UK BRIBERY ACT: RAISING THE BAR FOR ANTI-CORRUPTION PROGRAMS

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I. Introduction

In today's truly global economy, it is a given that much of the business that is done has an international component. Global anti-corruption laws present a unique challenge to companies that conduct such business. In the United States, enforcement of the Foreign Corrupt Practices Act ("FCPA"), enacted some thirty years ago, is at an all time high. In 2010 alone, U.S. enforcement agencies brought a combined 74 FCPA enforcement actions and assessed monetary penalties against corporations totaling $1.8 billion.[1] In 2010, the Department of Justice ("DOJ"), which jointly enforces the FCPA in conjunction with the Securities and Exchange Commission ("SEC"), announced that "FCPA enforcement is stronger than it has ever been—and getting stronger."[2] The SEC has also made FCPA enforcement a priority. Putting words into action, the SEC announced the creation of a specialized enforcement unit devoted to enforcement of the FCPA in 2009.[3] In announcing the new unit, Robert Khuzami, the SEC's Director of Enforcement, emphasized the unit's focus in "working more closely with our foreign counterparts, and taking a more global approach to these violations."[4] Outside the United States, foreign counterparts appear to be taking an ever more active role in anti-corruption enforcement. Numerous countries are strengthening their anti-corruption laws and bringing actions under these international anti-corruption laws. In particular, the United Kingdom recently passed anti-corruption legislation that will undoubtedly have a global impact on anti-corruption enforcement.[5]

On April 8, 2010, the U.K. Parliament passed the Bribery Act 2010 (the "Bribery Act"), which reformed the pre-existing anti-bribery laws in the U.K. Before the law is implemented, the U.K. Secretary of State is required to issue guidance on adequate compliance procedures for a proper anti-corruption program. The Bribery Act was

[1] *2010 FCPA Enforcement Index,* The FCPA Blog, (Jan. 3, 2011, 7:02 AM), http://www.fcpablog.com/blog/2011/1/3/2010-fcpa-enforcement-index.html.

[2] Lanny A. Breuer, Assistant Attorney Gen., Criminal Division, Prepared Address to The 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), *available at* http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html.

[3] Robert Khuzami, Director, Division of Enforcement U.S. Sec. and Exchange Comm'n,, Speech by SEC Staff, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (August 5, 2009).

[4] Speech by Robert Khuzami, Director, SEC Division of Enforcement, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009), *available at* http://www.sec.gov/news/speech/2009/spch080509rk.htm.

[5] The Bribery Act 2010.

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expected to come into force in April 2011, however, a January 31, 2011 release from the Serious Fraud Office (the "SFO"), the lead agency in England responsible for enforcing the Bribery Act, stated that there is delay in finalizing the guidance.[6] Until the guidance is released and enforcement under the new law begins, it is not clear how aggressively the provisions will be enforced. However, the law has received global attention from the press and commentators because in many ways the Bribery Act is more strict than the FCPA. For example, the Bribery Act criminalizes not only bribing a foreign government official, but also criminalizes a company's "fail[ure] to prevent bribery" of *any person.*[7] In other words—it criminalizes private bribery. Its passage sends a clear signal that cracking down on global corruption is a priority in the U.K. At the very least it can be expected that there will be cooperation among the United States agencies and the U.K.'s SFO. Not only can shared communication between the agencies be expected, but the Bribery Act's jurisdictional scope may expose some U.S. companies to increased liability under the Bribery Act itself. Its jurisdiction not only reaches U.K.-based businesses but any business with a U.K. nexus.[8] Thus, U.S. companies and any foreign companies conducting business in the U.K. need to be mindful of the implications of this legislation.

In light of these global anti-corruption developments, it has never been more important for companies doing business internationally to develop and maintain strong anti-corruption compliance programs. Not only can such programs help to prevent companies from running afoul of anti-bribery laws such as the FCPA and the Bribery Act, but in the case of the Bribery Act, they can act as a statutory defense. The Bribery Act provides for a defense to charges of private bribery if a company can show that it had "adequate procedures" in place to prevent the illegal conduct.[9] This article will focus on the differences between the Bribery Act and the FCPA and how, in light of these differences, a company can create an anti-corruption compliance program to properly address both laws. The article will first discuss the Bribery Act and highlight the key differences between it and the FCPA. Next, it will discuss the Bribery Act's adequate procedures defense. Finally, it will offer suggestions on how to adopt your anti-corruption compliance program.

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[6] *Bribery Newsflash-UK Government Announce Delay to Adequate Procedures Guidance,* Field Fisher Waterhouse, (Jan. 31, 2011), http://www.ffw.com/publications/all/alerts/adequate-procedures-guidance.aspx.

[7] The Bribery Act 2010 § 7(1).

[8] The Bribery Act criminalizes certain acts committed by a "commercial organization." A commercial organization is defined to include (i) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), (ii) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, (iii) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or (iv) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom. For purposes of this section, a trade or profession is a business. The Bribery Act 2010 § 7(5).

[9] The Bribery Act 2010 § 7(2).

II. Overview of the Bribery Act

As stated above, the Bribery Act reached royal assent on April 8, 2010. As required by the Act, the guidance regarding adequate procedures is expected to be issued in the near future.[10] Three months after the issuance of these guidelines, the Bribery Act will finally come into force. Generally, the Bribery Act covers: (1) general bribery offenses—giving and receiving bribes, (2) bribery of a foreign public official by a person, and (3) failure to prevent bribery of any person by a commercial organization.

A. General Bribery Offenses—Giving and Receiving Bribes.

Sections 1 and 2 of the Bribery Act restate two existing general U.K. offenses. These provisions prohibit giving and receiving a bribe, as well as offering or promising a bribe, or requesting or agreeing to receive a bribe.[11]

B. Bribery of Foreign Public Officials.

Section 6 of the Bribery Act makes it a criminal offense for any person to bribe a foreign government official if the intention is to influence the foreign official's capacity as a foreign public official.[12]

C. Failure of Commercial Organizations to Prevent Bribery.

Section 7 makes it a criminal offense for a "commercial organization" to fail "to prevent bribery of *another person*."[13] Therefore, dealings between two completely private entities or individuals are covered under the Bribery Act.[14] This provision holds organizations conducting business in the U.K. strictly liable for bribery committed by an "associated person," which is defined to include a person who performs services for or on behalf of the company, any employee, agent, or subsidiary, regardless of whether it was committed without the corporations' involvement or knowledge. Whether or not a person is considered to "perform services for or on behalf of the

[10] *Bribery Newsflash-UK Government Announce Delay to Adequate Procedures Guidance,* Field Fisher Waterhouse, (Jan. 31, 2011), http://www.ffw.com/publications/all/alerts/adequate-procedures-guidance.aspx.

[11] The Bribery Act 2010 § 1, 2.

[12] The Bribery Act 2010 § 6(1).

[13] A commercial organization is defined to include (i) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), (ii) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, (iii) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or (iv) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom. For purposes of this section, a trade or profession is a business. The Bribery Act 2010 § 7(5).

[14] The Bribery Act 2010 § 7.

company" will be determined by reference to all relevant circumstances.[15] Further, a commercial organization is defined to include not only businesses organized in the U.K., but *any* business that conducts some business in the UK.

III. Key Differences between the Bribery Act and the FCPA

1. *Mens Rea*

Unlike the FCPA, the Bribery Act does not require that payments made to foreign government officials be made with a *corrupt* intent.[16] The legislative history of the FCPA indicates that corrupt intent connotes some intent to "induce the recipient to misuse his official position in order to wrongfully direct business... or to obtain preferential legislation or a favorable regulation. The word 'corruptly' connotes an evil motive or purpose, an intent to wrongfully influence the recipient."[17] In contrast, the Bribery Act does not require a corrupt or wrongful intent, and liability may be triggered by a showing of: (1) an intention to influence a foreign government official in his official capacity, (2) an intention to obtain or retain business, or an advantage in the conduct of business, and (3) that the act is not permitted nor required by local written law.[18]

2. *Private Bribery*

Section 7 of the Bribery Act greatly expands liability and its reach is potentially the most troubling to companies engaged in international business. Under this provision, commercial bribery and business-to-business bribery is a basis for criminal prosecution. Further, in the case of commercial bribery, a commercial organization may be sanctioned for either the giving or receiving of a bribe. The FCPA only makes it a federal crime to *promise, offer, or make* a bribe. Because a commercial organization is defined to include not only businesses organized in the U.K., but *any* business that conducts business in the UK, the jurisdictional reach of this provision could have vast implications. Importantly, there is an affirmative defense to charges under this provision if the company can demonstrate that it had adequate procedures in place aimed at preventing bribery. This defense and others under the FCPA are discussed in greater detail in the following section.

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[15] The Bribery Act 2010 § 8.
[16] Bribery Act 2010 § 6; *Compare to,* 15 U.S.C. §§ 78-dd-1(a), -2(a), -3(a) (1998).
[17] *Id.*
[18] The Bribery Act 2010 § 6(1)-(2).

3. *Bona Fide Expenditures*

Additionally, the Bribery Act does not offer an exception for "bona fide business expenditures." In some circumstances the FCPA does permit "bona fide expenditures." The FCPA provides an affirmative defense, where a payment was "a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official...and was directly related to (A) the promotion, demonstration, or explanation of products or services; or (B) the execution of a contract with a foreign government or agency."[19]

4. *Facilitation Payments*

The Bribery Act does not offer an exception for facilitation payments. The FCPA, however, does allow for "facilitating" payments to low-level government employees to expedite or secure the performance of routine governmental action.[20] These payments are generally relatively small or nominal payments made to a low-level government employee in order to perform a routine service that the payee is otherwise lawfully entitled to receive. Companies that make such payments are still required to properly and accurately record them as such in their books and records.

For practical purposes, the Bribery Act's lack of an exception for facilitation payments makes little difference. While facilitation payments are explicitly permitted by the FCPA, U.S. enforcement agencies have taken a very narrow view of this exception and stated a general disfavor towards any such payments. During a panel discussion on April 8, 2010, Charles Duross, Assistant Chief in the DOJ Criminal Division's Fraud section emphasized that the exception for facilitation payments is "very narrow" and that the DOJ discouraged such payments.[21] Recent enforcement actions further illustrate that the DOJ and SEC construe the exception narrowly and have prosecuted payments that could arguably fall within the exception for facilitation payments.[22]

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[19] 15. U.S.C. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c) (2006).

[20] 15 U.S.C. §§ 78dd-1(b), -2(b), -3(b).

[21] Christopher M. Matthews, *Compliance Monitors Are Here to Stay*, MAIN JUSTICE, Apr. 8, 2010, www.mainjustice.com/2010/04/08/compliance-monitors-are-here-to-stay.

[22] *See, e.g.*, Litigation Release, U.S. Securities and Exchange Comm'n, SEC Sanctions Westinghouse Air Brake Technologies Corporation for Improper Payments to Indian Government Employees, Release No. 20457 (Feb. 14, 2008), *available at* http://www.sec.gov/litigation/litreleases/2008/lr20457.htm.

IV. Defenses under the FCPA and the Bribery Act.

A company may mitigate its liability for violations of the FCPA if it can show a strong compliance program that adheres to the standards set forth in the U.S. sentencing guidelines. Although implementing and following an anti-corruption program based on the sentencing guidelines is not an affirmative defense, it should act to reduce the risk of a violation from ever occurring. Additionally, if a violation does occur, even though the company had in place at the time of the violation an effective compliance and ethics program, the U.S. sentencing guidelines will subtract three points from the offense level setting of the base fine to be paid under the guidelines.[23] This can mean the difference of thousands, if not millions, of dollars to a company.[24]

While providing mitigation to penalties, the FCPA and U.S. sentencing guidelines fail to provide a complete defense for companies that adhere to strong compliance programs. In fact, there are many critics that view this as a defect of the FCPA, calling for reform and proposing that the FCPA be amended to include a compliance defense.[25] A defense of this nature would give an affirmative defense to a company that is being prosecuted for acts taken by an employee that has not followed policy, despite the company's strong compliance program.[26] The new Bribery Act provides this defense:

> A relevant commercial organization ("C") is guilty of an offense under this section if a person ("A") associated with C bribes another person intending—(a) to obtain or retain business for C, or (b) to obtain or retain an advantage in the conduct of business for C. **But** it is a defense for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.[27]

Until the final guidance is released, as required by the Bribery Act, it is not clear how "adequate procedures" will be defined, but the Serious Fraud Office released a

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[23] Federal Sentencing Guidelines Manual § 8C2.5(f) (2010).

[24] *See e.g.,* Federal Sentencing Guidelines Manual § 8C2.4(d) (2010).

[25] *See, e.g., Additional Proposed Amendments to the Foreign Corrupt Practices Act,* FCPA Compliance and Ethics Blog, (Nov. 11, 2010), http://tfoxlaw.wordpress.com/2010/11/11/additional-proposed-amendments-to-the-foreign-corrupt-practices-act/.

[26] *See, e.g., Proposed Reforms to the FCPA: the Compliance Defense and Respondeat Superior,* FCPA Compliance and Ethics Blog, (Nov. 2, 2010), http://tfoxlaw.wordpress.com/2010/11/02/proposed-reforms-to-the-fcpa-the-compliance-defense-and-respondeat-superior/.

[27] The Bribery Act 2010 § 7(1), (2) (emphasis added).

draft guidance procedure[28] in September 2010 that set forth six principles (the "U.K. principles") that an appropriate compliance program should include:

1. Risk assessment.
2. Top level commitment.
3. Due diligence.
4. Clear, practical and accessible policies and procedures.
5. Effective implementation.
6. Monitoring and Review.

Further, a recent release by the Ministry of Justice commented that "[t]he guidance will not be regulatory in nature as we do not wish it to create prescriptive standards. Organizations must be able to develop procedures appropriate to their circumstances and business sectors which take into account, for example, their size and the particular risks to which they might be exposed."[29]

Given these developments, it is imperative that companies operating in the U.K. and U.S. review their compliance program to ensure that once the Bribery Act is implemented, they will be able to avail themselves of the Bribery Act's affirmative defense.

V. Reviewing Your Compliance Program: Keeping Up with the Latest Guidance

Increased international enforcement underscores the importance of implementing effective internal controls. With that in mind, this section will provide information as to what the U.S. government currently considers to be the main elements of an acceptable anti-corruption compliance program. We will keep in mind the six principles released by the U.K. government and will base our discussion on the thirteen elements of the compliance program set forth in the Panalpina case[30] as it is a current indication of the essential components of an anti-corruption compliance

[28] *Consultation on Guidance About Commercial Organisations Preventing Bribery (Section 9 of the Bribery Act 2010),* Ministry of Justice, CP 11/10, *available at* http://www.justice.gov.uk/consultations/docs/bribery-act-guidance-consultation1.pdf (last visited Feb. 15, 2011).

[29] Lord Henley, *Bribery Bill—"Adequate Procedures" Guidance,* (Dec. 2009), *available at* http://www.justice.gov.uk/publications/docs/bach-letter-adequate-procedures-guidance.pdf.

[30] Plea Agreement, Attachment C, *U.S. v. Panalpina, Inc.,* (Oct. 27, 2010), *available at* http://www.justice.gov/opa/documents/panalpina-inc-plea-agreement.pdf.

program. Companies are well advised to benchmark themselves against these thirteen components.

1. A written compliance code with a clearly articulated and visible corporate policy against violations of anti-corruption laws, including the FCPA's anti-bribery, books and records, and internal controls provisions, and other applicable foreign counterparts.[31]

The obvious core to any compliance program is its basic policy. In creating this policy, many issues should be considered, among them, the size of the policy. A clearly articulated policy should not be so long that it becomes cumbersome and easy to ignore. Instead, the policy should be a clear statement, written in straight-forward, plain English.

As this policy is likely to apply to subsidiaries and/or foreign operations, care should be taken to ensure it is easy to translate. The policy's language should also be drafted in a manner that is sensitive to an international audience, careful not to have an overly western-centric tone. Instead of focusing purely on the FCPA, Bribery Act and U.S./U.K. law, the focus of the policy should be on anti-corruption. Because enforcement of anti-corruption laws is becoming more global, so too should a company's anti-corruption policy. It is important that employees abroad feel the policy and programs are not merely about imposing U.S. and U.K. laws. Focusing on anti-corruption as a whole will result in less pushback from these employees and will indicate to domestic employees that they too should be on the lookout for corruption issues. Finally, when creating a compliance policy, it is important to keep in mind that the policy itself is not enough. As underscored by the fifth element of the U.K. principles, the policy must also successfully be implemented and enforced.[32]

2. Assurance that the company's senior management provides strong, explicit, and visible support and commitment to its corporate policy against violations of the anti-corruption laws and its compliance code.[33]

Not only has setting the tone always been considered a vital aspect of a FCPA compliance program, but the U.K. principles also call special attention to the

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[31] *Id.* at ¶ 1.

[32] *Consultation on Guidance About Commercial Organisations Preventing Bribery (Section 9 of the Bribery Act 2010)*, Ministry of Justice, CP 11/10, at 11 *available at* http://www.justice.gov.uk/consultations/docs/bribery-act-guidance-consultation1.pdf (last visited Feb. 15, 2011).

[33] Plea Agreement, Attachment C at ¶ 2, *U.S. v. Panalpina, Inc.*, (Oct. 27, 2010), *available at* http://www.justice.gov/opa/documents/panalpina-inc-plea-agreement.pdf.

importance of setting the tone from the top.[34] The policy should be set by senior management working with their lawyers, as opposed to simply being handed down by the company's counsel. This early involvement of high-level business people provides legitimacy to the policy and helps clearly set the tone from the top. Senior management needs to demonstrate repeatedly to all employees that compliance is not to be viewed as a burden but is a core part of the company's values, and violations will not be tolerated. Management's sincere involvement is the single most cost-effective part of any compliance program.

3. Promulgation of compliance standards and procedures designed to reduce the prospect of violations of the anti-corruption laws and the company's compliance code, and taking appropriate measures to encourage and support the observance of ethics and compliance standards and procedures against foreign bribery by personnel at all levels of the company.[35]

The goal of any anti-corruption program is to foster a corporate culture where compliance is viewed as part of the corporate mission. In order to do this, compliance standards must be made public and promulgated throughout the company. Compliance standards should be placed on-line in an easily accessible manner. The policy and standards should be referenced in employment contracts and discussed during the hiring process. Employee performance reviews should place some weight on an employee's adherence to these compliance standards. Constant reinforcement indicates to employees, and the government, that anti-corruption compliance is of the utmost importance to the company.

In light of the passage of the Bribery Act, the vetting of third-party relationships, agents, and employees is more important than ever. The liability imposed under the Bribery Act on a company for failure to prevent bribery (including private bribery) by an "associated person" should cause companies to step back and reconsider any pre-existing or new third-party relationships. Additionally, the guidance provided by the U.K. principles specifically calls on companies to conduct thorough due

[34] *Consultation on Guidance About Commercial Organisations Preventing Bribery (Section 9 of the Bribery Act 2010),* Ministry of Justice, CP 11/10, at 11 *available at* http://www.justice.gov.uk/consultations/docs/bribery-act-guidance-consultation1.pdf (last visited Feb. 15, 2011).

[35] Plea Agreement, Attachment C at ¶ 3, *U.S. v. Panalpina, Inc.*, (Oct. 27, 2010), *available at* http://www.justice.gov/opa/documents/panalpina-inc-plea-agreement.pdf.

diligence for all transactions.[36] This includes transactions that deal with third-parties.[37]

4. The development of compliance standards and procedures, including internal controls, ethics, and compliance programs on the basis of risk assessment addressing the individual circumstances of the Company, in particular the foreign bribery risks facing the company.[38]

As identified by the first element in the guidance provided by the U.K. principles, before a company can create an adequate compliance program for anti-corruption issues, they must first start with a sober and thorough assessment of the corruption and books and records risks in their specific business. [39] Without such a risk assessment, it is impossible to discern on what a company's individual compliance program should focus and to determine how many resources need to be allocated to address the risk.

5. Review of the company's anti-corruption compliance standards and procedures, including internal controls, ethics, and compliance programs, no less than annually, and updating them as appropriate, taking into account relevant developments in the field and evolving international and industry standards, and updating and adapting them as necessary to ensure their continued effectiveness.[40]

The trend toward global anti-corruption enforcement makes it imperative for companies to stay up to date with evolving laws and industry standards. A company that cannot show a strong compliance program opens itself to substantial risk of liability, cannot get credit under the U.S. sentencing guidelines, and cannot avail itself of the adequate procedures defense under the U.K. Bribery Act.

6. The assignment of responsibility to one or more senior corporate executives of the company for the implementation and oversight of compliance with policies, standards and

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[36] *Consultation on Guidance About Commercial Organisations Preventing Bribery (Section 9 of the Bribery Act 2010),* Ministry of Justice, CP 11/10, at 11 *available at* http://www.justice.gov.uk/consultations/docs/bribery-act-guidance-consultation1.pdf (last visited Feb. 15, 2011).

[37] *Id.* at 14.

[38] Plea Agreement, Attachment C at ¶ 4, *U.S. v. Panalpina, Inc.,* (Oct. 27, 2010), *available at* http://www.justice.gov/opa/documents/panalpina-inc-plea-agreement.pdf

[39] The first guideline listed in the U.K. principles is risk assessment. *Consultation on Guidance About Commercial Organisations Preventing Bribery (Section 9 of the Bribery Act 2010),* Ministry of Justice, CP 11/10, at 11 *available at* http://www.justice.gov.uk/consultations/docs/bribery-act-guidance-consultation1.pdf (last visited Feb. 15, 2011).

[40] Plea Agreement, Attachment C at ¶ 5, *U.S. v. Panalpina, Inc.,* (Oct. 27, 2010), *available at* http://www.justice.gov/opa/documents/panalpina-inc-plea-agreement.pdf

> procedures regarding the anti-corruption laws. Such corporate official(s) shall have direct reporting obligations to independent monitoring bodies, including internal audit, the Company's board of directors, or any appropriate committee of the Board of Directors, and shall have an adequate level of autonomy from management as well as sufficient resources and authority to maintain such autonomy.[41]

The assignment of this role to an internal corporate official is of great importance. Even if much of the compliance work is outsourced to outside counsel, an internal officer in charge of corruption compliance legitimizes outside counsel's role and helps them to navigate the company's inner workings. Outside counsel is less likely to be dismissed by internal employees when working with and through a corporate officer.

As a best practice, large multi-national corporations should hire a full-time senior level individual whose full time job is to run the company's anti-corruption compliance program. Depending on the company's individual risk assessment, the number of persons hired for the full time position will vary. These individuals will be responsible for monitoring potential violations, managing due diligence, developing and giving compliance training, answering questions, testing the compliance program, and working on internal investigations.

Smaller companies are not immune to the requirement to have a designated person in charge of their program. While hiring a full time anti-corruption officer may be cost-prohibitive, a company can instead assign the role to in-house counsel. This is not necessarily as effective as hiring a full time employee but depending on the company's risk assessment, it can be a potentially viable option. Additionally, a company can outsource some of the work to outside counsel where necessary.

> 7. A system of financial and accounting procedures, including a system of internal accounting controls, designed to ensure the maintenance of fair and accurate books, records and accounts to ensure that they cannot be used for the purpose of foreign bribery or concealing such bribery.[42]

Most companies already have internal accounting controls in place – for the purposes of Sarbanes-Oxley and other accounting needs – from which to build. These pre-existing accounting controls are a good starting point for ensuring that accurate books are maintained. Ideally, accounting controls will be a useful tool to

[41] Plea Agreement, Attachment C at ¶ 6, *U.S. v. Panalpina, Inc.*, (Oct. 27, 2010), *available at* http://www.justice.gov/opa/documents/panalpina-inc-plea-agreement.pdf

[42] *Id.* at ¶ 7.

uncover substantive violations of anti-corruption laws and help ensure that illegal payments are not made. Both under FCPA best practices and the U.K. principles, the first step is to conduct a realistic risk assessment to determine an appropriate level of internal controls.

Whatever the level of risk, certain issues are likely to arise. An appropriate system should include a way to keep track of all receipts turned in by employees and the reason for all disbursements. Another area to treat with specific attention is the area of customs and taxes. Many FCPA cases have dealt with issues of improper payments to customs officials.[43] Consequently, any such payments are likely to raise red flags to global enforcement agencies. Accordingly, companies must make sure that all payments are valid and accounted for properly. If a company is in markets where high discounts to meet competition are common, its controls should include a process for documenting the reasons a transaction requires a high discount and the approval process for it being granted. Likewise, if a company's anti-corruption compliance policy currently allows for facilitation payments, that policy should be amended to comply with the Bribery Act and comments from U.S. enforcement agencies disfavoring these payments.[44]

8. The implementation of mechanisms designed to ensure that the anti-corruption policies, standards and procedures of the company regarding the anti-corruption laws are effectively communicated to all directors, officers, employees and, where necessary and appropriate, agents and business partners. These mechanisms shall include: (a) periodic training for all such directors, officers, and, employees and, where necessary and appropriate, agents and business partners; and (b) annual certifications by all such directors, officers, and management employees and, where necessary and appropriate, agents and

[43] *See* Litigation Release, DOJ, Helmerich & Payne Agree to Pay $1 Million Penalty to Resolve Allegations of Foreign Bribery in South America (July 30, 2009), *available at http://www.usdoj.gov/criminal/pr/press_releases/2009/07/07-30-09helmerich-pays.pdf; see also* Litigation Release, SEC, SEC Charges Nature's Sunshine Products, Inc. with making Illegal Foreign Payments, Litigation Release No. 21162 (July 31, 2009), *available at http://www.sec.gov/litigation/litreleases/2009/lr21162.htm (paying money to customs brokers, some of which was later paid to customs officials to allow unregistered products to be sold); see also* Litigation Release, DOJ, Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines, Litigation Release No. 07-075 (Feb. 6, 2007), *available at http://www.usdoj.gov/opa/pr/2007/February/07_crm_075.html (paying over $2 million in bribes to customs officials to obtain preferential treatment during customs process).*

[44] *See, e.g.,* Roger M. Witten, Kimberly A. Parker, Jay Holtmeier, M. Gosia Spangenberg, *Recent Developments in Global Antibribery Enforcement,* (June 1, 2010), http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=9516.

business partners, certifying compliance with the training requirements.[45]

As discussed above, setting a tone from the top is a key component both under the FCPA and the Bribery Act. In order for the proper tone to filter from the top management down to employees, and across to business partners, a strong training program must be implemented. A good training program has both a written and a presentation component. The program should use as many real-world examples as possible, such as case studies drawn from actual problems confronted by the company in the past, as well as those that are more likely to occur based on the industry and where and how the company does business. Training cannot be a one-time occurrence. Although all employees should receive initial training upon their hiring, periodic training helps to inculcate the anti-corruption policy of the company. With regard to keeping track of training information, a log should be kept detailing the training individuals have completed and when they completed it. Ideally, because there is a real chance you may need to prove this at some point, each employee should sign an acknowledgement form stating that he or she has received training, reviewed the compliance materials, and understands his or her responsibilities to comply with the company's program.

Training can come in many different forms. In person training remains the most effective but on-line and computer based training can be very effective. For all training, it is important to focus the sessions on business examples which are relevant to the company and the specific risks that your assessment has shown to be most critical. Additionally, individuals working in and with countries that are known for having a corrupt environment should receive additional training that focuses on country specific issues, including when and how to say no.

9. Maintenance of an effective system for (a) providing guidance and advice to directors, officers, employees, and, where necessary and appropriate, agents and business partners, (b) internal and, where possible, confidential reporting by, and protection of, directors, officers, employees, and where necessary and appropriate, agents and business partners, not willing to violate professional standards or ethics standards under instructions or pressure from hierarchical superiors, as well as for directors, officers, employees, and, where appropriate, agents and business partners willing to report breaches of the law or professional standards or ethics concerning anti-corruption occurring within the company, suspected criminal conduct and/or violations of the

[45] Plea Agreement, Attachment C at ¶ 8, *U.S. v. Panalpina, Inc.*, (Oct. 27, 2010), *available at* http://www.justice.gov/opa/documents/panalpina-inc-plea-agreement.pdf.

> compliance policies, standards and procedures regarding the anti-corruption laws for directors, officers, employees, and, as necessary and appropriate, agents and business partners and (c) responding to such requests and undertaking appropriate action in response to such reports.[46]

A key element of any good anti-corruption program is to have an internal process in place that allows officers, directors, employees and third-parties to report potential violations or concerns. Like many aspects of an adequate anti-corruption compliance program, the bones for this process are likely already in place. Most companies already have some sort of program that allows employees to report violations of company policy, sexual harassment claims, or other general business issues.

In order to extend this for purposes of an anti-corruption compliance program, a company must make sure that the individuals receiving the complaints can recognize when conduct raises potential issues. Outright bribery may be easily recognized, but the various books and records violations are not intuitive. Additionally, employees and third-parties must be made aware of the reporting system, and it needs to be very conspicuous and easy to find and use. This information needs to be brought up in training, posted on the web, and advertised in other ways.

A reporting system only works if individuals are encouraged to use the system. One way to do this is to allow anonymous tips to be made and to let people know they will be protected if they report anything. Many companies implement a hotline that can be staffed internally, or more commonly, outsourced to an external company which can handle multiple languages. These hotlines must be able to take calls in a multitude of languages so that anyone, employee or third party, can use them. Outside of using a hotline, companies must encourage employees to report questionable conduct to managers, or, if the employee believes the manager will do nothing, to Legal, Finance or to the next level above the manager.[47]

Finally, it is important to know that the reporting system actually works. If no tips are being made, the system must be tested to make sure it is doing what it is intended to do. When tips are received, it is important to follow-up. Notes should

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[46] *Id.* at ¶ 9.

[47] Care should be taken when implementing a whistleblower hotline to comply with local law. Some countries, particularly those in the EU, have strong individual data protection laws that make the implementation of such hotlines very difficult, if not illegal. For example, the French data protection authority ("CNIL") refused to approve two whistleblowing hotlines in May 2005 finding that they "could result in an organized system of workplace denouncements." (McDonald's, *CNIL Délibération No. 2005-110*, May 26, 2005; CEAC/Exide Technologies, *CNIL Délibération No. 2005-111*, May 26, 2005). German courts also held that a hotline implemented by Wal-Mart violated German employment law. *Arbeitsgericht Wuppertal*, 15 June 2005, 5 BV 20/05, NZA-RR 2005, 476.

be taken as to what conduct the tip indicated and what action is being taken to investigate. Whatever the recommended follow-up action is, it must be taken and noted in company records.

> 10. Implementation of appropriate disciplinary procedures to address, among other things, violations of the anti-corruption laws or the Company's anti-corruption compliance code, policies and procedures by directors, officers and employees. Implementation of procedures to ensure that where misconduct is discovered, reasonable steps are taken to remedy the harm resulting from such misconduct, and to ensure that appropriate steps are taken to prevent further misconduct, including assessing the internal controls, ethics, and compliance program and making modifications necessary to ensure the program is effective.[48]

Generally speaking, companies, and specifically their HR departments, disapprove of specific, mandated disciplinary actions. They instead prefer leeway to tailor the discipline on the specific circumstances of each violation of company policy and/or the law. As a result, a good compromise may be to have a policy that states that a violation of the anti-corruption policy is serious misconduct, and a violation may result in disciplinary action up to and including termination for cause. This allows companies the freedom to take disciplinary action on a case-by-case basis, taking into consideration the case's specific facts. Despite this room for interpretation, when violations occur, penalties must follow, or the government is likely to conclude that the anti-corruption program lacks any real teeth.

Beyond these issues, special care must be taken to ensure a company's disciplinary policy and actions are in compliance with local law. Many countries, especially throughout Europe, have laws that make it difficult to discipline or terminate employees. Even when the employee makes a serious breach of company policy, it can be difficult to discipline them. For example, some countries require that a company investigate and take disciplinary action within 30 days of management becoming aware of the grounds for discipline or termination, which allows very little time to conduct an investigation. Other countries have very strict data privacy laws which can inhibit the investigation process from the beginning and make gathering evidence to support disciplinary action difficult. Where termination is not permitted, some penalties that may work, depending on the level of culpability, are to demote the responsible individual(s), place a letter in their file, or deduct their pay. These are not always permitted and, again, care should be taken to comply with local law.

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[48] Plea Agreement, Attachment C at ¶ 10, *U.S. v. Panalpina, Inc.*, (Oct. 27, 2010), *available at* http://www.justice.gov/opa/documents/panalpina-inc-plea-agreement.pdf.

11. Appropriate due diligence requirements pertaining to the retention and oversight of agents and business partners, including (a) properly documented risk-based due diligence pertaining to the hiring and appropriate and regular oversight of agents and business partners; (b) informing agents and business partners of the company's commitment to abiding by laws on the prohibitions against foreign bribery, and of the company's ethics and compliance standards and procedures and other measures for preventing and detecting such bribery; and (c) seeking a reciprocal commitment from agents and business partners.[49]

The DOJ and SEC have stressed the need to conduct due diligence on anyone acting on behalf of an entity subject to the FCPA. And now, additional care must be taken to conduct due diligence on any entity subject to the Bribery Act. There is no one way to conduct due diligence. Due diligence is a potpourri of tasks that may include: interviews, background checks, reviews of databases and publications, consulting third-parties to provide reliable local information, using forensic accountants to review books and records to evaluate risk, visiting the office of agents and much more. Degrees of acceptable due diligence will vary from industry to industry and location to location. Again, risk assessment is a key step.

As to the timing of due diligence, all efforts should be made to conduct reasonable due diligence before entering into any relationship with a third-party that will act on a company's behalf. Due diligence should also be performed periodically throughout the relationship. The frequency of the due diligence review should be based on the relationship's perceived risk. Common times for periodic reviews are annually, semi-annually, every two years or at the contract's renewal. If a red flag is raised, an anonymous tip received, or any other instance where heightened compliance concerns dictate such a course of action, a review should also be initiated.

12. Standard provisions in agreements, contracts, and renewals thereof with all agents and business partners that are reasonably calculated to prevent violations of the anti-corruption laws, which may, depending on the circumstances, include: (a) anti-corruption representations and undertakings relating to compliance with the anti-corruption laws; (b) rights to conduct audits of the books and records of the agent or business partner to ensure compliance with the foregoing; and (c) rights to terminate an agent or business partner as a result

[49] *Id.* at ¶ 11.

of any breach of anti-corruption laws, and regulations or representations and undertakings related to such matters.[50]

The inclusion of anti-corruption representations and rights to conduct audits are increasingly important as the SEC, DOJ and the SFO continue to focus on the actions of agents and business partners. The Bribery Act's jurisdictional expansion to reach any company conducting *any* business in the U.K. further raises the stakes for a company to monitor the activities and compliance of its agents and business partners that ultimately could expose the company to liability. In many instances, the mere presence of an agent relationship can be a red flag. Consequently, contractual language must be carefully considered.

Figuring out exactly what language to put into an agreement to satisfy this standard can be tricky. Anti-corruption representations and provisions obligating parties can be made a standard in all of your company's various agreements with business partners, and a partner's attempt to eliminate or reduce their effectiveness is a red flag. If the partner wants to require that the provisions apply mutually, your own strong compliance program will ensure that you have nothing to fear by agreeing to the same terms as your partner.

The inclusion of audit provisions can be more difficult to negotiate, but they are important to your ability to effectively investigate and obtain documentary evidence. If you do not specify your audit rights in the agreement, you will have little ability to compel a partner to provide you with its business records. The right to audit corporate books must be worded broadly so that a company can actually conduct an appropriate and unhindered anti-corruption investigation. It should include the right to interview persons responsible for the making and keeping of the records. Often, even with a contract provision that allows for anti-corruption audits, an agent or partner will scoff at the idea of actually permitting one to be conducted. It is likely that the investigation cannot be forced on the other party, but stating your rights clearly in the contract will at least show that anti-corruption compliance is taken seriously by the company. Furthermore, the partner's refusal to allow the audit can be the clear material breach of contract you need for taking legal action to terminate the agreement.

13. Periodic review and testing of the company's anti-corruption compliance code, standards and procedures designed to evaluate their effectiveness in preventing and detecting violations of anti-corruption laws and the company's anti-corruption code, standards and procedures taking into

[50] *Id.* at ¶ 12.

account relevant development in the field and evolving international and industry standards.[51]

A strong compliance program must be regularly tested, probed, and analyzed. Not only have the DOJ and SEC increasingly placed an emphasis on this but "monitoring and review" is also one of the delineated elements of the U.K. principles.[52] Procedures must be regularly monitored, ensuring that all contracts for distribution agreements, joint ventures and consultants have included anti-corruption clauses. Due diligence procedures also need to be monitored to ensure that they are being followed at the levels set in your program.

Compliance should be monitored by direct observation, by supervision of the program, and by testing the controls. Some of this testing can be done in the company's normal internal audit process, and it is important that internal audit employees receive specific anti-corruption training so they understand what to do and why they are doing it. One increasingly common way of ensuring the testing of the controls is to conduct specific anti-corruption audits. These audits are intended to stress-test the anti-corruption procedures by picking high-risk transactions at random to see how the compliance program is being implemented. They can be conducted by properly trained internal or external auditors. A well designed anti-corruption program audit will look at a wide range of issues, including due diligence, third-party hiring, and payments related to corporate affairs, donations, customs, travel, and sponsorships for government affiliated individuals. Specific anti-corruption audits, as well as any periodic testing of the compliance code, should be taken into account at the outset of a compliance program and designed into the basic setup of the program.

VI. Conclusion

The purpose of an anti-corruption program is to mitigate exposure. This has never been more true than today. With the adequate procedures defense provided for by the Bribery Act and the increased importance placed on such programs by U.S. enforcement agencies, companies cannot, in good conscience, engage in international activity without first implementing a proper anti-corruption compliance program. When implementing such programs, companies should take into consideration all thirteen factors as set forth by the Panalpina case and the guidelines from the U.K. principles. However, the weight given to each of these elements will necessarily vary. There is no one correct approach for creating an anti-corruption compliance program. With anti-corruption efforts becoming a global

[51] *Id.* at ¶ 13.

[52] *Consultation on Guidance About Commercial Organisations Preventing Bribery (Section 9 of the Bribery Act 2010),* Ministry of Justice, CP 11/10, at 11 *available at* http://www.justice.gov.uk/consultations/docs/bribery-act-guidance-consultation1.pdf (last visited Feb. 15, 2011).

focus, the days of putting a compliance program in place and then leaving it unattended are long gone. Best practices are regularly evolving, so it is imperative that companies monitor developments in the field and periodically incorporate them into an updated program.