The UK Bribery Act: Its Global Reach on US and Other International Businesses

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TRANSCRIPT
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JF: I'm Jack Friedman, Chairman of the Director's Roundtable. And many of you have been to our events, but for those of you who don't know us, we're a civic group that's done 750 events nationally and globally. And we haven't charged a penny, by the way, to attend any of the 750 events for the last 20 years. Our mandate is to give away or organize the finest programming for boards of directors and their advisors.

And this particular topic today is of interest to me, because over the last 20 years, as the chair, I've seen the evolution of relations between American law and European law. Because years ago, people would say, 'oh, you Americans have those legal and regulatory problems. It's not a problem here.' So what's happening, obviously, is that Europe is converging more with the United States. And knowing what goes on there is important for people here.

I wanted, first of all, and if any of you have not gotten the announcement directly, just leave your card with staff on your way out, and we'd be happy to add you. And again, there's never a charge or anything. I want to thank, first of all, the audience for coming, because you are the subject, I mean, the purpose of the program. (Laughs) Or the intended beneficiaries of the program. I live in Los Angeles, and I have jet lag, sometimes, when I get here. So if I'm awake at all right now, it's the best I can do.

In terms of the panelists, I'm going to be turning it over to Sandy Winer of the Foley Lardner law firm, who will be introducing the people. And he'll be identifying the various speakers. But I did in particular want to thank the Foley people and Eversheds from London, who've come in. And the staff also from KPMG, for being kind enough to help us out on this event. The staff

doesn't get the credit; the partners who appear in public are the ones who get it. So again, I thank them very much.

So without further ado I'll be going to the back, and I'm turning the program over to Sandy.

SANDY WINER: Jack, thank you very much, and good morning, everyone. I want to thank the Director's Roundtable for arranging for this discussion of what is a very important U.K. regulatory initiative. In April of this year, the Queen of England approved a new and sweeping piece of legislation prohibiting not only corporate bribes of government officials, like our Foreign Corrupt Practices Act, but all forms of commercial bribery.

The U.K. Ministry of Justice announced that, starting September 14th of this year, it would be conducting for approximately eight weeks, a consultation in which it would be receiving comments regarding this legislation. And the statute, by the way, is planned to become effective starting next April, so that's April, 2011.

With the increasing globalization of commercial enterprise, coupled with the proposed extraterritorial reach of this new statute, and improved coordination between the United Kingdom law enforcement authorities and the U.S. law enforcement authorities, this statute warrants the attention of anyone whose business touches the U.K., whether directly or indirectly. Taking precautions now can spare you and your clients, and their management, from becoming ensnared in what promises to become a very high priority enforcement program.

It was reported just a few days ago, in the October 2010 issue of Ethisphere, which is known for the reliability of their surveys, that approximately 55 percent of the companies surveyed by Ethisphere, quote, 'believe that they are not ready to handle the upcoming anti-bribery requirements,' unquote. I'm sure that, as this statute receive more publicity and

people begin to realize the implications of not being ready, that number will shrink quickly.

We're pleased to have with us today some of the leading authorities on the (Inaudible) implications of this statute. As well as the FCPA. And so let me introduce our panelists, starting with on my second to the extreme left here, Vivian Robinson, Queen's Counsel and the General Counsel of the United Kingdom Serious Fraud Office. The prosecutorial arm of the Queen's government charged with enforcing this anti-bribery statute. Vivian has 42 years of experience as a prosecutor, as well as defense lawyer. And for three weeks a year, he has also been appointed to sit as a judge to preside over cases, including those at the Old Bailey(?), for those who've visited London and had a chance to see what happens there.

To my extreme right here, Neill Blundell is head of the Fraud Defense Practice at Eversheds. He's worked on the BAE case, and the AMEC(?) case in South Korea, and is very experienced in this area. To my immediate left, Seth Levine of Foley & Lardner is in our New York office. Seth started his career at Cravath and spent a significant stint as an Assistant U.S. Attorney in the East U.S. Attorney's Office in the Eastern District of New York, within the Securities Fraud Unit there as well.

And finally, to my immediate right, Marc Miller, a partner with KPMG, in the forensics practice, who focuses his practice on the FCPA, compliance and investigations. Finally, our moderator today is Barry Mandel, also of Foley & Lardner. Barry was formerly General Counsel Litigation Regulatory for Merrill Lynch. For many, many years. And Barry, I'm pleased to say, is head of Foley & Lardner's Securities Litigation Enforcement and Regulatory Practice. And so why don't I stop talking, Barry, and turn the discussion over to you?

BARRY MANDEL: Thank you, Sandy. Thank you. I have in my hand not today's top ten list, but today's *Wall Street Journal*. And the headline

reads, "Drug Firms Face Bribery Probe." Justice Department SECs seek information from companies on payments to overseas officials. And if Vivian Robinson has anything to say about it, next summer this will read, "Serious Frauds Office Seeks Information From Companies On Payments To Overseas Officials."

I asked Vivian to kick it off, but I'd ask him also to bear one question in mind as he gets started, and that is, if the act, which comes into effect next April, were in effect today, would it be an offense under the act that, in order to get Vivian to come over from the U.K. to speak here, we let Europe win the Rider Cup (Laughs) Vivian, would you?

VIVIAN ROBINSON: Thank you very much. Well, good morning, ladies and gentlemen, is the microphone working, can I just check on that first of all? I'd like to say what a pleasure it is to be here in New York. And would like to thank Foley & Lardner very much for the opportunity of being able to participate in this important event. I think, before I say anything about the Bribery Act, could I just say a few words about the Serious Fraud Office, by way of background, essential background?

Traditionally, we were, and I use the past tense deliberately, an organization which used a very conservative approach to prosecuting. We would wait for cases to be referred to us. We would then investigate them, and in appropriate cases, prosecute. But over the past 18 months, we have adopted a very much more proactive approach to prosecuting. We find out a great deal more about cases for ourselves, and we do this in a number of ways. Particularly through our own investigators. And through cooperation in finding out information from other agencies.

We also engage with the business community to discuss potential problems, and this is just such an example of that type of engagement. And we also think it appropriate that, as prosecutors, we don't simply deal with cases once they've come to us, and once cases have actually

been committed. We think it right to go a little bit further back than that. And involve ourselves with the business community in order to help them bring about what we describe as a proper business ethic, which would make it more difficult for fraud and corruption to take place.

Now, as General Counsel to the Serious Fraud Office, I come at this subject from a regulator's perspective, and hence, my billing on this agenda. And none of you, I think, would be surprised to hear me say that we at the Serious Fraud Office welcome the advent of this act, which as you have heard, will come into force next April. And I have to say that it's new in my experience to be discussing an act in this sort of forum, and detail, months before it actually comes into force. And it might give some of you comfort to know that the provisions of the act will not be retrospective.

The genesis of the act is a recognition of the fact that our previous law had been seriously and justifiably criticized, both at home and overseas, because of its inadequacy and because it was perceived as being out of step with other countries. And such criticism had to be taken seriously by our government, because as we all know, corruption has become a global issue affecting all sections of society.

And what has emerged from all this is an act with a number of features, which many would describe as draconian and which led one commentator to describe it as being the toughest corruption law in the world. So it seems that from being behind everybody else, we at one leap, suddenly get in front. And one of the reasons for it being so described is its potential for having major consequences for both individuals and organizations in other countries. I have to tell you that this act is very widely drawn, indeed. And that was Parliament's intention. We think, moreover, that on points of interpretation, interpreting the provisions of the act, the courts of the U.K. will be inclined to construe it as widely and conservatively as possible.

May I perhaps, therefore, spend a moment or two addressing the question of who may be subject to its provisions. I don't refer to slides during the course of my presentations, but a number of the principle features of what I am going to say have been helpfully reduced into slide form, which you will find in the packs which have been issued to you, which I hope will remind you of anything of interest which I say over the next few minutes.

And therefore, who may be subject to its provisions? And I'm going to split this up very quickly. I can do it quite shortly, into first individual liability, and then corporate liability. The act identifies three primary bribery offenses; namely, giving a bribe, receiving a bribe, which as you all know, is not part of the law in the U.S., and bribing a foreign public official. Where an act, forming part of the offense, takes place in the U.K., then obviously we can take proceedings against any individual involved, and if necessary, get them extradited to the U.K. to be tried.

But more importantly for your purposes, perhaps this: where all the acts or omissions, for that matter, occur outside the U.K., the act enables us to take proceedings only if the individual concerned has a close connection with the U.K. Now, there are obvious categories, such as U.K. citizens and the like.

But the closest that anybody in this room, I anticipate, would ever get, to falling within that category, would be part of the definition as an individual ordinarily resident, in the United Kingdom. And so if you don't fall within that category, it's pretty certain that if the actual omissions take place outside the U.K., the act will not give us jurisdiction over you as individuals.

A further provision deals with the individual accountability of senior officers. And this is a new statute. If it can be established that any of those three primary offenses, of bribery, had been committed by a corporate body, then a senior officer of that body, and that of course, includes directors, may be convicted of the same offense, if it was

committed with that person's consent or connivance. And connivance means simply either turning a blind eye to something, or choosing not to investigate it.

But the same qualification applies here. It's only if you have a connection with the U.K., a close connection with the U.K., that you as individuals, in a senior position in a company, would find yourself liable to our jurisdiction. And what it does, this particular offense, brings potential personal exposure right into the boardroom. As I say, it's not necessarily going to affect people in this room, or your clients very much; it's really more geared to our domestic market. But it's an example of just how tough this particular act is going to be.

It's when I turn to the second area of potential liability that your ears may prick up rather more. Because this act creates a controversial new corporate offense. And that offense is one of failing to prevent bribery. A company failing to prevent bribery. And this is where the act will really bite. Because potential liability for this act is very wide, it extends to any corporate body, wherever in the world it is incorporated. And which carries on at least part of its business in that U.K.

And this offense may be committed wherever in the world the acts or omissions constituting the offense take place. You will readily see that this is a massively widely-drawn provision, which is understandably arousing a great deal of international interest. Both here, and I can tell you, in Europe as well.

I've already mentioned the three primary offenses, but because of constraints of time, and because it's one of the most interest internationally, I'm going to concentrate, if I may, on this new corporate offense. You'll find the details regarding the other offenses in your handout. Why do we need such an offense? Historically, the main problem confronting prosecutors in the U.K. has been how to put commercial organizations in the dock, as well as

individuals associated with those organizations, who carry out bribery on behalf of their companies. How do we do it?

Our law has made it impossible to indict a company unless we can prove, this is the present law until the new act comes into force, that at least one individual involved in the corruption was what was called a controlling mind of the company. And that meant, in practice, unless we could prove that somebody either at or very close to board level was complicit in what was going on.

And I think one of the reasons why you in the United States have been much more successful and effective than we have in this field, is because you have not had to face this practical difficulty. So what this new act does, this new provision, is make a relevant commercial organization, I choose my words very carefully, from the act, a relevant commercial organization, guilty of an offense, if a person associated with it bribes another person, intending to obtain business or an advantage in the conduct of business for the company.

Well now, that raises two important questions: first, what is meant by a relevant commercial organization? And the act defines this as including, as I've mentioned, anybody corporate, wherever incorporated, which carries on at least part of its business anywhere in the U.K. And secondly, the question arises, who may be described as a person associated with such an organization? And again, the act defines such a person as being one who performs services for or on behalf of the company.

Any new act is liable to throw up a number of grey areas. And this throws up two straight away. First, you will be asking, well, what will amount to carrying on at least part of a business in the U.K.? Such as to make an international organization potentially liable under this provision. There are likely to be a number of different scenarios, and I've no doubt, reference will be made during the course of this event, to some of those.

I should say at this stage, that we are all, and that includes us, the Serious Fraud Office, feeling our way, to some extent, with regard to some of the provisions of the act. As a prosecutor, I can give you a steer in some directions; for example, facilitation payments, and gifts and hospitality. But some other areas are more tricky. All of them will be case-specific, and anything I say, I should make clear, will be an expression of personal opinion, and not to be regarded as necessarily representing official Serious Fraud Office policy, and in any sense, binding upon us, in the case of any individual brought to our attention.

All I can suggest here is that the safest course for the moment, in relation to all of these grey areas is to err on the side of caution. What we're trying to suggest in the Serious Fraud Office is that if people have a genuine problem about the interpretation of a grey area, instead of shoving it under the carpet or not doing anything about it, they should feel that we will be sympathetic enough to hear about it from them, discuss it and give some idea as to whether or not the hypothetical scenario that they're putting before us is one which would attract our attention, or not. That's what I would enjoin people to do at some stage in relation to this particular grey area of carrying on at least part of a business in the U.K.

Secondly, what is the ambit of the definition of a person who performs services for the company? The act provides some help here, because it includes, by way of example, the obvious. Obviously a company's employee, or a company's agent or a company's subsidiary, are performing services for a company. But our Parliament's intention to cast the net wide with regard to this is demonstrated by a provision in the act that the term 'associated person' is to be determined by reference to all the relevant circumstances, and not merely by reference to the relationship between the person and the company.

So you can see straight away that the act here gives the courts, it gives us, a very wide scope for interpretation of that particular provision. And so we think, again, in this grey area, that prudence requires companies to assume that it will apply to such things as consortium or joint venture partners, to contractors, and to suppliers.

The wisest course, we think, for companies to adopt at this stags, is to implement a policy of anti-bribery due diligence and monitoring in respect of any party with whom they have a business relationship. Now, that's the bad news. Can I just give you an item of good news, which I won't elaborate on, because I know some of my colleagues, I think Neill and Marc, are going to do so.

The Bribery Act provides a defense, a statutory defense, to this particular offense of failing to prevent bribery. And that occurs where a company can prove, so the burden of proof is on the company, to prove that it had in place at the time the act or omission constituting the bribery took place, adequate procedures designed to prevent persons associated with it, from committing bribery. You'll hear much on that, and it may well be that there will be questions addressing that particular area.

I want to move on, and deal with two other grey areas which are thrown up on this act, and which arouse, perhaps, more discussion in this sort of forum than any other; namely, facilitation payments and promotional expenses. And I'll deal with those very shortly, and in turn. The FCPA permits facilitation payments, as I understand it, if their purpose is to expedite or secure the performance of some routine governmental action.

No such exception is provided in the Bribery Act. Full stop. They are, therefore, and will be, unlawful in the U.K., and any such payment has at least the potential, and I emphasize that word, for triggering one of the primary bribery offenses, which I mentioned at the beginning of my

presentation, and in particular, of those, the offense of bribing a foreign public official.

We are constantly being asked, at meetings such as this, how the SFO, as the lead prosecuting agency, as we will be, in the U.K., for the purposes of this act, will approach enforcement with regard to such payments. Now, nothing which I say in the next few minutes can be taken as in any sense condoning facilitation payments, because it would be irresponsible for me, as a prosecutor, even to give that impression. Given that they are, and will be, unlawful under our law.

But I can perhaps, be a little bit more helpful here in giving you a steer. First of all, each case will obviously depend upon its individual and particular circumstances. But the paramount question for us, which we will be considering as prosecutors, looking at any particular instance, and assuming that there is sufficient evidence, is whether we consider it to be in the public interest to commence proceedings. That's the paramount consideration.

And three factors are likely to affect our decision on this: first, what was the amount of the payment? Secondly, was the payment systemic; was it one-off or was it systemic? And thirdly, have the company shown us some evidence of having taken steps to stop or at any rate, to curtail, any routine making of such payments? The bigger the payment, or the more systemic the payment, or the less effort the company has taken to stop them or curtail them, then the more likely it is that we would think it to be in the public interest to take action.

But even if small and un-systemic payments of this sort are unlikely to reach courts, and bear in mind, that as a prosecutor, as a government prosecutor, we operate under certain resource limitations, which means that we can't take steps in every case, and we have to be careful that we

take steps in the proper ones. So even if they don't reach court, we recommend that companies take all reasonable steps they can to prohibit and eliminate them.

It's just, perhaps, worth considering before I move on from facilitation payments, to considering why we say facilitation payments are potentially dangerous. Some may say, well, what's it matter? Well, we think they are potentially dangerous for this reason: it's because they are often part of organized schemes which are orchestrated at a higher level than that of the official to whom the payments are made, and the willingness of a company routinely making such payments can send out the message that the corporate is open to bribery on a more elevated scale.

The question is often asked of us, and perfectly properly, well if we as a company unilaterally adopt a zero tolerance approach to facilitation payments, are we not making ourselves uncompetitive with other companies which routinely make them? Perfectly proper question, and quite understandable. And I would like to make two comments, whether they satisfy or not, I don't know. But I think these two comments are worth making.

First, it is our experience that many companies, and particularly the bigger companies, do adopt zero tolerance policies here. And their general experience has been that after a time, those seeking them have stopped making them, stopped requesting them, and that business and competitiveness has not been seriously affected. So that's the first point. It's anecdotal, but it's the message that we are getting from quite a lot of people.

The second comment is this: it seems to us a matter of common sense that there's a lot to be said for sector-led initiatives. Where companies in a particular field adopt a widely and well-known approach by simply refusing to make such payments. Companies in fields like oil and gas, the pharmaceutical industry, defense, and the like. There's strength in numbers, and that is one step which, it seems to me, could be taken.

And that action can be complemented by companies making it known to their foreign embassies and to organizations such as the Organization for Economic Cooperation and Development, of locations where the practice of such payments, or request for such payments, is rife.

Promotional expenses, can I deal quickly with that? Because I'm conscious of the time. Under this head come gifts, hospitality and expenses. And those two present significant risk areas in this field, because they can be used. Why? Because they can be used by corrupt third-parties to groom company employees into a position of obligation, and thus prepare the way for bribery on a more significant scale. That is why they are insidious.

Now, can I make this recognition straight away? That reasonable and proportionate hospitality or promotional expenditure, which seeks to improve the image of a commercial organization, or better to present its products or services, or further cordial relations, is an established and important part of doing business. We accept that straight away. And where we're looking at any such cases referred to us, or we find out about, as with facilitation payments, our starting point is going to be the public interest.

In those circumstances, is the public interest going to be served by us taking steps? That, of course, a lot will depend upon its seriousness. I emphasize in the particular circumstances, because there is an infinite number of potential scenarios here. But as a general rule, the higher the cost, and the more lavish the hospitality, the greater the likelihood of us as prosecutors drawing the inference that the expenditure falls outside what is recognized as reasonable, and that it was intended to influence the recipient to grant business, or a business advantage in return.

So so much in this area, it seems to me, is a matter of proper judgment, and the application of simple good sense. There's already a huge amount of guidance out there, in the public domain on this subject. Written guidance. And more to come, as you will hear, from our own government, early

next year. But for present purposes, I believe that companies would reduce the likelihood of being compromised in this area, by following four steps, which are recommended by Transparency International, which some of you may know is a nongovernmental organization which deals with assistance to corporations and businesses as to, if you like, a gold standard of what should happen.

The four principles are these, and I'll deal with them very quickly. To publish a clear policy stating that the giving or receiving of gifts, hospitality or other expenses, which might be perceived a influencing a contractual or material transaction, is prohibited. Two, to provide guidance on an upper limit on the value of gifts, hospitality and expenses. Three, to make sure that its policy, procedure and guidance are communicated to its employees and its business partners and suppliers. And fourthly, to document fully all gifts, hospitality, and expenses, whether received or given.

And in a sense, that last one is the most important. Because it seems to me that, in this field, transparency is everything. The more transparently everything is done, the less likely we are to smell a rat. If things are pushed under the carpet and we discover them we're less likely to be sympathetic than if we were to find that things are perfectly proper and open for everybody to see, and to evaluate.

And if I have time, I turn to a topic, lastly, which has a major effect on whether or not we prosecute a case at all. And I'm going to look to my right to see if I have that time. May I do so?

BARRY MANDEL: I won't tell you you don't have time. Yes, sure, you have all the time you want.

VIVIAN ROBINSON: Self-reporting. This act has dispensed with a previous requirement that before we can prosecute in a case of bribery and corruption, we have to have the consent of our Attorney General. That's gone. And now it will be a matter entirely for our discretion as to whether or not we prosecute, or take another step. And the other possible step is to seek a civil

resolution of the problem, which does not involve taking the case to a criminal court. And I suppose, whether we take no action at all.

So there are those three factors open, because we do not have, and I wish we did, we're trying to get it, a deferred prosecution system, which you have in the United States. But we don't have that. What do I mean by a civil resolution? Simply this: I refer to a high court order, for the recovery of property obtained through unlawful conduct. So therefore, it has to go before the court and be approved by a judge. That's things like failing to keep proper accounting records, and the like. And the advantage, obviously, to a corporate of that particular procedure, is that it does not involve a criminal conviction, with all the consequences that flow from that.

The exercise of our discretion as to which course, of those three courses, we adopt, will depend on all the circumstances, but in particular, on whether a corporate, having discovered corruption, has reported it to us. That's one of the most important aspects of the exercise of discretion in this. And you know, sometimes it is suggested, well, there isn't much incentive for companies to self-report, because the chances of the Serious Fraud Office finding out for itself are slim. Well, I would only say that that is an increasingly dangerous approach to adopt.

Additional sharing of information between regulating authorities, greater cross-border cooperation, the work of our own investigators, and information from whistle-blowers, are all contributing to a considerably increased chance that we will discover ourselves cases of significant bribery and corruption.

And if we do find out, such conduct, which could and should have been reported to us, the disadvantages of failing to report are obvious. First, there would be less likelihood of us going down the civil resolution path. Secondly, even an investigation of a corporate will risk reputational damage to the company. And thirdly and obviously, a subsequent

prosecution conviction would inevitably lead to institutional damage. And while we could never guarantee, never would guarantee that self-reporting would lead to a noncriminal disposal, it would undoubtedly dramatically increase the chances.

And so I say in conclusion, we will be looking to use this act to come down hard on any companies with a sufficient link to the U.K., and who demonstrate an intention to take advantage of their own lack of ethical conduct, by obtaining competitive advantage over corporates who do behave in an ethical way. It remains to be seen how these provisions operate in practice. But it could never be said of this act that it failed to give us some effective tools, which we would use and could use, to combat the increasing menace of bribery and corruption. Thank you very much.

Q: Thank you, Vivian. (Applause) If you could just bear with us for a moment, we're going to leave plenty of time at the end for questions. There is something I should have mentioned at the outset, and let me just take care of this right now. Anyone applying for CLE credit should remember to sign the sign-in sheet at the registration table, and fill out the yellow evaluation form and hand that in at the registration table at the end of the program. And if anybody is standing in the back, I can't quite see because of the light, there are some seats up here, so please don't hesitate to come up. No one's going to jump over the table, I promise.

Vivian, thank you very much for a very clear presentation. We do have a few questions that I'd like to ask, partly because I know that we all want to hear the answers, and partly because I love to hear you speak. But one thing you talked about, the Serious Fraud Office being sympathetic to some of the grey areas and the uncertainty in the act, does remind that, when I was with the government, what the reaction was of people when I'd come to them and say I'm with the government and I'm here to help you. (Laughs) But it does sound like that. Let me ask you, as sort of a basic

example, because you said there would be many scenarios, but let me give you a very simple scenario to see if we can understand the scope of this act.

If we have an American who's working down in Venezuela, for an American company, which has a fair amount of presence in the U.K., something as simple as that, American company, American working in Venezuela, company has a lot of activities in the U.K. And that American in Venezuela makes a bribe, or receives a bribe, either one. What does that mean to the company, and what does that mean to the individual under the act?

VIVIAN ROBINSON: Well, as far as the individual is concerned, I can't envisage that we would regard the individual as being somebody who would come under our jurisdiction. Unless that individual had some connection with the U.K., which would be as I think I said earlier on, at the very least, being resident in the U.K. so I don't have a problem with that. Insofar as the corporate is concerned, I think we would only be interested in the corporate if any part of the bribery had a direct connection with the U.K. We're not interested in something, we're not trying to be the world's policeman on this, although some people might think the act gives that impression. I do not think in those circumstances that we'd go for the corporate.

Q: So, Vivian, if the bribe were funded from a U.K. bank account, or the books and records that keep track of the flow of funds are maintained in the U.K., would that be sufficient connection?

VIVIAN ROBINSON: In my view, it would.

Q: Now, one of the other things about which you spoke was the possibility that a corporate entity could actually commit the offense of bribery, and it can also commit the offense of failing to prevent bribery. Could you explain to us the difference and the impact of those two possibilities?

VIVIAN ROBINSON: Yes. The law will still remain that the corporate could only commit the offense of bribery if it has been committed by one of its employees who is sufficiently close to the board level to be regarded as part of

the directing mind. The directing mind principle still applies to that. It's important to put that on one side from the corporate offense, which has nothing to do with the directing mind. The corporate offense is a completely different concept. Of failing to take proper precautions. Very important to remember that the old law will remain in force with regard to directing mind, that will. Failure to take adequate procedures has nothing to do with that.

Q: Okay, and now we've talked a little bit about, or you've spoken a little bit about presence in the U.K. So again, in my example of an American company having a presence in the U.K., or carrying on business in the U.K., could you explain to us what carrying on business in the U.K. means? Does it mean having an office there, does it mean having operations there? Is it less than that?

VIVIAN ROBINSON: This is one of the difficult areas where we're feeling our way as well. First of all, as a matter of common sense, one can say straight away that having a business in the U.K. may be clearly a case with certain entities. I think that we're going to need some guidance on the interpretation of this in due course, from the courts. But what I would say is it's terribly important for present purposes, and because I think the courts are going to construe the acts as wide as they possibly can, that if you have any doubt about it, assume it is. For the moment. I can't give any more help, I'm afraid on that question, than that. Because it's one of the most difficult areas that this act throws up.

SANDY WINER: Okay, Vivian, when there is activity in the U.K., do you expect to receive any assistance in gathering evidence that may exist in the United States, from U.S. law enforcement authorities?

VIVIAN ROBINSON: Absolutely. It may interest people in this room to know that we are in virtually daily communication with the Department of Justice. Virtually every day, we exchange views, information. And help one

another in relation to our investigation. So the answer to your question, Sandy, absolutely.

Q: Vivian, perhaps one other thing, and then we'll move on, and as I say, we'll have plenty of time at the end for more questions. Because I'm sure we all have more questions for Vivian. But one of the things you said was that a corporate entity can be exposed by the conduct not only of its employees, and agents, but perhaps by its business partners or contractors. And the question is, how far is it anticipated that the SFO would expect a corporate entity to go to get comfort that its business partners, not an employee or a contractor with whom it does business, is acting in a proper manner?

VIVIAN ROBINSON: I have two comments to make about that, and the first is, we would only expect people to make reasonable inquiries with regard to those people with whom it does business.

Q: That brings to mind the phrase, 'reasonable people can disagree.' (Laughs)

VIVIAN ROBINSON: Right, of course they can, absolutely. And again, some of it's common sense. If in doubt, ask us. If you have a particular scenario which comes in the category of the question that you have, come and ask us. And we will say whether we think that is something which is sufficiently close for us to take action on. And I want to mention one other thing: we recognize that different companies have a different ability to be able to make the necessary checks. The large multinationals have the resources and the ability to do things which the smaller and the medium-size companies may not do.

And therefore we're not setting a gold standard for everybody. We are looking at every individual case and we are saying bearing in mind the size of this particular corporate, bearing in mind what it's reasonably able to do, and I think the word 'reasonable' is a perfectly appropriate one to use, despite the cynicism that's poured upon it, providing they've done everything that can be reasonably expected of them, we'd be satisfied. But the important thing

is for them to engage with us, and ask us questions. Rather than take a chance. I think taking a chance is a very dangerous thing to do in the modern concept of bribery and corruption. So serious that people must take all the steps they reasonably can.

Q: Okay, thank you, Vivian. We'll come back with some more questions, but why don't we move on to Neill, for Neill to give us counsel's perspective of the act? I think as Vivian said, he was the bad news guy, and I guess Neill is the good news guy.

Neill Blundell: Yes, hopefully, maybe. (Laughs) Good. Okay, well, it wasn't long ago that I was speaking to U.K. companies about the threat from the U.S. That was the sort of area that we worried about in the U.K. It seems not that long ago. And so to be standing here in New York this morning, and having been in the U.S. probably for three weeks already this year, talking to U.S. corporates about this new legislation, my goodness, the world's moved on.

And it's moved on quite significantly, because corruption is, in my view, the hot topic. I spoke to the General Counsel of a very large U.S. corporate in February, and they said to me, Neill, the number one risk for us now is the corruption risk. It terrifies us. It's the one thing that I wake up in the middle of the night sweating about. And I imagine that there's several of you here who may share those feelings, because when we listen, and I know Vivian, and I'm not going to be critical at all of the SFO's approach, so anything I say, Vivian, please scratch from the list and don't hold it against me back in London.

But that the reality is, there's lots of what we've heard this morning, grey area. And that applies to U.K. companies as well, because we're having to advise them, and they're saying, my God, what do you do about gifts and entertainments? Oh, we're prescriptive. Is our golf day now canceled? Can we fly someone in to inspect a facility? For a public official, it terrifies me, we're all going to prison, is it all over? Is the world as we know it, are we pulling out of Korea, are we pulling out of Nigeria?

So you are not alone. And interesting, if you go to France, it's like blah, who cares? What do we need to worry? (Laughs) You come to America it's like, my God, we got to do something, this is serious stuff. But the one thing that I've seen, having worked in this area for 15 years, is that there is a significant change. And when we talk about, we'll have a look at the SFO in a minute, this new touchy-feely SFO terrifies me. And every time I go into Elm(?) Street to see Vivian or Richard Alderman(?), the director, you know, I'm always slightly nervous, you know? Hi guys, you know, smiling, and they smile back now. They didn't used to smile two years ago. They used to have the shutters down.

With those conflicts and global mandates, I'm going to cover off a few things that we've already looked at, but I just want to do it in a way that hopefully will bring it alive for you a little bit. So conflicts and global mandates. We've got the U.S. in daily contact with the SFO. Desperate to tell them about U.S. companies, with U.K. connections who might be up to no good.

And we've got this new concept of global settlements. So you've got a U.S. company, with U.K. operations, it's got a corruption issue in, let's say, Nigeria, bingo, they need to start as a corporate, thinking about risk in Nigeria, in the U.K. and in America. And more recently, we've had problems in the courts, which I'll look at, where the U.K. courts have been saying well, you can't just make agreements with the Americans and come up with figures and come and tell us what they are; we're not happy with that. So we'll have a little look at that.

Agencies now geared to enforcement, absolutely. For those in the financial services sector here, the FSA has already, in the U.K., the Financial Services Authority in the U.K., has already been taking action for the first time, for what are perceived as bribery acts. So we look at what happened with Aeon(?) in the U.K., it couldn't really be prosecuted. Too difficult, because the law wasn't there. So they went after them on a regulatory penalty. The first

ever bribery penalty that the FSA imposed on a corporate. So we're seeing big changes in the U.K. And as I say, this touchy-feely sort of link with the U.S. as well.

Okay, well what happened? I was probably asleep, I missed it all, because in December, 2007, I missed the setting up of the overseas corruption unit at the City of London Police. I'm sure it appeared in the business press, you know, a little bit of a column in the *London Times*. But that was quite significant, because this is its own little police force that reports into Vivian's guys at the SFO, and it just looks at what corporates are doing overseas. It wants to find out. So we've got a dedicated force.

And then very, very importantly, this new management at the SFO, in April, 2008. Richard Alderman took the helm of the Serious Fraud Office. And shortly thereafter, I was sitting in my office in Eversheds, in London, and my secretary came in and she said we've had a call from Richard Alderman at the Serious Fraud Office, he'd like to see you. So I said, Well, I don't necessarily want to see him. What does he want to see me about? (Laughs) So she said I don't know, he just said he wants to see you.

So I said, Well, just ring back and find out what he wants to see me about. My goodness, I'm already planning up my list of who was going to represent me. Anyway, she rang back and she said, He wants to have breakfast with you. Wants to have breakfast with me? And you know, I've never, ever in, at that stage, 13 years in practice, been approached by the SFO. So I went off and had breakfast with Richard Alderman, and what a very nice guy he is, too.

And he had porridge, I hasten to add, and bananas, and I had the eggs, bacon and sausages and all the rest of it. But.

Q: Who paid? (Laughs)

Neill Blundell: He had to pay, he wouldn't let me pay. But the message that he was sending was we want to talk to your clients about bribery

and corruption. Ooh, why? He said, Because we're introducing this new system of self-reporting. We want you to tell us when they've done wrong. Blimey. (Laughs) Wow, you know, very, very different. You guys in America are used to it, you're clamoring at the door of the SEC and the DHA, telling them everything. But in the U.K., you know, if I go to a corporate and say let's go and see the Serious Fraud Office, they're like whoa, you know, no way.

So it was a very, very new approach. And then something else occurred in 2008, which was the ability, for these civil recovery orders, which you'll see at the bottom, I'll just say that now, and then we'll cut it off in a minute. We then get self-reporting guidelines issued, so they're telling us in documentary form, when we should come and talk to them. So there's, again, this open door touchy-feely policy, what's the purpose of that? Well, the purpose is if you're good, as you've heard, and you're a sensible corporate and you show that you've dealt with the issues and it's not inherent, and you've been really, really good, then they'll consider something other than a prosecution.

Now, we look at penalties, what can harm you with a prosecution in real terms, apart from the P.R.? Well, you could be debarred from bidding for public contracts in Europe under the EU Public Sector Procurement Directive. So it becomes quite a significant risk, because if you do business in Europe and you do public-related business in Europe, well, getting those grey areas wrong and being prosecuted for failing to prevent, and not having your adequate procedures, my goodness, it could have a massive impact on where your business can operate.

It could cost people their jobs, it could certainly lead to a shut-down of various sections of it. So behind it all is a very, very serious point, which is you can't afford, as corporates, to get it wrong. You've got to be looking at it. So what happened? Balfour Beatty(?) were the very first out of the hat. So they went to see them and said, We've had problems with a project in Egypt. Involving a subsidiary there. And there's been a bit of naughtiness, but

we're prepared to accept that there was some accounting irregularities. The SFO say yes, we're happy, I think they shut the division down since then, and they go off to the high court, they get a slap on the wrist. It's not a criminal prosecution, so you can't be barred from your public contracts, that's the important thing.

So they took control of it and they persuaded them to do something else. So why are civil recovery orders important? Because if you're thinking this global marketplace, then there may well be a situation where you, as corporates, are not only going to report your actions here, in the United States, but on the same day, going into the SFO in London to say, This is what's happened. Yes, it's affected our U.K. operation, or steels(?) have done in London. We want you to appreciate what we've done. To put our house in order. And what we're doing. And we want you, Vivian, or Richard, to smile kindly on us and deal with us in a way that's going to allow us to continue. At the same time, it's going to sell your anti-bribery message.

So that's why they're important. I make a case that I'm involved in at the moment, involves a project in South Korea, over the building of the Inchon Bridge, in South Korea. And again, we're looking at accounting irregularities. Interesting thing here is that the corporates got away with the civil recovery order, in the same way that Balfour Beatty did. But Balfour Beatty, there were no prosecutions of individuals. I'm representing former directors who are being investigated at the moment there.

So the SFO, even if they're going to treat the corporate kindly, won't necessarily treat individuals kindly. So we've talked about that a little bit, I know. Okay, so there's still some prosecutions. Maybe in Johnson(?), a big bridge manufacturer, they self-reported. But the SFO weren't having any of it this time. No, off to court they go. They're convicted and fined. So again, when we look at, say, if anybody's here from the farmer industry, we look at the

leniency provisions that you see within the U.K. acts, in relation to price fixing or cartel allegations, very different here.

You're actually at the whim of Vivian and his team at the SFO in deciding. So actually getting your initial approach right, presenting yourself in the right way, having the right team behind you in doing so, could be very, very important in the way in which you're treated. And we had Robert Dugal(?), who's the first individual, actually jailed for overseas corruption.

Well, I'm just going to mention something here, because I mentioned to you before this idea of global settlements being a problem. Well, the U.K. courts haven't been, I would say, unhappy with the SFO, but they've certainly been a little bit critical about the way it's done things. And there's going to be a little bit of bedding-in time, I think as Vivian's alluded to, as to what and how the SFO can behave in dealing with its foreign counterparts in reaching sort of deals and agreements.

But in both cases, they got a little bit criticized; in Interspec(?), the Lord Justice Thomas(?) said the director of the SFO has no power to enter into arrangements (sic) made, and no such arrangements should be made again. In other words, they weren't happy that the courts were being told what penalties should be imposed. And there's obviously going to need to be judicial guidance around that. I think in two years' time, we'll be looking at a very different world, and I think this will all be ironed out.

Q: So, Neill, we have something that goes on here in the United States from time to time, called the Deferred Prosecution Agreement, which essentially is an agreement between the government and a prospective defendant. Is there something like that in the U.K., or that is not possible?

Neill Blundell: No, at the moment. Do you think, Vivian, it will come in, are you going to lobby for it?

VIVIAN ROBINSON: We're certainly lobbying for it, in a very big way. And we've got most of the pieces, most of the component elements of the

Deferred Prosecution Agreement. What we don't have, and I'll be corrected if I'm wrong, in this audience, is that I understand that in a Deferred Prosecution Agreement, the company has to in fact, make a written admission as to fact as part of the agreement. And that if, over the period of I think, up to five years, isn't it? The conditions of the Deferred Prosecution Agreement are broken, then they can be brought back and indicted for the offense. And they have very little choice but to plead guilty, because they've already made the written admission. Now I hope, have I got the basic ingredients?

Now, that is something that we haven't got. And the only way we're going to get it is by primary legislation. And we'll have quite a struggle getting it, because the judges are so keen to make sure that they have a handle in the U.K. on everything that happens, that's why what Neill has just been saying about the criticism at Interspec, and the other case, they were critical about the language in the documents that we were putting before the court, setting out the agreement that we'd reached with the defense. Because they perceive, the judges, that we were telling the judges what the sentence should be. What the judges say we should have been doing is, this is the range of possible sentences, up to you, judge, what you impose. But don't tell us that somebody should get a suspended sentence, or two years imprisonment. You tell us what the range is, and what the guidance, and we'll make our minds up.

We've got to get the judiciary in the U.K. to the idea that there's got to be much more, and I'm saying this, and I make no apology, there's got to be much more understanding by the judiciary, I think, about the reality of the situation. And therefore, yes, Deferred Prosecution Agreements are something which we would like to have.

Neill Blundell: So it's another sort of grey area. And again, a bit alien to Americans to think, my goodness, you can't tell us what penalty may be imposed if we go down the route of pleading guilty, or indeed, going down other route. So it's harder, I think, for us, as U.K. lawyers, to give any sort of finality to

a situation that you might have had, being as a corporate. Probably easier for the guys here in the States to be telling you what penalties may well be imposed on a corporate here. But much harder at the moment, and not helped by the judiciary, as you've just heard.

SANDY WINER: Neill, I'll just drop a footnote there. I think in the U.S., things are shifting just a little bit, as Judge Raykoff(?) and now Judge Ravel(?) have questioned the SEC about the proposed penalties that were to be proposed, pursuant to agreement. And so there is a little bit of movement by our courts to question whether or not a regulatory agreement is going to be acceptable.

Neill Blundell: Thank you, Sandy. And then, of course, the new Bribery Act. So everything I talked about before has happened without the new Bribery Act. So the new Bribery Act just reinforces everything that's gone before. So really, apart from the investigation, the failed investigation, really, into BAE, and the connections with the Saudis, not a lot was going on in the U.K. There were no prosecutions. And then all of a sudden you get the new unit set up in 2007. The new team coming into the SFO in April, 2008. And we suddenly see a dramatic, dramatic shift. And now we have the birth of the Bribery Act, the child of all of this that's gone on. And it's going to be interesting to see how the grey areas are dealt with by our judiciary.

Okay, the U.S. threat is very, very significant. Because as you've just heard, they work very closely with the SFO. So as a U.K. corporate, I think, and it's my view, and it may not be shared by Vivian; I think it isn't. But it's my view that if you are Richard Alderman sitting in London, and say you've got a massive defense contractor with operations in the U.K., based here in the U.S., though, and there's a big issue in China over fighter jets, and the counterpart in the DOJ rings Richard and says, Hey, you know, got some really interesting stuff here, involves in part the U.K. I think we're going to see a joint investigation beginning immediately.

It makes it very easy on their resources. They do not have to be proactive; they can actually be reactive to the information that's provided. Now, I'm sure it works both ways, and I'm sure as the SFO developed, their own inquisital way of investigating, they will share back as well. But I can see that it's quite a gift, this corporate offense, because all you've got to show is that this bribery's occurred. So it puts them in a really strong position to cause some havoc for that corporate, in the U.K. And so I think that's a sort of risk area.

Q: Neill, do you think the Dodd Frank Whistle-Blower provisions are going to contribute to assistance to the Serious Fraud Office?

Neill Blundell: I love it. Yes, I mean, we've had our commentators talking about it, but if you're a director of a company in the U.K., has operations here in the U.S., and you know naughty things have been going on, my view is don't go and tell the SFO (Laughs) at the moment, 'til they've got the powers to do the same. Hop on a plane, come out to Washington, and then sign yourself up. Because if they get their $400 million penalty, they're entitled to up to a third? So it's got to be a risk. They don't need to be a U.S. national at all. So I think there is a real transatlantic coziness going forward.

In my view, the Bribery Act, I mean, Vivian's heard me say this before, but I'm sure that one or two members of the SFO came to Washington, were shut in a room, hypnotized, told bribery was wrong, it's wrong, everything's wrong, and then they were sent back on the plane. And the result was the Bribery Act. I'm sure of it. (Laughs) Definitely. It definitely has the U.S. written all over it.

And I remember when I sat with the head of outreach, then, who he won't mind me saying it, because he said it, but a guy called Bob Evans(?) at the SFO, he said, Neill, when will corporates get it in their head, bribery's just wrong? And when he said it, in his English accent, I could just hear

this American twang coming through. (Laughs) So it seemed he had been hypnotized out here.

But we're seeing other things going on here, aren't we, in the U.S. here? Reorganization of the SEC Enforcement Division, I won't go through this. But there's a risk here. And so we talk about those individuals involved in the U.S., potentially, in bribery and corruption, and how it could link to the U.K. And you may have problems there. But I can see the sharing of information between the two. So it doesn't mean necessarily that individual is going to end up in prison in the U.K., they may end up in prison in the U.S. (Laughs) All sorts of things could happen. So it's an interesting thing, and it will be to watch this space again, and see how it develops.

Okay, now I've done this deliberately with some asterisks, just to show European companies and those that involve the U.K. authorities. So you'll see seven out of ten there involve European companies. And two specifically have U.K. investigations in as well, which you'll see on the right, BAE and Interspec.

Now, I'm wondering whether I come here in two years' time, and I'll have a U.K. Enforcement recent cases, asterisked with American firms, being dealt with in the U.K. I just wanted to highlight that, because I think from the U.K. perspective, they're already there. They're terrified of the U.S. And now, for the first time, there's a real fear the other way. But of course, what's really going to embed that fear and make corporates behave sensibly, in particular get the systems under control, is when people like Vivian and the SFO actually take these actions. And they can show some victims, I think in due course. So we'll have to wait and see how proactive they are, and how they achieve that.

I've just put in the figures for Siemens. Of course, legal and accountancy costs were, or are, horrific. Unfortunately I don't represent them, otherwise I'd be on my yacht somewhere, smoking a cigar. (Laughs) But

you know, I've heard figures up to nearly a billion pounds in fees. On top of all of this. On top of the most awful publicity, share price being knocked every time there's an issue, degorgement of profits, debarment in independent monitor. If it goes wrong, it can go very, very badly wrong. And in this new society of global investigations, it's a scary prospect, I think, for General Counsel.

Okay, just very briefly, you heard it's coming in next year, you've got the dates in the slides there. It's not retrospective. They have issued, which I will talk to you about, Marc from KPMG will also have a look at, this idea of what would be inadequate procedures. But again, there's this grey area, isn't there? It's principle-based, it's not prescriptive, it just says these are the areas you should look at. It makes it very hard for corporates. Particularly, and I'll share some stories with you in a minute, particularly when it is difficult to do business in certain parts of the world. We won't be evangelical about it, but there's a reality sometimes to doing business in Vietnam or in Nigeria, or other jurisdictions.

And actually, this law may make it, for the zero tolerance organization, very difficult for them to do business in certain jurisdictions. Now, maybe that sends a message to those jurisdictions. Maybe if big corporates pull out, the governments of those jurisdictions will do something about it. Maybe they won't. But the issue for you, going forward, is how do you protect yourselves from nasty investigations? Going to be difficult.

Q: Let me ask a question about this consultation period. I mean, here in the U.S., take the SEC, for example, they propose rules, and they ask for comments. And then after evaluating the comments, they adopt final rules, under which people have to act, or they violate the rule. What we have now is, if I understand, sort of preliminary guidance. There's a consultation period where people, I guess, will make their comments, and then there'll be a final guidance. What does that mean? What does that mean (Overlap)?

Neill Blundell: Well, it basically means that they've decided at the moment, the areas around, the principles around which you should develop your anti-corruption program, and because the government wanted to allow a period for businesses to consult on it, I mean, loads of businesses have been consulting already, to be fair. I mean, I sit on a working committee for the CBI(?) in London, and we have been feeding in our views on adequate procedures for the last year. So it's something that's going on.

At Eversheds, we're putting in a big document of observations in relation too, but I don't see it dramatically changing, because it's not prescriptive, it's principle-based. (Laughs) So what are you going to change? You're going to say, oh, you don't need a program of policies; they're not ever going to say that in a million years. So I think that it may give an understanding to the Ministry of Justice and to the SFO and to others, about issues that businesses have. And where they're going to struggle. But I don't think it's going to change dramatically what comes out in January in finalized form.

Q: Okay, well, when it comes out in finalized from, Vivian, we now have final guidance from the Ministry of Justice, is that a safe harbor? Okay, companies, if you do that, you're okay?

VIVIAN ROBINSON: Yes, I mean, it's going to be a very good indication of what companies should have in place, but I think everybody involved in this particular adequate procedures area is united in this: it's absolutely essential that companies should regard adequate procedures as a simply tick box procedure. Obviously there are certain fundamentals that any company should have in place, and what strikes me as being almost consistent throughout all of the material that there is out there, is the similarities between it. There are certain things that are just professional obvious. You've got to have a policy, you've got to have a code of conduct, you've got to have it filtering up. All of those are givens. No question about that.

So I think the important thing is that companies should look at all of this, make sure that they've got this structure in place, at least as a minimum, but not, as I say, regard it as tick box. Because the important thing is to make sure, in any company that there is a culture which goes from top to bottom of the company, which makes sure that everybody is striving to adopt procedures in which bribery and corruption are less likely; you'll never obliterate it, but less likely to occur. Don't be rigidly bound by the guidance. But the guidance is there, as I would say, a bare minimum.

Neill Blundell: Thank you, Vivian. I've put this up just to say that I, although it's not termed in the app this way, I call it active and passive bribe, and the general offense of the giving or receiving, or the offering to give or the offering to accept (Audio Dropout) your copies there, because it's the general offense and the specific offense that affect only companies that are incorporated in the U.K. So they affect U.K. incorporated companies. The corporate offense affects all companies, wherever incorporated. So there's a distinction, which we'll see, and I just want to cover it again, so you'll really understand individual liability here.

There is a difference between the way in which those different offenses are treated. But when we talk again, about the perception of Parliament, it deliberately made that corporate offense to capture foreign incorporated entities that do business, or part of a business, in the U.K. What was in the perception of Parliament at the time? In my view, that means companies who don't necessarily have an office, but are flying in; they're generating business out of the U.K. They're in there, they're marketing, they're doing stuff. In my view, at the moment. And I'd be surprised if that isn't the view that's taken in due course, because it wouldn't make sense otherwise. You might have just sort of kept it as U.K. incorporated entities.

Now, of course, it's wider. In your pack, I've put in an Eversheds document, which gives you the main differences between the two.

But of course, what's important, I think, from your area, is it covers all trading. So where FCPA policies fail will be in relation to commercial to commercial transactions. It does not matter who it's with. It can be between two corporate entities; that is fine. It is cool. And that is the distinct difference between the two.

And that is the one area, if you think about it, the DOJ could send information across to the U.K. and say, well, we can't deal. This happened, but you can deal. We'd like you to deal, because you've got the ability to do it, and it involves one of our corporates with entities in the U.K. committing commercial to commercial bribery. Well, look at facilitation payments as well, because I just want to read this, because it was a quote from the SFO on it. And it said, 'Any facilitation is unjustifiable, and should be removed, because these payments cut across transparency and openness. They also render a corporate more vulnerable for demands for larger bribes. They are a major contributor to the belief that bribery is a necessary part of business culture.'

Well my goodness, that's pretty strong, isn't it? If we think about the, again, evangelical approach taken to facilitation payments, that's a really strong quote saying, my goodness, you've got to get your house in order in relation to facilitation payments. I'll give you an example of a story that I heard, and it involved a corporate in India. And the client was unhappy because they paid facilitation payments, and they kept being stopped at these bridges to pay them. And it was causing holds-up and they kept having to come in.

Meanwhile, their main competitor was able to drive across the bridges. Now, they were really knocked off, because they were convinced their competitor was paying a significant amount more to allow the free flow. Actually, when it was investigated, it turned out that they weren't paying any facilitation (Laughs) payments, and they had a zero tolerance to it, which meant they weren't stopped at all because there was no point. Because there wouldn't be any money given.

And so this corporate was dealing with it in slightly the wrong way. Now, Vivian talked about corporates getting together. Now, that can be very difficult, depending on the sector you're in. You won't find many, for example, defense contractors sitting down together saying, Jesus, we've got to sort this problem out. There's all sorts of secrecy provisions, you go anywhere near your competitor, you're going to be shot, you know. There's that.

So there are difficulties around it, but I think there's a genuine desire, and I understand the desire from the SFO, to say there must be a way around it. Lobby in India, lobby in Korea, lobby wherever it is, stop this happening. And again, we'll have to see whether that is realistic, and whether corporates can stay in those jurisdictions. And I do see facilitation payments as a major problem.

I've put some scenarios in; they're very obvious, for active and passive bribery. They're not necessarily bribery, but they could be. But I think anything that involves holidays, involving family. Interestingly, your agent in Korea receives increased commission so that he can help secure business with Tips of Happiness(?). That, to help secure business with Tips of Happiness, is a direct quote from a Turkish minister who was asked to comment on bribery and corruption. He thought, actually, bribery helped secure business with Tips of Happiness.

And was happy to say it. My goodness, you know, country sitting right on the edge of Europe there. With a very different view. And these are the countries you're doing business in. You know? There's the real difficulty. Here we get a facilitation payment, and here we have the consent and connivance provisions. And again, do you remember I talked about the general and specific offense? That's where the consent and connivance comes in. So you're a U.K. resident or national, and you are ignoring stuff that's going on. Maybe a whistle-blower. Maybe systems aren't in place, adequately in place in your U.K. subsidiary to deal with allegations.

You have a head of HR who sits on this complaint, it says I think this is happening. They mean to do something; they don't. The activity continues. Six months later, the SFO come knocking. Oh, dear. That person has put themselves individually in a very, very difficult position.

Q: Neill, the way a lot of U.S. regulators look at this is they say, well, a senior manager received a red flag, or had a red flag occur, such as a huge increase in business in a market that is known for corruption, and he did not seek to find out how it was that this business suddenly increased so dramatically. I mean, do you expect the SFO to be saying that that would be consent?

Neill Blundell: That sounds like. Yes, I do.

VIVIAN ROBINSON: I think that kind of an indication would certainly be one which we would investigate, and if the situation was that the corporate hadn't taken steps, we'd want to know why.

Neill Blundell: Yes, and you call it willful blindness, don't you, in the U.S.? Am I right?

Q: And in terms of this information coming to the attention of a senior officer, of a company, what's the exposure of that senior officer, individually?

Neill Blundell: Well, if they are a U.K. national, or resident in the U.K. and they do not act on it, then potentially they are criminally liable for failing to do something about it.

Q: And if they are not a U.K. national?

Neill Blundell: Well, then they're okay, because again, it comes under the specific and general offense.

VIVIAN ROBINSON: That's exactly right.

Neill Blundell: I just wanted to set that out for you, in that way. That you could see, rather than the corporate offense. But it doesn't prevent, see, you could have a situation where the U.K. subsidiary's bribing on behalf of the U.S.

entity. So you end up with individuals in your U.K. subsidiary being prosecuted, including under the consent and connivance provisions, and the U.S. entity ending up in difficulty in relation to the failing to prevent.

So you know, it could cause; it's not a get out of jail free for the U.S. company at all. Okay, I'll just put some passive bribery examples in there. As the receiving of. And just to reinforce, again, what I've just said, personal liability, and I've put it there, for the general and specific offenses. So when you go back to your offices, you can just remind yourself about that.

And here's, again, the failing to prevent. The failing to prevent is about active bribery, not passive bribery, okay? It's all about active bribery. And the only effective get out of jail card is having adequate procedures. But remember what I said about global settlements? And remember when I talked about civil recovery orders, and Vivian mentioned them. If you have an issue, as a corporate, you're going to have to weigh up, can we satisfy in adequate procedures? Are we better in trying to go down the civil recovery route and avoid the prosecution that way, or are we better defending ourselves entirely by saying, well, actually we've got adequate procedures in place?

I don't know how that will pan out; we'll have to see. But obviously the civil recovery route may well be a preferred option in due course.

Q: Vivian, on adequate procedures, are you expecting that corporates are going to, in addition to disseminating policies and procedures, have to engage in active training of their employees?

VIVIAN ROBINSON: Absolutely. I mean, that is one of the fundamental things that we would be looking at. Two things about employees. That they are vetted properly before they come into any company. And secondly, that there is a continuing process of training, which applies right the way across the board, from top to bottom. Not just the employees, the people on

the ground; training as it applies to senior management as well. And you will notice, when you look at all the material that there is out there, including the Transparency International Document, which I comment to anybody, because it's the best document that I have seen; it was published in July, setting out what companies ought to be doing in anticipation of this. They all say training is absolutely essential, from top to bottom. And that's one thing that we would be looking at, is the culture in this organization, is it filtering down from the very top?

Q: So if I trained people in April of 2011, I'm good until 2030 or 2040? How often do I have to do this training?

VIVIAN ROBINSON: How long is a piece of string? I mean, one has to be reasonable about it. I mean, no question about it, I don't think we'd set down any specific timing, but it's just a matter of being sensible about it.

Neill Blundell: I was going to say, we have developed an online training that could be run out to a complete organization. But even with online training, and we showed it to the SFO, in their touchy-feely open door way, and had coffee up there and showed them. And they liked the tool, but of course Richard Alderman made the point, well he'd still expect face-to-face training for those people who are at most risk. And just an example, I'll tell you one story. I came over here, dealt with the U.S. corporate, helped them revisit their policies, we talked through lots of issues and did training of the board in the U.S. We then went back a week later to the U.K. and trained procurements and sales staff in the U.K.

Now, the General Counsel, and Head of Compliance, were both very happy that they had everything in order. And in fact, they're a very good organization, got everything looking really good. And a little chap puts his hand up and he said, Well, in relation to tendering processes, you know, we've all worked at our competitors, and it's fine if I take out the person at the other organization, even during the tendering process, if I pay. And I don't

charge the company. And you know, this smile on the GC's face went very quickly. They drained, the color was like, oh my God.

But what it did do is it highlighted a risk that they didn't think they had. (Laughs) So they were able to say, No of course not. You're always acting for the corporate, you know. It just highlighted and allowed people to talk back in a way that an online training product wouldn't do. So it is worth revisiting what you do. I would say when people come into an organization, it's useful for them to have the online training product, because it sets out, at the beginning, the ethics of the business. Has a message from the CEO. And it goes into the sort of scenarios that may impact them in their particular sector.

But then, on top of which, it should be reinforced. Because you'll never prevent bribery entirely, but you can minimize it. And you need to be able to show what you've done. An online training with a test at the end is a very good way of showing that those people understood that it was wrong. Okay, we did our corruption clamp-down survey, of U.K. directors.

Q: This thing about not being able to prevent it entirely, so if you go into the SFO and say to Vivian, Vivian, listen, we've done really well, our bribery cost is down from several hundred million dollars down to a couple of million dollars a year. Is that going to be okay?

VIVIAN ROBINSON: Oh, we'd be very impressed by that. (Laughs) I think it's a question of degree. You've got to be very careful to do all you possibly can. You're never going to completely reduce it, but if you come along with figures like that, I think we'd be much more sympathetic than if you came along with no figures at all, or no indication that you were trying to do anything.

Neill Blundell: Okay, just out of that, you heard about Sandy mentioned the 55 percent not happy that their systems were up to scratch. We had 45 percent admitting no systems (Inaudible) bribery and corruption. Out of that 45 percent, there were some who didn't even know they actually had policies; they weren't rolled out. Now, that just shows how far the U.K. have to

come to catch up with you guys. So actually, for you guys it's about upping the game slightly; from the U.K. perspective it's about entering a completely new game altogether.

Okay, here we get it. This is the easy, this is it, this is the answer. You can all go away now, happy that you can cover it. You just need to risk-assess, top level commitment, due diligence, clear practical accessible policies, effective implementation, monitoring review. Easy. (Laughs) Everybody happy?

Yes, it's slightly harder. Let's look at risk assessment. It's a little game, have a little game with you, okay? Because I've spoken to clients and they say, oh, they say, it all happens in the Middle East now. Oh, yes, all the competitors are busy committing bribery and corruption. So what can you do about it?

Well, if you look at Transparency International's index of the most corrupt, and least corrupt countries, there's a few little surprises. And I think when you look at risk-assessing, you need to come out of the box a bit, and actually do it properly. And think actually how are we at risk, where are we at risk? So four(?), and I bought Cadbury's chocolate, which you know has been taken over by Kraft, which caused outrage in the U.K., although I've got to say my (Audio Dropout) eaten them. I had one on the plane and one subsequently in the hotel, which is why it's not a surprise today, so I've had to go to Hershey's.

But just so you know, Cadbury's chocolates still taste the same, even though our newspaper's convinced the entire public of the U.K. that once Kraft had taken over Cadbury's, they were all going to taste like Hershey's. The reality is they don't; they taste good. But I've got two (Laughs) ... prizes, two good American prizes of Hershey's chocolate. What is, according to Transparency International, the least corrupt country in the world? Anybody? No? Close.

Q: New Zealand.

Neill Blundell: There's always one, isn't there, who reads it. Absolutely, who is that?

Q: Singapore?

Neill Blundell: No, Singapore is in the top three, so you get, do you want almonds and milk chocolate, or just milk chocolate? (Laughs) Okay, and I'll give you an easy one, what is the most corrupt?

Q: India.

Q: China.

Neill Blundell: Anybody?

Q: Nigeria?

Neill Blundell: No. They're pretty bad.

Q: China?

Neill Blundell: No.

Q: Not India?

Neill Blundell: No, think of pirates.

Q: Somalia.

Neill Blundell: Thank you. Who got Somalia first?

VIVIAN ROBINSON: Oh, that was (Inaudible) three or four.

Neill Blundell: Oh I think we have one, oh I think definitely, we'll do that. Well, okay, you can share it. You can share. Well, okay, so that's pretty obvious, isn't it? Somalia, Afghanistan is the second to bottom. And so on. You know, it makes sense, doesn't it? We think everything, that's nice and easy. But actually, when we look, and I've written Al(?), Catarrh(?) and St. Lucia are in the top 25. In fact, they're joint 22nd, just behind the U.S. at 19, and the U.K. at 17. Israel in the top 32, Cyprus at 27. And Uruguay and Chile at 25. So we've got South American countries, we've got Middle Eastern countries, all up there in the top 25.

And then we have some surprises, because whilst I mentioned Uruguay being 25, Paraguay is 154th. It's basically just ahead of

Afghanistan, Somalia and others. Russia at 146. If we look at Western Europe, Greece is at 71. So you've got Cyprus at 27, but Greece at 71, well behind countries like Botswana and South Korea and others. So you can't simply say on risk, well it all happens in the Middle East or it all happens in Asia. Uh-uh. And some of those countries are pretty tough on bribery and corruption.

Probably aware China has the death penalty for it. And in fact, somebody was put to death in December. A Chinese government official was put to death in December. Now, we know the Chinese are interesting. We talk about this increasing interest, Rio Tinto in China. Being dealt with, directors going to prison. So you start realizing that actually, what the SFO are doing, what the DOJ are doing, okay, they may be slightly ahead, but actually it's about corporates protecting themselves and their employees from having these massive problems in different jurisdictions.

So when you're doing your risk assessment, do it properly. Consider it properly. Top level commitment's all about the board, all about ownership. All about having somebody that reports into them. I think the guidance says don't just have a board committee that deals with it; the board have got to have ownership of it. That means maybe board minutes have to have a section just entitled bribery risk for that period. Where that person reports into them at their board meetings.

Adequate due diligence. Clear practical and accessible policies. Rolled out. People must understand them. Effective implementation, monitoring and review. Now, let Marc have a little bit more of a go at those areas. But I just wanted to highlight a few things before I finish and hand over to Marc. The U.S. and Germany experiences show how rapidly the compliance landscape can change over a few years. Did you know that it was legal to commit bribery in Germany up to about 1995? And indeed, you got a tax break if you put it in your account. So a good 15 years later, how the world's changed.

Germany probably again, one of the leading nations in trying to deal with their bribery risk. The Americans, you guys all went mad after around 1998, in enforcing it. And waking the rest of the world up to it. Because of poor enforcement in the U.K., U.K. firms are only really addressing it now. But you've got to think around what are the differences, how can we do it in a nice, easy way? Most of you should be able to, because you are (Inaudible) of the FCPA compliance. Or should be.

So you're actually ahead of the game. It should be easy. And, as the act is broadly drawn, a narrow, technical compliance approach can't work. So take those points with you today, when you go. Just a few sort of points here of interest, I think. Materiality is irrelevant, because you've heard from Vivian, it's more facilitation (Overlap) come into the region. Don't need to worry about materiality. And you know, that's sort of obvious, I think.

And finally, remember about the monitoring and review? It's fine, having all these great policies, but if they're not checked, if you're not rolling them out, if you don't know where your risk areas are properly, if you're not ensuring that it's embedded right the way down, you're much more likely to have problems. Take, think around your agents. You know most overseas corruption cases will involve some agent. You know, understanding why you pay commission levels at the level that you do in the jurisdiction can be very, very important.

Again, I've dealt with cases like that. Where people say it's normal, we always have this guy. He's our main agent in this jurisdiction, always pays seven percent. And you say well, why are other agents paid traditionally two percent in that jurisdiction? Well, are they? Oh, he gets paid seven because he's really good and he gets lots of work. And it's, as they say it, the penny jobs, oh God, you know, jeepers, he could have a slush fund, oh my

goodness, that's why he's such a good agent. You need to think about these things.

When you look at charitable donations, and again, I saw one in an African country, donating to the wife of this government official to the orphanage, well, it's fine if you do some due diligence, but my goodness, make sure that money doesn't divert back out through the orphanage into their Swiss bank accounts, because I've seen that as well. Good intentions going wrong.

And when we talk about risk in different countries you probably remember the story about Prince Andrew and the lovely Sarah Ferguson, who spends most of her time in the U.S., I think. (Laughs) There he is, U.K. Trade and Industry spokesman, going out around the world. Technically a foreign public official isn't he really. And Sarah Ferguson, helping companies get meetings with him, for money. There we are, in the British Royal Family. Although the papers didn't concentrate on the bribery risk, there it is. My goodness, you pay Sarah Ferguson part of a fee to get business through Prince Andrew, there you have it.

A very obvious example, but one missed by British media, for some reason; they're much more interested in other elements of Sarah Ferguson's personality and why she's gone bankrupt. And I think a few wanted her to move to America, finally, so I think is she going on "Dancing On Ice" or something? I don't know. But anyway (Laughs), if she hasn't, she'll be on it before long.

But that's where I want to finish. I'll hand it over to Marc, to look at it. You're not alone. It is a changing landscape. The act isn't retrospective, you've got time. We've got Vivian here smiling and showing, as a prosecutor, that he's a kind, warm, caring person. (Laughs) And when we go and see him at the SFO, if we have to, he's going to treat people really kindly, who are really trying to get it right. So that's all the positives.

The downside is you can't sleep on it. You've got to check what you're doing. You've got to check your risk areas, and you've got to make sure that you are now ahead of the game in relation to it, because if you're not, if your board isn't prepared to buy in, and you get it wrong, then it's going to be the most expensive mistake probably, that a corporate can make in the next two to three years.

Q: Thank you, Neill. (Applause) Now Marc, why don't you come on up and talk a little bit from a compliance perspective, what this means in terms of the adequate procedures defense, to a claim of failure to prevent bribery? In a little bit more concrete terms. These are easy words to toss around, but what does that mean to a company? What do they have to do?

MARC MILLER: Sure, and obviously we've heard that the guidance and the adequate procedures do not provide prescriptive elements, and details associated with that, I think we equate that back to our U.S. Foreign (Inaudible) Practices Act, and that's somewhere of the situation where we've been. I think historically, we would look back to Deferred Prosecution Agreements, DOJ opinion releases, or U.S. sentencing guidelines. And then also to the OECD and some guidance they've given, most recently in November of '09.

But did want to talk about the elements that Neill introduced to us, and again, this is the adequate procedures in defense of the failure to prevent that Vivian laid out for us this morning. Again, this draft guidance does not detail specific measures, but rather, provides a principles-based approach. If I were to put my old CPA hat on, and it's got a lot of dust on it, but nonetheless, I'm sure everyone has heard about IFRS. Or your controllers and your colleagues in that space, really the U.S. generally accepted accounting principles has been rules-based.

So you would look at the text, and it would be at least this thick, with a lot of details associated with various different transactions. How

you would account for those appropriately. Walking through scenarios, and the like. And as they moved to IFRS, that too is principles-based. So you could, in some ways, understand how your accounting colleagues may be struggling with that change in their philosophy, as to how they account for the books and records. Financial reporting basis. But again, we'll get into the principles.

Do we have a wireless? Well, if we don't, you can see in the materials, I don't have many slides, and we'll try to move quickly.

Q: I'll change it, is this the one you want?

MARC MILLER: Yes, perfect. The U.K. government considers that procedures put in place by companies should be informed by these six principles, that Neill introduced. And again, consistent with the USFCPA and the OECD guidance, U.K.'s adequate procedures guidance is very much that, principles or guidance. The intent is these general principles should be outcome-focused and flexible.

Each organization should tailor its policies and procedures so that they are proportionate to the nature, scale and complexity of your activities, and therefore your risk that your organization has. So obviously from Company A to Company B, those principles and the details behind your overall compliance program will vary. From organization to organization, arguably, even within the walls of an organization, as you can consider different foreign subsidiaries and your personnel associated with what.

So I want to talk first a little bit about the risk assessment. Similar to elements stated within our U.S. federal sentencing guidelines and the OECD's November 2009 guidance, this should really come as no surprise, I think, to U.S. corporates. But it really gets down to how do you go about doing it.

Each of your companies face a range of bribery risks that must be assessed. This is done so that you are obviously aware of the different and current bribery risks in the markets in which you operate. A

decision needs to be made on oversight and responsibility. Typically what we see with our clients is the board has ultimate ownership and responsibility for oversight, and it will regularly meet with, and hear assessments and reports from senior management.

A decision also needs to be made as to who is going to perform the assessment. Does she have the adequate skills and expertise to perform that on her own? What kind of resources may be needed? And then ultimately you get into what are the different factors that should be considered? We've heard some about Transparency International and country perceptions. So, thinking about the countries in which you operate, local business conditions and customs. Look at your competitors. What is out there. What are your competitors doing as challenges?

How much dependence do you have on third-party intermediaries, both to get products and services approved in countries, and also on a sales and marketing side? I think at least from the U.S. perspective, most of the large enforcement issues are focused on sales and marketing, so to the extent you're utilizing third-party intermediaries, be it distributors and agents, to think about what kind of risks they bring to your organization.

And then ultimately we've heard before about training. And make sure that you're training the right people and you're training them on the right information.

Neill Blundell: Just get into one issue that I've seen raised with distributors, and obviously incentivization schemes, where you would incentivize them to sell your product over your competitors because the more they sell, they win a car or they win a holiday and so on. You're going to need to look very carefully (Laughs) at that, as to how that is set up. And I think, when we talk about grey areas, that's one of them. So if you are involved in that sort of activity, which I know lots of companies are, you're going to have to think through quite carefully how you do it.

MARC MILLER: Yes, and I think some of the shortcomings that we've seen at companies, when they've had to redo risk assessments? Is they did not give enough consideration at the talking to people out at high-risk locations. Talking to the people at the front lines, or actually dealing with day-to-day activities. And understanding what kind of issues and what kind of challenges, and therefore, risks, come across the organization.

Q: Marc, can you actually help companies by developing algorithms to assess risk quantitatively?

MARC MILLER: Yes, one of the things that a lot of companies are starting to do is, we'll get to it maybe a little bit with the last bullet there, monitoring and review, is helping them identify transactions that they may want to look at for testing. And to your point, applying maybe algorithms or scores associated with taking the full set of data, evaluating which transactions may be of higher risk, be it that if it's a pharmaceutical company, let's say, and they've finally penetrated a new hospital, look at travel and entertainment and other out of pocket expenses that may be incurred during the tender process?

Or how did they actually get into that hospital. And almost test the good information. So there's a lot of techniques that internal audit folks, compliance are starting to incorporate, data analytic's a key component of that. Moving to the second bullet here, top level commitment, I think this goes without saying, but the board and senior executives need to establish a culture in which bribery is completely unacceptable.

Some of the clients that I work with focus strictly on the Foreign Practices Act, and obviously that's U.S.-centric and focused on foreign government officials. As you've heard, this act makes that broader, and the U.K. act is not alone. Obviously local laws, many of which do not allow such things as facilitation payments. And obviously here with the U.K. Act, we're pulling in commercial bribery.

We've had cases in the U.S. where the U.S. has used the full arsenal of the penal code. I think Control Components is an example of that, where they saw domestic bribery, so Control Components not only had FCPA problems from the U.S. regulators, but also Travel Act issues, to pull in the commercial bribery side. Examples of what top level management should include in doing, in their exercise. Again, zero tolerance policy towards bribery in all parts of the organization, both direct and through indirect channels.

Clear explanation of the consequences that employees and business partners will suffer if they violate the corporate policy. Ensuring publication and communication of the company's anti-bribery measures to all employees, agents and business partners. And appointing, ultimately, a senior manager, someone in senior management, to have individual responsibility for both driving and development of the overall plan.

I think these points, too, if you would look at the firm prosecution agreements, even the COSO Framework, which is in many enhanced with Sarbanes-Oxley, these elements sit out there broadly. Due diligence, we talked about that some. Third-party due diligence, or background check screening has been a catalyst for anti-bribery enforcement around the world, I think for a couple of years now. And I think some recent proactive measures that we've heard from Robert Khuzami of the SEC, and obviously the DOJ, very involved in enforcement, that the actions of third-parties, I believe, has led to some of them being proactive. I think the pharmaceutical industry, again, is seeing that, with some things back in the spring.

VIVIAN ROBINSON: Yes, I was just going to say, when we look at policies, of course within pharma sector, we've got very, very strong prescriptive gift and entertainment policies, because they have to be.

MARC MILLER: Yes.

VIVIAN ROBINSON: Especially around entertaining doctors, and doctors traveling on behalf of the companies, and so on.

MARC MILLER: Yes. So the U.K. Act gets down and explicitly states that organizations should employ due diligence policies and procedures covering third-parties, everybody basically involved in a business transaction or relationship. Clearly that includes agents, it includes joint venture partners and the joint venture itself. Inquiries should include research of civil, administrative, criminal proceedings, reputational concerns, anti-bribery, corruptions measures in place at your business partner. Get an understanding of what do they have, what are their policies.

And just a word of caution, as many clients have tried to do that by Googling? I guess that's now a verb. But to Google that on the internet, and they think that's it. But there's certain parts of the world; China, India, where it's very provincial, it's very almost boots on the ground that you need to apply to do your sufficient diligence, to surface if there's anything untoward in the record of your business partner. Not only looking at the entity, if it's a distributor, but also the principles of the owner standing behind that.

Neill Blundell: I was just going to say don't forget, if you're acquiring a corporate, you're acquiring the problems that it has, so your due diligence in acquisitions needs to look very, very carefully who you're buying, who their third-party relationships are with.

MARC MILLER: Yes, and then moving to the fourth principle, clear practical and accessible policies and procedures, again, consistent with the U.S. Federal Sentencing Guidelines, COSO Guidance, amongst others, clear and concise. The policy should be readily available, it should be easily accessible and should be easy to understand. I worked with an attorney who said it's very much rules, guidelines, and give me some scenarios and examples, so my people on the front lines and out at foreign locations can really understand what is meant by this.

Q: Yes, Marc, let me ask you a question. Let's say you're doing business with a distributor of your product. Does the distributor of your product have to sign on to your policies?

MARC MILLER: I think the best practice is to educate your distributor of your policies, and have them certify that they will abide by them. Whether or not they need to incorporate that into their business, is probably a business negotiation to some degree. But clearly, I think the expectation is that they are made aware of your policies, and that they consent to agree to that.

Q: Vivian, do you have a view on that?

VIVIAN ROBINSON: Well, I was just going to say, I think the bare minimum is that they should be aware of what your policies are. If they are prepared to sign up to them, that's even better. But the minimum, as I say, is awareness.

MARC MILLER: So the act says the policies and procedures should reflect the various roles of different members of your workforce. You know, so think broadly, think of different examples. Some examples that the draft guidance, explicit statement prohibiting bribery in any and all forms, including a strategy for implementing this prohibition in the organization's decision making.

And actually an example included within that is whether or not you should modify sales incentive comp models to account for business lost when employees reject to engage in bribery activity. An interesting concept. Not one that I have seen companies adopt, but I wonder if that may be a good indication, because obviously you have sales reps out there who may be asked to pay a bribe, or may be engaged in that activity. And if they raise the flag, should they be rewarded in some way, to not partake in that activity?

Q: Mark, if I'm putting together, there's a lead bank, a lending syndicate or an underwriting syndicate, should I be taking steps to ensure that the members of the syndicate are observing my policy?

MARC MILLER: I think you should. I think it's, again, very well consistent with what Vivian's response was. So guidance, again, on providing gifts, contributions, hospitality. You've heard that already this morning. Guidance on actions to take in response to extortion and blackmail are thoughts that the guidance includes. Details on the organization's commitment to protect whistle-blowers from discrimination, and how existing corporate procedures, be it the whistle-blower hotline, disciplinary procedures, performance reviews, corporate audit exercises, how they will be employed to prevent bribery. To make that known, to make it transparent, to some of the points that have already been raised.

Effective communication. The act conveys a similar message to what we've heard at the DOJ, I can hear Lenny Brewer's(?) words. I believe Richard Alderman has said it as well. But the concern about a paper policy. And that their concern is that a lot of corporates have well-written policies and procedures. Are they training the right people, are they doing it enough, back to the point, I think Sandy, your scenario? If you train in 2011, could we do it again in 2030? I think the answer's clearly no.

And then all the different aspects of the overall compliance program, and continuum. And I think the key message here is you need to be prepared to answer how you brought your policy to life. Because I think undoubtedly, the SFO, just like our DOJ, and the SEC, will be looking for you not only to come in and educate them on what you've done, but also be able to document and show them how that's worked and how you've tried and tested that.

And the tried and tested piece really gets to the monitoring and review. This principle, based on the clients that I work with, I think they still struggle with this. In some ways it's a missing component of the overall ABC anti-bribery and corruption compliance programs? I think without it, you don't know if the message from the top is resonating in the field. Without it,

you have nothing to validate that your people understand. That they get it, they get the message as to what is right and what is wrong, how they can raise their hand, how things can work and be improved.

And also without it, you're not necessarily identifying new risks. New risks that may come about in six months because you have a new JV(?) partner, or because you've penetrated a new market. Or you've learned that training is not resonating, and maybe there's a different way to do it. Maybe the web-based training isn't working; maybe we should have the GC come out and deliver that training at a regional sales meeting or something like that.

So some of the procedures on monitoring and review, and I'll wrap it up, is obtain and evaluate compliance training materials, including documentation to assess the scope of training, who was trained, the certifications that training actually took place, identifying communication channels available, both to employees, are they available to third-parties? And as I go through these, I think just conceptually, a lot of these are general fraud and fraud mitigation type steps that can be and corporate.

Inquire with personnel regarding processes for performing due diligence of third-parties. Has it been done? It should be done prior to signing them up. Prior to them starting to transact on behalf of your organization. And then another challenge is how often do we refresh that. And I think that answer changes. And I think Vivian, I asked you this last night, but I know we've heard from the U.S. regulators that a risk-based approach is reasonable, and one that would likely be accepted. I don't know if that's consistent, perhaps, with the SFO.

VIVIAN ROBINSON: Yes, I think it is, I think it is consistent with our approach.

MARC MILLER: A sample review of third-party contracts. Some of the better practices out there are obviously in the contracts, to embed

language that they will agree to abide by. And you should not put in there the U.S. Foreign Corrupt Practices Act or the U.K. Bribery Act. But really put in the intent and the language behind those agreements. So they are embedded in the contracts that you have with your third-parties. Also a notion that companies think about is to include audit write provisions.

And then last, to inquire with personnel regarding authorization processes and controls for use of company assets. Those could be the hot areas that you can anticipate, be it from establishment of new vendors, commission payments, T&E and the like. So.

Q: Thanks, Marc. Hey Seth, we've touched on some of the differences between the FCPA and the Bribery Act. I don't know if you have any additional views on that, but in addition to that, would you also tell us, if you're at a company and you learn of a problem, what's your view about what you do then? Now what?

SETH LEVINE:Well, obviously you pick up your phone and you call us. If you have a problem. That's the first thing you have to remember to do. (Laughs) But you know, I think this is all thrilling, because what we now know, I think in some really wonderful presentations, is that we have a statute that's been passed, that is so broad that we expect it to have the broadest possible application. We know that the rules are in the process of being made. The government will use good judgment, and they can't quite tell you how they should do this.

The last time those of us sitting in this city had to deal with that, I think we would have had to add to say, you know, one if at land, two if by sea, three if by any bribery. And I think that there really is here a difficulty in that U.S. companies are going to have to address this very complicated law, without the benefit of guidance. And that's not criticism, I think it's just the reality in which you face.

I think that what the first point really is to think about what the differences are between this and the FCPA. And I know we've highlighted them, and let me just go through a couple, just so they're clear. Because I do think what you do depends a lot on what the differences are. The first thing, which we've talked about, which I think everybody needs to go back and sort of immediately sort of assess, is this law goes far farther than the FCPA. The FCPA is about foreign officials.

Now, that can get confusing, depending upon the relationship between an individual and the government of a country, and sometimes it's not clear whether or not the person is sort of proceeding with official sanction. But I think it's very important to recognize this does cover all manner of commercial transactions. And I think it also covers, of course, not only making bribes, but receiving bribes. So when you think about looking into these kinds of problems, it's very important to recognize that's a whole sphere which some companies, as we've heard, have addressed by having zero tolerance policies and having no bribery activity, or no facilitation at all.

But if you don't have that, I think you have to start sort of with first principles and figure out what are we going to have to do now for the vendors that we deal with, internationally? I think also the other concern here is what in the end, is this close connection to the U.K. going to mean? We've heard, I think, very helpful things today, from Vivian, about a desire to limit the scope of how they will apply the law to U.K. companies, to U.K. citizens, or to people that have a very close connection.

But we also did hear, well, what about somebody that stops over in England and has a meeting? What about telephone calls where you have small staffing operations in England, or somebody was operating out there? Because of that issue, and because of the connection, it's not clear how finely that's going to be drawn.

Those of us in the United States know the Department of Justice, U.S. Attorney's Offices commonly take the position that a person flew into JFK Airport, and maybe they had a small interaction, maybe their purpose was only to go somewhere else. That's sufficient, in the United States, often, for jurisdiction in the Eastern District of New York and the Southern District of New York. It may well be that our friends across the pond will take a different view. So I think that one has to start, as Vivian said, with the premise that you need to err right now on the side of caution.

I think also, very importantly, I think you now have what has increasingly been going on, which is you're playing multidimensional chess when it comes to the regulators in this area, we're just adding more and more pieces and more and more regulators. Ordinarily, within five or six years ago when these things were happening, one might say how are we going to deal with DOJ and the SEC? Who are we going to call first? Who should be the lead person on it?

You had some sense of what you should do; it depended a little bit on how much criminal liability you thought you had, whether you thought DOJ was going to be interested. I think now, one of the things that's going to be necessary, is to consider that issue really taking into account many of the regulators, especially Vivian's office.

Because, of course, those cases will now go both ways. If there are matters of commercial bribery, that perhaps the FCPA folks would not have picked up upon, or they would have decided not to pursue the case, as a wire fraud or a mail fraud or a travel light(?) kind of case, which often they didn't, you now know that case is going to be squarely in the U.K.'s interest. They're going to look at it. And then you can certainly imagine that in those situations where there's an American executive, whether stationed in the United States or abroad, which the U.K. is going to decline to prosecute, you may have

an obvious case that a U.S. prosecutor in the spirit of cooperation, will consider cooperating.

So I think that one of the biggest things you need to do now is to start thinking about the differences in the statute, the difference in reach. Because when these cases come in, both the United States and the U.K. have enough flexibility that they will be able to make cases, making up for some of these differences.

And can I make one other point that I think's very important, and it's something if I get wrong, I know Vivian will correct me. It has been very common, and frankly often the best solution that you can get in big corporate investigations has not been a Deferred Prosecution Agreement, but a Nonprosecution Agreement. The difference generally being a Nonprosecution Agreement with the Department of Justice means you essentially sign an agreement with the department, with the U.S. Attorney's Office. There's no court filing, there's an agreement to do something. You haven't pled to anything. That's something that is used often in cases, where the conduct isn't quite as serious, or there's no need to have the imprimatur of the court.

I think it's very important and useful to recognize, and as I understand it, Vivian, in the U.K., there is no ability to resolve a case at this moment with Vivian's office, without a court disposition. Is that correct?

VIVIAN ROBINSON: Well, if we decide not to prosecute, we decide not to prosecute. On a particular case. Otherwise there has got to be some kind of procedure, which is either putting somebody before the criminal court or putting somebody through the civil courts on a civil recovery. Those are the only two. We do not have a system of Nonprosecution Agreements.

Q: Vivian, just a question. I take it, since the Foreign Corrupt Practices Act applies to publicly-held companies. Is there a similar limitation under the Bribery Act?

VIVIAN ROBINSON: No, absolutely not.

Q: So I can be privately-held and subject to liability?

VIVIAN ROBINSON: Absolutely, in the whole area. The only thing that applies specifically to the companies is the Section 7 offense of failing to prevent bribery. Can I just add one thing? Whether it's the last thing that we deal with here, and it's just come to me. When I was a kid, a song that I really liked from the States was a song called "Sixteen Tons." Which used to be sung by Tennessee Ernie Ford. And the very last verse had this great line, and you might think of it in terms of whether or not the SFO or the Department of Justice take steps. It was "One fist of iron and the other of steel. If the right one doesn't get you, then the left one will." And (Laughs) that's probably quite a good message to take away in relation to the way that we are cooperating with the Department of Justice.

SETH LEVINE: That's reassuring, thank you. (Laughs)

Q: Let me open this for questions. Anyone have any questions? Yes?

Q: I have a question about the corporate crime and the failing to present the corporate crime. Just want to make sure. So if my understanding is correct, that technically your office does have a jurisdiction to go after a U.S. company that did not prevent its employee in Venezuela from giving a bribe.

VIVIAN ROBINSON: Yes, yes.

Q: So technically you do have jurisdiction, however, you said that, in fact, you probably will not be trying to become the world's policeman.

VIVIAN ROBINSON: Correct.

Q: And would not go after each and every instance unless there is a connection to the U.K.

VIVIAN ROBINSON: Absolutely. That's exactly what it is. We feel that there must be some connection with the U.K., and if we felt that there was a

proper nexus and a proper link, and that it was in the public interest to go ahead, we'd do so.

Q: Although by law, you have that right. By law, if you really wanted to go after that particular U.S. corporate, you could.

VIVIAN ROBINSON: We could.

Q: And just to put a finer point on it, Vivian, if that means that you, as a U.S. company, have an operation in the U.K., you have an office in London, and in a particular instance somebody uses those facilities, they stopped over, they printed something out on their way to another country, that would be enough, if you chose to exercise your discretion.

VIVIAN ROBINSON: It would be enough.

Q: So I think everybody has to keep in mind that, while Vivian, I think is taking, and their office, it seems, a reasonable view, at this point it's very difficult for you to assume that in those circumstances, I think Barry had one with Venezuela and the United States, that you're okay. And one can only imagine, in a political charged, high profile case, what might happen.

VIVIAN ROBINSON: Exactly.

Q: But I won't speculate.

Q: Yes?

Q: I've got a question for Mr. Robinson. A very common practice with the hardware and software industry in the U.S. was to pay referral fees to consultants, like Accenture, Cap Gemini(?), for facilitating or recommending the hardware/software vendor's products to the customer. And it was also very common practice to not disclose to the ultimate customer that the consultant was being paid this referral fee. HP paid 55 million recently to the federal government because that was viewed very dimly in government contracting. Is it your view that that sort of program would constitute a violation under the Bribery Act?

VIVIAN ROBINSON: I don't want to, but I think that's a particular difficult area. And I don't want to give a knee-jerk reaction to it, because oddly enough, it's a question which is raised very often. In these meetings, the very one that you just put forward. I think that needs quite a lot of thought, and it's a very grey area for me. I'm not prepared to say I think it is or it isn't. I want to give that a lot more consideration. Because of the common nature of the practice, as you describe it. Part of me says I think that it's something which people should be discouraged from doing. But on the other hand, it could be said to fall within that category of business practice, which is sufficiently normal for us not to think it in the public interest to take action. So there are two arguments there.

Q: Does disclosure (Inaudible)?

VIVIAN ROBINSON: Disclosure goes a long way towards it, because I think when you said it's not the practice to disclose it, well, a red flag started to go up straight away. I said, during the course of my presentation, that in my mind, transparency is everything. And if you need to be untransparent about something, that would lead me to think that there might be something about it which we should be looking at.

Q: Yes?

Q: I'm a little confused about the private nature, and the public and the private sector liability? As I understood, the restriction was on the bribery of public officials. So if you have the situation where a distributor or a vendor wants an exclusive agreement with your U.K. company, and you require an advance, would that be considered falling under the jurisdiction of the U.K. Bribery Act? A private company, a U.K. company, the vendor pays an advance to the corporation in order to get the business.

VIVIAN ROBINSON: Yes, I mean, it theoretically could, there's no question about it. I don't really see where the public official side of it comes in.

Q: No, I see that there's no public official side.

VIVIAN ROBINSON: No, it would certainly I would say technically, come within our bribery, or primary bribery offenses, certainly. Whether we would take action is another matter. But it technically would.

Neill Blundell: I was just going to say, you know, corporates are struggling, really struggling with how they do normal business practices. My view is, if you've got a normal business practice, in a sector, and it's open and transparent, on the face of the documents you can see who's paid what, and for what service, you're probably going to be fine. The problem is, where there are slinky side agreements that people (Laughs) don't discover, and other things. So you need to be thinking quite carefully. In different sectors, there is different behavior. And that behavior isn't necessarily bribery and corruption, it may be just the normal way it's done? But the key is, open and transparent.

M: There's also, you should keep in mind that, unlike the FCPA, which does provide some defense, if you're acting properly under the particular law of the jurisdiction you're in, the U.K. law refers only to itself. And the U.K.' view of bribery, so wherever you are. So oftentimes, if people are following local custom and there's a particular way deals are being done, you would even not have a problem if it's a foreign official. Here, it's a private transaction between two commercial entities. If somebody in the U.K. would think that that's an improper payment, you may have an issue. Which I think is something that you have to revisit in your new compliance laws(?).

VIVIAN ROBINSON: I think that's a very important point, that we're constrained, or the courts will construe this, on the U.K. definition of bribery. As set out in the act. And you'll find that in Sections 1 and 2, and various explanatory sections after that. It's very important, it's the U.K. pitch on what bribery is, is the way it will be construed.

Q: Let's take one more, or two more questions. And please, just if you want the CLE, to sign in and to hand in your (Inaudible) forms. The gentleman in back?

Q: Do you have a U.S. parent company with a U.K. subsidiary, and the U.S. parent company discovers an act of bribery, say, on the part of an employee, at the U.K. subsidiary, what liability is there, if any, to the U.S. parent company?

VIVIAN ROBINSON: Well, there is major liability to the U.S. parent company, in that situation. What I would say is that, if that were discovered, the correct course would be to draw it to the attention self-reporting, both here and to us, as simultaneously as you possibly can. That would be my approach. That would be the sensible course to adopt.

M: And one thing from, you know, a U.S. enforcement perspective, that that raises, is putting to one side, for one second, if you would ordinarily have reported that anyway. Under some other theory other than the FCPA. You now, if it's in the purely commercial sector, you have this pressure to potentially talk to FCPA people at Justice, or at the SEC, about a matter which you know may not even be within their ambit, based on that statute.

Now, the U.S. Attorney's Offices and other people might prosecute it, but it also means that you just have to really spend a lot of time, and do the hard thinking when a matter first comes in, about how you're going to deal with disclosure to the government. Because you do have the problem that, if you're going to walk in, in the U.K., because it really should not be the subject of a U.S. prosecution, you have a lot of risk. And I think that calculating those risks, and how you do simultaneous disclosures, becomes even more important now. Because he is going to be picking up the phone, potentially, and calling DOJ anyway. And so it's another added benefit to all of this, for all of us to do.

Q: Yes, there was another question?

Q: Well, given that a U.S. company that has, let's say, a subsidiary in the U.K., and it also has other subsidiaries, let's say, in Latin America. And given this new U.K. law, and that U.S. company has a policy to

prevent bribery, but it's basically considering just FCPA, the message would be that the U.S. company would need to revise the policy, and now adjust it so that it will cover not only bribery to foreign officials, but also bribery in general?

M: Yes.

M: Yes.

VIVIAN ROBINSON: Absolutely.

Q: Yes, go ahead. I'll take a couple of more questions, right over here.

Q: Is the definition of the Bribery Act, or bribery under the act, to obtain a business advantage? And if so, what if the payment was to prevent a business disadvantage?

VIVIAN ROBINSON: (Laughs) There are two different definitions of bribery, under the act. The first is insofar as the primary offenses are concerned. And in a nutshell, it is to offer, promise, or give a financial or other advantage to another, with this intention: to induce a person to perform improperly a relevant function. Now that's the first definition. The second definition is a different one, and it refers to foreign public officials, and it doesn't require you to prove in that particular case, anything improper. So the word improper goes out.

It's simply, in that offense, is to influence the foreign official in his capacity, as a foreign official, to obtain or retain business or the advantage in the conduct of business. So those are the two specific definitions which you will find in the act.

Q: So in the normal course of a facilitation payment, when it's in the normal course of an FCPA type of a facilitation payment to a foreign official to request them to do what they customarily would do, but to like customs clearance situation.

VIVIAN ROBINSON: Correct.

Q: Like the $3,000 example that you guys gave earlier, and if you don't make that payment, you possibly could suffer a disadvantage by being placed in the back of the line, for example.

VIVIAN ROBINSON: Well, I guess you might. But I mean, that goes back to the point that I was making, that the experience that we are hearing from people is that, if you turn around and say, and maintain I'm not going to pay it, full stop, you might get a period of initial pain, but eventually they understand what the position is, and you don't get a disadvantage of business. So that's what we're told. I mean, I could only base it on what I'm hearing from people at the front end.

Q: Providing you have the commercial muscle.

M: I mean, the point is, in simplest terms, with respect to grease payments? With the U.K. law, grease is not the word. (Laughs) It's just not the word in the U.K.

VIVIAN ROBINSON: Yes, that's right.

Q: Any other questions, yes?

Q: The proposed guidance in several places refers to reasonable and proportionate expenditures, I think in particular with respect to promotional activities.

VIVIAN ROBINSON: Yes.

Q: But doesn't offer any guidance on how to calibrate what you mean by proportionate.

VIVIAN ROBINSON: If you think about it, you can't really do that. You can't really have a sort of gold standard. What you can have is this: number one, the first test is, is it, as a matter of common sense, something which anybody looking at it would think was way over the top?

But two, if you are transparent about it, and you make a note, and everybody can see, at any rate, you are giving an organization like us, or indeed somebody over here, the Department of Justice, an opportunity of

themselves saying to you, we think that that type of amount is more than you should be paying, in order to avoid the inference that the payments are to gain an advantage in business, rather than simply part of good business relations. So those are the two things. That way you can't specifically say what it is, use your common sense. But number two, be transparent about it, and therefore give the regulating authorities an opportunity of advising you.

Neill Blundell: Could I just say, I've often advised people to use the sniff test. If it smells funny, then it probably is. You know, a good example, talking to a corporate about three weeks ago and they said, look, we always give long pens at this function. And I said, well, you know, long pens symbolize equality and other stuff, and I understand why you're doing it, but why can't you just create a nice pen, it's not a (Inaudible) long, looks nice, with your logo on, as a gift? In a nice box, and it'd be cheaper. And they were like, oh, okay. That seems like a (Laughs) good idea.

You know, I think you need to think what your competitors, or how your competitors would view something? So it's not the death of golf. In fact, Richard Alderman said it's not the death of the golf day, but you wouldn't necessarily be taking somebody with their wives to you know, five days of golf in Atlanta from the U.K. Because your competitor may think that may influence them in the order of business, it's suddenly started to cross the line. So use the sniff test.

Q: Yes?

Q: Two questions. How do you resolve the fact that facilitation payments are explicitly okay under the FCPA, and explicitly not okay under the British regime? And secondly, I've heard a lot of cooperation between the United States and Britain. What about the rest of the EU, and say, Japan?

VIVIAN ROBINSON: That's a very good question, and the answer to it is I think everybody should strive to get away from what one of the people in this audience was speaking to me about before we started, parallel tracks. We

ought to start trying to think about converging. Now, I'd be the last person to be arrogant enough to say that the United States should start to revisit their views on facilitation payments. I don't want to be quoted as saying that. I'm not saying it.

But I do think there's a great deal of opportunity and importance in making sure that, in the very areas that you've just talked about, the two jurisdictions get together and talk. And not only the two jurisdictions; Europe as well. And the same question has been put to me, when I've been talking in various countries in Europe, what should we be doing to make sure that there is uniformity in these very important areas?

It doesn't seem to me to be beyond the wit of man for people to be able to agree in relation to what is an appropriate combined approach, so that we don't have this parallel track system of one person overtaking, trying to overtake another, and whatever. We have a consistent policy on the very things that you've just been talking about.

Q: But there's also going to be a risk, obviously, if you have company and you decide to simply abide U.S. law here, and you have a sufficient connection to the U.K., you run a real risk that you are in noncompliance, and you know, you would have to work through, if that comes up, very serious disclosure and other issues. So the question is, in order to, I think, make the distinction, you're going to have to feel very comfortable about where you're operating. Because otherwise you're simply going to be out of compliance and I think it's obvious from this that the folks in the U.K. are going to be looking for those kinds of things.

M: Yes, this is actually not brand-new, because it has more recently been the case, that some of the laws around the world have been somewhat more lax than some of the laws here. And companies have said, well, wait a second, it's okay in Pakistan to do this, and the U.S. government would

say, But we don't care, because the law here prevents you from doing that. And so I think what's going to happen is the same kind of problem.

VIVIAN ROBINSON: I've seen well, two, American corporates who prohibit facilitation payments, unless staff members are in danger. Already. And they had that in before they knew the Bribery Act said it.

M: But with the FCPA, it's not a laxity issue, it's an affirmative okay. Which makes it different from the situation anyplace else.

VIVIAN ROBINSON: It's very different, yes.

M: It's not that some of you who are working in large organizations that operate in a lot of countries, we have the same issue in data privacy. There are some countries which transporting any data outside the country, or in an improper way, is difficult. And as you all know, that creates enormous complexity generally. But of course, if you have any legal issues, in dealing with those things. So you're right to identify it, it's a real problem and there's not an easy answer.

Neill Blundell: I mean, just think of that whistle-blowing hotline today, France, it's very, very difficult to bring in whistle-blowing hotlines. There can be strikes and all sorts of union officials get involved. They go absolutely bananas, justification being giving information to the Gestapo in the Second World War. (Laughs) So you've got countries with very differing views on things, and it can make it extremely difficult for global companies to operate with one policy across the globe. It's difficult. And I think what we're hearing from Vivian is they do understand that. The question is how you go about doing it.

I think Richard Alderman's talked about facilitation payments, in that what he said, I think, Vivian, was what he wanted to see from corporates was an effort to minimize them. He wanted to see action taken. So if he speaks to corporates, and they're saying, well, this is what we've done, we're now lobbying on it. We've still got to pay it. We've reduced our payments, and so on. So it's heading in the right direction.

VIVIAN ROBINSON: So exactly, we want to see some sign, some sign that the corporation are either cutting it out completely, or reducing it as much as they possibly can. It can't be done overnight. We understand that. It's not something which we expect people to be able, necessarily, to do speedily. Sometimes these things are achieved gradually. What we would want to see is some kind of positive evidence, of steps being taken.

Q: Okay, well, is there another question?

Q: Yes. Does the possibility exist for the act to apply to passive investors, like if you're a U.S. company investing in a U.K. private equity fund, and you have less than 20 percent in that fund? And if the possibility does exist, what are the types of circumstances that you foresee that would trigger the liability?

VIVIAN ROBINSON: I don't see that possibility as existing, to be honest. I don't know whether any of my colleagues do, but the example you've just given, I don't think would (Overlap).

Neill Blundell: You're talking about p-houses(?) private equity investment in certain sectors, I can't see. I think it's removed.

VIVIAN ROBINSON: I think that's way beyond. I mean, what everybody does, all our courts do, no doubt here, is when they have that kind of problem, they try and think what was Parliament's intention when passing the act, or what was the legislature here, what was their intention. I don't think it was Parliament's intention to embrace that particular area at all.

Q: Okay, well thank you very much, panel, and thank you very much for attending. I appreciate it. (Applause)

(END OF TAPE)