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Anti-Corruption Regulation in Sweden and Abroad

Leading anti-corruption legislation within the international community in
the perspective of multinational corporations

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“[I] would certainly value the major contribution that academics could bring to researching [bribery and corruption] issues and to providing new ideas and insights.”¹

¹ Richard Alderman, Director of the UK Serious Fraud Office in a speech held in June 2010 regarding the Bribery Act 2010 - <http://fcpaprofessor.blogspot.com/search/label/United%20Kingdom> - last viewed December 1, 2010

Summary

The negative effects that corruption has on both individual nations and the global society as a whole are known and well documented. Still, an estimated one trillion US dollars (US \$1.000 billion) is paid each year in bribes worldwide and both individuals and organizations testify to engaging in corrupt behavior.

The interest in fighting corruption has grown significantly in recent years, both in individual nations and within the international community. Compliance with the American legislation on bribery and corruption, the *Foreign Corrupt Practices Act* (FCPA), has become one of the most important compliance issues for multinational companies, both US and non-US, and one of the most prioritized parts of due diligence in relation to mergers and acquisitions. The FCPA is designed to deter improper inducements to foreign officials in connection with business activities and in doing so it consists of two major components namely, the accounting and record-keeping provisions and the anti-bribery provisions. The anti-bribery provisions apply to both physical and juristic persons and criminalize corrupt payments of foreign (non-US) government officials for the purpose of obtaining business. The United Kingdom recently enacted a reconstructed anti-bribery law, the *Bribery Act 2010* (Bribery Act), with far-reaching extraterritorial effects. The Bribery Act introduces a specific offence applicable to corporations failing to prevent acts of bribery committed by employees or agents. The basic provisions on bribery and corruption in Swedish law are found in the *Penal Code of 1962* (Penal Code), where passive bribery and active bribery are separated as two different offences, listed in different chapters of the Code. Swedish anti-bribery law may soon be subject to change as an Inquiry has been appointed by the Swedish government to investigate and evaluate Swedish law in the area of anti-bribery and corruption. The Inquiry recently presented a report containing proposed changes of the bribery provisions of the Penal Code and a *Code on Gifts, Rewards and Benefits in the Business Sector*.

The overlying purpose of the proposed changes of the Swedish Penal Code presented by the Inquiry is to update Swedish anti-bribery law making it clearer and easier to understand and to apply. In order to do so, the Inquiry proposes structural change, organizing the bribery offences in one single chapter of the Penal Code - namely current chapter 10 with the proposed title of "*On Embezzlement, Other Breaches of Trust and Bribery*". However, the structural arrangement proposed by the Inquiry is misleading as it puts a disproportionate focus on breach of trust. As analyzed in this thesis there are a number of advantages to be obtained by regulating bribery in a separate law or in a separate chapter of the Penal Code.

Among a number of material changes, the Inquiry proposes that the key element of *improper reward* is to be replaced by *improper influence*.

However, the problem of what is to be considered *improper* remains. The Inquiry has to some extent made interpreting the bribery provision and its key elements easier, by providing for sub-sections. The sub-sections highlight that there are different interests protected by the provision on bribery. However, to fully eliminate the problem a clearer separation of the different sets of interests protected by the provisions on bribery is required. The different aspects taken into consideration when determining what is to be deemed as *improper* should be reflected in the statutory language of the bribery provisions. Even though the change proposed by the Inquiry is important since it is indeed the effects of a given reward that are improper and unwanted not the reward itself, the proposed change does not make it easier to differentiate a proper reward from an illicit bribe.

The purpose and the field of application of the *Code on Gifts, Rewards and Benefits in the Business Sector*, proposed by the Inquiry, need not only be clarified but analyzed and questioned. The code is intended to provide for a buffer for the corporations and organizations that choose to follow it, as the provisions of the code are stricter and reach further than the provisions of the Penal Code. Corporations who choose to implement the code and be in compliance with it, are intended to be able to feel fairly confident that they are not offending the bribery provisions of the Penal Code. It is unclear however, what the consequences will be if a corporation, accidentally or intentionally, offends the provisions of the code. Self-regulation and ethical rules are indeed very welcomed as part of maintaining good business practice and there should be incentives for corporations and organizations to put forward and adhere to ethical standards. But when linking these ethical rules and standards to the law, one should do so with care. There is a risk of developing a notion that what is unethical consequently is unlawful, which would undermine the purposes of self-regulated codes such as the *Code on Gifts, Rewards and Benefits in the Business Sector*, discouraging corporations from voluntarily committing to ethical standards higher than the ones provided for by law.

The Bribery Act, when it comes into force, will have a significant impact on multinational corporations. The Bribery Act applies to all corporations incorporated in the UK and in terms of the offence *failure of commercial organizations to prevent bribery* to all bodies or partnerships that carry on a business or part of a business in any part of the UK. Thus its extraterritorial jurisdiction is broad. Two important questions in regards to the offence *failure of commercial organizations to prevent bribery* are (i) what “carrying out part of a business in the UK” really means and (ii) what “an associated person” will come to mean and thus whose actions a corporation is responsible for. Employees, agents and subsidiaries will most likely be presumed to be associated with a corporation, for the purpose of this offence, but what other business associates, performing services for or on behalf of a corporation, will come to be included? These questions are analyzed in this thesis.

Unlike the Bribery Act and the Swedish Penal Code, the FCPA provides for an affirmative defense for reasonable and *bona fide* business expenditures related to certain company promotions. The Bribery Act sets itself apart from both American and Swedish anti-corruption regulation in that it is not necessarily a defense to state that the illicit payment was permitted under the written laws of the country where the act took place. In theory one can be held liable for bribery, under the Bribery Act, even if the written laws of the jurisdiction where the act took place permitted the act. These as well as other differences between the respective laws are analyzed in this thesis.

Swedish, British, American and multinational corporations and organizations with some form of connection to either of these countries are all affected by the anti-corruption regulations presented in this thesis. Accordingly, being aware of the jurisdictions an organization is exposed to and making sure that the organization is in compliance with the anti-bribery and corruption laws of those jurisdictions is of the utmost importance. If not, both organizations and individuals risk facing considerable sanctions such as several years of imprisonment, unlimited fines, considerable legal costs, debarment from public procurements and a damaged reputation. A well crafted compliance program does not only provide for sound corporate conduct preventing acts of corruption from taking place, but will also serve as a vital component when trying to limit or cut off liability as well as arguing for a reduced sentence when acts of corruption have taken place. As a corporation can be found liable for the acts of subsidiaries, agents and other business partners, it is also important to perform adequate due diligence before entering into these types of business relations. The basic components of a compliance program include top level commitment, risk assessment, clear and accessible policies and procedures, effective implementation, monitoring and review as well as performing due diligence of business partners and middlemen.

Successful action against corruption is impossible without the combined efforts of governments, individual organizations, corporations and people. And a corporation choosing to be in compliance with anti-bribery and corruption law does so, not only to the benefit of social justice and global and national economic growth but also to the benefit of its own profitability.

Sammanfattning

De negativa effekter som korruption har på såväl enskilda nationer som det globala samhället i helhet är kända och väl dokumenterade. Ändå betalas uppskattningsvis tusen miljarder amerikanska dollar varje år i mutor över hela världen och både individer och organisationer erkänner att de begått korrupta handlingar.

Intresset för att bekämpa korruption har ökat väsentligt under senare år, både på nationell och på global nivå. Efterlevnad av den amerikanska lagstiftningen om mutor och korruption *Foreign Corrupt Practices Act* (FCPA) har blivit en av de viktigaste efterlevnadsfrågorna för både amerikanska och icke-amerikanska bolag, samt en av de mest prioriterade delarna av due diligence i samband med fusioner och förvärv. FCPA avser att avskräcka individer och bolag från att erbjuda eller ge mutor till offentliga tjänstemän i samband med affärsverksamhet utanför USA's gränser. FCPA består av två regelverk där det ena behandlar ett bolags redovisningsskyldighet och det andra behandlar mutbrott. Bestämmelserna om mutbrott gäller både fysiska och juridiska personer. Storbritannien antog nyligen en rekonstruerad lag om mutbrott och korruption, *Bribery Act 2010*, vilken har en långtgående extraterritoriell verkan. Lagen innehåller ett särskilt brott vilket medför strikt ansvar för företag som inte lyckas förhindra att mutbrott begås av dess anställda eller samarbetspartners. I svensk rätt återfinns de grundläggande bestämmelserna om mutor och korruption i brottsbalken kapitel 17 och 20, där mutbrott och bestickning är separerade som två olika brott. Dessa bestämmelser kan dock snart komma att ändras med anledning av den utredning som nyligen presenterats, SOU 2010:38. Utredningen föreslår förändringar av bestämmelserna i brottsbalken om mutbrott och bestickning. Utredningen presenterar även ett förslag på en *Kod för gåvor, belöningar och förmåner i näringslivet*.

Det övergripande syftet med de av utredningen föreslagna förändringarna av bestämmelserna om mutbrott och bestickning är att uppdatera svensk mutlagstiftning för att göra den tydligare och lättare att förstå och tillämpa. För att uppnå detta syfte föreslår utredningen bland annat en strukturell förändring i brottsbalken vilken innebär att bestämmelserna om mutbrott och bestickning sammanförs i ett och samma kapitel - nuvarande kapitel 10 med den föreslagna titeln "Om förskingring, annan trolöshet och mutbrott". Dock är detta strukturella arrangemang något vilseledande och det torde finnas ett antal fördelar att uppnå genom att reglera mutbrott och korruption i en särskild lag eller i ett separat kapitel i brottsbalken. Denna tes presenteras och analyseras i denna uppsats.

Utredningen föreslår även att det centrala rekvisitet, *otillbörlig belöning*, i nuvarande reglering av mutbrott och bestickning ska ersättas med rekvisitet *otillbörlig påverkan*. Problemet med vad som är att anse som *otillbörligt* kvarstår dock. Utredningen har till viss del underlättat tolkningen av

bestämmelserna om mutbrott och bestickning genom att dela upp bestämmelsen om mutbrott i olika delar, vilka behandlar olika former av mutbrott. Denna uppdelning markerar att det finns olika skyddsintressen bakom bestämmelserna om mutbrott och bestickning. För att helt eliminera problemet krävs dock en än mer tydlig åtskillnad mellan de olika intressen som bestämmelserna har till syfte att skydda. De olika aspekter som beaktas vid fastställandet av vad som är att anse som en *otillbörlig* påverkan borde på ett eller annat sätt avspeglas i lagtexten. Även om den förändring som utredningen föreslår är viktigt, eftersom det är just effekterna av en viss belöning som är olämpliga och oönskade snarare än belöningen i sig, så innebär inte den föreslagna förändringen att det blir lättare att särskilja en tillåten förmån från en olaglig muta.

Syftet med och tillämpningen av den av utredningen föreslagna *Koden om gåvor, belöningar och andra förmåner i näringslivet*, bör inte bara klarläggas ytterligare utan även analyseras och ifrågasättas något. Koden är avsedd att utgöra en buffert för företag och organisationer som väljer att följa den, eftersom bestämmelserna i koden är strängare och når längre än bestämmelserna om mutbrott och bestickning i brottsbalken. De företag och organisationer som väljer att följa koden ska således kunna känna sig relativt säkra på att de inte bryter mot lagen. Det framgår dock inte vilka konsekvenserna blir om ett företag, oavsiktligt eller avsiktligt, bryter mot bestämmelserna i koden. Självregering och etiska normer utgör ett viktigt inslag för att verka för och upprätthålla god affärssed på marknaden. Det bör därför finnas incitament för företag och organisationer att utveckla och följa sådana etiska regelverk. Om lagstiftaren väljer att koppla ihop dessa etiska regelverk med lag, bör det göras med försiktighet och eftertanke. Det finns risk för att det utvecklas en föreställning om att det som är oetiskt följaktligen är olagligt, vilket skulle motverka syftet med självregerande koder som den föreslagna *Koden om gåvor, belöningar och andra förmåner i näringslivet* och följaktligen avskräcka företag och organisationer från att frivilligt tillämpa normer av en högre etisk dignitet än vad som föreskrivs i lag.

Den nya brittiska mutlagstiftningen *Bribery Act 2010* (Bribery Act) kommer, när den träder i kraft, att ha en betydande inverkan på multinationella företag. Lagens bestämmelser är tillämpliga på alla företag registrerade i Storbritannien och i fråga om det specifika brottet *failure of commercial organizations to prevent bribery* alla organ eller bolag som bedriver verksamhet eller en del av en verksamhet i Storbritannien. Således är lagens extraterritoriella verkan långtgående. Två viktiga frågor i fråga om brottet *failure of commercial organizations to prevent bribery* är (i) vad ”att bedriva en del av en verksamhet i Storbritannien” egentligen innebär samt (ii) vad begreppet *“an associated person”* kommer att innefatta och därmed vems gärningar ett företag kan komma att bära ansvar för. Anställda, agenter och dotterbolag kommer sannolikt att antas vara förknippade med ett företag men vilka andra affärskontakter, som utför tjänster för eller på uppdrag av företaget, kommer att ingå? Dessa frågor analyseras i denna uppsats.

Till skillnad från den brittiska och den svenska mutlagstiftningen så innehåller FCPA bestämmelser vilka uttryckligen undantar rimliga och *bona fide* förmåner givna i samband med ett företags affärsverksamhet från straffbarhet. Dock måste dessa förmåner vara rimliga, nödvändiga och givna i god tro - det vill säga utan korrupt uppsåt - för att de ska omfattas av undantaget i FCPA. Vidare skiljer sig *Bribery Act* från både FCPA och svensk mutlagstiftning i att det inte nödvändigtvis utgör ett försvar att den aktuella förmånen var lagenlig i det land där handlingen företogs. I teorin kan således en individ eller en organisation hållas ansvarig för mutbrott enligt *Bribery Act* även om skrivna lagar i den jurisdiktion där mutbrottet företogs tillät handlingen. Dessa och andra skillnader mellan de respektive lagarna analyseras i denna uppsats.

Svenska, brittiska, amerikanska och multinationella företag och organisationer med någon anknytning till dessa länder är alla berörda av de lagstiftningar som presenteras i denna uppsats. Följaktligen är det av yttersta vikt att vara medveten om den eller de jurisdiktioner en organisation omfattas av samt att säkerställa att organisationens verksamhet bedrivs på ett sätt som överensstämmer med gällande mutlagstiftning för respektive jurisdiktion. Både enskilda personer och organisationer riskerar annars att träffas av avsevärda konsekvenser så som flera års fängelse, obegränsade böter, höga rättsliga kostnader, uteslutning från offentliga upphandlingar och ett skadat varumärke och rykte. Ett väl utformat *compliance* program möjliggör inte bara en sund företagskultur där korrupta handlingar förebyggs, utan kommer även att utgöra en viktig del när ett företag söker begränsa eller skära av ansvar för redan begångna handlingar samt argumentera för ett mildrare straff vid en eventuell rättegång. Eftersom ett företag kan finnas ansvarigt för handlingar begångna av dotterbolag, agenter och andra samarbetspartners så är det även viktigt att genomföra adekvat *due diligence* innan ett företag träder in i dessa typer av affärsrelationer. De grundläggande komponenterna i ett *compliance* program inkluderar engagemang från personer och organ i styrande positioner, riskbedömning, tydliga och tillgängliga riktlinjer och rutiner, ett effektivt genomförande, uppföljning och översyn av programmet samt *due diligence* av företagets affärspartners.

Framgångsrika åtgärder mot korruption kräver gemensamma ansträngningar från både regeringar, enskilda organisationer och företag samt individer. Samtidigt kan de företag som väljer att bedriva sin verksamhet på ett sätt som överensstämmer med mut- och korruptionslagstiftning göra det både till förmån för social rättvisa och global och nationell ekonomisk tillväxt samt till fördel för sin egen lönsamhet och fortlevnad.

Preface

I would like to dedicate special thanks to Mr. Thomas Yongo, Ms. Helén Waxberg, Ms. Michaela Ahlberg and Prof. Stephen C. Hicks for inspiration and guidance in the process of writing this thesis - Thank You!

As this thesis constitutes the final chapter of law school, I would like to take this opportunity and express my thanks to the faculty and staff of *Juridicum*, *Lund University* and *Suffolk University Law School* for providing me with my legal education. I am especially grateful to Prof. Stephen C. Hicks and Ms. Bridgett Halay for believing in me and my capabilities as a law student. Prof. Christopher Gibson and Prof. Dwight Golann - Your classes truly inspired me and reminded me of why I find law to be such an interesting field of practice!

Any inaccuracies of the facts presented in this thesis are to be attributed to me and no one else.

Amanda Wassén

Stockholm, December 2010

Abbreviations

Bribery Act	Bribery Act 2010
DOJ	Department of Justice
FCPA	Foreign Corrupt Practices Act of 1977
ICC	International Chamber of Commerce
OECD	Organization for Economic Co-Operation and Development
Penal Code	Penal Code of 1962
SEC	Securities and Exchange Commission
SFO	Serious Fraud Office
SOU	Official Report Series of the Legislative and Investigations Commissions
UK	United Kingdom
US	United States

1 Introduction

There are considerable costs tied to corruption² including political, economic, and social costs. Corruption undermines democracy and the rule of law, it depletes national wealth and it feeds poverty and social injustice. Corruption diverts money from public services and it stifles private sector growth.³ Poor people often lack access to basic services such as water, sanitation, health care, education and electricity, corruption being a contributing factor. For example, corruption raises the cost of connecting a household to a water network in a developing nation by as much as thirty percent.⁴ Studies show the negative effects of corruption affect the poorest people the most, not only because they are at a disadvantage to begin with but also because they carry a disproportionate share of the corruption burden. The poorer households pay a higher share of their incomes in unjustified “fees” than higher income households, commonly for public services that are supposed to be provided for free.⁵ The poor are also the first ones to be deprived of things essential in life such as medical care and education because they lack the funds to pay bribes. 86 percent of parents polled in Nicaragua reported having to pay mandatory “contributions” to teachers.⁶ 68 percent of those who paid bribes in Uganda, 51 percent in Kenya and 55 percent in Tanzania, did so to facilitate the delivery of services which are already catered for by taxes.⁷ As education serves as one of the most powerful tools to achieve independence and financial stability, corruption keeps poor people in poverty.

A reported one trillion US dollars (US \$1.000 billion) is paid each year in bribes worldwide, according to research at the World Bank Institute.⁸ This estimate only includes bribes paid by the private sector to the public sector. Consequently, the estimate would be even higher if it included all types of corruption such as corrupt acts solely within the private sector as well as embezzlement of public funds. This money could come to far better use. Tackling corruption and improving governance can provide for a major boost to the economic development of a nation, specifically a developing nation, drastically improving its national income making it less dependent on funds from developed nations and more contributive to the development of the global society. Not providing for adequate governance and anti-

² Corruption is operationally defined by *Transparency International* as the abuse of entrusted power for private gain, see http://www.transparency.org/news_room/faq/corruption_faq - last viewed December 2, 2010

³ See *United Nations Convention Against Corruption*, Preamble

⁴ Transparency International - *2008 Global Corruption Report*, p. 10

⁵ The World Bank - *Six Questions on the Cost of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann*

⁶ Transparency International - *Millennium Development Goals are unreachable without commitment to fighting corruption*, Press release September 13, 2010

⁷ Transparency International - *East African Bribery Index 2009: The Kenya Police is the most corrupt institution in East Africa*, Press release July 2, 2009

⁸ The World Bank - *The Costs of Corruption*, April 8, 2004

corruption enforcement weakens a nation, making it vulnerable to the influence of powerful corporations. Individual nations as well as the international community as a whole stand a lot to gain from fighting corruption. Corporations report to deter from an otherwise interesting investment due to the host country's reputation for corruption. It is not uncommon, although it is rarely announced publicly, for corporations to pull out of an existing relationship either with an individual commercial partner or with an entire country due to corruption. Reports show that the business sector grows significantly faster where corruption is lower and property rights and the rule of law is safeguarded. This benefits the nation where a corporation is active as well as the corporation itself.⁹

Individual corporations are constantly losing business to corruptive competitors. Reports show that almost half of US based corporations and a quarter of UK based corporations believe to have lost business to corrupt competitors in the last five years.¹⁰ This negative effect of corruption affects both small and large businesses equally. Then, is there an economic incentive for corporations to choose to engage in corrupt behavior? Evidentially corruption exists. It exists in both developing and developed nations and it takes place within both the public and the private sector. Its existence could be interpreted as an evidence of corruption being a profitable business strategy. However, this notion might be about to change.

The interest in fighting corruption has grown significantly in recent years, both in individual nations and within the international community. Governments as well as international organizations such as Transparency International¹¹ influence the business world and puts pressure on private actors to join their efforts to combat bribery and corruption. Business entities have to comply with national and international regulations and are more or less forced to implement sufficient codes of conduct and compliance programs in order to ensure that they are in compliance with the law. Compliance with the American legislation on bribery and corruption, *Foreign Corrupt Practices Act* (FCPA), has become one of the most important compliance issues for multinational companies, both US and non-US, and one of the most prioritized parts of due diligence in relation to mergers and acquisitions.¹² The reach and enforcement impact of the FCPA continues to grow as the US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC) reach historically high levels of enforcement actions. FCPA enforcement proceedings and the amount of financial penalties have grown exponentially.¹³ Serving as a powerful

⁹ The World Bank - *Six Questions on the Cost of Corruption* with World Bank Institute Global Governance Director Daniel Kaufmann

¹⁰ Control Risks and Simmons & Simmons - *International business attitudes to corruption*, Survey 2006, p. 5

¹¹ <http://www.transparency.org/>

¹² Masters, Brooke - *A closer eye* - Financial Times, published March 17 2010 17:36 - http://www.ft.com/cms/s/0/0775687a-308f-11df-a24b-00144feabdc0,dwp_uuid=03e33ef8-31a7-11df-9ef5-00144feabdc0.html - last viewed April 9, 2010

¹³ Shearman & Sterling - *FCPA Digest, Recent Trends and Patterns in Enforcement of the Foreign Corrupt Practices Act*, March 4, 2010, p. 2,3,7

source of anti-bribery and corruption legislation and with its extraterritorial effects, knowledge and awareness of the FCPA is well worth having both as a US and a non-US business lawyer.

The trend is evident within the European Union as well where the United Kingdom, in response to major criticism from international organizations, recently enacted a reconstructed anti-bribery law, *Bribery Act 2010*, expected to reach even further than the American version.¹⁴ Sweden has during the past ten years become a party to a number of international conventions in the area of anti-corruption issued by the United Nations, the European Union, the Organization for Economic Co-operation and Development and the World Bank. On March 19, 2009 the Swedish government appointed a person in charge of an inquiry to investigate and evaluate the Swedish legislation in the area of anti-bribery and corruption. The Inquiry was given directives to (i) evaluate current anti-bribery and corruption legislation, (ii) consider whether or not to criminalize so called "trading in influence" and (iii) propose a code of conduct applicable to the private sector. The Inquiry finalized its work and presented its report in June 2010.¹⁵

1.1 Purpose

The purpose of this thesis is to investigate the legal issues related to the field of anti-bribery and corruption. Multinational corporations are exposed to numerous jurisdictions and thus have to comply with numerous sets of regulations. The ambition is to provide guidance on leading anti-bribery and corruption regulations and how corporations and organizations are to best comply with them.

In addition to Swedish anti-bribery law, I have chosen to investigate the US *Foreign Corrupt Practices Act of 1977* (FCPA), as it is known to be a powerful source of anti-corruption legislation with an extraterritorial reach. I have also chosen to investigate the newly presented British anti-bribery law, *Bribery Act 2010* (Bribery Act). The Bribery Act is set out to reach even further than the FCPA, armed with both a broad extraterritorial jurisdiction and provisions stipulating far-reaching corporate liability.

My aspiration is for this thesis to be of value for practicing lawyers wanting an insight in the area of anti-bribery and corruption law. This area of law is truly under development and the thesis might therefore be of value not only to those new to this subject but to those familiar with the subject wanting a better insight in the newly presented British anti-bribery law and/or the suggested changes of Swedish anti-bribery law presented in SOU 2010:38. The thesis focuses on the perspective of corporations, thus a large part of the

¹⁴ Publication on the website of *Ministry of Justice* - <http://www.justice.gov.uk/publications/bribery-bill.htm> - last viewed April 9, 2010

¹⁵ Dir. 2009:15 - *En modernare mutbrottslagstiftning och en kod för beslutspåverkan inom näringslivet*

analysis presented in the thesis is conducted from a multinational corporation's point of view. By investigating and analyzing the abovementioned laws, I am hoping to provide guidance to corporations and organizations wanting to live up to and be in compliance with the law.

Specifically this thesis is set out to answer the following questions.

- *Which aspects of the proposed changes of the bribery provisions of the Swedish Penal Code and the Code on Gifts, Rewards and Benefits in the Business Sector presented by the Inquiry, would benefit from further improvement?*
- *In which respects are the bribery provisions of the Swedish Penal Code, the FCPA and the Bribery Act different from one another and what are the consequences of these differences?*
- *What constitutes a sufficient and successful compliance program and adequate due diligence in regard to the anti-bribery laws presented in this thesis and why would a corporation choose to develop and implement such compliance programs and perform such due diligence?*

1.2 Method

Writing this thesis I have used a traditional legal method, foremost using legislation, legislative history and authoritative doctrine. In regard to Swedish law, I have used legislation, legislative history, case law, articles published in *Juridisk Tidsskrift* and doctrine. In regard to American law and the FCPA, I have used legislation, legislative history such as reports by the House of Representatives and the Senate, as well as case law, doctrine and articles published by the American Bar Association. In regard to British law and the Bribery Act, I have used legislation and publications by governmental bodies such as the Ministry of Justice. In regard to the sections on trends and developments as well as the second part of the thesis, I have used sources such as publications and press releases by governmental bodies, publications by the American Bar Association and articles and publications by international organization such as Transparency International, the World Bank and the International Chamber of Commerce.

1.3 Delimitations

In order to meet the purpose of providing an up to date and informative review and analysis of Swedish, American and British anti-bribery law in an accessible format, delimitations have had to be made. This thesis is not an exhaustive report on anti-bribery and corruption regulations of the respective countries. Instead I have chosen to present and analyze the bribery provisions of the Swedish Penal Code, the FCPA and the Bribery Act, which I believe to be the most interesting parts of the anti-bribery regime of the respective countries. In doing so, I have left out certain aspects of anti-bribery and corruption regulation. In regard to Swedish law, there is a couple of offences linked to bribery and corruption listed in the

Swedish Penal Code, which this thesis does not cover. In regard to American law, there is both federal and state law on anti-bribery and corruption, which this thesis does not cover. There are also a number of specific laws complementing bribery law in the respective countries, such as laws regulating competition and marketing practice, which are not covered by this thesis.

The full content of the report by the Swedish Inquiry, SOU 2010:38, is not accounted for in this thesis. Regarding the Bribery Act, the FCPA and the Swedish Penal Code only chosen aspects of these laws are accounted for in this thesis. Although occasionally mentioned in the thesis, there is no focus on international conventions and instruments on the area of anti-bribery and corruption.

An interesting aspect of anti-bribery and corruption efforts is the phenomena of so called whistle blowing - the possibility of an employee to anonymously expose fraud, abuse, corruption or other misbehavior in a company or organization. However, this issue is not covered by this thesis.

1.4 Disposition

The thesis is divided into two separate but related parts, both parts consisting of three chapters each. The first part of the thesis, chapter 2, 3 and 4, consists of a presentation of Swedish, American and British anti-bribery law. The second part of the thesis, chapter 5, 6 and 7, then analyzes these laws, analyzing the proposed changes of Swedish anti-bribery law, comparing the Swedish, American and British laws to each other and accounting for the impact they may have on corporations and organizations.

Chapter 2 focuses on the current bribery provisions of the Swedish Penal Code and the newly presented report, SOU 2010:38, proposing changes of the bribery provisions of the Penal Code as well as a *Code on Gifts, Rewards and Benefits in the Business Sector*. Chapter 3 provides an overview of the structure, legal prerequisites and enforcement mechanisms of the FCPA. Chapter 4 examines and presents the Bribery Act in the same way. Each of these chapters have a sub-section providing information on the trends and developments of the respective anti-bribery laws, mainly reflecting the work of enforcement authorities.

The second part of the thesis then starts off with chapter 5 and an analysis of the proposed changes of the Swedish Penal Code and the proposed *Code on Gifts, Rewards and Benefits in the Business Sector* presented in SOU 2010:38, specifically focusing on areas of possible improvement. Chapter 6 contains a comparative analysis of the Swedish, American and British anti-bribery laws previously examined in the thesis. Chapter 7 then examines the impact that these anti-bribery laws might have on corporations and organizations. This chapter includes a suggestion of precautionary measures multinational organizations should take in order to be in compliance with

the abovementioned laws as well as an analysis of why such compliance is beneficial to the individual organization.

2 Swedish Anti-Bribery Law

This chapter provides an overview of the structure, legal prerequisites and enforcement mechanisms of the bribery provisions of the *Swedish Penal Code of 1962* (Penal Code). It also provides an overview of the propositions made by the Swedish Inquiry presented in SOU 2010:38.

2.1 Structure and Legal Prerequisites

2.1.1 Overview

The basic provisions on bribery are found in the Penal Code, where passive bribery and active bribery are separated as two different offences, listed in two different sections of the Code. Passive corruption, or *bribe taking*, is listed in chapter 20 section 2 along with provisions regulating acts of breach of duty. Whereas active corruption, or *bribery*, is listed in chapter 17 section 7 along with provisions regulating crimes against public activities. The provisions on bribery and bribe taking are applicable to corruptive acts both within the public and the private sector. The provisions on bribery and bribe taking are very similar and they both consist of three key elements; (i) the parties involved (ii) the reward must be given/accepted for the performance of official duties and (iii) the reward must be deemed as improper.

2.1.2 The Parties Involved

He who gives, promises or offers a bribe or other improper reward to an employee or someone who is carrying out a certain assignment (foremost those listed in chapter 20, section 2, as well as foreign officials) for the exercise of his official duties shall be sentenced for bribery according to chapter 17, section 7. The Penal Code defines the briber as “any person”, thus the scope of the paragraph is broad. However, according to established legal principles in Swedish law, only physical persons can be held criminally responsible which eliminates entities with legal personalities from criminal charges. If, for example a company carries out illicit payments, the physical persons who participated in the corrupt activity such as board members or employees will be held responsible.¹⁶ A person cannot escape responsibility by acting through a third party such as an agent, instead that third party can also be held responsible for complicity.¹⁷

According to chapter 20, section 2, subsection 1 the bribe taker is defined as an employee who, whether for himself or for any other person, receives,

¹⁶ Cars, Torsten - *Mutbrott, bestickning och korruptiv marknadsföring*, Norstedts Juridik, 2001, p.25

¹⁷ Holmqvist/Leijonhufvud/Träskman/Wennberg - *Brottsbalken, En kommentar* kap. 13-24 (1998 plus supplement 1-23), Norstedts Blå Bibliotek p. 17:29 b

accepts a promise of or demands a bribe or other improper reward for the performance of his official duties. Subsection 2 of the same provision then lists a number of actors who, in addition to employees, fall within the scope of possible bribe takers. The provision targets politicians performing public functions and services within the Swedish government or municipalities as well as those acting as fiduciary in legal, economic, scientific or technical matters such as directors of companies, brokers, commercial agents, commissions agents and legal consultants - actors who fall outside of what Swedish labor law classifies as employees.¹⁸

2.1.3 For the Performance of Official Duties

As aforementioned, the criminal act consists of “giving, promising or offering” or “receiving, accepting a promise of or demanding” a bribe or other improper reward *for the performance of official duties*. The nexus between the giving or receiving of the bribe and the performance of the receivers duties is a key element of both the bribery and the bribe taking provision;¹⁹ The relationship between the parties must be of a professional nature, which means that the recipient must be in a position where he or she has a practical possibility to influence a decision or act upon which the giver is dependant in any way. It is irrelevant whether or not the receiver was indeed influenced by the bribe and the prosecutor does not even have to prove a fraudulent intent, instead the relevant question is whether or not the giver and the receiver have a professional or business relation to each another.²⁰ A situation that might complicate the matter is where the parties have more then one relation to each other. They might for instance share both a business relation and a friendship. In those cases one must assess in which of the relations the reward was given. A problematic aspect of such an assessment is that one might tend to look to the nature of the reward itself in order to be able to figure out in which relation the reward was given. If the nature of the reward is commonly accepted as a token of friendship, a bouquet of flowers for example, one might tend to deem the giving of such a reward as outside the scope of the business relation and vice versa.²¹ That, however, is not in accordance with the law. In a case from the Swedish Supreme Court, NJA 1987 s. 604, a nurse was acquitted from charges of bribery. The nurse had been legated a farm by a deceased patient and the court looked to the testament in order to determine the motive behind the gift. The court found that the farm had been given to the nurse in appreciation of her as a person and not as a reward for the performance of her duties. The nature of the gift was not at all of importance when asserting in which context the reward was given. A recently decided case from the Supreme Court further highlights this issue. A public defender was acquitted from charges of bribe taking and the father of his client was acquitted from charges of bribery. The determinative factor was that the gift, which had

¹⁸ SOU 1974:37 p. 95 ff

¹⁹ SOU 1974:37 p. 32, 142 f

²⁰ SOU 1974:37 p. 33, 142 f

²¹ Suzanne Wennberg - *Advokaters ansvar för mutbrott; en kommentar till en ny dom från Högsta domstolen*, JT 2009-10 Nr 3, p. 691 ff

been given by the father to the lawyer, had not been given for the performance of the lawyer's official duties. The lawyer and the father shared both a business relation and a friendship and the court found the friendship to be the reason for the gift. The involved parties had been friends for quite some time and they had exchanged gifts similar to the current one before.²²

2.1.4 An Improper Reward

The Penal Code defines illicit payments as “a bribe or other improper reward”. In theory, anything of direct or indirect value to the recipient can be considered a bribe or and improper reward. The key element is the word *improper* and the interpretation of what should be viewed as improper will ultimately rest upon the notion of moral and ethics. The word “improper” is ambiguous and an individual assessment in each case is necessary. Every transaction with the intent to have an effect on the way the percipient performs his or her official duties shall be deemed as improper.²³ If there is evidence of the percipient performing his or her official duties in a wrongful way or if there is proof of that being intended, the reward should, again, be deemed as improper.²⁴ If there is no evidence of corrupt intent, the assessment is more difficult to make. An important factor in the assessment is the value of the reward. A reward of an exceptionally low value runs little to no risk of being able to influence the way the recipient performs his or her official duties and is therefore unlikely to be deemed as improper.²⁵ An example of such a reward could be marketing in the form of inexpensive pens, lighters etc. Another important factor is the nature of the position or employment of the recipient. Rewards given to those working in the public sector are more likely to be deemed as improper than those given to employees in the private sector.²⁶ An important difference between the public and the private sector is the relevance of whether the reward is given openly or in secrecy. The fact that a reward is given in the open or with the knowledge of the receiver's principal is rarely an eligible defense when the act concerns the public sector. However, if the act is carried out in the private sector, the knowledge of the principal could serve as a successful defense, since the main purpose of the criminal provisions (in regard to the private sector) is to protect the principal's interest of being able to trust his or her employees.²⁷ A reward is normally deemed as proper if it is a customary element of the employment, such as business meals or educational trips. The expenditure must however be reasonable. Business expenditures related to representation or promotion of a company may also be deemed as proper provided that it is reasonable and necessary.²⁸

²² NJA 2009 s. 751

²³ SOU 1974:37 p. 143 f.

²⁴ SOU 1974:37 p. 38, 112 and Prop. 1975/76:176 p. 36

²⁵ SOU 1974:37 p. 144 and NJA 1981 s. 477

²⁶ SOU 1974:37 p. 144

²⁷ Prop. 1975/76:176 p. 37

²⁸ Cf. RH 1993:74

2.2 Liability and Enforcement

2.2.1 Sanctions

Both bribery and bribe taking are, according to the Penal Code, punishable by a fine or imprisonment for two years at the most. If the crime is grave it is punishable by imprisonment for at least six months and for six years at the most. In addition to the criminal sanctions provided for by the provisions on bribery and bribe taking, an employee guilty of bribe taking stands the risk of additional sanctions provided for by labor law such as dismissal or salary reduction. Furthermore, the Penal Code criminalizes actions such as unlawful disposal and breach of faith and breach of duty.²⁹ Accounting law provides for an efficient complement to the provisions on bribery and bribe taking, as all businesses have a legal duty to be able to verify all commercial transactions.³⁰ The court may also declare illicit payments confiscated to the State Treasury, unless it would be manifestly unreasonable to do so.³¹ This includes not only the illicit payment itself, but also estimated economic advantages resulting from the crime. If, for example, a corporation has been able to secure an advantageous business deal by bribing its counterpart, the actual or estimated profits from that business deal may be confiscated.³² Bribery offences may also lead to disbarment from public procurement according to Chapter 10 of the Public Procurement Act.³³

As aforementioned, an entity with a legal personality cannot be subject to criminal charges. They can however, under specific circumstances, be subject to a fine. If the criminal act of bribery or bribe taking has been committed in the name of a corporation and a person acting is a high-level employee such as a vice president or a board member *or* if a corporation has failed to do what can be expected from it to prevent the criminal act, the corporation may be subject to a fine in accordance with the Penal Code. The fine may range from 5 000 to 10 million SEK.³⁴

2.2.2 Legal Proceedings

Chapter 17 section 17 and chapter 20 section 5 of the Penal Code prescribe for partly different prosecution rules for bribery and bribe taking within the public and private sectors. In cases of bribery and bribe taking committed within the public sector, the Public Prosecutor may at his or her own discretion initiate legal proceedings. Acts of bribery and bribe taking committed in the private sector may only be initiated to prosecution if the

²⁹ Penal Code, chapter 10, section 5 and chapter 20, section 1

³⁰ Cars, Torsten - *Mutbrott, bestickning och korruptiv marknadsföring*, Norstedts Juridik, 2001, p.157 f

³¹ Penal Code, chapter 36, section 1

³² Penal Code, chapter 36, section 4

³³ Lag (2007:1091) om offentlig upphandling

³⁴ Penal Code, chapter 36, sections 7-10 a

employer or the principal of the bribe taker reports the crime to the Public Prosecutor, or if prosecution is called for by public interest.³⁵

2.2.3 International Aspects

Specific rules apply for acts of bribery and bribe taking committed outside of Swedish territory. According to chapter 2 of the Penal Code a Swedish court has jurisdiction over acts committed abroad if the act was committed by (i) a Swedish citizen or a foreign citizen habituated in Sweden, (ii) a foreign citizen who after the crime was committed became a Swedish citizen or habituates in Sweden or a Danish, Norwegian, Finish or Icelandic citizen while in Sweden, (iii) a foreign citizen while in the territory of Sweden if the crime is punishable by six months of incarceration. A prerequisite for prosecution in the above-mentioned cases is that the act was criminalized in the state where it was committed.³⁶ Local customary practices where the act was committed must be taken into consideration when a Swedish court establishes whether a reward is to be deemed as proper or improper according to Swedish law, which may cause a discrepancy between the legality of rewards given or accepted in or outside the territory of Sweden.³⁷

2.3 Proposals Regarding New Regulation Presented in SOU 2010:38

2.3.1 Overview

On March 19, 2009 the Swedish government called for an investigation of Swedish legislation on the area of anti-corruption and bribery. A person appointed by the government to lead the Inquiry was to (i) evaluate current anti-corruption and bribery legislation, (ii) consider whether or not to criminalize so called trading in influence and (iii) propose a code of conduct applicable to the private sector. The Inquiry finalized its work and presented its report, SOU 2010:38, in June 2010.

The Inquiry proposed a number of structural and substantive changes in the Penal Code concerning the bribery provisions. It also put forward a proposal regarding a *Code on Gifts, Rewards and Benefits in the Business Sector* (Code on Gifts etc.) that is intended to be part of self-regulation in the business sector. The main purpose behind these proposals is to achieve provisions that give clear guidance as to what constitutes a permissible reward and what constitutes a punishable crime. The committee intends to introduce a modern and accessible anti-bribery and corruption regulation

³⁵ Penal Code, chapter 17, section 7 and chapter 20, section 5

³⁶ Penal Code, chapter 2, section 2

³⁷ Prop. 1975/76:176 p. 41

where the purposed *Code on Gifts etc* plays an important role in distinguishing permissible and impermissible influence.³⁸

2.3.2 Proposed Changes of the Penal Code

2.3.2.1 Structural Changes

In order to bring structural order the Inquiry purposes that the provisions concerning bribery and corruption are to be arranged in one single chapter, namely current chapter 10 of the Penal Code, with the suggested title *On Embezzlement, Other Breaches of Trust and Bribery*. Chapter 10 section 5, with sub-sections, will host the following provisions; 5 Breach of Trust, 5(a) Bribery, 5(b) Bribe Taking, 5(c) Grave Bribery and Bribe Taking, 5(d) Negligent Financing of Bribery. Consequently chapter 17 section 7 and chapter 20 section 2 will not remain in force.³⁹

2.3.2.2 Definition of the Briber and Bribe Taker

The current provisions on bribery and bribe taking are limited to a specific group of actors. Only employees or those listed in chapter 20 section 2 sub-section 2 can commit the crime of bribe taking and only those who give, promise or offer a bribe or other improper reward *to* that same group of actors can commit the crime of bribery. These provisions have been criticized for limiting the scope of the bribery and bribe taking provisions in an unjustified way. There are certain actors, such as self-employed persons, who fall outside the scope of the provisions.⁴⁰ A self-employed physician for example, may accept a reward from a pharmaceutical manufacturer in exchange for a promise of prescribing its products - without facing possible charges of bribe taking. Another example would be a corporation offering money to a freelance journalist in exchange for a promise of not writing a specific article that may harm the reputation of the corporation. The provisions have also been criticized for being difficult to interpret in regard to their scope and for being difficult to maintain as society changes. In order to cope with this, the Inquiry proposes the current list of actors to be replaced by a more general description of those covered by the provisions. Consequently the provisions on bribery and bribe taking will cover all employees and contractors, both within the public and private sector. The Inquiry makes clear that the question of whether or not a reward is deemed to have an improper influence on the way an employee or contractor carries out his or her duties, will serve as a limitation on the scope of the provisions. It is considered less likely that a reward given to a self-employed contractor is deemed as having an improper influence, than one given to an employee, since a self-employed contractor has full discretion on how to run his or her business without a principal to answer to.⁴¹

³⁸ SOU 2010:38 p. 13

³⁹ SOU 2010:38 p. 23 ff

⁴⁰ RH 2010:5

⁴¹ SOU 2010:38 p. 154 ff

2.3.2.3 Improper Influence

The current provisions on bribery and bribe taking define an illicit payment as “a bribe or other improper reward”. The Inquiry consider this wording to give a disproportionate importance to the nature of the reward, as if the reward itself is the decisive factor when defining an illicit payment. The Inquiry proposes to change the phrase “improper reward” to “improper influence” in order for the statutory language to better reflect the purpose and application of the provisions. The key element of the provisions should be if the reward has an improper influence on the exercise of public authority, a public procurement or the recipient’s way of performing his or her duties. The proposed wording excludes all rewards which has a *proper* influence on the recipient’s way of performing his or her duties, such as tipping a waiter or waitress at a restaurant. An employer in the private sector may in this way exclude his or her employees from criminal liability by accepting that they accept rewards from others. Such a reward may however be deemed improper regardless of the approval of the involved employer, if the transaction jeopardizes other important interests such as the interest of consumers and fair competition. In order to assess if or not a reward has an improper influence on the recipient one must look to the overall transaction. Customary business practices could serve an important norm in the determination and the Inquiry proposes that a transaction falling within the limits of the proposed Code on Gifts etc. should be deemed as proper.⁴²

2.3.2.4 Chapter 10 Section 5 - Breach of Trust

Chapter 10 section 5 clarifies that breach of trust also comprises bribery. According to the provision, anyone who demands, accepts a promise of or receives a reward to the benefit of the donor or some other third party, to the disadvantage of the recipient’s principal will be liable for *breach of trust*. The offence also encompasses other acts, aside from bribery, where an individual abuses his or her position of trust at the expense of his or her principal. Nevertheless, the committee proposes this change of wording of the provision to clarify that breach of trust includes passive bribery.⁴³

2.3.2.5 Chapter 10 Section 5(a) - Bribery

The Inquiry proposes to divide the provision on bribery, chapter 10 section 5(a), into three sub-sections regarding; (1) bribes in the exercise of public authority and public procurement, (2) unfair competition and (3) bribes in competitions. The three sub-sections all describe the same crime which is bribery. It is the involved parties and the purpose of the criminal act that distinguish one from the other.

Chapter 10 section 5(a)(1) targets the case where a bribe is given with the direct intention to influence the exercise of public authority or a public procurement. The Inquiry wishes to emphasize the graveness of such a

⁴² Ibid. p. 157

⁴³ Ibid. p. 160 f

crime and the importance of protecting the trust in public functions by single it out in a separate sub-section. This sub-section is different from the following two, in that it includes an element of direct intent. Thus, the prosecutor has to prove that the bribe was offered, given or promised with the direct intent to influence or reward the exercise of public authority or a public procurement. The bribe could be intended to either influence the recipient to exercise his or her duties in a wrongful way or to exercise his or her duties at all - both cases are criminalized in the proposal. An example of the latter case could be offering a bribe to a government official in exchange for him or her making a decision within an assigned time period. The provision encompasses both state officials and those working within the private sector but with a legal duty to exercise public authority.⁴⁴

Chapter 10 section 5(a)(2) targets the case where a bribe is given *aiming to* improperly influence the way an employee or contractor performs his or her duties. This paragraph encompasses illicit payments in the private sector as well as illicit payments as the abovementioned but where the prosecutor is unable to prove direct intent. Thus, an important legal technicality that differentiates subsection 2 from subsection 1 is the lack of direct intent. Under sub-section 2 the prosecutor does not need to prove direct intent, instead the prosecutor must show that the transaction is of such kind where there is a *general/typical risk* of the recipient being influenced in the exercise of his or her official duties. This reasoning ties on to the element of improper influence discussed above. The Inquiry lists a number of determinative factors when assessing if a transaction implies a typical risk of improper influence. These factors are the following.

- The nature and value of the benefit
- The connection between the benefit and the recipients work or commission
- The recipients position in relation to both his or her employer and the provider of the reward
- The way in which the reward was given, for example if it took place openly or in secrecy, if the reward was given to a single employee or a number of employees and if the benefit was provided at the initiative of the recipient
- General custom and usage in the industry regarding benefits and rewards.⁴⁵

Chapter 10 section 5(a)(3) targets bribes given to influence the outcome of competitions on which commercial betting takes place. This paragraph is constructed in the same way as subsection 2 regarding the lack of direct intent.⁴⁶

⁴⁴ Ibid. p. 161 f

⁴⁵ Ibid. p. 162 f

⁴⁶ Ibid. p. 164 ff

2.3.2.6 Negligent Financing of Bribery

An entirely new provision proposed by the Inquiry is the one on *negligent financing of bribery*. Chapter 10 section 5(d) states criminal liability for he or she who, on behalf of a corporation, offers, promises or provides money or other assets to someone who, due to his or her position or by contract, represent the corporation in a particular matter and thereby, through gross negligence, furthers bribery. This provision targets situations where middlemen such as agents or affiliated companies use corruptive measures when acting on behalf of their principals. A parent company may for example be using an agent or a subsidiary to sell its products. If it is evident that the agent/subsidiary has been using part of the parent company's finances to facilitate bribes, the parent company may be liable for negligent financing of bribery. The provision targets situations where the bribery has taken place abroad or in Sweden, but there has to be evidence of an actual case of bribery or gross bribery. When determining what constitutes gross negligence, one should look to precautionary measures taken by the corporation. In order to avoid liability a corporation must show evidence of precautionary measures taken to prevent corruptive behavior by their partners, such as adequate due diligence. The proposed Code on Gifts etc. contains a section on precautionary measures a corporation may take before entering into partnership agreements with middlemen and affiliated companies, which if practiced by the corporation should free it from liability for negligent financing of bribery.⁴⁷

2.3.2.7 Gross Bribery and Bribe Taking

The Inquiry proposes a special provision in the Penal Code for gross bribery and bribe taking. Chapter 10 section 5(c) exemplifies circumstances that a court should take into consideration when determining if a violation is to be considered as gross. When assessing if an act of bribery or bribe taking is to be considered gross, one should consider if the deed concerned a substantial value, if it was part of systematic criminal activity or if the deed was of a particularly dangerous kind.⁴⁸

2.3.2.8 Legal Proceedings

As aforementioned⁴⁹ there are certain rules on prosecution, which differ depending on if the bribery or bribe taking involve actors from the public or the private sector. The Inquiry proposes the abolishment of the current rule, which limits a prosecutor's duty to prosecute acts of bribery and bribe taking committed within the public sector to cases where the principal has reported the crime. The rule is considered to put unjustified restrictions on the possibility to take legal action against corruptive measures harmful to other actors than the employer or principal. A sales manager may for example accept bribes in exchange for ordering products from the bribers

⁴⁷ Ibid. p. 153 f, 165

⁴⁸ Ibid. p. 166

⁴⁹ 2.2.2 Legal Proceedings

company. Even though the sales manager's principal may know and accept it, the behavior can be harmful to competing corporations and/or consumers. The Inquiry therefore proposes a joint provision, where all acts of bribery and bribe taking are to be prosecuted if it is in public interest. Prosecution of acts of bribery or bribe taking within the public sector is generally considered to be of the public interest. Regarding the private sector, it is for the Public Prosecutor to decide which cases to prosecute. When doing so the prosecutor should look to the Code on Gifts etc. and other customary practices, according to the Inquiry.⁵⁰

2.3.3 The Proposed Code on Gifts, Rewards and Benefits in the Business Sector

The Inquiry has, in cooperation with representatives from Swedish industry, put forward a proposal for a *Swedish Code on Gifts, Rewards and Benefits in the Business Sector* (Code on Gifts etc.). The code is to be part of self-regulation within the business sector and it is intended to be adopted and administrated by the *Anti Corruption Institute*⁵¹ - a non-governmental organization. The code, as well as common practice and codes of conduct, is intended to provide guidance as to what constitutes unacceptable or even unlawful business behavior. A self-regulated code provide for more flexibility than statutory law and can therefore give detailed guidance as to what is to be considered an illicit payment. The code is intended to compliment the Penal Code when interpreting what constitutes "improper influence" in relation to the provision on bribery and bribe taking, and "gross negligence" in relation to the provision on negligent financing of bribery. Since the code is to be updated regularly it shall ensure that the regulation on anti-bribery and corruption stays modern and adequate. A self-regulated code also enables the industry to combat behavior that, even if it does not constitute a crime, may be deemed improper or unethical. The code thereby provides for a buffer, where corporations in compliance with the code should be able to feel confident that they are in compliance with the law. Offending the provisions set out in the code does not necessarily mean breaking the law.⁵²

The code is applicable to all corporations active on the Swedish market, when producing or trading services or goods. More specifically the code is applicable to all corporations with a statutory duty to keep accounts according to the Accounting Act⁵³ or the Foreign Branches Act⁵⁴. The code contains the following sections: Purpose, Introduction, Definitions, A) Field of Application, B) Benefits, C) Agents and Other Partners, D) Preventive Measures, E) Administration of the Code.⁵⁵

⁵⁰ SOU 2010:38 p. 167

⁵¹ <http://www.institutetmotmutor.se>

⁵² SOU 2010:38 p. 205 ff

⁵³ Bokföringslag (1999:1078)

⁵⁴ Lag (1992:160) om utländska filialer m.m.

⁵⁵ SOU 2010:38 p. 29 ff

2.3.3.1 Illicit Rewards

The provisions of the code reflect the provisions of the Penal Code in that they prohibit corporations from giving, offering or promising illicit rewards. The code lists rewards that in themselves are to be deemed illicit such as; a) monetary gifts, b) monetary loans or other financial securities, c) offering of an employment or products or services intended for private use, d) rewards with certain stipulations not approved by the receiver's principal, e) hidden provisions or kickbacks and f) pleasure trips etc.⁵⁶

The code also provides a list of criteria that will help determine if a reward is to be deemed as an illicit payment. These criteria are the following.

- *The value of the reward* - The higher the value of the reward and the higher the frequency of the given rewards, the higher the risk of the reward being deemed improper. A reward should also be proportionate in relation to the purpose of the reward.
- *The employment of the recipient* - It is important to look to the type of employment of the recipient. A reward given to a government official run a higher risk of being deemed improper than one given to an employee within the private sector. A reward given to a government official involved in making a decision or in a procurement regarding the giver is always prohibited.
- *The nature of the reward* - The reward should have a clear nexus to the employment and the official duties of the receiver. A pleasure trip may for example be deemed illicit, while a trip to an educational conference may be deemed as proper.
- *The nature of the transaction* - A reward should, if possible, be offered to an unspecified group of people rather than to a specific employee. The transaction should be made in the open and to the principal of the receiver.⁵⁷

2.3.3.2 Proper Rewards

A corporation is, according to the code, allowed to offer, promise or give rewards to employees or contractors of other corporations as long as a) the transaction is made in the open, b) the reward is moderate and c) the reward is not of such nature that it has an improper influence on the recipient's way of performing his or her duties. When determining if a reward is moderate one has to look to the specific transaction and the parties involved. Factors such as official position, official duties, experience and age of both the receiver and the giver may influence the assessment. One should also look to the specific corporation and industry involved since customary practices may be relevant.⁵⁸

⁵⁶ Ibid. p. 35

⁵⁷ Ibid. p. 33 f

⁵⁸ Ibid. p. 36 f

2.3.3.3 Agents and Other Partners

A corporation shall, if necessary, perform proper due diligence of their business partners. In terms of when it is necessary to perform due diligence, the code provides a list of warning flags. Due diligence is normally called for under the following circumstances.

- If the partner is an agent and is to receive a significant provision,
- If the partner is to be given far-reaching authority to represent the corporation,
- If the partner is to receive its provision in advance,
- If the partner demands a disproportionately large provision,
- If the partner asks for the provision to be given to a middleman or to an account located outside of where the partner is active,
- If the partner has been recommended by an official body,
- If the partner is a frequent donator to political parties,
- If that which qualifies the partner is its influence on official authorities or,
- If a majority of the partner's business consists of selling the products or services of the corporation.

An initial due diligence should focus on possible anti-corruption and bribery policies of the partner. If there are any signs of corruptive measures taken by the partner or if its policies show to be insufficient, one should expand the due diligence. An expanded due diligence should include an analysis of the owner structure, background, qualifications, and the financial situation of the partner. All contracts should include clauses forbidding the partner from engaging in corruptive behavior and allowing for an exit if that should be the case.⁵⁹

2.3.3.4 Preventive Measures

Corporations should, if necessary, implement sufficient codes of conduct to prevent illicit payments and corruptive behavior. A sufficient code of conduct should be adjusted to the specific corporation and its size, nature, owner structure and field of practice. A code of conduct could include specific guidelines of acceptable and unacceptable rewards, areas of risk or concern and rules on implementation and education.⁶⁰

2.4 Trends and Developments

The National Anti-Corruption Unit is a national prosecution office within the Swedish Prosecution Authority, specializing in combating corruption. It has been acting in its present form since 2005 and consists of five specially trained prosecutors and three accountants.⁶¹

⁵⁹ Ibid. p. 38 f

⁶⁰ Ibid. p. 40 f

⁶¹ <http://www.aklagare.se/Sok-aklagare/Nationella-aklagarkammare-/Riksenheten-mot-korruption/> - last viewed October 27, 2010

The National Anti-Corruption Unit has had little practice in enforcement actions involving acts of bribery taking place abroad. A single case of bribery of a foreign public official has resulted in a conviction in Sweden since 2003. The case involved two Swedish consultants bribing a public official of the World Bank, sentenced to one year and 18 months in prison respectively. During 2009, three investigations were dropped due to lack of evidence, among them the highly controversial case of the *JAS-Gripen contracts*.⁶² The case was initiated in 2007 and was part of a major international criminal investigation regarding suspicions of bribery in the sale of JAS Saab Gripen jet-fighters to various European countries. To date, enforcement actions have been brought against BAE Systems both by American and British enforcement agencies.⁶³ The Swedish Prosecution Authority was however unable to prove that the representatives of Sweden's Saab AB and Gripen International had intentionally assisted in the alleged bribe payments by BAE Systems after July 2004. Any actions taken before that date were unable to have prosecuted due to the statute of limitations. A number of Swedish corporations have been involved in investigations or prosecutions in other jurisdictions, foremost in the United States, including ABB, AstraZeneca, Ericsson, Volvo⁶⁴ and Saab.⁶⁵

According to Transparency International, Swedish authorities are “moderately” active in its enforcement actions regarding foreign bribery cases and Sweden has more work to do in order to live up to its obligations under the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*. The Convention currently has 38 parties and each year Transparency International publishes a *Progress Report* to evaluate the enforcement actions taken by each nation. The parties are classified according to three categories: “Active Enforcement”, “Moderate Enforcement” and “Little to No Enforcement”. The classification is based on the number and importance of cases and investigations brought by each nation, taking into account the size of the nation's exports. Sweden, along with Argentina, Belgium, Finland, France, Japan, South Korea, Netherlands and Spain is in the report of 2010 classified in the category of moderate enforcement, which is considered an inadequate deterrent. Denmark, Italy and the United Kingdom this year join Germany, Norway, Switzerland and the United States as classified in the category of active enforcement.⁶⁶ Transparency International recommends Sweden to, among other things, introduce adequate penal law provisions against corporations bribing through subsidiaries, joint ventures and/or agents, to introduce heavier fines for corporations and other legal entities, to

⁶² <http://www.transparency-se.org/Ny-sida-2.html> - last viewed October 27, 2010

⁶³ Please see section 3.2.4 and 4.2.3

⁶⁴ Volvo and its subsidiaries were involved in several US cases resulting in settlements and fines, including a settlement related to the UN Oil-for-Food program discussed further in section 3.2.4

⁶⁵ Transparency International, *Progress Report 2010, Enforcement of the OECD Anti-Bribery Convention*, p. 57

⁶⁶ *Ibid.* p. 7 f

abolish the prerequisite of dual criminality and to introduce an effective, specific law providing protection for whistleblowers.⁶⁷

In its 2010 *Corruption Perceptions Index (CPI)* Transparency International ranked countries according to its perception of corruption in the public sector. The CPI draws on different assessments and business opinion surveys carried out by independent and reputable institutions. Each nation is scored on a scale of ten (very clean) to zero (very corrupt). Sweden, with a score of 9,2 is ranked number four, along with Finland. Although the score is the same as last year, Sweden has dropped from number three in 2009, and number one in 2008.⁶⁸

⁶⁷ Ibid. p. 58

⁶⁸ Transparency International, *Corruption Perceptions Index 2010*, p. 3 ff

3 Foreign Corrupt Practices Act

This chapter provides an overview of the structure, legal prerequisites and enforcement mechanisms of the American anti-bribery and corruption law *Foreign Corrupt Practices Act of 1977* (FCPA).

3.1 Structure and Legal Prerequisites

3.1.1 Overview

The FCPA was enacted in 1977 as a result of investigations headed by the Securities and Exchange Commission (SEC) during the mid 1970's linked to the Watergate Scandal under President Richard Nixon's Presidency. The investigations resulted in over 400 US companies admitting to have made improper payments to foreign government officials in order to obtain business. As a result, US Congress enacted the FCPA in 1977 to put a stop to bribery and to restore public confidence in American business.⁶⁹ As an anticipation of US's accession to the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, amendments were added to the FCPA in 1998, which further expanded its scope.⁷⁰ The FCPA is designed to deter improper inducements to foreign officials in connection with business activities. In doing so it consists of two major components namely, the accounting and record-keeping provisions and the anti-bribery provisions. The accounting provisions apply to any company that has publicly-traded securities in the US and requires those companies to adhere to certain standards of accounting and record-keeping that accurately and fairly represent the company's transactions. The anti-bribery provisions apply to both physical persons and legal entities and criminalize corrupt payments of foreign (non-US) government officials for the purpose of obtaining business. Penalties for violating the FCPA include civil fees, criminal fines and incarceration.

3.1.2 The Anti-Bribery Provisions

The anti-bribery provisions of the FCPA prohibits the making or authorizing of any promise, offer, or payment of anything of value if the offeror knows that any portion will be offered, given, or promised to a foreign official, a political party or party official, or a foreign political candidate for the purpose of influencing a governmental decision.⁷¹

⁶⁹ House of Representatives Report No. 95-640 p. 5 f

⁷⁰ Senate Report No. 105-277 p. 1 f

⁷¹ Deming, H. Stuart - *The Foreign Corrupt Practices Act and the New International Norms, Second Edition*, International Practitioner's Deskbook Series, a Section of International Law American Bar Association, 2010, p. 7

3.1.2.1 Jurisdiction

The jurisdiction of the anti-bribery provisions of the FCPA is broad. It is based on the nationality principle and establishes jurisdiction over US citizens, nationals or entities organized under the laws of the US or entities having its principal place of business located in the US. The anti-bribery provisions are divided into three different sets of rules. The first⁷² one applies to “issuers”, the second⁷³ to “domestic concerns” and the third⁷⁴ to “any person”. An issuer is a corporation, US or foreign, that issues securities registered in the US or who is required to file reports under the Securities Exchange Act of 1934.⁷⁵ A domestic concern can be either a physical individual or an entity. Any individual who is a citizen, national or resident of the US and any juridical entity organized under the laws of the US or a territory, possession or commonwealth of the US is considered a domestic concern.⁷⁶ The third set of rules applies to persons other than issuers and domestic concerns while in the territory of the US. It applies to both individuals and entities that use the mails or means or instrumentality of interstate commerce, or does an act in furtherance of an improper inducement. This may include foreign persons or entities that otherwise would not be subject to the provisions of the FCPA, if they cause an act to be done within the territory of the US.⁷⁷ A person or entity cannot isolate themselves from liability by using third parties to carry out the corrupt payment on their behalf. As long as the offeror knows that *any portion* will be offered, given, or promised to a foreign official, a political party or party official, or a foreign political candidate the act is covered by the provisions of the FCPA.⁷⁸

3.1.2.2 Key Elements

The FCPA requires that the thing of value is promised, offered, or paid with corrupt intent. Corrupt intent is defined as having an improper motive to influence a foreign official to misuse his official position. The thing of value must be given or offered with the intent to influence. However, it is irrelevant if the corrupt act succeeds according to its purpose. It is also irrelevant if the official never even had the authority or position to influence the official decision or if the payment was accepted or not. As long as it was intended to influence an official act, it is a violation of the FCPA.⁷⁹

The term “anything of value” should be presumed to have an as broad application as possible and will encompass almost anything that indirectly or directly will be of benefit to the recipient. The FCPA has no *de minimis* exception and no limitations as to what can be construed as “anything of

⁷² 15 U.S.C. §78dd-1

⁷³ 15 U.S.C. §78dd-2

⁷⁴ 15 U.S.C. §78dd-3

⁷⁵ 15 U.S.C. §78dd-1(a)

⁷⁶ 15 U.S.C. §78dd-2(h)(1)(A)(B)

⁷⁷ 15 U.S.C. §78dd-3(a) and Senate Report No. 105-277 p. 4 f.

⁷⁸ Deming, H. Stuart p. 7 ff

⁷⁹ House of Representatives Report No. 95-640 p. 8 and Deming, H. Stuart p. 15

value”. The subjective perception of the recipient will be a key factor in the determination. It is important to keep in mind that what may be seen as valuable to some may not be seen as valuable to others. The circumstances of the particular situation will help determine what is to be determined as something of value. Examples of benefits that have been viewed as falling within the scope of the FCPA provisions are scholarships for family members, upgrades to first class airfare, side trips to resorts, offers of employment to family members, gifts, discounts, the use of materials or equipment, entertainment, drinks, meals and transportation.⁸⁰

The term “foreign official” includes officials of all branches of government as well as all units of government, regardless of country. It includes both civil service and political functions, in countries where those functions are not unified. It includes any person acting in an official capacity or on behalf of any foreign government, department, agency or instrumentality.⁸¹ A company may be considered a “instrumentality” of a state even if the state does not fully own the company in question as long as the state has any ownership interest in a company. Consequentially, any employee of a company being deemed as an “instrumentality” will be considered a foreign official, regardless of position. The interpretation of who will be classified as a foreign official according to the FCPA is independent and it is irrelevant if the individual in question is classified as a foreign official under foreign law and whether or not he or she is paid or unpaid. An important factor is if the individual occupies a position of public trust and has official responsibilities.⁸²

One of the requirements for an act to be prohibited under the anti-bribery provisions of the FCPA, is that the improper inducements must be offered to *assist the offeror in obtaining or retaining business*. The payment or offer of payment must be intended to induce the foreign official to act on the offeror’s behalf. It is not a requirement that the official act possibly taken by the foreign official *directly* assists the offeror. Thus, actions that would have an *indirect* effect on the offeror’s business such as reduction of taxes or customs duties, circumvention of licensing requirements etc. will fall under the provisions of the FCPA. The prohibition extends to more than the renewal or award of a contract. It also includes payments related to the execution of an already existing contract or business or payments made for the purpose of obtaining more favorable treatment.⁸³

⁸⁰ Deming, H. Stuart p.17 f and Foley, Veronica/Haynes, Catina - *The FCPA and its impact in Latin America, International Trade law Journal*, Summer 2009, p. 29

⁸¹ 15 U.S.C. §78dd-1(f)(1), -2(h)(2), -3(f)(2)

⁸² Deming p. 18 and Foley/Haynes p. 29

⁸³ Deming p. 21

3.1.2.3 Exceptions and Affirmative Defenses

There are payments, which even though they fulfill the criteria described above, will be deemed permissible under the anti-bribery provisions. The FCPA provides for one category of exemptions and two categories of affirmative defenses.

The FCPA permits payments used to expedite or secure routine government actions taken by a foreign official, political party, or party official, which the individual is already bound to perform.⁸⁴ These payments are commonly referred to as “expediting”, “facilitating” or “grease” payments. The important factor in these payments is that they are given to secure or accelerate a performance of a nondiscretionary act that an official is already obligated to perform. This exception applies to narrow categories of largely non-discretionary, ministerial activities performed by mid- or low-level functionaries. A permissible payment would be made to expedite the process, or move the issuance of a permit up in line, where there would be no question as to *if* the action would be taken, but *when*. Examples of actions that could fall into this category would be processing governmental papers such as visas and work orders, providing police protection, mail pick-up and delivery, phone service and water, or scheduled inspections associated with contract performance or transit of goods. To predict what will be determined as a permissible expediting payment can be very difficult. There is no guarantee that what was deemed permissible in one case will be deemed as permissible in another. There is in general no necessary nexus to the value of the payment but it might however be more likely that a larger payment will be seen as more suspect by enforcement officials.⁸⁵

The anti-bribery provisions provide an affirmative defense for reasonable and *bona fide* business expenditures related to certain company promotions.⁸⁶ A company may provide a product or a service to a foreign official for the purpose of promotion, demonstration or explanation of that product or service, or in execution of an already existing contract. One must take care when determining if a business expenditure will be deemed as legitimate or not and focus must be on the fact that the expenditure should be reasonable and necessary. Diversions to resorts, upgraded travels or invited family members should give rise to concern.⁸⁷

A second affirmative defense under the FCPA is if the payment or offer is lawful according to the written law of the country of the percipient.⁸⁸ Recognized customs or practices do not qualify as law in this context. The act in question must be lawful under the written laws, including case law, of the relevant jurisdiction. This defense is most likely to have practical

⁸⁴ 15 U.S.C. §78dd-1(b), -2(b), -3(b)

⁸⁵ Deming p. 22 f and Foley/Haynes p. 30

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

⁸⁷ Deming, H. Stuart p. 24

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

relevance in situations where payments or offers have been made to political parties or organizations, since that is lawful in some jurisdiction of the world.⁸⁹

The Foreign Corrupt Practices Act Opinion Procedure is a procedure where an issuer or a domestic concern asks the DOJ for an opinion of a proposed business conduct. The request must be specific and focused on a well-defined issue involving prospective conduct. It cannot concern historical or hypothetical conduct and the parties cannot be anonymous. The request must be accompanied with all the relevant material and information regarding the conduct including background information, complete copies of all operative documents and detailed statements of all collateral or oral understandings. The opinion procedure provides for a reputable presumption that the conduct in question does not violate the anti-bribery provisions. The opinion is only binding upon the parties, and cannot serve as precedent for others. The SEC does not have a similar procedure, but they have, however, taken the position not to take civil enforcement actions under the anti-bribery provisions against someone who has obtained a favorable opinion from the DOJ. A favorable opinion does not preclude action by the DOJ or the SEC regarding the accounting and record-keeping provisions, since the opinion only concerns the anti-bribery provisions of the FCPA.⁹⁰

3.1.3 Accounting and Recordkeeping Provisions

The accounting and recordkeeping provisions of the FCPA work in tandem with the anti-bribery provisions to deter improper payments. By requiring proper accounting methods and internal accounting controls, corporations are discouraged from engaging in illegal payments.⁹¹ According to the provisions of the FCPA, an “issuer” must make and keep books, records, and accounts that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of that issuer. An issuer must also maintain a system of internal accounting controls.⁹² The purpose of an accounting control system is to enhance corporate accountability by ensuring that boards of directors, officers and shareholders of issuers are aware and able to prevent possible improper use of an issuer’s assets.⁹³ The accounting and record-keeping provisions apply to all aspects of an issuers practices relating to the preparation of the financial statements of an entity. They are not connected to foreign officials, as are the anti-bribery provisions, but apply to practices wholly unrelated to foreign activities. The scope and jurisdiction of the accounting provisions are limited to “issuers”.⁹⁴

⁸⁹ Deming, H. Stuart p. 26

⁹⁰ Ibid. p. 26 f

⁹¹ Senate Report No. 95-114 p.7

⁹² 15 U.S.C. §78m

⁹³ Senate Report No. 95-114 p.7 ff

⁹⁴ Deming, H. Stuart p. 41 ff

3.2 Liability and Enforcement

Both individuals and entities can be held liable for violating the anti-bribery and/or the accounting and record-keeping provisions of the FCPA. A commonly overlooked consideration regarding liability is the fact that both individuals and entities can be held responsible for conduct of third-parties acting on their behalf. This can include agents, consultants, representatives, distributors, joint venture partners, foreign subsidiaries or affiliates, contractors or subcontractors, regardless of whether the third party is subject to the FCPA or not. The subjective requirement for establishing vicarious liability varies depending on whether the anti-bribery or the accounting and record-keeping provisions are involved and whether criminal or civil charges are brought.⁹⁵

3.2.1 Criminal

Violating the anti-bribery provisions or the accounting and record-keeping provisions can lead to criminal liability. An entity can be subject to a fine of up to \$2 million per violation of the anti-bribery provisions.⁹⁶ An individual can face up to five years in prison, a fine of up to \$100,000 or both, per violation of the same provisions.⁹⁷ Violating the accounting and record-keeping provisions can result in fines of up to \$25 million, for an entity. An individual could face a 20 years prison sentence and/or a fine of up to \$5 million.⁹⁸ There are also alternative sentencing provisions, where the amount of the fines are based on gross gain or loss derived from the offence, opening up the possibility for even larger fines.⁹⁹ The DOJ is responsible for investigating and prosecuting all criminal charges under the FCPA. Investigations are generally conducted in cooperation with the SEC to facilitate communication and to minimize duplication of resources. The overall authority to bring charges under the anti-bribery and record keeping provisions resides with the Fraud Sections of the Criminal Division of the Justice Department. The Federal Bureau of Investigation (FBI) has the primary responsibility for investigations regarding violations of the anti-bribery provisions of the FCPA.¹⁰⁰

3.2.2 Civil

The DOJ and the SEC share responsibility for civil enforcement actions. The civil enforcement authority of the SEC is limited to issuers as well as individuals such as officers, directors, employees, agents and stockholders of issuers and anyone acting on behalf of issuers. All other civil enforcement action of the FCPA, including taking civil actions for

⁹⁵ Ibid. p. 59

⁹⁶ 15 U.S.C. §78ff (c)(1)

⁹⁷ 15 U.S.C. §78ff (c)(2)

⁹⁸ 15 U.S.C. §78ff (a)

⁹⁹ Deming, H. Stuart p. 80

¹⁰⁰ Ibid. p. 76

violations of the anti-bribery provisions, is left to the DOJ.¹⁰¹ The standard of proof in a civil enforcement action is lower than in a criminal enforcement action under the FCPA. Compared to the anti-bribery provisions, proof of intent is not required in a civil procedure.¹⁰² Enforcement consequences of civil actions under the FCPA are those standard to the SEC - injunctions, civil penalty action including substantial fines and administrative proceedings.¹⁰³ The DOJ can also investigate and seek injunctive relief and the imposition of civil penalties for those not subject to the jurisdiction of the SEC.¹⁰⁴

3.2.3 Deferred Prosecution Agreements

A deferred prosecution agreement (or non-prosecution agreement) is an agreement between the DOJ and an entity. It does not entail the filing of formal charges, instead it represents a middle ground between the DOJ declining prosecution and bringing charges against the entity. The conditions associated with a deferred prosecution agreement are often onerous and costly for the entity but the advantages almost always outweigh the disadvantages, why the entities choose to agree to them. It limits the exposure and uncertainty associated with an ongoing investigation. It can also help restore the integrity of an entity's operations and conduct. For the DOJ it provides the possibility of designing conditions to promote compliance, and at the same time spare innocent third parties for whom a conviction might have had significant consequences. Deferred prosecution agreements also provide prompt restitution for victims while at the same time saving governmental resources. By entering into a deferred prosecution agreement an entity, in effect, admits to the charges. If the entity later fails to abide by the terms of the agreement, the DOJ has the right to file charges, which will be fairly easy to prove since the entity cannot dispute or contradict the facts it agreed to in the deferred prosecution agreement.¹⁰⁵

3.2.4 Trends and Developments in FCPA Enforcement

The number of enforcement actions, taken by both the DOJ and the SEC, related to FCPA violations has drastically increased over the past few years. In addition, prosecutions of individuals such as corporate executives have been reported as one of the top ten trends in FCPA enforcement activity.¹⁰⁶ Both the frequency and the severity of enforcement actions have increased the over the last few years. Reports show that both the DOJ and the SEC

¹⁰¹ Ibid. p. 75

¹⁰² Ibid. p. 82

¹⁰³ 15 U.S.C. §78ff (c)(1)(B), (c)(2)(B)

¹⁰⁴ Deming, H. Stuart p. 84

¹⁰⁵ Ibid. p. 79

¹⁰⁶ Warin, F. Joseph/Speice, Patrick F., Jr - *Go Directly to Jail: Sentencing of Individual Criminal Defendants in Foreign Corrupt Practices Act Cases*, in National Institute on the Foreign Corrupt Practices Act, a Publication of the American Bar Association Criminal Justice Section, 2008

have become more aggressive in their enforcement actions, resulting in a growth in new investigations, an increase in over all prosecutions and prosecutions against individuals as well as more severe consequences for corporations and individuals than ever before.¹⁰⁷ The third quarter of 2010 has maintained the record-breaking pace of FCPA enforcement, with several new investigations launched by the DOJ and the SEC. As of September 2010, the DOJ and the SEC already exceeded last years total of resolved FCPA enforcement actions, with 26 and 21 resolved FCPA-related enforcement actions respectively. The DOJ and the SEC commonly deal with one corporation per investigation, but have in the recent years also launched several consolidated investigations concerning corporations located in different jurisdictions.¹⁰⁸

A major investigation, which continues to lead to prosecutions, involves the United Nations Iraq Oil-for-Food Program, includes numerous companies and agencies. Many companies and individuals have either been indicted or reached resolutions with the DOJ and the SEC.¹⁰⁹ For example, on March 20 2008, Volvo AB settled with the DOJ and the SEC on Oil-for-Food charges. The essential allegations were that the Iraqi government imposed a 10% “after sales service fee” as a condition of sales under the Oil-for-Food Program. To fund these mandatory payments, contractors typically increased the value of their contracts by 10%, thereby receiving an additional 10% from the United Nations escrow account, and passed the increase on to the Iraqi government through third party agents and Iraqi-controlled bank accounts. Volvo AB was charged with violations of the accounting and record-keeping provisions for inaccurately recorded payments by its French and Swedish subsidiaries, Renault Trucks and Volvo Construction Equipment. To settle the allegations Volvo AB agreed to pay a \$4 million civil penalty and to disgorge \$8,602,649 in profits plus prejudgment interest. To resolve the criminal investigations by the DOJ Volvo AB entered into a deferred prosecution agreement and agreed to pay a \$7 million criminal fee. Volvo AB also agreed to the filing of criminal complaints against its two implicated subsidiaries, each alleging a conspiracy to commit wire fraud and to violate the accounting and record-keeping provisions.¹¹⁰ Along with an increasing number of investigations, an increase in prosecutions is reported specifically against individuals. Since 1990, the DOJ has brought more than twice as many prosecutions against

¹⁰⁷ <http://www.lexology.com/library/detail.aspx?g=8a24caf0-13fa-44ab-8edb-1b07869fb61f> - last viewed April 25, 2010

¹⁰⁸ Miller Chevalier, *FCPA Autumn Review 2010*, October 8, 2010 - <http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=42304#UK> - last viewed October 21, 2010

¹⁰⁹ *Deferred Prosecution Agreement as to Volvo AB* dated March 18 2008, *United States v. Volvo Construction Equipment AB*, Docket No: 08-CR-069-RJL and *United States v. Renault Trucks SAS*, Docket No: 08-CR-068-RJL

¹¹⁰ Sherman & Sterling LLP - *Recent Trends and Patterns in FCPA Enforcement*, in National Institute on the Foreign Corrupt Practices Act, a Publication of the American Bar Association Criminal Justice Section, 2008 and Gibson Dunn & Crutcher LLP - *2008 Mid-Year FCPA Update*, in National Institute on the Foreign Corrupt Practices Act, a Publication of the American Bar Association Criminal Justice Section, 2008

individuals as against corporations. In 2007, the DOJ brought actions against ten individuals, among them the first ever against a US government official charged with offering bribes to Nigerian government officials along with other charges.¹¹¹ In combination with rising numbers of prosecutions, larger penalties (both criminal fines and civil penalties) are imposed by the DOJ and the SEC.¹¹²

Reports also show the DOJ increasingly using non-prosecution (or deferred prosecution) agreements in FCPA matters and communicating willingness to reward defendants who cooperate during the investigations. Traditionally most cases brought by the DOJ are resolved through plea agreements¹¹³. Of the total criminal dispositions from 1990-2007, 54% of the cases brought were resolved through plea agreements, 5% were convictions, 3% were dismissals and 10% were acquittals. 23% of the total criminal dispositions were non-prosecution agreements, and according to reports this number is on the rise. When the DOJ enters into a non-prosecution agreement with a company, it agrees not to prosecute those companies in exchange for, among other things, proof of continuing compliance. Non-prosecution agreements contain elements similar to plea agreements including fines and monitoring. As an example, in a non-prosecution agreement with InVision in 2004, the company agreed to pay a fine of \$800,000, to accept responsibility for misconduct and to adopt an FCPA compliance program and internal controls designed to prevent future violations.¹¹⁴

There are signs of a trend evolving whereby companies voluntarily disclose investigations to the SEC or the DOJ following internal investigations by the companies themselves. These voluntary disclosures are often made in relation to mergers and acquisition activities. Several of the most significant FCPA prosecutions came to light during the course due diligence in mergers and acquisitions. Information is disclosed to the SEC and the DOJ as a result of company investigations conducted in the course of due diligence proceedings and the assessment of potential liabilities. Self-reports like these may indicate that companies perceive the act of self-reporting to be favorable to the ultimate outcome of an investigation. There may also be a correlation between the disclosure of FCPA violations and the process of due diligence in mergers and acquisitions, highlighting both rising awareness of corruption issues and new focuses in the process of due diligence.¹¹⁵

¹¹¹ *United State v. William J. Jefferson*, Docket No: 07-CR-209-TSE

¹¹² Shearman & Sterling - *Recent Trends and Patterns in FCPA Enforcement*, in National Institute on the Foreign Corrupt Practices Act, a Publication of the American Bar Association Criminal Justice Section, 2008

¹¹³ An agreement whereby the prosecutor offers the defendant the opportunity to plead guilty, usually to a lesser charge or to the original criminal charge with a recommendation of a lighter than the maximum sentence.

¹¹⁴ Shearman & Sterling - *Recent Trends and Patterns in FCPA Enforcement*, in National Institute on the Foreign Corrupt Practices Act, a Publication of the American Bar Association Criminal Justice Section, 2008

¹¹⁵ *Ibid.*

4 Bribery Act 2010

This chapter provides an overview of the structure, legal prerequisites and enforcement mechanisms of the upcoming British anti-bribery and corruption law *Bribery Act 2010* (Bribery Act). The Bribery Act is enacted as statutory law and will enter into force in April 2011.

4.1 Structure and Legal Prerequisites

4.1.1 Overview

The Bribery Act abolishes existing common law and statutory offences regarding bribery and replaces them with a single legal framework of statutory offences applicable to bribery both within the UK and abroad. The Act addresses bribery and corruption both within the public and the private sector. The Act introduces a specific offence of bribing a foreign official with the intention of influencing the performance of his or her duties. It also creates an offence applicable to corporations failing to prevent bribery committed by employees or agents. The Act is far reaching in its extraterritorial effects and it enables prosecution of bribery committed outside the territory of the UK.

4.1.2 Jurisdiction

The Bribery Act is set out to be far reaching in its extraterritorial effects. British courts will have jurisdiction over offences under section 1, 2 and 6¹¹⁶ if any part of the conduct element of the crime was carried out in the UK.¹¹⁷ The courts will also have jurisdiction over offences committed abroad when the person who committed the offence is a British national or ordinarily resident in the UK, or a body incorporated in the UK or a Scottish partnership.¹¹⁸ For the purpose of the offence in section 7¹¹⁹ the courts will have jurisdiction irrespectively of where the acts or omissions that form part of the offence are committed.¹²⁰

4.1.3 The Anti-Bribery Provisions

4.1.3.1 Active and Passive Bribery

Section 1 of the Bribery Act criminalizes active bribery and makes it an offence for a person to offer, promise or give a financial or other advantage to another person in one of two cases. The first case applies when a person

¹¹⁶ See section 4.1.3.1 and 4.1.3.2

¹¹⁷ Bribery Act, section 12(1)

¹¹⁸ Bribery Act, section 12(2-4)

¹¹⁹ See section 4.1.3.3

¹²⁰ Bribery Act, section 12(5)

intends to induce the recipient to perform improperly a relevant function or activity - or to reward such improper performance. The second case applies when a person knows or believes that the acceptance of the advantage offered, promised or given in itself constitutes the improper performance of a relevant function. It is irrelevant whether the person to whom the advantage is offered, promised or given is the same person who is to perform or has performed the concerned function or activity. Thus, one may not circumvent the provision by offering the bribe to a third person. Nor may one circumvent the provision by using a third person to facilitate the bribe.¹²¹ The recipient of a bribe will be guilty of an offence if that person requests, agrees to receive or accepts a financial or other advantage in the aforementioned circumstances, according to section 2 of the Bribery Act.¹²²

“Financial or other advantage” is a broad and imprecise concept left to be determined as a matter of common sense by the tribunal of fact.¹²³ The question of what amounts to a bribe will depend on all the surrounding circumstances, but in general an advantage of high value runs a higher risk of being deemed as improper than an advantage of low value.¹²⁴ As for what constitutes a “relevant function or activity” and an “improper performance” one should look to sections 3, 4 and 5 of the Bribery Act.

Section 3 of the Bribery Act specifically states which functions and activities fall within the scope of the bribery provisions, thus it defines the fields within which bribery can take place. The person to whom one offers, promises or gives the bribe does not have to be the same person who is to perform, or has performed the relevant activity even though that might generally be the case¹²⁵. The functions and activities listed in the provision include all functions of a public nature and all activities connected with a business, trade or profession. It includes activities performed both in the course of an employment and on behalf of a corporation or any body of persons. However, not every improper performance of a function or activity included in the field just mentioned will violate the general bribe offence. In order to be regarded as a *relevant* function or activity, the person performing the function or activity must (a) be expected to perform it in good faith, (b) be expected to perform it impartially or (c) be in a position of trust.¹²⁶

Section 4 of the Bribery Act then defines what constitutes an “improper performance” of the relevant function or activity. In summary, a function or activity is performed improperly if it is performed in breach of a relevant expectation, such as those mentioned in section 3. One must then decide

¹²¹ Bribery Act, section 1

¹²² Bribery Act, section 2

¹²³ *Explanatory notes to the Bribery Bill*, prepared by the Ministry of Justice as printed November 19, 2009 p. 3

¹²⁴ Ministry of Justice - *Consultation on guidance about commercial organizations preventing bribery (section 9 of the Bribery Act 2010)* p. 22

¹²⁵ Bribery Act, section 1(4)

¹²⁶ Bribery Act, section 3(3-5) and *Explanatory notes to the Bribery Bill*, prepared by the Ministry of Justice as printed November 19, 2009 p. 5

what constitutes a relevant expectation. According to section 5, one should perform an expectation test, that is a test of what a reasonable person in the UK would expect in relation to the performance of the type of function or activity concerned.¹²⁷ If the performance of the concerned function or activity is not subject to UK law - if for example it has taken place outside of UK jurisdiction - one is not to look to local custom or practice for guidance. Only the written law applicable could justify ones expectations.¹²⁸

4.1.3.2 Bribery of Foreign Public Officials

Section 6 of the Bribery Act creates a separate offence of bribery of a foreign public official. The provision criminalizes the act of offering, promising or giving a financial or other advantage to a foreign public official with the intention of influencing the official in the performance of his or her official duties, in order to obtain or retain business or an advantage in the conduct of business. However, an offence is not committed if the official is permitted or required by the applicable written law, to be influenced by the advantage. It is irrelevant whether the offer, promise or gift is made directly to the official or through a third party. The offence will also be committed if the advantage is offered *to* a third party at the request of the official or with his or her assent or knowledge.¹²⁹ “Foreign public officials” are defined in subsection 5 to include both government officials and those working for international organizations. It includes individuals who hold a legislative, administrative or judicial position of any kind of a country or territory outside of the UK. It also covers individuals who exercise public functions such as professionals working for public health agencies and offices in state-owned enterprises.¹³⁰

4.1.3.3 Failure of Commercial Organizations to Prevent Bribery

Section 7 of the Bribery Act creates strict liability for a commercial organization failing to prevent bribery. The provision states that a relevant commercial organization is guilty of an offence if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organization. A “relevant commercial organization” is defined as a body or partnership which is incorporated or formed under the laws of the UK and which carries on business, regardless of where that business is carried out or any other body or partnership, wherever incorporated or formed, which carries out business in the UK¹³¹. For the purposes of this provision, a person associated with the organization will be considered to have bribed another person if their actions would

¹²⁷ Bribery Act, section 4 and 5

¹²⁸ Ministry of Justice - *Consultation on guidance about commercial organizations preventing bribery (section 9 of the Bribery Act 2010)* p. 19 f

¹²⁹ Bribery Act, section 6(1-4)

¹³⁰ Ministry of Justice - *Consultation on guidance about commercial organizations preventing bribery (section 9 of the Bribery Act 2010)* p. 20

¹³¹ Bribery Act, section 7(5)

amount to an offence under section 1 (bribery) or section 6 (bribery of a foreign official). According to ordinary principles of criminal law, the reference to the offences under sections 1 and 6 include secondary liability, that is being liable for such an offence by way of aiding, abetting, counseling or procuring¹³² It is irrelevant whether or not the associated person has been prosecuted for such an offence. However the prosecution will have to prove beyond reasonable doubt that such an offence has been committed.¹³³ An “associated person” is defined in section 8 as a person who performs services for or on behalf of the commercial organization, such as employees, agents or subsidiaries. Whether or not a person is performing services for or on behalf of a commercial organization is to be determined by reference to all relevant circumstances and not merely to the nature of the relationship. However, employees are presumed to be performing services for their employer unless the contrary is shown. Note that there is no need for principal’s knowledge or consent for the provision to be applicable.

Section 7, subsection 2, provides for a statutory defense if the organization can prove that it had *adequate procedures* in place, designed to prevent persons associated with it from committing bribery. Section 9 then requires the Secretary of State to publish guidance about such procedures. Such guidance has not yet been published, but is to be published before the Bribery Act enters into force in April 2011 in order to support businesses in determining what preventative measures they can put in place. Important to keep in mind is that the guidance published in accordance to section 9 of the Bribery Act will be of a general character. Since the guidance must be applicable across all sectors and for all types and size of business, it will not be possible, nor is it intended, to provide for detailed and complete guidance on all possible preventative measures. It is meant to complete, not replace or supersede, other forms of bribery prevention guidance and it is not intended to impose any direct obligation on business.¹³⁴ In the end, the question of if an organization had adequate procedures in place to prevent a specific case of bribery is one to be resolved by taking in all relevant facts and circumstances of that specific case.

The British government has proposed guidance formulated around six general principles that will be presented below. Even if the guidance is not yet finalized or published, it should be of interest to look to these general principles in order to get an understanding of the type of preventative measures that might amount to adequate procedures according to the Bribery Act. The principles are the following.

- *Risk Assessment* - A commercial organization should regularly and comprehensively assess the nature and extent of the risks relating to bribery to which it is exposed. Internal risks could include

¹³² *Explanatory notes to the Bribery Bill*, prepared by the Ministry of Justice as printed November 19, 2009 p. 8

¹³³ Ministry of Justice - *Consultation on guidance about commercial organizations preventing bribery (section 9 of the Bribery Act 2010)* p. 20

¹³⁴ Ministry of Justice - *Consultation on guidance about commercial organizations preventing bribery (section 9 of the Bribery Act 2010)* p. 4

deficiencies in the knowledge or training of employees in regards to the organization's business profile and policies. External risk factors could include risks specific to certain countries, transactions or partners.¹³⁵

- *Top Level Commitment* - Top level management of a commercial organization should be committed to preventing bribery. They should establish a culture within the organization in which bribery is never acceptable. They should take steps to ensure that the organization's policy to operate without bribery is clearly communicated to all levels of management, the workforce and all relevant external actors. Top level management of an organization might produce an official statement of commitment to counter bribery in all parts of the organization. One might also appoint a senior manager to oversee the development of an anti-bribery program and to ensure its effective implementation.¹³⁶
- *Due Diligence* - A commercial organization should incorporate due diligence policies and procedures that cover all parties to a business relationship, including the organization's supply chain, agents and intermediaries, all forms of joint ventures and similar relationships and all markets in which the commercial organization does business.¹³⁷
- *Clear, Practical and Accessible Policies and Procedure* - A commercial organization's policies and procedures to prevent bribery from being committed on its behalf should be clear, practical, accessible and enforceable. Policies and procedures should take into account the roles of the whole work force from the owners or board of directors to all employees, and all people and entities over which the commercial organization has control. An organization may wish to consider how clear its policy and procedure documentation is to those within the organization. Such documentation should include clear prohibition of all forms of bribery as well as guidance on making political and charitable contributions, gifts, and hospitality or promotional expenses. It should also include advice on relevant laws and regulations and information on anti-corruption programs relevant to the sector. An organization may wish to consider which procedures to use for bribery prevention purposes, such as allowing for employees to report of suspected bribery in a safe and confidential manner. Finally, an organization may consider deciding on proper procedures to deal with actual incidents of bribery or corrupt behavior in a prompt, consistent and appropriate manner.¹³⁸
- *Effective Implementation* - A commercial organization should effectively implement its anti-bribery policies and procedures and ensure that they are embedded throughout the organization. This process should ensure that the development of policies and

¹³⁵ Ibid. p. 12 f

¹³⁶ Ibid. p. 13 f

¹³⁷ Ibid. p. 14

¹³⁸ Ibid. p. 15 f

procedures reflect the practical business issues that an organization's management and workforce face when seeking to conduct business without bribery. Larger organizations may wish to establish an implementation strategy that clearly sets out how policies and procedures are to be implemented across various groups and functions of the organization. An organization may also want to consider how to best communicate its anti-bribery policies both internally and externally.¹³⁹

- *Monitoring and Review* - A commercial organization should institute monitoring and review mechanisms to ensure compliance with relevant policies and procedures and to identify issues as they arise. The organization should continue to implement improvements where appropriate. Organizations should also establish the type of system needed to monitor and review their anti-bribery policies. In smaller organizations, it might include effective financial and auditing controls. In larger organizations, it might include financial monitoring, bribery reporting and incident management procedures.¹⁴⁰

4.2 Liability and Enforcement

4.2.1 Liability and Sanctions

An individual guilty of an offence under section 1 (active bribery), 2 (passive bribery) or 6 (bribery of a foreign public official) may be sentenced to imprisonment for a term of not exceeding 10 years, to a fine or both. The same offence committed by an entity is punishable by fine. An entity guilty of an offence under section 7 (failure of commercial organization to prevent bribery) may be sentenced to a fine. In either case the amount of the fine is unlimited, if the conviction is on indictment.¹⁴¹ The Bribery Act thereby raises the maximum sentence for bribery committed by an individual from seven to ten years of imprisonment.¹⁴²

It is important to note that, in addition to any liability, which might arise under section 7, the offences under section 1, 2 and 6 apply to incorporated and unincorporated bodies as well as individuals. Section 14 of the Bribery Act states personal criminal liability for senior management, or some one purporting to act in that capacity, where a corporation has committed an offence under section 1, 2 or 6, provided that the offence was committed with the consent or connivance of a senior officer. A senior officer is defined as a director, manager, secretary or other similar officer. For

¹³⁹ Ibid. p. 16 f

¹⁴⁰ Ibid. p. 17 f

¹⁴¹ Bribery Act, section 11

¹⁴² Ministry of Justice - *Consultation on guidance about commercial organizations preventing bribery (section 9 of the Bribery Act 2010)* p. 19

criminal liability the senior officer must have a “close connection” with the UK, as listed in section 12(4).¹⁴³

4.2.2 Legal Proceedings

The duty to prosecute an offence under the Bribery Act lies with the prosecuting authorities and no proceedings for an offence may be instituted in England except by or with the consent of the Director of Public Prosecutions, the Director of the Serious Fraud Office or the Director of Revenue and Customs Prosecutions.¹⁴⁴ When deciding whether or not to proceed with a prosecution, the prosecutors must apply a two-stage test. First, there must be sufficient evidence to provide a realistic prospect of a conviction. Secondly, it must be in the general interest of the public to prosecute.¹⁴⁵

The Serious Fraud Office (SFO) is an independent department of the government and part of the UK criminal justice system. It is the lead agency in England, Wales and Northern Ireland for investigating and prosecuting cases of domestic and overseas corruption. The Director of the SFO is appointed by and accountable to the Attorney General, who in turn is responsible to Parliament.¹⁴⁶

4.2.3 Trends and Developments

Although bribery has been illegal under domestic UK law for centuries, there have been few developments in the law for over 90 years. The most important development took place in 2001, when the jurisdiction of the anti-bribery provisions were extended to include acts by UK citizens and corporations done abroad.¹⁴⁷ The Bribery Act 2010 is said to represent an important and overdue step in reforming the bribery laws of the UK, which have been a source of criticism both in the UK and abroad for more than thirty years.¹⁴⁸ The working group of the OECD prepared reports in 2003, 2005 and 2007 particularly critical of “deficiencies” in UK bribery law. It called on the UK government to enact “modern bribery legislation and establish effective corporate liability for bribery as a matter of high priority”.¹⁴⁹ The UK Law Commission has described the law of bribery as “riddled with uncertainty and in need for rationalization”.¹⁵⁰ Thus, in November 2008, the Law Commission recommended an overhaul of UK

¹⁴³ Bribery Act, section 14(4)

¹⁴⁴ Bribery Act, section 10

¹⁴⁵ Ministry of Justice - *Consultation on guidance about commercial organizations preventing bribery (section 9 of the Bribery Act 2010)* p. 23

¹⁴⁶ <http://streamstudio.world-television.com/CCUIv3/frameset.aspx?ticket=739-916-9000&target=en-default-&status=ondemand&browser=ie-9-0-0-10-0&stream=wm-audio-32> - last viewed October 18, 2010

¹⁴⁷ *Joint Committee on the Draft Bribery Bill, First Report Session 2008-09 Vol. 1*, Published by authority of the House of Commons p. 8

¹⁴⁸ *Ibid.* p. 5

¹⁴⁹ *Ibid.* p. 10

¹⁵⁰ *Ibid.* p. 9

anti-bribery legislation, replacing the scattered provisions and laws with the creation of a single law. The Bribery Act received Royal Assent on 8 April 2010 and is expected to come into force in the spring of 2011.¹⁵¹

Few individuals have been prosecuted for bribery offences in the UK in recent years and up until 2009 no company had ever been convicted.¹⁵² However, parallel to the reform of the anti-bribery laws UK authorities have been reported to step up its enforcement actions. One case particularly illustrative is that of BAE and the “Al Yamamah defense contracts”. The leading British defense company BAE Systems Plc (BAE) entered into contracts with the government of Saudi Arabia in 1985, selling aircrafts in a deal eventually worth more than 42 billion pounds. The deal became particularly controversial after 2001 when allegations arose of illegal payments being made by BAE. The SFO opened an investigation into these allegations in 2004, then halted it in 2006 after an intervention of the then Prime Minister Tony Blair.¹⁵³ According to the official statement of the SFO, the decision was taken following representations made both to the Attorney General and the Director of the SFO concerning the need to safeguard national and international security. Furthermore, it had been found necessary “to balance the need to maintain the rule of law against the wider public interest”.¹⁵⁴ The decision was later tried in court. The Divisional Court held that the then Director of the SFO had failed to protect the rule of law by being influenced by threats made by Saudi officials of intelligence sharing arrangements being withdrawn unless the investigation was abandoned. The House of Lords reversed this decision on the ground that the Director was entitled to base his decision on the threat to public safety.¹⁵⁵ These controversies resulted in major external review of the SFO and its anti-corruption work. Internal personnel changes took place, a new Overseas Anti-Corruption Unit¹⁵⁶ was created and a US-style plea bargaining system was instituted, measures that reportedly have produced results. The new negotiation model allows for companies to voluntarily disclose corruption violations and then enter formal settlement negotiations. In return, the SFO pledge to use civil penalties instead of criminal fines wherever possible. The system is supposed to encourage companies to work with the SFO, which in the long run will benefit both companies and the public.

The SFO successfully undertook its first prosecution for overseas bribery in October 2008 when Balfour Beatty became the first company to reach a plea

¹⁵¹ <http://www.justice.gov.uk/publications/bribery-bill.htm> - last viewed October 20, 2010

¹⁵² *Joint Committee on the Draft Bribery Bill, First Report Session 2008-09 Vol. 1*, Published by authority of the House of Commons, p. 9

¹⁵³ *Ibid.* p. 13

¹⁵⁴ Press release by the SFO, Published December 14th 2006 on their website <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2006/bae-systems-plcsaudi-arabia.aspx> - last viewed October 20, 2010

¹⁵⁵ *Joint Committee on the Draft Bribery Bill, First Report Session 2008-09*, Published by authority of the House of Commons, p. 61

¹⁵⁶ The City of London’s Anti-Corruption Unit was established in 2006

bargain settlement with the SFO.¹⁵⁷ In June 2009 a British solicitor was charged with conspiracy to corrupt, conspiracy to launder money and conducting fraudulent trades in connection with a United Nations program to provide life saving HIV and anti-malarial drugs to the Democratic Republic of Congo - a scheme reportedly worth (pounds) 21 million. This was the first UK national prosecuted by the Anti-Corruption Unit.¹⁵⁸ In July 2009, SFO reported of its first successful prosecution of a UK company. The UK construction firm Mabey & Johnson Ltd pleaded guilty of charges of conspiracy to corrupt in Jamaica and Ghana and a breach of UN sanctions in Iraq. As part of its sentence Mabey & Johnson is to pay a total penalty of 6.6 million pounds and retain an independent monitor.¹⁵⁹ In October 2009, the SFO obtained a civil recover order of nearly 5 million pounds against AMEC plc, an international engineering and project management firm. As part of the resolution, AMEC agreed to appoint an independent consultant to review its ethics, compliance and accounting standards and report the findings to the SFO.¹⁶⁰

After the discontinued investigation on BAE and the Al Yamamah defense contracts, the SFO began investigating BAE in connection to other contracts and countries. In January 2010, the SFO charged a former BAE agent for conspiracy to corrupt in connection to defense contracts between BAE and Czech Republic, Hungary and Austria.¹⁶¹ Later in February 2010, both the SFO and the DOJ announced settlements with BAE, in what the SFO referees to as “ground braking global agreements”.¹⁶² The DOJ agreement involves BAE’s business dealings in a number of countries, and BAE is being charged with conspiracy for making false statements to the US government. BAE has reportedly agreed to a criminal fine of 400 million dollars. If imposed, it would be the third highest in the history of enforcement of the FCPA.¹⁶³ The SFO agreement concentrates on BAE’s operations in Tanzania and BAE is to plead guilty to an offence of failing to keep reasonably accurate accounting records and is to pay 30 million pounds comprising a financial order to be determined by a Crown Court judge with the balance paid as an *ex gratia* payment for the benefit of the people of Tanzania.¹⁶⁴ Internationally coordinated settlements like these will most likely continue to occur since the SFO has expressed great willingness

¹⁵⁷Miller Chevalier Publications, *FCPA Autumn Review 2008*, October 13, 2008

¹⁵⁸Miller Chevalier Publications, *FCPA Autumn Review 2009*, October 2, 2009

¹⁵⁹ Press release by the SFO, Published July 10th 2009 on its website

<http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey--johnson-ltd-prosecuted-by-the-sfo.aspx> - last viewed October 20, 2010

¹⁶⁰ Gibson Dunn Publications, *UK Enacts New Bribery Act*, April 8, 2010

¹⁶¹ Press release by the SFO, Published January 29th 2010 on their website

<http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/former-bae-agent-charged-with-corruption.aspx> - last viewed on October 20, 2010

¹⁶² Press release by the SFO, Published February 5, 2010 on their website

<http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/bae-systems-plc.aspx> - last viewed October 20, 2010

¹⁶³ Cadwalander, *FCPA Advisor*, February 2010

¹⁶⁴ Press release by the SFO, Published February 5, 2010 on their website

<http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/bae-systems-plc.aspx> - last viewed October 20, 2010

to cooperate with anti-fraud agencies abroad, such as the DOJ, in order to fight international corruption.¹⁶⁵

¹⁶⁵ See <http://www.guardian.co.uk/uk/2010/oct/06/two-held-in-bribery-investigation-australia> - last viewed October 20, 2010

“We must make vigorous efforts in order to
combat Swedish corruption”¹⁶⁶

¹⁶⁶ Transparency International Sweden on October 26, 2010, in a public letter published in *Dagens Nyheter* - <http://www.dn.se/debatt/vi-maste-ta-krafttag-mot-den-svenska-korruptionen-1.1195902> - last viewed December 1, 2010

5 Sweden - Looking Ahead

This chapter presents an analysis of the proposed changes of the bribery provisions of the Swedish Penal Code as well as the proposed *Code on Gifts, Rewards and Benefits in the Business Sector*, presented in SOU 2010:38. The analysis specifically focuses on areas where further improvement might be possible.

5.1 The Proposed Changes of the Swedish Penal Code

The proposed changes of the Swedish Penal Code presented in SOU 2010:38 constitute a significant improvement of Swedish anti-bribery law. The most significant changes include (i) coordinating the provisions, (ii) abolishing the list of those covered by the anti-bribery provisions making the provisions applicable to all, (iii) defining gross bribery and bribe taking, (iv) providing for less restrictions on the duty to prosecute and (v) widening the criminal area by providing for the new offence *negligent financing of bribery*. The offence *negligent financing of bribery* is analyzed in chapter 6. This section will focus on two areas, where I would like to argue that further improvements have to be made, namely the need for structural change and the need for clarification of the key elements of the bribery provisions.

5.1.1 Why not a bribery law?

The overlying purpose of the proposed changes of the Swedish Penal Code is to update Swedish anti-bribery legislation making it clearer and easier to understand and to apply. In order to do so, the Inquiry proposes a structural change of the Penal Code, organizing the bribery offences in one single chapter, namely chapter 10 with the proposed title of “*On Embezzlement, Other Breaches of Trust and Bribery*”. The Inquiry states that there can be little doubt that a concentration of the bribery offences would make them easier to apply as well as it would underline the importance of combating corruption.¹⁶⁷ Choosing from the options of creating a new separate law on bribery, creating a new separate chapter of the Penal Code or collecting the bribery offences in an existing chapter of the Penal Code, the Inquiry chooses the latter. However, it could be of interests to reevaluate their choice. Creating a new, separate, law on bribery would bring several advantages. A separate law on bribery and corruption would clearly demonstrate the political will and ambition to combat corruption both nationally and internationally. It would send a clear message to individuals, corporations and organizations, that corrupt acts are looked at in the most serious way and that the Swedish government is now stepping up, joining the global fight against corruption. The Inquiry fears that creating a separate

¹⁶⁷ See SOU 2010:38 p. 147

law would undermine these efforts, as severe crimes traditionally are regulated in the Penal Code.¹⁶⁸ However, there are examples of severe crimes being regulated in separate individual laws, such as the law prohibiting female genital mutilation.¹⁶⁹ Thus many may interpret a separate law, specifically criminalizing and targeting an individual social problem as a prioritized ambition to combat that problem. A separate law, or chapter of the Penal Code, would furthermore make the provisions even more accessible and easier to apply. The current proposition by the Inquiry, where bribery is regulated along with embezzlement and breach of trust, risks creating the conception that acts of bribery equals acts of breach of trust. The Inquiry argues that acts of bribery within the public and the private sector share the common trade of some form of breach of trust, why they are fit to be regulated in a chapter along with other acts of breach of trust.¹⁷⁰ However, acts of bribery or corruption are different from acts of embezzlement and breach of trust in many ways. Even though acts of bribery *can* amount to breach of trust, it is not always the case. Acts of bribery does not only affect a presumed principal of the bribe taker, but it influences the way decisions are made and it involves others than the briber and bribe taker. The crime of bribery does not, unlike breach of trust, involve a plaintiff but many are affected by corrupt acts such as the society as a whole, the judicial system, fair competition, consumers, corporations and individuals. The proposed structural arrangement is misleading as it portrays acts of corruption as associated with acts of breach of trust when in reality it does not have to be. It also puts a disproportionate focus on breach of trust, which is unfortunate since a criticized area of current Swedish anti-bribery law is its inability to reflect the importance of fighting corruption within the private sector in order to provide for healthy competition.¹⁷¹ Bribery is a complex crime with various aspects to be considered other than the trust of a presumed principle, why it should be regulated in a separate chapter of the Penal Code or in a separate law highlighting all aspects of the crime as well as protecting all interests affected by bribery and corruption.

5.1.2 Do the proposed changes of the bribery provisions make them easier to apply?

The most significant material changes proposed by the Inquiry, regarding the bribery provisions, are the following. Firstly, bribery within the public and the private sector are somewhat differentiated in separate sub-sections of the passive bribery provision. According to the proposed provision on passive bribery, the first sub-section specifically targets the case where a bribe is given to improperly influence the exercise of public authority or a public procurement and the second sub-section targets other cases of bribery mainly those committed within the private sector. This structure illustrates

¹⁶⁸ See SOU 2010:38 p. 147 f

¹⁶⁹ See Lag (1982:316) om förbud mot könsstympning av kvinnor

¹⁷⁰ See SOU 2010:38 p. 149

¹⁷¹ For a presentation on the criticized areas of Swedish anti-bribery law please see "*En kritisk analys av den svenska mutlagstiftningen*" published by the Anti-Corruption Institute (Institutet Mot Mutor) 2006

that there are different interests protected by the bribery provisions, both the interest of public authority being exercised objectively and impartially and the interest of safeguarding a sound market place with healthy competition. The second material change of significance is the change of the key elements of the bribery provisions. The current bribery provisions have three key elements namely (i) the involved parties, (ii) the connection to the performance of official duties and (iii) the reward being deemed as improper. According to the proposed bribery provisions there is only one key element and that is the element of improper influence - on the exercise of public authority or a public procurement, on the way an employee or contractor performs his or her duties, or on the outcome of competitions on which commercial betting takes place. An important question is if these material changes of the bribery provisions make them easier to apply? One of the most criticized aspects of the current bribery law is that the bribery provisions are too difficult to apply.¹⁷² How is one to differentiate a proper reward from an illicit bribe?

The underlying problem and reason for why the current bribery provisions are difficult to interpret and apply is two folded. Firstly, there is the problem of having two different sets of interests protected by the same criminal provisions. The bribery provisions are set out to protect the democratic system and the rule of law by prohibiting bribes being paid to or accepted by public officials *and* protect a principle from disloyal employees and the interest of healthy competition by prohibiting bribes being paid to or accepted by those in the private sector. Secondly, there is the problem of the elements of the crime being too difficult to interpret - the second problem actually being a consequence of the first. The key elements, *connection to the performance of official duties* and the reward being deemed as *improper*, are imprecise and it is especially the latter element that creates confusion. The reason why the element *improper reward* is so hard to interpret is because its meaning varies depending on the circumstances of the crime. What is deemed improper in one case may very well be deemed proper in another, depending mainly on the involved parties and in which context the act is committed. As we know, the provisions on bribery are “stricter” on those working in the public sector than those working in the private sector, both the legislative history of the bribery provisions as well as case law tells us so. Thus, the key element of the provisions, *improper reward*, is connected to the interests the provisions are set out to protect. Accordingly, the element *improper reward* has one meaning when applied to acts of bribery within the public sector and another when applied to acts of bribery within the private sector. However, judging by the statutory language of the bribery provisions it seems as though they are to be applied equally on all cases of bribery, even though that is not actually the case.

The Inquiry has proposed that the key element of *improper reward* is to be replaced by *improper influence*. However, the aforementioned problem

¹⁷² For a presentation on the criticized areas of Swedish anti-bribery law please see “*En kritisk analys av den svenska mutlagstiftningen*” published by the Anti-Corruption Institute (Institutet Mot Mutor) 2006

remains since the two sets of interests still are to be protected by the same provisions. The Inquiry has in some way made interpreting the passive bribery provision and the key elements easier, by providing for sub-sections. The sub-sections highlight that there *are* different interests protected by the provisions on bribery, also signaling that it is never acceptable to intentionally seek to improperly influence the exercise of public authority or a public procurement. However, to fully eliminate the problem, a clearer separation of the different sets of interests protected by the provisions on bribery is required. The different aspects taken into consideration when determining what is to be deemed as *improper* - whether it is improper rewards or improper influence - need to be reflected in the statutory language of the bribery provisions. Even though the proposed change by the Inquiry is important since it is indeed the effects of a given reward that are improper and unwanted not the reward is self, it does not make it easier to differentiate a proper reward from an illicit bribe. The element *improper influence* will, just like the element *improper reward*, be dependent on all relevant circumstances of the specific case. And in general, the most significant circumstance in a case of alleged bribery is if the act took place within the public or the private sector. Just as case law on the current bribery provisions tells us that a reward is more likely to be deemed as improper if it is given to a public official in the performance of his or her duties than to an employee of a private corporation, future case law on the suggested bribery provisions would most likely tell us that a reward is more likely to be deemed as aiming to *improperly influence* that same public official. The basis for determining what is to be considered as *improper influence* will vary depending on which main category of persons the bribe taker relates to, namely a public official exercising public authority or an employee or contractor in the private sector.

To truly get to the bottom of the problem of applicability and predictability of the bribery provisions one need to further separate the different sets of interests protected by the provisions. Regardless of if one decides to keep the provisions on passive and active bribery as two single provisions with separate sub-sections, or if one decides to create two sets of entirely separate offences, the key elements of the bribery provision should be differentiated and defined based on the different sets interests protected. It is for example known that some persons are unable to accept almost anything of personal value within the exercise of their official duties such as police officers, judges or prosecutors. Others may not be subject to the same strict standards, but must still show great precaution such as officials within the local government or members of the Swedish Riksdag. When looking at the private sector one must respect and take into consideration the natural element of a free market. It is natural that private corporations engage in business promoting relations and as long as these activates reflect good business practice and are not harmful to competition or consumers it should fall outside the application of the bribery provisions. I interpret the proposed *Swedish Code on Gifts, Rewards and Benefits in the Business Sector* as an effort to address the problems described above, since it sets out to clarify when a reward given within the private sector is to be deemed as having an

improper influence. However, the different aspects of the element *improper influence* described above should be reflected in the statutory language of the bribery provisions. One way of doing so would be to create a specific sub-section or a specific provision for acts of bribery committed within the private sector, and in that sub-section refer to the fact that acts in accordance to good business practice (sv. god affärssed) are accepted. That would also be a way to incorporate the *Code on Gifts, Rewards and Benefits in the Business Sector* into the bribery provisions.

Separating acts of bribery within the public and the private sector from one another as well as differentiating the key elements and components of acts of bribery committed within the respective sectors would arguably make it easier to interpret the provisions and thereby foreseeing what constitutes a permissible reward and what constitutes a bribe.

5.2 The Proposed Code on Gifts, Rewards and Benefits in the Business Sector

The proposed *Code on Gifts, Rewards and Benefits in the Business Sector* (Code on Gifts etc.) presented by the Inquiry is intended to be part of self-regulation within the business sector and it is to be adopted and administrated by the Anti-Corruption Institute. As part of the administration of the code the Inquiry suggests that the Anti-Corruption Institute may establish a committee to give opinions on how to interpret the code. These opinions may then be of importance in legal proceeding when determining if any of the bribery provisions have been offended.¹⁷³ The code is intended to provide more detailed information than the law as to what constituted a permissible reward and an illicit bribe. The Inquiry has suggested that the code is to be applied to interpret some of the key elements of the bribery provisions namely *improper influence* and *gross negligence*.

5.2.1 Is the Code on Gifts etc. intended to complement or constitute law?

Since the Inquiry published their report, the proposed Code on Gifts etc. has been subject to critique.¹⁷⁴ Some have suggested that the code and its proposed area of application constitute a threat to the principle of legality, in that a private body is allowed to have too much influence on the law.¹⁷⁵ However, it should be noted that self-regulation does exist and work well as

¹⁷³ See SOU 2010:38 p. 220

¹⁷⁴ The report (SOU 2010:38) has been under consideration by a number of public authorities and private organizations such as Svea Hovrätt, the Swedish Prosecution Authority (sv. Åklagarmyndighetern), the Swedish Competition Authority (sv. Konkurrensverket), the Confederation of Swedish Enterprise (sv. Svenskt Näringsliv), the Anti-Bribery Institute (sv. Institutet Mot Mutor), the Swedish Union of Journalists (sv. Journalistförbundet) etc.

¹⁷⁵ See the opinions by Svea Hovrätt, the Swedish Prosecution Authority, the Swedish Competition Authority and the Swedish Union of Journalists

a complement to Swedish law, the *Swedish Corporate Governance Code* applicable to Swedish listed companies serving as an example. Self-regulated codes like these have shown to be valuable instruments with preventative measures, providing for ethical business behavior. In regard to the area of anti-bribery and corruption, self-regulation like the Code on Gifts etc. could be a valuable way to concretize an area of law otherwise known to be ambiguous. It is important, however, to clarify the specific purpose and area of application of the Code on Gifts etc. The Inquiry proposes the code to be applicable when interpreting some of the key elements of the bribery provisions and to provide for a buffer for corporations and organizations who decide to follow it.¹⁷⁶ Consequently, the code is suggested to be quite influential in the area of Swedish anti-bribery law. It is therefore surprising that the code is in no way referred to in the proposed bribery provisions of the Penal Code. If the code is indeed intended to compliment the law the law should refer to it, directly or indirectly.

The purpose and field of application of the Code on Gifts etc. need not only be clarified but also analyzed and questioned. It is clear that it is intended to provide for a buffer for the corporations and organizations that choose to follow it, since the provisions of the code are stricter and reaches further than the provisions of the Penal Code.¹⁷⁷ Corporations, choosing to implement the code and be in compliance with it are intended be able to feel fairly confident that they are not offending the bribery provisions. It is unclear however, what the consequences will be if a corporation, accidentally or intentionally, offends the provisions of the code. Except from stating that breaking the code does not necessarily equals breaking the law, this question is left unanalyzed by the Inquiry.¹⁷⁸ Even if breaking the code does not (and should not) necessarily mean that one has offended the anti-bribery provisions set out in the Penal Code, there is a risk that corporations and organizations who choose to follow the provisions of the code are at a greater risk of getting attention from enforcement authorities than the ones who did not chose to implement the code at all. If a corporation, who offended the code, later is found guilty in a court of law, the attention from enforcement authorities was obviously justified. But there might be a risk of corporations and organizations getting their goodwill or reputation damaged by being subject to unjustified investigations by enforcement authorities. A fundamental prerequisite connected to the Code on Gifts etc. should therefore be that the code is mandatory in the same way as the *Swedish Corporate Governance Code*, where corporations either has to comply with the provisions of the code or explain and justify why they have chosen not to, commonly known as the principle of comply or explain.¹⁷⁹

The specific purpose of the Code on Gifts etc. and what role it is intended to play should be analyzed further before it is finalized and put into play. Both

¹⁷⁶ See SOU 2010:38 p. 234

¹⁷⁷ See SOU 2010:38 p. 206

¹⁷⁸ See SOU 2010:38 p. 208

¹⁷⁹ See the *Swedish Corporate Governance Code*, 2010, p 8

the Code on Gifts etc. and specific industry codes are, according to the Inquiry, to be used as a source of law.¹⁸⁰ Accordingly, when one is to decide what constitutes *improper influence* one should look not only to the statutory language and the legislative history but also to the Code on Gifts etc. and other self-regulatory industry codes. As aforementioned, the Code on Gifts etc. is stricter than the provisions of the Penal Code, and specific industry codes could in turn be even stricter than the Code on Gifts etc., which raises the question of the scope of the criminalized area. To illustrate this question we could look to the pharmaceutical industry, an industry known to be heavily regulated both by public regulations and laws and by self-regulation. *The Ethical Rules for the Pharmaceutical Industry* (Ethical Rules) is an industry code, which is part of a system of self-regulation within the pharmaceutical industry in Sweden. These rules are maintained by an industry organization for researched-based pharmaceutical corporations active in Sweden - "LIF".¹⁸¹ These rules are very detailed and intended to ensure that pharmaceutical corporations not only live up to Swedish law but to ethical standards maintaining a high level of credibility. The Ethical Rules regulate, among a number of other things, situations when corporations wish to invite employees or representatives from medical services and pharmacies to different kinds of arrangements such as educational conferences. According to article 35 of the Ethical Rules, only specific locations are permissible for these arrangements. A conference may not take place at a location known for exclusivity or tourism or where an international event such as a golf tournament is taking place. The city Marrakech in Marrocco and the city of Rhodos in Greece are examples of locations that have been deemed as unacceptable by the *Information Practices Committee* of LIF.¹⁸² Furthermore, according to article 36 of the Ethical Rules, the pharmaceutical companies are never allowed to pay for more than the conference fee and 50 percent of the costs of travel, board and lodging for the invited participants of the conference. These rules illustrate the level of detail that industry codes may have. They also illustrate possible discrepancies between anti-bribery law and self-regulated ethical codes. A pharmaceutical company paying for 70 percent of the costs of travel, board and lodging for the invited participants of a conference is clearly offending the Ethical Rules stated above - but does that same conduct constitute an offence according to the bribery provisions of the Penal Code? If we are to look to detailed and far-reaching ethical codes like these when determining what is to be deemed as having an *improper influence*, the bribery provisions will be far stricter than initially intended. The bribery provisions would also end up being stricter on certain industries, something that may or may not be justified. If the self-regulated codes are to be applied as proposed by the Inquiry, corporations acting within a certain industry or connected to a certain *voluntary* code may run a higher risk of not only receiving the attention of enforcement authorities but also being found

¹⁸⁰ See SOU 2010:38 p. 234 f.

¹⁸¹ www.lif.se

¹⁸² See *NBL 886/10 and NBL 871/09*, two decisions made by the *Information Practices Committee* of LIF - a committee set out to make decisions on how the *Ethical Rules* are to be interpreted

guilty of bribery, than corporations in different industries or those refrained from committing to ethical codes. In some cases it might be justified to apply a higher standard and a stricter interpretation of what constitutes *improper influence* than in others. Nevertheless, it is important to note that one should be careful not to put ethical rules on an equal footing as legal rules.

Self-regulation and ethical rules are very welcomed as part of maintaining good business practice and there should be incentives for corporations and organizations to put forward and adhere to ethical standards. But when linking these ethical rules and standards to the law, one should do so with care. In addition to the risks analyzed above, there is also the risk of developing a notion that what is unethical consequently is unlawful. Even though law ultimately rests upon the notion of ethics and moral it is important to keep the concepts separated. The fact that corporations and organizations choose to comply with ethical standards and thereby help provide for a market of an even higher ethical standard than the one provided for by law is both a desirable and necessary part of a community founded on democracy and the rule of law. It is therefore important to create incentives for corporations and organizations to do so. The suggested Code on Gifts etc. could act as such an incentive, where corporations are stimulated to comply with ethical standards even higher than the one provided for by anti-bribery and corruption law. In order to serve as such an incentive, it is important that the Code on Gifts etc. as well as specific industry codes are applied and used in a correct way.

In summary I believe that the proposed Code on Gifts etc. is part of a welcomed development where self-regulation could compliment the bribery provisions provided for by law. However, the question of how the Code on Gifts etc. and industry codes relates and interacts with the bribery provisions of the Penal Code should be analyzed further before the suggested changes of the Penal Code and the Code on Gifts etc. possibly becomes reality. I believe that the propositions made by the Inquiry would benefit from clarifying the dividing line between law and ethics as well as the practical application of the suggested Code on Gifts etc.

6 Comparative Analysis

This chapter presents a comparative analysis of the bribery provisions of the *Swedish Penal Code of 1962* (Penal Code), including the changes proposed by the Inquiry in SOU 2010:38, the *Foreign Corrupt Practices Act* (FCPA) and the *Bribery Act 2010* (Bribery Act). The chapter consists of a comparative chart as well an explanatory section, analyzing some of the characteristic differences between the anti-bribery laws.

6.1 Comparative Chart

	Sweden - Current Bribery Provisions of the Penal Code	Sweden - Changes Proposed in SOU 2010:38	The FCPA	The Bribery Act
<i>Who can commit bribery?</i>	<p>If the crime is committed in Sweden - any individual.</p> <p>If the crime is committed abroad - (i) a Swedish citizen or a foreign citizen resident in Sweden, (ii) a foreign citizen who after the crime was committed became a Swedish citizen or resides in Sweden or a Danish, Norwegian, Finnish or Icelandic citizen while in Sweden, (iii) a foreign citizen while in Sweden.</p> <p>A prerequisite for prosecution of acts committed abroad is that the act was criminalized in the country where it was committed.</p> <p>Only physical persons can be held criminally responsible which eliminates juristic persons such as business entities from criminal liability. However, if a</p>		<p>Domestic concerns - US citizens, nationals and residents. Entities organized under US laws, or having its principal place of business in the US.</p> <p>Issuers - corporation (US or non-US) who issues securities in the US.</p> <p>Others - who does an act in furtherance of an improper inducement,</p>	<p>If the crime is committed in the UK - any individual or a body incorporated in the UK.</p> <p>If the crime is committed abroad - UK citizens and those ordinarily resident in the UK or a body incorporated in the UK.</p> <p>Negligent Financing of Bribery - any body or partnership, wherever incorporated, which carries out business in the UK.</p>

	company carries out illicit payments or other corrupt activities, the physical persons who participated in the corrupt activity such as board members/directors or employees can be held criminally responsible.		while in the territory of the US. US parent companies may be liable for acts of foreign subsidiaries if it authorized, directed or controlled the activity.	
<i>Who can be bribed?</i>	Employees and those listed in Chap. 20 Sec. 2 (2). Restriction through requirement of “ <i>for the performance of official duties</i> ”.	Any person. (All employees and contractors both within the public and private sector). Restriction through requirement of “ <i>improper influence</i> ”.	Foreign officials. The FCPA only covers the public sector.	Any person. Restriction through requirement of “ <i>improper performance of relevant function or activity</i> ”.
<i>Nature of the advantage obtained by bribery</i>	No nexus to business. Instead, nexus between giving the bribe and “ <i>the performance of official duties</i> ”.	No nexus to business. Instead, nexus between giving the bribe and “ <i>an improper influence</i> ”.	Nexus to business; the bribe is given “... <i>with intention to obtain or retain business</i> ”.	Section 1 - No nexus to business, instead to <i>improper performance</i> . Section 6 and 7 - Nexus to business “... <i>with intention to obtain or retain business</i> ”.
<i>Is passive bribery covered?</i>	Yes, in chapter 20 section 2.	Yes, in chapter 10 section 5b.	No.	Yes, in section 2.

<i>Strict corporate liability?</i>	No.	No. However, <i>Negligent financing of bribery</i> - Section 5d provides for criminal liability for he who out of gross negligence finances bribery. Defense - pre-cautionary measures taken, such as those provided for in The Code on Gifts etc.	Strict liability for <i>issuers</i> only under the accounting provisions - failure to maintain adequate systems of internal control and failure to keep proper books and accounts.	Strict liability for the failure of a commercial organization to prevent bribery. Defense - “ <i>adequate procedures</i> ”.
<i>Local law</i>	Affirmative defense.		Affirmative defense.	Section 6; affirmative defense. Section 1 and 7; not an affirmative defense, but could be a factor to consider in “ <i>the expectation test</i> ”.
<i>Business promotion expenditures</i>	Not an affirmative defense, <i>however see section 6.1.1.2</i>		Affirmative defense for reasonable and <i>bona fide</i> business expenditures.	Not an affirmative defense, <i>however see below...</i>
<i>Facilitation payments</i>	Not exempted.		Exempted.	Not exempted.

There are numerous interesting aspects to be analyzed when comparing the FCPA, the Bribery Act and anti-bribery provisions of the Swedish Penal Code. Below, some of those aspects are analyzed.

6.2 Failure to Prevent Bribery & Negligent Financing of Bribery

The Bribery Act, when it comes into force, will have a significant impact on multinational corporations. Unlike the FCPA, the Bribery Act encompasses corruptive acts both within the public and the private sector. As the Bribery Act applies to all corporations incorporated in the UK and in terms of the offence *failure to prevent bribery* in section 7 to all bodies or partnerships that carries on a business or part of a business in any part of the UK, it has a broad extraterritorial jurisdiction. An important question is what “carrying out part of a business in the UK” really means. At its face, it seems to be a wide definition encompassing not only corporations who have some sort of establishment in the UK but all corporations who carry out business in the UK. So far, there has been no specific guidance to this question, and it will ultimately be up to the judges of British courts to specify this jurisdictional issue. In the meantime, multinational organizations might want to take the safe approach and make sure they do have “adequate procedures” in place. Both the *failure to prevent bribery* offence in section 7 of the Bribery Act and the *negligent financing of bribery* offence in section 5(d) of the proposed changes of the Swedish Penal Code are innovative and “new” offences within anti-bribery and corruption regulation. There is no similar offence under the FCPA or prescribed for in the *OECD Convention on Combating Bribery of Foreign Public Officials*. Considering the extraterritorial reach of section 7 of the Bribery Act combined with strict liability and a wide definition of “associated persons” I predict this provision to have noticeable consequences on multinational corporations and organizations.

Another important question in relation to section 7 of the Bribery Act is what “an associated person” will come to mean and thus which actions a corporation bears responsibility for. Employees, agents and subsidiaries will most likely be presumed to be associated with a corporation, for the purpose of the section 7 offence, but what other business associates, performing services for or on behalf of the corporation, will come to be included? This question too will be up for argumentation by the Public Prosecutor and the defense and will ultimately be decided in court. Section 5(d) of the proposed changes of the Swedish Penal Code is too (intentionally?) vague in this respect. According to the wording of the provision the corporation - or the physical person or persons responsible for the corporate actions - face possible liability for those who due to their position or by contract represent the corporation in a particular matter. The wording of both the British and the Swedish provisions encompass anyone associated with a corporation - no contractual relationship needed - who performs services on behalf of or represents a corporation in some way. As a result, corporations should be aware of and perform due diligence on all individuals or consultants related

to the corporation, including obvious individuals such as distributing agents as well as less obvious individuals such as drivers or interpreters. An important difference between the Bribery Act and the proposed changes of the Swedish Penal Code are the subjective elements of the provisions. Section 7 of the Bribery Act 2010 provides for strict liability, while section 5(d) of the Penal Code provides for gross negligence. While a British prosecutor would have to show sufficient evidence of a committed bribery offence by an associated person to the corporation, a Swedish prosecutor would, in addition to that, have to show gross negligence of behalf of the corporation. Depending on the circumstances though, there might not be much of a difference, since it may not take much for the prosecutor to show an assumption of gross negligence, which the defense then would have to address. In a Swedish case, a corporation dealing with an agent located in a country where bribery is common, without taking precautionary measures, may be considered as acting in gross negligence.¹⁸³ It would then be up to the corporation to show evidence of them *not* acting in gross negligence by showing they have proper procedures in place, to prevent bribery from taking place (just as a British corporation would have to show they have “adequate procedures” in place) in order to escape liability.

Unlike section 7(2) of the Bribery Act, section 5(d) of the proposed changes of the Swedish Penal Code does not explicitly state that having proper procedures in place serves as a defense. However, the Inquiry proposes the Code on Gifts etc. to be of guidance when determining what procedures a corporation can put in place.¹⁸⁴ Both the Swedish code and the official guidance that is to be published by the UK Secretary of State in accordance to section 9 of the Bribery Act will thereby have great influence when determining what could be expected of corporations in terms of preventative procedures. Corporations and organizations active within the jurisdiction of British and Swedish courts should therefore invest time and money to make sure they are in compliance with these two sets of guidelines.¹⁸⁵

6.3 Business Expenditures and Facilitation Payments

Unlike the Bribery Act and the Swedish Penal Code, the FCPA provides for an affirmative defense for reasonable and *bona fide* business expenditures related to certain company promotions. A corporation may provide a foreign official with a product or service, for the purpose of promotion, demonstration or explanation of that product or service without it being deemed as an illicit payment under the FCPA. Looking at this provision, knowing that there is no equivalent in the Bribery Act or in the Swedish Penal Code one might think of the FCPA as less strict than the other two laws. However, in order for a business expenditure to be deemed as proper according the FCPA, it must be *reasonable, necessary and given in good*

¹⁸³ See SOU 2010:38 p. 165

¹⁸⁴ See SOU 2010:38 p. 165

¹⁸⁵ More on this subject in chapter 7

faith - that is without a corrupt intent. When examining the key elements of the Bribery Act and the bribery provisions of the Swedish Penal Code, one should be able to argue that there is room for reasonable, necessary and *bona fide* business expenditures, according to these laws as well. In order for a business expenditure to amount to a bribe according to the Bribery Act, it must first amount to “a financial or other advantage”. Secondly, it must be intended to induce a person to perform a function improperly or to influence a foreign official, with the intention to obtain or retain business. A small, routine, business expenditure may not amount to neither of the above-mentioned key elements. The same line of arguments may be applied to the bribery provisions of the Swedish Penal Code and the key elements presented there. According to both the legislative history of the current bribery provisions of the Penal Code and case law, reasonable and necessary business expenditures are to be deemed as proper.¹⁸⁶ The suggested changes of the Penal Code changes the statutory language and the key element of “improper influence” is introduced. However, I do not believe these changes to be intended to change status quo in this respect. Thus, business expenditures intended to promote or present a product or to establish corded relations, will most likely be recognized as an established and important part of doing business by both American, British and Swedish courts - provided that the expenditures are indeed reasonable, necessary and given in good faith. With that said, it may still call for significant research in order to distinguish a proper business expenditure from a possible bribe.

Unlike the FCPA, the Bribery Act and the Swedish Penal Code do not exempt facilitation payments from the criminalized area. “Facilitation”, “grease” or “expediting” payments, are small payments paid to facilitate routine government action. As an exemption provided for by the FCPA, the important factor in these payments is that they are given to secure or accelerate a performance of a nondiscretionary act that an official is already obligated to perform. Generally the payment is made to expedite or speed up a process, for example to move the issuance of a permit up in line. Facilitation payments are reportedly very common in some countries and regions, and by not permitting them one might argue that it creates an unrealistic burden on corporations wishing to do business in these regions as well as an unfair advantage for American corporations (those only subject to the FCPA). On the other hand, one might stress the damage that is caused by facilitation payments and argue that in cases where a facilitation payment amount to an illicit payment according to the law should in fact be treated just like other bribes. The Bribery Act and the British government has taken a clear stand on this subject, stating that providing for an exemption for facilitation payments “creates artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and business partners, and have the potential to be abused”.¹⁸⁷

¹⁸⁶ See section 2.1.4

¹⁸⁷ Ministry of Justice - *Consultation on guidance about commercial organizations preventing bribery (section 9 of the Bribery Act 2010)* p. 23

6.4 Local Law and the Legal Principle on Dual Criminality

The Bribery Act sets itself apart from both the FCPA and Swedish Penal Code in that it is not necessarily a defense to state that the illicit payment was permitted under the written laws of the country where the act took place. It is only in the case of a section 6 offence, bribery of a foreign public official, where the Bribery Act provides for an affirmative defense if one can show that the foreign public official was either permitted or required by the written local law applicable to be influenced by an offer, promise or gift. In cases of bribery, section 1, and failure of a commercial organization to prevent bribery, section 7, there is no such affirmative defense. However, in practice the “local law” defense may not have as much of an impact as one might be inclined to think. As aforementioned, there are a limited number of jurisdictions that explicitly allows for public officials, and other individuals, to be influenced by others in these ways. However, it is worth noticing that the Bribery Act takes a step further by not necessarily considering local law when determining if a section 1 or section 7 offence has been committed. In theory one can be held liable for bribery, under the Bribery Act, even if the written laws of the jurisdiction where the act took place permitted the act.

Sweden further sets itself apart from the US and the UK in this respect. According to the principle of dual criminality, a Swedish court does not have jurisdiction over offences committed abroad if the act was not criminalized in the country where it was committed. In effect, Swedish citizens are free to engage in corrupt behavior when doing business abroad, unless the foreign country in question had laws explicitly criminalizing bribery, at the time when the act was committed. In addition, Swedish courts may not apply sanctions more severe than those applicable under the law of the foreign country. One could argue that this is a significant weakness in Swedish anti-corruption legislation and that it serves as a legal obstacle when trying to fight corruption committed abroad. As Sweden is a nation highly engaged in export and in doing business abroad¹⁸⁸, such criticism might be justified. There are exemptions to the principle of dual criminality in Swedish law. Although they are few in numbers and limited to specifically grave crimes one could argue that acts of corruption and bribery, with its well-known corrosive effects on societies worldwide, ought to become one of them.

¹⁸⁸ See world map - exports by capita - <http://www.mapsofworld.com/thematic-maps/world-export-map.htm> - last viewed October 31 2010

“Corruption is a very short-sighted attitude, because next time others are better at it.”¹⁸⁹

¹⁸⁹ Mark Pieth, Head of the OECD Anti-Bribery Working Group - <http://www.transparency.org.uk/corruption-data#commentsquotations> - last viewed December 1, 2010

7 Corporate Conduct

The anti-bribery laws presented in this thesis affect all Swedish, British and American corporations and organizations as well as all multinational corporations and organizations with some form of connection to any of these countries. Accordingly, being aware of the jurisdictions an organization is exposed to and making sure that the organization is in compliance with the anti-bribery and corruption laws of those jurisdictions is of the utmost importance. If not, both organizations and individuals risk facing considerable sanctions such as several years of imprisonment, unlimited fines, considerable legal costs, debarment from public procurements and a damaged reputation. Corporations and organizations of all sizes and nationalities run the risk of being confronted with demands for bribes, having to compete with corrupt competitors or being undermined by corrupt behavior of their own employees.

It is ultimately up to each individual corporation and organization to choose *if* they want to work actively to ensure compliance with anti-bribery and corruption regulation. It is also up to the individual corporation or organization *how* they wish to ensure such compliance. However, this chapter is intended to provide for guidance for corporations and organization that choose to actively work to prevent corrupt behavior from taking place within their organization. The following sections of this chapter will present, what I find to be, the elements needed to successfully construct and implement a compliance program, what to keep in mind when performing anti-corruption based due-diligence and the true benefits of compliance.

7.1 Starting Points

Firstly, it is important to establish which jurisdictions the corporation or organization is subject to. Doing so might be harder than it seems at first and one must be attentive to (i) where the corporation is seated, (ii) where the corporation is registered, (iii) the nationality and residency of employees and management, (iv) subsidiaries, agents or other affiliated bodies and (v) where the corporation is carrying out business.

Secondly, corporations and organizations ought to make sure they are in compliance with the laws of each jurisdiction they are subject to. In doing so, adequate compliance programs should be implemented and executed. A well crafted compliance program does not only provide for sound corporate conduct preventing acts of corruption from taking place, but will also serve as a vital component when trying to limit or cut off liability as well as arguing for a reduced sentence - when acts of corruption have taken place. As a corporation can be found liable for the actions of subsidiaries, agents and other business partners, it is also important to perform adequate due diligence before entering into these types of business relations.

7.2 Compliance Programs

Although anti-bribery and corruption regulation such as the FCPA or the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* dates back to 1977 and 1997 respectively, there are surveys indicating that corporations and organizations still find it challenging to implement truly successful anti-bribery policies.¹⁹⁰ There is no “one size fits all”, instead compliance programs should be individualized to fit the needs of the specific organization. However, there are certain components that should be included and certain aspects that one should take into consideration.

The Swedish *Code on Gifts, Rewards and Benefits in the Business Sector* (Code on Gifts etc.) and the soon to be published guidance on preventative measures, by the UK Secretary of State, are documents that provide for some information on this matter. The Swedish Code on Gifts etc. simply states that corporations should implement sufficient codes of conducts and provides for little information on how to do it. It does, on the other hand, provide for more detailed guidance on how to perform adequate due diligence, which will be analyzed further in the following section of this chapter. The soon to be published guidance on preventative measures, by the UK Secretary of State, provides for a better insight to what kind of preventative measures one should take in order to be compliant with the Bribery Act. As aforementioned, the guidance has not yet been finalized and is up until November 8, 2010 open for public consultation. Another important source of information on this subject is the *US Federal Sentencing Guidelines*, established by the US Sentencing Commission. The US Sentencing Commission’s principal purpose is to establish sentencing policies and practices for the federal criminal justice. These guidelines provide for detailed information on the appropriate sentences for offenders convicted of federal crimes.¹⁹¹ Chapter eight of the US Federal Sentencing Guidelines refer to sentencing of organizations and provides for specific guidance as to what is considered an “effective compliance and ethics program” for the purposes of the same document. Having such a compliance program in place can make a corporation or an organization eligible for a reduced sentence.¹⁹² Having an efficient compliance program in place is also considered important in order to position a corporation to advocate for a non-prosecution or a deferred prosecution agreement.¹⁹³ In addition to the these documents prepared by governmental bodies, there are a number non-governmental organizations also providing guidance on compliance programs such as *Business Principles for Countering Bribery* and the *2010*

¹⁹⁰ Transparency International - *Business Principles for Countering Bribery*, 2009, p. 1

¹⁹¹ *2010 Federal Sentencing Guidelines Manual*, chapter 1, part A

¹⁹² See *2010 Federal Sentencing Guidelines Manual*, §8B2.1 Subsection (a)

¹⁹³ Gibson Dunn Publications, *U.S. Sentencing Commission Amends Requirements for an Effective Compliance and Ethics Program Apr 13, 2010* -

<http://www.gibsondunn.com/publications/pages/USSentencingCommissionAmendsRequirementsForEffectiveComplianceEthicsProgram.aspx> - last viewed December 1, 2010

Bribery Act Adequate Procedures by Transparency International, *Resisting corruption: How company programs are changing* by The Conference Board, *OECD Principles of Corporate Governance* by the OECD, *Social Responsibility Standard* by the ISO and *Combating Extortion and Bribery; ICC Rules of Conduct and Recommendations* by the ICC.

By taking the aforementioned documents under consideration and applying them to the anti-bribery laws presented in this thesis, I present what I find to be the basic components needed in a compliance program addressing the FCPA, the Bribery Act and the Swedish Penal Code (including the proposed changes in SOU 2010:38).

7.2.1 The Basic Components

7.2.1.1 Top-Level Commitment

Top-level commitment is essential when implementing and enforcing an efficient compliance program.¹⁹⁴ It is the responsibility of the board of directors or an equivalent body to establish a corporate culture where corruption is never acceptable. In doing so the board of directors must take responsibility for the vital components and steps of the compliance program, from its content to its execution. The board must be knowledgeable about the content of the compliance program as well as the risks and effects of corruption. The board, or someone at senior level, should monitor and review the compliance program by regular reports and address all violations of the compliance program promptly. It is important that top level management truly stands by the values of the corporation by making it evident to employees and business partners what is expected of them and that the management and board are prepared to forgo contracts rather than engaging in corrupt behavior. Employees should feel confident in that they have top-level support when faced with difficult decisions or lost contracts due to the refusal to engage in corrupt behavior.

7.2.1.2 Risk Assessment

Risk assessment is fundamental when designing a compliance program.¹⁹⁵ The compliance program should be tailored to address the risks specific to the individual corporation. External risks could be tied to a specific industry, sector, location of operation, transaction or business partner. Internal risks could be tied to deficiencies in top-level commitment, training, promotion or bonus schemes etc. High-risk areas and operations within the business that could expose the company to serious liability and enforcement actions should be looked at and evaluated. Risk assessment can be done on both

¹⁹⁴ See Ministry of Justice - *Consultation on guidance about commercial organizations preventing bribery (section 9 of the Bribery Act 2010)* p. 13 f presented above in section 4.1.3.3. See also *2010 Federal Sentencing Guidelines Manual*, §8B2.1 Subsection (b)(2)

¹⁹⁵ See Ministry of Justice - *Consultation on guidance about commercial organizations preventing bribery (section 9 of the Bribery Act 2010)* p. 12 f presented above in section 4.1.3.3. See also *2010 Federal Sentencing Guidelines Manual*, §8B2.1 Subsection (c)

larger and smaller scales, ranging from risk assessment templates with major categories of inquiry based on the nature and type of business, to conducting risk assessment with key business and staff personnel within the different areas of the corporation. Involving the personnel could also generate questions and input, which will help invest the business unit and its personnel in fully cooperating with anti-bribery policies and procedures once they are developed and implemented. The risk assessment should be updated regularly.

7.2.1.3 Policies and Procedures

Once risk assessment has been made the compliance program should be updated to specifically address the high-risk areas. The written policies should be capable of reducing the prospect of criminal activity in the primary areas of risk within the corporation and reflect the corporation's compliance commitment.¹⁹⁶ The compliance program should reflect the anti-bribery laws applicable to the corporation and its employees in a clear and explanatory way. The scope of the compliance program should at least cover acts of bribery, political contributions, charitable contributions and sponsorships, facilitation payments as well as gifts, hospitality and business expenditures, as these are all issues covered by anti-bribery law. Charitable contributions and sponsorships as well as gifts and business expenditures is a problematic area where detailed guidance is needed. A compliance program could provide for hand picked scenarios, exemplifying situations employees might be faced with and the appropriate action to be taken in those situations. Such scenarios could include the following topics; gifts, business dinners, travel expenses paid for by others than the employer, hospitality given to public officials, hosting meetings and conferences. If the corporation is subject to the Bribery Act, the Swedish Penal Code or some other jurisdiction not accepting facilitation payments, there has to be specific guidance on that issue. The corporation should also maintain accurate books and records that fairly document all transactions. Off-the-books accounts should never be maintained. Adequate books and records is needed both to be in compliance with the FCPA as well as to be able to show good practice in case of enforcement actions against the corporation.

The compliance program should also include provisions on sanctions in case of misconduct. A compliance program without such provisions may run the risk of not being deemed as effective.¹⁹⁷

7.2.1.4 Implementation

To detect and prevent corrupt behavior a corporation must raise awareness amongst its employees. All aspects of human resources, including recruitment, promotion, training, performance evaluation and remuneration

¹⁹⁶ See Ministry of Justice - *Consultation on guidance about commercial organizations preventing bribery (section 9 of the Bribery Act 2010)* p. 15 f presented above in section 4.1.3.3. See also *2010 Federal Sentencing Guidelines Manual* §8B2.1. Subsection (a)(7)

¹⁹⁷ See *2010 Federal Sentencing Guidelines Manual* §8B2.1. Subsection (b)(6)

should reflect the compliance program. For example, all employees should be required to attest in writing that they have read, understood and will observe the requirements of the compliance program. In turn the corporation should confirm that no employee will suffer adverse consequences for refusing to engage in corrupt behavior even if such refusal may result in the corporation losing business. The corporation should provide its employees with regular compliance education and training including information about the corporation's ethical values, the various types of offending conduct and the serious corporate and individual liabilities for such misconduct. The training should be individualized and customized for the different positions within the corporation and for different locations. Information should be provided for in an accessible format and in the local language. There are various opinions regarding *how* to best provide efficient training - some argue over values-based versus rules-based approaches where focus is put either on "ethics" or "compliance".¹⁹⁸ Affected employees should also receive training on the accounting and record-keeping provisions of the FCPA. A compliance program has to be implemented effectively in order for it to be deemed as effective both in accordance to the Bribery Act and the FCPA.¹⁹⁹

One should not forget to address agents, intermediaries and consultants since both the FCPA, the Bribery Act and the proposed changes of the Swedish Penal Code provide for vicarious liability in different forms. The Bribery Act is specifically strict on this issue since it provides for strict liability for actions taken by associated persons. A corporation should ensure that joint ventures, over which it maintains effective control, has compliance programs in place consistent with its own. If the corporation does not maintain effective control over the joint venture, the corporation should make known its own compliance program and encourage adoption of a similar program for the joint venture. In case of acts inconsistent with the corporation's own compliance program, the corporation should take appropriate actions such as requiring correction, application of sanctions or termination of its participation in the joint venture. Regarding agents and other intermediaries, the corporation should have all intermediaries contractually agree to comply with the corporation's own compliance program and the corporation should provide its intermediaries with information and training on the content of the compliance program. A corporation should also contractually require all intermediaries to keep proper books and records available, in order for the corporation to be able to perform inspection and detect possible corruptive acts. A corporation should always make sure it has the contractual right to terminate in the event of agents, intermediaries, contractors or suppliers acting in a way inconsistent with the corporation's own compliance program. In respect of the proposed changes of the Swedish Penal Code and the offence of *negligent bribery*, it

¹⁹⁸ Wrage, Alexandra - *Training: What Works*, in National Institute on the Foreign Corrupt Practices Act, a Publication of the American Bar Association Criminal Justice section, 2008

¹⁹⁹ See Ministry of Justice - *Consultation on guidance about commercial organizations preventing bribery (Section 9 of the Bribery Act 2010)* p. 16 f presented above in section 4.1.3.3. See also *2010 Federal Sentencing Guidelines Manual* §8B2.1. Subsection (b)(4)

is of utmost importance that compensation to agents, intermediaries etc are appropriate and justifiable and for legitimate services rendered.²⁰⁰

An important part of implementing a compliance program is to provide the employees with a way to both raise questions and ask for guidance as well as report suspected acts of misconduct.²⁰¹ An employee should be able to report any suspected misconduct without fear of reprisal. The corporation should also have a response plan in case of acts of misconduct that clearly details who is responsible for investigation and follow up.²⁰²

7.2.1.5 Due Diligence

Before a corporation enters into transactions with agents and other intermediaries it must perform adequate due diligence not only regarding the entity's general structure, but also its compliance with anti-bribery and corruption regulation. Even though the FCPA pose no obligation as far as due diligence is concerned, it may be one of the first questions asked by enforcement authorities when investigating suspected violations.²⁰³ One should be prepared to explain the nature of the due diligence performed and what it showed. In regards to the proposed changes of the Swedish Penal Code and the offence *negligent financing of bribery*, due diligence is of importance. Not performing adequate due diligence before entering into transactions with agents and other intermediaries may constitute gross negligence. The proposed Code on Gifts etc. provides for some guidance as how to perform such due diligence, although additional information would be welcomed.²⁰⁴ Due diligence is important in regard to the Bribery Act and the offence *failure to prevent bribery* as well. Having proof of adequate due diligence being performed could serve as a statutory defense.²⁰⁵

There are certain aspects specific for due diligence regarding conduct covered by anti-bribery and corruption regulation. Essentially the due-diligence should be focused on finding out if the entity to be acquired or with whom a business relationship is contemplated, is or has engaged in corrupt behavior. There is not one specific format for conducting anti-corruption due diligence, but there are specific factors that should be taken into account such as (i) what part of the world the transaction is to be made (ii) the nature of the business and (iii) the type of transaction. Some parts of the world and some markets are more exposed to corruption than others.

²⁰⁰ See section 2.3.2.6 and 2.3.3.3

²⁰¹ See Ministry of Justice - *Consultation on guidance about commercial organizations preventing bribery (section 9 of the Bribery Act 2010)* p. 15 f presented above in section 4.1.3.3. See also *2010 Federal Sentencing Guidelines Manual* §8B2.1. Subsection (b)(5)(c)

²⁰² See Ministry of Justice - *Consultation on guidance about commercial organizations preventing bribery (section 9 of the Bribery Act 2010)* p. 15 f presented above in section 4.1.3.3. See also *2010 Federal Sentencing Guidelines Manual* §8B2.1. Subsection (b)(7)

²⁰³ Stein, Lee - *Recognizing the FCPA Risks Associated with Transactions with Foreign Companies*, in National Institute on the Foreign Corrupt Practices Act, a publication of the American Bar Association Criminal Justice Section, 2008

²⁰⁴ See section 2.3.2.6 and 2.3.3.3

²⁰⁵ See section 4.1.3.3

The Transparency International's *Annual Corruption Perception Index*, could be a guide to the relevant level of corruption in the country which one is about to enter. Corporations active in industries that are subject to heavy government regulation and corporations that are costumers or suppliers to public bodies tend to experience more problems with corruption than others. However, one should keep in mind that all corporations may from time to time have to secure building permits, seek zoning variances, resolve tax disputes etc which could open up for possible corruption. The amount of due diligence required also depends on the transaction itself, where acquiring 100% of a company can be very different from purchasing a minority non-controlling interest in a company or engaging an independent sales agent. The more control the acquiring company can be said to have over the acquired entity, the deeper and broader the due diligence.

The question of *who* and *what* should be investigated will have to be determined with the specific situation and transaction in mind. In general though, the due diligence should provide information on (i) principals, (ii) shareholders who own a meaningful share of the business and who exercise influence over the company, (iii) officers and directors, (iv) key management personnel and (v) all employees who come into contact with government officials as a regular part of their employment. An acquiring entity may engage a third party to perform an over all backup check and review. In addition, an acquiring entity may want to (i) review the books, records and other financial information of the company, (ii) review all agreements or contracts it has with governmental entities and (iii) review agreements and the work product of agents and consultants of the company.

The overall purpose of an anti-corruption due diligence is rather evident - to discover and cut of responsibility for violations of anti-bribery and corruption regulation. As the due diligence is progressing, facts and accusations of improper behavior may arise which have to be further evaluated. Indications of possible violations of anti-bribery and corruption regulation could be (i) rumors or evidence of corrupt activity, (ii) close relationships or repeated interactions with governmental officials, (iii) excessive use of agents to secure business with governmental bodies or to obtain relief from the government, (iv) poorly documented records of business entertainment and travel, (v) the ability to achieve extraordinary results, (vi) lump sum contracts that appear to be in excess of fair market value and (vii) requests for campaign contributions or charitable contributions by government officials directly or through third parties.²⁰⁶

²⁰⁶ Cf. *Swedish Code on Gifts, Rewards and Benefits in the Business Sector* presented in section 2.3.3.3

7.2.1.6 Monitoring and Review

When designing a compliance program one must establish the department or function responsible for carrying out monitoring and oversight.²⁰⁷ As mentioned initially, it is important that the board or an equivalent body provides the ultimate oversight and receives regular reports. However, the main responsibility for monitoring the compliance program may be given to the audit committee or an equivalent body such as a compliance committee. A designated person should coordinate the compliance activities in each region, with sufficient management authority and support from the board of directors or equivalent body. The monitoring body is responsible for establishing a confidential reporting line where employees can report any suspected misconduct. The different departments and business units within a corporation should regularly provide the monitoring body with self-reports. If the corporation becomes aware of acts of bribery or corruption, it should consult with legal advisers and decide whether to conduct self-reporting to relevant enforcement authorities. The monitoring body is responsible for monitoring all aspects of the compliance program as well as making sure the compliance program and its provisions are up to date and relevant. As the corporation evolves, new employees are hired, new business relationships are built or new markets are entered, the compliance program must continuously be updated and reevaluated.²⁰⁸

7.3 The True Benefits of Compliance

Individual corporations are constantly losing business to corruptive competitors. Reports show that almost half of US based corporations and a quarter of UK based corporations believe to have lost business to corrupt competitors in the last five years.²⁰⁹ This negative effect of corruption affects both small and large businesses equally. Then, is there an economic incentive to choose to engage in corrupt behavior? I would argue the opposite. Except for social and economic costs that an individual corporation's corruptive acts will have on the nation in which it is present, there are economic costs of corruption specifically tied to the individual corporation engaging in corruption as well as there are numerous advantages not to take to corrupt measures. First, bribes are expensive. In a survey on international business attitudes to corruption²¹⁰, respondents were asked to estimate the maximum percentage increase that corruption can have on an international project. A quarter of the respondents estimated a zero to five percent increase in costs, a tenth of the respondents estimated a twenty-five to fifty percent increase and about seven percent of the respondents

²⁰⁷ See Ministry of Justice - *Consultation on guidance about commercial organizations preventing bribery (section 9 of the Bribery Act 2010)* p. 17 f presented above in section 4.1.3.3. See also *2010 Federal Sentencing Guidelines Manual* §8B2.1. Subsections (b)(2)(c) and (b)(5)(a)

²⁰⁸ See *2010 Federal Sentencing Guidelines Manual* §8B2.1. Subsection (c)

²⁰⁹ Control Risks and Simmons & Simmons - *International business attitudes to corruption*, Survey 2006, p. 5

²¹⁰ The survey involved 350 international corporations based in the following seven jurisdictions; the UK, the US, Germany, France, the Netherlands, Brazil and Hong Kong.

estimated the costs of corruption to increase the total costs of an international project by more than fifty percent.²¹¹ A five percent increase might not seem to be that much, but can indeed amount to considerable amounts if the project is large, and an increased cost of more than fifty percent is obviously allot. Another study on foreign direct investments estimates that corruption is the equivalent of a 20 percent tax on foreign investors.²¹² And it is a poor investment. As the opening quote to this chapter summarizes - corruption is a shortsighted business attitude since there is no way of knowing if you will be able to keep it up. Instead of building a corporation's business on variables the corporation itself is able to control, such as knowledge of the industry, quality of the product or service offered, competent staff and a good reputation, it chooses to invest in bribes and corrupt acts. There is no way of foreseeing if someone else will be able to do it better - that is to pay larger bribes - in the next procurement process or negotiation. If one truly wishes to succeed and become rooted in a market, one must turn to long-term investments such as local knowledge and presence.

When breaking the issue of compliance down to its basics, you could say that a corporation which stands to implement a compliance program can do so for one of two reasons or a combination of both, namely to avoid getting in trouble with national enforcement authorities for breaking the law and/or because it decides that "it is the right thing to do".

A corporation is run by its rules and guidelines but also by its values. Most corporations spend considerable amounts of money on implementing and communicating values and ethics programs to provide a common understanding – an inner "compass" if you wish – for the employees to steer by when performing their duties. Most corporations want their employees to be guided by values such as "equality", "diversity", "honesty", "openness" and "transparency". To be consistent with such values does not go well with bribing and thereby supporting a system, which is recognized as a "promoter of poverty". To do the right thing is therefore a solid message to the employees of a corporation.

In practice, corrupt behavior such as bribing also calls for "workarounds" of the corporate financial and controlling systems, not seldom requiring large amounts of cash and/or transfers to obscure accounts. As the corporation itself no longer has full control over its funds, it is not unlikely that some of these funds will also end up in the pockets of individuals who are participating in the bribery set-up. As top management and shareholders of a corporation normally first look at the numbers (monthly, quarterly, yearly) to analyze its business and decide upon strategies, they have no way of understanding and evaluating these numbers correctly if they are achieved through corrupt measures. As good results coming out of corrupt practice

²¹¹ Control Risks and Simmons & Simmons - *International business attitudes to corruption*, Survey 2006, p. 9

²¹² The World Bank - *Six Questions on the Cost of Corruption with World Bank Institute* Global Governance Director Daniel Kaufmann

are vulnerable to uncontrollable changes (the competition may decide to pay higher bribes, the decision maker accepting the bribes may be exchanged for someone new, the local legislation may change etc.) the use of corrupt practices also mean that the decision makers have no real control over the basic information upon which they base their decisions. To do the right thing is therefore also a solid message to the shareholders and other stakeholders in a corporation ensuring them that they can rely on top management taking care of their investment.

An increased number of people are becoming aware of the negative impact of worldwide corruption. They make choices such as which corporation to associate themselves with, buy from or be employed by. The reputation of a corporation is one of its most valued assets and if a corporation becomes associated with corruption, this asset is seriously damaged. On the other hand, to be associated with being an ethical and clean company can improve a corporation's reputation and thereby increase its competitive value. To choose to be part of the solution instead of being part of the problem can become a competitive advantage instead of a burdensome legal obligation.

In summary, successful action against corruption is impossible without the combined efforts of governments, individual organizations, corporations and people. And a corporation choosing to be in compliance with anti-bribery and corruption regulation does so, not only to the benefit of social justice and global and national economic growth but also to the benefit of its own profitability.

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