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REGULATING THE REGULATORS: A SOLUTION TO FOREIGN CORRUPT PRACTICES ACT WOES

*Cyavash Nasir Ahmadi**

INTRODUCTION

As the number of markets available to multi-national corporations grow, concerns over foreign bribery used to tap those markets have similarly grown.¹ In the United States, the Foreign Corrupt Practices Act (hereinafter “FCPA” or “Act”) prohibits the bribery of foreign officials.² Enacted amidst the Watergate scandal, Congress intended to improve two infirmities in the corporate and securities regulatory scheme of 1977: low confidence in domestic security markets and stressed relations with foreign trade partners.³ Since 1977, the number of FCPA prosecutions has risen dramatically as the act, its interpretation, and its enforcement has evolved.

This Note argues, through three interrelated points, that the *status quo* of FCPA enforcement must not be maintained. First, an overzealous enforcement policy, coupled with the scarcity of judicial interpretation of the FCPA, has given rise to alarming uncertainty among domestic corporations attempting to enter new markets. Second, that such uncertainty engendered a backlash of powerful opposition to the FCPA, which, if successful, could severely harm national interests. Third, that the current enforcement policy actually betrays the Congressional intent of the Act. The FCPA’s enforcement policy should be revised to give rise to increased compliance and confidence in domestic securities markets.

Part I of this note provides an overview of the FCPA. Part II addresses the importance of maintaining strong anti-corruption policies by surveying economic, political, and social impacts of corruption. Part III discusses the proposed reforms and contrasts them to arguments in favor of retaining the status quo. Part III also observes a proposal for administrative guidance from the Securities and Exchange Commission (hereinafter “SEC”) in the form of a ‘Reg. FCPA.’ Lastly, Part IV concludes that the language of the Act should remain unamended; meanwhile, administration and enforcement models must be refined if the anti-corruption momentum is to continue.

I. OVERVIEW OF THE FOREIGN CORRUPT PRACTICES ACT

The FCPA was enacted in 1977 following a series of overseas and domestic bribery scandals involving the falsification of records of over 300 major corporations designed to facilitate undisclosed questionable or illegal corporate payments exceeding hundreds of mil-

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¹ See DAVID KENNEDY & DAN DANIELSON, OPEN SOCIETY FOUNDATIONS, BUSTING BRIBERY: SUSTAINING THE GLOBAL MOMENTUM OF THE FOREIGN CORRUPT PRACTICES ACT 5-6 (2011) [hereinafter BUSTING BRIBERY].

² Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

³ Lanny A. Bruer, Assistant Att’y Gen., Address at the 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011), available at <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html>; see also discussion *infra* Part I.A.

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lions of dollars.⁴ As enacted, the FCPA solely prohibited U.S. corporations from making improper payments to foreign officials, parties, or candidates in order to receive an advantage over competitors.⁵ Since then the FCPA was amended twice,⁶ first in 1988⁷ and again in 1998.⁸ Today, the FCPA covers individuals and any company or issuer subject to SEC regulation.⁹

The FCPA is composed of two major provisions.¹⁰ The anti-bribery provisions prohibit corrupt payments to foreign officials.¹¹ The recordkeeping and internal controls provisions require certain companies and issuers to keep financial records and periodically report those records to the SEC.¹² This section begins with an explanation of the history and purpose of the FCPA. A description of the current enforcement environment follows. This part then concludes with a discussion of the anti-bribery provisions and recordkeeping provisions.

A. The History and Purpose of the FCPA

The FCPA was the brainchild of former federal Judge Stanley Sporkin, who worked behind the scenes with lawmakers such as Senator William Proxmire of Wisconsin,¹³ to put an end to the era of corporate slush funds.¹⁴ Judge Sporkin was serving as Director of Enforcement at the SEC when he discovered of the widespread corporate practice of not accurately reporting slush fund transactions.¹⁵ A year before the FCPA was adopted, results from the SEC's 1976 *Report on Questionable and Illegal Corporate Payments and Practices* (hereinafter "SEC Report") gave rise to a call for improved disclosure of payments to foreign entities among public companies.¹⁶ Judge Sporkin noted his surprise that companies were not required to make such disclosures when he testified to Congress:

Most of all, I was amazed that there was no requirement that publicly traded corporations maintain honest books and records. My research of the various laws did reveal that such a "books and records" requirement was included in the laws governing this nation's financial institutions. It occurred to me that if such a requirement was good enough for this nation's brokerage and banking institutions, why not for its industrial concerns?

⁴ See S. REP. NO. 95-114, at 4101 (1977), reprinted in 1977 U.S.C.C.A.N. 4098.

⁵ Pub. L. 95-213, 91 Stat. 1494 (1977).

⁶ See generally Pub. L. 100-418, 102 Stat. 1415 (1988); Pub. L. 105-366, 112 Stat. 3302 (1998).

⁷ Pub. L. 100-418, 102 Stat. 1415 (1988).

⁸ Pub. L. 105-366, 112 Stat. 3302 (1998).

⁹ See 15 U.S.C. § 78dd-1(a), -2(a), -3(a) (2012).

¹⁰ See *id.* §§ 78m, 78dd-1 to -3.

¹¹ See *id.* §§ 78dd-1 to -3.

¹² See *id.* § 78m(a)(2).

¹³ Former Chair of the Senate Banking, Housing, and Urban Development Committee. See S. REP. NO. 95-114 (1977), reprinted in 1977 U.S.C.C.A.N. 4098.

¹⁴ Michael Volkov, *One of the Great Ones*, THE FCPA BLOG (Nov. 2, 2011, 3:28 AM), <http://www.fcplib.com/blog/2011/11/2/one-of-the-great-ones.html>.

¹⁵ *Id.*

¹⁶ *Id.*; see also S. REP. NO. 95-114, at 2-3 (1977); SECURITIES AND EXCHANGE COMMISSION, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (1976) [hereinafter "SEC Report"] (describing various illicit payments by corporations and their potential harms to shareholders).

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I became convinced that what was necessary was a simple law that would require corporations to keep accurate books and records. In my view, a corporation would think twice before it recorded a bribe for what it was. Since bribery is generally considered a crime, it would be virtually untenable for someone to admit in writing that the corporation is engaging in such activities on an ongoing basis. Bribery needs secrecy in order to flourish. Thus, I theorized that requiring the disclosure of all bribes paid would, in effect, foreclose that activity.¹⁷

Thus, the recordkeeping provisions were born. Originally, Judge Sporkin did not advocate for the enactment of anti-bribery provisions because he thought they would be too hard to enforce.¹⁸ Senator Proxmire, however, held more ambitious goals.¹⁹ Ultimately, his insistence on the anti-bribery provisions prevailed.²⁰ Though the FCPA was enacted in 1977, it was not until 1990, in *Lamb v. Phillip Morris, Inc.*, when the Sixth Circuit would become the first court to articulate its purpose.²¹

In *Lamb*, the Sixth Circuit held that “[the FCPA was] primarily designed to protect the integrity of American foreign policy and domestic markets, rather than to prevent the use of foreign resources to reduce production costs.”²² Protecting the integrity of American foreign policy could not be satisfied without the prohibition on bribing foreign government officials.²³ Nor could the American securities market retain shareholder confidence without the accounting provisions of the Act.²⁴

As articulated by the Sixth Circuit, the purpose of the FCPA is twofold. The first is derived from the policy behind disclosure requirements of domestic concerns. According to the SEC Report, during the late seventies, corporations were not recording material transactions in their books and records.²⁵ The Act was adopted to reverse the widespread practice of non-disclosure; to bestow upon securities markets the benefits that flow from increased transparency.²⁶

The second purpose flows from foreign policy goals. The FCPA was enacted because corruption and its concomitant effects threatened foreign policy interests.²⁷ The very payments that were diminishing shareholder value were also destabilizing the governments of Japan, the Netherlands, and Italy.²⁸ As these bribes were traced to United States corporations, foreign policy considerations demanded their prohibition.²⁹ These views are certainly reflected in the Act’s broad language, jurisdictional reach, and harsh penalties.

¹⁷ Volkov, *supra* note 14.

¹⁸ *Id.*

¹⁹ *Id.*; see also William Proxmire, *The Foreign Payoff Law is Necessary*, N.Y. TIMES, Feb. 5, 1978, at F16.

²⁰ Volkov, *supra* note 14.

²¹ See *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990).

²² *Id.* at 1029.

²³ See Proxmire, *supra* note 19.

²⁴ SEC Report, *supra* note 16.

²⁵ *Id.*

²⁶ See *Lamb*, 915 F.2d 1024.

²⁷ See Proxmire, *supra* note 19; see also S. REP. NO. 95-114, at 2-3 (1977).

²⁸ See Proxmire, *supra* note 19; see also discussion *infra* Part II.B (explaining how corruption operates to destabilize governments).

²⁹ See Proxmire, *supra* note 19.

B. The Anti-Bribery Provisions

(i) Application

The FCPA prohibits payments, made corruptly, to foreign government officials for the purpose of obtaining or retaining business.³⁰ The Act applies to three classes of persons: (1) “issuers” (or agents thereof); (2) “domestic concerns” (or an agent thereof); and (3) foreign nationals or businesses (or an agent or national thereof).³¹ Any of these persons may be held liable if they violate the Act³² while within the territory of the United States.³³ “Issuer” means any member, broker, or dealer, or company that is required to file periodic reports to the SEC.³⁴ “Domestic Concern” includes individuals who are citizens, corporations, partnerships, sole proprietorships and the like.³⁵ Foreign individuals, companies, their employees, and agents are also covered under the Act.³⁶ In particular, a foreign company is covered if it violates the Act while on U.S. territory, regardless of whether it has its principle place of business within the United States.³⁷

In 1998, the FCPA was amended to provide for extraterritorial jurisdiction covering domestic concerns.³⁸ The FCPA’s expansive jurisdiction is a result of implementing the Organization for Economic Cooperation and Development (hereinafter “OECD”) Convention on Combating Bribery of Foreign Officials in International Business Transactions (hereinafter “OECD Convention”).³⁹ Specifically, implementing the OECD Convention effectively precluded the use of off-shore bank accounts and foreign agents or employees to make the corrupt payment.⁴⁰

(ii) Foreign Officials and Public International Organizations

The term “foreign official” covers individuals that act in an official capacity of, or on behalf of, any foreign government or public international organization, and any agency,

³⁰ See generally 15 U.S.C. §§ 78dd-1 to -3 (2012).

³¹ *Id.*

³² See *id.*

³³ See *id.*

³⁴ *Id.* §78dd-1(a); see also *id.* § 78l(a); *id.* § 78o(d)(1).

³⁵ 15 U.S.C. § 78dd-2(h)(1) (2012) (defining “domestic concern” as “any individual who is a citizen, national, or resident of the United States and any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States”).

³⁶ *Id.* § 78dd-3.

³⁷ ROBERT W. TARUN, *THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK: A PRACTICAL GUIDE FOR MULTINATIONAL GENERAL COUNSEL, TRANSACTIONAL LAWYERS AND WHITE COLLAR CRIMINAL PRACTITIONERS* 7 (2010).

³⁸ International Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105-366, 112 Stat. 3302 (1998); see also 15 U.S.C. § 78dd(i)(1) (2012).

³⁹ S. REP. NO. 105-277, at 2-3 (1998); see also Org. for Econ. Cooperation & Dev. [OECD], *Convention on Combating Bribery of Foreign Officials in International Business Transactions*, at 16-17, art. 4 (Nov. 21, 1997) [hereinafter *OECD Convention*], available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf>.

⁴⁰ See TARUN, *supra* note 37, at 8.

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department, or instrumentality thereof.⁴¹ The term's breadth may have serious implications for corporations doing business with state owned enterprises of foreign nations.⁴²

In *U.S. v. Aguilar*, a federal district court judge in California expanded the reach of the term by holding that companies that are wholly-owned by a foreign government are an "instrumentality" of that government.⁴³ In this case, an electric utility company, wholly-owned by the government of Mexico, was an "instrumentality" of a foreign government within the meaning of the Act.⁴⁴ Despite that the FCPA does not explicitly list state-owned corporations as falling within its scope,⁴⁵ the district court had no difficulty finding that officers of a wholly-owned state public utility company also fell within the scope of the term.⁴⁶ Furthermore, the *Aguilar* Court relied on the *Charming Betsy* doctrine,⁴⁷ in dicta, to indicate that the term should be construed so as not to violate the OECD Convention's definition.⁴⁸ Since the 1998 amendments were meant to conform the FCPA to the requirements of the OECD,⁴⁹ it stands to reason that the term "foreign official" may be so broad to include "any person exercising a public function for a foreign country."⁵⁰ While it may not have been clear, prior to *Aguilar*, that officers of state-owned enterprises were included, it was plain that the term includes members of legislative committees and executive branch employees.⁵¹

Additionally, "public international organization" is defined as:

- (i) an organization that is designated by Executive order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288); or (ii)
- any other international organization that is designated by the President by

⁴¹ 15 U.S.C. § 78dd-1(f)(1)(A) (2012).

⁴² See TARUN, *supra* note 37, at 9.

⁴³ *United States v. Aguilar*, 783 F.Supp. 2d 1108 (C.D. Cal. 2011).

⁴⁴ *Id.*

⁴⁵ *Id.* at 1117.

⁴⁶ *Id.* at 1115 ("[The electric utility company] was created by statute as a 'decentralized public entity'; its governing Board is comprised of various high-ranking governmental officials; it describes itself as a government agency; and it performs a function the Mexican nation has described as a quintessential government function. . . Indeed, the Mexican Constitution recognizes the supply of electric power as 'exclusively a function of the general nation.'").

⁴⁷ *Id.* at 1116. "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . ." *Id.* (quoting *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 117-18 (1804)). "Thus, 'where fairly possible, a United States statute is to be construed so as not to conflict with . . . an international agreement of the United States.'" *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987)).

⁴⁸ *Id.* "'Foreign public official' is defined to include 'any person exercising a public function for a foreign country, including for a public agency or public enterprise. . .'" *Id.* (quoting *OECD Convention*, *supra* note 39, art. 1.4.a). "The OECD Convention's Commentaries define 'public enterprise' to include 'any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence.'" *Id.* (quoting *OECD Convention*, *supra* note 39, at Commentary ¶ 14).

⁴⁹ S. REP. No. 105-277, at 2 (1998).

⁵⁰ *OECD Convention*, *supra* note 39, art. 1.4.a.

⁵¹ See, e.g., Sec. & Exch. Comm'n v. Dow Chem. Co., Accounting and Auditing Enforcement Act Release No. 2554, 89 SEC Docket 3176 (Feb. 12, 2007) (improper payments to key member of a committee in India that determined when certain chemical products would receive government registrations); Sec. & Exch. Comm'n v. Monsanto Co., Accounting and Auditing Enforcement Act Release No. 2159, 89 SEC Docket 2284 (Jan. 6, 2005) (improper payments to obtain governmental licenses and permits in Indonesia).

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Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.⁵²

The Act has not been interpreted to permit the prosecution of the bribe recipient.⁵³

(iii) Money or Anything of Value

The FCPA prohibits offering, paying, promising to pay, or authorizing the same, or making a gift, of “anything of value.”⁵⁴ However, the Act does not define, nor has any federal court interpreted, the term.⁵⁵ Nonetheless, it certainly includes what is colloquially considered a “thing of value” such as cash equivalents, charitable donations, and housing expenses.⁵⁶

In *United States v. King*, the Eighth Circuit upheld the conviction of an individual found to have made a \$1 million bribe euphemistically characterized as a “kiss payment,” “closing cost,” or “toll” to secure concessions for land on which a new development was to be built.⁵⁷ However, the posture of the *King* court was such that it only considered the sufficiency of the evidence proffered against the defendant.⁵⁸ Implicit in the decision is that the \$1 million payment constituted a valid “thing of value,” though it does not bear repeating that cash is indeed a “thing of value.” Importantly, the court correctly found that violators could not be exculpated by characterizing otherwise illegal payments as something else in order to evade prosecution. For corporations entering markets where bribery is commonplace, the key to compliance is a robust compliance policy.

One example of such a program can be found at Apple, Inc. “During Steve Jobs’ life, Apple wasn’t named in an FCPA enforcement action and didn’t appear on [the FCPA blog’s] corporate investigation list.”⁵⁹ This feat is attributable to Apple’s conservative approach to compliance.⁶⁰ Apple states their principles of business conduct (applying to anyone working for or with the company worldwide) define the way they do business.⁶¹ According to the company’s business conduct policy, gift-giving to foreign government officials is limited to items valued up to \$25, except with advance approval of the law department.⁶² Additionally, “[m]eals at any value should be avoided with officials from government agencies

⁵² 15 U.S.C. § 78dd-1(f)(1)(B) (2012); see also TARUN, *supra* note 37, at 10 (“Examples include the World Bank, the Organization of American States (OAS), and the African Union.”).

⁵³ *United States v. Castle*, 925 F.2d 831, 834 (5th Cir. 1991) (noting the purpose of the Act, as found in its legislative history, was not to proscribe receipt of improper payments, rather to exclusively focus “on the U.S. companies and the effects of their conduct within and on the United States.”).

⁵⁴ 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a) (2012).

⁵⁵ See *id.*

⁵⁶ See TARUN, *supra* note 37, at 10.

⁵⁷ See *United States v. King*, 351 F.3d 859 (8th Cir. 2003).

⁵⁸ *Id.* at 862.

⁵⁹ *iCompliance*, THE FCPA BLOG (Oct. 10, 2011, 2:28 AM), <http://www.fcpablog.com/blog/2011/10/10/i-compliance.html>. The blog periodically compiles a list of corporations currently under SEC or DOJ investigation. See *id.*

⁶⁰ *Id.*

⁶¹ See *id.*

⁶² See Apple, Inc. Business Conduct Policy (Updated 07/11) [hereinafter Apple Business Conduct Policy], available at <http://investor.apple.com/governance.cfm>; see also *iCompliance*, *supra* note 59.

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where Apple has a pending application, proposal, or other business.”⁶³ Apple’s definition of “foreign official” parallels that of the OECD’s.⁶⁴

(iv) Corrupt Intent

The anti-bribery provisions of the FCPA are violated only when a bribe prohibited by the Act is made “corruptly.”⁶⁵ Although the Act fails to define “corruptly,” the Eighth Circuit affirmed a jury instruction which defined “corruptly” as: “. . . [A]n act [that] is done . . . voluntarily [a]nd intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.”⁶⁶ The Fifth Circuit accorded this definition in *United States v. Kay (Kay III)*.⁶⁷ The *Kay* court also held that in order to sustain a conviction, the Government must prove beyond a reasonable doubt that the action was performed willfully.⁶⁸ The *Kay* court opted for an intermediate level of criminal “willfulness” meaning that a defendant must have known his actions were unlawful, but does not require knowledge of the specific law, in this case, the FCPA.⁶⁹ While defendants usually deny any knowledge of wrongdoing, circumstantial evidence more often than not proves otherwise.⁷⁰

(v) The Business Nexus Test (a/k/a The Business Purpose Test)

In *Kay I*,⁷¹ the 5th Circuit interpreted the FCPA’s business nexus test, which makes it improper to bribe for the purpose of “securing any improper advantage. . . or retaining business for or with, or directing business to, any person. . .”⁷² Initially, the district court dismissed the indictment, concluding that the FCPA did not cover bribes for the purpose of reducing duties and taxes.⁷³ The district court reasoned that a reduction in duties and taxes did not constitute an “improper advantage” which “assisted [the company] in obtaining or retaining business.” The Fifth Circuit reversed, holding that, as per the legislative history, a reduction in duties and taxes established a potential violation of the FCPA.⁷⁴ Thus, there appears to be some internal tension between the “grease payments” exception⁷⁵ and the business nexus requirement. While facilitating payments are *permissible*, payments made to se-

⁶³ *iCompliance*, *supra* note 59.

⁶⁴ Compare Apple Business Conduct Policy, *supra* note 62, with *OECD Convention*, *supra* note 39, art. 1.4.a.

⁶⁵ See 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a) (2012).

⁶⁶ *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991).

⁶⁷ *United States v. Kay (Kay III)*, 513 F.3d 461, 464 (5th Cir. 2008), *aff’d* 359 F.3d 738 (5th Cir. 2004), *cert. denied*, 129 S.Ct 42 (2008).

⁶⁸ *Id.* at 446. The willfulness standard applies only to individuals who violate the Act. See *id.*

⁶⁹ *Id.* at 448.

⁷⁰ TARUN, *supra* note 37, at 11.

⁷¹ *United States v. Kay (Kay I)*, 359 F.3d 738 (5th Cir. 2004).

⁷² 15 U.S.C. § 78dd-1(a)(1) (2012).

⁷³ *Kay I*, 359 F.3d at 740.

⁷⁴ *Id.* at 748-50 (“The congressional target was bribery paid to engender assistance in improving the business opportunities and the payor or his beneficiary, irrespective of whether that assistance be direct or indirect, and irrespective of whether it be related to administering the law, awarding, extending, or renewing a contract, or executing or preserving an agreement.”).

⁷⁵ See discussion *infra* Part I.B.viii for an explanation of the “grease payments” exception.

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cure an “improper advantage” are *impermissible*.⁷⁶ It remains to be seen where the line between “improper advantage” and “facilitating payment” will be drawn.

(vi) “Knowledge”

The FCPA’s *mens rea* requirement is satisfied if: “(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.”⁷⁷

The legislative history addresses the problem of willful ignorance.⁷⁸ According to the House Conference Report, the knowledge requirement was meant to reflect that of existing law: “The knowledge requirement is not equivalent to ‘recklessness.’”⁷⁹ It requires an awareness of a high probability of the existence of the circumstance. As the Second Circuit stated in *United States v. Jacobs*: “. . . [T]he element of knowledge may be satisfied by proof that a defendant deliberately closed his eyes to what otherwise [would] have been obvious to him.”⁸⁰ Thus, in cases of willful ignorance, knowledge may be inferred where the defendant has notice of the high probability of the existence of the fact and has failed to establish an honest, contrary disbelief.⁸¹ This intent was codified in the FCPA.⁸²

(vii) Third Parties

The FCPA also prohibits making payments to third parties if the payor “knows” that “all or a portion of such money or thing of value” will be given to induce a foreign official, political party, party official, or candidate for the purposes prohibited by the Act.⁸³ This rule resulted from findings that “foreign sales agents were responsible for many of the questionable foreign payments disclosed during the 1970s.”⁸⁴ According to practitioners’ handbooks, the third-party payment provision continues to confuse compliance officers regarding potential liability.⁸⁵ “A frequent concern is the extent to which a U.S. corporation may be liable under the FCPA for the improper conduct of its sales agent or consultant, or other third-party.”⁸⁶ There are generally two circumstances when a U.S. corporation may be subject to potential liability under the FCPA when a third party makes improper payments. The first is when the corporation plans on using the third party as a proxy for making illegal payments.⁸⁷

⁷⁶ Compare 15 U.S.C. § 78dd-1(a)(1)(A)(ii), (B) (2012), with *id.* §78dd-1(b). See also TARUN, *supra* note 37, at 12; LUCINDA A. LOW, CLAUDIUS O. SOKENU, DONALD ZARIN, THE FOREIGN CORRUPT PRACTICES ACT: 2009 COPING WITH HEIGHTENED ENFORCEMENT RISKS 158-160 (2009).

⁷⁷ 15 U.S.C. § 78dd-1(f)(2)(A)(i), (ii) (2012).

⁷⁸ H.R. REP. NO. 100-576, at 920 (1977) (Conf. Rep.).

⁷⁹ *Id.*

⁸⁰ *Id.* (citing *United States v. Jacobs*, 475 F.2d 270, 277-88 (2nd Cir. 1973)).

⁸¹ *Id.* at 921.

⁸² “When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.” 15 U.S.C. § 78dd-1(f)(2)(B) (2012).

⁸³ *Id.* §§ 78dd-1(a)(3), -2(a)(3), -3(a)(3).

⁸⁴ See LOW, SOKENU, ZARIN, *supra* note 76, at 145.

⁸⁵ *Id.*; see also TARUN, *supra* note 37, at 13.

⁸⁶ LOW, SOKENU, ZARIN, *supra* note 76, at 145; see also TARUN, *supra* note 37, at 13.

⁸⁷ LOW, SOKENU, ZARIN, *supra* note 76, at 147.

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The second circumstance arises when the corporation originally had no plans to use the third party as proxy, but authorizes an improper payment after the payment is requested by a government official or offered by the third party.⁸⁸

Thus, it is clear that vicarious liability may attach as between parent and subsidiary corporations acting as third party proxies. However, whether successor liability attaches to corporations that acquire corporations which violated the FCPA prior to the merger has not been decided.⁸⁹

(viii) Exceptions and Affirmative Defenses

The FCPA lists one exception and two affirmative defenses.⁹⁰ The aptly-named “routine governmental action” exception permits payments that, if made for the purpose of expediting routine governmental action, would otherwise be considered improper.⁹¹ The Act narrowly defines “routine governmental action” as ministerial actions or public functions which are normally performed by government officials.⁹² Excluded from the exception are decisions by foreign officials on core business matters such as granting government contracts.⁹³

The first affirmative defense to actions under the FCPA is that “the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s . . . country.”⁹⁴ In *U.S. v. Kozeny*, the defendant invoked this affirmative defense arguing that the bribes paid were legal under the laws of the Republic of Azerbaijan.⁹⁵ The district court rejected the argument, distinguishing between relief of a violation of law after the fact and the violation of the law itself.⁹⁶ This indicates that there must be at least some express provision of law in the foreign country that affirmatively permits the payment in question.⁹⁷

⁸⁸ *Id.* at 147.

⁸⁹ See U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FCPA 14 n.47 (2010) [hereinafter RESTORING BALANCE].

⁹⁰ 15 U.S.C. §§ 78dd-1(b), (c) (2012).

⁹¹ Also known as “grease payments.” See *United States v. Kay (Kay III)*, 513 F.3d 432 (5th Cir. 2007).

⁹² See 15 U.S.C. § 78dd-1(f)(3)(A) (2012) (obtaining permits, processing papers, providing police protection, mail delivery, or routine inspections, providing phone service, power, and water supply, and “actions of a similar nature” are expressly defined as routine governmental action).

⁹³ 15 U.S.C. § 78dd-1(f)(3)(B) (2012). See also *W.S. Kirkpatrick & Co., Inc. v. Env’tl Tectonics Corp., Int’l*, 493 U.S. 400, 404-05 (1990) (applying FCPA where defendant bribed Nigerian officials to obtain construction contract from Nigerian government); *United States v. Giffen*, 326 F.Supp.2d 497, 501 (S.D.N.Y. 2004) (holding exception did not apply to claim that officer of American corporation had bribed government official to award lucrative contract to that corporation).

⁹⁴ 15 U.S.C. § 78dd-1(c)(1) (2012).

⁹⁵ *United States v. Kozeny*, 582 F.Supp.2d 535, 537 (S.D.N.Y. 2008) (“[the defendant] . . . argues that pursuant to Azeri law, any criminality associated with payments was excused when he reported them to the President of Azerbaijan.”).

⁹⁶ *Id.* at 539 (“[a]n individual may be prosecuted under the FCPA for a payment that violates foreign law even if the individual is relieved of criminal responsibility for his actions by a provision of foreign law.”).

⁹⁷ See *id.* at 539. (“For purposes of the FCPA’s affirmative defense, the focus is on the *payment*, not the payer. A person cannot be guilty of violating the FCPA if the payment was *lawful* under foreign law. But there is no immunity from prosecution under the FCPA if a person could not have been prosecuted in the foreign country due to a technicality (e.g., time-barred) or because a provision in the foreign law “relieves” a person of criminal

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The court in *Kozeny* also held that in circumstances of true extortion, the defendant would lack the requisite “corrupt” intent.⁹⁸ The court looked to the legislative history of the FCPA, finding that, “true extortion situations would not be covered by [the FCPA].”⁹⁹ Accordingly, while the FCPA applies in situations where the government demands the bribe as a cost for entering the market or securing a contract, it does not apply in situations where officials demand payment “to keep an oil rig from being dynamited.”¹⁰⁰ Thus, “true extortion” is also an exception to FCPA liability.

Currently, the Act of State Doctrine¹⁰¹ has not provided a useful defense for defendants that seek its shelter.¹⁰² In *U.S. v. Giffen*,¹⁰³ the defendant was authorized by the Kazakh government to “establish, maintain and operate bank accounts. . .to receive fees, deposits, bonuses or other funds on behalf of the [Kazakh] Government, and maintain appropriate accounts in international financial organizations and banks.”¹⁰⁴ Giffen claimed that in acting as a Kazakh government representative, his payments to senior Kazakh officials were shielded from FCPA scrutiny.¹⁰⁵ The district court rejected Giffen’s argument, holding that Giffen’s letters of appointment “fail[ed] to show that his secret payments constituted official acts of Kazakhstan.”¹⁰⁶ Lastly, the court also sided with courts that determined the Act of State Doctrine does not reach “acts committed by foreign sovereign in the course of their purely commercial operations.”¹⁰⁷ The act of state doctrine will not shield a defendant from FCPA liability even if he is permitted to make secret payments by the foreign official’s government.¹⁰⁸

Payments made for bona fide expenditures are also protected under the FCPA.¹⁰⁹ The FCPA allows payments made, for example, for travel and lodging expenses incurred by foreign officials that are directly related to “the promotion, demonstration, or explanation of products or services.”¹¹⁰ The Act also permits payments that are directly related to “the execution or performance of a contract with the foreign government or agency.”¹¹¹ To date, no case has ruled on what constitutes a valid bona fide expenditure.

responsibility. An individual may be prosecuted under the FCPA for a payment that violates foreign law even if the individual is relieved of criminal responsibility for his actions by a provision of the foreign law.”)

⁹⁸ *Id.* at 540.

⁹⁹ *Id.* (citing S. REP. NO. 95-114, at 10-11 (1977)).

¹⁰⁰ *Id.*

¹⁰¹ The doctrine holds that in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from sitting in judgment on acts of a governmental character done by a foreign state within its own territory. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 443 (1987).

¹⁰² See *Kozeny*, 582 F.Supp.2d at 503.

¹⁰³ *United States v. Giffen*, 326 F.Supp.2d 497 (S.D.N.Y. 2004).

¹⁰⁴ *Id.* at 502.

¹⁰⁵ *Id.* at 503.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (quoting *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706 (1976) (plurality opinion)).

¹⁰⁸ See *id.*

¹⁰⁹ See 15 U.S.C. § 78dd-1(c) (2012).

¹¹⁰ *Id.* § 78dd-1(c)(2)(A).

¹¹¹ *Id.* § 78dd-1(c)(2)(B).

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(ix) Penalties

The FCPA provides for both civil and criminal penalties.¹¹² Domestic concerns that violate the Act and are not natural persons “shall be fined no more than [\$2 million.]”¹¹³ In actions brought by the Attorney General, the same domestic concerns are subject to penalties no greater than \$10,000.¹¹⁴ Natural persons who are officers, directors, employees, agents, or stockholders of domestic concerns are subject to a maximum fine of \$100,000 and/or five years imprisonment.¹¹⁵ The civil penalties for the same mirror that of those for domestic concerns.¹¹⁶ Corporations may not indemnify their officers, directors, employees, agents or stockholders against FCPA fines.¹¹⁷

C. The Recordkeeping Provisions

The FCPA amended the Securities Exchange Act of 1934 (hereinafter “‘34 Act” or “Securities Exchange Act”) by adding record-keeping and internal control requirements for issuers subject to the Securities Exchange Act’s reporting provisions.¹¹⁸ Every issuer that is registered with the SEC or required to file reports with the SEC, pursuant to the ‘34 Act, is a subject of the FCPA’s internal controls provisions.¹¹⁹ “As a result [of the FCPA], even non-material payments not recorded accurately could constitute a violation of U.S. law. The principal accounting provisions are contained in 15 U.S.C. §78m(b)(2) and b(5), which state the record-keeping and internal control requirements, as well as the necessary standard to impose criminal liability for failure to meet these requirements.”¹²⁰ The record-keeping provisions can be summarized as follows:

The FCPA requires every issuer to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets.” The Act broadly defines “records” to include “accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type.” “Reasonable detail” means such level of detail as would satisfy prudent officials in the conduct of their own affairs. There is no materiality requirement for a books and records violation. An individual or entity may be criminally liable if he knowingly falsifies a book, record, or account. However, inadvertent mistakes will not give rise to enforcement actions or prosecutions.¹²¹

¹¹² See *id.* § 78dd-2(g).

¹¹³ *Id.* § 78dd-2(g)(1)(A).

¹¹⁴ *Id.* § 78dd-2(g)(1)(B).

¹¹⁵ *Id.* § 78dd-2(g)(2)(A).

¹¹⁶ *Id.* § 78dd-2(g)(2)(B).

¹¹⁷ See *id.* § 78dd-2(g)(3).

¹¹⁸ Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act - 1977 to 2010*, 12 SAN DIEGO INT’L L.J. 89, 96 (2010) (citing Andrea Dahms & Nicolas Mitchell, *Foreign Corrupt Practices Act*, 44 AM. CRIM. L. REV. 605 (2007)).

¹¹⁹ See 15 U.S.C. § 78m(a) (2012); TARUN, *supra* note 37, at 18-19.

¹²⁰ Bixby, *supra* note 118, at 96.

¹²¹ TARUN, *supra* note 37, at 19.

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Further, the FCPA applies to a broad class of issuers, including those that have absolutely no foreign operations.¹²² If an issuer owns 50% or more of a foreign subsidiary's stock, it must ensure the subsidiary adheres to the aforementioned provisions.¹²³ Lastly, the record-keeping provisions do not apply to domestic concerns or natural persons that are not issuers under the Securities Exchange Act.¹²⁴

D. The Current Enforcement Environment

Recently, the SEC and DOJ have taken a decidedly more aggressive stance on FCPA prosecutions by increasing the number of FCPA enforcement actions and seeking larger penalties.¹²⁵ Prior to establishing a dedicated FCPA unit at the SEC, and before the DOJ turned up its FCPA rhetoric, the federal government "averaged only about three FCPA-related prosecutions a year."¹²⁶ The year 2008 illustrates the magnitude of the impact of the federal government's policy reversal: the DOJ and SEC settled a combined 890 million dollars, including the 800 million dollar *Siemens* settlement, between eleven organizations and twenty-six individuals.¹²⁷ Former Attorney General, John Ashcroft, cited greater awareness of the human cost of corruption, a climate of distrust of the financial sector, and the growing nexus between corruption and national security as the reasons behind the sudden change.¹²⁸ In 2009, the agencies settled 641 million dollars in financial damages.¹²⁹ In 2010 that figure grew to 1.8 billion dollars.¹³⁰ In 2011, the DOJ and SEC settled fifteen cases for a total of 508.6 million dollars.¹³¹ In late 2011 and early 2012, the DOJ had mixed results with FCPA enforcement.¹³² To be sure, President Barack Obama's administration has sustained the enforcement

¹²² See 15 U.S.C. § 78m(b)(2) (2012); see also Bixby, *supra* note 118, at 96; TARUN, *supra* note 37, at 19.

¹²³ See 15 U.S.C. § 78m(b)(6) (2012); see also Bixby, *supra* note 118, at 96-97; TARUN, *supra* note 37, at 20.

¹²⁴ TARUN, *supra* note 37, at 20.

¹²⁵ See generally Bixby, *supra* note 118, at 102-09 (discussing the recent expansion of FCPA enforcement actions); Jon Jordan, *The New UK Bribery Act: A Global Trend Towards Greater Accountability in the Prevention of Foreign Bribery*, 7 N.Y.U. J.L. & Bus. 845, 861-62 (2011) (discussing aggressive rhetoric from the DOJ and SEC's contemporaneous establishment of a new FCPA unit); RESTORING BALANCE, *supra* note 89, at 1-2; SHEARMAN & STERLING, RECENT TRENDS AND PATTERNS IN FCPA ENFORCEMENT 4 (2008), available at http://www.shearman.com/files/upload/LIT_FCPA_Trends_121208.pdf (Average SEC/DOJ proceedings grew from 1.4 in 1993-97 to 17.2 in 2004-2008).

¹²⁶ Bixby, *supra* note 118, at 104-05 n.60.

¹²⁷ 2008 FCPA Enforcement Index, THE FCPA BLOG (Dec. 29, 2008, 7:08 PM), <http://www.fcpablog.com/blog/2008/12/30/2008-fcpa-enforcement-index.html>; see also SEC Charges Siemens AG for Engaging in Worldwide Bribery, SEC. & EXCH. COMM'N, (Dec. 15, 2008), <http://sec.gov/news/press/2008/2008-294.htm>.

¹²⁸ Thomas Fox, FCPA Compliance, FCPA Enforcement in 2009, CORPORATE COMPLIANCE INSIGHTS (May 19, 2009), <http://www.corporatecomplianceinsights.com/fcpa-compliance-fcpa-enforcement-obama-mcnulty-ashcroft-comments-on-foreign-corrupt-practices-act/>.

¹²⁹ 2010 FCPA Enforcement Index, THE FCPA BLOG (Jan. 03, 2011, 7:02 AM), <http://www.fcpablog.com/blog/2011/1/3/2010-fcpa-enforcement-index.html>.

¹³⁰ *Id.*

¹³¹ 2011 FCPA Enforcement Index, THE FCPA BLOG (Jan. 2, 2012, 7:18 AM), <http://www.fcpablog.com/blog/2012/1/2/2011-enforcement-index.html>.

¹³² See "Firm to Pay \$54.6M to Settle FCPA Charges," Sec. Reg. & L. Rep. (BNA) No. 44, at 155 (Sep. 8, 2009) (On January 17, 2012, a Tokyo-based trading company agreed to pay \$54.6 million as part of a deferred prosecution agreement with the DOJ over its alleged role in bribing Nigerian officials.). *But see* United States v. Aguilar, No. CR10-01031(A)-AHM, 2011 WL 6097144 (C.D. Cal. 2011) (In late December, 2011, a federal judge in California dismissed a prosecution of one of the biggest FCPA cases ever as a consequence of prosecutorial misconduct.). See also United States v. O'Shea, No. H:09-CR-629 (S.D. Tex. 2012); *Judge to*

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policies of former President George W. Bush. The corporations targeted most recently by the DOJ and SEC are a diverse group of domestic and foreign corporations.¹³³

II. SOCIAL, POLITICAL AND ECONOMIC COSTS OF CORRUPTION

The economic, political, and human costs of corruption are legion.¹³⁴ Prior to enacting the FCPA, the generally accepted view was that corruption greased the wheels of commerce.¹³⁵ In the late 1960s it was thought that corruption simply increases market efficiency by making bureaucracies more efficient by “opening market access in heavily regulated closed bureaucratic economies.”¹³⁶ It was argued that corruption could benefit political development by contributing to: (1) economic development (through capital formation, cutting red tape, and entrepreneurship and incentives), (2) national integration (through elite integration and non-elite integration), and (3) increasing governmental capacity (by augmenting legal material incentives).¹³⁷ Thus, it was argued, through the multitude of benefits derived from bribery, emerging nations would soon transform into developed, industrious nations.

Today, comprehensive economic studies have dispelled this myth.¹³⁸ Corruption in the form of bribery is more accurately described as an “eco-cycle.”¹³⁹ Economists ask, “what does a rational, self-interest maximizing (and now corrupt) government official do after he has just been bribed? He looks for more opportunities to maximize his economic self-interest” - presumably by soliciting bribes with increased frequency.¹⁴⁰ In order to create more opportunities to solicit bribes, the government official enacts more regulations.¹⁴¹ Regulations generate bribes, and bribes generate regulations by virtue of the economic incentives behind governmental and private actors.

DOJ: *Your Principal Witness Knows Almost Nothing*, THE FCPA BLOG (Feb. 19, 2012, 12:08 PM), <http://www.fcpablog.com/blog/2012/1/19/judge-to-doj-your-principal-witness-knows-almost-nothing.html> (In January 2012, a Houston judge acquitted a defendant *sua sponte*, saying the testimony of the prosecution’s star witness was “generally gossip.”); *Foolish And Unprofessional’ Behavior Infected FCPA Prosecutions*, THE FCPA BLOG (Feb. 22, 2012, 6:28 AM), <http://www.fcpablog.com/blog/2012/2/22/foolish-and-unprofessional-behavior-infected-fcpa-prosecutio.html> (In February, 2012, the DOJ dropped its own sting case prosecution.).¹³³ These targeted corporations include 3M, Alcoa, Inc., Bristol-Meyers Squibb, Covidien PLC, Embraer SA, Griflos SA, Halliburton Copmany, Koch Industries, Kraft Foods Inc., and Hewlett Packard, among others. See, e.g., *The Corporate Investigation List* (March 2012), THE FCPA BLOG (Apr. 3, 2012, 2:28 AM), <http://www.fcpablog.com/blog/2012/4/3/the-corporate-investigations-list-march-2012.html>.

¹³⁴ See, e.g., Elizabeth Spahn, *Nobody Gets Hurt?*, 41 GEO. J. INT’L L. 861, 869 (2010) (arguing that bribes destroy rational markets); SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOV’T* 26 (1999) (showing that “pervasive corruption undermines the legitimacy of government” and that corruption deters foreign direct investment (FDI)); Paolo Mauro, *Corruption and Growth*, 110 Q. J. ECON. 681 (1995) (finding that corruption lowers investment, which, in turn, lowers economic growth).

¹³⁵ See, e.g., Spahn, *supra* note 134, at 864; J.S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417, 419-21 (1967).

¹³⁶ Spahn, *supra* note 134, at 864-65.

¹³⁷ Nye, *supra* note 135, at 419-20.

¹³⁸ See, e.g., Spahn, *supra* note 134, at 865; Mauro, *supra* note 134; ROSE-ACKERMAN, *supra* note 134; Susan Rose-Ackerman, *The Political Economy of Corruption - Causes and Consequences*, PUBLIC POLICY FOR THE PRIVATE SECTOR, Apr. 1996; INTERNATIONAL DEVELOPMENT COMMONS SELECT COMMITTEE, *THE IMPACT OF CORRUPTION ON DEVELOPMENT*, REPORT, 2000-1, H.C. 39-I, at ¶1 (U.K.), available at <http://www.parliament.the-stationery-office.co.uk/pa/cm200001/cmselect/cmintdev/39/3908.htm>.

¹³⁹ Spahn, *supra* note 134, at 866.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

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The immediate effects of this “eco-cycle” may not be readily apparent. However, numerous studies show this seemingly innocuous quid pro quo radically impacts economies, political stability, and social welfare.

A. Economic Costs

Bribes destroy rational markets by ignoring fundamental tenants of free market systems.¹⁴² “A fundamental tenant of a free market system is that economic transactions should be based solely on the price and quality of a product and the service provided by the seller.”¹⁴³ As discussed in section II, *supra*, governmental bribe-takers make the basis of their regulatory decision wholly personal. By accepting a bribe, governmental bribe-takers permit private bribe-givers to circumvent traditional factors affecting market prices such as quality and service.¹⁴⁴ Thus, a product is no longer subject to rational market forces. Rather, goods pass through the channels of commerce solely because its proponent was able to pay off a government official.

Further, healthy, free-market competition is stifled by corruption.¹⁴⁵ In a corrupt system, government-funded projects are selected on bribe-getting opportunities for officials.¹⁴⁶ Consequently, competitors are selected on the basis of their willingness to bribe officials and “consideration[s] of traditional market factors (e.g., price, service, quality),”¹⁴⁷ are thrown out the window. Thus, an unqualified competitor may win a government bid solely on the basis of an unlawful payment rather than its economic advantages over other competitors.

Corruption also restricts market entry.¹⁴⁸ Businesses attempting to enter markets in corrupt environments become targets of bribe solicitations.¹⁴⁹ This presents multinational corporations with a dilemma. Multinational corporations are made the targets of bribe solicitation to gain entry or upon entering these markets, and if accepted, the corporation may face

¹⁴² See *id.* at 869-75; Philip M. Nichols, *Are Extraterritorial Restrictions on Bribery a Viable and Desirable Int'l Policy Goal Under the Global Conditions of the Late Twentieth Century?*, 20 MICH. J. INT'L L. 451, 463 (1999) (quoting Mark B. Bader & Bill Shaw, *Amendment of the Foreign Corrupt Practices Act*, 15 N.Y.U. J. INT'L L. & POL. 627, 627 (1983)); see also Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 249 (1997).

¹⁴³ Nichols, *supra* note 142, at 463 (quoting Mark B. Bader & Bill Shaw, *Amendment of the Foreign Corrupt Practices Act*, 15 N.Y.U. J. INT'L L. & POL. 627, 627 (1983)).

¹⁴⁴ Spahn, *supra* note 134, at 869; see also Nichols, *supra* note 142, at 463 (“Bribery causes government decision makers to ignore fundamental parameters of economic decision making.”).

¹⁴⁵ Spahn, *supra* note 134, at 869; see also Nichols, *supra* note 142, at 463.

¹⁴⁶ Spahn, *supra* note 134, at 869.

¹⁴⁷ *Id.* at 870.

¹⁴⁸ *Id.* at 871-75.

¹⁴⁹ During the period between July 1, 2007 and June 30, 2008, 148 reports of bribery in China were filed with TRACE International. Of those 148 reports, “85% were requested by an individual affiliated with the government.” *BRIBELINE China Report Provides New Details on Bribery: Most Reported Incidents Involve Individuals Affiliated with Government; Avoiding Harm Most Common Purpose*, TRACE INT'L (July 15, 2008), https://secure.traceinternational.org/data/public/documents/China_PR_and_Report-64652-1.pdf. In Mexico, TRACE reported that between July 11, 2007 and January 6, 2010, over 85% of all bribes were solicited by people associated with the government. See *Bus. Registry For Int'l Bribery and Extortion: 2010 Mexico Report*, TRACE INT'L, <https://secure.traceinternational.org/data/public/documents/2010MexicoBRIBELINEReport-64590-1.pdf> (last visited Feb. 12, 2012). In India, TRACE reported that 91% of all bribe demands were made by individuals associated with the government. See *id.*; see also Rose-Ackerman, *supra* note 138, at 4.

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criminal prosecutions and civil sanctions at home or in other OECD member states.¹⁵⁰ If the company rejects a government official's solicitation, it may not enter the market at all. Businesses use the dilemma described above to harass other competitors. Companies use corrupt business environments to "raise costs and restrict market entry for [their] competitors. . . [c]apturing the state - the regulatory, administrative and law enforcement officials of a government - by bribing higher-level officials is the mechanism used by the now-corrupt corporation."¹⁵¹

The economic harm resulting from corruption is magnified in developing countries.¹⁵² "For example, in 1997, the International Monetary Fund (hereinafter "IMF") and the World Bank together suspended over \$250 million in loans to Kenya because of the country's inability and refusal to address bribery issues within its government."¹⁵³

B. Political and Governmental Costs

Corrupt systems are inherently unstable.¹⁵⁴ Wide-spread corruption undermines the legitimacy of governments because it diminishes the power of the state to meet citizens' expectations.¹⁵⁵ There are traditional criteria that justify governmental action.¹⁵⁶ An honest civil servant following these criteria maintains the power of the state and its ability to play its proper role.¹⁵⁷ A corrupt civil servant reduces the power of the state and its ability to play its proper role.¹⁵⁸ If the power of the state is reduced in this manner it will no longer be able to fulfill its function in society. In such circumstances the government loses its legitimacy in the eyes of its citizens as it no longer has the power to meet its citizens' expectations. The allocative, redistributive, and stabilizing roles of government become warped when government is corrupt.¹⁵⁹ In a setting where these perversions of the government's role are wide-spread it can fairly be said that the government as a whole lacks accountability.¹⁶⁰ In nascent democracies the consequences are greater as an accountable leadership cannot develop from a corrupt climate.¹⁶¹

¹⁵⁰ See Jordan, *supra* note 125, at 861-63; SHEARMAN & STERLING, *supra* note 125.

¹⁵¹ Spahn, *supra* note 134, at 872-73.

¹⁵² *Frequently Asked Questions about Corruption*, TRANSPARENCY INT'L, http://transparency.org/news_room/faq/corruption_faq (last visited Oct. 22, 2011) ("Though [the cost of corruption] is harmful in the established democracies, it is even more so in newly emerging ones."); see also INTERNATIONAL DEVELOPMENT COMMONS SELECT COMMITTEE, THE IMPACT OF CORRUPTION ON DEVELOPMENT, REPORT, 2000-1, H.C. 39-1, at ¶1 (U.K.), available at <http://www.parliament.the-stationery-office.co.uk/pa/cm200001/cmselect/cmintdev/39/3908.htm>.

¹⁵³ Bill Shaw, *The Foreign Corrupt Practices Act and Progeny: Morally Unassailable*, 33 CORNELL INT'L L.J. 689, 691-92 (2000).

¹⁵⁴ See *id.* at 692-94.

¹⁵⁵ See Rose-Ackerman, *supra* note 138, at 4; see also Vito Tanzi, *Corruption, Corruption, Governmental Activities, and Markets*, FIN. & DEV., Dec. 1995, at 26.

¹⁵⁶ See Tanzi, *supra* note 155, at 26.

¹⁵⁷ See *id.*

¹⁵⁸ See *id.*

¹⁵⁹ *Id.*

¹⁶⁰ See *id.*

¹⁶¹ Strong civil society, the bedrock of a strong democracy, also fails to develop in corrupt climates for similar reasons. See Kenneth Newton, *Trust, Social Capital, Civil Society, and Democracy*, 22 INT'L POL. SCI. REV. 201, 212 (2001); see also TRANSPARENCY INT'L, *supra* note 152.

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Many African countries illustrate that reality.¹⁶² Budgets of corrupt African governments reflect the needs and interests of elites at the expense of the poor and disadvantaged groups.¹⁶³ Supply of medicine for the poor, feeder roads for villages, and effective public health programs are thrown to the wayside.¹⁶⁴ Rather, airports, military hardware, and highways are all given higher priority in national budgets because their development is in the interest of the nations' rulers and elites.¹⁶⁵ A 2002 United Nations Human Development Report concludes that the "[i]nability - or reluctance - of the elected governments to provide the essential public services . . . [undermines] the value of democracy and effectiveness of electoral politics."¹⁶⁶

Corruption also diminishes the role of government in promoting justice. The rule of law becomes meaningless by virtue of a bribe-giver's ability to buy their way around the law.¹⁶⁷ Citizens receive the message that government is up for sale and consequently lose trust in the political system, its institutions and leadership.¹⁶⁸

The character of transnational relationships are degraded by bribery.¹⁶⁹ Rather than building relationships with other nations, corrupt administrations are composed of individuals more interested in seeking bribes.¹⁷⁰ This misplaced focus translates into weaker relationships with potential economic partners, including private actors.¹⁷¹ This also means that actors are free to buy monopolies from the state, relieving them of the incentive to develop quality relationships.¹⁷²

C. Social Costs

The victims of the economic and political consequences of corruption are the innocent citizens of a corrupt nation. At the turn of the millennium, three studies found a significant positive impact of corruption on income inequality.¹⁷³ Those studies found that corruption leads to the obstruction of public education and violation of human rights for the poor.¹⁷⁴ A systemic lack of accountability has led to favoring the needs and interests of elites

¹⁶² See U.N. Dev. Programme, *Human Dev. Rep. 2002: Regional Overview of the Impact of Failures of Accountability on Poor People*, 17-18 (2002) (Ahmed Mohiddin) [hereinafter *Human Dev. Rep.*].

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Nichols, *supra* note 142, at 468.

¹⁶⁸ *Id.*; see also TRANSPARENCY INT'L, *supra* note 152.

¹⁶⁹ Nichols, *supra* note 142, at 469 (arguing that international relationships are important to maintaining global security).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*; see also Philip M. Nichols, *Corruption as an Assurance Problem*, 19 AM. U. INT'L. L. REV. 1307, 1321-26 (2004).

¹⁷² Nichols, *supra* note 171, at 1323.

¹⁷³ JOHANN GRAF LAMBSDORFF, *THE INSTITUTIONAL ECONOMICS OF CORRUPTION AND REFORM: THEORY, EVIDENCE AND POLICY* 91-92 (2007).

¹⁷⁴ See generally 1 DEEPA NARAYAN, ET AL., *CAN ANYONE HEAR US?: VOICES FROM 47 COUNTRIES* (1999) (discussing the relationship between corrupt governments and the poor); *Corruption: The Invisible Price-tag on Education*, CIET INT'L (Oct. 12, 1999), http://www.ciet.org/_documents/200622318486.doc (discussing instances where corruption has been a direct barrier to obtaining a fundamental education); *Human Dev. Rep.*, *supra* note 162 (discussing consequences of corruption for the poor, especially in Africa).

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and the expense of poor and disadvantaged groups.¹⁷⁵ In many African countries, this results in the denial of adequate education for non-elite individuals.¹⁷⁶ Poor people are disenfranchised because corruption reduces the efficiency and effectiveness of delivering governmental services.¹⁷⁷ In India, high levels of corruption discourage impoverished individuals from taking out loans.¹⁷⁸ Furthermore, accountability failures stemming from corruption may lead to violent conflicts and civil wars.¹⁷⁹

When foreign corporations bribe government officials they contribute to an environment where society acquiesces to corruption and its concomitant effects.¹⁸⁰ Corruption is correlated to income inequality,¹⁸¹ prevents children from receiving a basic education,¹⁸² creates a serious obstacle to the poor seeking government services,¹⁸³ and can even be attributed to creating violent conflict and civil war.¹⁸⁴ Acknowledging the human cost of corruption, the government cites it as a major factor influencing the growing momentum of FCPA enforcement.¹⁸⁵

III. SUGGESTED REFORMS AND OPPOSITION TO SUGGESTED REFORMS

As a result of current enforcement policies, the FCPA has taken heat from the media and other commentators, but especially from the U.S. Chamber of Commerce (hereinafter "Chamber").¹⁸⁶ The Chamber, and those that support reforming the FCPA, argue that the Act has made U.S. businesses less competitive than their foreign counterparts, that the it has had a chilling effect on U.S. business.¹⁸⁷ On the other hand, proponents of the FCPA argue that the Chamber's proposals would be a serious setback to the fruits the FCPA has helped produce in the way of promoting good corporate governance and fighting public corruption.¹⁸⁸ This section summarizes the Chamber's arguments and then summarizes arguments in favor of maintaining the *status quo*. This section concludes with an analysis of the FCPA reform debate.

¹⁷⁵ *Human Dev. Rep.*, *supra* note 162, at 17.

¹⁷⁶ *Id.* at 18.

¹⁷⁷ See NARAYAN, ET AL., *supra* note 174, at 73.

¹⁷⁸ *Id.* at 74.

¹⁷⁹ *Human Dev. Rep.*, *supra* note 162, at 17-18.

¹⁸⁰ See SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT 22 (1999); *Corruption: The Invisible Price-tag on Education*, *supra* note 174.

¹⁸¹ LAMBSDORFF, *supra* note 173, at 91.

¹⁸² *Corruption: The Invisible Price-tag on Education*, *supra* note 174.

¹⁸³ NARAYAN, ET AL., *supra* note 174.

¹⁸⁴ *Human Dev. Rep.*, *supra* note 162, at 17.

¹⁸⁵ Thomas Fox, *FCPA Compliance, FCPA Enforcement in 2009*, CORPORATE COMPLIANCE INSIGHTS (May 19, 2009), <http://www.corporatecomplianceinsights.com/fcpa-compliance-fcpa-enforcement-obama-mcnulty-ashcroft-comments-on-foreign-corrupt-practices-act/>.

¹⁸⁶ See RESTORING BALANCE, *supra* note 89, at 6-7; discussion *supra* Part I.D.

¹⁸⁷ RESTORING BALANCE, *supra* note 89, at 6-7. Aggressive enforcement may also work to neutralize FCPA deterrence. Joe Cassin, *Has More FCPA Enforcement Brought Less Deterrence?*, THE FCPA BLOG (Feb. 8, 2012, 4:28 AM), <http://www.fcpablog.com/blog/2012/2/8/has-more-fcpa-enforcement-brought-less-deterrence.html>.

¹⁸⁸ See BUSTING BRIBERY, *supra* note 1, at 5.

A. The Chamber's Arguments in Favor of Reform

The Chamber was never in favor of the FCPA.¹⁸⁹ The Chamber believed there were better ways of dealing with the illicit payment crisis, including the SEC's voluntary disclosure program.¹⁹⁰ Furthermore, the Chamber believed the FCPA would not do much in the way of curbing foreign bribery.¹⁹¹ Today, the Chamber sets the stage for its argument in favor of narrowing the FCPA's scope by pointing out its costly enforcement.¹⁹² In 1999, the Congressional Research Service estimated that the anti-bribery provisions have cost one trillion dollars annually in lost U.S. export trade.¹⁹³

Where foreign corporations are getting ahead by paying bribes, the Chamber argues it is a problem that U.S. corporations are not allowed to do the same. The problem stems from the broad language of the FCPA which lends itself to covering behavior traditionally considered to be legitimate. The statute's broad language, argues the Chamber, creates uncertainty for multinational corporations doing business overseas.

The Chamber's solution is to amend the FCPA "to make clear what is and what is not a violation. . . The FCPA should incentivize [companies] to establish compliance systems that will actively discourage and detect bribery, but should also permit companies that maintain such effective systems to avail themselves of an affirmative defense to charges of FCPA violations."¹⁹⁴ Their publication recommends five major transformations to the FCPA: (1) adding a compliance defense; (2) limiting a company's liability for the prior actions of a company it has acquired; (3) adding a "willfulness" requirement for corporate criminal liability; (4) limiting a company's liability for acts of a subsidiary; and (5) defining "foreign official" under the statute.¹⁹⁵

First, the Chamber recommends adding a compliance defense as it would increase compliance with the FCPA.¹⁹⁶ Additionally, it would give corporations some measure of protection from aggressive or misinformed prosecutors by foreclosing indictments based on violations arising from the misconduct of rogue employees.¹⁹⁷ A compliance defense would

¹⁸⁹ See *Unlawful Corporate Payments Act of 1977: Hearing on H.R. 3815 and H.R. 1602 Before the Subcomm. on Consumer Protection and Finance of the H. Comm. on Interstate and Foreign Commerce*, 95th Cong. 234-237 (1977) (statement by J. Jefferson Staats, Staff Associate of the Chamber of Commerce of the United States of America).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² RESTORING BALANCE, *supra* note 89, at 5 (citing Melissa Klein Aguilar, *How to Size Up, & Manage, FCPA Investigation Costs*, COMPLIANCE WEEK (Aug. 17, 2010), <http://www.complianceweek.com/pages/how-to-size-up-and-manage-fcpa-investigation-costs/article/186914>) (noting the cost of FCPA compliance and enforcement can range into the tens or hundreds of millions).

¹⁹³ *Id.* at 6 (citing P. Beck et al., *The Impact of the Foreign Corrupt Practices Act on US Exports*, 12 MANAGERIAL AND DECISION ECON. 295 (1991); Scott P. Boylan, *Organized Crime in Russia: Implications for U.S. and International Law*, 19 FORDHAM INT'L L.J. 1999, 2015-2022 (1996); John Bray, *International Business Attitudes Toward Corruption*, GLOBAL CORRUPTION REPORT 316 (2004); Michael V. Seitzinger, Cong. Research Serv., RL 30079, *Foreign Corrupt Practices Act* (Mar. 3, 1999).

¹⁹⁴ *Id.* at 6-7.

¹⁹⁵ *Id.* at 7.

¹⁹⁶ *Id.* at 13.

¹⁹⁷ *Id.* But see discussion *infra* Part III.D (arguing, based on the legislative history and plain language of the statute, that a corporation cannot be held liable for misconduct of a truly rogue employee).

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protect corporations from “employees who commit crimes despite a corporation’s diligence.”¹⁹⁸

Second, the Chamber argues that a company’s liability for the prior violations of an acquired company should be limited. According to DOJ FCPA Opinion Procedure Release No. 03-01, a company could potentially be held liable for the actions of an acquired company, even if those actions took place prior to the acquisition.¹⁹⁹ The Chamber urges that if this were indeed practiced in FCPA prosecutions, it would be “antithetical to the goals of criminal law, including punishing culpable conduct or deterring offending behavior.”²⁰⁰ Thus, the second reform sought is to set clear parameters on successor liability.²⁰¹

Third, the Chamber seeks a “willfulness” requirement for corporate criminal liability; the same as the willfulness requirement currently in place for individuals.²⁰² The argument is that the omission of a willfulness requirement extends the scope of criminal liability.²⁰³ This extension makes a violation for improper payments tantamount to strict liability.²⁰⁴ Since the corporate entity is at least one more step removed from the actual actors who violate the FCPA, the Chamber argues it would only be fair to hold corporate entities to the same *mens rea* standard as those individuals.²⁰⁵

In addition to balancing the *mens rea* requirements, a willfulness requirement for corporate entities will relieve the liability a parent corporation may have for the acts of its subsidiaries that it has no knowledge of.²⁰⁶ Moreover, “the lack of a ‘willful’ requirement means that corporations can potentially be held criminally liable for anti-bribery violations in situations where they not only do not have knowledge of the improper payments, but also do not even know that U.S. law is applicable to the actions in question.”²⁰⁷ The Chamber also proposes that a reform to preclude unknowing *de minimus* contact with the United States as a predicate for jurisdiction.²⁰⁸

Fourth, a parent company’s civil liability for acts of a subsidiary should be limited.²⁰⁹ The approach taken by the SEC, who routinely charges parent companies with civil violations of the anti-bribery provisions based on actions taken by foreign subsidiaries of which the parent is entirely ignorant, is contrary to the language of the FCPA.²¹⁰ The SEC is using the lack of precedent unfairly in the opinion of the Chamber. Since no case has tested

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 14 (citing DEP’T OF JUSTICE, OPINION PROCEDURE RELEASE NO. 03-01, FOREIGN CORRUPT PRACTICES ACT REVIEW (Jan. 15, 2003), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2003/0301.pdf>) (advising that a company that conducted due diligence on a target company and self-reported any violations that took place pre-acquisition may be able to escape criminal and/or civil successor liability, thereby suggesting that successor liability was a viable theory of liability under the FCPA).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 19.

²⁰² Compare 15 U.S.C. § 77dd-2(g) (2012), with *id.* § 77dd-3(e).

²⁰³ See RESTORING BALANCE, *supra* note 89, at 20-21.

²⁰⁴ See *id.*

²⁰⁵ *Id.* at 21.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 22.

²⁰⁹ *Id.*

²¹⁰ *Id.*

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whether the SEC's approach will sustain a conviction, companies have been coerced into settling their cases.²¹¹

Two recent settlements exemplify the oppressive nature of the SEC's strategy. One settlement required a company to pay \$350,000 in disgorgement and prejudgment interest.²¹² The other settlement required the company to retain an independent monitor for a period of three years, disgorge approximately \$2 million, and make an additional payment of \$750,000 in prejudgment interest.²¹³ "A parent's control of the corporate actions of a foreign subsidiary should not expose the company to liability under the anti-bribery provisions where the parent did not direct, authorize, or know about the improper payments in question."²¹⁴

Finally, the definition of "foreign official" should be clarified.²¹⁵ As the FCPA does not define "instrumentality," it is unclear what types of entities are "instrumentalit[ies]" of foreign governments such that their employees will be considered "foreign officials" for purposes of the Act.²¹⁶ Though there is no specific guidance from the DOJ or SEC regarding "instrumentalities" under the FCPA, their enforcement reveals that they interpret the term extremely broadly.²¹⁷ "[T]his interpretation sweeps in payments to companies that are state-owned or state-controlled."²¹⁸ A more precise definition could use percentage ownership by a foreign government as an indication of whether it qualifies as an "instrumentality."²¹⁹ It would also indicate whether ownership by a foreign official necessarily qualifies a company as an instrumentality.²²⁰ If it does, then the definition of "instrumentalities" should also indicate whether the foreign official must hold a minimum rank, or whether the ownership must reach a certain percentage threshold.²²¹ Lastly, "instrumentalities" should describe to what extent "control" by a foreign government or official will qualify a company as an "instrumentality."²²²

B. The Open Society Foundations' Anti-Reform Arguments

In 2011, the Open Society Foundations (hereinafter "OSF")²²³ issued a report entitled *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act* as a direct response to the Chamber's arguments in favor of amending the FCPA.²²⁴ The OSF argues that reforming the FCPA now would "substantially undermine the possibility for suc-

²¹¹ See *id.* at 24.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 25. But see *United States v. Aguilar*, 783 F.Supp.2d 1108 (C.D. Cal. 2011); discussion *supra* Part I.B.ii.

²¹⁸ RESTORING BALANCE, *supra* note 89, at 25 (Aguilar discussed *supra*, at Part I.B.ii, was decided after RESTORING BALANCE was published).

²¹⁹ *Id.* at 27.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ The Open Society Foundations is an organization dedicated to building stronger democracies by shaping public policies that assure greater fairness in political, legal, and economic systems. *About the Open Society Foundations*, THE OPEN SOCIETY FOUNDATIONS, <http://www.soros.org/about> (last visited Mar. 17, 2012).

²²⁴ BUSTING BRIBERY, *supra* note 1, at 6.

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cessful enforcement of America's anti-bribery commitments."²²⁵ The adoption of the FCPA sparked a global anti-corruption movement; international organizations and nations alike have adopted similar regulations.²²⁶ Embracing the suggested reforms, the OSF argues, would "send a signal to these entities that our commitment to combatting corruption has wavered, potentially stalling this global momentum."²²⁷

First, the OSF responds to the Chamber's sought after compliance defense. An affirmative defense of compliance is fundamentally inconsistent with the FCPA's high standards for corporate criminal liability for two reasons.²²⁸ A compliance program would be "logically incompatible with the requirement that violations be undertaken with "actual knowledge" or "a conscious disregard or deliberate ignorance of known circumstances" and the requisite "corrupt" intent to induce a foreign official to misuse his official position to wrongfully obtain business or direct business to another."²²⁹ Because the Act requires proof of a "knowing" violation for the government to sustain a conviction, any compliance program that failed to prevent a violation of the FCPA "must either be *per se* inadequate or not undertaken in good faith."²³⁰

Furthermore, "[c]reating a "compliance defense" to knowing and intentional violations of the FCPA would amount to eliminating criminal liability under the FCPA all together by permitting a "fig leaf" compliance program to insulate companies from knowing and intentional wrong-doing."²³¹ There is well-founded reason for this concern; it allows a company with such a *reasonable* compliance program to "unknowingly" -but-knowingly bribe, as the architects of the bribing scheme hide behind the absolute defense of the company's compliance program. As the Chamber is concerned with rogue employees, the OSF responds by pointing out that the Act already protects against rogue employees by virtue of the FCPA's *mens rea* requirement.²³² The OSF observes that Congress amended the Act in 1998 to eliminate liability based on bribery a corporation had "reason to know" was taking place.²³³ A compliance defense would be paradoxical because corporate criminal liability under the FCPA requires proof beyond a reasonable doubt that the corporation acted with actual knowledge and corrupt intent.²³⁴

The OSF also asserts that the concern that companies lack adequate incentives to implement appropriate compliance programs lacks factual support.²³⁵ Fiduciary duties of due care and oversight already requires corporate managers to implement suitable reporting requirements "reasonably designed to bring malfeasance by employees and representative[s] to light as well as compliance mechanisms designed to ensure compliance with the company's legal obligations. . . ." ²³⁶ Furthermore, sentencing guidelines are designed to provide "incentives for organizations to maintain internal mechanisms for preventing, deterring, detecting,

²²⁵ *Id.* at 5.

²²⁶ *See id.* at 5-6.

²²⁷ *Id.* at 6.

²²⁸ *Id.* at 29-30; *see also* 15 U.S.C. §§ 78dd-1(f)(2)(a), (b) (2012).

²²⁹ BUSTING BRIBERY, *supra* note 1, at 30.

²³⁰ *See id.*

²³¹ *Id.* at 31.

²³² *Id.* at 6.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 32.

²³⁶ *Id.* (citing *In re Caremark Int'l Derivative Litig.*, 698 A.2d. 959 (Del. Ch. 1996)).

and reporting criminal conduct.”²³⁷ Under modern global circumstances good compliance programs are a necessary part of business.²³⁸

Second, the OSF responds to the Chamber’s proposal for eliminating successor liability for pre-acquisition acts of an acquired company. The OSF argues that doing so would create a loophole by which corporations could escape liability through deliberate, fraudulent, corporate restructuring, as illustrated by the *Alliance One*²³⁹ and *Halliburton*²⁴⁰ cases.²⁴¹ Furthermore, adopting the elimination would “result in perverse incentives to avoid investigation of past FCPA violations by potential acquirers. . . Even if rarely imposed, the potential for successor liability remains important to prevent companies from escaping from liability through restructuring while preserving appropriate incentives for monitoring and compliance in the context of acquisitions.”²⁴² The *Alliance One* and *Halliburton* cases exemplify why successor liability is crucial to an effective anti-corruption legislative scheme.²⁴³ In *Alliance One*, two corporations, each acting through foreign subsidiaries, engaged in systemic bribery of foreign government officials to obtain contracts for tobacco purchases and sales.²⁴⁴ In 2005, the two companies merged into Alliance One.²⁴⁵ In 2010, the newly formed Alliance One was indicted for the acts of the two corporations that merged to form it.²⁴⁶ Had the FCPA failed to include successor liability, that indictment would have been impossible and any two corporations seeking to evade prosecution could simply restructure in the same fashion as Alliance One.

The *Halliburton* case reveals the necessity for successor liability and the utility of the FCPA Opinion Release Procedure. In *Halliburton*, Halliburton Company sought to purchase a U.K. corporation but did not have enough time to conduct its FCPA due diligence.²⁴⁷ As a result, Halliburton used the FCPA Opinion Release Procedure to answer its questions regarding successor liability in such time sensitive circumstances.²⁴⁸ The DOJ responded that Halliburton would not be subject to FCPA successor liability for: (i) merely acquiring the Target, (ii) pre-acquisition violations by the Target which were disclosed during the 180-day period following the closing, or (iii) for post-acquisition conduct by the Target disclosed during the 180-day period following the closing.²⁴⁹ Provided that Halliburton implemented a post-closing remediation plan and that no Halliburton employee or agent know-

²³⁷ *Id.* at 33 (citing U.S. SENTENCING GUIDELINES MANUAL, Ch. 8, introductory cmt. (2010)).

²³⁸ *Id.*

²³⁹ Complaint, Sec. & Exch. Comm’n v. Alliance One Int’l, Inc., No. 01:10-cv-01319 (D.D.C. Aug. 6, 2010), available at <http://www.sec.gov/litigation/complaints/2010/comp21618-alliance-one.pdf>. See generally *Alliance One Int’l Inc. and Universal Corp. Resolved Related FCPA Matters Involving Bribes to Foreign Gov’t Officials*, DEP’T OF JUSTICE (Aug. 6, 2010), <http://www.justice.gov/opa/pr/2010/August/10-crm-903.html>.

²⁴⁰ DEP’T OF JUSTICE, OPINION PROCEDURE RELEASE No. 08-02, FOREIGN CORRUPT PRACTICES ACT REVIEW (Jun. 13, 2008), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf>.

²⁴¹ BUSTING BRIBERY, *supra* note 1, at 34-35.

²⁴² *Id.* at 6-7.

²⁴³ *Id.* at 34-35.

²⁴⁴ *Id.* at 34.

²⁴⁵ *Id.*

²⁴⁶ Complaint, Sec. & Exch. Comm’n v. Alliance One Int’l, Inc., No. 01:10-cv-01319 (D.D.C. Aug. 6, 2010), available at <http://www.sec.gov/litigation/complaints/2010/comp21618-alliance-one.pdf>.

²⁴⁷ BUSTING BRIBERY, *supra* note 1, at 35-36.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 36.

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ingly played a role in the violations by the Target, the parent company would bear no liability.²⁵⁰

The *Alliance One* and *Halliburton* cases show that the FCPA is working just as it was intended.²⁵¹ Eliminating successor liability would ultimately disrupt the “functional balance”²⁵² demonstrated by the mechanisms in place to prevent companies from escaping liability while also providing incentives for companies to conduct due diligence before and after acquisitions.²⁵³

Third, the OSF responds to the Chamber’s proposal for a willfulness requirement. The OSF maintains that the applicable standards for individuals and corporations are effectively equivalent.²⁵⁴ The OSF points out that corporations do not run the risk of criminal penalties under the FCPA for innocent, unknowing or mistaken violations of the act.²⁵⁵ The suggested reform would allow corporate subsidiaries to violate the provisions of the FCPA so long as they remained ignorant of its specific provisions.²⁵⁶

Fourth, the OSF responds to the proposal for eliminating a parent company’s civil liability under the FCPA for unlawful acts carried out by its subsidiary. The OSF contends, “[e]liminating the risk of civil liability would substantially decrease the incentives for [a] parent company to oversee FCPA compliance by their foreign subsidiaries.”²⁵⁷ When the FCPA was first debated, Congress found it appropriate to extend the coverage of the bill to non-U.S. based subsidiaries:

[B]ecause of the extensive use of such entities as a conduit for questionable and improper conduct. The [Interstate and Foreign Commerce] Committee believes this extension of U.S. jurisdiction to so-called foreign subsidiaries is necessary if the legislation is to be an effective deterrent to foreign bribery. Failure to include such subsidiaries would only create a massive loophole in this legislative scheme through which millions of bribery dollars will continue to flow.²⁵⁸

Although foreign subsidiaries are not covered under the Act, U.S. parent companies remain liable for corrupt payments made indirectly through its foreign subsidiary.²⁵⁹ Furthermore, adopting the suggested reform would encourage a “head-in-the-sand” management style to facilitate corruption abroad.²⁶⁰ “Arguments about potential risk of prosecutorial over-reach

²⁵⁰ *Id.*

²⁵¹ *Id.* at 37.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 7.

²⁵⁵ *Id.*; see also *id.* at 38 n.124.

²⁵⁶ BUSTING BRIBERY, *supra* note 1, at 39-41 (noting the perverse outcome this would have on cases similar to *Siemens* and *BAE*). See generally Statement of Offense, *United States v. Siemens Bangl. Ltd.*, Cr. No. 08-369-RJL (D.D.C. Dec. 15, 2008), available at <http://www.justice.gov/opa/documents/siemens-bangladesh-stmt.pdf>; *BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million in Criminal Fine*, DEP’T OF JUSTICE (Mar. 1, 2010), <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html>.

²⁵⁷ BUSTING BRIBERY, *supra* note 1, at 42.

²⁵⁸ *Id.* at 43.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 7.

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are purely speculative.”²⁶¹ Ultimately, eliminating the liability of parent companies for corrupt payments made indirectly through its foreign subsidiary would open the “massive loophole” congress intended to close.

Fifth, the OSF responds to the Chamber’s request for legislative clarification of “foreign official” by arguing such clarification would be both over and under inclusive, as public control over commercial enterprises is so diverse from country to country and in different contexts.²⁶² Any clarification would run the risk of undermining the purposes of the FCPA - preventing bribery - as the rest of the world organizes public authority in a variety of ways.²⁶³ Thus, it is false to assume any *legislative* clarification would accurately define the diversities that exist in the way public authorities are organized.

The FCPA’s definition of “foreign official,” tracks the approach taken by the rest of the world.²⁶⁴ If Congress were to adopt a less encompassing approach than that in treaties the U.S. is signatory to, such as the OECD Convention, it would violate those treaties by failing to adopt their requisite domestic legislation.²⁶⁵ Accordingly, the OSF proposes, the issue of who qualifies as a “foreign official” is best left to the judiciary.²⁶⁶

C. “A Modest Proposal”

In August 2007 a former general counsel of the SEC, James R. Doty, proposed “[a] new, rule-based system of permissive filing, modeled on the principles of administrative safe-harbor regulations.”²⁶⁷ Doty identifies three deficiencies in the current FCPA regime which could “overshadow the statute’s positive effects.”²⁶⁸ First, imposing civil liability on parent issuers for the actions of “rogue” employees or agents.²⁶⁹ Second, prosecution on aggressive theories extending beyond traditional bribery.²⁷⁰ And third, the expansive criminalization of vicarious liability where there is uncertainty whether a bribe has been offered or paid by a corporation.²⁷¹

²⁶¹ *Id.* at 7; *see also id.* at 45. *See generally* United Industrial Corp., Exchange Act Release No. 60005 (May 29, 2009), <http://www.sec.gov/litigation/admin/2009/34-60005.pdf>; Complaint, Sec. & Exch. Comm’n v. Thomas Wurzel, No. 1:09-CV-01005 (D.D.C. May 29, 2009), *available at* <http://www.sec.gov/litigation/complaints/2009/comp21063.pdf>; Sec. & Exch. Comm’n v. Thomas Wurzel, SEC. & EXCH. COMM’N (May 29, 2009), <http://www.sec.gov/litigation/litreleases/2009/lr21063.htm>; Diagnostic Products Corp., Exchange Act Release No. 51724 (May 20, 2005), <http://www.sec.gov/litigation/admin/34-51724.pdf>; *DPC (Tianjin) Ltd. Charged with Violating the Foreign Corrupt Practices Act*, DEP’T OF JUSTICE (May 20, 2005), <http://www.justice.gov/opa/pr/2005/May/05-crm-282.htm>.

²⁶² BUSTING BRIBERY, *supra* note 1, at 47.

²⁶³ *Id.* at 7.

²⁶⁴ *See id.* at 49.

²⁶⁵ *See* S. REP. NO. 105-277, at 6 (1998); BUSTING BRIBERY, *supra* note 1, at 49; *List of OECD Member Countries*, ORG. FOR ECON. COOPERATION & DEV., http://www.oecd.org/document/58/0,3746,en_2649_201185_1889402_1_1_1_00.html (last visited Mar. 17, 2012).

²⁶⁶ BUSTING BRIBERY, *supra* note 1, at 50.

²⁶⁷ James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. L. 1233, 1233 (2007).

²⁶⁸ *Id.* at 1233.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

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Thus, “the [SEC should] formulate a “Reg. FCPA” to guide registrants in the implementation of anti-bribery policies, to improve transparency and foster general acceptance of best practices, and to enable corporations to address squarely the question of imputed, vicarious liability.”²⁷² In contrast to proposals to amend the FCPA, Reg. FCPA enhances administration of the Act.

Reg. FCPA would set forth the contours of a rule-based system that would afford registrants safe harbor in pursuing business opportunities.²⁷³ The generalities of Reg. FCPA are as follows:

- Reg. FCPA would establish a permissive filing regime; by making the filing, a registrant would benefit from a regulatory presumption of compliance.
- The burden of demonstrating compliance would remain with the registrant claiming the safe harbor, which would not exculpate violative conduct or circumvention of the rule by individuals.
- Reg. FCPA would set forth items required to be described, represented or disclosed, with appropriate exhibits, constituting the registrant’s FCPA Compliance Program.
- A “Part II” of the Reg. FCPA filing would permit confidential treatment of commercially sensitive information.
- The filed FCPA Compliance Program would be subject to Staff review and comment, as with the Annual Report on Form 10-K.
- No-Action advice would be available on the basis of the registrant’s filing.
- The availability of the safe harbor would answer concerns about the value of self-reporting.²⁷⁴

To reap the benefits of Reg. FCPA, a company would have to “establish an FCPA Compliance Program designed to prevent and detect, insofar as practicable, any violations. The company would also [have to certify that it has enacted the program], and that the company is not aware of continuing, unremedied violations.”²⁷⁵

The first part of Reg. FCPA contemplates a public filing system, enabling the SEC to establish a process by which companies could protect themselves from liability.²⁷⁶

[P]ortions of such a filing would include: the basic code of corporate conduct, representations and covenants similar to those required in joint venture and agency agreements; a description of the means employed to communicate the FCPA Compliance Program to employees, vendors and counterparties; procedures for testing the effectiveness of such communications; and internal procedures for monitoring and testing both employee

²⁷² *Id.* at 1234.

²⁷³ Compare *id.*, with RESTORING BALANCE, *supra* note 89, at 7.

²⁷⁴ Doty, *supra* note 267, at 1234.

²⁷⁵ *Id.* at 1243-44.

²⁷⁶ See *id.* at 1244.

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understanding and the actual effectiveness of the FCPA Compliance Program.²⁷⁷

This program would bring to light “the evolving level of detailed guidance on best practices” and “the regulatory acknowledgment under Reg. FCPA of the specifics of compliance.”²⁷⁸

The safe harbor would operate in the same manner as other SEC safe harbors operate; Reg. FCPA would set forth the requisite elements for compliance. The claimant would then have the burden of proving those elements.²⁷⁹ If successful, a presumption of compliance attaches, and the burden shifts to the SEC to rebut, by a preponderance, that the claimant violated the statute.²⁸⁰

The second part of Reg. FCPA contemplates provisions for a confidential filing system which would enhance administration of the FCPA twofold.²⁸¹ First, the filing would provide the basis for “a meaningful ‘no-action’ review and response by the Government.”²⁸² Next, it would begin to enhance the Government’s understanding of international transactional reality.²⁸³

These reforms are a middle ground between the Chamber and the other groups arguments. The implementation of a Reg. FCPA, as proposed, does not suggest changes to the FCPA itself. Rather, the proposal attempts to alleviate concerns over the administration and enforcement of the Act. Second, as compliance is considered at every phase of an investigation,²⁸⁴ Reg. FCPA would considerably aid the SEC and DOJ in determining whether an issuer or corporation was compliant.²⁸⁵ Third, the Reg. FCPA would also provide issuers and corporations with substantive guidance regarding compliance.²⁸⁶

Concerns that the system would create “a roadmap for evasion,” and that the system would undercut the value of ambiguities in the statutory language are not persuasive in these circumstances for two reasons.²⁸⁷ First, the SEC’s administration of the federal securities law already contains similar systems and none of them weaken the enforcement process.²⁸⁸ Second, the Reg. FCPA would actually strengthen enforcement by sharpening the “distinctions between reasonable practices and inappropriate ones.”²⁸⁹

D. Analysis

The FCPA reform debate must begin and end with the Congressional intent behind adopting the Act because it not only addresses most of the arguments in favor of departing from the *status quo*, but also determines what arguments are relevant. The FCPA was in-

²⁷⁷ *Id.* at 1243.

²⁷⁸ *Id.* at 1244.

²⁷⁹ *Id.* at 1245.

²⁸⁰ *Id.*

²⁸¹ *See id.* at 1246.

²⁸² *Id.*

²⁸³ *See id.*

²⁸⁴ BUSTING BRIBERY, *supra* note 1, at 29.

²⁸⁵ *See Doty, supra* note 267, at 1243-45.

²⁸⁶ *Id.* at 1234.

²⁸⁷ *Id.* at 1249.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

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tended to improve the United States' securities market by improving disclosure and foreign relations, and by prohibiting corporations domiciled in the United States from bribing foreign government officials.²⁹⁰ With the adoption of the OECD Convention, a human element entered the enforcement context. Accordingly, it is desirable that the Act be widely enforced, even against foreign corporations. But, the DOJ and SEC have aggressively enforced the Act without adopting measures which would improve compliance. By failing to do so, the DOJ and SEC actually betray Congressional intent because such measures would improve the securities market and foreign relations. Improved compliance also translates into decreased human costs.²⁹¹ Further, the failure to adopt said measures has given rise to calls for amending an act which needs no amendment; such an amendment would seriously harm national interests.

The current reform debate is fixated on claims that the Act's language is too broad, too vague, and as a result, too chilling on business. However, when read in conjunction with the Act's legislative history, the FCPA is quite easy to understand. As illustrated by the Apple, Inc. case study *supra*, the Act is not so oppressive as to prohibit expansion into notoriously corrupt markets. Nonetheless, a lack of judicial interpretation on important issues, such as a *respondeat superior* theory for truly rogue employees, coupled with aggressive enforcement has given rise to concerns the Act is poorly drafted. Illustrated by the fact the purpose of the statute was not expressed by the courts until 1990, thirteen years after the act was passed, and the additional fact that important terms, like "government official," were interpreted only within the period of expanding enforcement, it only makes sense that uncertainty in this circumstance is more alarming than in circumstances where uncertainty exists but enforcement is not as cut-throat. The answer to these woes, is not, however, to water down the efficacy of the statute at proscribing intolerable conduct - bribery. Rather, a careful analysis of the statute's history reveals a fragile balance struck by Congress between corporate interests and the policy objectives of the Act.

A corporation's culpability, and therefor its liability under a theory of *respondeat superior*, is to be determined on a case-by-case basis.²⁹² Thus, the issue of adding a "compliance defense" is moot as nothing has materially changed in this regard since the Act was adopted in 1977. The Senate Report squarely confronts the issue:

[The prohibition on corporate bribery] as reported also covers the officers, directors, employees, or stockholders making overseas bribes on behalf of the corporation. *This provision is intended to make clear that it is corporate or business bribery which is being proscribed.* Whether or not a particular situation involves bribery by the corporation or by an individual acting on his own will depend on all the facts and circumstances, including the

²⁹⁰ The author's advising professor also suggested a very interesting point that is well beyond the scope of this Note. Namely, Professor Ronald Colombo points out that bribery is also harmful because "it corrupts the actual briber him/herself. As a person crosses the line from one who is willing to bribe, to one who actually bribes, that person moves further away from virtue and good conduct - thereby opening the door to even worse acts of misconduct." E-mail from Ronald Colombo, Professor of Law, Hofstra University Maurice A. Deane Sch. of Law (Mar. 5, 2012, 12:44 PM EST) (on file with author); see also Ronald J. Colombo, *Toward a Nexus of Virtue*, 69 WASH. & LEE L. REV. 3, 14 (2012).

²⁹¹ "The Reg. FCPA suggestion has no support or interest at the SEC." E-mail from James R. Doty, Chairman, Public Company Accounting Oversight Board (Feb. 13, 2012, 12:27 PM EST) (on file with author).

²⁹² S. REP. NO. 95-114, at 4108 (1977).

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position of the employee, the care with which the board of directors supervises management, the care with which management supervises employees in sensitive positions and its adherence to the strict accounting standards set forth under section 102.²⁹³ (emphasis added)

Corporations cannot exculpate themselves by using unwitting employees to violate the FCPA. By implication, Congress did not intend to hold corporations liable for the improper conduct of an individual “acting on his own.”²⁹⁴ As such, corporations cannot be held liable under *respondeat superior* for the actions of truly rogue employees. Further, as illustrated by the penalty structure of the Act,²⁹⁵ and the *Kay* court’s discussion of the willfulness element for individual liability,²⁹⁶ the Act protects employees from personal liability incurred by working for corporations that would have them unknowingly violate the act. Because these vitally important issues are slowly reaching the courts, there will be some time before courts make necessary interpretations. As the government created the current zealous enforcement environment, it should consider alternative measures to carrying out Congress’ policies regarding foreign corruption while these issues reach the courts in order to relieve some legal pressures felt by the business community.

The government should overhaul the procedure for opinion releases. Currently, the government assists compliance through the opinion procedure release. However, the last time the rules for obtaining an opinion were revised was thirteen years ago, in 1999. To be sure, a revamped opinion release procedure could cut compliance costs, thus making it more attractive than non-compliance. The last four opinion releases - dating back to at least 2009 - took more than thirty days to reach the hands of requestors. In the fast-paced environment of global business, thirty days is impractical.²⁹⁷

IV. CONCLUSION

The current administrative environment is highly aggressive and the fight against corruption warrants such enforcement of the Act. That enforcement model, however, lacks meaningful resources to guide compliance. Reg. FCPA accords the dual purposes of the FCPA in two ways. First, it would curb foreign bribery, thus satisfying foreign policy concerns. Second, by engendering certainty, Reg. FCPA would strengthen the domestic securities market. The Chamber’s proposals sweep too far, as illustrated by the OSF. As such, the FCPA should remain unamended. The SEC should formulate the Reg. FCPA and the DOJ should place into practice and the hands of compliance officers meaningful resources to encourage compliance in order to ensure a more equitable enforcement of the Foreign Corrupt Practices Act.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ Where the “rogue employee” case occurs and the employee is held liable for monetary fines, the corporation is statutorily prohibited from directly or indirectly reimbursing the defendant. This provision serves to protect shareholders and corporations by preventing corporations from promising to reimburse employees through winks and nods. See 15 U.S.C. § 78dd-2(g)(3) (2012); discussion *supra* Part I.B.v.

²⁹⁶ *United States v. Kay*, 513 F.3d 432, 446 (5th Cir. 2007).

²⁹⁷ The DOJ’s website has ample information on what cannot be done overseas, but has little in the way of compliance best-practices or information of similar nature. See *Foreign Corrupt Practices Act*, DEP’T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa> (last visited Mar. 12, 2012).