

THE FOREIGN CORRUPT PRACTICES ACT: ‘Mo Money ‘Mo Problems

Bribery In General

In the U.S., the term *bribery* evokes imagery of smarmy, powerful individuals taking advantage of their position and influence to gain even more power, influence, and wealth. Americans view corruption as an evil that creates more societal cleavages. Bribery, to Americans is a real threat to the basic founding philosophy of equality of men. The view of bribery abroad, however, even in developed countries, does not match the American viewpoint.

For example, Germans use the term *Schmiergeld* to describe the payment of a bribe. Breaking down the term *Schmiergeld*, *Geld* is the German word for money. *Schmiere*'s meaning is related to “greasing the palm.”¹ *Greasing the palm* is far less threatening than the term *bribery*. Germans, do not see bribery as a huge societal threat. Rather, they see it plainly as a reality of the world. There is a German saying “*Az men schmeert nit, fort men nit.*” (“If you don’t bribe, you don’t ride”, or, less literally, “Without bribery, you get nowhere.”)²

The United States unilaterally created the Foreign Corrupt Practices Act (“FCPA”)³ to prohibit the bribery of foreign officials. The FCPA prohibits bribery directly through its anti-bribery provisions, and indirectly through its accounting requirements. Many critics of the FCPA view the U.S.’s attempt to eradicate all forms of corporate bribery as another example of the U.S. acting as Don Quixote and tilting at

¹ Leo Rosten, *The Joys of Yiddish* 129 (1968).

² *Id.* at 353.

³ 15 U.S.C. § 78dd-1

windmills.⁴ The law may not be taken seriously outside of the U.S., but significantly restricts American multinational corporations. The FCPA remains “the world’s toughest law against foreign bribes” arguably, because many countries do not have anti-bribery statutes like the FCPA and those that do are generally not enforced.⁵

The philosophically different viewpoints of bribery between the U.S. and the rest of the world, makes the FCPA largely ineffective and stunts U.S. multinationals’ profit margins abroad.

Historical Background

The FCPA was passed in 1977 as a response to the corporate bribery that was revealed during the Watergate Scandal.⁶ The idea for the FCPA arose out of the Congressional testimony at the tail end of the infamous Watergate hearings, where a number of corporate officials testified about impermissible contributions made by their corporations to President Nixon’s re-election campaign. At the time, Stanley Sporkin was working with the Committee.⁷ The testimony Sporkin heard during the Watergate hearings forced him to ask questions such as, “How did a publicly traded corporation record such an illegal transaction? What, if any, information did the outside auditors

⁴ “Tilting at Windmills” is an English idiom, which means attacking imaginary enemies. The phrase is used to describe confrontations where adversaries are incorrectly perceived, or courses of action are based on misapplied heroic justifications.

⁵ Neil King, Jr., *Momentum Builds for Corporate-Bribery Ban*, Wall Street Journal, Sept. 23, 1997, at 16.

⁶ Stuart H. Deming, *The Foreign Corrupt Practices Act and the New International Norms* 1 (2005)

⁷ Stanley Sporkin is a former judge of the United States District Court for the District of Columbia. He worked for the Securities and Exchange Commission (“SEC”) from 1961 until 1981, and was director of the Division of Enforcement from 1974 to 1981. See (<http://www.stanleysporkin.com/homepage/>).

have?”⁸ Mr. Sporkin posed these questions to officials at the Securities and Exchange Commission, and found an answer. The political contributions, unearthed during the Watergate Hearings, were disguised on the corporation’s books and records through foreign subsidiaries. The foreign subsidiaries masked secret mislabeled accounts that held funds used for bribing. Further investigations uncovered that the secret mislabeled accounts were used for far more than illegal political contributions. These secret funds were also used to make many other forms of illicit payments, including payments of bribes to high-level officials of foreign governments. Mr. Sporkin’s inquiries soon lead to a formal SEC investigation.

The SEC investigation discovered that, “over 400 U.S. companies admitted making questionable or illegal payments in excess of \$300 million to foreign government officials, politicians and political parties.”⁹ These payments were made by 117 of the top Fortune 500 corporations.¹⁰ The SEC’s caseload precipitously increased, and the SEC became overwhelmed prosecuting some of the country’s most profitable companies for failures to comply with the disclosure requirements of the Securities and Exchange Act of 1934.¹¹ The solution developed was the FCPA.

⁸ Stanley Sporkin, *The Worldwide Banning of Schmiergeld*, Northwestern Journal of International Law & Business (Winter 1997), at 271.

⁹ United States Department of Justice, *Foreign Corrupt Practices Act Antibribery Provisions*, in Levenson, *Corporate Compliance and the FCPA* (1997), note 8 at 131.

¹⁰ See H.R. Rep. 95-640, at 4 (1977)

¹¹ 15 U.S.C. § 78a. The Securities and Exchange Act Antifraud Provisions are considered “catch-all” provisions. They have been used to prosecute a company’s failure to communicate relevant information to investors.

Statutory Structure of the FCPA

The FCPA attacks international corruption in two ways: (1) the anti-bribery provisions, and (2) the accounting provisions.¹² The anti-bribery provisions prohibit individuals and businesses from bribing foreign government officials in order to obtain or retain business.¹³ The Accounting provisions impose record keeping and internal control requirements on issuers, and prohibit individuals and companies from knowingly falsifying an issuer's books and records or circumventing or failing to implement an issuer's system of internal controls.¹⁴ Violations of either the anti-bribery, or the accounting provisions can lead to civil and criminal penalties, sanctions, and remedies, including fines, disgorgement, and imprisonment.¹⁵

The anti-bribery statute of the FCPA states,

“It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to...”¹⁶

There are three parts to the FCPA anti-bribery statute: the who, the what, and the where.

The who are the actors, and include three categories of persons and entities: (1) “issuers” and their officers, directors, employees, agents, and shareholders; (2) “domestic concerns” and their officers, directors, employees, agents, and shareholders; and (3) other

¹² 15 U.S.C. § 78dd-1

¹³ A Resource Guide to the U.S. Foreign Corrupt Practices Act, U.S. DEP'T of Justice Criminal Div. & U.S. Sec. & Exch. Comm'n Enforcement Div., at 10.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ § 78dd-1 [Section 30A of the Securities & Exchange Act of 1934].

persons or entities acting while in the territory of the United States.¹⁷ The what is the kind of action that is covered by the FCPA. The FCPA only applies to payments that are intended to induce or influence a foreign official.¹⁸ The payment must be made, “in order to assist...in obtaining or retaining business for or with, or directing business to, any person.”¹⁹ Payment’s are “illicit” when they fall under the Business Purpose test and are made for the purpose of gaining or maintaining business. The where of the FCPA is the jurisdictional reach of the act, which is expansive. The open ended language describing the “who” and “what” allow the FCPA to extend to actions inside and outside of the United States.²⁰ In fact, the FCPA even applies to payments that are merely wire transferred through the U.S.²¹

Statutory Structure: Penalties, Sanctions, Remedies

The FCPA punishes non-compliance with both criminal and civil penalties for companies and individuals.²² The FCPA provides guidance to both criminal and civil fine and penalty amounts.²³ For each violation of the anti-bribery provisions, corporations and other business entities are subject to a fine of up to \$2 million.²⁴ Officers, directors, stockholders, and agents of corporations or business entities are subject to fines of up to \$250,000 and imprisonment for up to five years.²⁵ Under the SEC accounting provisions,

¹⁷ A Resource Guide to the U.S. Foreign Corrupt Practices Act, *Supra* Note 13.

¹⁸ § 78dd-1, *Supra* Note 16.

¹⁹ H.R.REP.No.95-831, at 12 (referring to “business purpose” test.)

²⁰ A Resource Guide to the U.S. Foreign Corrupt Practices Act, U.S. DEP’T of Justice Criminal Div. & U.S. Sec. & Exch. Comm’n Enforceent Div., at 11.

²¹ *Id.*

²² A Resource Guide to the U.S. Foreign Corrupt Practices Act, *Supra* at 68.

²³ 15 U.S.C. § 78dd-1.

²⁴ 15 U.S.C. §§ 78dd-2(g)(1)(A), 78dd-3(e)(1)(A), 78ff(c)(1)(A).

²⁵ *Id.*; 18 U.S.C. § 3571(b)(3), (e) (fine provision that supersedes FCPA-specific fine provisions).

corporations and business entities are subject to a \$25 million fine,²⁶ and individuals are subject to a \$5 million dollar fine and up to 20 years imprisonment.²⁷

However, under the Alternative Fines Act,²⁸ an FCPA criminal violation can result in a fine up to twice the benefit the payer sought to obtain through the improper payment.²⁹ The DOJ uses the advisory U.S. Sentencing Guidelines when calculating penalty ranges.³⁰ The DOJ clarifies that, “The Guidelines provide a very detailed and predictable structure for calculating penalties for all federal crimes, including violations of the FCPA. To determine the appropriate penalty, the

“ ‘[O]ffense level’ is first calculated by examining both the severity of the crime and facts specific to the crime, with appropriate reductions for cooperation and acceptance of responsibility, and for business entities, additional factors such as voluntary disclosure, cooperation, pre-existing compliance programs, and remediation.”³¹

Factors that affect criminal fines under the Guidelines include: the number of employees in the organization; whether high-level personnel were involved in or condoned the

²⁶ 15 U.S.C. § 78ff(a).

²⁷ *Id.*

²⁸ 18 U.S.C. §3571 (d).

²⁹ A Resource Guide to the U.S. Foreign Corrupt Practices Act, U.S. DEP’T of Justice Criminal Div. & U.S. Sec. & Exch. Comm’n Enforcement Div., at 68.

³⁰ The U.S. Sentencing Guidelines are promulgated by the U.S. Sentencing Commission: The United States Sentencing Commission (“Commission”) is an independent agency in the judicial branch composed of seven voting and two non-voting ex-officio members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes. The Guidelines and policy statements promulgated by the Commission are issued pursuant to Section 994(a) of Title 28, United States Code. U.S. Sentencing Guidelines § 1A1.1 (2011).

³¹ A Resource Guide to the U.S. Foreign Corrupt Practices Act, *Supra* Note 29.

conduct; prior criminal history; whether the organization had a pre-existing compliance and ethics program; voluntary disclosure; cooperation; and acceptance of responsibility.³²

Fines associated with a violation are large. Below is a table that demonstrates the largest corporate FCPA settlements:

Company	Amount	Year
1. Siemens	\$800 million(DOJ – \$450 million)(SEC – \$350 million)	2008
2. KBR / Halliburton	\$579 million(DOJ – \$402 million)(SEC – \$177 million)	2009
3. Total	\$398 million(DOJ – \$245 million)(SEC – \$153 million)	2013
4. Alcoa	\$384 million(DOJ – \$209 million)(SEC – \$175 million)	2014
5. Snamprogetti / ENI	\$365 million(DOJ – \$240 million)(SEC – \$125 million)	2010
6. Technip	\$338 million(DOJ – \$240 million)(SEC – \$ 98 million)	2010
7. JGC	\$219 million(DOJ – \$219 million)	2011
8. Daimler	\$185 million(DOJ – \$94 million)(SEC – \$91 million)	2010
9. Weatherford Int'l	\$153 million(DOJ – \$87 million)(SEC – \$66 million)	2013
10. Alcatel-Lucent	\$137 million(DOJ – \$92 million)(SEC – \$45 million)	2010

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³² *Id.*

³³ This table is available at: <http://www.fcprofessor.com/fcpa-101#q17>.

Statutory Structure: Purpose

In 1977, the legislative history of the FCPA indicated that the purpose of the statute was to discourage unethical conduct by U.S. businesses and ensure the efficiency of international markets.³⁴ In 1977, the FCPA was intended to halt the revealed corrupt practices, create a level playing field for honest business, and restore public confidence in the integrity of the marketplace.³⁵ Although domestic outcry existed in 1977, foreign policy goals also existed. That goal was to secure a positive reputation for U.S. corporations overseas in order to maintain Cold War alliances.³⁶ The legislative record indicated those foreign policy concerns,

“Corporate bribery is bad business. In our free market system it is basic that the sale of products should take place on the basis of price, quality, and service. Corporate bribery is fundamentally destructive of this basic tenet. Corporate bribery of foreign officials takes place primarily to assist corporations in gaining business. Foreign corporate bribes also affect our domestic competitive climate when domestic firms engage in such practices as a substitute for healthy competition for foreign business.”³⁷

The rationale for including anti-corruption provisions in laws partially governed by the SEC is to assure the integrity of corporate securities as well as the integrity of the securities markets to the public who purchases securities and invests in the securities markets.³⁸ The SEC was established to protect investors through market integrity and

³⁴ H.R. Rep. No. 95-640, at 4 (1977) (“[Bribery] rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards.”)

³⁵ S. Rep. No. 95-114 at 4 (1977) *available at*

<http://www.justice.gov/criminal/fraud/fcpa/history/1977/seateret-95-114.pdf>

³⁶ Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanction Against Emerging Markets*, 62 FLA. L. Rev. 351 (2010) at 378-90.

³⁷ A Resource Guide to the U.S. Foreign Corrupt Practices Act, U.S. DEP’T of Justice Criminal Div. & U.S. Sec. & Exch. Comm’n Enforceent Div., at 1.

³⁸ *The Investor’s Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Foramtion*, U.S. Securities and Exchange Commission, *available at*: <http://www.sec.gov/about/whatwedo.shtml#.U3ZVZs09llw>. (Citing that, “The main

transparency.³⁹ The purpose of the securities laws is to assure investors that they are not investing in something that is fraudulent.⁴⁰

The FCPA however is an ideological document.⁴¹ Part of its purpose is to uphold the values of “good business.”⁴² This ideological purpose is the driving force behind the DOJ’s expansion of the FCPA.

Historical Compliance with the FCPA

The original process of compliance with the FCPA would be that a corporation with an illicit payment problem would go to a corporate “confessional” and repent. The corporation would be required to publicly disclose the questionable payments it had made as well as agree to commission an independent internal investigation to determine the full nature and extent of its worldwide bribery and any other questionable activities.⁴³ The last stage of corporate compliance would be to assure the Commission that appropriate steps had been taken to insure that recurrence was not possible.⁴⁴ Because the private investigation was not guaranteed to have the requisite integrity and objectivity, the

purpose of these laws can be reduced to two common sense notions: Companies publicly offering securities for investment dollars must tell the public the truth about their businesses, the securities they are selling, and the risks involved in investing. People who sell and trade securities – brokers, dealers, and exchanges – must treat investors fairly and honestly, putting investor’s interests first.”)

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ H.R. REP. No. 95-640 at 4-5 (1977) *available at* <http://www.justice.gov/criminal/fraud/fcpa/history/1977/housepret-95-640.pdf>. (“The payment of bribes to influence...is unethical. It is counter to the moral expectations and values of the American public.”)

⁴² *Id.*

⁴³ *See* Securities and Exchange Commission, Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices 13-17 (1976).

⁴⁴ *Id.*

Commission reserved the right to bring formal action.⁴⁵ The U.S. corporate community was informally assured, but not promised, that if all went well, no Commission action would be brought against a voluntarily complying corporation.⁴⁶

The original program was a huge success for the federal government. Over 400 corporations participated.⁴⁷

The FCPA was created in the wake of the Lockheed and United Brands bribery scandals. The Lockheed scandal started late in 1975 when an SEC investigation into Lockheed Corporation revealed that the aircraft manufacturer had paid at least \$22 million (about \$90 million in current dollars) in bribes to foreign government officials and political organizations.⁴⁸ In 1975, this was not illegal, but proper customary practices of compliance did exist and Lockheed failed to follow them.⁴⁹ In like cases, the custom was for the corporation to reveal to the SEC which foreign officials had received bribes and then an agreement would follow to cease further like payments.⁵⁰ The Lockheed case was different because Lockheed refused to disclose their bribes' beneficiaries and would make no promise to stop future payments. Lockheed argued that bribes were normal, necessary, and consistent with the practices of other U.S. multinationals abroad.⁵¹

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Foreign Corrupt Practices Act Antibribery Provisions*, Note 10 at 131.

⁴⁸ Ann Hollingshead, *A Brief History of U.S. Policy Toward Foreign Bribery*, Financial Transparency Coalition, July 28, 2010.

⁴⁹ *Id.*

⁵⁰ The SEC had jurisdiction over these claims because the companies' failure to properly report the payments was non-compliance with the Securities and Exchange Act. *See* Note 11.

⁵¹ Ann Hollingshead, *A Brief History of U.S. Policy Toward Foreign Bribery*, Financial Transparency Coalition, July 28, 2010.

Lockheed was also an exacerbated case, because the SEC investigation revealed that the company had bribed the Prime Minister of Japan as well as the President of Italy.⁵²

The United Brands bribery was unveiled shortly after the suicide of its president, Eli Black, in February of 1975.⁵³ The SEC investigation uncovered that the company negotiated a reduction in an export tax in Central America.⁵⁴ The Honduran President, Oswaldo Lopez Arellano, had helped orchestrate \$1.25 million in bribes and received a portion of the money.⁵⁵

The FCPA was enacted as a political and ideological movement that built steam in light of these public scandals. The political left built off these scandals to support a tenet of the Democratic Party that still exists today: minimizing corporate power and influence. The events that occurred around the Watergate Scandal were the perfect storm and a combination that proved powerfully compelling to pass the FCPA.

The success of the FCPA has spiraled into massively costly compliance programs for U.S. corporations as well as mounting damages claims by the Department of Justice for “non-complying” companies who are made to be public examples.⁵⁶ So how responsible is the U.S. for improving the morals of people and governments abroad? Is

⁵² *Id.*

⁵³ Marcelo Bucheli, *Bananas and Business: The United Fruit Company in Colombia*, New York University Press (2005).

⁵⁴ *Id.*

⁵⁵ *Id.* at 76.

⁵⁶ The FCPA does not provide litigants a private right of action. However, civil disputes between private parties deal with violations of the FCPA substantively. Technically, private litigants cannot sue directly under the umbrella of the FCPA. See Douglas R. Youg, *The Foreign Corrupt Practices Act as a Factor in Private Civil Litigation*, (2002) available at: http://www.fbm.com/files/Publication/2b79d8bf-740f-45c7-8ff2-9980da7c7b89/Presentation/PublicationAttachment/e70b13d2-ecca-4bf3-807d-99b19fd76632/3C02CACD-4C60-467B-B371-5C58427333E0_document.pdf.

the FCPA necessary for the health of the global economic market? Or is it just another example of American exceptionalism tilting at windmills?

This paper finds that (1) the United States continues to pursue an effectively unilateral and stand-alone approach to deterring foreign corruption, especially with respect to enforcement activity and the significance of fines and sanctions (2) the United States' current approach asymmetrically imposes heavy fines leaving those subject to the FCPA at a serious competitive disadvantage and (3) these circumstances are unlikely to change. The United States must reevaluate its approach to crusading global corruption.

THE FCPA TODAY

The United States, for almost two decades, was the only country with a law like the FCPA.⁵⁷ Although the FCPA was symbolically important, it was ineffective and did not affect the business of U.S. multinationals.⁵⁸ That changed with two events. First, in 1997 the Organisation for Economic Co-operation and Development (“OECD”)⁵⁹ banned bribery of foreign officials.⁶⁰ Secondly, the U.N. called on its member states to back up the OECD and do the same.⁶¹ As this intergovernmental push for corruption reform occurred, the Bush and Obama Administrations significantly stepped up enforcement of the FCPA in the U.S.⁶² The enforcement ramp up in the U.S. extends to ensuring that

⁵⁷ James Surowiecki, *Invisible Hand, Greased Palm*, The New Yorker, May 14, 2012.

⁵⁸ *Id.* The measure of ineffectiveness is comparative to the unilateral prosecution that exists today.

⁵⁹ The OECD is an international economic organization whose purpose is to stimulate economic progress and world trade. The OECD provides a platform where member countries can compare policy experiences, seek answers to common problems, identify good practices and coordinate domestic and international policies. *See About the OECD*, Available at: <http://www.oecd.org/about/>.

⁶⁰ James Surowiecki, *Invisible Hand, Greased Palm*, *Supra* Note 57.

⁶¹ *Id.*

⁶² *Id.*

compliance is an unavoidable part of any multinational's business.⁶³ In the past 5 years, companies have paid the U.S. government almost four billion dollars in FCPA fines.⁶⁴

Multinational corporations are complaining. The FCPA as it exists today, makes it difficult to do business abroad, especially because, in many developing countries, bribery is viewed as *schmiergeld*. Although the FCPA is currently focused to change the philosophy of *schmiergeld* by acting through economic sanctions, the effect may not be prudent. For multinationals, the fear of potential prosecution effectively raises the cost of doing business in high-corruption countries, which makes the likelihood of operating there very low. So although the U.S. government is reaching its goals through scare tactics, the cost of being ethically sound is not economically sensible.

Developing countries have hypertrophied bureaucracies, which require businesses to deal with enormous amounts of red tape. The political scientist Samuel Huntington once argued that under these conditions bribery was a reasonably efficient way for businesses to cut through that red tape. As Huntington said, "The only thing worse than a society with a rigid, over centralized, dishonest bureaucracy is on with a rigid, over centralized honest bureaucracy."⁶⁵ Without bribery, doing any kind of business in a developing country takes much longer and the result is less economic activity. Less economic activity means fewer big companies developing business and less trade. Seen this way, bribery does not just grease the palms, but also the wheels of commerce.

⁶³ The FCPA makes compliance unavoidable because of the hefty sanctions forced upon companies without compliance programs. It really acts as an ultimatum.

⁶⁴ *Id.*

⁶⁵ Arnold J. Heidenheimer, *Political Corruption: Concepts and Contexts*, Transaction Publishers (2002) At 323.

In a utopian world, good behavior would be good business, but the world is not that simple. The catch in today's world is that bans on bribery are effective only when they are widespread. Unilateral enforcements laws, like the FCPA, loose their effect, when other countries fail to enforce similar bans. The FCPA loses its effect amongst it's own multinationals, because they are competing with companies in the global market place who can and do bribe. If bans are not widespread, U.S. companies begin to feel the competitive pressure to bribe. Today, some of the biggest players in the global market, including BRICS nations like India,⁶⁶ do not have anti bribery laws. Major global economic players like China and Russia have laws , but those laws are not enforced.⁶⁷Transparency International found that Chinese and Russian companies were most likely to pay bribes.⁶⁸ This is especially troublesome in light of the fact that they invested \$120 billion dollars abroad in 2010 alone.⁶⁹ While the FCPA has failed to clean up the climate of official corruption that afflicts many ill governed countries, it has granted a huge competitive advantage to companies not within the DOJ's reach. (China) The conclusion that the U.S. Federal Government must reach is that: (1) everyone else in the global market bribes; (2) U.S. multinational's can not bribe because they are scared of FCPA enforcement and the fines that come with enforcement; (3) U.S. multinationals are at a competitive disadvantage because they cannot bribe; (4) Therefore, the Federal Government should repeal the FCPA and put U.S. multinationals on a level playing field.

⁶⁶ BRICS is an acronym for the economies of 'Brazil, Russia, India and China' and became prominent after Goldman Sachs coined the term when speculating that by 2050 these four economies would be wealthier than most of the current major economic powers. Investopia definition Available at: <http://www.investopedia.com/terms/b/bric.asp>

⁶⁷ James Surowiecki, *Invisible Hand, Greased Palm*, The New Yorker, May 14, 2012.

⁶⁹ *Id.*

III Effects: The Facts

From 2005 to 2009, The DOJ and the SEC brought four times as many corporate enforcement actions as they did in the previous five years.⁷⁰ Actions against individual defendants have precipitously risen as well.⁷¹ In 2010, U.S. enforcement activity more than doubled from enforcement action numbers in 2009.⁷² These increases not only represent heightened scrutiny of large publicly traded U.S. companies, but also the expanding scope of enforcement against non-U.S. and non-publicly traded companies. Eight of the ten largest FCPA settlements in history occurred in 2010 or 2011(with the remaining two occurring after 2007.)⁷³ Not coincidentally, both the DOJ and SEC have announced plans to increase their resources dedicated to FCPA enforcement.⁷⁴ Obviously these increases in enforcement amplified the ill effects of the FCPA on multinational companies and international business transactions.

The effects of the FCPA on transactions are seen principally in (1) transaction costs (increased due diligence efforts), (2) post- transaction integration costs (adding appropriate FCPA compliance procedures to an acquired company or across a company that was not previously subject to the FCPA), (3) increased risk of exposure to an enforcement action and related costs (international investigations and fines) and (4) as a

⁷⁰ Danforth Newcomb & Philip Urofsky, Shearman & Sterling LLP, *FCPA A Digest of cases and Review Releases Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977* (October 1, 2009), 1-126 (2009)

⁷¹ *Id.*

⁷² Trace Global Enforcement Report 2011, Figure II *available at* <http://www.ibe.org.uk/usefiles/globalenforementreport2011.pdf>.

⁷³ Andrew Weissman and Alixandra Smith, *Restoring Balance, Proposed Amendments to the Foreign Corrupt Practices Act*, released by the U.S. Chamber Institute for Legal Reform, October 2010 at 2

⁷⁴ Richard L. Cassin, The FCPA Blog, *J&J Joins New Top Ten* (April 8, 2011)

result of (1),(2), and (3), the abandonment or lack of interest in transactions that otherwise would have been completed. As a result, large mature European Companies and U.S. Companies are put at a regulatory disadvantage to their non-covered competitors.⁷⁵ This regulatory asymmetry not only affects companies subject to the FCPA but also affects U.S. markets.

⁷⁵ Large mature European Companies fall under the jurisdictional reach of the FCPA, because the vague terms of the FCPA allow the inclusion of anyone who uses the U.S. mails or any means or instrumentality of interstate commerce in furtherance of a corrupt payment to a foreign official. “The FCPA also applies to certain foreign nationals or entities that are not issuers or domestic concerns. Since 1998, the FCPA’s anti-bribery provisions have applied to foreign persons and foreign non-issuer entities that, either directly or through an agent, engage in *any* act in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in the territory of the United States. Also, officers, directors, employees, agents or stockholders acting on behalf of such persons or entities may be subject...” A Resource Guide to the U.S. Foreign Corrupt Practices Act, U.S. DEP’T of Justice Criminal Div. & U.S. Sec. & Exch. Comm’n Enforceent Div., at 11; 15 U.S.C. § 78dd-3(a). As discussed above, foreign companies that have securities registered in the United States or that are required to file periodic reports with the SEC, including certain foreign companies with American Depositary Receipts, are covered by the FCPA’s anti-bribery provisions governing “issuers” under 15 U.S.C. § 78dd-1; See International Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105-366, 112 Stat. 3302 (1998); 15 U.S.C. § 78dd-3(a); see also U.S. Dept. of Justice, Criminal Resource Manual § 9-1018 (Nov. 2000) (the Department “interprets [Section 78dd-3(a)] as conferring jurisdiction whenever a foreign company or national causes an act to be done within the territory of the United States by any person acting as that company’s or national’s agent.”). This interpretation is consistent with U.S. treaty obligations. See S. Rep. No. 105-2177 (1998) (expressing Congress’ intention that the 1998 amendments to the FCPA “conform to the requirements of and to implement the OECD Convention.”); Anti-Bribery Convention at art. 4.1, *supra* note 19 (“Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.”); 15 U.S.C. § 78dd-3(a); see, e.g., Criminal Information, *United States v. Alcatel-Lucent France, S.A., et al.*, No. 10-cr-20906 (S.D. Fla. Dec. 27, 2010), ECF No. 1 [hereinafter *United States v. Alcatel-Lucent France*] (subsidiary of French publicly traded company convicted of conspiracy to violate FCPA), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-lucent-sa-et-al/12-27-10alcatel-et-al-info.pdf>; Criminal Information, *United States v. DaimlerChrysler Automotive Russia SAO*, No. 10-cr-64 (D.D.C. Mar. 22, 2010), ECF No. 1 (subsidiary of German publicly traded company convicted of violating FCPA), available at [16](http://www.justice.gov/criminal/fraud/fcpa/cases/daimler/03-22-10daimlerrussia-</p></div><div data-bbox=)

COURSES OF ACTION: FINDING A BANDAID

Repeal

Walter Olson of the CATO Institute argues that the FCPA, “is a feel-good piece of over criminalization that oversteps the proper bounds of federal lawmaking” so much in fact that its passage should have been prevented.⁷⁶

The FCPA should be repealed for four distinct reasons. First, the FCPA is vague. Its vagueness leaves multinationals wondering where the line is between tolerated payments and improper bribes. Some are even left wondering, “Who counts as an ‘official’?”

Secondly, the FCPA is extraterritorial.⁷⁷ Currently, the FCPA yields expansive power that purports to punish overseas misdeeds that do not deprive Americans of liberty or property and whose punishment is better left to other authorities.

Third, the FCPA is vicarious. It inflicts liability on businesses and unknowing higher ups over the actions of rogue local subsidiaries, salespeople and facilitators.

Finally, the FCPA is punitive. The FCPA’s victims face twenty-year prison terms and inflict penalties for minimal non-threatening behavior.

info.pdf; Criminal Information, *United States v. Siemens S.A. (Argentina)*, No. 08-cr-368 (D.D.C. Dec. 12, 2008), ECF No. 1 (subsidiary of German publicly traded company convicted of violating FCPA), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-12-08siemensargen-info.pdf>.

⁷⁶ Walter Olson, *The Foreign Corrupt Practices Act: Clarification Is Not Enough*, CATO at Liberty, November 11, 2011.

⁷⁷ The term extraterritorial describes a law or decree that is valid outside of a country’s territory. The FCPA is extraterritorial, because its jurisdiction extends to the actions of foreigners and acts that occur outside of the U.S.

(1) The FCPA is Vague

The key terms of the statute are vague and interpreted broadly. The FCPA prohibits giving or promising anything of value to a foreign official for the purposes of influence.⁷⁸ The definition of “foreign official” under the act is,

“any officer or employee of a foreign government or any department, agency, or instrumentality thereof...or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality.”⁷⁹

Additionally, the DOJ and the SEC interpret terms such as “instrumentality” or “person acting in an official capacity for or on behalf of” broadly. As a result, corporations may reasonably believe that they are not interacting with a foreign official or that oversight is not necessary. The confusion comes to a head with state owned enterprises (“SOE”). An SOE is a commercial enterprise that is an instrumentality of the government. In many developing nations, utilities companies are SOEs. Nearly any SOE employee with managerial authority could be a “foreign official” under the FCPA. More confusion occurs when companies are substantially or majority owned and managed by the private sector but are still considered SOEs.⁸⁰ The broad interpretation of “foreign official” lacks strong support in the legislative history, other statutory language, and even other countries’ approaches to foreign corruption.⁸¹ The reality is that the breadth and uncertainty in the application of substantive terms of the FCPA make corporate

⁷⁸ 15 U.S.C. § 78 dd-1(a) (2006).

⁷⁹ *Id.* § 78 dd-1(f).

⁸⁰ The Nigeria LNG Limited is a natural gas company that is 49% state owned and 51% privately owned, but is considered an SOE and as such an instrumentality of the Nigerian Government. Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of its Decade of Resurgence*, 43 Ind. L. Rev. 389, 412-13 (2010).

⁸¹ Joel M. Cohen, Michael P. Holland, *Under the FCPA, Who is a Foreign Official Anyway?*, 63 Bus. Law. 1243, 1250 (2008).

compliance efforts broad, and accordingly insufficient in the eyes of the DOJ and SEC.

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(2) The FCPA is Extraterritorial

The U.S. government has granted itself expansive jurisdiction under the FCPA that complements its expansive interpretation of its substantive terms. The FCPA anti-bribery provisions apply to “domestic concerns,” which encompass U.S. citizens, nationals and residents, as well as any company with its principal place of business in the U.S. or any company organized under the laws of the U.S., a state or a territory.⁸⁴ It is unexpected that the United States would have interest in these parties and assert jurisdiction over them. The FCPA’s jurisdictional reach also extends to any issuer with a class of securities registered in the United States, as well as to any person or company that engages in a corrupt act “while in the territory of the United States.”⁸⁵

(3) The FCPA is Vicarious

The U.S. interprets the FCPA’s jurisdiction to extend to conduct by foreign subsidiaries and joint ventures of companies that are originally subject to the FCPA. This includes

⁸²The existence of a broad compliance programs will be a factor in the DOJ’s damages calculations as proscribed by the U.S. Sentencing Guidelines. However, it is one of many factors in that calculation, and does not allow a company to avoid penalties and fines altogether. A Resource Guide to the U.S. Foreign Corrupt Practices Act, U.S. DEP’T of Justice Criminal Div. & U.S. Sec. & Exch. Comm’n Enforceent Div., at 68.

⁸³ *Id.* at 1255-63.

⁸⁴ 15 U.S.C. § 78 dd-2 (2006).

⁸⁵ *Id.* § 78 dd-1 and 3. “while in the territory of the United States” is particularly far reaching; in some cases, a foreign company with sparse to no activity in the U.S. has been charged with violating the FCPA as a result of alleged corrupt payments made to a foreign government official, where the only U.S. connection was that the funds were routed through a U.S. bank. Paul R. Berger, Erin W. Sheehy, Kenya K. Davis and Bruce E. Yannett, *Is that a Bribe?*, 26 INT’L FIN. L. REV. 76, 76 (2007) (the article discussed Statoil and Christian Sapsizian, who were both charged with FCPA violations based on activity in a U.S. bank account specifically the transfer of funds between them and foreign officials.)

instances where parent company control is limited.⁸⁶ The DOJ gives guidance as to when a parent company could be liable. The DOJ explains that,

“There are two ways in which a parent company may be liable for bribes paid by its subsidiary. First, a parent may have participated sufficiently in the activity to be directly liable for the conduct—as, for example, when it directed its subsidiary’s misconduct or otherwise directly participated in the bribe scheme. Second, a parent may be liable for its subsidiary’s conduct under traditional agency principles. The fundamental characteristic of agency is control.”⁸⁷

Almost all international conduct and actors are subject to the scrutiny of U.S.

enforcement, because the FCPA’s jurisdiction is overly broad and the DOJ and SEC prosecute a wide array of activity.

(4) The FCPA is Punitive

The DOJ and the SEC impose costs that are effectually punitive on companies subject to the FCPA. In addition to the obvious costs of compliance, such as due diligence, maintaining compliance programs and conducting internal investigations in the event of corruption, companies also face less obvious costs that put them at a competitive

⁸⁶ For example, in one instance, a Kazakh immigration prosecutor threatened to fine, jail, or deport employees of a U.S. company’s subsidiary. Believing the threats to be genuine, the employees in Kazakhstan sought guidance from senior management of the U.S. subsidiary and were authorized to make the payments. The employees then paid the government official a total of \$45,000 using personal funds. The subsidiary reimbursed the employees, but it falsely recorded the reimbursements as “salary advances” or “visa fines.” The parent company, which eventually discovered these payments, as well as other improperly booked cash payments made to a Kazakhstani consultant to obtain visas, was charged with civil violations of the accounting provisions. Admin. Proceeding Order, In the Matter of NATCO Group Inc., Exchange Act Release No. 61325 (Jan. 11, 2010), available at <http://www.sec.gov/litigation/admin/2010/34-61325.pdf> (imposing cease-and-desist order and \$65,000 civil monetary penalty).

⁸⁷ A Resource Guide to the U.S. Foreign Corrupt Practices Act, U.S. DEP’T of Justice Criminal Div. & U.S. Sec. & Exch. Comm’n Enforceent Div., at 27; *Pacific Can Co. v. Hewes*, 95 F.2d 42, 46 (9th Cir. 1938) (“Where one corporation is controlled by another, the former acts not for itself but as directed by the latter, the same as an agent, and the principal is liable for the acts of its agent within the scope of the agent’s authority.”); *United States v. NYNEX Corp.*, 788 F. Supp. 16, 18 n.3 (D.D.C. 1992) (holding that “[a] corporation can of course be held criminally liable for the acts of its agents,” including “the conduct of its subsidiaries.”).

disadvantage. For example, competitors not subject to the FCPA's jurisdictional reach do not have to require foreign joint venture partners to adopt costly compliance measures. In some cases, companies are forced to forgo certain overseas business opportunities altogether because the risk of corruption is so high that no compliance efforts would sufficiently reduce enforcement risks.

(1) Direct Costs Associated with the FCPA

The direct costs associated with the FCPA include direct out of pocket costs in the form of compliance programs, internal audits and investigations, and fines imposed for settlements or violations.

The obvious direct costs of the FCPA are the fines and penalties associated with non-compliance. These fines have dramatically increased in recent years. In 2007, the largest fine was \$28.5 million against Titan Corporation. Today, each of the top eight fines exceeds \$100 million with the top five exceeding \$300 million.⁸⁸ Adding insult to injury, the penalties imposed by the SEC and DOJ usually greatly exceed the corrupt payment or the profit gained from allegedly corrupt deeds.⁸⁹ No company wants to take on the risk of being indicted or taking an issue to trial, therefore the only potential check on the continuing increase in the size of penalties is the discretion of those imposing them.

Companies subject to the FCPA spend substantial financial resources implementing internal controls and internal investigations that prevent and identify instances of potential misconduct. Compliance with the FCPA essentially requires collecting data and

⁸⁸ See Newcomb & Urofsky, *Supra* note 21 at vii-xiii

⁸⁹ *United States v. Helmerich & Payne, Inc.* (2009) (H&P paid \$173,000 to avoid \$200,000 in customs cost, and was penalized \$1 million by the DOJ and disgorgement of \$400,000 to the SEC) *U.S. v. Control Components, Inc.*, No. 09-00162 (C.D. Ca. 2009) (CCI made corrupt payments of 4.9 and agreed to a nearly \$18 million fine).

voluntarily self-reporting. This process is extremely expensive. Preventive investigations range from \$2 to 20 million per enterprise.⁹⁰

In the context of cross border business transactions, especially transactions involving targets with international operations, FCPA due diligence has become overly burdensome. When evaluating acquisition targets, companies covered by the FCPA (especially those that have a prior history of FCPA enforcement) require a deep dive into the target's business practices. Similarly, when a company subject to the FCPA enters into a consulting agreement with an agent outside the U.S., the FCPA counsel requires them to do a thorough background check to shield itself from potential FCPA liability by the consultant.⁹¹

The current FCPA regime forces companies into over compliance that is extreme and costly. The greater issue is companies that invest great resources in compliance have no assurance that in the event of an alleged violation (even one that could not reasonably have been detected or prevented) their efforts will be rewarded with lenient or gentle prosecution or forgiveness.⁹² Adding to the cost, a foreign agent must be monitored. Neither the DOJ nor the SEC are satisfied if a company claims that it went through painstaking due diligence prior to a foreign acquisition or a contract with an agent if the company failed to monitor the acquisition or agent throughout the term of the

⁹⁰ Daniel J. Grimm, *The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Successor Liability and its Consequences*, 7 N.Y.U.J.L. & BUS. 247, 272-76 (2010).

⁹¹ David Isaak, *FCPA Compliance – Navigating the Minefield of Intermediaries*, 17 CURRENTS INT'L TRADE L.J. 22 (2008).

⁹² Outside the U.S., in some countries with anti-bribery provisions, the adoption and the effective implementation of an adequate organizational risk management and control model potentially exonerates companies from liability. U.S. authorities do not appear willing to dilute the effects of the *respondeat superior doctrine*.

engagement.⁹³ The great irony is that many times foreign agents are retained precisely to help in the due diligence process, because the company lacks the requisite knowledge, or connections to the target country.⁹⁴ Often overlooked by companies is the need to continue FCPA compliance integration to remedy any existing issues or prevent the occurrence of future non-compliance. These costs are significant, recurring, and often overlooked.

(2) Indirect Costs Associated with the FCPA

When a company subject to the FCPA is competing to acquire or partner with a “target” company it must factor into its deal the relative compliance costs associated with the transaction and the fact that they will be higher. Basically, the company subject to the FCPA has to pay more for the same opportunity, which absolutely places the company at a competitive disadvantage.

The strain placed on business relationships from ensuring compliance and requiring non-U.S. business partners to adopt U.S. style business practices for compliance is a huge indirect cost. Proper enforcement requires companies to ask probing and uncomfortable questions of any foreign entity they wish to acquire, merge, partner, or do business with.⁹⁵ The invasive nature of due diligence creates discomfort and distrust between the U.S. regulated company and any foreign counterpart who is rightfully offended by the FCPA line of questioning.

⁹³ See Isaak, *Supra* note 35.

⁹⁴ Mike Koehler, *The FCPA, Foreign Agents, and Lessons From the Halliburton Enforcement Action*, 36 OHIO N.U.L. REV. 457, 458 – 60 (2010).

⁹⁵ *Transcript of Panel Discussion: Effective FCPA/Export Controls Due Diligence in Mergers and Acquisitions*, 17 CURRENTS INT’L TRADE L.J. 28 (2008) (FCPA due diligence creates challenges because of the types of questions that must be asked).

Furthermore, numerous examples exist where the FCPA forces a U.S. regulated company to deviate from the customs and traditions of a foreign country (celebratory meals/exchange of gifts)⁹⁶ and this has deeply offended the foreign corporate officers and government officials they are required to establish relationships and business opportunities with. This dynamic is only exacerbated by the fact that the FCPA's terms are interpreted broadly and are somewhat all encompassing. Corporations and officers are rendered overly cautious and avoid not only objectionable conduct but also acts that actually should be encouraged.

REPEAL IS UNLIKELY

Despite the direct and indirect costs to U.S. governed businesses and the economic markets, repealing the FCPA, unfortunately is not a viable option. The United States is unquestionably the leader in the ideological fight against corruption. And as such, repealing the FCPA is unrealistic.

Furthermore, unfettered and uncontrolled bribery is in fact a bad thing. Recently, a foreign businessman was shot twice in the head by a "krysha" or Russian bribe-seeking gang.⁹⁷ His children's safety was threatened when a gang member waved photographs of them going to school.⁹⁸ Bribery laws exist to prevent this kind of extreme behavior. The international bribery laws that do exist criminalize bribes paid under realistic threats of

⁹⁶ It is custom and expected in China to complete contract negotiations with a large banquet like celebration attended by hundreds of individuals, followed by an exchange of gifts. Mike Koehler, *The Unique FCPA Compliance Challenges of Doing Business in China*, 25 WIS. INT'L L.J. 397, 417 (2008). The FCPA does not give a de minimis value exception for "anything of value".

⁹⁷ Tim Worstall, *Wal-Mart and Corruption in Mexico: So What?*, Forbes (2012) available at: http://www.forbes.com/sites/timworstall/2012/04/22/wal-mart-and-corruption-in-mexico-so-what/?_suid=140027300469309047956210561097.

⁹⁸ *Id.*

imminent violence. Bribery laws must exist to prevent violent extortion. This view is reiterated throughout the world. Bribery laws should not criminalize activity that fosters actual business deals, like *Schmiergeld*. The punitive nature of the FCPA criminalizes what is normal and necessary business behavior in many parts of the world. The FCPA is overzealous.

BORROWED WISDOM: INTERNATIONAL APPROACHES

The OECD convention signatories are required to: (1) criminalize bribery of foreign public officials, (2) hold corporations and other legal persons liable for bribery, (3) prohibit “off the books” payments and other accounting practices that may facilitate corruption, (4) make bribery an extraditable offense and (5) provide mutual legal assistance to each other in bribery cases.⁹⁹ The convention does not require the adoption of a specific set of legal rules, but rather adoption of the Convention’s aforementioned principals should be upheld on a “functional equivalence” basis. This basis allows different countries to use varying methods, according to the idiosyncrasies of their individual legal systems and customs.¹⁰⁰

Among OECD signatories, the U.S. by far has the highest number of prosecutions and the greatest fines. For example, the U.S. brought 67 prosecutions under the FCPA in 2006-2007 alone, 15 countries, “including Australia, Mexico, New Zealand, and Portugal,” brought none.¹⁰¹ Canada and Japan each brought one prosecution, each with

⁹⁹ Indira Carr & Opi Outhwaite, *The OECD Anti-Bribery Convention Ten Years On*, 5 MANCHESTER J. INT’L ECON. L. 3, 6-7 (2008). Over 30 countries adopted the OECD and its standards were incorporated into the FCPA by the International Anti-Bribery and Fair Competition Act of 1998.

¹⁰⁰ John Hatchard, *Recent Developments in Combating the Bribery of Foreign Public Officials: A Cause for Optimism?*, 85 U. DET.MERCY L. REV. 1, 8 (2007).

¹⁰¹ *Id.*

minor consequences.¹⁰² In fact, from 2000 to 2010, the U.S. brought more than 3.5 times more foreign bribery actions than all the other countries combined.¹⁰³ The numbers are not proportionate to the international activity of each country. It is unlikely that the corporations within these countries conduct their international business in a substantially different manner than those subject to the FCPA (in fact there are many companies that are subject to multiple regimes).¹⁰⁴

Many countries that are home to important multinational companies are not parties to the OECD Convention.¹⁰⁵ As the world economic forum continues to become even more globalized, the effectiveness of any transnational anti-corruption effort that fails to cover these enterprises will ultimately be limited.

The global anti-corruption playing field can be seen with three tiers: (1) the FCPA (expansive law and zealous enforcement), (2) other OECD Convention signatories (legally similar but lighter and more flexible enforcement), (3) non-OECD signatories (limited law with no notable enforcement). The playing field is clearly not level and leveling is a daunting task. Leveling the playing field is unlikely to occur, because of ideological and cultural differences that prevent foreign countries from matching the U.S. anti-corruption efforts. The only option the U.S. has, absent of full repeal, is a drastic pull back of the FCPA's jurisdictional reach and enforcement. One viable option is that the DOJ and SEC adopt a functional equivalence basis, allowing each multinational within

¹⁰² *Id.*

¹⁰³ Trace Global Enforcement Report 2011, Figure II, *supra* note 23.

¹⁰⁴ The U.K., internationally regarded as like-minded with the U.S., has been criticized for its failure to effectively prosecute foreign bribery. *See* Hatchard, *supra* note 44 at 8-9

¹⁰⁵ *Id.* at 11.

the FCPA's jurisdiction to be flexible to the fluctuations in corporate customs and practices amongst offshore ventures.

What can the U.S. Federal Government Do Now?

Former Attorney General, Michael B. Mukasey, testified before Congress making several suggestions as to how the FCPA could be altered. His proposal included: (1) clarifying the definition of terms used in the law, including the term "foreign official"; (2) adding an affirmative defense for companies that have rigorous compliance programs in place but still ran into trouble; (3) adding a "willfulness" requirement for corporate criminal liability; (4) limiting successor liability for the prior corrupt activities of a business that was acquired; (5) improving the way the DOJ provides guidance and advice to companies that are trying to comply with the law; and (6) limiting a parent company's liability when it was unaware of the foul behavior of their subsidiary.¹⁰⁶ Although Mr. Mukasey's suggestions are beneficial, they do not go far enough.

The Former General Counsel of the SEC, James R. Doty, suggested that the SEC create a "REG. FCPA" like regulation D under the SEC act of 1933.¹⁰⁷ In Mr. Doty's view, this addition would "establish a permissive filing regime; by making the filing, a registrant would benefit from a regulatory presumption of compliance."¹⁰⁸ Under his visions, "Reg. FCPA would set forth items required to be described, represented or disclosed, with appropriate exhibits, constituting the registrant's FCPA Compliance Program" and "[t]he filed FCPA Compliance Program would be subject to Staff review

¹⁰⁶ *The Foreign Corrupt Practice Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary* (June, 14, 2011).

¹⁰⁷ 17 C.F.R. §230.501 *et seq.* Regulation D is considered a safe harbor for the private offering exemption of Section 4(2) of the Securities Act.

¹⁰⁸ James R. Doty, *Toward a Reg. FCPA: A modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 Bus. Law. 1233, 1234 (2007).

and comment, as with the Annual Report on Form 10-K”¹⁰⁹ Mr. Doty believes this system would be easy to administer and the SEC could use its experience with similar regulations to ensure its smooth functioning.¹¹⁰ Simplifying the reporting of bribes doesn’t solve all of the issues associated with the FCPA.

A majority of the posited solutions pursue a more effective adequate preventative measures defense or different degrees of leniency schemes.¹¹¹ These approaches foster positive compliance and contribute to long-term reduction of misconduct.¹¹² These suggestions alone are insufficient because they do not provide companies with guidance and cannot resolve the power imbalance between the prosecution and businesses that fear the huge costs associated with an FCPA indictment.

A Hybrid Approach

A hybrid approach, combining a statutory adequate preventative measures defense along with a formal leniency program is the DOJ’s and SEC’s surest bet to continue their crusade against global bribery while allowing multinationals to profit economically.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *FCPA Hearing, supra* note 50 at 23 (advocating for the creation of a compliance defense); Andrew Weissmann & Alixandra Smith, U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE; PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 1 (2010) (recommending the creation of a compliance defense); James R. Doty, *Toward a Re. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233, 1235-36 (2007) (advocating a new regulatory filing system that would afford a safe harbor to complying businesses); Tarun & Tomczak, *A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 212-13 (2010) (proposing a leniency program modeled after one currently used by the DOJ’s Antitrust Division).

¹¹² Tarun & Tomczak, *supra* note 54, at 236 (clear and predictable policies provide incentive for compliance, cooperation, and self disclosure).

(1) The Statutory Defense Addition

The DOJ and SEC should adopt and implement an affirmative defense of adequate compliance into the regulatory scheme of the FCPA. The current regulatory scheme that lacks any affirmative defenses discourages investment in internal anti bribery policies and self-reporting identified violations. The adequate preventative measures defense would not be absolute, but rather a company would need to prove that it reasonably implemented and maintained anti-bribery programs.¹¹³

The United Kingdom's anti-bribery legislation, enacted in 2010, contains an affirmative defense provision for adequate internal compliance. So far, there has not been a suggestion that the U.K. defense is being abused.¹¹⁴ Furthermore, twelve OECD signatories, including Australia, Germany, Sweden, and Switzerland, all have a functional compliance defense.¹¹⁵

The addition of a statutory defense would increase compliance with the FCPA while incentivizing businesses to identify and self report violations. Proactive compliance by businesses will substantially reduce the rate of violations. With a statutory defense in

¹¹³ Nonbinding and Advisory in nature, the 2012 *Resource Guide* suggests general principles of best practices and lacks specific recommendations or guidance regarding how compliance affects prosecutorial decisions. Lindsay Lawyer, "Underwhelmed" by New Guidance, FCPA BLOG, <http://www.fcpablog.com/blog/2012/lindsey-lawyer-underwhelmed-by-new-guidance-.html>.

¹¹⁴ Bribery Act, 2010, c. 23 §7 (Eng.) (a corporation can proce in its defense that it had adequate procedures in place designed to prevent persons associated with it from engaging in prohibited conduct.); Jon Jordan, *The Adequate Procedures Defense Under the UK Bribery Act: A British Idea for the Foreign Corrupt Practices Act*, 17 STAN. J.L. BUS. & FIN. 25, 32-33 (2011-2012). Multinationals invoking the defense must satisfy the rigid criteria set out by the UK's ministry of Justice. This criteria ensures that the defense is not easily manipulated through paper compliance. See MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE 20-31 (2011).

¹¹⁵ *The Compliance Defense Around the World*, FCPA PROFESSOR (June 28, 2011), <http://www.fcpaprofessor.com.the-compliance-defense-around-the-world>.

place, prosecutors will no longer be able to prosecute compliant corporations for the acts of a single employee. Thus, a statutory defense will also give businesses protection from prosecutors. Clearly, a statutory defense will level the power disparity between prosecutors and businesses that has become intrinsic to the FCPA.

(3) The Formal Leniency Policy Addition

Alone, a statutory defense will not add full clarity or predictability to the enforcement process. Companies will have the ability to defend themselves against the DOJ, but they still will be forced to engage in the guesswork associated with FCPA compliance. An approach that would lessen ambiguity is the adoption of formal leniency policies.¹¹⁶ Leniency policies would require the DOJ to spell out clear and predictable sanctions and instruct as to how those sanctions could be reduced for companies that self report violations. As such, companies would be incentivized to report misdeeds. Businesses would also be afforded the ability to make informed decisions. The additions of formal policies that are communicated succinctly in advance of prosecution would allow businesses to make the decision to invest in compliance.¹¹⁷

CONCLUSION

Many U.S. multinationals are willing to comply with the FCPA but are daunted by the vagueness of the current requirements. It is the role of the U.S. legislators and regulators to cut through the confusion and dispel concerns of compliance in vain. The addition of both a statutory defense and a formal leniency program would provide protection to businesses throughout the investigation, inquiry, and prosecution stages.

¹¹⁶ Tarun & Tomczak, *supra* Note 54, at 156, 190 (proposing a leniency policy similar to those in the antitrust prosecutions).

¹¹⁷ *Id.*

This hybrid approach would also make compliance economically achievable for participating companies by providing incentives to institute costly compliance programs, self-report violations, and cooperate with law enforcement. This approach most importantly provides companies with leverage in negotiations with prosecutors who, in the absence of judicial oversight, have abused their discretion in the enforcement of clearly ambiguous terms.

This hybrid solution is not an end all be all. By itself , the hybrid approach does not provide instructions, restrain the jurisdictional reach, or clarify ambiguous statutory terms. However, it does reduce uncertainty and provides much needed leverage to multinationals. A hybrid approach between both legislators and regulators will transform current FCPA enforcement from authoritative prosecution to a collaborative and productive dialogue between government and business.