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220 Years Later and the Commonwealth Is Still Imposing Laws on the United States

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NOTES

220 Years Later and the Commonwealth Is Still Imposing Laws on the United States: A Comparative Look at U.S. Antibribery Legislation and the United Kingdom's Bribery Act 2010

ABSTRACT

The United States has been combating the bribery of foreign officials for 35 years through the Foreign Corrupt Practices Act (FCPA). Both domestic and international prosecutions for bribery remained almost nonexistent for decades. In recent years, the United States experienced an explosion of enforcement actions under the FCPA. Broad enforcement theories and increased prosecutorial effort have greatly expanded the scope of the FCPA. Moreover, the passage of the UK Bribery Act in 2010 has forced many U.S. organizations to face additional and conflicting antibribery regimes. Although the United States remains the world leader in prosecuting the bribery of foreign officials, the FCPA has failed to keep pace with the evolving international standard of antibribery legislation. As a result, ever-increasing uncertainty surrounds antibribery compliance and liability. In response to these concerns, Congress must amend the FCPA accordingly, as inaction will only exacerbate the current concerns.

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I. INTRODUCTION

Despite the ever-increasing pressures impacting American businesses and jobs—Why does the United States continue to force

American companies to spend billions of dollars on bribery compliance while failing to actually curtail international bribery? Far from being a fringe issue, antibribery enforcement has become a top business concern in recent years.¹ It is estimated that bribery conservatively amounts to a trillion dollars a year,² which is equal to approximately 1.5 percent of the world's gross domestic product (GDP).³ Almost a quarter of large international organizations have been approached to pay a bribe within the past 2 years.⁴ While disgorgements of profits and fines under the FCPA⁵ can be significant,⁶ even allegations of bribery can require substantial expenses.⁷ Despite facing no formal prosecution under the FCPA, Avon Products Inc., Weatherford International Ltd., and Wal-Mart Stores Inc. collectively spent nearly half a billion dollars in the first

1. On October 1, 2012, the *Wall Street Journal* featured an article discussing the increased enforcement of the FCPA and an article discussing the lucrative business of FCPA compliance experts. See Joe Palazzolo, *FCPA Inc.: The Business of Bribery*, WALL ST. J. (Oct. 1, 2012), <http://online.wsj.com/news/articles/SB10000872396390443862604578028462294611352> (noting the development of legal specialties that focus upon FCPA compliance and defense); see also Joe Palazzolo, *How the Sleepy FCPA Became a Hulk and Why It's Staying that Way*, WALL ST. J. L. BLOG (Oct. 2, 2012, 9:31 AM), <http://blogs.wsj.com/law/2012/10/02/how-the-sleepy-fcpa-became-a-hulk-and-why-its-staying-that-way/> (profiling the increased enforcement of the FCPA by the SEC and DOJ).

2. See Leslie Wayne, *Hits, and Misses, in a War on Bribery*, N.Y. TIMES (Mar. 11, 2012), <http://www.nytimes.com/2012/03/11/business/corporate-bribery-war-has-hits-and-a-few-misses.html?pagewanted=all&r=0> (stating that the World Bank estimates that bribes paid to government officials conservatively amount to \$1 trillion annually).

3. See *The World Factbook*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html> (last visited Sept. 21, 2013) (estimating the world GDP in 2011 as \$69.99 trillion).

4. See Press Release, Ernst & Young LLP, *Company Executives Risk Fines and Jail by Ignoring Anti-Bribery Laws* (May 15, 2008), available at <http://www.businesswire.com/news/home/20080515005983/en/Company-Executives-Risk-Fines-Jail-Ignoring-Anti-Bribery> (discussing the results of Ernst & Young's 10th Global Fraud Survey, which found that 23 percent of the organizations surveyed had been approached to pay a bribe within the last 2 years).

5. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended in scattered sections of 15 U.S.C.), amended by An Act to Enhance the Competitiveness of American Industry, and For Other Purposes, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified at 15 U.S.C. §§ 78dd-1 to 78dd-3, 78ff) and International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified at 15 U.S.C. §§ 78dd-1 to 78dd-3, 78ff).

6. See Press Release, U.S. Sec. and Exch. Comm'n, *SEC Charges Siemens AG for Engaging in Worldwide Bribery* (Dec. 15, 2008), available at <http://www.sec.gov/news/press/2008/2008-294.htm> (announcing that Siemens agreed to pay \$350 million in disgorgement to settle SEC charges and a \$450 million fine to the DOJ to settle criminal charges).

7. See Palazzolo, *FCPA Inc.: The Business of Bribery*, *supra* note 1 (noting that in addition to paying civil and criminal fines, Siemens AG incurred around 1.5 million billable hours of legal services in order to investigate and settle bribery allegations).

nine months of 2012 defending allegations that employees bribed foreign officials.⁸

The relative strength⁹ of U.S. antibribery legislation and enforcement has effectively reduced the likelihood of foreign actors requesting bribes from U.S. organizations.¹⁰ However, the effectiveness of the FCPA comes with ever-increasing costs as organizations face more legal uncertainty surrounding FCPA compliance. In-house counsel for the largest companies in the United States cite the FCPA as one of the three main legal uncertainties facing their organizations.¹¹ Over the past few years, the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) have dramatically increased their commitment to FCPA enforcement.¹² While the DOJ and SEC only brought one FCPA case in 2000, collectively they filed sixty-seven cases in 2009 alone.¹³

Not only do American companies face increasing enforcement but also a far more complicated regulatory regime due to the United Kingdom's Bribery Act 2010 (Bribery Act).¹⁴ The Bribery Act marks the end of an era of UK dormancy in the enforcement and prosecution of bribery.¹⁵ The Bribery Act differs significantly from the FCPA—therefore, the United States must address the increasing uncertainty companies face in the antibribery sector by amending the FCPA to realign with the evolving international standard.

8. See *id.* (noting that between January and September 2012 bribery allocations had “already cost Avon Products Inc., Weatherford International Ltd. and Wal-Mart Stores Inc. nearly half a billion dollars”).

9. See FRITZ HEIMANN & GILLIAN DELL, *TRANSPARENCY INT'L, EXPORTING CORRUPTION?: COUNTRY ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION* PROGRESS REPORT 2012, 8 (2d ed. 2012), available at http://issuu.com/transparencyinternational/docs/2012_exportingcorruption_oecdprogress_en?e=2496456/2042485 (“[T]he US continues to lead in foreign bribery prosecutions.”).

10. See Press Release, Ernst & Young LLP, *supra* note 4 (noting that only 15 percent of U.S. organizations surveyed had experienced an incident of bribery or corruption in the last 2 years compared to the global average of 24 percent).

11. See Ashby Jones, *Legal Maze's Murkiest Corners*, WALL ST. J., Dec. 22 2012, at B1 (discussing the uncertain areas of the law that most concern in-house counsel in the United States). FCPA liability concerns are rivaled only by the uncertainty posed by patent suits and the SEC's whistleblower program. *Id.*

12. See Carl Pacini, *The Foreign Corrupt Practices Act: Taking a Bite Out of Bribery in International Business Transactions*, 17 *FORDHAM J. CORP. & FIN. L.* 545, 553–56 (2012) (analyzing trends in FCPA cases).

13. *Id.* at 547.

14. Per UK practice, acts of the United Kingdom do not include the word of between the name of the act and the year, although they are sometimes incorrectly referred to as such.

15. See *OECD to Conduct a Further Examination of UK Efforts Against Bribery*, ORG. FOR ECON. CO-OPERATION AND DEV. (Mar. 3, 2007), <http://www.oecd.org/general/oecdtoconductafurtherexaminationofukeffortsgainstbribery.htm> (noting the weaknesses present in UK antibribery laws).

This Note examines the major provisions of the FCPA and the Bribery Act to determine the effects the Bribery Act may have upon the FCPA and American businesses. Part II summarizes the development of antibribery legislation in the United States and the United Kingdom and provides insight into international co-operation in this field. Part III offers an overview of the major provisions of the FCPA. Part IV provides an overview of the major provisions of the Bribery Act and the UK Ministry of Justice's guidance on the act.¹⁶ Part V explores the important differences between the two pieces of legislation. Part VI puts forth recommendations for amendments to the FCPA that the United States should adopt in the wake of the Bribery Act. Part VII concludes that the United States needs to implement changes to the FCPA to reduce uncertainty, update the FCPA to the evolving international standard, and allow the United States to maintain its significant influence over the evolution of international antibribery legislation.

II. HISTORY OF ANTIBRIBERY LEGISLATION

Although the international community has only recently begun to tackle foreign bribery,¹⁷ the United States started developing its antibribery legislation more than 35 years ago.¹⁸ In 1977, Congress enacted the FCPA in response to an SEC investigation in which more than four hundred U.S. companies admitted to illegal or questionable payments to foreign officials totaling over \$300 million.¹⁹ In doing so, Congress set out to prevent the bribery of foreign officials and to restore the public's faith in the integrity of American business.²⁰ In 1988, Congress feared that the legislation forced American companies to operate at a significant disadvantage to foreign competitors.²¹ As a result, Congress amended the FCPA to exclude small denomination

16. See generally U.K. MINISTRY OF JUSTICE, BRIBERY ACT 2010: GUIDANCE (2011) [hereinafter GUIDANCE], available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

17. Bribery is defined as "the voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done or with the corrupt intent to influence the action of a public official or of any other person professionally concerned with the administration of public affairs." See BALLENTINE'S LAW DICTIONARY 174 (3d ed. 1969).

18. See U.S. DEPT OF JUSTICE, LAY PERSON'S GUIDE: FOREIGN CORRUPT PRACTICES ACT 1 (2012) [hereinafter LAY PERSON'S GUIDE] (on file with author).

19. *Id.*

20. See *id.* (explaining that "Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system").

21. See *id.* at 2 (noting that the 1998 amendments were advanced partially because Congress realized that American companies were being forced to compete with "foreign companies who routinely paid bribes and, in some countries, were permitted to deduct the cost of such bribes as business expenses on their taxes").

nondiscretionary payments, known as facilitation payments.²² Facilitation payments are nominal payments used to expedite the performance of a routine, nondiscretionary action of a foreign official.²³ In an attempt to increase international cooperation in 1998, the United States signed the Organization for Economic Co-Operation and Development's Convention on Combating Bribery of Foreign Officials in International Business Transactions (OECD Antibribery Convention). Subsequently, Congress increased the FCPA's jurisdiction to incorporate this new international agreement.²⁴

After the OECD Antibribery Convention, the United States began to more proactively seek out and prosecute actions of foreign bribery under the FCPA.²⁵ In his analysis of FCPA enforcement between 2000–2009, Professor Carl Pacini discovered a number of important trends.²⁶ These trends highlight the importance of FCPA compliance and the need for clarity in the coming years. Mr. Pacini's study cogently quantifies the federal government's recent aggressive enforcement regime.²⁷ The number of FCPA cases filed annually has escalated considerably since 2004.²⁸ Over 80 percent of case filings in the decade ending in 2009 occurred between 2005 and 2009.²⁹ In 2005, fourteen cases were initiated compared to sixty-seven in 2009.³⁰ The federal government has also increased its willingness to file criminal cases,³¹ to bring cases against individuals,³² and to seek greater monetary sanctions.³³ The broad nature of the FCPA has

22. See Jon Jordan, *The OECD's Call for an End to "Corrosive" Facilitation Payments and the International Focus on the Facilitation Payments Exception Under the Foreign Corrupt Practices Act*, 13 U. PA. J. BUS. L. 881, 893 (2011) (noting that Congress set out the facilitation payment exception in the 1998 amendments).

23. See LAY PERSON'S GUIDE, *supra* note 18, at 4–5 (defining a permissible facilitation payment).

24. See International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified as amended at 15 U.S.C. §§ 78dd-1 to 78dd-3, 78ff) (amending the FCPA); see also LAY PERSON'S GUIDE, *supra* note 18, at 2 (stating that in 1998 the United States implemented legislation to ratify the OECD Antibribery Convention, which the United States signed in 1997).

25. See Pacini, *supra* note 12, at 553–56 (finding a distinct trend of increased aggressiveness in SEC and DOJ enforcement efforts since 2000).

26. See generally *id.*

27. See *id.* (analyzing the DOJ and SEC enforcement campaigns for the years 2000–2009).

28. See *id.* (noting the increase in FCPA enforcement after 2004).

29. *Id.* at 553.

30. *Id.*

31. See *id.* (noting that the majority of cases that contributed to the rise in the level of FCPA enforcement involved criminal cases brought by the DOJ).

32. See *id.* (finding that in 2009 almost three times as many cases were brought against individuals (50) than against corporations (17)).

33. See *id.* at 554 (stating that “[b]oth total and mean monetary sanctions have increased considerably” between 2000 and 2009).

allowed U.S. enforcement agents to establish the United States as the most aggressive prosecutor of international bribery.³⁴

In the past 15 years, the international community has taken significant steps toward criminalizing the corruption of international business transactions.³⁵ Whether out of protectionist concerns, a fear of imposing competitive disadvantages on domestic businesses, or general indifference, no country had enacted a law similar to the FCPA prior to 1997. In 1997, the OECD Antibribery Convention changed this international acquiescence to bribery by obligating its ratifying members to criminalize the act of bribing foreign officials.³⁶ In 2003, the United Nations began advocating for the criminalization of specific conduct associated with bribery and the strengthening of international enforcement.³⁷ As more countries address this global issue, regional³⁸ and nongovernmental organizations³⁹ are joining the fight against international bribery.

However, international efforts to investigate and prosecute bribery have significantly trailed that of the United States.⁴⁰ The level of foreign bribery prosecutions differs greatly among the thirty-nine member countries.⁴¹ The United States is the most aggressive enforcer of foreign bribery⁴² with almost double the amount of cases

34. See HEIMANN & DELL, *supra* note 9 (stating that the United States continues to lead in foreign bribery prosecutions).

35. Since 1997, the OECD, the United Nations, and independent organizations have taken actions related to international corruption. See *infra* notes 40–42 and accompanying text.

36. See Lawrence W. Newman, *The New OECD Convention on Combating Bribery*, N.Y. L.J., Mar. 29, 1999 at 29 (“The OECD Convention, in criminalizing active corruption of officials of foreign countries by nationals of signatory states, serves to strengthen and unify international opposition to corrupt practices.”).

37. See United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. Doc A/58/422 (Oct. 31, 2003) (intending to promote and strengthen measures to prevent corruption).

38. See Rollo C. Baker, *Foreign Corrupt Practices Act*, 47 AM. CRIM. L. REV. 647, 671–72 (2010) (discussing the broad anticorruption conventions established by the European Union in 1997 and the African Union in 2006).

39. See Kathleen M. Hamann et al., *Developments in U.S. and International Efforts to Prevent Corruption*, 40 INT’L L. 417, 419–22 (2006) (summarizing the antibribery efforts of various nongovernmental organizations such as The Corner House, Global Witness, Trace, and Transparency International).

40. See generally HEIMANN & DELL, *supra* note 9 (profiling the progress and effectiveness of international antibribery legislation and enforcement via the eighth annual progress report on the OECD Antibribery Convention by Transparency International).

41. See *id.* at 6 (categorizing seven member countries as having “active enforcement,” twelve as having “moderate enforcement,” ten as having “little enforcement,” and eight as having “no enforcement”).

42. See *id.* at 6–9 (recognizing the United States as the most aggressive country that exhibits “active enforcement” of antibribery laws). While accounting for only 9.6 percent of the world’s exports in 2011, the United States prosecuted 39 percent and 40 percent of all foreign bribery cases in 2011 and 2010, respectively. See *id.* at 9 tbl.A (prosecuting 275 of a total of 708 worldwide cases in 2011 and prosecuting 227 of a total of 564 worldwide cases in 2010). Additionally, the United States was responsible

and investigations of any other member country.⁴³ Although the payments of bribes from U.S. organizations are lower than the global average, such payments remain significant and are proportionally greater than other developed world powers, such as Germany and France.⁴⁴ Despite heavy-handed enforcement, the pressure to pay bribes remains strong on account of the pervasive belief within organizations that business is often lost due to bribery committed by a competitor.⁴⁵

Although the United Kingdom was an original ratifying member of the OECD Antibribery Convention,⁴⁶ it did little to implement its obligations for 10 years after its signing.⁴⁷ Prior to the convention, UK antibribery laws consisted of a few outdated statutes and various common law convictions for bribery.⁴⁸ These statutes were “inconsistent, anachronistic and inadequate to comply with the [UK’s] obligations” under the OECD Antibribery Convention.⁴⁹

The United Kingdom took its first step toward true bribery prevention in 2001 with the passage of the Anti-Terrorism, Crime and Security Act.⁵⁰ The legislation did little to modernize the United Kingdom’s antibribery legislation, despite criminalizing bribery committed outside the United Kingdom,⁵¹ as it only applied to UK

for 39 percent and 45 percent of the current investigations of bribery in 2011 and 2010, respectively. *See id.* (initiating 113 out of a total of 286 worldwide investigations in 2011 and initiating 106 out of a total of 234 worldwide investigations in 2010).

43. *See id.* (providing data on the cases and investigations for the next most aggressive enforcement country, Germany). In 2011, Germany had 176 total cases and 43 investigations underway. Comparatively, in 2011, the United States had 275 cases and 113 investigations underway. *Id.*

44. *See* Press Release, Ernst & Young LLP, *supra* note 4 (noting in an Ernst & Young fraud survey that 15 percent of U.S. respondents reported at least one instance of bribery or corruption in the last 2 years as compared to the global average of 24 percent and a 6 percent average for both Germany and France respectively).

45. *See* David Hess & Cristie L. Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT’L. L.J. 307, 313 (2008) (“Overall, in 2006, 44% of the managers of U.S.-based corporations surveyed believed that they lost a contract due to bribery in the last five years and 20% believed that the same had occurred in the last twelve months.”).

46. *See generally* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1 (entered into force Feb. 15, 1999) (committing signatory OECD Antibribery Convention nations to criminalize the bribing of foreign public officials).

47. *See generally* Anti-Terrorism, Crime and Security Act, 2001, c. 24, § 109 (U.K.) (establishing the first UK antibribery legislation after the OECD Antibribery Convention).

48. These early twentieth century statutes consisted of the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916. *See* DAVID AARONBERG & NICHOLA HIGGINS, *THE BRIBERY ACT 2010: ALL BARK AND NO BITE...?*, 1, 1 (2010), available at http://www.15nbs.com/library/the_bribery_act_2010all_bark_and_no_bite.pdf (discussing the predecessors of the Bribery Act).

49. *Id.*

50. Anti-Terrorism, Crime and Security Act, 2001, c. 24, § 109 (U.K.).

51. *See id.* (addressing external acts of bribery).

nationals.⁵² Consequently, it was incapable of reaching any non-UK national even if they resided within the United Kingdom.⁵³

The United Kingdom's failure to reform its antibribery laws and to uphold its obligations under the OECD Antibribery Convention received repeated and often harsh criticism from the OECD Working Group on Bribery.⁵⁴ The United Kingdom's reputation was further damaged when the UK Serious Fraud Office (SFO) failed to properly investigate and prosecute illegal payments made to Saudi Arabian officials by BAE Systems (BAE), one of the United Kingdom's biggest arms manufacturers.⁵⁵ Only after the United States intervened to impose FCPA sanctions was BAE forced to pay a \$445 million fine for providing hundreds of millions of dollars in bribes to foreign officials to win defense contracts in Saudi Arabia and Hungary.⁵⁶

Under increasing international pressure, the United Kingdom passed the Bribery Act on April 8, 2010.⁵⁷ The Bribery Act repealed earlier patchwork legislation and established a single, comprehensive approach through the creation of four overlapping offenses: accepting a bribe, requesting a bribe, bribing a foreign official, and failing to prevent bribery by a commercial organization.⁵⁸ After some delay, the Ministry of Justice released the statutorily mandated guidance on the

52. *Id.* § 109(1)(a).

53. Section 109(4) defines a national of the United Kingdom as an individual who is:

- (a) a British citizen, a British Dependent Territories citizen, a British National (Overseas) or a British Overseas citizen,
- (b) a person who under the British Nationality Act 1981 (c. 61) is a British subject, or
- (c) a British protected person within the meaning of that Act.

Id. § 109(4).

54. See *OECD to Conduct a Further Examination of UK Efforts Against Bribery*, *supra* note 15 (noting that, in both 2003 and 2005, the OECD Working Group recommended that the United Kingdom adopt modern antibribery laws at the earliest possible time and, in 2007, the group reaffirmed that it maintained serious concerns about the state of UK antibribery laws).

55. See James Sturcke, *Serious Fraud Office Admits BAE Controversy Has Been Damaging*, THE GUARDIAN (June 27, 2007), <http://www.theguardian.com/world/2007/jun/27/bae.saudi-arabia> (reporting that SFO Director, Robert Wardle, had told Members of Parliament that Britain's reputation for fighting corruption was probably damaged by dropping the investigation into BAE); see also *OECD to Conduct a Further Examination of UK Efforts Against Bribery*, *supra* note 15 (recognizing the suspension of the BAE investigation as a factor contributing to the OECD's concern over the United Kingdom's ability to properly prosecute bribery under the laws existing at the time).

56. See *BAE Settles Protracted, Controversial Bribery Case with U.S. and U.K. Authorities*, MILLER CHEVALIER, <http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=26504> (recognizing that the United States began its own investigation in 2007 after the discontinuation of the UK investigation).

57. See AARONBERG & HIGGINS, *supra* note 48 (discussing the passing of the Bribery Act).

58. See *id.* (discussing the legislation that predated the Bribery Act).

act (Guidance) on March 30, 2011, and the Bribery Act became enforceable on July 1, 2011.⁵⁹

III. OVERVIEW OF THE FCPA

The FCPA prohibits two categories of conduct. The antibribery provisions generally prohibit a payment or an offer to make a payment to a foreign official in an attempt to obtain or retain business.⁶⁰ In addition, the accounting provisions force any company (domestic or foreign) whose securities are listed in the United States to implement appropriate compliance controls and to establish and maintain adequate business and financial records.⁶¹ The antibribery provisions apply to a broader range of entities than the accounting provisions because they apply to both issuers⁶² and domestic concerns,⁶³ while the accounting provisions are limited to issuers.⁶⁴

The 1998 amendments significantly expanded the FCPA's jurisdiction to cover more intentional conduct and parties. Under the current FCPA, issuers and domestic concerns may now be held liable for prohibited conduct whether the conduct occurs within the territory of the United States or abroad.⁶⁵ Foreign citizens and

59. See Kevin LaCroix, *U.K. Government Issues Bribery Act Guidance, Sets Effective Date*, THE D & O DIARY (Mar. 31, 2011), <http://www.dandodiary.com/2011/03/articles/foreign-corrupt-practices-act/uk-government-issues-bribery-act-guidance-sets-effective-date> (discussing the release of the Guidance).

60. See Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, §§ 78dd-1 to -3, 91 Stat. 1494 (1977); see also LAY PERSON'S GUIDE, *supra* note 18, at 2 (explaining that the antibribery provisions of the FCPA make it unlawful "to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person").

61. See Foreign Corrupt Practices Act § 78m(b)(2)(A); see also LAY PERSON'S GUIDE, *supra* note 18, at 2 (outlining which companies are required to meet the accounting provisions of the FCPA).

62. See Foreign Corrupt Practices Act § 78dd-1 (outlining prohibited foreign trade practices by issuers). An "issuer" is any company that has issued securities in the United States or any company that is subject to the reporting requirements of the Securities Exchange Act of 1934. LAY PERSON'S GUIDE, *supra* note 18, at 3.

63. See Foreign Corrupt Practices Act § 78dd-2 (prohibiting domestic concerns from certain foreign trade practices). A "domestic concern" includes "any individual who is a citizen, national, or resident of the United States" along with "any corporation, partnership . . . [or other business entity] which has its principal place of business in the United States" or is organized under the laws of the United States. See Foreign Corrupt Practices Act § 78dd-2(h)(1) (defining *domestic concern* as used within the FCPA).

64. See Foreign Corrupt Practices Act § 78m (outlining provisions that apply to issuers).

65. Originally, the FCPA only had jurisdiction over conduct that utilized a means or instrumentality of interstate commerce. See Foreign Corrupt Practices Act § 78dd-1(g)(1) (providing alternative jurisdiction over issuers "irrespective of whether such issuer or such officer, director employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce"); see also Foreign

companies also fall under the jurisdiction of the FCPA for acts committed within the United States.⁶⁶

A. The Antibribery Provisions

The antibribery provisions cover a broad range of corrupt activity beyond direct cash payments to government officials. Specifically, the antibribery provisions prohibit covered parties from (1) corruptly paying or offering to pay, (2) anything of value, (3) to a foreign official, (4) with the purpose of obtaining, retaining, or directing business to any person.⁶⁷

B. Corrupt Intent

A payment must be made corruptly to violate the FCPA.⁶⁸ The FCPA does not define *corruptly*,⁶⁹ but its inclusion ensures that the payor intends to wrongly influence the recipient. Notably, an intent to influence satisfies this requirement as the FCPA does not require that the act be carried out or that the conduct establish the desired outcome.⁷⁰ Courts have expanded this element to include anyone who intentionally attempts to accomplish a bad purpose, including unlawful results and the use of unlawful means.⁷¹ This element is an

Corrupt Practices Act § 78dd-2(i)(1) (providing similar alternative jurisdiction over domestic concerns).

66. Foreign citizens and corporations were originally only subject to the FCPA as issuers. See LAY PERSON'S GUIDE, *supra* note 18, at 3 (recognizing the original scope of the FCPA). The 1998 amendments increased the jurisdictional reach of the FCPA by extending jurisdiction over "any person" utilizing a means or instrumentality of interstate commerce. See Foreign Corrupt Practices Act § 78dd-3. A foreign citizen may further be subject to the FCPA for acts committed outside of the United States if they are acting as an agent of a domestic concern. Foreign Corrupt Practices Act § 78dd-2.

67. See Foreign Corrupt Practices Act §§ 78dd-1 to -3, 78dd-2, 78dd-3 (highlighting prohibited conduct as applied to issuers, domestic concerns, and persons other than issuers or domestic concerns).

68. See Foreign Corrupt Practices Act §§ 78dd-1 to -3 (requiring violators to "corruptly" make payments).

69. See S. REP. NO. 95-114, at 10 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4100-01 (providing that the word *corruptly* was utilized to ensure that the conduct be "intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or a favorable regulation").

70. See *id.* (stating that the FCPA does not require that the act be "fully consummated, or succeed in producing the desired outcome"); see also LAY PERSON'S GUIDE, *supra* note 18, at 3 (noting that there is no requirement in the FCPA that the corrupt act succeed in its desired purpose).

71. See Cyavash Nasir Ahmadi, Note, *Regulating the Regulators: A Solution to Foreign Corrupt Practices Act Woes*, 11 J. INT'L BUS. & L. 351, 357 (2012) (quoting *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991)) (explaining that the Eighth Circuit upheld a jury instruction for convictions under the FCPA that defined a *corrupt act* as an act that intentionally attempts to accomplish a bad purpose, which includes both unlawful results and the use of unlawful means).

important limitation on the scope of the FCPA as it is one of the few elements that the SEC and DOJ cannot functionally evade. The FCPA also requires that a defendant have knowledge that the payments will be made for a corrupt or illegal purpose.⁷² However, the 1998 amendments prevent an individual from avoiding the knowledge that payments are going toward a corrupt purpose in an attempt to circumvent this requirement.⁷³

1. Anything of Value

Illegal payments are not limited to monetary payments but include any “offer, gift, promise to give, or authorization of the giving of anything of value.”⁷⁴ Certain cases, such as the Marubeni Corporation’s payment of over \$50 million in bribes to Nigerian officials to obtain government contracts, clearly qualify as an exchange of value.⁷⁵ However, both the DOJ and SEC have given this phrase a far-reaching definition, encompassing items such as future consideration, executive training programs, and the payment of certain travel and medical expenses.⁷⁶ Moreover, the SEC has found even intangible items, such as intangible benefits from a charitable donation, to be a thing of value.⁷⁷ This all-inclusive definition

72. See Robert A. Youngberg, *A Guide to the Foreign Corrupt Practices Act*, 18 UTAH BAR J. 22, 23–24 (2005) (discussing the scope of the knowledge requirement of the FCPA and the expansion of the 1998 amendments to cover individuals who attempt to avoid such knowledge).

73. See *id.* (recognizing the expansion of this element after the 1998 amendments to cover individuals who attempt to avoid such knowledge).

74. Foreign Corrupt Practices Act § 78dd–1(a).

75. See ROBERT W. TARUN, *THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK: A PRACTICAL GUIDE FOR MULTINATIONAL GENERAL COUNSEL, TRANSACTIONAL LAWYERS AND WHITE COLLAR CRIMINAL PRACTITIONERS* 7 (3d ed. 2013) (recognizing that cash and equivalents are well understood to be within the meaning of the FCPA); Press Release, U.S. Dep’t of Justice, Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$54.6 Million Criminal Penalty (Jan. 17, 2012), available at <http://www.justice.gov/opa/pr/2012/January/12-crm-060.html> (discussing the DOJ’s settlement with the Marubeni Corporation regarding bribery allegations).

76. See Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 538 (discussing the broad nature of the interpretation of the phrase *anything of value*). In the related context of bribery of U.S. government officials, courts have similarly broadly construed the term *thing of value* and consider an item to be of value as long as the person receiving it subjectively attaches any value to the item. See *United State v. Gorman*, 807 F.2d 1299, 1305 (6th Cir. 1986) (“[T]he focus of [the term *thing of value*] is to be placed on the value which the defendant subjectively attaches to the items received.”). In *United States v. Gorman*, the Sixth Circuit found that both the extension of a loan and also a noncontractual promise of future employment amounted to a thing of value. *Id.*

77. See Westbrook, *supra* note 76, at 539 (discussing the 2004 settlement of an FCPA action against the Scherling-Plough Corporation for the payment of charitable donations).

provides the DOJ and SEC with unconstrained authority to prosecute activities that most individuals would not consider bribery.

2. Foreign Official⁷⁸

The FCPA provides an expansive meaning to the term *foreign official*.⁷⁹ The FCPA is not concerned with an individual's rank or position as it focuses on the corrupt purpose, not the ability of the recipient to carry out the corrupt purpose.⁸⁰ The FCPA's definition of a *foreign official* covers direct employees of a foreign government and those that exercise authority over government decisions and contracts.⁸¹

Additionally, an officer or employee is considered a foreign official if they work for an "instrumentality" of a foreign government.⁸² The DOJ and SEC have interpreted *instrumentality* to include employees of state-owned or state-controlled companies.⁸³ While willing to prosecute payments to employees of partially state-owned or state-managed entities, the DOJ and SEC have failed to provide adequate guidance on the meaning of instrumentality of a foreign government.⁸⁴ Even if the business is only partially

78. The definition and scope of *foreign official* under the FCPA is a highly nuanced and uncertain area within the FCPA. While various commentators have addressed the development and expansion of the term *foreign official*, this complexity is outside the scope of this Note. See Westbrook, *supra* note 76, at 531–38 (discussing the expansive statutory interpretation given to the term *foreign official*). See generally Court E. Golumbic & Jonathan P. Adams, *The "Dominant Influence" Test: The FCPA's "Instrumentality" and "Foreign Official" Requirements and the Investment Activity of Sovereign Wealth Funds*, 39 AM. J. CRIM. L. 1 (2011) (discussing the application of the term *foreign official* as applied to sovereign wealth funds).

79. See Foreign Corrupt Practices Act §§ 78dd–1(f)(1)(A), 2(h)(2)(A), 3(f)(2)(A) (defining *foreign official* as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization").

80. See LAY PERSON'S GUIDE, *supra* note 18, at 3 (recognizing the FCPA's focus on the corrupt purpose).

81. See *id.* (including any individual acting in an official capacity).

82. See Foreign Corrupt Practices Act §§ 78dd–1(f)(1)(A), 2(h)(2)(A), 3(f)(2)(A) (defining *foreign official* as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization").

83. See Joel M. Cohen, Michael P. Holland & Adam P. Wolf, *Under the FCPA, Who Is a Foreign Official Anyway?*, 63 BUS. LAW. 1243, 1249–50 (discussing the DOJ and SEC's interpretation of the term *foreign official* under the FCPA).

84. See *id.* at 1250 ("[T]he DOJ and SEC have declined to provide guidance so that companies may proactively determine whether their customers and business partners are 'instrumentalities' of their respective governments."). While it is clear that an entity need not be wholly owned by the government to be considered an instrumentality, it is not clear exactly what level of government ownership or control is

government owned or controlled, all officers, employees, and any individual acting on behalf of an instrumentality of a foreign government are considered a foreign official.⁸⁵ This ambiguously broad definition imposes significant uncertainty upon employees and companies as it is often difficult to ascertain whether they are actually transacting with an instrumentality of a foreign government.⁸⁶ This is especially challenging when dealing with foreign governments that maintain significant control or ownership of domestic businesses, such as China.⁸⁷ While this definition of *foreign official* is broad, it is still narrower than the definition recommended by the OECD Antibribery Convention.⁸⁸

3. The Business Purpose Test

In order to qualify as illegal conduct, one must either secure an improper advantage or assist in the retaining, obtaining, or directing of business to any person.⁸⁹ The DOJ and SEC have interpreted this requirement broadly to include more than the obtaining or continuation of a government contract.⁹⁰ Moreover, the Fifth Circuit

required in order to convert a public business or entity into a government instrumentality. *Id.*

85. Foreign Corrupt Practices Act §§ 78dd-1(f)(1)(A), 2(h)(2)(A), 3(f)(2)(A).

86. See Cohen, Holland & Wolf, *supra* note 83, at 1250-54 (noting the confusion surrounding the DOJ and SEC's interpretation of the term *instrumentality*).

87. See Eve Cary, *Reforming China's State-Owned Enterprises*, THE DIPLOMAT, (June 19, 2013), available at <http://thediplomat.com/2013/06/19/reforming-chinas-state-owned-enterprises/?all=true> (recognizing the existence of "China's huge apparatus of state-owned enterprises").

88. See Golumbic & Adams, *supra* note 78, at 12-13 (discussing the scope and definition of *foreign official* under the OECD Antibribery Convention). Specifically, the OECD Antibribery Convention defined *foreign official* to include both individuals that hold governmental offices within a country (judicial, administrative, and legislative) and also "any person exercising a public function for a foreign country, including for a public agency or *public enterprise*." *Id.* (emphasis in original). On account of the OECD Antibribery Convention, part of the 1998 amendments added public international organizations into the definition of *foreign official*. See *id.* (discussing the changes implemented after the 1998 amendments). While Congress has expanded the scope of foreign official on account of the OECD Antibribery Convention, Congress has not incorporated the OECD Antibribery Convention's standards of ownership, which would render an entity a public enterprise. See *id.* at 13 (noting Congress's response to the OECD Antibribery Convention).

89. See Foreign Corrupt Practices Act § 78dd-2(a)(1) (prohibiting the use of the mail for payments, offers to "any foreign official for purposes of . . . securing any improper advantage," or "obtaining or retaining business for or with, or directing business to, any person"). This requirement is commonly referred to as the business purpose or business nexus test. The scope of this provision was extended during the 1998 amendments to include an improper advantage. See Youngsberg, *supra* note 72 (discussing the 1998 amendments to the FCPA).

90. See LAY PERSON'S GUIDE, *supra* note 18, at 4 (recognizing the broad interpretation of the business purpose test). Similarly, the Fifth Circuit, in *United States v. Kay*, held that Congress intended the FCPA to address exchanges beyond those that relate directly to a government contract. See 359 F.3d 738, 749 (5th Cir.

noted that disadvantaging competitors has a “sufficient nexus” to an entity’s ability to obtain, maintain, conduct, or increase business in the country, satisfying this element.⁹¹ Thereby, a transaction that has a monetary savings or other positive impact will satisfy this requirement.⁹² The advantage does not need to come directly from the government or an instrumentality of the government as long as the transaction occurs with a foreign official.⁹³

4. The Facilitating or Grease Payment Exception

Congress provided a limited exception to the antibribery provisions to address the realities of the business environment in foreign countries and to lessen the competitive disadvantage placed upon American companies transacting abroad.⁹⁴ The difficulty of competing with foreign institutions that may freely bribe without facing corresponding liability was a great concern to both the U.S. business community and Congress.⁹⁵ Accordingly, the FCPA does not explicitly apply to “any facilitating or expediting payment to a foreign official[,] . . . the purpose of which is to expedite or to secure the performance of a routine governmental action.”⁹⁶

While judicial rulings upon this exception are significantly limited, courts that have dealt with this provision have focused their

2004) (pointing out that “the immorality, inefficiency, and unethical character of bribery presumably does not vanish simply because the tainted payments are intended to secure a favorable decision less significant than winning a contract bid”).

91. See *Kay*, 359 F.3d at 749 (recognizing that if the defendant’s bribes sufficiently lowered their costs of doing business in the country, then such actions would satisfy the business nexus requirement).

92. See *id.* (recognizing tax savings procured through bribery as sufficiently linked to retaining business to meet the requirement).

93. See LAY PERSON’S GUIDE, *supra* note 18, at 4 (pointing out the lack of a requirement for direct payment). Many improper advantages, such as the awarding of government contracts or the reducing of custom’s payments, come directly from the government; yet, other advantages, such as an improper permit for a factory that fails to meet a statutory requirement, create improper advantages (lower operating costs) that come only indirectly from the government. See *Kay*, 359 F.3d at 747 (recognizing that an unwarranted permit would amount to an improper advantage covered under the FCPA).

94. See Report, Committee on Fiscal Affairs to the OECD Council, Implementation of the OECD Recommendations on the Deductibility of Bribes to Foreign Public Officials (Apr. 28, 1998), available at <http://www.oecd.org/daf/bribery/ininternationalbusiness/anti-briberyconvention/implementationoftheoecdrecommendationonthetaxdeductibilityofbribestoforeignpublicofficials.htm> (recognizing that prior to the OECD Antibribery Convention, many countries not only tolerated bribes of foreign officials but also allowed companies to deduct such expenses for tax purposes).

95. See Emily N. Strauss, Note, “Easing Out” *The FCPA Facilitation Payment Exception*, 93 B.U. L. REV. 235, 236 (2013) (noting that Congress recognized the realities faced by many corporations doing business abroad when enacting the facilitation payment exception).

96. Foreign Corrupt Practices Act § 78dd–1(b), 2(b), 3(b).

analysis on the lack of a foreign official's discretionary authority. In *United States v. Kay*, the Fifth Circuit noted that Congress sought to prevent bribery, which requires an official to abuse his governmental position through the misuse of his discretionary authority.⁹⁷ Unlike bribery, facilitation payments are essentially ministerial actions that move a governmental action toward a discretionary decision, but the action itself is nondiscretionary.⁹⁸ Although there is no statutory limitation on the monetary value, general consensus is that facilitation payments are under one thousand dollars.⁹⁹

Additionally, the phrase *routine governmental action* limits the breadth of this exception to an ordinary action of a foreign official.¹⁰⁰ Without providing an exhaustive list, the statute offers specific examples of routine actions.¹⁰¹ The unifying characteristic of these examples is that they amount to nondiscretionary actions foreign officials perform during the normal course of fulfilling their duties.

5. Affirmative Defenses: Legal Payments and Bona Fide Expenditures

The 1998 amendments to the FCPA established two affirmative defenses.¹⁰² First, a payment or exchange is legal if it is "lawful under the written laws and regulations" of the foreign country in which it was made.¹⁰³ The use of this defense is extremely rare as it requires proof of an affirmative and written foreign law that specifically allows the payment or gift.¹⁰⁴ Neither customary practices nor prosecutorial

97. See *Kay*, 359 F.3d at 747 (noting the importance of the use of a foreign official's discretionary authority in order to constitute bribery).

98. See *id.* (relying upon the legislative history of the FCPA to define these terms as Congress did not provide for expressed textual exceptions).

99. See Arthur F. Matthews, *Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Decree Settlements*, 18 NW. J. INT'L L. & BUS. 303, 315 (1998) (discussing the size of facilitation payments).

100. See Foreign Corrupt Practices Act §§ 78dd-1(f)(3), 2(h)(4), 3(f)(4)(A) (defining *routine governmental action*).

101. See *id.* (providing that the following categories of activities may fall into a routine governmental action: obtaining official documents to conduct business in the country (permits, licenses, etc.); facilitating the processing of governmental papers (visas and various work orders); and the providing of various services, including but not limited to police protection, loading cargo, power and water, and scheduling of inspections).

102. See Youngberg, *supra* note 72, at 25 (discussing the adoption of the affirmative defenses).

103. See Foreign Corrupt Practices Act §§ 78dd-1(c)(1), 2(c)(1), 3(c)(1) (defining requirements for the first affirmative defense).

104. See LAY PERSON'S GUIDE, *supra* note 18, at 5 (requiring a written law in order for the defense to apply).

acquiescence will suffice.¹⁰⁵ Judicial construction of this defense is infrequent and typically raises more questions than it answers.¹⁰⁶

Second, the FCPA does not prohibit a payment, gift, offer, or promise of anything of value that is a reasonable “bona fide expenditure.”¹⁰⁷ The foreign official must incur this expense, which must be directly related to “(A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof.”¹⁰⁸ An example of a reasonable and bona fide expenditure would be payment for travel and lodging expenses.¹⁰⁹

B. *The Accounting Provisions*

The accounting provisions represent Congress’s response to organizations that were using off-the-books slush funds to covertly bribe foreign officials.¹¹⁰ Specifically, the accounting provisions, codified in 15 U.S.C. § 78m(b)(2) and (b)(5), consist of two requirements: an issuer must maintain (1) accurate records of transactions concerning assets and (2) an appropriate system of internal controls.¹¹¹ These requirements apply to conduct outside the context of bribery as they cover all record keeping.¹¹² However, these provisions only apply to issuers as defined by the Securities Exchange

105. See H.R. REP. NO. 100-576, at 922 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547,1955 (requiring proof of a written law in the country for the defense to apply).

106. See *First Judicial Construction of the FCPA Local Law Administrative Defense Raises More Questions than it Answers*, STEPTOE & JOHNSTON LLP (Nov. 14, 2008) <http://www.stepto.com/publications-5743.html> (noting that a recent judicial opinion “raised more questions than it answered – and provided little useful guidance to corporations”).

107. See Foreign Corrupt Practices Act §§ 78dd-1(c)(2), 2(c)(2), 3(c)(2) (defining requirements for the second affirmative defense).

108. *Id.*

109. *Id.* In practice, the exception is very limited. For example, while travel expenses may be considered a bona fide expenditure, such payments are also often considered impermissible if they provide any personal benefit or convenience to the foreign official. See Westbrook, *supra* note 76, at 538 (discussing the overly broad nature of the interpretation of the phrase *anything of value*).

110. See S. REP. NO. 95-114, at 1-2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4100-01 (discussing the history of the amendment bill, including the existence of “undisclosed[,] questionable or illegal corporate payments”).

111. See Foreign Corrupt Practices Act §§ 78m(b)(2), (b)(5) (defining *issuer reporting requirements*).

112. See U.S. DEP’T OF JUSTICE & SEC. AND EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, 38 (2012) [hereinafter *THE GUIDE*] (noting that not only do the accounting provisions address bribery but they are also the basis for most disclosure and accounting fraud cases pursued by the SEC and DOJ). In this aspect, the accounting provisions have a wide reach as they apply regardless of whether a company conducts foreign business. *Id.* at 42-43 (discussing civil liability for issuers, affiliates, and subsidiaries).

Act of 1934, meaning the provisions have a narrower scope than the far-reaching antibribery provisions.

1. The Books and Records Provision¹¹³

The books and records provision attempts to prevent the concealment of improper payments in a company's books by concealing such payments as legitimate business expenses. The DOJ and SEC recognize that there are nearly infinite possibilities available to companies to mischaracterize bribes.¹¹⁴ For example, a company may falsely record a bribe as any number of legitimate business expenses, such as petty cash withdrawals, sales commissions, or consulting fees.¹¹⁵

Specifically, the books and records provision mandates that issuers "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."¹¹⁶ This provision has three objectives: (1) making unlawful any act resulting in inaccurate financial records; (2) ensuring that transactions are recorded according to accepted methods of reporting; and (3) providing records that reflect a transaction such that financial statements may be produced in conformity with Generally Accepted Accounting Principles and other standards.¹¹⁷

113. The books and records provision is the common term used to refer to 15 U.S.C. § 78m(b)(2)(A). See THE GUIDE, *supra* note 112, at 39 ("Section 13(b)(2)(A) of the Exchange Act (15 U.S.C. § 78m(b)(2)(A)) . . . [is] commonly called the 'books and records' provision").

114. See THE GUIDE, *supra* note 112, at 39 (acknowledging in their 2012 guidance on the FCPA that the DOJ and SEC have seen bribes mischaracterized as: "Commissions or Royalties, Consulting Fees, Sales and Marketing Expenses, Scientific Incentives or Studies, Travel and Entertainment Expenses, Rebates or Discounts, After Sales Service Fees, Miscellaneous Expenses, Petty Cash Withdrawals, Free Goods, Intercompany Accounts, Supplier/Vendor Payments, Write-offs, and 'Customs Intervention' Payments").

115. See *id.* (discussing specific examples of bribe mischaracterizations).

116. See Foreign Corrupt Practices Act § 78m(b)(7) (defining *reasonable detail* as a "level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs").

117. In *SEC v. World-Wide Coin Invs., Ltd.*, 567 F. Supp. 724, 748 (N.D. Ga. 1983) the court found that the books and records provision has:

three basic objectives: (1) books and records should reflect transactions in conformity with accepted methods of reporting economic events, (2) misrepresentation, concealment, falsification, circumvention, and other deliberate acts resulting in inaccurate financial books and records are unlawful, and (3) transactions should be properly reflected on books and records in such a manner as to permit the preparation of financial statements in conformity with GAAP and other criteria applicable to such statements.

There are a few notable aspects of this provision. *Reasonable detail*¹¹⁸ serves as the qualifying term of this provision. Congress and the courts have noted that this provision does not require a level of exact precision,¹¹⁹ instead the level of accuracy necessary will vary with the nature of the transaction.¹²⁰ However, no materiality threshold exists in order for an inaccurately recorded transaction to breach this provision.¹²¹ Finally, although not specifically defined, *books, records, and accounts* have received very broad and potentially all encompassing definitions.¹²²

2. The Internal Controls Provision

The FCPA internal controls provision requires issuers to maintain a system of internal accounting controls.¹²³ Neither the FCPA nor the SEC explains how to determine an adequate system of controls, nor do they mandate the implementation of specific controls.¹²⁴ Similar to the books and records provision, the FCPA applies the reasonableness requirement.¹²⁵

118. See Foreign Corrupt Practices Act § 78m(b)(7) (defining *reasonable detail*).

119. See THE GUIDE, *supra* note 112, at 39 (“[A]s Congress noted when it adopted this definition, [t]he concept of reasonableness of necessity contemplates the weighing of a number of relevant factors, including the costs of compliance.”); see also *World-Wide Coin Invs.*, 567 F. Supp. at 749 (noting the numerous objections to the requirement that records be “accurate”).

120. See *World-Wide Coin Invs.*, 567 F. Supp. at 749 (noting that the accuracy requirement requires “conformity with accepted methods of recording economic events” and not “exact precision as measured by some abstract principle”).

121. See THE GUIDE, *supra* note 112, at 39 (noting that the inaccurate recording of any payment is enough for an issuer to be in violation of the provision).

122. See *World-Wide Coin Invs.*, 567 F. Supp. at 748–49 (explaining that the broad definition may be such that it is possible that “virtually any tangible embodiment of information made or kept by an issuer is within the scope” of the books and records provision).

123. Section 78m(b)(2)(B) of the Foreign Corrupt Practices Act prescribes that this system of controls must

provide reasonable assurances that – (i) transactions are executed in accordance with management’s general or specific authorization; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management’s general or specific authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

Foreign Corrupt Practices Act § 78m(b)(2)(B).

124. See *id.* (prescribing what assurances an organization’s system of controls must provide but not mandating any specific forms of control).

125. See *id.* § 78m(b)(7) (providing the same definition for both *reasonable assurances* used in the internal controls provision and *reasonable detail* used in the books and record provision).

Overall, the importance of company-specific risks requires that this provision remain open-ended to provide flexibility. Generally, the nature of an organization's business and the risks inherent in its operations will drive the design and implementation of its system of controls.¹²⁶ To be effective, a compliance program must be tailored to meet company-specific risks.¹²⁷ While not legally binding, the terms of DOJ and SEC settlement agreements help to establish a common law of FCPA compliance best practices.¹²⁸

IV. ANTIBRIBERY LAW IN THE UNITED KINGDOM: BRIBERY ACT 2010

Although the United Kingdom signed the original OECD Antibribery Convention 16 years ago,¹²⁹ the enactment of the Bribery Act represents the United Kingdom's first meaningful effort to address foreign bribery. Prior to the Bribery Act, legislative indifference caused the United Kingdom to gain a reputation as being soft on bribery.¹³⁰ The Bribery Act replaced existing UK laws by creating three main offenses: (1) bribing another person; (2) accepting a bribe; and (3) bribing a foreign official.¹³¹ Additionally, the Bribery Act established a far-reaching strict liability offense that criminalizes a commercial organization's failure to prevent bribery done on their behalf.¹³²

126. See THE GUIDE, *supra* note 112, at 40 (noting the importance of risk assessments in regard to high risk regions and businesses).

127. An effective system of internal controls will include a wide variety of components, potentially covering: (1) the overall tone and importance placed upon integrity and ethics by the corporation, (2) information, communication, and monitoring procedures, (3) policies designed to effectively ensure management directives are implemented, (4) risk assessment procedures to uncover high risk regions or businesses, (5) internal disciplinary systems, (6) employee training and education, and (7) proper violation reporting procedures. See *id.* (discussing components of typical internal control systems).

128. See, e.g., Plea Agreement at 10, United States v. Siemens Aktiengesellschaft, No. 1:08-CR-00367-RJL (D.C. Cir. Dec. 15, 2008), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-15-08siemensakt-plea.pdf> (requiring Siemens AG to implement an outside monitoring firm for 4 years as a condition of settlement).

129. See generally Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 46.

130. See *Bribery Laws 'Shameful', Say MPs*, BBC NEWS (Apr. 4, 2001) http://news.bbc.co.uk/2/hi/uk_news/politics/1259957.stm (discussing the perceived inadequacies of the UK antibribery legislation).

131. See Bribery Act, 2010, c. 23, §§ 1, 2, 6 (U.K.) (setting forth new antibribery crimes).

132. See *id.* § 7 (providing for an organizational strict liability offense).

A. Giving or Receiving Bribes: § 1 and § 2 Offenses

Combined, § 1 and § 2 of the Bribery Act cover an individual making (§ 1 offenses) or receiving (§ 2 offenses) a bribe.¹³³ These sections apply to individuals regardless of whether they are acting in their individual capacity or on behalf of an organization.¹³⁴

Section 1 makes it illegal to offer, promise, or give—either directly or through a third party or agent¹³⁵—a financial or other advantage to another person when (1) the exchange intends to induce or reward the “improper performance” of a “relevant function” or (2) where the offeror knows or believes that acceptance of the exchange itself would amount to an improper performance of such function.¹³⁶ Section 1 is not limited to monetary bribes, nor does it require actual payment as an offer constitutes an offense.¹³⁷ A relevant function entails the actions of public officials, including acts taken in conjunction with private business and acts done in the course of one’s employment that arise to a position of trust.¹³⁸ An act or omission related to such function is performed improperly if it breaches the relevant expectations of a reasonable person in the United Kingdom without consideration for any local custom or practice absent written local law.¹³⁹ An individual must in good faith respect a position of trust.¹⁴⁰

Section 2 of the Bribery Act concerns the potential recipient of the bribe (or a third party acting at their request)¹⁴¹ who requests, agrees to receive, or accepts a financial or other advantage in one of four different situations.¹⁴² All aspects of § 1 offenses are similarly applied to § 2 offenses.¹⁴³

133. See *id.* §§ 1–2 (defining liability for individuals making or receiving bribes).

134. See *id.* (extending liability to exchanges in which the individual making or receiving a bribe is not the ultimate beneficiary of the transaction).

135. See *id.* § 1(5) (“[I]t does not matter whether the advantage is offered, promised or given by [a person] directly or through a third party.”).

136. See *id.* §§ 1(2)–(3) (making it an offense to offer, promise, or give an advantage when that advantage is intended to induce an improper performance, as well as when the acceptance of such an advantage would itself be an improper performance).

137. See *id.* (making it an offense to give, promise, or offer a “financial or other advantage”).

138. *Id.* § 4(2).

139. See *id.* §§ 4–5 (defining the Act’s “expectation test”).

140. See GUIDANCE, *supra* note 16, at 10 (explaining that “‘improper performance’ . . . means performance which amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust”).

141. See Bribery Act, 2010, c. 23, § 2(5)(b) (identifying third-party recipients as covered under the Bribery Act).

142. See *id.* § 2 (setting forth the situations in which an individual improperly receives a bribe). In its entirety, Section 2 of the Bribery Act states:

(1) A person (“R”) is guilty of an offence if any of the following cases applies.

B. Bribery of Foreign Public Officials: § 6 Offenses

Like the FCPA, § 6 of the Bribery Act addresses payments made to a foreign official. An individual may not offer, promise, or give any financial or other advantage to a foreign official if the individual intends to (1) obtain or retain business or a related advantage and (2) influence the foreign public official in their official capacity.¹⁴⁴ The Bribery Act provides an expansive definition of *foreign public official* that includes anyone who holds an administrative, judicial, or legislative position outside of the United Kingdom, as well as individuals who exercise a public function for a foreign government, public agency, or public international organization.¹⁴⁵

(2) Case 3 is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person).

(3) Case 4 is where—

(a) R requests, agrees to receive or accepts a financial or other advantage, and

(b) the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.

(4) Case 5 is where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity.

(5) Case 6 is where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly—

(a) by R, or

(b) by another person at R's request or with R's assent or acquiescence.

(6) In cases 3 to 6 it does not matter—

(a) whether R requests, agrees to receive or accepts (or is to request, agree to receive or accept) the advantage directly or through a third party,

(b) whether the advantage is (or is to be) for the benefit of R or another person.

(7) In cases 4 to 6 it does not matter whether R knows or believes that the performance of the function or activity is improper.

(8) In case 6, where a person other than R is performing the function or activity, it also does not matter whether that person knows or believes that the performance of the function or activity is improper.

Id.

143. Section 2 bribes are not limited to either cash or monetary payments, nor does the bribe need to be completed as a request alone may be enough to complete the offense. *Id.* Additionally, the same definitions of *relevant functions* and *improper performance* apply similarly to § 2. *Id.* §§ 3–4.

144. *Id.* §§ 6(1)–(3).

145. *Id.* § 6(5).

While § 6 exists as a standalone offense, § 1 and § 6 often capture the same conduct but in different ways.¹⁴⁶ The Ministry of Justice has indicated that the inclusion of § 6 removes the requirement of proving an improper performance on account of the inherent evidentiary difficulties concerning foreign officials.¹⁴⁷

C. Failure of Commercial Organizations to Prevent Bribery: § 7 Offenses

Section 7 applies strict liability to “relevant commercial organizations” if a “person associated” with the organization bribes another person to obtain business or a related advantage.¹⁴⁸ Consequently, a qualifying organization will be liable for any action taken by an associated person that meets the requirements of § 1 or § 6.¹⁴⁹ The expansive definitions provided for *associated person* and *relevant commercial organizations*, which are unique to § 7, grant this provision broader jurisdiction than the rest of the Bribery Act.

The definition for an *associated person* includes anyone who performs services on behalf of the organization¹⁵⁰—the Bribery Act does not focus on the capacity in which a person serves the organization.¹⁵¹ This comprehensive definition was intended “to embrace the whole range of persons connected to an organization who might be capable of committing bribery on the organization’s behalf.”¹⁵² Thus, this overly broad classification encompasses more than employees, agents, and subsidiaries, it also includes contractors, suppliers, and other members of an organization’s supply chain.¹⁵³

The definition of *relevant commercial organizations* further extends § 7’s extraterritorial reach. While § 1, § 2, and § 6 of the Bribery Act govern actions occurring in foreign territories, these sections are limited to UK entities or those with a close connection to the United Kingdom.¹⁵⁴ Conversely, while clearly covering UK-based entities, § 7 does not require a close connection to the United

146. See GUIDANCE, *supra* note 16, ¶ 23, at 11 (noting that the conduct targeted by § 6 may include activity that constitutes “improper performance” for the purposes of § 1).

147. See *id.* (recognizing that the legislature was attempting to “formulate the offense to take account of the evidential difficulties”).

148. Bribery Act, 2010, c. 23, § 7(1).

149. See *id.* (Section 7 offenses cover conduct addressed under § 1 and § 6).

150. *Id.* § 8(1).

151. *Id.* §§ 8(2)–(4); see GUIDANCE, *supra* note 16, ¶ 37, at 16 (discussing the Bribery Act’s focus on all of the relevant circumstances of the relationship between the individual and the organization).

152. GUIDANCE, *supra* note 16, ¶ 37, at 16 (emphasis added).

153. See *id.* ¶ 37–39, at 17 (noting the possibility of including such entities within the scope of an *associated person* as defined by the Bribery Act).

154. See Bribery Act, 2010, c. 23, § 12(1) (“An offence is committed under section 1, 2 or 6 in England and Wales, Scotland or Northern Ireland if any act or omission which forms part of the offence takes place in that part of the United Kingdom.”).

Kingdom. Accordingly, for § 7 to apply to an organization, it must simply carry on any part of its business in the United Kingdom.¹⁵⁵ This lack of a territorial emphasis will impose § 7 upon many non-UK entities, some of which may have only tangential contact with the United Kingdom. Furthermore, the Ministry of Justice's Guidance provides little insight into what organizations qualify under this provision.¹⁵⁶ As a result, UK courts will eventually define the scope of this provision themselves.

However, § 7 does contain a complete affirmative defense based on an organization's compliance procedures.¹⁵⁷ Since § 7 requires no intent or knowledge on behalf of the organization, if an associated person's action constitutes a bribe, then the organization will be liable unless it can establish this sole defense.¹⁵⁸

The required procedures are not specified in the Bribery Act. Instead, § 9 mandates that the UK Secretary of State publish guidance concerning such procedures.¹⁵⁹ Regrettably, this Guidance fails to provide any bright-line rules but simply sets forth six flexible, nonprescriptive principles that should inform a commercial organization's antibribery procedures.¹⁶⁰ While each principle contains both commentary and potentially applicable procedures, in aggregate these principles amount to an application of the same common sense yet highly ambiguous standards used to determine the initial applicability of § 7. Functionally, the Guidance amounts to a requirement that the procedures be "proportionate to [the] risk" an organization faces.¹⁶¹ Importantly, the Guidance notes that the onus remains on the organization to establish the adequacy of their procedures under a court's fact-specific inquiry.¹⁶²

155. See *id.* § 7(5) (defining a *relevant commercial organization* as any partnership or corporation that "carries on a business, in any part of the United Kingdom").

156. See GUIDANCE, *supra* note 16, ¶¶ 35–36, at 15 (providing exclusively for a common sense approach under which a "demonstrable business presence" would be considered enough for an organization to qualify under § 7).

157. See Bribery Act, 2010, c. 23, § 7(2) (describing possible defenses for commercial organizations).

158. See GUIDANCE, *supra* note 16, ¶ 11, at 8 (stating that § 7 provides for a full defense by way of the existence of adequate procedures).

159. Bribery Act, 2010, c. 23, § 9(1); see generally GUIDANCE, *supra* note 16 (highlighting that § 9's required guidance was included as part of the Bribery Act Guidance published in March 2011).

160. The six principles consist of proportionate procedures, top-level commitment, risk assessment, due diligence, communication, and monitoring and review. See *id.* at 21–31 (setting forth each principle and their accompanying commentary).

161. *Id.* at 20.

162. See *id.* ¶ 4, at 6 (requiring that the courts conduct a factual inquiry into the organization's specific circumstances as the Guidance is incapable of making such a fact specific determination).

Considering the lack of clarity as to what courts will consider adequate procedures, a non-UK company's best defense may be to ensure that they do not fall within the jurisdiction of § 7. While this may be impossible for countless business or logistical reasons, in order to avoid inclusion within § 7, a company must operate in a way that avoids "a close connection" to the United Kingdom and does not carry on any part of its business in the United Kingdom.¹⁶³

V. COMPARATIVE ANALYSIS: THE FCPA AND THE BRIBERY ACT 2010

The framework, scope, and controlling provisions of the FCPA and the Bribery Act have many commonalities. Both pieces of legislation share the goal of preventing bribes to foreign officials, and many related provisions possess similar scope and meaning.

However, these pieces of legislation differ in material ways. These differences are important to consider even for organizations incorporated and based in the United States for three main reasons: (1) the scope and jurisdictional reach of § 7 of the Bribery Act makes it likely that it will apply to many U.S.-based organizations; (2) the Bribery Act will serve as the *de facto* regulation when its provisions are broader than those in the FCPA; and (3) the uncertainty concerning various provisions of the Bribery Act provide prosecutors with significant discretion to pursue claims that would not be brought under the FCPA.

A. Jurisdictional Reach

The Bribery Act expanded the jurisdictional reach of the United Kingdom's antibribery legislation in two significant ways. First, the Bribery Act extended liability for acts committed outside of the United Kingdom to individuals who are not UK nationals.¹⁶⁴ This was accomplished through the Bribery Act's close connection to the UK test.¹⁶⁵ This requirement makes it illegal for anyone considered to

163. See *supra* text accompanying notes 129–30.

164. See *supra* text accompanying notes 43–44 (explaining that prior to the Bribery Act, UK antibribery laws failed to reach beyond UK nationals).

165. The Bribery Act specifies that a person has a close connection with the United Kingdom if they meet any of the following criteria:

- (a) a British citizen,
- (b) a British overseas territories citizen,
- (c) a British National (Overseas),
- (d) a British Overseas citizen,
- (e) a person who under the British Nationality Act 1981 was a British subject,
- (f) a British protected person within the meaning of that Act,
- (g) an individual ordinarily resident in the United Kingdom,
- (h) a body incorporated under the law of any part of the United Kingdom,

have a close connection to the United Kingdom to bribe another individual, accept a bribe, or bribe a foreign official (§ 1, § 2, and § 6, respectively).¹⁶⁶ This extension of jurisdictional reach is similar but less broad than the 1998 amendments to the FCPA¹⁶⁷ that extended FCPA jurisdiction to anyone utilizing a means or instrumentality of interstate commerce. Unlike the comprehensive jurisdiction of the FCPA, the close connection test of the Bribery Act only extends jurisdiction over residents of the United Kingdom and organizations incorporated under its laws.

Despite the relatively constricted scope of § 1, § 2, and § 6, § 7 of the Bribery Act exhibits a significantly wider extraterritorial reach. In addition to businesses incorporated within the United Kingdom, § 7 extends its jurisdiction to any entity that “carries on a business or part of a business, in any part of the United Kingdom.”¹⁶⁸ Thus, § 7 effectively covers most international organizations within its jurisdiction and all persons associated with those organizations.

Conversely, the FCPA does not cover the actions of foreign organizations acting outside of the United States unless the organization avails itself of the United States’ public markets.¹⁶⁹ Furthermore, the FCPA does not include a strict liability provision comparable to § 7. While the accounting provisions of the FCPA and § 7 of the Bribery Act both encourage internal controls, far from the extraterritorial approach of § 7, the jurisdiction of the FCPA’s accounting provisions are narrower than the FCPA’s antibribery provisions.¹⁷⁰

While the extraterritorial breadth of the FCPA is statutorily limited, § 7 of the Bribery Act arguably provides the United Kingdom’s SFO with jurisdiction to pursue actions taken in a foreign territory by any individual associated with an organization as long as the organization avails itself of any part of the UK economy.¹⁷¹ While

(i) a Scottish partnership.)

Bribery Act, 2010, c. 23, §§ 12(1)–(4).

166. See *id.* §§ 12(2)(c), 12(3) (establishing liability for acts committed outside of the United Kingdom as long as an individual has a close connection to the United Kingdom).

167. Included within the 1998 amendments to the FCPA was the addition of the phrase *any person*, thereby extending the jurisdictional reach of the statute. Foreign Corrupt Practices Act § 78dd-3.

168. Bribery Act, 2010, c. 23, §§ 7(5)(b), (d).

169. Availing oneself to U.S. markets makes one an issuer under the Securities Exchange Act of 1934 and thereby under the jurisdiction of the FCPA. See Foreign Corrupt Practices Act § 78dd-1.

170. See *supra* text accompanying notes 62–66 (discussing the jurisdictional reach of the antibribery and accounting provisions of the FCPA).

171. Bribery Act, 2010, c. 23, § 12(5) (“An offence is committed under section 7 irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere.”).

the Guidance suggests a potentially more narrow application,¹⁷² SFO Director Richard Alderman has made statements that directly conflict with such a limited scope. Mr. Alderman views the Bribery Act as applicable to organizations that “have some business within the UK” even if the actionable “corruption has no connection with that business presence.”¹⁷³ Since the Guidance is neither law nor restrictive upon the SFO, the Bribery Act may significantly expand liability beyond current FCPA liability.

B. *Corrupt Element*

The Bribery Act requires an actor to act with the intent to influence a foreign official in his or her official capacity.¹⁷⁴ However, unlike the FCPA, the *mens rea* requirement does not include corrupt intent as an element. As discussed in Part III,¹⁷⁵ in order for a payment to be illegal under the FCPA, an actor must have the corrupt intent to improperly provoke or encourage the foreign official to misuse their position to direct business or a benefit to the payor.¹⁷⁶ While § 4 of the Bribery Act imposes the improper performance test on the giving and receiving of bribes (§ 1 and § 2, respectively), this requirement does not apply to § 6.

The lack of a corrupt intent requirement for § 6 offenses reflects the United Kingdom’s concerns over the evidentiary difficulties of establishing such improper performance concerning a foreign public official.¹⁷⁷ Nonetheless, the Guidance recognizes that “it is not the Government’s intention to [criminalize behavior] where no such mischief occurs.”¹⁷⁸ Some commentators have suggested that this means an additional intent requirement could be read into this offense.¹⁷⁹ While possible, courts have yet to impose such a requirement, and this suggestion is at odds with the Guidance’s

172. See GUIDANCE, *supra* note 16, ¶ 36, at 15 (providing that listing on the London Stock Exchange or a UK subsidiary alone may not, by itself, establish one as a “relevant commercial organization”).

173. Richard Alderman, Dir., Serious Fraud Office, Bribery Act 2010 – A New Beginning (Oct. 13, 2010), available at <http://www.sfo.gov.uk/about-us/our-views/director%27s-speeches/speeches-2010/lawyers-in-commerce-industry-in-association-with-mayer-brown.aspx>.

174. See Bribery Act, 2010, c. 23, § 6(1) (describing the necessary intent for bribery of foreign public officials).

175. See Part III.A.1.

176. See *supra* text accompanying notes 59–60.

177. See GUIDANCE, *supra* note 16, ¶ 23, at 11 (recognizing that the legislature was attempting to “formulate the offense to take account of the evidential difficulties”).

178. *Id.*

179. See Jacqueline L. Bonneau, *Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement*, 49 COLUM. J. TRANSNAT’L L. 365, 403 (2011) (suggesting that an intent requirement will be read into the foreign bribery offense as it is applied).

emphasis on prosecutorial discretion.¹⁸⁰ The Guidance provides an overarching directive that the government utilize its significant prosecutorial discretion and carefully consider the public interest when deciding to prosecute actions that facially trigger a provision of the Bribery Act.¹⁸¹ This lack of a corrupt intent element allows for far greater prosecutorial discretion. If this is the case, individuals and all organizations associated with that individual may be liable for legitimate business expenses in which they possessed no intent to improperly influence a foreign official.

The allocation of significant prosecutorial discretion has the potential to subject international organizations to vast uncertainty concerning their Bribery Act liability, similar to the uncertainty surrounding FCPA liability. Although dormant for many years, the discretion provided for in the FCPA enabled the DOJ and SEC to implement their recent, aggressive enforcement campaign.¹⁸² The DOJ and SEC have used their discretion to apply increasingly expansive definitions to almost every aspect of the FCPA.¹⁸³ In fact, due to the enforcement theories of the DOJ and SEC, businesses may be prosecuted for payments explicitly exempt from the FCPA.¹⁸⁴ As a result, one practitioner has warned that organizations “need to anticipate that the SEC is going to pursue any legal theory that it feels is remotely supportable. To some extent, you have to expect the unexpected.”¹⁸⁵

While this aggressive enforcement in the United States does not mean that UK regulators will similarly utilize their discretion to expand the Bribery Act, the DOJ’s and SEC’s use of prosecutorial discretion demonstrates the inherent risk of such discretion. Moreover, the SFO has already utilized its discretion to interpret sections of the Bribery Act broadly.¹⁸⁶ When combined with the strict liability aspect of § 7, international organizations could face liability

180. See GUIDANCE, *supra* note 16, ¶¶ 49–51, at 19 (providing the scope and application of prosecutorial discretion).

181. See *id.* (providing the scope and application of prosecutorial discretion).

182. See *supra* text accompanying notes 23–28.

183. See *supra* Part III.A.I (discussing the broad interpretation of *corrupt intent*); see *supra* Part III.A.2 (discussing how the interpretation of *anything of value* extends as far as indirect intangible benefits); see *supra* Part III.A.3 (discussing the expansive treatment of who qualifies as a foreign official); see *supra* Part III.A.4 (discussing the application of the business purpose test to cover more than the awarding or maintaining of government contracts).

184. See Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. TOL. L. REV. 99, 122–24 (2011) (summarizing numerous FCPA enforcement actions that amount to the prosecution of payments that would likely qualify as facilitation payments under the FCPA).

185. See Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 531 (2011) (quoting Yin Wilczek, *Recent Cases Show SEC’s Creative Use of Existing Law to Widen Enforcement Reach*, 41 SEC. REG. & L. REP. (BNA) 34, at 1583 (2009)).

186. See *supra* text accompanying notes 145–46.

through the actions of an employee or otherwise associated person, even though that individual had no intent to bribe a foreign official.

C. Facilitation Payments

One major divergence of the Bribery Act from the FCPA is the absence of an exception for facilitation payments. The FCPA excludes nondiscretionary, low denomination payments from triggering liability when specific criteria are met.¹⁸⁷ This exclusion focuses enforcement upon actions in which an organization gains a competitive advantage.¹⁸⁸

Conversely, in response to the OECD calling for the removal of all such exceptions, the Bribery Act explicitly bans all payments, including facilitation payments.¹⁸⁹ Despite the relatively small size of these payments, the drafters of the Bribery Act recognized the negative implications of allowing these payments, most notably the difficulty of enforcing such an artificial distinction.¹⁹⁰ Although specifically noting that small facilitation payments will remain prohibited under the Bribery Act, UK officials have stated that the likelihood of being prosecuted for such a payment is remote.¹⁹¹ While the likelihood of the SFO pursuing an individual facilitation payment is low, these payments remain illegal and may be uncovered and pursued during the course of an investigation. SFO officials have publically stated that SFO investigations may consider such payments in the aggregate and an organization may not escape prosecution simply because it limits illegal payments to small onetime payments that fail to collectively amount to a certain value.¹⁹²

187. See *supra* Part III.A.5 (providing a more in depth discussion of the facilitation or grease payment exception provided for by the FCPA).

188. See *Kay*, 359 F.3d at 747 (noting the importance of the use of a foreign official's discretionary authority in order to constitute an actionable bribery offense since nondiscretionary acts provide no benefit to the "bribing" party compared to its competitors).

189. See GUIDANCE, *supra* note 16, ¶¶ 44–45, at 18 (discussing the 2009 OECD recommendation that recognized the "corrosive effect of facilitation payments" and the OECD request that "adhering countries [] discourage companies from making such payments").

190. *Id.* ¶ 45, at 18 (recognizing also that a facilitation payment exception "undermine[s] corporate anti-bribery procedures, confuse[s] anti-bribery communication with employees and other associated persons, perpetuate[s]) an existing 'culture' of bribery, and [has] the potential to be abused").

191. See Alderman, *supra* note 173, at 2 (clarifying the illegality of facilitation payments although recognizing that "the chances of the SFO prosecuting a small (say \$50) one off facilitation payment that is picked up and remedied by a corporate's (sic) internal processes are remote").

192. See Richard Kovalevsky & Barry Vitou, *The Bribery Act, Facilitation Payments & the Burning Questions: Practical SFO Guidance*, THEBRIBERYACT.COM (Oct. 22, 2010, 3:22 PM), <http://thebriberyact.com/2010/10/22/the-bribery-act-facilitation-payments-the-burning-questions-practical-sfo-guidance/> (quoting Richard

D. Compliance Programs and the Adequate Procedures Defense

Perhaps the largest deviation from the FCPA is the United Kingdom's adoption of an adequate procedures defense. Under the Bribery Act, an organization may establish a complete defense by demonstrating that they designed and maintained adequate procedures to prevent bribery by associated people.¹⁹³ The Ministry of Justice has published the Guidance concerning the adequate procedures defense; however, this Guidance remains vague and unclear. Because the Guidance is not binding law, it is currently uncertain whether existing FCPA compliance programs will be sufficient to establish an adequate procedures defense under the Bribery Act. Even though the required effectiveness of a compliance program may be unclear, the potential benefit of an organization's compliance program is undoubtedly more significant under the Bribery Act.

Although not directly mandating internal compliance programs, the accounting provisions of the FCPA similarly require international organizations to establish, evaluate, and maintain internal control programs.¹⁹⁴ Unlike the Bribery Act, the FCPA does not provide a defense based upon an organization's compliance program. However, the DOJ does consider "the existence and effectiveness of a corporation's pre-existing compliance program" among other concerns during investigations, prosecutions, and settlement offers.¹⁹⁵

Nonetheless, the effectiveness of an organization's internal compliance program typically has limited practical effect under the FCPA. First, this provision exists among a number of other factors that the DOJ considers when prosecuting an organization, such as: the nature and seriousness of the offense, management wrongdoing, self-disclosure, and the history of organizational misconduct.¹⁹⁶ Second, a compliance program alone is insufficient to justify failing to prosecute an organization even if the program specifically prohibits

Alderman as stating that corporations cannot "decide that it is acceptable to have a number of so called one off payments provided that in total they do not exceed shall we say \$20 million a year").

193. See Bribery Act, 2010, c. 23, § 7(2) ("But it is a defence (sic) for [a relevant commercial organization] to prove that [they] had in place adequate procedures designed to prevent persons associated with [the organization] from undertaking such conduct.").

194. Although not directly mandating internal compliance programs, as a practical matter organizations must develop internal controls to ensure that these provisions are satisfied. See generally Foreign Corrupt Practices Act §§ 78m(b)(2), (b)(5) (providing no direct requirement that internal controls be implemented).

195. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL 9-28.300 (2012).

196. See *id.* (outlining the factors that should be considered when criminally prosecuting a business organization).

the conduct in question.¹⁹⁷ Third, since a large majority of FCPA cases are settled prior to litigation,¹⁹⁸ the lack of an affirmative defense prevents many organizations from utilizing the existence of an effective internal compliance program as the DOJ and SEC only recognize such considerations during the sentencing phase.¹⁹⁹

VI. A U.S. RESPONSE TO THE BRIBERY ACT 2010

For years, the United States stood as the world leader in prosecuting foreign bribery. The enactment of the FCPA imposed limitations upon American businesses competing internationally with companies that were not subject to similar domestic antibribery legislation. However, in exchange for imposing this strict standard, the FCPA became the accepted model for countries adopting antibribery legislation.

The adoption of the Bribery Act may significantly alter this status quo. On the one hand, the significant jurisdictional reach of the Bribery Act aids in leveling the playing field by imposing regulations upon companies immune to the FCPA. However, by being more restrictive than the FCPA, the Bribery Act may significantly decrease the United States' control over antibribery legislation. Therefore, if the United States desires to maintain its prominence as a world leader on this issue, it must amend the FCPA to realign it with the evolving international standard and help facilitate a more coordinated international scheme of antibribery legislation.

Additionally, the United States needs to address the potential effects the Bribery Act will have upon U.S. and international organizations that are subject to both pieces of legislation. The Bribery Act refuses to allow for even facilitation payments in return for providing an internal, control-based defense. Conversely, the FCPA refuses to allow for an organization's compliance efforts to serve as a complete defense, while overlooking facilitation payments. Any organization that falls under the jurisdiction of both acts will be unable to rely upon either the FCPA's allowance for facilitation payments or the Bribery Act's adequate procedures defense. This

197. See *id.* at 9-28.800 (citing *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983) (holding that a corporation may be liable for actions of employees even if "such acts were against corporate policy or express instructions")).

198. See Pacini, *supra* note 12, at 565 (noting the high settlement rate of FCPA cases); Stuart H. Deming, *The Potent and Broad-Ranging Implications of the Accounting and Record-Keeping Provisions of the Foreign Corrupt Practices Act*, 96 J. CRIM. L. & CRIMINOLOGY 465, 500 (2006) (recognizing that FCPA settlements are rarely subject to judicial scrutiny with most prosecutions coming in the form of SEC civil proceedings under the accounting provisions).

199. See U.S. DEPT OF JUSTICE, *supra* note 195 (holding that a compliance program does not justify nonprosecution).

patchwork, de facto legislation leaves businesses subject to significant and unnecessary uncertainty. While some, including the OECD, desire the de facto regulatory framework the two acts have created,²⁰⁰ neither country proactively decided to establish such a regime.

A. A Graduated Penalty System: Proportional Exclusion of Facilitation Payments

The elimination of the facilitation payment exception is an important step that the United States must take to align the FCPA with the global stance on bribery. Many of the original justifications for the facilitation payment exception fail to support maintaining the exception in the twenty-first century.

First, the historical justifications for the facilitation payment exception have drastically reduced over time. Originally, the FCPA caused many to fear that U.S. companies would be unable to compete internationally against foreign companies willing to pay bribes.²⁰¹ While potentially relevant 30 years ago, this concern is no longer relevant as companies subject to the broad jurisdiction of the Bribery Act now face stricter limitations than American businesses under the FCPA.

Additionally, the willingness of the original drafters to include an exception for facilitation payments suggests that they believed small, nondiscretionary bribes were less harmful than larger denomination bribes. However, not only do these low level bribes foster a climate of acquiescence to bribery,²⁰² but some economists have held that in certain circumstances low level bribes are more destructive than the larger bribes the FCPA targets.²⁰³

Moreover, the international standard has evolved to view facilitation payments as corrosive,²⁰⁴ evidenced by the OECD calling

200. See GUIDANCE, *supra* note 16, ¶¶ 44–45, at 18 (discussing the 2009 OECD recommendation that recognized the “corrosive effect of facilitation payments” and the OECD’s request that “adhering countries [] discourage companies from making such payments”); Melisa Aguilar, *New OECD Stance on Facilitation Payments*, COMPLIANCE WEEK (Dec. 18, 2009), <http://www.complianceweek.com/new-oecd-stance-on-facilitation-payments/article/187306/> (“The Organisation (sic) for Economic Cooperation and Development has taken a new stance on facilitation payments, urging its member countries to encourage companies to ban or discourage [the] use [of facilitation payments.]”).

201. See 123 CONG. REC. 38604-2, 38778, 36304 (providing statements of Senator John Tower discussing the facilitation payments exception).

202. See Aguilar, *supra* note 200, at 13 (noting that the OECD recommends the removal of facilitation payments on account of their “corrosive effect . . . [upon] economic development and the rule of law”).

203. See Christopher J. Waller et. al., *Corruption: Top Down or Bottom Up?*, 40 ECON. INQUIRY 688, 688 (2002) (discussing the cumulative impact that facilitation payments may have).

204. See GUIDANCE, *supra* note 16, ¶¶ 44–45, at 18 (discussing the 2009 OECD recommendation that recognized the “corrosive effect of facilitation payments”).

upon all its members to ban facilitation payments.²⁰⁵ The United States, once a leader in antibribery legislation, is now among only a few other countries—Australia, Canada, New Zealand, and South Korea—that allow facilitation payments despite the fact that the payments are illegal in the country where they are made.²⁰⁶

While the continuation of the facilitation payment exception subjects the United States to international criticism, the actual application of the exception itself may cause more harm to U.S. organizations than a complete ban. First, the exception has been construed narrowly, only applying to completely nondiscretionary actions.²⁰⁷ Additionally, little guidance exists regarding the specifics of the exception.²⁰⁸ The OECD Working Group has noted that representatives from all business sectors “were of the opinion that the scope of the exception for facilitation payments is unclear, particularly what kinds of decision-making are discretionary and non-discretionary.”²⁰⁹ Finally, the aggressive, recent enforcement of the FCPA makes this ambiguity even more costly since organizations risk having their actions deemed outside of the exception, thus facing a full-fledged violation of the FCPA.

The unclear boundary of the facilitation payment exception is not the only problem companies face. The DOJ’s and SEC’s aggressive prosecution and broad enforcement theories have caused commentators to question whether the exception has, in practice, been read out of the statute. As Professor Mike Koehler points out,

Notwithstanding the FCPA’s express exception for facilitating payments, the FCPA’s legislative history, and an appellate court decision specifically rejecting the government’s expansive interpretation of ‘obtain or retain business,’ several recent FCPA enforcement actions nevertheless allege payments made to secure

205. See Aguilar, *supra* note 200, at 13 (“The Organisation (sic) for Economic Cooperation and Development has taken a new stance on facilitation payments, urging its member countries to encourage companies to ban or discourage [the] use [of facilitation payments.]”); GUIDANCE, *supra* note 16, ¶¶ 44–45, at 18 (discussing the 2009 OECD recommendation in which the OECD asked “adhering countries to discourage companies from making such facilitation payments”).

206. See Aguilar, *supra* note 200 (recognizing the few countries that still utilize a form of the facilitation payment exception in their antibribery legislation).

207. See Strauss, *supra* note 95, at 242 (discussing *United States v. Kay* and the narrow application that the court gave to the exception).

208. See *id.* at 257–58 (discussing how the lack of guidance has influenced how corporations handle facilitation payments in their compliance programs).

209. ORG. FOR ECON. CO-OPERATION AND DEV., UNITED STATES: PHASE 3: REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 2009 REVISED RECOMMENDATIONS ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, ¶ 76, at 25 (Oct. 15, 2010), available at <http://www.oecd.org/daf/anti-bribery/internationalbusiness/anti-briberyconvention/unitedstates-oecdanti-briberyconvention.htm>.

foreign licenses, permits, applications, or certificates, or in connection with customs and tax duties.²¹⁰

For example, in 2008, Westinghouse Air Brake Technologies Corporation settled allegations of FCPA violations.²¹¹ Despite agreeing to pay significant fines, the alleged FCPA violations concerned payments made to a government agency in India to, among other things, “schedule pre-shipment product inspections . . . [and] obtain issuance of product delivery certificates.”²¹² This is exactly the type of activity the exception supposedly immunizes.²¹³

This trend will likely endure as the DOJ and SEC continue using a wide array of broad enforcement theories to bring allegations of FCPA violations for activities that arguably fall within the exception.²¹⁴ Moreover, even if some of these actions did fall within the exception, the fact remains that most companies settle alleged violations.²¹⁵ Therefore, the applicability of the facilitation payment exception is not, in practice, explored, and these settled allegations then stand as de facto precedent for disregarding the exception.²¹⁶

The Bribery Act’s failure to include a similar exception further complicates conformity and increases compliance costs by placing the FCPA and the Bribery Act in direct conflict. Since the accounting provisions require that payments be accurately recorded²¹⁷ and the Bribery Act forbids such payments, organizations subject to the FCPA will be forced to admit a violation of the Bribery Act in order to utilize the FCPA’s facilitation payment exception or risk violating the

210. Koehler, *supra* note 184, at 122.

211. See generally Press Release, U.S. Dep’t of Justice, Westinghouse Air Brake Technologies Corporation Agrees to Pay \$300,000 Penalty to Resolve Foreign Bribery Violations in India (Feb. 14, 2008), available at www.justice.gov/opa/pr/2008/February/08_crm_116.html.

212. See *id.* (“These payments were made in order to: assist Pioneer in obtaining and retaining business with the IRB; schedule pre-shipment product inspections; obtain issuance of product delivery certificates; and curb what Pioneer considered to be excessive tax audits.”).

213. See Foreign Corrupt Practices Act §§ 78dd-1(b), -2(b), -3(b) (stating that the FCPA explicitly does “not apply to any facilitating or expediting payment to a foreign official, . . . the purpose of which is to expedite or to secure the performance of a routine governmental action”).

214. See Koehler, *supra* note 184, at 122–25 (summarizing the specific use of broad “enforcement theories” against a variety of companies, including “Pride International, Tidewater, Transocean, GlobalSantaFe,” Noble Corp, Royal Dutch Shell, NATCO Group, Snamprogetti, and Panalpina, and individuals, including “Joe Summers, an employee of Pride International”).

215. See Pacini, *supra* note 12, at 565 (noting “the high settlement rate [of] FCPA cases”).

216. See Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907, 976 (2010) (discussing the potential applicability of the “facilitat[ion] payment exception” to “enforcement actions” and the failure of accused violators to apply the relevant defense on account of settling the enforcement action).

217. See Foreign Corrupt Practices Act §§ 78m(a)–(b) (requiring the accurate recording of all payments, including facilitation payments).

FCPA's accounting provision. Given the SFO's stated intention to diligently prosecute unlawful payments under the Bribery Act,²¹⁸ without an amendment to the FCPA, this conflict creates a de facto ban on facilitation payments for any company subject to both acts. Considering the uncertain nature of the FCPA's facilitation payment exception, the Bribery Act's ban on such payments may in fact make compliance for U.S. companies easier as they now no longer need to concern themselves with what is a permissible payment under the FCPA.

Given these concerns, it would be prudent for the United States to amend the FCPA in order to remove the facilitation payment exception. However, an amendment to the FCPA need not go as far as the Bribery Act in order to satisfy these concerns. Instead of removing the current exception, the United States could implement a scaled or progressive penalty system covering lower level acts of bribery.

The implementation of a progressive penalty system would significantly benefit FCPA enforcement. Under the current system, concealment is incentivized as companies face significant liability if a payment is found to be outside the exception.²¹⁹ Conversely, a limited penalty system may increase the likelihood that companies self-report illegal payments as they have more certainty concerning their liability.²²⁰ Increased reporting would generate two valuable side effects: it would (1) incentivize self-reporting, which would aid in bringing lower level bribery to light for foreign governments whose officers are accepting bribes; and (2) limit liability, which would remove some of the unjust outcomes previously discussed. However, if such payments are found within a larger scheme of bribery, the illegality of facilitation payments will allow the DOJ and SEC to assert substantial leverage. Consequently, it would also be advisable to limit the applicability of any progressive penalty system to situations in which no corresponding scheme of bribery exists.

Additionally, a progressive penalty system would address many of the concerns of the exception's advocates. Scholars recognize conflicting effects that facilitation payments may have upon markets. Facilitation payments may further increase costs of doing business in

218. See Alderman, *supra* note 173 (stating that it is the SFO's intention to prosecute many illegal payments, including payments that are excluded under the FCPA).

219. See generally Press Release, U.S. Dep't of Justice, *supra* note 211 (agreeing to pay a significant fine after certain payments were discovered despite arguably being covered under the exception).

220. This will especially be the case if Congress also adopts a complete adequate procedures defense, as this Note suggests *infra* Part VI.B. In this case, a company would be inclined to self-report small violations as they would either face no liability under an adequate procedures defense or reduced liability if eligible for a progressive penalty system.

developing markets by “spawn[ing] additional demands.”²²¹ Conversely, banning facilitation payments may amplify this effect such that the costs of transacting in a developing market may become prohibitively high, leading to market exit.²²² While certain cultural practices, such as gift giving or *guanxi* in China,²²³ often make compliance with the FCPA more difficult, a progressive penalty system could actually decrease the risks of transacting in such a culture. Under the current system, a firm must balance respecting cultural norms with remaining within the unclear and progressively limited facilitation payment exception. Under a progressive penalty system, a company may transact in a foreign market, respect cultural traditions, and have some certainty that if such payments amount to an FCPA violation, then their liability is limited and predefined.²²⁴ Thereby, a progressive penalty system would incentivize market entry as organizations could better evaluate the risks of transacting in foreign markets.

Finally, by predefining an organization’s potential liability, a progressive penalty system has the potential to encourage self-reporting, thereby revealing more bribery, especially smaller payments. Increased self-reporting would allow foreign nations to start addressing the demand side of bribery through the application of their own laws, a criticism antibribery scholars often make of foreign countries.²²⁵

However, one must acknowledge that reduced penalties have the potential to counteract the original purpose of the FCPA, as organizations may simply internalize the costs of bribery and fines as a cost of doing business. Nevertheless, such fears can be addressed through the proper scaling of a progressive penalty system. In response to this concern, Congress should impose various eligibility requirements for application of the progressive penalty system, including: (i) a minimum level of compliance procedures; (ii) requiring that the violation be self-reported; and (iii) restricting access to

221. See Joseph W. Yockey, *Solicitation, Extortion and The FCPA*, 87 NOTRE DAME L. REV. 781, 801 (2011) (“The willingness of a firm to acquiesce to one demand for payment can further spawn additional demands, which will then lead to continued costs and complications as the firm becomes ‘the goose that lays the golden eggs’ for a particular foreign official or group of officials.”).

222. See *id.* at 832 (“If the FCPA is altered to prohibit all bribe payments—including facilitation payments and payments in response to economic extortion—this [demand-side corruption] would be amplified to the extent that firms might effectively be prevented from doing any business in some countries.”).

223. See *id.* (noting that, in China, well-respected “cultural and social norms” often require the giving of gifts in the development of a business relationship called *guanxi*, thus further complicating compliance with antibribery legislation).

224. A progressive penalty system would impose a specific fine for lower level acts of bribery, thus removing uncertainty surrounding the liability for such violations.

225. See generally Yockey, *supra* note 221, at 839 (arguing that countries need to begin “fighting corruption” and bribery from “the demand side” by prosecuting the “foreign officials who solicit and receive bribes”).

organizations that have not had any infractions within a specified time period.²²⁶ While such a system does augment the risk that organizations will internalize bribery costs, the proposed regime would function more effectively through increased transparency and decreased uncertainty.

B. Adoption of a Complete Adequate Procedures Defense

The consideration given to a company's compliance procedures differ under the Bribery Act and the FCPA. The Bribery Act considers the extent of an organization's compliance procedures during the liability phase, while the FCPA does not consider such procedures until the sentencing phase.²²⁷ In-house counsel for many of the largest U.S. companies cite uncertain FCPA liability as a major legal uncertainty.²²⁸ Much of this concern stems from the difficulty companies face in preventing a rogue worker in a foreign outpost from paying a bribe.²²⁹ The Ministry of Justice has similarly recognized "the fact that no bribery prevention regime will be capable of preventing bribery at all times."²³⁰

The adoption of an adequate procedures defense in the United States is not novel as Congress proposed a defense that would consider an organization's compliance procedures during the liability phase in 1988.²³¹ Additionally, high ranking regulators have proposed similar defenses, noting that the "current law leaves largely unresolved the central issue of when a company's compliance system

226. A system linking a firm's compliance procedures to its eligibility for a progressive penalty system would further incentivize the development of compliance programs, which this Note argues, *infra*, should serve as a complete defense to an FCPA violation. See *infra* Part VI.B (proposing the creation of an "adequate procedures defense" to liability under the FCPA).

227. See *supra* Part V.D (providing a comparative analysis of the impact of compliance programs upon liability under the FCPA and the Bribery Act).

228. See Jones, *supra* note 11, at B1 (discussing the uncertain areas of the law that most concern in-house counsel in the United States).

229. See *id.* (noting that some in-house counsel "concede the difficulty of preventing a rogue worker in a foreign outpost from paying a bribe").

230. GUIDANCE, *supra* note 16, ¶ 11, at 8.

231. When Congress successfully passed various amendments to the FCPA, the House of Representatives proposed such a defense as an amendment to the FCPA. See *See* H.R. REP. NO. 100-576, at 922 (1988) (Conf. Rep.), reprinted in 1988 U.S.C.A.N. 1547,1955 (failing to include the House safe harbor defense in the 1988 amendments). While eventually conceding to the Senate, which proposed no similar amendment, the House's bill included a safe harbor defense based upon the establishment of procedures that were "expected to prevent and detect' [FCPA violations]." See *id.* at 922-23 ("Under the House bill, a firm could not be held vicariously liable for such violations if it had established procedures 'reasonable [sic] expected to prevent and detect' any such violation, and the officer and employee with supervisory responsibility for the offending employee's or agent's conduct used 'due diligence' to prevent the violation.").

and antibribery policy are sufficient, in either design or implementation, to safeguard the corporate enterprise.”²³²

Moreover, the recent increase in FCPA enforcement has the potential to impact foreign relations. In the past few years, many of the largest enforcement actions have been against foreign issuers.²³³ This enforcement against foreign issuers raises concerns when considered in conjunction with two additional factors: (1) the FCPA has long been considered harmful to U.S. businesses on account that it imposes competitive disadvantages upon them internationally; and (2) these foreign issuers may be in compliance with the new international standard of antibribery regulations through the implementation of a first-rate compliance program. Taken together, these factors could lead many to view FCPA enforcement against foreign issuers as a protectionist measure whereby the United States is imposing overly strict laws on foreign businesses while protecting domestic businesses through selective nonenforcement.

In recognition of these concerns, the United States must offer a complete defense to FCPA liability based upon an organization's compliance procedures. If the United States desires to remain a world leader in antibribery prevention and prosecution, then it must amend the FCPA to conform to the new international standard.²³⁴ While other amendments suggested in this Note would subject organizations to tougher regulations, the increased certainty and ability to insulate oneself from liability through an adequate procedures defense will counterbalance these sterner regulations.

Although the adoption of an adequate procedures defense could alter the dynamic of FCPA enforcement, the adoption of the defense itself would be rather easy to implement. Significant guidance already exists regarding the compliance procedures the DOJ and SEC deem adequate.²³⁵ Further, companies can utilize the opinion

232. James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. L. 1233, 1233–35 (2007) (setting forth a safe harbor amendment to the FCPA). In 2007, James Doty, currently the Chairman of the Public Company Accounting Oversight Board, suggested an adequate procedures defense called Reg. FCPA. *See id.* at 1233–34 (calling for the SEC to “formulate a ‘Reg. FCPA’ to guide . . . implementation of anti-bribery polices, to improve transparency and foster general acceptance of the best practices”). Notably, while recognizing that law-enforcement officials often ignore an organization's compliance procedures, Mr. Doty's safe harbor defense would only establish a rebuttable presumption that the FCPA was not violated. *See id.* at 1245 (limiting his safe harbor defense to the establishment of a rebuttable presumption that “could be rebutted by a preponderance of the evidence”).

233. *See* Bonneau, *supra* note 179, at 395 (“[M]any of the largest FCPA settlements in recent years have been with foreign issuers.”).

234. *See supra* Part VI.A (advocating for the removal of the facilitation payments exception in order to bring U.S. regulation in line with the evolving world standard).

235. *The Federal Sentencing Guidelines Manual* provides specific guidance on what constitutes an effective compliance program in order to mitigate one's sentence.

procedures provided for under the FCPA to obtain opinions on the adequacy of company-specific procedures.

Consequently, this amendment could refocus U.S. efforts toward the original goal of the FCPA, preventing the bribery of foreign officials, instead of simply prosecuting acts of bribery. An adequate procedures defense could provide significant benefits to the United States, including decreasing a major source of uncertainty affecting American businesses and incentivizing the implementation of effective compliance programs. Moreover, it would allow a company to greatly reduce its exposure to FCPA liability through the implementation of a first-rate compliance program, as it may utilize the existence of these well-known procedures as a defense prior to the liability phase.

The adoption of an adequate procedures defense could also allow the United States to regain its control over shaping international antibribery enforcement. While the United Kingdom has provided an adequate procedures defense, it has failed to provide useful guidance on what constitutes adequate procedures.²³⁶ Moreover, unlike the FCPA, the Bribery Act fails to provide an opinion procedure through which one can inquire about the adequacy of specific procedures.²³⁷ This ambiguity under the Bribery Act establishes a window of opportunity for the United States. Through the inclusion of an adequate procedures defense, the United States may apply its existing compliance guidance on adequate compliance programs. This would provide the United States with the ability to control the focus of compliance programs and the norms through which the adequate procedures defense develops. However, the uncertainty surrounding what constitutes adequate procedures under the Bribery Act will not remain *ad infinitum*. In the absence of an amendment to the FCPA, UK courts and the SFO will inevitably shape the defining characteristics of an adequate compliance program and the adequate procedures defense.

Additionally, DOJ deferred prosecution agreements and opinion releases provide significant guidance on relevant aspects of FCPA compliance programs. *See, e.g.*, U.S. DEPT OF JUSTICE, No. 04-02, FOREIGN CORRUPT PRACTICES ACT REVIEW OPINION PROCEDURE RELEASE (July 12, 2004), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0402.pdf> (providing insights into specific aspects of a compliance program that would potentially serve as part of an adequate FCPA compliance program, such as a whistleblower reporting system for violations of both the compliance program and the FCPA, along with respective disciplinary procedures designed to prevent and address violations).

236. *See supra* text accompanying notes 157–63 (discussing the uncertainty surrounding the guidance provided by the Ministry of Justice concerning the adequate procedures defense to the Bribery Act).

237. *Compare* Foreign Corrupt Practices Act §§ 78dd-1(e), -2(f) (requiring the Attorney General to respond to “specific inquires” through a written opinion, addressing whether it considers certain “conduct” illegal under the FCPA), *with* Bribery Act, 2010, c. 23 (no similar opinion procedure is provided for in the Bribery Act).

While the DOJ and SEC have provided significant guidance covering what procedures they consider important in FCPA compliance programs, they should consider adapting a few additional aspects into an adequate procedures defense:

- The defense should contain certain minimum procedures in order for a company to be eligible for the defense. Such minimum procedures will ensure that every compliance program meets certain important criteria without limiting the DOJ's and SEC's ability to impose additional organization-specific requirements.
- The defense should create a complete defense to an FCPA violation, not simply a rebuttable presumption.²³⁸ While the use of a rebuttable presumption would allow the DOJ and SEC to maintain significant leverage, such a presumption will fail to effectively decrease uncertainty surrounding FCPA liability.²³⁹
- The defense should not only assess the focus of an organization's compliance procedures but also the focus of the actual implementation and maintenance of the compliance program. Improper or failed implementation poses significant risks and will render even the best designed system ineffective.
- An organization attempting to set forth an adequate procedures defense should be required to show, in reasonable detail, how and why their current procedures failed to alert management of the illegal activity. This requirement will: (i) help determine if adequate procedures were actually implemented; (ii) ensure that senior management did not know of such information; and (iii) force a company to find and understand the shortcomings of its compliance system. In the future, a related requirement would be that this shortcoming be remedied before an organization could qualify for the adequate procedures defense.

238. See *supra* note 232 and accompanying text (noting that Mr. Doty's proposed Reg. FCPA included an adequate procedures safe harbor defense that would only establish a rebuttable presumption against an FCPA violation).

239. A major source of FCPA liability comes from the fact that the SEC and DOJ litigate few FCPA cases as companies often settle allegations of FCPA violations. See Pacini, *supra* note 12, at 565 (noting "the high settlement rate [of] FCPA cases"). The use of such a rebuttable presumption will serve to require costly trials and potential exposure to uncertain liability, thereby similarly encouraging settlement. Without a complete defense, the adequate procedures defense will do little to increase certainty as to a company's potential exposure to the FCPA.

VII. CONCLUSION

Two independent developments in the antibribery sector are placing significant pressure upon the current state of the FCPA: (1) the increased prosecutorial effort of U.S. regulators has led to significant uncertainty concerning FCPA liability; and (2) the adoption of the Bribery Act has exposed the FCPA as an outdated piece of legislation that has failed to keep pace with the evolving international standard. Moreover, the adoption of the Bribery Act directly affects U.S. organizations on account of its broad jurisdiction and the imposition of strict liability. These two independent developments are interrelated as the passage of the Bribery Act has further increased the uncertainty of FCPA liability.

Through the adoption of two amendments to the FCPA, the United States could resolve significant issues relating to the FCPA. Removal of the current facilitation payment exception will significantly reduce uncertainty surrounding FCPA liability. Additionally, through the use of a progressive penalty system, Congress could supplement the detection and prosecution efforts of the DOJ and SEC through increased transparency, establishing an overall more effective antibribery regime.

Nonetheless, to bring the FCPA in line with the current international standard, the United States must also adopt an adequate procedures defense, similar to the defense included in the Bribery Act. Such an amendment would serve a far greater purpose than solely coordinating the FCPA with the new international standard. This amendment would drastically reduce a significant source of ambiguity. Furthermore, this amendment would provide the United States with the means to utilize the limited window currently available to regain its significant influence in shaping the trajectory of future international antibribery legislation.

Taken together, these amendments would establish a far more efficient scheme to prevent organizations from bribing foreign officials. Although the FCPA was originally a trailblazing piece of legislation, Congress has failed to maintain the FCPA as the world model for antibribery legislation. Recent developments have further uncovered the need to modernize the FCPA. Continued inaction will only exacerbate these growing concerns.

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