RECENT DEVELOPMENTS IN THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW UK BRIBERY ACT: A GLOBAL TREND TOWARDS GREATER ACCOUNTABILITY IN THE PREVENTION OF FOREIGN BRIBERY

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I.
INTRODUCTION

Recent developments in the enactment and enforcement of domestic and international antibribery laws have signaled a more aggressive and global approach in the fight against foreign bribery. The United States, through the Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC"), has increased its enforcement of the Foreign Corrupt Practices Act ("FCPA").[1] Overseas, the United Kingdom has also stepped up its enforcement efforts against corruption through the enactment of the UK Bribery Act in 2010, which is scheduled to come into force in 2011.[2] These latest enforcement and legislative developments have served to proactively strengthen a growing international consensus against foreign bribery. In the author's view, they have also served to create greater accountability in the prevention of foreign bribery by senior executives and their corporations.

While the FCPA and global antibribery laws have generally punished senior executives and their corporations who had knowledge of, or participated in, wrongful bribery, recent legal developments have attached liability in certain situations where there was no knowledge alleged of the pertinent bribery. The SEC's recent action in *Nature's Sunshine Products* and the United Kingdom's new UK Bribery Act demonstrate how senior executives and their corporations can be held accountable in situations where they did not have knowledge of the relevant bribes.[3] These new developments mean that senior ex-

1. *See* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 [hereinafter FCPA] (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd-1 to 78dd-3, 78ff (2000)).

2. *See* Bribery Act, 2010, c.23 (U.K.) (2010) [hereinafter UK Bribery Act]. This law is one of the most comprehensive international laws outlawing bribery. *See id.* The UK Bribery Act will officially come into force three months after guidance is issued by the UK Ministry of Justice with respect to compliance with the new law. *See* News Release, U.K. Ministry of Justice, Bribery Act Implementation (July 20, 2010), http://www.justice.gov.uk/news/newsrelease200710a.html; *see also* Richard Tyler, *Bribery Act: Lack of Clear Guidance from Ministry of Justice Blamed for Second Delay*, TELEGRAPH, Jan. 31, 2011.

3. *See* SEC Charges Nature's Sunshine Products, Inc. with Making Illegal Foreign Payments, Litigation Release No. 21162, 2009 SEC LEXIS 2607 (Jul. 31, 2009); *see also* Complaint, SEC v. Nature's Sunshine Products, Inc., No. 2:09-cy-00672-BSJ, (D. Utah filed Jul. 31, 2009), *available at* http://www.sec.

ecutives and their corporations need to be more diligent than ever in establishing, maintaining, and supervising compliance systems designed to prevent running afoul of the international antibribery laws.

This article will present a basic outline of the FCPA and its enforcement procedures. It will then trace recent developments in the FCPA and cases filed by the DOJ and SEC, including the noteworthy *Nature's Sunshine Products* case. I will then argue that these developments represent a trend towards more aggressive enforcement of the FCPA and other international antibribery laws within the United States. Subsequently, I will focus on the UK Bribery Act enacted in 2010 and outline what this new law could mean for corporations doing business abroad. I will then explain my views on what all of these developments mean and give my recommendations on what senior executives and corporations should do in order to limit their liability in this heightened era of accountability and enforcement.

II.
THE FCPA

The FCPA was enacted in 1977 and establishes criminal and civil liability for the bribery of foreign government officials, political party officials, and candidates for political office, in order to obtain business.[4] It also imposes certain accounting requirements on domestic and foreign companies with securities publicly traded in the United States, requiring these companies to report such illicit payments.[5] The FCPA was

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gov/litigation/complaints/2009/comp21162.pdf [hereinafter Nature's Sunshine Products].

4. *See* 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a) (West 2010). The FCPA was created in 1977 in response to findings by the SEC that numerous public companies had engaged in questionable payments overseas and falsified their accounting entries with respect to such payments in their books and records. *See* S. REP. NO. 95-114, at 1–2 (1977); *see also* H.R. REP. NO. 95-640, at 1–3 (1977). The SEC had prepared an extensive report on problematic corporate payments on May 12, 1976 that "revealed the widespread nature of the practice of questionable corporate foreign payments." H.R. REP. NO. 95-640, at 3; *see also* S. COMM. ON BANKING HOUS. & URBAN AFFAIRS, 94TH CONG., 2D SESS., REP. OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (Comm. Print 1976).

5. *See* 15 U.S.C. § 78m(b)(2) (2006).

amended in 1988 for clarification purposes[6] and again in 1998 to conform to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Antibribery Convention").[7]

The FCPA is divided into two substantive areas: the accounting provisions and the antibribery provisions. The accounting provisions impose recordkeeping and internal controls requirements for publicly held companies.[8] The antibribery provisions make it illegal to bribe foreign government officials for the purposes of obtaining or retaining business, directing business to another person, or securing any improper advantage.[9]

A. *The Accounting Provisions*

The FCPA's accounting provisions require that "issuers," companies required to register or file reports with the SEC, maintain certain recordkeeping standards and internal accounting controls.[10] The recordkeeping provision requires

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6. The FCPA was amended as part of the Omnibus Trade and Competitiveness Act of 1988. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 5001–5003, 102 Stat. 1107, 1415–25 (codified at 15 U.S.C. §§ 78m, 78dd-1 to 78dd-3, 78ff (2000)).

7. *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1 (1998) [hereinafter OECD Antibribery Convention] (entered into force Feb. 15, 1999). The Member States of the Organization of Economic Cooperation and Development ("OECD") had adopted the OECD Antibribery Convention which obligates signatory countries to enact domestic laws similar to the FCPA that criminalize bribery of foreign officials. *See id.* The International Anti-Bribery and Fair Competition Act of 1998 amended the FCPA to conform its provisions to the OECD Antibribery Convention. *See* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) [hereinafter 1998 Amendments] (codified at 15 U.S.C. §§ 78dd(1)–(3), 78ff (2000)).

8. *See* 15 U.S.C. § 78m(b)(2) (2006).

9. *See id.* §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

10. *See id.* § 78m(b)(2). "Issuers" are those companies that are required to register with the SEC under Section 12 or that are required to file reports under Section 15(d) of the Securities Exchange Act of 1934 ["Exchange Act"]. 15 U.S.C. § 78l(g) (2006). This definition includes certain foreign companies that issue stock on a U.S. securities exchange as well as their personnel. *Id.* For example, a foreign company that lists American Depository Receipts ("ADRs") on a U.S. stock exchange, such as the New York Stock Exchange, would fall under the definition of an "issuer." *Id.* Under the accounting provisions a new Section 13(b)(2) was added to the Exchange Act

that all issuers "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[11] The internal controls provision mandates that issuers create a system of internal accounting controls that will provide "reasonable assurances that transactions are executed in accordance with management's general or specific authorization."[12] In order to be found criminally liable for violating the FCPA accounting provisions, a person must "knowingly circumvent or knowingly fail to implement a system of internal accounting

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which required every issuer to keep accurate books and records and establish and maintain a system of internal accounting controls. *See* 15 U.S.C. § 78m(b)(2) (2006). The SEC also adopted two rules related to the accounting provisions. Rule 13b2-1 provides that "[n]o person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to Section 13(b)(2)(A)" of the Exchange Act. 17 C.F.R. § 240.13b2-1 (2006). Rule 13b2-2 prohibits a director or officer of an issuer from making or causing to be made any materially false or misleading statement or omission in connection with any audit. 17 C.F.R. § 240.13b2-2.

11. 15 U.S.C. § 78m(b)(2)(A) (2006). The term "reasonable detail" is defined to mean "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." *Id.* § 78(m)(b)(7). It is important to note that all transactions of issuers are covered under the recordkeeping provision, not just transactions that raise FCPA concerns. *See id.* § 78m(b)(2)(A).

12. 15 U.S.C. § 78m(b)(2)(B) (2006). The provision specifically requires that issuers "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that: (i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences." *Id.* The term "reasonable assurances" utilizes the same "prudent officials" standard as the "reasonable detail" term under the recordkeeping provision. *Id.* § 78m(b)(7). It is important to note that where an issuer holds 50 percent or less of the voting power of a domestic or foreign firm, it is required only to "proceed in good faith to use its influence" to cause such firm "to devise and maintain a system of internal accounting controls consistent with [the accounting provisions]." *Id.* § 78m(b)(6). In this regard, "[a]n issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the [accounting provisions]." *Id.*

controls or knowingly falsify any book, record, or account described in [the provisions]."[13]

B. *The Antibribery Provisions*

The FCPA antibribery provisions generally make it illegal to bribe foreign government officials for the purpose of obtaining or retaining business, directing business to other persons, or securing any improper advantage.[14] Specifically, the FCPA antibribery provisions prohibit: (1) any issuer, domestic concern, or any person acting within U.S. territory, or any officer, director, employee, agent, or stockholder acting on behalf of any of the foregoing; (2) from using any means or instrumentality of U.S commerce "corruptly" in furtherance of; (3) an offer, payment, or promise to pay, or authorization of the payment of anything of value; (4) to (a) any "foreign official," (b) any foreign political party or party official, (c) any candidate for foreign political office, (d) any public international organization official, or (e) any other person, while "knowing" that the payment or promise to pay will be given to any of the foregoing; (5) for the purpose of (a) influencing any act or decision of that person in his or her official capacity, (b) inducing that person to do or omit to do any act in violation of his lawful duty, (c) securing any improper advantage, or (d) inducing that person to use his influence with a foreign government to affect or influence any government act or decision; (6) in order to assist such issuer, domestic concern, or person acting within U.S. territory, in obtaining or retaining business, or directing business to any person.[15] The term "issuer" has the same definition as that under the FCPA account-

13. 15 U.S.C. § 78m(b)(5) (2006). Criminal liability will not flow from a violation of the accounting provisions absent this "knowingly" standard, in which case only civil liability will be found with respect to violations of these provisions. *See id.* § 78m(b)(4).

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

15. *Id.* §§ 78dd-1(a), -2(a), -3(a) (2006). The term "foreign official" means "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization." *Id.* §§ 78dd-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A) (2006). The 1998 Amendments added the term "public international organization" to the definition of foreign official to conform the FCPA to the OECD Antibribery Convention. *See* 1998 Amend-

ing provisions.[16] The term "domestic concern" means any U.S. citizen, national or resident, as well as any corporation, partnership or association which has its principal place of business in the United States or that is incorporated in the United States.[17]

There is an exception to the FCPA antibribery provisions that permits so-called "facilitation" or "grease payments" to foreign officials for the purposes of expediting or securing the performance of a "routine governmental action."[18] The term "routine governmental action" means any action which is ordinarily and commonly performed by a foreign official, such as obtaining permits, processing visas, and lining up basic services.[19] The routine governmental action exception is only ap-

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ments, *supra* note 7. For purposes of this article the term "foreign official" will generally connote the recipient, or intended recipient, of a bribe.

16. *See* 15 U.S.C. § 78l(g) (2006); *see also supra* note 10, and accompanying text.

17. 15 U.S.C. § 78dd-2(h)(1) (2006). The antibribery provisions apply to all domestic corporations regardless of whether or not they issue securities. *See* 15 U.S.C. §78dd-1, -2 (2006). The FCPA's antibribery provisions do not generally apply to foreign corporations unless some action in furtherance of the bribe occurs within the territory of the United States. *See* Dooley v. United Techs. Corp., 803 F. Supp. 428, 439 (D.D.C. 1992). However foreign corporations that meet the definition of an "issuer" will still be subject to the FCPA. *See* 15 U.S.C. § 78dd-1 (2006). With respect to foreign subsidiaries, the legislative history of the FCPA and case law generally suggests that foreign subsidiaries of domestic companies "acting on their own behalf and not as agents or covered persons generally are not covered by the antibribery provisions." *See* Lucinda A. Low et al., *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, 1665 PLI/CORP 711, 723 (2008) (citing H.R. CONF. REP. NO. 95-831, at 14 (1977); *Dooley*, 803 F. Supp. at 439 (noting that legislative history excludes foreign subsidiaries from *per se* FCPA coverage)). However, if a foreign subsidiary "performs any acts in furtherance of a prohibited payment within the United States," it could be "directly liable under the FCPA's territoriality jurisdictional prong." *Id.*

18. 15 U.S.C. §§ 78dd-1(b), -2(b), -3(b) (2006).

19. *Id.* §§ 78dd-1(f)(3), -2(h)(4), -3(f)(4) (2006). The statute itself defines "routine governmental action" as "an action which is ordinarily and commonly performed by a foreign official in: (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across the country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable prod-

plicable to the FCPA antibribery provisions and there is not a similar exception under the FCPA accounting provisions.[20]

There are also two affirmative defenses to the FCPA antibribery provisions for certain types of payments. The first affirmative defense applies when the payment at issue "was lawful under the written laws" of the relevant foreign officials' country.[21] The second affirmative defense effectively allows for certain payments made for "reasonable and bona fide" expenditures.[22] Reasonable and bona fide expenditures include such things as travel and lodging expenses incurred by or on behalf of the foreign official and need to be directly related to "the promotion, demonstration, or explanation of products or services," or "the execution or performance of a contract with a foreign government or agency thereof."[23]

The FCPA is both a civil and criminal statute, and part of it has been incorporated into the federal securities laws. As a result, the DOJ is responsible for all criminal enforcement of the FCPA and for civil enforcement of the antibribery provisions against non-issuers subject to the FCPA's jurisdiction.[24] The SEC is responsible for all civil enforcement of the ac-

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ucts or commodities from deterioration; or (v) actions of a similar nature." *Id.*

20. *See* Low et al., *supra* note 17, at 725 (stating additionally that the routine governmental action exception is also unique to the United States and the FCPA and it is not an exception in many other countries' domestic antibribery laws).

21. 15 U.S.C. §§ 78dd-1(c)(1), -2(c)(1), -3(c)(1) (2006).

22. *Id.* §§ 78dd-1(c)(2), -2(c)(2), -3(c)(2) (2006).

23. *Id.*

24. Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 395-96 (2010). The criminal penalties that result from violations of the antibribery provisions can include fines of up to $2 million for entities, and fines of up to $100,000 and imprisonment of up to five years against officers, directors, employees, agents, or shareholders of the relevant entities. *See* 15 U.S.C. §§ 78dd-2(g), -3(e), and 78ff(c). In addition, under the Alternative Fines Act the fines may be higher in that "the actual fine may be up to twice the benefit that the defendant sought to obtain by making the corrupt payment." U.S. Dep't of Justice & U.S. Dep't of Commerce, *Foreign Corrupt Practices Act Antibribery Provisions*, http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf. The DOJ can also bring a civil action for a "fine of up to $10,000 against any firm as well as any officer, director, employee, or agent of a firm, or stockholder acting on behalf of the firm, who violates the antibribery provisions." *Id.*; *see also* 15 U.S.C. §§ 78dd-2(g), -3(e), and 78ff(c).

counting provisions and for civil enforcement of the antibribery provisions with respect to issuers.[25]

III.
RECENT DEVELOPMENTS IN THE FCPA

In the author's view, there has been a movement towards more aggressive enforcement of the FCPA by both the DOJ and SEC over the last several years as reflected in the increased number of cases brought and the amount of fines obtained. In addition, the DOJ and SEC have taken a more proactive approach at targeting and identifying potential FCPA violations. The recent *Nature's Sunshine Products* case exemplifies the different legal angles the DOJ and SEC have considered in pursuing cases under the FCPA.

A. *Current Enforcement of the FCPA*

1. *Recent Cases by the DOJ and SEC*

The last few years have seen a dramatic increase in the number of FCPA cases brought by both the DOJ and the SEC.[26] The DOJ's Assistant Attorney General for the Criminal Division, Lanny Breuer, recently touted in a May 2010 speech that since 2005 the DOJ has been involved in "36 corporate FCPA and foreign bribery-related resolutions with fines totaling more than $1.5 billion."[27] He also noted that since that time the DOJ has charged 77 individuals with FCPA related violations, with 46 of these indictments having been brought

25. *See* Koehler, *supra* note 24, at 395-96. The civil remedies and penalties for violations of the accounting provisions by issuers are generally those available to the SEC under its general enforcement authority for violations of the federal securities laws, which includes the authority to seek injunctive relief, cease and desist orders, and the imposition of civil fines. *See* 15 U.S.C. § 78u (2006).

26. *See* Claudius O. Sokenu, *FCPA News and Insights: An Update on Recent Foreign Corrupt Practices Act and Global Anti-Corruption Enforcement, Litigation, and Compliance Developments, in* THE FOREIGN CORRUPT PRACTICES ACT OF 2010, 641, 645 (Practicing Law Inst. ed., 2010).

27. Lanny A. Breuer, Assistant Attorney Gen., Criminal Div., U.S. Dep't of Justice, Speech at the Meeting of the Council on Foreign Relations: International Criminal Law Enforcement: Rule of Law, Anti-Corruption and Beyond (May 4, 2010) [hereinafter Breuer May 2010 Speech] (transcript *available at* http://www.cfr.org/publication/22048/international_criminal_law_enforcement.html).

since the beginning of 2009, "more than the total number of indictments brought in the previous seven years combined."[28]

The year of 2009 was a strong one enforcement-wise and involved a total of 16 criminal and civil enforcement actions against corporations and 24 such actions against individuals.[29] 2010 has also seen the announcement of several noteworthy enforcement actions, including *Innospec*,[30] *Daimler*,[31] and *Technip*.[32] In addition, several major corporations have an-

28. *Id.*

29. Sokenu, *supra* note 26, at 645.

30. *See* United States v. Innospec Inc., No. 1:10-cr-00061-ESH (D.D.C. Mar. 17, 2010); Press Release, Dep't of Justice, Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba (Mar. 18, 2010), http://www.justice.gov/opa/pr/2010/March/10-crm-278.html; SEC v. Innospec, Inc., No. 1:10-cv-00448 (RMC) (D.D.C. Mar. 10, 2010); SEC Files Settled Foreign Corrupt Practices Act Charges Against Innospec, Inc. for Engaging in Bribery in Iraq and Indonesia, Litigation Release No. 21454, 2010 SEC LEXIS 747 (Mar. 18, 2010). Innospec Inc. was charged with FCPA violations for, among other things, paying kickbacks to Iraqi government officials in order to obtain contracts under the United Nations Oil for Food Program. *Id.*

31. *See* Plea Agreement, United States v. Daimler AG, No. 1:10-cr-00063-RJL (D.D.C. Mar. 22, 2010); Plea Agreement, United States v. Daimler-Chrysler Automotive Russ. SAO, No. 1:10-cr-00064-RJL (D.D.C. Mar. 22, 2010); Plea Agreement, United States v. Daimler Export and Trade Finance GmbH, No. 1:10-cr-00065-RJL (D.D.C. Mar. 22, 2010); Press Release, Dep't of Justice, Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay $93.6 Million in Criminal Penalties (Apr. 1, 2010), http://www.justice.gov/opa/pr/2010/April/10-crm-360.html; Complaint, SEC v. Daimler AG, No. 1:10-cv-00473 (D.D.C. Mar. 22, 2010); Sentencing Memorandum, United States v. DaimlerChrysler China LTD., No. 1:10-cr-00066-RJL (D.D.C. Mar. 22, 2010); Press Release 2010-51, SEC, SEC Charges Daimler AG with Global Bribery (Apr. 1, 2010), http://www.sec.gov/news/press /2010/2010-51.htm. Daimler AG was charged with a systematic practice of paying bribes to foreign government officials to secure business in Asia, Africa, Europe, and the Middle East. *Id.*

32. *See* Complaint, SEC v. Technip, No. 4:10-cv-02289 (S.D. Tex. Jun. 28, 2010); Press Release, Dep't of Justice, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty (Jun. 28, 2010) http://www.justice.gov/opa/pr/2010/June/10-crm-751.html; SEC Charges Technip with Foreign Bribery and Related Accounting Violations, SEC Litigation Release No. 21578, 2010 SEC LEXIS 2120 (Jun. 28, 2010). It was alleged that Technip was part of a four-company joint venture that bribed Nigerian government officials over a ten-year period in order to win construction contracts in Nigeria worth more than $6 billion. *Id.* The SEC noted that one of Technip's joint venture partners, KBR, Inc.

nounced in 2010 that they have settled or were close to settling several "long-running" FCPA investigations.[33]

Recent FCPA cases have also resulted in some of the largest penalties and fines ever imposed for violations of the statute. In *Siemens AG*, filed in December 2008, the company agreed to settle FCPA charges with the SEC and DOJ for combined penalties totaling $800 million.[34] And in *KBR/Halliburton*, filed in 2009, the combined penalties totaled $579 million, with Kellogg Brown & Root agreeing to pay a $402 million criminal fine to the DOJ, and its current and former parent

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and its former parent, Halliburton Company, had previously settled to similar charges. *Id.*; *see also infra* note 35, and accompanying text.

33. Shearman & Sterling LLP, *FCPA Digest of Cases and Review Releases Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977*, May 19, 2010, http://www.shearman.com/files/upload/FCPA-Digest-Spring-2010.pdf. The law firm of Shearman & Sterling reported in May 2010 that "the first months of 2010 saw the announcements by BAE, Technip, Daimler, and Alcatel-Lucent that they had settled or were close to settling long-running FCPA investigations with a combination of guilty pleas and SEC settlements." *Id.* The firm also noted that "a number of other companies, including Innospec, Pride International, and ENSCO, have announced they expect to complete their negotiations with the government in the near term." *Id.*

34. *See* Sentencing Memorandum, United States v. Siemens Aktiengesellschaft, No. 08-367 (D.D.C. Dec. 12, 2008); Sentencing Memorandum, United States v. Siemens A.S. (Arg.), No. 08-368 (D.D.C. Dec. 12, 2008); Sentencing Memorandum, United States v. Siemens Bangladesh Ltd., No. 08-369 (D.D.C. Dec. 12, 2008); Sentencing Memorandum, United States v. Siemens S.A. (Venez.), No. 08-370 (D.D.C. Dec. 12, 2008); SEC v. Siemens Aktiengesellschaft, No. 1:08-cv-02167 (D.D.C. Dec. 12, 2008); Press Release, Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html; SEC Files Settled Foreign Corrupt Practices Act Charges Against Siemens AG for Engaging in Worldwide Bribery, SEC Litigation Release No. 20829 (Dec. 15, 2008), http://www.sec.gov/litigation/litreleases/2008/lr20829.htm. Siemens was charged with FCPA violations for engaging in a widespread and systematic practice of paying bribes throughout the world. *Id.* Siemens agreed to pay $350 million in disgorgement to the SEC and a $450 million criminal fine to the DOJ. *Id.* In addition, Siemens agreed to pay a fine of approximately $569 million to the Office of the Prosecutor General in Germany and had previously paid a fine of $285 million to this same prosecutor in October 2007, making the total amount of disgorgement and fines paid by Siemens related to the matter at over $1.6 billion. *Id.*

companies, KBR, Inc. and Halliburton Company, agreeing to pay $177 million in disgorgement of profits to the SEC.[35]

In the author's view, the pace of enforcement cases and amount of fines levied is likely to increase in the years to come.[36] While all of these cases have generated a lot of attention concerning enforcement of the FCPA, there is one particular FCPA enforcement case brought by the SEC that the author believes deserves special attention for its unique angle in finding FCPA liability on the part of senior executives.

2. *Nature's Sunshine Products*

The author considers *SEC v. Nature's Sunshine Products, Inc.*[37] to be a case that deserves particular attention because it is the first time that a "control person" theory has been used in an FCPA enforcement matter.[38] In that case, the SEC filed a settled enforcement action, which charged Nature's Sunshine Products, Inc. with violating the FCPA's antibribery, books and records, and internal controls provisions, as well as other provisions in the federal securities laws. These allegations were based on payments made by its Brazilian subsidiary to local customs brokers for the purposes of facilitating the importa-

35. *See* United States v. Kellogg Brown & Root LLC, No. H-09-071 (S.D. Tex. 2009); SEC v. Halliburton Co., 4:09-CV-399 (S.D. Tex. 2009); Press Release, Dep't of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009), http://www.justice.gov/opa/pr/2009/February/09-crm-112.html; SEC Charges KBR, Inc. with Foreign Bribery; Charges Halliburton Co. and KBR, Inc. with Related Accounting Violations, SEC Litigation Release No. 20897A, 2009 SEC LEXIS 383 (Feb. 11, 2009). Kellogg Brown & Root LLC was alleged to have bribed Nigerian government officials over a ten-year period in order to obtain construction contracts. *Id.*

36. *See infra* notes 66-81, and accompanying text.

37. *See* Nature's Sunshine Products, *supra* note 3.

38. Section 20(a) of the Exchange Act defines "control person" liability and provides that: "Every person who, directly or indirectly, controls any person under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action." 15 U.S.C. § 78t(a) (2006).

tion of unregistered products into Brazil.[39] The SEC also charged two of the company's senior executives (its chief executive officer and former chief financial officer), even though it was not alleged that these senior executives had knowledge of the relevant bribes which had occurred.[40] The charges against these executives stemmed from alleged violations of the FCPA's books and records and internal controls provisions while acting as "control persons" within the company.[41]

Nature's Sunshine Products is a manufacturer of nutritional and personal care products.[42] The company established a wholly-owned subsidiary in Brazil, which soon became the company's largest foreign market.[43] In 1999 and 2000, the Brazilian government reclassified certain vitamins, herbal products and nutritional supplements sold in Brazil as "medicines," including some of the products sold at the time by the company's Brazilian subsidiary.[44] This reclassification required the company's Brazilian subsidiary to register many of its products as medicines in order to import and sell them in Brazil.[45] According to the SEC's complaint, the company's Brazilian subsidiary was unable to register some of these products as medicines, and as a result, sales in the Brazilian subsidiary subsequently plunged.[46] In an effort to circumvent the

39. Nature's Sunshine Products, *supra* note 3, at ¶¶ 49-69 (alleging that the company violated Sections 10(b), 13(a), 13(b)(2)(A), 13(b)(2)(b), and 30A of the Exchange Act and Rules 10b-5, 12b-20, 13a-1, 13a-13 thereunder).

40. *Id.* ¶¶ 43-48 (alleging that the senior executives violated Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act as control persons under Section 20(a) of the Exchange Act). The SEC filed a settled enforcement action against the company and the two senior executives, and all three, without admitting or denying the allegations in the complaint, consented to the entry of final judgments against them enjoining them from future violations of the alleged provisions of the federal securities laws. *See* Nature's Sunshine Products, *supra* note 3. The company agreed to pay a civil penalty of $600,000 and the senior executives each agreed to pay a civil penalty of $25,000. *Id.* During the period relevant to the allegations, the CEO was acting in the capacity as the company's chief operating officer. *Id.*

41. *Id.* ¶¶ 43-48

42. *Id.* ¶ 2.

43. *Id.* ¶¶ 1, 3. The wholly owned subsidiary was Natures Sunshine Produtos Naturais Ltda. *Id.* ¶ 16.

44. *Id.* ¶ 4.

45. *Id.*

46. *Id.* ¶ 5. Sales in the Brazilian subsidiary went from approximately $22 million in 2000 to approximately $2.6 million in 2003. *Id.* ¶ 21.

new registration requirements, it was alleged by the SEC that the Brazilian subsidiary made undocumented cash payments totaling over $1 million to Brazilian customs brokers in 2000 and 2001, a portion of which were later paid to custom officials, to permit the importation of the relevant unregistered products in Brazil.[47] Finally, the SEC alleged that these cash payments were not accurately recorded in the Brazilian subsidiary's books and records because they were recorded as legitimate importation expenses.[48]

Outside of the general facts underlying the bribery scheme by the company itself, the SEC's complaint highlighted allegations concerning the falsification of the company's books and records and the failure of company senior executives to adequately supervise company employees responsible for making and keeping books and records and maintaining a system of internal controls.[49] The complaint alleged that in December 2000, an operations manager for the Brazilian subsidiary told two controllers about the difficulties the subsidiary was having in importing unregistered products and about the cash payments that had been made to the customs brokers.[50] One of the controllers claimed to have passed along this information to a senior manager at the company, but the company did not investigate the matter further or take any corrective action.[51] The complaint further alleged that in November 2001, the Brazilian subsidiary hired a new controller who allegedly discovered approximately 80 cash payments, including the relevant payments made to the customs brokers, for which there was no supporting documentation.[52] The complaint then noted that "despite a lack of supporting documentation" for the cash payments, the company accounted for the payments in their 2001 financial statements as legitimate

47. *Id.* ¶¶ 22-23.

48. *Id.* ¶ 27.

49. *See id.* ¶¶ 45, 48.

50. *See id.* ¶¶ 29-34.

51. *Id.* ¶ 35. Both of the relevant company controllers worked in the company's corporate headquarters in Provo, Utah, and both had responsibility for maintaining the company's books and records and preparation of the company's financial statements "regarding the inclusion of financial information" for the company's foreign subsidiaries, including the Brazilian subsidiary. *Id.* ¶ 36. Neither of the two controllers nor the senior manager were charged by the SEC. *See id.* ¶¶ 43-48.

52. *Id.* ¶¶ 37-38.

importation expenses.[53] The complaint alleged that in 2002, "in an effort to create the appearance" that the cash payments were legitimate importation expenses, the Brazilian subsidiary "purchased fictitious supporting documentation for the cash payments."[54] Finally the complaint alleged that in March 2002, the company filed its Form 10-K with the SEC and that the filing failed to disclose material information related to the improper payments that had been made.[55]

With respect to the senior executives that were charged, the SEC's complaint stressed that these executives "had supervisory responsibilities for the senior management and policies" of the company.[56] In this respect, it alleged that the senior executives had direct reports which included senior management who were directly or indirectly responsible for making sure the company's books and records accurately reflected the state of registration of products sold in Brazil and maintaining a system of internal controls "sufficient to provide reasonable assurance that the registration" of the company's products sold in Brazil were "adequately monitored."[57] The complaint then alleged that the senior executives "failed to adequately supervise" company personnel in 2000 and 2001 and to "make and keep books and records that accurately reflected in reasonable detail the state of registration" of the company's products sold in Brazil and to adequately supervise company personnel "in devising and maintaining a system of internal controls sufficient to have provided reasonable assurance that the registration" of company products sold in Brazil were "adequately monitored."[58] In this respect, the complaint alleged that the CEO and CFO, in their capacity as "control persons," as defined under Section 20(a) of the Exchange Act, violated the FCPA books and records and internal controls provisions, in connection with the improper cash payments made in Brazil.[59]

The charges against the senior executives in *Nature's Sunshine Products* stand out as it is the first time that the SEC has

53. *Id.* ¶ 39.
54. *Id.* ¶ 40.
55. *Id.* ¶¶ 41-21.
56. *Id.* ¶¶ 43, 46.
57. *Id.* ¶¶ 44, 47.
58. *Id.* ¶¶ 45, 48.
59. *Id.* ¶¶ 66-69.

charged control person liability in an FCPA context.[60] Some commentators have noted that prior to this case the SEC had "limited itself to pursuing executives who had direct knowledge of payments to foreign officials or of the misreporting of such payments in their companies' books."[61] In this case, however, the SEC did not allege that the two officers were aware of, or had knowledge of, the underlying wrongful bribes. Rather the complaint alleged that the two senior officers "failed to adequately supervise" the relevant company personnel in charge of maintaining the proper books and records and internal controls.[62] In this regard, at least one securities practitioner has wondered whether the "case may presage a broader enforcement effort against executives who fail to adequately supervise employees responsible for maintaining the company's books and records and system of internal controls."[63] And given that the SEC had decided to charge the senior executives with control person liability, without alleging that either participated in or had knowledge of the relevant bribery, this same practitioner warned that the case "raises the disturbing spectre of strict liability" for senior executives at companies where FCPA violations take place.[64] In this regard, some have perceived *Nature's Sunshine Products* as expanding the SEC's arsenal of weapons that it can undertake in the FCPA in holding corporate officers more accountable for wrongful bribery committed by their corporations.[65]

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60. *See* Sokenu, *supra* note 26, at 648; *See* also Koehler, *supra* note 24, at 415. It is worth noting that control person liability, while a new concept in the FCPA, is not really a new one with respect to the federal securities laws and has been used in finding liability on the part of senior executives in general corporate fraud cases. *See* Sokenu, *supra* note 26, at 647.

61. Mary Spearing et al., New Developments in FCPA Enforcement: What it All Means, Address Before the American Bar Association: 24th Annual National Institute on White Collar Crime (Feb. 25, 2010).

62. Nature's Sunshine Products, *supra* note 3, ¶¶ 43-48.

63. Abigail Arms, *Discussion Points: SEC Update and Priorities*, Practicing Law Institute, 1778 PLI/CORP 69, 83 (Dec. 10-11, 2009).

64. *Id.* at 86. Arms goes on to note that, "[a]t a minimum, the SEC's embrace of 'control person' liability for FCPA violations will shift the burden to officers who choose not to settle to prove that they acted in good faith and did not directly or indirectly induce the acts triggering liability." *Id.*

65. *See id.* at 86; *see also* Sokenu, *supra* note 26, at 647; Spearing et al., *supra* note 61, at H-20.

B. *The Movement Towards Aggressive Enforcement of the FCPA*

The DOJ and SEC, the two enforcers of the FCPA, have recently produced tough talk, and action, concerning enforcement of the FCPA.

1. *Tough Talk by the DOJ*

On the DOJ front, Attorney General Eric Holder in a November 2009 speech about corruption quoted President Obama as saying that "the struggle against corruption is one of the greatest struggles of our time."[66] In that context, Holder called corruption "a scourge on civil society" and stated that the prosecution of corruption was an issue that was "deeply personal" to him.[67] In recognizing a global need to fight corruption, he also declared that the world needed to "vigorously enforce" their own laws prohibiting foreign bribery, as the United States intended to do with respect to enforcement of the FCPA.[68]

Soon after Holder's speech, Assistant Attorney General Breuer echoed the same sentiments in another November 2009 speech.[69] Noting that the past year "was probably the most dynamic single year in the more than 30 years the FCPA was enacted," Breuer promised to continue "the upward trend in FCPA enforcement" through further aggressive enforcement of the FCPA.[70] Breuer also added to Holder's calls for an international front against bribery, and stated that the DOJ would be pressing for "ever-increasing vigilance" by its "foreign counterparts to prosecute companies and executives in their

66. Eric H. Holder, U.S. Att'y Gen., Address at the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity (Nov. 7, 2009) [hereinafter Holder Speech], *available at* http://www.state.gov/p/inl/rls/rm/131641.htm. President Obama made this quote in a speech before he was the U.S. President. *See* Barack Obama, U.S. Senator, An Honest Government, A Hopeful Future, Address at the University of Nairobi (Aug. 28, 2006), *available at* http://nairobi.usembassy.gov/root/pdfs/obama-speech.pdf.

67. Holder Speech, *supra* note 66.

68. *Id.*

69. *See* Lanny A. Breuer, Assistant Attorney Gen., Criminal Div., U.S. Dep't of Justice, Prepared Address to the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009) [hereinafter Breuer November 2009 Speech], *available at* http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf.

70. *Id.*

own countries for foreign bribery."[71] Breuer repeated these calls in a May 2010 speech when he conveyed that the DOJ would be continuing its global efforts in combating bribery, through treaties and diplomatic measures, until there was a "global consensus" throughout the world "that corruption is unacceptable."[72]

2. *The SEC's New FCPA Unit*

Recently the SEC stepped up its calls for enforcement of the FCPA. In an August 2009 speech, SEC Enforcement Director Robert Khuzami announced that the SEC would be creating a new FCPA Unit.[73] He stated that the Unit would "focus on new and proactive approaches to identifying" violations of the FCPA and would "work more closely" with its foreign counterparts in taking a "more global approach" in dealing with FCPA violations.[74]

A few months later, in January 2010, the SEC and Khuzami officially announced the formation of the new FCPA Unit with Cheryl Scarboro as the new Unit Chief.[75] In her statement as the new Chief, Scarboro stated that the "primary mission" of the FCPA Unit was "to devise ways to be more proactive" in the SEC's enforcement of the FCPA.[76] She said that the Unit would be conducting "more targeted sweeps and

71. *Id.* In making this statement he noted that this was "part of a long-term goal to ensure a level-playing field for U.S. companies." *Id.*

72. Breuer May 2010 Speech, *supra* note 27. In this respect he conveyed that the DOJ intended to work with other countries in helping them build up their own capacities in fighting global corruption. *See id.*

73. *See* Robert Khuzami, Dir., Div. of Enforcement, U.S. Sec. and Exch. Comm'n, 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.

74. *Id.*

75. *See* Robert Khuzami, Dir., Div. of Enforcement, U.S. Sec. and Exch. Comm'n, Remarks at News Conference Announcing Enforcement Cooperation Initiative and New Senior Leaders (Jan. 13, 2010), *available at* http://www.sec.gov/news/speech/2010/spch011310rsk.htm.

76. Cheryl Scarboro, Chief of the Foreign Corrupt Practices Act Unit, U.S. Sec. and Exch. Comm'n, Remarks at News Conference Announcing New SEC Leaders in Enforcement Division (Jan. 13, 2010), *available at* http://www.sec.gov/news/speech/2010/spch011310newsconf.htm. She also stated that members of the FCPA Unit would "gain in-depth knowledge of industries and regional practices" so that the Unit could "uncover corrupt practices." *Id.*

sector-wide investigations" along with its regulatory counterparts both domestically and abroad.[77] She also noted that the Unit would be raising the SEC's "profile on the global stage by playing a more active role in international regulatory working groups and building closer relationships" with the SEC's foreign counterparts.[78] Finally, she noted that the FCPA Unit would leverage the efforts of the SEC, the DOJ, and their foreign counterparts in leveling "the playing field worldwide" so that "together" they would "send a clear message that wrongdoers will face a strong and united front around the world."[79]

The tough talk by officials at the DOJ and SEC, and the creation of the SEC's new FCPA Unit, indicates that enforcement of the FCPA will be pursued more aggressively on both a domestic and global scale in the future. Such enforcement is also likely to take place on a proactive basis, as the DOJ and SEC have both stressed targeted sweeps and industry-based approaches designed to detect and prosecute potential FCPA violations.[80] The two agencies are also more likely to adopt a more global approach in their detection and prosecution of bribery as both agencies have announced their intentions to work with countries throughout the world in combating global corruption wherever it is found.[81]

IV.
UK BRIBERY ACT OF 2010

The regulatory enforcers in the United States were not the only ones talking tough and promising a more aggressive

77. *Id.*

78. *Id.*

79. *Id.*

80. *See id.* Breuer warned in his November 2009 speech that the DOJ would be focusing its "attention on areas and on industries where we can have the biggest impact in reducing foreign corruption." Breuer November 2009 Speech, *supra* note 69. He also conveyed in his most recent May 2010 speech, that the DOJ was setting up "sting operations" as a proactive tool in their investigations concerning corruption. Breuer May 2010 Speech, *supra* note 27. *See also* Shearman & Sterling, *supra* note 33, at 136-137. The SEC also noted that they would be proactive in the enforcement of the FCPA with FCPA Unit Chief Scarboro recently warning that the SEC would be conducting "targeted sweeps and sector-wide investigations" in looking for violations of the statute. Scarboro, *supra* note 76.

81. *See* Scarboro, *supra* note 76. *See also* Breuer November 2009 Speech, *supra* note 69; Breuer May 2010 speech, *supra* note 27.

approach toward enforcement of the antibribery laws. The United Kingdom took a historical step in its fight against bribery on April 8, 2010 with the enactment of the Bribery Act 2010 ("UK Bribery Act").[82] This comprehensive law replaced the antiquated laws previously governing bribery in the United Kingdom. The UK Bribery Act criminalizes bribery of domestic and foreign government officials, commercial bribery, and the receipt of a bribe.[83] It also uniquely criminalizes the failure of corporations to prevent bribery.[84] Individuals found to have violated the UK Bribery Act face imprisonment for a term of up to 10 years, and both individuals and corporations found to have violated the new law face being penalized with a fine of an unlimited amount.[85] For purposes of this article, the discussion will focus on the UK Bribery Act as it applies to foreign bribery.

A. *Bribery of Foreign Public Officials*

The UK Bribery Act criminalizes the bribery of foreign public officials.[86] Specifically, Section 6 of the UK Bribery Act provides that a person who bribes a foreign public official is guilty under the new law if the person doing so intended to obtain or retain business or a business advantage as a result of the bribe.[87] For a violation to have occurred the person making the bribe must have, directly or through a third party, of-

82. *See* UK Bribery Act, *supra* note 2.

83. *See id.* §§ 1-6. The Ministry of Justice stated that the UK Bribery Act replaced various "fragmented" laws concerning bribery under the common law and the prevention of Corruption Acts 1889-1916. *See* Bribery Act 2010, Ministry of Justice, http://justice.gov.uk/publications/bribery-bill.htm. It is worth noting that the enactment of the new law is seen as an indirect response to controversy in the United Kingdom surrounding the closure of a case involving BAE Systems. *See* Afua Hirsch, *New Bribery Law Puts Overseas Payments Under Scrutiny*, GUARDIAN, Apr. 12, 2010, at 16.

84. *See* UK Bribery Act, *supra* note 2, at § 7.

85. *Id.* § 11(1)-(3).

86. *Id.* § 6. Section 6(5) of the UK Bribery Act defines a "foreign public official" as any individual who: (a) "holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom;" (b) "exercises a public function - (i) for or on behalf of a country or territory outside the United Kingdom, or (ii) for any public agency or public enterprise of that country or territory;" or (c) "is an official or agent of a public international organization." *Id.* § 6(5).

87. *See id.* §§ 6(1)-(2).

fered, promised, or given a bribe to a foreign public official or to another person at the foreign public official's request, assent, or acquiescence.[88] A senior officer of a corporation can also be guilty under the law if his or her relevant corporation violates the law with the "consent or connivance" of the senior officer.[89] The bribery prohibitions under the UK Bribery Act apply to all United Kingdom companies, citizens, and residents, regardless of where the bribery occurred.[90] The bribery provisions also apply to any individual or company, irrespective of their nationality, when the relevant violative acts take place in the United Kingdom.[91]

B. *Failure to Prevent Bribery*

The most remarkable aspect of the UK Bribery Act is that it makes it a crime for a corporation to fail to prevent bribery.[92] In the author's view, this provision is both revolutionary and dangerous, and one that any corporation doing any kind of business on an international scale needs to be very wary of.

1. *Failure to Prevent Bribery*

The UK Bribery Act establishes criminal liability for corporations that fail to prevent bribery.[93] Section 7 of the UK Bribery Act provides that "a relevant commercial organization" violates the law when a person "associated" with the organization bribes another person intending to obtain or retain business or a business advantage for the organization.[94] The term "relevant commercial organization" includes corporations incorporated within the United Kingdom as well as any other corporation, wherever incorporated, "which carries on a business, or part of a business, in any part of the United Kingdom."[95] A person is considered to be "associated" with a com-

88. *See id.* § 6(3). This section also requires that the relevant law governing the foreign public official not permit him to be influenced through the payment of any bribe. *Id.*
89. *Id.* § 14.
90. *See id.* § 12(4).
91. *See id.* § 12(1).
92. *See id.* § 7.
93. *Id.*
94. *Id.*
95. *Id.* § 7(5).

mercial organization when that person "performs services for or on behalf" of the organization.[96]

The new "failure to prevent bribery" standard is groundbreaking in the international antibribery arena because it effectively applies a standard of quasi-strict liability on corporations for bribery committed by their employees or third parties acting on their behalf.[97] It also has a broad extraterritorial reach, applying to any corporation that conducts any "part of a business" in the United Kingdom, regardless of any other nexus to the United Kingdom.[98] Therefore any international corporation that does any kind of business in the United Kingdom can be held criminally liable for failure to prevent bribery even when the corporation is not based in the United Kingdom, the offensive bribe did not take place in the United Kingdom, or the recipient of the bribe is not from the United Kingdom.[99] All that is needed for jurisdiction is that the company does "part of a business" in the United Kingdom.[100]

2. *Adequate Procedures Defense*

While the UK Bribery Act's "failure to prevent bribery" provision may seem alarming at first, the law does provide corporations with a defense from liability under this provision if they can show that they have in place "adequate procedures designed to prevent" persons associated with them from engaging in the violative conduct.[101] This defense mitigates what could be considered a harsh liability standard under the "failure to prevent bribery" provision. This defense also appears to avoid punishing corporations that in good faith seek to take precautions in preventing bribery within their operations.

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96. *Id.* § 8. The "capacity" in which a person "performs services for or on behalf" of a commercial organization "does not matter." *Id.* at § 8(2). The section specifically notes, as an example, that the associated person may be a commercial organization's "employee, agent or subsidiary." *Id.* § 8(3).

97. *See id.* § 7.

98. *See id.* §§ 7, 12(5)-(6).

99. *See id.*

100. *See id.* § 7(5). This extraterritorial reach is expansive and far broader than that of the FCPA. It remains to be seen whether the Serious Fraud Office ("SFO"), the primary enforcer of the UK Bribery Act, will seek to apply the new law's extraterritorial reach in this kind of manner.

101. *Id.* § 7(2).

What actually constitutes "adequate procedures" for purposes of the defense is uncertain and remains to be seen. The UK Bribery Act states that there will be guidance on this issue in the future.[102] Whichever the case, this defense is unique and unlike any defense that arises under the FCPA.[103]

V.
INCREASED ACCOUNTABILITY IN THE PREVENTION OF BRIBERY

A. *Increased Accountability*

The recent trend governing the enforcement of laws against corruption points towards greater accountability in the prevention of bribery. While senior executives and corporations have always had some accountability with respect to the prevention of bribery, *Nature's Sunshine Products* and the UK Bribery Act have enhanced this accountability.

In the author's view, *Nature's Sunshine Products* heightened the accountability of senior executives that could be considered "control persons" under the federal securities laws for making and keeping books and records and maintaining a system of internal controls.[104] In *Nature's Sunshine Products*, senior executives were alleged to have "failed to adequately supervise" company personnel under them with a view towards maintaining the proper books and records and a system of internal controls, notwithstanding the fact that the SEC had not alleged that these executives had actual knowledge of the bribes which had occurred.[105] Some have considered this case as raising the "disturbing spectre of strict liability" for senior executives at companies where FCPA violations take place.[106] In the author's view, it points to greater accountability by se-

102. *Id.* § 9. Section 9(1) specifically provides that "[t]he Secretary of State must publish guidance about procedures that relevant commercial organizations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1) [failure to prevent bribery provision]." *Id.*

103. The DOJ and SEC may look at several factors when determining whether and what amount of penalty to seek in an FCPA action, including a corporation's compliance policies and procedures. However, in the author's view, such policies and procedures will not in itself act as an affirmative defense to liability under the FCPA.

104. Nature's Sunshine Products, *supra* note 3.

105. *Id.*

106. Arms, *supra* note 63, at 86.

nior executives with regard to making and keeping books and records and maintaining a system of internal controls within their respective organizations. Senior executives who do not act in good faith or who directly or indirectly induce acts constituting an FCPA violation may find themselves liable if bribery occurs under their watch, notwithstanding their lack of knowledge of the relevant bribes.

Likewise, the UK Bribery Act has heightened the accountability of corporations in the prevention of bribery. A corporation will be criminally liable under the law when any person that "performs services for or on behalf" of the organization bribes another person intending to obtain or retain business or a business advantage for the organization.[107] This broad standard of quasi-strict liability on corporations for acts committed by their employees or third parties acting on their behalf is particularly dangerous given that the UK Bribery Act has a broad extraterritorial reach.[108] While the UK Bribery Act does provide a defense from liability under the "adequate procedures" provision, the law itself still heightens the accountability of corporations in preventing bribery by any of its employees or individuals performing services on behalf of the corporations.

B. *Challenges for Senior Executives and Corporations*

Nature's Sunshine Products and the UK Bribery Act show how the very act of a bribe by someone associated with a corporation, even when senior executives did not know of the bribe, combined with the failure to adequately supervise those who make and keep books and records and who devise and maintain a system of internal controls, is enough to warrant civil liability under the FCPA's books and records and internal controls provisions or criminal liability under the UK Bribery Act. So what are senior executives to do? Especially senior executives in large corporations where it is impossible to keep an eye on every relevant employee responsible for compliance with the relevant FCPA provisions or acting on behalf of the corporation? And what are large corporations to do? Corporations that have subsidiaries and offices spread throughout the world, including in countries where bribery is prevalent?

107. UK Bribery Act, *supra* note 2, at § 8.
108. *See id.* §§ 7(5), 12.

The increased accountability to prevent bribery, combined with the aggressive enforcement efforts and increased attention at combating foreign bribery by regulators, means that senior executives and corporations need to be more compliance oriented and diligent than ever in preventing bribery. This means that senior executives and their corporations must design, maintain, and implement a robust and comprehensive corporate compliance program designed to detect and prevent bribery. While such a robust compliance program, in and of itself, may not always allow senior executives and their corporations to escape liability under the various anticorruption laws, it does serve to provide the best defense against liability as it significantly decreases the likelihood of any bribery occurring. After all, the best defense to a potential violation is to make sure that such a violation never occurs.

A strong compliance program can also act as a good defense to liability even when certain violative bribes have occurred. In the FCPA context with respect to senior executives, a strong corporate compliance program can serve to better protect corporate senior executives. Arguably, a senior executive that is mindful of potential FCPA violations and is vigilant, through a comprehensive compliance program, in seeking to prevent such violations, including in the supervision of those employees responsible for maintaining the company's books and records and system of internal controls in compliance with the FCPA, could argue as a defense that he adequately supervised his employees with a view towards compliance with the FCPA and therefore should not be held liable, even as a control person, for any bribery that has occurred under his watch. While this defense may or may not work in a litigated context, in the author's view it is certainly a good argument that senior executives at corporations with robust compliance programs could use, especially when the violative acts were committed by truly rogue employees who exercised all available means to cover up and hide any relevant violative activity.

A robust and comprehensive compliance program can also serve as a defense to potential corporate criminal liability under the UK Bribery Act. The UK Bribery Act itself provides a defense from liability when a corporation can show that it has in place "adequate procedures designed to prevent" the

relevant bribery.[109] While the new law does not specifically define what constitutes "adequate procedures" for purposes of this defense, the law does provide that the relevant United Kingdom authorities will publish "guidance" on what should constitute such procedures in the future.[110] What the guidance will be remains to be seen. It is likely that the relevant United Kingdom authorities will look at the OECD's recent corporate compliance guidelines that came out in February 2010 for guidance on what should constitute "adequate procedures" for purposes of this defense.[111] Whichever the case, corporations should follow and incorporate such future guidance into their own corporate compliance programs.

While the specific provisions that should be incorporated within a corporate compliance program are beyond the course and scope of this article, and are also very subjective in nature depending on any given corporation's operations, at the very least it can be said that such a compliance program should be designed to detect, address, and prevent potential bribery in violation of the FCPA and other anticorruption laws. The program should also be able to identify, address, and remedy any bribery that has occurred as quickly as possible. It should be applicable to all offices and subsidiaries located throughout the world and should include a training component to it wherein employees, and possibly even agents, are trained on what to watch out for and the law with respect to the FCPA and

109. *Id.* § 7(2).

110. *Id.* § 9.

111. The United Kingdom is a party to the OECD Antibribery Convention. *See* OECD Antibribery Convention, *supra* note 7. The OECD adopted and released the "Good Practice Guidance on Internal Controls, Ethics and Compliance" on February 18, 2010. This guidance recommends, among other things, that corporations have a clear and visible corporate compliance program regarding foreign bribery, proper oversight of such a compliance program, proper due diligence with respect to the hiring and doing business with third parties and business partners, and training for corporate personnel with respect to their compliance obligations. *See Good Practice Guidance on Internal Controls, Ethics and Compliance*, OECD, Feb. 18, 2010, http://www.oecd.org/dataoecd/5/51/44884389.pdf. Starting in March 2010, the OECD Working Group on Bribery, which is made up of representatives from the 38 countries that are party to the OECD Antibribery Convention, will be monitoring the signatory countries' progress in "encouraging their companies to implement" the OECD's new Good Practice Guidance. *See* Press Release, OECD, OECD calls on Businesses to Step up Their Fight Against Bribery (Mar. 3, 2010) (on file with the author).

other antibribery treaties. Further, a corporation's compliance program should have a due diligence component to it wherein third party agents, who could be considered to be acting on a corporation's behalf, are screened to ensure that such agents have not and will not likely engage in prohibitive bribery activity.

VI.
CONCLUSION

It is the author's view that recent developments in the FCPA, in both cases brought and statements made by the DOJ and SEC, signal an upward trend in enforcement of this domestic antibribery law. The enactment of the UK Bribery Act, along with its unique criminalization for the failure to prevent bribery, also indicates a desire by countries overseas to fight bribery in a more aggressive manner. These global enforcement developments emphasize that corporations and those senior executives who are control persons have legal responsibilities with regard to making and keeping books and records and maintaining a system of internal controls reasonably designed to prevent bribery.

The trend towards greater accountability in the prevention of bribery means that senior executives and their corporations need to be extremely vigilant in establishing and maintaining compliance systems designed to prevent bribery. It is the author's view that the enforcers of these laws, with their calls for more aggressive enforcement, will be less forgiving when violations have been found through lax compliance. Furthermore, this trend is not likely to subside as the United States continues to call for other countries to adopt and enforce more stringent international laws designed to prevent bribery, laws that may one day truly reflect a "global consensus" that bribery is unacceptable.[112] In this respect, senior executives and corporations that heed the warnings of today, in the trend toward greater accountability in the prevention of bribery, will find themselves in a more tenable position tomorrow, in a world with a stronger global antibribery environment.

112. Breuer May 2010 Speech, *supra* note 27.