generally BRIBERY ACT 2010 GUIDANCE, *supra* note 2.

59. *Id.* at 8.

around the globe. Otherwise, be prepared to face zealous prosecution. Effectively, this is a hard law mandate (itself inspired by international soft law from the OECD) for industry leaders to generate further soft law standards on the prevention of bribery.

The U.K. Bribery Law consists of three separate classes of offenses: (1) the general offenses under Sections 1 and 2, (2) bribery of foreign government officials under Section 6, and (3) the corporate liability offense for failure to prevent corruption under Section 7. The standard of liability differs depending on the particular offense. Prosecutions under Sections 1, 2, and 6 require that the charged person have knowingly perpetrated the criminal act.<sup>60</sup> Under Section 7, business entities are held to a strict liability standard, with the availability of an affirmative defense for having taken reasonable steps to prevent employees, agents, partners, or affiliates from engaging in the behavior prohibited in Sections 1, 2, and 6.<sup>61</sup>

Section 1 prohibits offering, giving, or promising a financial or other advantage in exchange for the improper performance of a relevant function or activity.<sup>62</sup> Section 2 correspondingly prohibits requesting, accepting, or agreeing to accept a financial or other advantage in exchange for the improper performance of a relevant function or activity.<sup>63</sup> Section 3 defines “relevant function or activity” as “any function of a public nature; any activity connected with a business, trade or profession; any activity performed in the course of a person’s employment; or any activity performed by or on behalf of a body of persons (whether corporate or unincorporate).”<sup>64</sup> Notably, this covers both private and public functions. Section 4 characterizes the performance of a relevant act or activity as “improper” where it constitutes a breach of an expectation of good faith or impartiality or where it is performed in a way that a person in a position of trust would not reasonably have anticipated.<sup>65</sup>

Section 6 prohibits the bribery of foreign public officials.<sup>66</sup> Notably, it does not cover the conduct of the foreign official receiving or requesting the bribe. This is consistent with the one-sided obligations enshrined in the OECD Anti-Bribery Convention.<sup>67</sup> For political and practical reasons and considerations of comity and deference, the Law leaves the monitoring of

60. See BRIBERY ACT 2010, *supra* note 33, §§ 1-2, 6.

61. *Id.* § 7. For more on the corporate commission of violations under Sections 1, 2, and 6, see *id.* § 14. For violations of the Section 7 corporate offense through partners, see *id.* § 15.

62. *Id.* § 1.

63. *Id.* § 2.

64. *Id.* § 3.

65. BRIBERY ACT 2010, *supra* note 33, § 4.

66. *Id.* § 6.

67. OECD, *Commentaries on the Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions* (1997), pmb1., DAF/IME/BR(97)20, available at <http://www.justice.gov/criminal/fraud/fcpa/docs/combattbribe2.pdf> (“This Convention deals with what, in the law of some countries, is called “active corruption” or “active bribery”, meaning the offence committed by the person who promises or gives the bribe, as con-

the foreign official's conduct to local law enforcement. In order to further avoid scrutinizing the propriety of the conduct of foreign officials, Section 6 does not require a showing that the bribe recipient acted improperly, unlike the offenses under Sections 1 and 2.<sup>68</sup> In a similar vein, Section 13 excludes intelligence gathering and military contracting activities from the Law's purview.<sup>69</sup> These defenses leave a broad swath of international commercial activity unregulated under the Law.

The corporate liability offense under Section 7 has caused the greatest stir in the business world. It is a strict liability offense, requiring no intent to bribe or actual knowledge of the bribe.<sup>70</sup> The entity is liable for violations of Sections 1, 2, and 6 committed by anyone in the company. Further, Section 8 ("associated persons") provides for vicarious liability under the corporate offense, and Section 14 provides for liability through actions of partners.<sup>71</sup> Fortunately, Section 7(2) provides for the previously discussed affirmative defense of adequate procedures to prevent bribery (both at the receiving and paying ends).<sup>72</sup> How precisely this affirmative defense is defined is the most important question a company should consider in determining how to comply with the Law, one which has been the subject of considerable speculation.

Unlike the FCPA, the U.K. Bribery Law does not provide for successor liability. This has significant implications for mergers and acquisitions and the private equity industry. An acquiring business entity will not be held liable under the corporate liability offense for acts of bribery occurring in or by the target company prior to the date of acquisition. This obviates the need for retrospective due diligence. However, prudence dictates that the acquiring company remain on guard against acquiring a business with an established culture and practice of corruption (discussed at greater length in Part IV). First, it may be difficult to alter an entrenched tolerance for bribery, exposing the acquirer to prospective risks, such as continued bribery. Second, performing due diligence in the acquisition is part of the risk assessment encouraged under the adequate procedures affirmative defense. Only by knowing what risks one has acquired can one purport to undertake adequate procedures to mitigate those risks. Thus, extensive due diligence, even regarding past conduct for which the acquirer is not liable, should be conducted by a company that seeks to take shelter under the affirmative defense.

Section 12 sets out the U.K. Bribery Law's broad jurisdiction.<sup>73</sup> In order to fall under the provisions of the Law, conduct violating Sections 1, 2,

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trasted with "passive bribery", the offence committed by the official who receives the bribe.") (following the text of the Convention itself).

68. See BRIBERY ACT 2010, *supra* note 33, §§ 1-2, 6.

69. *Id.* § 13.

70. See *id.* § 7(1).

71. *Id.* §§ 8, 14.

72. *Id.* § 7(2).

73. *Id.* §§ 12(1)-(2).

or 6 must have been committed either in the U.K. or abroad, provided that such conduct would have been illegal had it occurred in the U.K., and the prosecuted party must have a “close connection” to the U.K.<sup>74</sup> This includes being a U.K. national or an entity organized in the U.K.<sup>75</sup> Under the corporate offense (Section 7), the standard is far looser, as no part of the omission or underlying acts must have occurred in the U.K.<sup>76</sup> Yet, the Guidance indicates that Section 7 covers only those companies that are “carry[ing] on a business or a part of a business in the U.K.”<sup>77</sup> It is unclear where precisely this line is drawn. The Ministry of Justice has indicated that it does not intend to prosecute companies with mere stock listings or subsidiaries in the U.K.<sup>78</sup> However, entities with other activities in the U.K. should be aware that they may fall within the Law’s purview, subject only to prosecutorial discretion. Furthermore, the Guidance’s use of vague language, so as to not rule out a broad range of prosecutions in the future, provides minimal comfort to foreign businesses.

Section 10 provides that one found guilty of the individual offenses may be prosecuted on either a summary offense charge or a criminal indictment. Where charged with a summary offense, the perpetrator faces up to 12 months in prison and unlimited fines.<sup>79</sup> Where prosecuted under an indictment, the maximum prison term is ten years, and the fines remain unlimited.<sup>80</sup> Section 14 provides that company directors may be held personally liable for violations of the corporate offense.<sup>81</sup>

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74. See BRIBERY ACT 2010, *supra* note 33, §§ 12(1)-(2).

75. See *id.* § 12(4).

76. *Id.* §§ 12(5)-(6).

77. BRIBERY ACT 2010 GUIDANCE, *supra* note 2, at 15 (“A ‘relevant commercial organisation’ is defined at section 7(5) as a body or partnership incorporated or formed in the U.K. irrespective of where it carries on a business, or an incorporated body or partnership which carries on a business or part of a business in the U.K. irrespective of the place of incorporation or formation. The key concept here is that of an organisation which ‘carries on a business’. The courts will be the final arbiter as to whether an organisation ‘carries on a business’ in the U.K. taking into account the particular facts in individual cases.”).

78. *Id.* at 15-16 (“However, the Government anticipates that applying a common sense approach would mean that organisations that do not have a demonstrable business presence in the United Kingdom would not be caught. The Government would not expect, for example, the mere fact that a company’s securities have been admitted to the U.K. Listing Authority’s Official List and therefore admitted to trading on the London Stock Exchange, in itself, to qualify that company as carrying on a business or part of a business in the U.K. and therefore falling within the definition of a ‘relevant commercial organisation’ for the purposes of section 7. Likewise, having a U.K. subsidiary will not, in itself, mean that a parent company is carrying on a business in the U.K., since a subsidiary may act independently of its parent or other group companies.”).

79. BRIBERY ACT 2010, *supra* note 33, § 11.

80. *Id.*

81. *Id.* § 14. It is important to note that company directors may be exempted from certain penalties under the Company Directors Disqualification Act of 1986.

### C. Private Equity Facing New Perils in Emerging Markets

Private equity firms increasingly seek investment opportunities overseas in emerging markets.<sup>82</sup> While firms in emerging economies, such as Brazil, China, and India, are desirable portfolio companies for private equity funds, they pose complex challenges for those accustomed to operating in developed economies.<sup>83</sup> The 2010 U.K. Bribery Law, along with the renewed vigor of enforcement in the U.S., adds to the risks that the private equity industry faces in unfamiliar business climates, especially areas where corruption is prevalent. To make matters worse for those unacquainted with the array of anti-corruption practices, both the U.S. and the U.K. have indicated an intent to aggressively prosecute overseas corruption.<sup>84</sup> In the U.K., the Financial Services Authority (FSA) has announced its plans to investigate investment banks and private equity firms in particular, after recently releasing a report on corruption in the insurance industry.<sup>85</sup> Meanwhile, in the U.S., prosecutors have brought an increasing number of investigations and cases against private equity firms.<sup>86</sup> In this new climate, private equity firms cannot fall asleep at the wheel; rather, they must monitor quickly changing overseas anti-corruption obligations.

## IV. HOW TO COMPLY

Under both the U.S. and U.K. anti-corruption regimes, firms are encouraged—in different ways—to adopt adequate procedures to prevent corruption. The U.K. Bribery Law provides that such practices may constitute an affirmative defense to the corporate offense. U.S. enforcement is more ambiguous, lacking any such statutory affirmative defense. Nevertheless, prosecutors have used the threat of FCPA prosecution to pressure firms to adopt such procedures. The DOJ and SEC sometimes close investigations in which they are satisfied with the firm's internal processes for handling corruption.<sup>87</sup> In other cases, they have entered non-prosecution agreements with firms on the condition that those firms adopt new proce-

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82. See Davidoff, *supra* note 1.

83. *Id.*

84. Lanny A. Breuer, Assistant Att'y Gen., Dep't of Justice, Address at the American Conference Institute's 28th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2012), available at <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1211161.html>; *FSA Gears up for Dual Attack on Bribery Act*, FIN. TIMES (June 30, 2011, 10:26 PM), <http://www.ft.com/intl/cms/s/0/33181c56-a34e-11e0-8d6d-00144feabdc0.html>.

85. *FSA Gears up for Dual Attack on Bribery Act*, FIN. TIMES (June 30, 2011, 10:26 PM), <http://www.ft.com/intl/cms/s/0/33181c56-a34e-11e0-8d6d-00144feabdc0.html>.

86. Mara Senn et al., *Recent Enforcement Trends Indicate Increased FCPA Peril for Private Equity Firms*, BLOOMBERG LAW, <http://about.bloomberglaw.com/practitioner-contributions/fcpa-peril-for-private-equity-firms/> (last visited Oct. 10, 2013).

87. See, e.g., Richard Cassin, *Medtronic Wins Double Declination*, FCPA BLOG (June 27, 2013, 7:28 AM), <http://www.fcpablog.com/blog/2013/6/27/medtronic-wins-double-declination.html> (explaining how Medtronic's internal investigations and disclosures satisfied both the SEC and DOJ that further prosecution was not necessary).

dures going forward.<sup>88</sup> Many settlements provide for the appointment of an independent monitor to ensure compliance with such a mandate.<sup>89</sup> Notably, the firm must often pay the monitoring costs, which can total millions of dollars.<sup>90</sup> The U.K. Bribery Law does not explicitly incorporate the standard set in the American non-prosecution agreements. However, the absence of an explicit definition of adequacy for anti-corruption procedures suggests acquiescence in the current best practices in the global industry. Thus, this Note suggests that the U.K. Financial Services Authority (FSA) and Serious Fraud Office (SFO) will likely accept the adequacy of procedures such as those required in the U.S. non-prosecution agreements.

In order to offer more concrete compliance guidance, the discussion below surveys the procedures that the DOJ and SEC have required in non-prosecution agreements. Additionally, the reader is advised to refer to the OECD best practices in anti-corruption for more examples of sound anti-bribery safeguards.<sup>91</sup> While such precautions are not *per se* adequate under the U.K. Bribery Law, they offer useful examples of the gold standard in commercial anti-corruption practices. Please note the flexible discretion which prosecutors on both sides of the Atlantic exercise in holding firms operating in different contexts to different levels of procedural accountability. The official Guidance accompanying the U.K. Bribery Law indicates that the adequacy of procedures is to be judged in proportion to the sophistication and size of the firm, as well as to the corruption risk

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88. *See, e.g.*, Letter from Denis J. McNerney, Chief, Fraud Section, Criminal Division, Dep't of Justice, to Carlos F. Ortiz, LeClairRyan (July 6, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/nordam-group/2012-07-17-nordam-mpa.pdf> (explaining the procedures the DOJ will require NORDAM to comply with to avoid prosecution under the FCPA).

89. *See, e.g., id.* at B-3 (“The Company will assign responsibility to one or more senior corporate executives of the Company for the implementation and oversight of the Company’s anticorruption policies, standards, and procedures. Such corporate official(s) shall have direct reporting obligations to independent monitoring bodies, including internal audit, the Company’s Board of Directors, or any appropriate committee of the Board of Directors, and shall have an adequate level of autonomy from management as well as sufficient resources and authority to maintain such autonomy.”); *see also* Deferred Prosecution Agreement at C-4, United States v. Panalpina World Transp. (Holding) Ltd. (Oct. 27, 2010), <http://www.justice.gov/opa/documents/panalpina-world-transport-dpa.pdf>; Deferred Prosecution Agreement at C-4, United States v. Shell Nigeria Exploration & Prod. Co. Ltd. (Nov. 4, 2010), <http://www.justice.gov/opa/documents/shell-dpa.pdf>; Deferred Prosecution Agreement at C-4, United States v. Transocean Inc. (Oct. 21, 2010), <http://www.justice.gov/opa/documents/transocean-dpa.pdf>; Letter from Denis J. McNerney, Chief, Fraud Section, Criminal Division, Dep't of Justice, to Mary C. Spearing, Baker Botts LLP (July 6, 2012), at B-3, available at <http://www.justice.gov/opa/documents/noble-mpa.pdf>.

90. *See supra*, note 89; Client Alert, Willkie Farr & Gallagher, Imposition of Compliance Monitors in FCPA Settlements is Down, But Recent Court Ruling Increases the Risk of Public Access to Monitor Reports (Apr. 20, 2012), [http://www.willkie.com/files/tbl\\_s29Publications%5CFileUpload5686%5C4063%5CImposition\\_of\\_Compliance\\_Monitors.pdf](http://www.willkie.com/files/tbl_s29Publications%5CFileUpload5686%5C4063%5CImposition_of_Compliance_Monitors.pdf).

91. *Key OECD Anti-Corruption Documents*, OECD, <http://www.oecd.org/corruption/keyoecdanti-corruptiondocuments.htm> (last visited Mar. 3, 2014).

represented by the sector or region of business.<sup>92</sup> Thus, while one must keep in mind the differing breadth and jurisdictional reach of the American and British provisions, implementing a single set of comprehensive procedures is likely to greatly reduce liability under both pieces of legislation.

### A. *Adequate Procedures: U.S. Non-prosecution Agreements*

The SEC and DOJ have entered multimillion-dollar non-prosecution agreements with numerous companies under investigation for violations of the FCPA. These agreements are nearly uniformly conditioned on the adoption of specified programs to reduce the risk of future violations of anti-corruption law. Although these procedures are not themselves incorporated into the statutory framework as an affirmative defense (while similar measures, termed *adequate procedures*, are included in the U.K. Bribery Law under Section 7(2)), the clear signal that these non-prosecution agreements send is that companies should adopt standardized procedures to prevent, detect, and report violations of anti-corruption laws and internal codes of ethics.<sup>93</sup>

Given the relatively greater depth of experience with such prosecutions in the U.S., the terms of these agreements serve as a good indication of the types of policies that companies should adopt to satisfy the adequate procedures under the U.K. Bribery Law. The U.S. and U.K. have effectively worked in tandem to regulate the behavior of international businesses in the area of corruption to a far greater extent than any other major economies.<sup>94</sup> This collaborative effort has helped to establish an international standard for ethical conduct. In fact, there is a growing sense<sup>95</sup> that the increased anti-corruption enforcement efforts in the U.S.

92. BRIBERY ACT 2010 GUIDANCE, *supra* note 2, at 21 (“Adequate bribery prevention procedures ought to be proportionate to the bribery risks that the organisation faces. An initial assessment of risk across the organisation is therefore a necessary first step. To a certain extent the level of risk will be linked to the size of the organisation and the nature and complexity of its business, but size will not be the only determining factor.”).

93. BRIBERY ACT 2010, *supra* note 33, § 7(2).

94. SERIOUS FRAUD OFFICE, INTERNATIONAL STRATEGY, available at <http://www.sfo.gov.uk/media/57517/international%20strategy.pdf> (last visited Nov. 13, 2013) (discussing the U.K. SFO’s coordination with American, European, and other foreign anti-corruption and anti-fraud authorities); see also Mythili Raman, Assistant Att’y Gen., Dep’t of Justice, Key-note Address at Global Anti-Corruption Congress (Jun. 17, 2013), available at <http://www.justice.gov/criminal/pr/speeches/2013/crm-speech-130617.html> (“[L]ong before the U.K. Bribery Act was even proposed, we were working together with the U.K.’s Serious Fraud Office to bring cases against U.S. and U.K. companies alike, as well as their executives and agents involved in bribery schemes.”).

95. Phil Beckett, *A Preventative Approach*, GLOBAL LEGAL POST (Feb. 21, 2014), <http://www.globallegalpost.com/blogs/global-view/a-preventative-approach-61611724/> (“To avoid the attentions of the SFO altogether, organisations must ensure that they have adequate procedures in place. Until now, these have primarily been seen as a defence mechanism and best-practice for bribery avoidance. All firms clearly need to implement a mixture of good policies, procedures and training[.]”)



and U.K. are designed to promote this standard more broadly as quasi-compulsory, rather than simply exemplary practice. For this reason, some insights based on the particular compliance conditions imposed in many of the larger FCPA non-prosecution agreements can be instructive. It is important to note that the U.K. Bribery Law is, in some ways, more demanding than the FCPA and that compliance with one will not necessarily suffice to avoid prosecution under the other. A more detailed discussion of the differences between the two standards is addressed in Part IV.B.

The DOJ non-prosecution agreements typically list conditions that the company under investigation must satisfy if it is to avoid prosecution. Some commentators have criticized the ubiquity of these agreements, since they foist stringent requirements and hefty fines upon companies without having to prove the facts of a case or the application of underlying legal theories in court.<sup>96</sup> Others, however, have argued that companies enter these agreements to ensure greater predictability, and that they have had a positive impact by encouraging firms to abide by more uniform ethical standards. The particular terms vary somewhat from agreement to agreement, depending on the type, scale, and severity of the corruption activities under investigation. However, the basic requirements (generally spelled out in *Appendix B* of the agreements) are largely uniform.<sup>97</sup>

Consider, for example, RAE's \$1.7 million settlement agreement with the DOJ in 2010.<sup>98</sup> The twelve conditions listed in *Appendix B* of the Agreement required:

- (1) the inclusion in its corporate code of a statement against violations of the FCPA, other corruption laws, and its internal ethics requirements;
- (2) senior management to demonstrate strong, visible, and explicit support and commitment to compliance with the FCPA and other anti-corruption laws and standards;
- (3) the adoption of internal policies to discourage violations of the FCPA and other anti-corruption laws and standards by its employees, directors, and, where appropriate, third parties (each of whom is to be notified of their duty to help ensure compliance throughout the company). Specifically, the company is to adopt policies addressing:
  - (i) gifts;
  - (ii) hospitality, entertainment, and expenses;
  - (iii) customer travel;
  - (iv) political contributions;
  - (v) charitable donations and sponsorships;
  - (vi) facilitation payments; and

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96. See Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEORGETOWN J. INT'L L. 907 (2010).

97. See Brandon L. Garrett & Jon Ashley, *Federal Organizational Prosecution Agreements*, UNIV. OF VA. SCH. OF L., [http://lib.law.virginia.edu/Garrett/prosecution\\_agreements/home.suphp](http://lib.law.virginia.edu/Garrett/prosecution_agreements/home.suphp) (last updated Jan. 29, 2014); *SEC Enforcement Actions*, *supra* note 32.

98. Letter from Denis J. McInerney, Chief, Fraud Section, Criminal Divison, Dep't of Justice, and Melinda L. Haag, U.S. Att'y, N.D. Ca., to Carlos F. Ortiz, LeClairRyan, and Roy K. McDonald, DLA Piper (Dec. 10, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/rae-systems/12-10-10rae-systems.pdf>.

- (vii) solicitation and extortion; and
- (4) the tailoring of these policies to a comprehensive assessment of risk factors specific to the company based on the prevalence of joint ventures, the volume of dealings with immigration or customs, frequency and scope of interactions with foreign government officials, and the extent of business carried out in high-risk countries or sectors;
  - (5) the institution of an annual review and overhaul of internal policies where improvement is needed to reduce corruption risk;
  - (6) the appointment of at least one senior corporate executive officer to oversee implementation of anti-corruption efforts, possessing reporting duties to independent monitoring bodies, internal audit, the Board of Directors, and any relevant subcommittee thereof. The designated official shall have sufficient autonomy from the Board of Directors, and adequate resources and authority to maintain that autonomy;
  - (7) the adoption of policies to ensure fair and accurate accounting and book-keeping;
  - (8) the implementation of effective mechanisms to ensure compliance standards are communicated to all employees, directors, and relevant third parties, including but not limited to the adoption of mandatory anti-corruption training and annual certification;
  - (9) the establishment of effective resources to offer guidance, including in emergency situations in all countries where the company carries on business, on anti-corruption compliance for all employees, directors and appropriate third parties. The company shall establish a means to encourage the confidential reporting of violations within the company. Additionally, it shall provide mechanisms and procedures to protect reporters and those who refuse to engage in prohibited conduct. Further, the company shall take reasonable steps to address reported violations;
  - (10) the adoption of disciplinary procedures to address violations within the company;
  - (11) the exercise and proper documentation of due diligence in the retention and oversight of third parties, the communication to agents and business partners of the company's commitment to compliance with anti-corruption laws and standards, and requesting such third parties undertake a reciprocal commitment; and
  - (12) the inclusion, where appropriate, of anti-corruption terms in its contracts with third parties, such as providing for a right to audit the partner's internal records, and granting the company the right to terminate the contract if the partner engages in behavior violating the FCPA, other corruption laws, or internal standards.

This set of requirements is largely mirrored in the other FCPA non-prosecution agreements. For example, the list is identical in the Tenaris, Deutsche Telekom, and Comverse agreements.<sup>99</sup> This pattern indicates the emergence of a coherent and consistent set of anti-bribery standards. Very likely, these can be used as adequate procedures under Section 7 of the U.K. Bribery Law corporate offense. Since the onus is on the business to prove that its efforts to prevent corruption have been in good faith, many turn to the slew of independent specialists that comprise a budding

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99. For a complete listing of agreements, see Garrett & Ashley, *supra* note 97.

industry of corruption compliance consultants.<sup>100</sup> By contracting with outside specialists, businesses subject their practices to external review, which has, at the very least, the appearance of greater impartiality. These specialists may, for example, be involved in regular staff training sessions to help disseminate knowledge about which practices are prohibited, how an employee can report suspected violations, or how to seek out confidential practical guidance within the firm.<sup>101</sup> Through anonymous reporting, detection of accounting discrepancies, or other means, they may also help identify those segments of the business in which corruption continues to pose a risk requiring further mitigation efforts.<sup>102</sup>

### B. Differences between U.K. and U.S. Compliance

The three most significant differences between the U.S. and U.K. legislations deal with (1) bribery of those other than public officials, (2) the treatment of facilitation payments, and (3) the defense of legality under local law. Under the FCPA, neither facilitation payments nor payments to purely private commercial parties is prohibited (though, again, recent efforts to apply the Travel Act to private commercial bribery may mean this is changing). Meanwhile, the U.K. Bribery Law takes a more far-reaching approach, prohibiting both such payments.<sup>103</sup> This serves to substantially broaden the scope of activities falling within the new U.K. anti-corruption provisions. As a consequence, compliance with the U.K. Bribery Law will usually require more rigorous oversight than will compliance with the FCPA. Private equity firms must be wary not only of bribes being paid on their behalf to foreign government officials, but also those improper payments being made in the private sphere. All dealings with potential clients or other business partners must be carefully monitored to ensure that no improper payments are made for unfair advantage.

Additionally, so-called facilitation payments, which are subject to a special carve-out in the FCPA, are prohibited under the U.K. Bribery Law.<sup>104</sup> A facilitation payment is the payment of a standard fee to facilitate or expedite a transaction. Where one draws the line between these payments and bribery, however, is rather murky. To this end, the British law may not necessarily represent a harsher application of anti-corruption

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100. See, e.g., ERNST & YOUNG, THE UK BRIBERY ACT (2011), available at [http://www.ey.com/Publication/vwLUAssets/UK\\_Bribery\\_Act\\_-\\_Developing\\_an\\_anti-corruption\\_compliance\\_framework/\\$FILE/EY\\_UK\\_Bribery\\_Act\\_-\\_Developing\\_anticorruption\\_compliance\\_framework.pdf](http://www.ey.com/Publication/vwLUAssets/UK_Bribery_Act_-_Developing_an_anti-corruption_compliance_framework/$FILE/EY_UK_Bribery_Act_-_Developing_anticorruption_compliance_framework.pdf); *Anti-Bribery Training*, TRANSPARENCY INT'L UK, <http://www.transparency.org.uk/our-work/bribery-act/training> (last visited Mar. 3, 2014); *About TRACE*, TRACE INT'L, <http://www.traceinternational.org/Trace/about-trace.html> (last visited Mar. 3, 2014).

101. See, e.g., *Anti-Corruption & FCPA Services*, SIERRA FIN. GRP., <http://www.sfg-global.com/fcpa-consulting> (last visited Jan. 22, 2014) (describing training services offered).

102. *Id.* (describing risk-analysis services).

103. *Facilitation Payments*, *supra* note 42.

104. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (2012); *Facilitation Payments*, *supra* note 42.

law to such payments. Rather, its goal may simply be to grant prosecutors greater leverage in settlement negotiations and the ability to avoid arguing over what is, or is not, a facilitation payment rather than a bribe.

Finally, the FCPA provides that payments that would otherwise be deemed corrupt, and therefore prohibited, are permissible when made in compliance with local law.<sup>105</sup> Notably, such a general defense is absent in the U.K. Bribery Law; the local law carve-out applies only to the bribery of foreign public officials.<sup>106</sup> Thus, while making a particular type of payment may be allowed under the FCPA by virtue of being consistent with local law, it may still violate the U.K. Bribery Law.

## V. CONCLUSION AND AVENUES FOR FURTHER GROWTH

The U.K. Bribery Act of 2010 brings significant new zeal to the global effort to combat corruption. It not only joins the U.S. in enacting stringent measures under which to prosecute the bribery of foreign government officials, but it also extends the scope of overseas bribery law to reach improper payments made in the private commercial sphere. This move does more than simply indicate support for good governance overseas; it could also facilitate the creation of more transparent and efficient markets around the world. If effective, this attack on corruption will not only aid development in emerging markets, but will also help business planning and cost projections. Exactly how far the British Act's jurisdiction will reach remains ambiguous. It should be clear, however, that businesses operating globally, particularly those acquiring new targets, must be mindful to prevent corruption globally. The techniques and standards developed under the FCPA offer the most detailed guidance for how businesses can proceed. In particular, the measures required in FCPA non-prosecution agreements provide a relatively specific list of good practices.

With increasing investment overseas at the precise moment that the U.S. and U.K. are stepping up their anti-bribery enforcement efforts, private equity firms must be on guard to adequately assess corruption risks and be proactive in formulating new industry-wide and firm-specific plans to mitigate those risks. This Note proposes that there will likely be further convergence between the British and American anti-corruption regimes, and that standards developed in the context of FCPA non-prosecution agreements are a good starting point with regard to adequate procedures under the U.K. Bribery Law. As other nations, such as Russia, enter the field, compliance may become somewhat more complicated.

Conversely, as more nations enact such regimes, businesses will press harder for uniformity, at least among the more developed economies, to level the playing field. American or British companies losing business to bribe-paying French or Italian companies are likely to pressure their governments to further multilateralize anti-corruption law. While a more ro-

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105. 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1).

106. BRIBERY ACT 2010, *supra* note 33, § 5(2).

bust OECD or UN treaty may prove impractical, there could be a significant convergence of pressures to force the EU, Canada, or Australia to act.

Interest groups as diverse as development activists and big business have reason to harmonize and extend global anti-corruption regimes. For activists, corruption is an ethical scourge and a practical obstacle to development and good governance. At the same time, global businesses exposed to U.S. and U.K. anti-corruption regimes surely bristle each time a potentially corrupt rival bidder, free from such liability, wins a government contract or gains another advantage. Ultimately, a more rigorous global regime to combat corruption would be a boon to development and good governance around the world, while also enhancing business and market efficiency. What started four decades ago as an idealistic American project to end bribery may now have substantial global business interests supporting its continued expansion. The field is changing, growing, and diversifying.<sup>107</sup>

In the short-term, the challenge laid down before the U.S. is whether it will follow the British lead in regulating private commercial bribery alongside the bribery of foreign public officials. The FCPA alone does not provide a framework for such prosecutions. However, a recent case shows how the Travel Act may fill the gaps and lay the groundwork for future prosecutions to reach non-governmental overseas bribery. The DOJ, in *Nexus Technologies* (E.D. Pa. 2010),<sup>108</sup> invoked the Travel Act in tandem with the FCPA to prosecute individuals for the bribery of persons in Vietnam for commercial advantage. A dispute existed as to whether the alleged bribery was covered by the FCPA, because the recipients may not have fallen under the “foreign public officials” definition. The DOJ side-stepped the issue by arguing that the bribes had also run afoul of the Travel Act, a 1952 federal statute criminalizing interstate travel or trans-

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107. Further areas of controversy remain regarding, for example, the treatment of foreign investment contracts in which a bribe was paid to secure the contract. In *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006), an ICSID tribunal found that a foreign investor who had bribed a Kenyan government official lost the right to bring his expropriation claim under a Bilateral Investment Treaty by virtue of having paid a bribe contrary to *l'ordre public*. This creates the odd outcome that a state can shield itself from potential liability by seeking bribes. An investor, on the other hand, must be careful not to pay any bribes in the course of securing or operating its investment, in order to preserve claims under Bilateral Investment Treaties. *Id.* In addition to the interaction with international arbitration law, as described in *World Duty Free* above, corruption could grow in the future as businesses become more used to complying, and more aware that some of their rivals are obtaining unfair benefits by not complying. Under a competition theory, rival businesses could be granted a private cause of action analogous to those in antitrust, so that a non-bribing business that loses a contract or other benefit could recover damages from a bribing business that does secure the benefit. This would take corruption law partially out of the realm of purely public law. However, it would serve to promote equality between similarly situated parties and would enable far more vigorous enforcement.

108. Press Release, Dep't of Justice, *Nexus Technologies Inc. and Three Employees Plead Guilty to Paying Bribes to Vietnamese Officials* (Mar. 16, 2010), available at <http://www.justice.gov/opa/pr/2010/March/10-crm-270.html>.

portation in furtherance of an unlawful act.<sup>109</sup> Essentially, this Act federalized the bribery laws of any state. Such domestic bribery laws generally reach commercial bribery, that is, bribery where the recipient is a private party, as well as the bribery of public officials.<sup>110</sup> The DOJ argued that the Travel Act covered bribery of individuals located outside the U.S., in effect establishing a U.S. equivalent to the U.K. Bribery Law's regulation of purely private commercial bribery around the world. However, the DOJ's theory remains untested for now, as the parties in *Nexus Technologies* pleaded guilty. Nevertheless, U.S. prosecution strategies and possible changes in the law could lead to the U.S. joining the U.K. in regulating the bribery of private, as well as of public individuals, around the world.

Just as the U.K. may be drawing on U.S. standards, the U.S. seems to also be following U.K. developments in the field. Parties technically subject only to U.S., but not U.K., jurisdiction may, in effect, find themselves required to comply with the broader range of standards being developed in the U.K. Bribery law. The field of anti-corruption enforcement can be expected to continue to grow and converge globally as international guidelines are incorporated into domestic laws, as the domestic laws of one country adopt standards developed in other countries, as domestic laws incorporate soft law, and as the industry develops better methods for preventing bribery.

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109. See 18 U.S.C. § 1952 (2012).

110. See, e.g., CAL. PENAL CODE § 641.3 (2013); N.Y. PENAL LAW § 180 (2013); DEL. CODE tit. 11, § 881 (2013); MASS. GEN. LAWS ch. 271, § 39 (2013).

