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Essay

The Bribery Act's New
Approach to Corporate
Hospitality

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The Bribery Act’s New Approach to Corporate Hospitality

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INTRODUCTION

Following the passage of the U.K. Bribery Act of 2010¹ (the “Bribery Act”) on April 8, 2010, and its most recent enactment on July 1, 2011, businesses² both in the United Kingdom and abroad expressed great concern over the expansive extraterritorial implications the new law could have on their own conduct.³ Indeed, the Bribery Act’s prohibitions appear

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1. Bribery Act, 2010, c. 23 (U.K.).

2. For purposes of this Essay, the use of the term “business,” “corporation,” or “company” is meant to refer to the same type of corporate business entity whether it be a corporation, firm, partnership or otherwise.

3. See, e.g., Dionne Searcey, *U.K. Law on Bribes Has Firms in a Sweat*, WALL ST. J., Dec. 28, 2010, at B1; Martin Bentham, *Bribery Act Lawsuits ‘Could Ruin Bosses,’* EVENING STANDARD, Feb. 21, 2011, <http://tinyurl.com/4bekn4o>; Nicholas Cecil, *Ken Clarke Delays Bribery Act After Protests from Business Chiefs*, EVENING STANDARD, Jan. 31, 2011, <http://tinyurl.com/4qud6na>; James Hurley, *UK Anti-Bribery Law ‘Big Risk to Business,’* TELEGRAPH, Dec. 6, 2010, <http://tinyurl.com/5ue5xpo>; James Kirkup, *Bribery Act to be Reviewed After Business Fears*, DAILY TELEGRAPH, Jan. 14, 2011,

to extend far beyond those of its U.S. counterpart, the Foreign Corrupt Practices Act (the “FCPA”), which principally seeks to prevent certain classes of individuals and entities from bribing foreign public officials⁴ in order to obtain an unfair business advantage.⁵ Among the most controversial of the Bribery Act’s provisions is the treatment of “corporate hospitality payments.”⁶ Businesses around the world frequently engage in these payments in order to promote specific goods and services, assist in the execution of contracts, and generally garner goodwill with current and

<http://tinyurl.com/5vdro8k>; Alistair MacDonald, *U.K. Delays Bribery Law*, WALL ST. J. ONLINE, Jan. 31, 2011, <http://tinyurl.com/5uk9epx>; Alistair MacDonald & Dionne Searcey, *Britain Delays Imposing New Bribery Law*, WALL ST. J. ONLINE, Feb. 1, 2011, <http://tinyurl.com/6f43cla>; Carl Mortished, *Bribery or Seduction?*, WALL ST. J. ONLINE, Feb. 7, 2011, <http://tinyurl.com/6errxdg>; Jonathan Russell, *Leaked Bribery Act Changes ‘Unfair to UK Companies,’* DAILY TELEGRAPH, Mar. 17, 2011, <http://tinyurl.com/6e494oa>; Richard Tyler, *Bribery Act: OECD and CBI Clash Over Delay*, DAILY TELEGRAPH, Feb. 2, 2011, <http://tinyurl.com/3gw4w6a>; SHEARMAN & STERLING LLP, *THE BRIBERY ACT: ARE THE REPORTS OF ITS DEATH GREATLY EXAGGERATED?* 1, 1–3 (2011), available at <http://tinyurl.com/3k7j42g>; Dionne Searcey, *Britain Backpedaling on the Bribery Act?*, WALL ST. J. BLOG (Jan. 19, 2011), <http://tinyurl.com/4z2dzfq>.

4. While being the subject of a great deal of debate within the FCPA field, the term “foreign public official” most generally means any officer or employee of a foreign government, public international organization or any department thereof, or any person acting in an official capacity. See 15 U.S.C. §§ 78dd-1(f)(1), 78dd-2(h)(2) (2006); see also UNITED STATES DEPARTMENT OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT: ANTIBRIBERY PROVISIONS 4 (2010), available at <http://tinyurl.com/3dsmydn>. The Bribery Act applies a similar definition to “foreign public official.” Bribery Act, 2010, c. 23, § 6(5) (U.K.) (defining a foreign public official as an individual who “(a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the 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 organisation”).

5. See 15 U.S.C. § 78dd-1(c)(2) (2006). The affirmative defense of “reasonable and bona fide” expenditures is meant to protect corporate hospitality payments such as travel and lodging expenses incurred by a foreign official which are related to either (1) the promotion, demonstration, or explanation of products or services, or (2) the execution or performance of a contract. *Id.* Admittedly, while there has been no bright line definition of “reasonable and bona fide expenditures,” this affirmative defense is essentially defined as reasonable expenses for legitimate business hospitality or entertainment of foreign officials that might otherwise violate the letter of the statute. For cases applying and refining the “reasonable and bona fide” expenditure defense, see generally SHEARMAN & STERLING LLP, FCPA DIGEST (Mar. 2010), <http://tinyurl.com/3z8evvu>.

6. For purposes of this Essay, “corporate hospitality payments” refers to payments, typically in kind though not exclusively, made by corporations to anyone, foreign public official or not, in their efforts to improve or maintain relations with current or prospective clients. For example, payments made by a corporation hosting foreign clients to cover the cost of lodging and airfare is considered a corporate hospitality payment. Additionally, corporations covering the cost of dinner or other entertainment for clients would also be considered a corporate hospitality payment. See, e.g., Chris Blackhurst, *How is spending £270,000 on a would-be client not a bribe?*, EVENING STANDARD, Mar. 7, 2011, <http://tinyurl.com/3o7qkec> (describing corporate hospitality concerns of businesses); Richard Tyler, *Bribery Act Guidance on Corporate Hospitality a ‘Bureaucratic Nightmare,’* TELEGRAPH, Sep. 17, 2010, <http://tinyurl.com/3x6xxxl>; Richard Wachman & Larry Elliott, *Serious Fraud Office Promises Crackdown on Firms Offering Bribes Abroad*, GUARDIAN, Oct. 10, 2010, <http://tinyurl.com/25qcc5b>.

potential clients. Drawing the line between bribery and corporate hospitality is admittedly a difficult task and U.S. officials charged with enforcing the FCPA pay close attention when businesses are involved in building and maintaining relations with clients who additionally happen to be foreign public officials. Nevertheless, the FCPA recognizes the relevance corporate hospitality payments have to U.S. and foreign businesses and permits such payments so long as they are “reasonable and bona fide.”⁷ In contrast, the Bribery Act is so broad that it effectively treats all corporate hospitality payments to foreign public officials as *prima facie* violations,⁸ subject to a relatively vague affirmative defense known as the “adequate procedures” defense.⁹ As a result, scholars analyzing the Bribery Act have explained its provisions “could potentially sweep in legitimate conduct.”¹⁰

On March 30, 2011, following months of criticism, the U.K. Ministry of Justice released its long awaited Guidance¹¹ on the Bribery Act in order to assist businesses to better understand and comply with the law upon going into effect on July 1, 2011.¹² Interestingly, while the MoJ Guidance sheds new light on the most troublesome provisions of the Bribery Act, it also indicates some backpedaling on the part of U.K. officials. The MoJ Guidance attempts to reassure corporations that enforcement of the Bribery Act will take a “common sense” approach,¹³ but what this means is incredibly vague. In fact, this “common sense” approach appears to effectively amount to U.K. officials telling the business community, *trust us*

7. 15 U.S.C. § 78dd-1(c)(2) (2006).

8. F. Joseph Warin et al., *The British are Coming!: Britain Changes its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 TEX. INT'L L.J. 1, 21 (2010).

9. “Adequate procedures” refer to the policies a business can enact to prevent individuals associated with the organization from violating Section 1 or Section 6 of the Bribery Act. Bribery Act, 2010, c. 23, § 7(2) (U.K.); MOJ GUIDANCE, *infra* note 11, ¶ 1. While not defined in the statute, the MoJ Guidance, discussed below, was largely intended to provide guidance as to what constitutes “adequate procedures.” The MoJ Guidance delineates “six guiding principles” to help businesses comply with the Bribery Act, although there remains some debate as to the clarity of these principles. MOJ GUIDANCE, *infra* note 11, ¶ 1–4; *see also* Bribery Act, 2010, c. 23, § 9(1) (U.K.) (“The Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in [S]ection 7(1).”). Even ignoring the vagueries of the “adequate procedures” defense, availing oneself of the “adequate procedures” defense will be financially costly, leaving many businesses with the choice between cutting back expenses or risking Bribery Act prosecution.

10. Warin et al., *supra* note 8, at 16.

11. *See* MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE, Mar. 30, 2011, <http://tinyurl.com/5sf582t> [hereinafter MOJ GUIDANCE].

12. *See* Julia Werdigier, *Britain Releases Guidance on New Anti-Bribery Law*, N.Y. TIMES, Mar. 30, 2011, at B4, <http://tinyurl.com/3q54yvy>; Cassell Bryan-Low, *U.K. Outlines Bribery Rules*, WALL ST. J., Mar. 31, 2011, <http://tinyurl.com/43689ct>.

13. MOJ GUIDANCE, *supra* note 11, at 2.

— little consolation to a U.S. corporation unsure of how to manage its future conduct.

Given the lack of clarity in this law,¹⁴ this Essay attempts to assess the MoJ Guidance's effect on the Bribery Act's treatment of corporate hospitality payments in which U.S. companies frequently engage. By doing so this Essay proposes an interpretation of the Bribery Act and MoJ Guidance that has not yet been discussed within current scholarship. What is clear is that the MoJ Guidance has softened the Bribery Act's treatment of corporate hospitality payments. But, while much of the interest generated by the MoJ Guidance has been directed at clarifying the "adequate procedures" defense, the MoJ Guidance has implicitly created a new standard that should ultimately limit prosecutorial discretion. Ultimately, with the introduction of the MoJ Guidance, the Bribery Act should not be seen as the coming end of all corporate hospitality payments, but rather as a legal regime that will function more like its counterpart across the Atlantic, the FCPA.

I. TREATMENT OF CORPORATE HOSPITALITY PAYMENTS UNDER THE BRIBERY ACT

The Bribery Act creates four antibribery provisions: (1) a prohibition on bribery, applicable to both private individuals and public officials, domestic or foreign ("Section 1");¹⁵ (2) a prohibition on being bribed ("Section 2");¹⁶ (3) a prohibition on bribing a foreign public official ("Section 6");¹⁷ and (4) a requirement that commercial organizations prevent bribery on the part of their employees and associates ("Section 7").¹⁸ In contrast, the FCPA can be broken into two complementary groups of violations: (1) the prohibition on bribing foreign officials "to

14. See Joe Palazzolo, *Deloitte Poll: 73% Are Unfamiliar with Bribery Act Provisions*, WALL ST. J. BLOG (Apr. 19, 2011, 8:09 AM), <http://tinyurl.com/3z5s8gp>.

15. Bribery Act, 2010, c. 23, § 1 (U.K.).

16. *Id.* § 2.

17. *Id.* § 6. Admittedly, Section 6's prohibition on bribing a foreign public official seems at first glance entirely redundant of Section 1's prohibition of bribery of all persons (private or public alike). While Section 1 is intended to expand the prohibition on bribery into the private sector it can equally be applied to public officials. Thus a foreign public official could be liable under both Section 1 and Section 6. As will be clear shortly, the difference between the two prohibitions is the standard by which prosecutors apply when prosecuting a defendant under Section 1 and a defendant under Section 6. See *infra* pp. 44–45; see also Bribery Act, 2010, c. 23, § (3)(1)–(2) (U.K.) (explaining that the relevant activity to be affected by the bribe includes "any function of public nature"); MOJ GUIDANCE, *supra* note 11, ¶ 23 ("[S]ection 1 and 6 may capture the same conduct but will do so in different ways."); Warin et al., *supra* note 8, at 24 ("[Section 3] expressly extends the law of bribery [delineated under Section 1] so that it equally covers "public and selected private functions, within discriminating between the two.") (citing Bribery Act, 2010, c. 23, Explanatory Notes para. 28 U.K.).

18. *Id.* § 7.

obtain or retain business” and (2) two accounting provisions requiring entities to (a) keep accurate books and records as well as (b) maintain a system of internal controls that ensures corporate assets are used only for corporate purposes.¹⁹ Sections 1, 6, and 7 of the Bribery Act are the most relevant to the making of corporate hospitality payments.

Section 7 grants U.K. courts jurisdiction to hear Bribery Act cases against not only U.K. but also U.S. businesses.²⁰ In fact, Section 7 grants extraordinarily broad extraterritorial jurisdiction, outreaching even the long arm of the FCPA.²¹ Any corporation or partnership, whether inside or outside the United Kingdom, will be subject to the Bribery Act, regardless of where the activity takes place, as long as the entity “carries on a business, or part of a business, in any part of the United Kingdom.”²² Given that the United Kingdom has the eighth largest economy in the world,²³ Section 7 expands U.K. courts’ jurisdiction to cover the activity of potentially any major multinational corporation.

In addition to granting extraterritorial jurisdiction, Section 7 serves as the basis for corporate liability under the Bribery Act. Any “commercial organisation” will be liable under Section 7 if any “person” associated with such an organization bribes another in violation of either Section 1 or 6, with the *intent* of obtaining or retaining business or a business advantage.²⁴ Problematically, corporate hospitality payments almost automatically trigger Section 7’s jurisdictional hook because they are frequently made with the specific intent of obtaining and retaining business. Simply put, corporate hospitality payments would serve little purpose altogether if corporations, and therefore the specific person making the corporate

19. See 15 U.S.C. §§ 78dd-1(a), 78ff(a)–(c) (2006); see also Warin et al., *supra* note 8, at 7. It is worth noting that the Bribery Act does not create any affirmative obligations of corporate accounting like the FCPA, but this apparent deficiency is corrected by the United Kingdom’s Companies Act of 2006 which imposes accounting and financial record keeping requirements similar to those in the FCPA. See Companies Act, 2006, c. 1, §§ 380–538 (U.K.).

20. Bribery Act, 2010, c. 23, § 7(5) (U.K.).

21. See Warin et al., *supra* note 8, at 28.

22. Bribery Act, 2010, c. 23, § 7(5) (U.K.). It is important to note that in its Guidance, the Ministry of Justice has retreated on initial assessments of the Bribery Act’s jurisdictional reach. The MoJ Guidance has explained that it is not the government’s intention that the Bribery Act apply by virtue of a company’s listing on the London Stock Exchange. Nevertheless the MoJ Guidance reiterates that U.K. courts will have the final say on the jurisdictional scope of the Bribery Act. DEBEVOISE & PLIMPTON LLP, *The U.K. Bribery Act 2010: Implementation and Guidance*, 2 FCPA UPDATE, Mar. 2011, at 2–3, available at <http://tinyurl.com/44mrjlr>.

23. CENT. INTELLIGENCE AGENCY, *Country Comparison: GDP (Purchasing Power Parity)*, in THE WORLD FACTBOOK (2010), available at <http://tinyurl.com/3bwsma>.

24. Bribery Act, 2010, c. 23, § 7(1) (U.K.). The Bribery Act’s use of the term “associated person” has been another source of concern because of its potentially broad interpretation. The MoJ Guidance appears to narrow the interpretation of “associated person,” making the definition of this term a less important issue for the purposes of this Essay. See MOJ GUIDANCE, *supra* note 11, ¶¶ 37–43.

hospitality payment on behalf of the corporation, were not trying to obtain or retain business with the payments. Thus the intent requirement of Section 7 should always be satisfied, and liability will attach as long as the corporate hospitality payment violates either Section 1 or 6. In the event the “associated person” violates either Section 1 or 6, the burden shifts to the defendant business to prove it maintained “adequate procedures,” provided for under Section 7.²⁵ Thus, in order for a business to avoid Section 7 liability it must successfully argue that it either maintained “adequate procedures” or, the more understated defense, that the “associated person” did not violate Section 1 or 6 in the first place.

Section 1 of the Bribery Act makes clear that all bribes intended to induce “improper performance of a relevant function” by private individuals or public officials (domestic or foreign) are prohibited.²⁶ But while this restriction has no direct counterpart under the FCPA, which only restricts payments to “foreign officials,” both federal white collar crime statutes and state commercial bribery statutes impose prohibitions largely applicable to acts of bribery between private individuals, capturing much of the same conduct that Section 1 of the Bribery Act would otherwise capture.²⁷ Thus, even though Section 1 extends beyond the scope of the FCPA in theory, in practice it makes little difference as U.S. businesses are already prohibited from engaging in such activity under domestic laws.

However, while few U.S. corporations should be disturbed by Section 1’s prohibition on bribery between private individuals, this section is significant because it includes a requirement that prosecutors show the corporate hospitality payment was made to induce the *improper performance*

25. Bribery Act, 2010, c. 23, § 7(2) (U.K.); *see also* Warin et al., *supra* note 8, at 29 (discussing the burden shifting elements of Section 7 and the “adequate procedure” defense); *see also supra* note 9.

26. Bribery Act, 2010, c. 23, § 1 (U.K.); *see also supra* note 17.

27. *See, e.g.*, N.Y. PENAL LAW § 180.03 (McKinney 2011) (New York state’s commercial bribery statute); CAL. PENAL CODE § 641.3 (Deering 2011) (California state’s commercial bribery code); TEX. PENAL CODE ANN. § 32.42 (West 2011) (Texas state’s commercial bribery statute); 18 U.S.C. § 1952 (2011) (Federal Travel Act); 18 U.S.C. § 1956 (2006) (Federal Money Laundering Statute); 18 U.S.C. § 1343 (Supp. 2010) (Federal Wire Fraud Statute); 18 U.S.C. § 1344 (2006) (Federal Bank Fraud Statute); 18 U.S.C. §§ 1961–68 (2006) (Federal Racketeer Influences and Corrupt Organizations Statute); *see generally* SHEARMAN & STERLING LLP, FCPA DIGEST (Mar. 2010), <http://tinyurl.com/3z8evvu> (demonstrating that domestic penal statutes not directly targeted at foreign public officials, such as the Travel Act, have been equally applicable in recent FCPA cases); Thomas R. Fox, *Robert Kennedy, the Travel Act and the FCPA*, FCPA COMPLIANCE AND ETHICS BLOG (Jan. 11, 2010, 1:44 PM), <http://tinyurl.com/3mxtb7v> (same); Mike Koehler, *Carson Defendants Move to Dismiss Travel Act Counts*, FCPA PROFESSOR BLOG (Jun. 16, 2011, 5:28 AM), <http://tinyurl.com/3p7z4c2> (same); *We Repeat, It’s the Travel Act*, FCPA BLOG (May 4, 2011, 6:49 AM), <http://tinyurl.com/448vblo> (discussing the way in which the U.S. Department of Justice has used federal white collar crime statutes, such as the Travel Act, as well as state commercial bribery acts in cases where defendants were subject to prosecution for FCPA violations).

of the recipient of the bribe — the “improper performance” test. Such “improper performance” is explicitly laid out in Section 4 of the Bribery Act and can be essentially defined as performance that amounts to a breach of a reasonable person’s expectation that the receiver of the payment will act in good faith, impartially, or in accordance with a position of trust.²⁸ What is clear from the “improper performance” test is that corporate hospitality payments under Section 1 are banned insofar as they are made with the intent to induce some form of wrongful conduct on the part of a private or public official. If no such intent to induce improper or wrongful conduct exists, then Section 1 cannot be triggered.

Such is not the case for Section 6, the greatest cause for concern among U.K. and U.S. businesses regarding their corporate hospitality practices. Section 6 is, ironically, the prohibition most analogous to the FCPA, stating that any person who offers, promises, or gives any financial or other advantage to a foreign public official with the intent to influence the official in the performance of his or her official functions will violate the Bribery Act.²⁹ One problem, however, is the notable absence of any specific affirmative defense for corporate hospitality payments like the FCPA’s exception for “reasonable and bona fide” payments. More importantly, Section 6 does not require prosecutors to show any form of intent to induce wrongful conduct as is the case for Section 1’s “improper performance” test; instead all that prosecutors must show is a connection between the advantage offered and an intention to influence the foreign official in his formal capacity, whether wrongful or not.³⁰ Again the problem remains, corporate hospitality payments by their very nature are intended to influence the recipient, foreign official or otherwise, to the benefit of the business making such a payment; businesses would not otherwise engage in such corporate hospitality efforts. Thus, much like the case under Section 7, because nearly every corporate hospitality payment made to a foreign official is intended to influence the foreign official, these payments become *prima facie* violations of Section 6. What this means is that even wholly legitimate payments, such as covering the cost of airfare and lodging for clients who happen to be foreign officials on a business trip, are brought within the scope of Section 6.

Overall, because almost all corporate hospitality payments are made with an intent to influence foreign public officials in order to obtain or retain business, any U.S. business engaging in such seemingly innocuous conduct will have likely violated Section 6 and will be subject to liability under Section 7. Even if a U.S. corporation manages to fall within the

28. See Bribery Act, 2010, c. 23, § 4(1)–(3) U.K.; MOJ GUIDANCE, *supra* note 11, ¶ 18.

29. Bribery Act, 2010, c. 23, § 6 (U.K.).

30. MOJ GUIDANCE, *supra* note 11, ¶ 23.

“reasonable and bona fide” payment exception of the FCPA, this U.S. corporation will not be protected from prosecution in the United Kingdom under the Bribery Act. Unfortunately, while businesses do retain the “adequate procedures” defense, that defense comes as little consolation because it will only be relevant after the business has already been forced to litigate the matter, enduring reputational damage it would prefer to avoid altogether.³¹ Moreover, given the presumptive financial cost of availing oneself to the “adequate procedures” defense, many smaller businesses may not even retain this protection. Thus the focus for most business entities will be on how U.K. prosecutors decide when to enforce the statute. Without greater clarification and the establishment of a limiting principle that protects corporate hospitality payments under Section 6, the Bribery Act becomes a potentially onerous regulation for many U.S. businesses.

II. MINISTRY OF JUSTICE GUIDANCE

Under Section 9 of the Bribery Act, the Secretary of State for Justice, Kenneth Clark, was required to publish guidance regarding the procedures that “relevant commercial organisations can put into place to prevent persons associated with them from [violating the Bribery Act].”³² With this mandate, the Secretary of State began a consultation period between September 14, 2010, and November 8, 2010, where he solicited opinions of various nongovernmental actors.³³ Business interests remained extremely critical of the Bribery Act during the solicitation period, and subsequent assessments of the MoJ Guidance have almost unanimously agreed that the U.K. government has heeded to business interests.³⁴

Although the MoJ Guidance does not have the status of law, it was specifically designed to guide businesses in their efforts to comply with the Bribery Act, creating heavy reliance on the document’s prescriptions. Given the softened approach embodied in the MoJ Guidance, any

31. Within the white collar defense field it is relatively common knowledge that large corporations subject to criminal prosecutions rarely litigate and attempt a defense. Instead, most corporations will plead guilty to certain charges and accept deferred prosecution agreements as a penalty in order to avoid the reputational harm caused by ongoing criminal allegations. The vast majority of FCPA cases have been concluded in such a way, and there is reason to believe that corporate entities subject to the Bribery Act will act in a similar fashion. *See generally* SHEARMAN & STERLING LLP, FCPA DIGEST (Mar. 2010), <http://tinyurl.com/3z8evvu> (demonstrating the majority of FCPA cases were concluded on a plea agreement); *see also* Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. (forthcoming 2011).

32. Bribery Act, 2010, c. 23, § 9(1) (U.K.) (alteration in original).

33. *See* MINISTRY OF JUSTICE, CONSULTATION ON GUIDANCE ABOUT COMMERCIAL ORGANISATIONS PREVENTING BRIBERY, 2010, *available at* <http://tinyurl.com/38erfyq>.

34. *See* Bryan-Low, *supra* note 12; *see also* sources cited *supra* note 3.

corporation complying with all the provisions therein will have strong support for arguing that the Bribery Act should not be enforced in as strict a fashion as was initially feared. In many ways the MoJ Guidance acts as an administrative release would in the United States, carrying with it some precedential effect. At least until the U.K. courts hear cases concerning the Bribery Act, the MoJ Guidance should carry with it some force of law. Thus the backtracking made by the Secretary of State for Justice should be understood to reshape how the U.K. courts and commercial organizations understand the Bribery Act.

III. SOFTENED APPROACH TO CORPORATE HOSPITALITY PAYMENTS

Problematically, the MoJ Guidance reiterates that Section 6 will not require proof of intent to induce some form of wrongful conduct, as is the case for Section 1.

The policy that founds the offense at section 6 is the need to prohibit influencing of decision making in the context of publicly funded business opportunities by the inducement of personal enrichment of foreign public officials or to others at the official's request, assent or acquiescence. Such activity is very likely to involve conduct which amounts to 'improper performance' . . . [to] which section 1 applies, but, unlike section 1, *section 6 does not require proof of it or an intention to induce it.*³⁵

This language suggests that the Ministry of Justice is committed to a strict interpretation of the text of Section 6 and the approach that any payment made to a foreign public official will potentially be subject to prosecution under the Bribery Act. Thus even in the event that no wrongdoing was sought and that a corporate hospitality payment was completely bona fide, a U.S. corporation may still be subject to prosecution in the United Kingdom.

The strong rhetoric used to defend Section 6 appears largely due to the pressures asserted by international transparency organizations as well as the Organization for Economic Co-operation and Development ("OECD").³⁶ The drafters of the Bribery Act even specifically rejected including a wrongfulness-connoting adverb such as "corrupt" that would exclude legitimate conduct from prosecution, citing fears that such an addition would render the provision inadequate.³⁷ Such concerns revolve

35. See MOJ GUIDANCE, *supra* note 11, ¶ 23 (alteration in original) (emphasis added).

36. See SHEARMAN & STERLING LLP, *supra* note 3.

37. Letter from Lord Tunnicliffe, Minister in the Government Whips Office, Government Spokesperson for the Ministry of Justice, to Lord Henley, House of Lords (Jan. 14, 2010), available at <http://tinyurl.com/3qyknzc> [hereinafter Tunnicliffe].

around the varying cultural understandings of what types of payments constitute wrongful conduct depending upon the country where the payment was made.³⁸ A payment of the kind that would be considered wrongful according to the U.K. standards might not be so in a country like Somalia, Myanmar, or Afghanistan (three of the most corrupt countries in the world).³⁹ Observers worried that this element of the law would create difficulties in its consistent application. From a practical perspective, however, the only parties generally able to intentionally influence foreign public officials with corporate hospitality payments are highly sophisticated entities, fully aware of what constitutes a bribe regardless of the local practices of a certain region. Regardless of this reality, drafters of the Bribery Act believe that granting U.K. prosecutors broad discretion to prosecute corporate hospitality payments is the solution.⁴⁰

Despite the strong language in the MoJ Guidance's discussion of Section 6,⁴¹ the document opens its analysis of corporate hospitality payments with the following statement:

Bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the [Bribery] Act to criminalise such behavior.⁴²

There appear to be two conflicting strands of thought running through the MoJ Guidance. The first is the hard-line rhetoric demonstrating the Bribery Act's intended use to punish any and all bribes; the second suggests that the Bribery Act will not be enforced as harshly as the statute might appear. Throughout this second, more business-friendly section the MoJ Guidance attempts to reassure businesses it is not the intention of U.K. officials to prohibit legitimate corporate expenditures, despite the potential that all such payments could be subject to prosecution. In likely its most famous line the MoJ Guidance explains, "no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix" and explains in an example "an invitation to foreign clients to attend a Six Nations match at Twickenham as part of a public relations exercise . . . is extremely unlikely to [trigger liability]"

38. See JOINT COMMITTEE ON THE DRAFT BRIBERY BILL, FIRST REPORT OF SESSION 2008–09, 2009, H.L. 115-I/H.C. 430-I, ¶ 146.

39. See TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX 2010 (2010), <http://tinyurl.com/2ag2kpg>.

40. See Tunnicliffe, *supra* note 37, at 2.

41. See *supra* p. 47.

42. MOJ GUIDANCE, *supra* note 11, ¶ 26 (alteration in original).

under the Bribery Act.⁴³ Unfortunately, without any sort of limiting principle contained in the Bribery Act itself, this circular explanation effectively means corporate hospitality payments violate Section 6 when the U.K. government *says* they violate Section 6. Regardless of U.K. officials' best intentions, this broad discretion carries the very real risk of punishing completely legitimate conduct, or at least deterring it for the risk of prosecution.

Given the entirety of the confusion, the Ministry of Justice seems to understand the difficulties presented to businesses engaging in corporate hospitality payments and has made an honest attempt to clarify its position. The MoJ Guidance establishes a middle ground when it explains U.K. officials do not “intend for the Act to prohibit *reasonable and proportionate*” corporate hospitality payments.⁴⁴ But the establishment of the “reasonable and proportionate” standard, accompanied by a variety of examples of acceptable corporate hospitality payments, still does not get to the root of the problem. With only a “reasonable and proportionate” standard and no element requiring a form of wrongful conduct, Section 6 could lead to the prosecution of completely legitimate corporate hospitality payments that were either viewed as unreasonable or disproportionate by prosecutors.⁴⁵ The reality is that the “reasonable and proportionate” standard is not sufficiently correlated with the conduct the Bribery Act seeks to capture to make it an adequate standard by excluding legitimate conduct from prosecution. Thus there is a clear need for an additional limiting principle to apply to Section 6 violations for corporate hospitality payments.

In fact, the MoJ Guidance has implicitly established this very limiting principle: the MoJ Guidance requires U.K. prosecutors to make a lesser showing of intent to induce wrongdoing on the part of the foreign official under Section 6, while at the same time maintaining its position that the “improper performance” test applies only to Section 1. The crucial phrase appears during the MoJ Guidance's reiteration of the differing standards applied between Section 1 and Section 6 and its claim that Section 1 prosecutions alone would be insufficient.⁴⁶ But in this context, the MoJ

43. *Id.* ¶ 20 (citation omitted).

44. *See id.* ¶ 26 (emphasis added).

45. An example might be an idiosyncratic foreign public official who is necessary to manage the implementation of an investment project but has high priced expectations, forcing the business to incur higher than normal expenses. Such a circumstance might cause corporate hospitality payments to be disproportionate yet wholly legitimate. Additionally, under the reasonable and proportionate standard, Section 6 would not capture reasonable and proportionate corporate hospitality payments that were meant for illegitimate purposes, although likely such cases would be captured by Section 1's “improper performance” test.

46. *See* MOJ GUIDANCE, *supra* note 11, ¶ 23 (explaining the Ministry of Justice does not wish to

Guidance qualifies its previous statements, explaining that “it is not the Government’s intention to criminalise behavior where no such *mischief* occurs . . .”⁴⁷ The use of the word “mischief” is critical, defined as harm or evil done to or suffered by a person; it potentially connotes a lesser form of wrongdoing below “improper performance” in Section 1.⁴⁸ By characterizing the conduct that Section 6 seeks to capture as “mischief,” the MoJ Guidance has effectively created a less stringent form of the “improper performance” test. This is to say, corporate hospitality payments made to foreign officials will violate Section 6 if they were made with the intent of inducing some lesser standard of wrongdoing on the part of the foreign official as opposed to simply *influencing* them. This argument is completely consistent with the MoJ Guidance’s frequent refrain that the U.K. government does not intend to prosecute legitimate forms of corporate hospitality.⁴⁹ Thus although it is not necessary to prove clear “improper performance,” by requiring U.K. prosecutors to prove that defendants intended some lesser form of wrongdoing or “mischief” under Section 6, the MoJ Guidance appropriately curtails the pure discretion afforded to prosecutors by the Bribery Act.

Moreover, under English law “mischief” has acquired a unique meaning that corresponds to the basic objective, purpose, or conduct the legislation was intended to prevent (i.e., bribery and corruption around the world).⁵⁰ This interpretation of the word “mischief” is particularly prominent in the English rules of statutory interpretation, namely the “mischief rule.”⁵¹ This centuries-old rule of statutory interpretation enables the English courts to

impose an improper performance-like test to Section 6 violations “because the exact nature of the functions of person regarded as foreign public officials is often very difficult to ascertain with any accuracy, and the securing of evidence will often be reliant on the co-operation of the state any such officials serve. To require the prosecution to rely entirely on [S]ection 1 would amount to a very significant deficiency in the ability of the legislation to address this particular *mischief*.” (emphasis added). This reasoning mimics the reasoning alluded to above, as the greater fear is that wrongful conduct by a foreign official varies between nations and cultures. *See supra* p. 48.

47. MOJ GUIDANCE, *supra* note 11, ¶ 23 (emphasis added).

48. OXFORD ENGLISH DICTIONARY 852 (2d ed. 1989).

49. MOJ GUIDANCE, *supra* note 11, ¶ 26 (“Bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the [Bribery] Act to criminalise such behaviour.”).

50. *See* FRANCIS BENNION, STATUTORY INTERPRETATION 636 (Butterworths 2d ed. 1992) (explaining that “mischief” in can be understood in certain contexts as “social mischief” or “a factual condition that is causing concern (such as an increase in mugging, or a decline in the birthrate).”); *see also* MOJ GUIDANCE, *supra* note 11, at 2 (discussing, in the MoJ Guidance’s foreword, the priority of preventing corruption and bribery around the world).

51. Heydon’s Case, 76 Eng. Rep. 637 (1584) (establishing the mischief rule under English Law); *see also* JOHN BELL & GEORGE ENGLE, CROSS STATUTORY INTERPRETATION 10–20 (Butterworths 3d ed. 1995).

resolve vagueness within statutory law in order to capture the “mischief” at which the legislation was aimed, even if a literal interpretation might render the legislation inapposite.⁵² Although the application of the “mischief rule” has evolved over time and today is no longer applied as it was initially conceived,⁵³ its history provides important context for those interpreting the term as it is used in the MoJ Guidance. Ultimately, use of the word “mischief” in the MoJ Guidance functions as an unspoken reference to the “mischief rule” and implies that this flexible approach of statutory interpretation should be applied by the English courts to the Bribery Act to require an implicit act of wrongdoing.⁵⁴

Regardless of whether the Ministry of Justice intended “mischief” to signify a more colloquial understanding of the word or its understanding under English law, the effect is the same. A court applying a more modern form of the “mischief rule” would seemingly search for some type of wrongful conduct in order to capture the purpose or conduct the Bribery Act was intended for and should therefore reject a strict interpretation of the legislation.

While the contours of what might be called the “mischief test” have not been as well-developed as the “improper performance” test, both the MoJ Guidance and the U.K. Prosecutors Guidance Manual present circumstances and factors effectively giving all parties the understanding

52. See, e.g., *Building Societies Comm'n v. Halifax Building Soc'y*, [1997] Ch. 255 (applying the mischief rule to resolve an obscure section of a statute to capture the basic mischief that the statute was aimed at capturing); see also BELL & ENGLE, *supra* note 51, at 10–20 (explaining the mischief rule); V.C.R.A.C. CRABBE, *UNDERSTANDING STATUTES* 82–85 (Cavendish Pub. Ltd. 1994) (explaining that in applying the mischief rule “not only the language, but the circumstances surrounding the enactment, are involved; the *spirit* rather than the *letter* of the law becomes important”); MANCHESTER, SALTER, MOODLE & LYNCH, *EXPLORING THE LAW: THE DYNAMICS OF PRECEDENT AND STATUTORY INTERPRETATION* 42–45 (Sweet & Maxwell eds., 2d ed. 2000) (explaining the “mischief rule” and the purposive approach as one in the same).

53. Lord Griffith provides a description the English courts’ modern approach to the “mischief rule” in the case of *Pepper v. Hart*: “The days have long passed when the courts adopted a strict-constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background upon which the legislation was enacted.” [1993] 1 All E.R. 42 (H.L.) 50; see also BELL & ENGLE, *supra* note 51, at 10–20 (providing a brief review of the development of statutory interpretation under English law and the current “purposive approach” of English judges).

54. To date, the English courts have effectively rejected the “mischief rule” as it was initially established in *Heydon’s Case*, 76 Eng. Rep. 637 (1584). See BELL & ENGLE, *supra* note 51 at 17–18. The English courts have also rejected the narrow literalist approach to statutory interpretation. See *id.* What has emerged is the “purposive approach” illustrated by *Peppers v. Hart*, [1993] 1 All E.R. 42 (H.L.) 50, which allows the English courts to retain a focus on fidelity to the text as well as the objectives aimed at by Parliament. See BELL & ENGLE, *supra* note 51, at 20. Regardless of these distinctions, commentators have held that the purposive approach is simply the modern form of what was once the “mischief rule.” BENNION, *supra* note 50, at 659 (“[P]resenting the modern version of what used to be called the mischief rule, namely purposive construction [or approach].”).

that at least some form of wrongdoing must be present.⁵⁵ Using these examples, one could speculate as to how a “mischief test” might be applied in practice; for example, U.K. courts could adopt a rule that Section 6 prosecutions may proceed if it can be shown inferentially or circumstantially that some wrongdoing on the part of the foreign official took place.⁵⁶ However, the significance of the word “mischief” without specific clarification as to the level of wrongdoing needed to trigger Section 6 liability may provide little comfort. Nevertheless, the point is that while before businesses feared they could be prosecuted for almost any benefit provided to a foreign official, they now have reasons to believe that such a fear will not come to fruition. Moreover, those businesses unable to successfully avail themselves to the “adequate procedures” defense now have a new defense to Section 7 violations. Ultimately, the use of the word “mischief” indicates that the Ministry of Justice recognizes that it would be quite unfair to impose Section 6 violations on corporate hospitality payments without requiring that there be some form of wrongful conduct to justify an enforcement action.

55. See MOJ GUIDANCE, *supra* note 11, ¶ 31 (“Some further examples might be helpful. The provision by a UK mining company of reasonable travel and accommodation to allow foreign public officials to visit their distant mining operations so that those officials may be satisfied of the high standard and safety of the company’s installations and operating systems are circumstances that fall outside the intended scope of [Section 6]. Flights and accommodation to allow foreign public officials to meet with senior executives of a UK commercial organisation in New York as a matter of genuine mutual convenience, and some reasonable hospitality for the individual and his or her partner, such as fine dining and attendance at a baseball match are facts that are, in themselves, unlikely to raise the necessary inferences. However, if the choice of New York as the most convenient venue was in doubt because the organisation’s senior executives could easily have seen the official with all relevant documentation when they had visited the relevant country the previous week then the necessary inference might be raised. Similarly, supplementing information provided to a foreign public official on a commercial organisation’s background, track record and expertise in providing private health care with an offer of ordinary travel and lodgings to enable a visit to a hospital run by the commercial organisation is unlikely to engage section 6. On the other hand, the provision by that same commercial organisation of a five-star holiday for the foreign public official which is unrelated to a demonstration of the organisation’s services is, all things being equal, far more likely to raise the necessary inferences.”); SERIOUS FRAUD OFFICE, BRIBERY ACT 2010: JOINT PROSECUTION GUIDANCE OF THE DIRECTOR OF THE SERIOUS FRAUD OFFICE AND THE DIRECTOR OF PUBLIC PROSECUTIONS 7, 10, <http://tinyurl.com/3r4vlg8> (“The more lavish the hospitality or expenditure (beyond what may be reasonable standards in the particular circumstances) the greater the inference that it is intended to encourage or reward improper performance or influence the official. Lavishness is just one factor that may be taken into account in determining whether an offense has been committed. The full circumstances of each case would need to be considered. Other factors might include that the hospitality or expenditure was not clearly connected with legitimate business activity or was concealed.”).

56. This suggestion is based upon the the MoJ Guidance’s descriptions of examples of corporation hospitality payments that would and would not be subject to Section 6 prosecution based upon whether “the necessary inference might be raised.” See *supra* note 55.

The ultimate result is that the “mischief” element, combined with the “reasonable and proportionate” standard, effectively mimics the FCPA’s treatment of corporate hospitality payments. Indeed the “reasonable and proportionate” standard and “mischief” requirement largely correlate with the “reasonable” and “bona fide” characteristics, respectively, under the FCPA’s exception to corporate hospitality payments. Under both Acts, in order for corporate hospitality payments to avoid scrutiny, they must be made for reasonable and legitimate business purposes. Thus, the Bribery Act effectively adopts the same standard set by the FCPA, so U.S. corporations should feel slightly more comfortable with this facet of the U.K. law.

CONCLUSION

Few can blame the U.K. government for the action it has taken. On one side it has faced years of criticism from the OECD and other NGOs for failing to pass comprehensive antibribery laws.⁵⁷ But upon doing so, the backlash from businesses in the United Kingdom and around the world has been fierce.⁵⁸ It appears that the world was not quite ready for the Bribery Act as it was initially envisioned.

What should be clear, however, is that the MoJ Guidance makes the Bribery Act’s standards for U.S. corporations far less stringent than was once thought. The language of the MoJ Guidance regarding corporate hospitality payments will require U.K. prosecutors to make some showing of unreasonableness or disproportionateness, plus “mischief.” The result has been to make this feature of the Bribery Act appear all the more like the FCPA and its exception for “reasonable and bona fide” corporate hospitality payments. Ultimately, this should come as little surprise, as experts in the field have previously suggested that the FCPA should serve as a model for Bribery Act compliance.⁵⁹

With less unchecked discretion being provided to U.K. prosecutors, it seems that those businesses legitimately attempting to comply will not be punished. While there is still much to be said about the Bribery Act and the effects of its other provisions, corporate officials can rest a little easier knowing they can still take a trip to Twickenham with that one prospective client and be safe from prosecution in the U.K. courts.

57. See, e.g., SHEARMAN & STERLING LLP, *supra* note 3.

58. *Id.*

59. See, e.g., Richard Tyler, *Bribery Act: Lord Goldsmith Says Look to the US*, TELEGRAPH, Jan. 5, 2011, <http://tinyurl.com/3y4m48l>.