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To Bribe a Prince: Clarifying the Foreign Corrupt Practices Act Through Comparisons to the United Kingdom's Bribery Act of 2010

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TO BRIBE A PRINCE: CLARIFYING THE FOREIGN CORRUPT PRACTICES ACT THROUGH COMPARISONS TO THE UNITED KINGDOM'S BRIBERY ACT OF 2010

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Abstract: Bribery in overseas markets is a major concern for U.S. foreign policy. In the 1970s, after allegations of corruption abroad, the U.S. Congress passed the Foreign Corrupt Practices Act (FCPA). The FCPA outlines civil and criminal sanctions for corporations that seek to bribe "foreign officials." It also inspired responses from other states, including the United Kingdom's Bribery Act, enacted in 2010. For decades, the federal government enforced the FCPA only sporadically. Since the turn of the twenty-first century, however, increased prosecutions under the FCPA by the Department of Justice and the Securities and Exchange Commission led to a corresponding increase in criticism of the statute. Responding to these critiques in November 2012, the two agencies co-authored a FCPA guideline. Viewing this new manual in comparison to prior implementation of the FCPA and to the Bribery Act may help determine the most effective tools to combat foreign bribery.

INTRODUCTION

Residents of the United States invest more capital abroad than any other State.[1] In 2013 alone, U.S. firms spent over $350 billion overseas.[2] This is the apex of a decades-long trend that, since 1990, has seen U.S. foreign investment grow sevenfold.[3] This investment is not always a positive development, as it can produce illicit requests by bureaucrats overseas for bribes or kickbacks from U.S. corporations.[4] Businesses sometimes obtain favorable treatment

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[1] *See Country Comparison: Stock of Direct Foreign Investment Abroad*, CENT. INTEL. AGENCY https://www.cia.gov/library/publications/the-world-factbook/rankorder/2199rank.html (last visited Apr. 16, 2014).

[2] JANET K. JACKSON, CONG. RESEARCH SERV., RS21118, U.S. DIRECT INVESTMENT ABROAD: TRENDS AND CURRENT ISSUES 1 (2013).

[3] *See id.* at 2.

[4] *See* Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 232 (1997).

from foreign regimes in exchange for agreeing to these illegal appeals.[5] This occurs most frequently in the developing world, where weak government institutions create an atmosphere rife with corruption.[6] Bribery and corruption negatively affect the conduct of international relations between the United States and the world.[7] U.S. corporations also suffer costs when they lose contracts to foreign companies that commit foreign bribery.[8]

In 1977, to combat foreign bribery and improve dealings abroad, the U.S. Congress enacted the Foreign Corrupt Practices Act (FCPA).[9] The FCPA, among other civil prohibitions, criminalizes certain payments to "foreign officials."[10] Not only does the FCPA combat foreign bribery on the part of U.S. corporations, but U.S. regulators often utilize the statute against foreign corporations that might otherwise gain an unfair advantage on their U.S. competitors.[11] Conversely, critics of the law argue that it hurts U.S. corporations' ability to compete in the global economy.[12]

Despite the critiques, for much of the FCPA's history, the U.S. government rarely acted against corporate violations of the statute.[13] During the George W. Bush Administration, however, the Department of Justice steadily increased FCPA enforcement.[14] The surge grew throughout the first four and one half years of the Obama Administration, when the DOJ averaged over

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[5] *See* Steven R. Salbu, *Battling Global Corruption in the New Millennium*, 31 LAW & POL'Y INT'L BUS. 47, 55 (1999).

[6] *See* Jonathan P. Doh et al., *Coping with Corruption in Foreign Markets*, 17 ACAD. MGMT. EXEC. 114, 115 (2003). Corruption causes direct and indirect costs to both U.S. firms seeking to conduct business in foreign states, and those states themselves. *See id.*

[7] *See* GEORGE C. GREANIAS & DUANE WINDSOR, THE FOREIGN CORRUPT PRACTICES ACT 60 (1982).

[8] *See* Margaret Ryznar & Samer Korkor, *Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing*, 76 MO. L. REV. 415, 416 (2010) ("In 1998 alone, U.S. businesses collectively lost $37 billion worth of contracts abroad due to foreign bribery.").

[9] *See* STUART H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 1 (2005).

[10] *See generally* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C. (2012)), *amended by* Omnibus Trade & Competitiveness Act of 1988, Tit. V, Pub. L. No. 100-418, 102 Stat. 1415 (1988), *and* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified as amended 15 U.S.C. §§ 78dd-1 to -3, 78ff (2012)).

[11] *See* Ryznar & Korkor, *supra* note 8, at 445 (noting how the United States has selected a forceful anti-bribery prosecution scheme against foreign corporations).

[12] *See* Scott Cohn, *US Intensifies Crackdown on Corporate Foreign Bribes*, CNBC (Nov. 14, 2012), http://www.cnbc.com/id/49818589 (last visited Apr. 16, 2014).

[13] *See* Charlie Savage, *Justice Dept. Issues Guidance on Overseas Bribes*, N.Y. TIMES, Nov. 15, 2012, at B10.

[14] *See* Editorial Board, Op-Ed., *Bribing Foreign Officials*, WASH. POST (Feb. 26, 2012), http://www.washingtonpost.com/opinions/bribing-foreign-officials/2012/02/24/gIQAvKUUcR_sto ry.html (last visited Apr. 16, 2014).

twenty-four FCPA actions per year.[15] This new emphasis on FCPA implementation increased the chorus of calls by organizations such as the U.S. Chamber of Commerce stating that the law is both inadequate and flawed.[16] Reacting to such criticism in November 2012, the DOJ, in conjunction with the Securities and Exchange Commission, issued *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (*Resource Guide*), a document seeking to clarify some of the ambiguous terms and policies of the FCPA.[17]

At the time of its enactment, the FCPA uniquely sought to curb bribery of "foreign officials."[18] Since the United States established the law, it has inspired numerous other states to enact similar provisions.[19] Recently, the United Kingdom enacted the Bribery Act 2010 (Bribery Act).[20] There are marked differences between the FCPA and the Bribery Act.[21] Comparing the two can help determine whether the *Resource Guide* adequately meets the DOJ's and SEC's goal of elucidating the FCPA.[22]

Part I of this Note provides relevant context to the FCPA, the *Resource Guide*, and the Bribery Act. Part II first discusses how, prior to the issuance of the *Resource Guide*, the DOJ and SEC's FCPA enforcement scheme gave corporations insufficient guidance concerning adherence to the FCPA. Part II continues by reviewing the *Resource Guide's* advice and comparing the relevant provisions and interpretations of the Bribery Act with the FCPA. Part III argues that the *Resource Guide* unsatisfactorily clarifies the FCPA and that the Bribery Act may actually offer corporations more of this much needed clarity, therefore representing a more adequate statutory scheme for combating foreign bribery. This Note concludes by suggesting that Congress should not only con-

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[15] *See* GIBSON, DUNN & CRUTCHER LLP, *2013 Mid-Year FCPA Update,* GIBSON DUNN PUBLICATIONS (July 8, 2013) at 2, *available at* http://www.gibsondunn.com/publications/Documents/2013-Mid-Year-FCPA-Update.pdf. This stands in contrast to the preceding five years, when the DOJ brought an average of approximately eleven actions per year. *See id.*

[16] *See id.*

[17] *See* Savage, *supra* note 13. *See* U.S. DEP'T OF JUSTICE & U.S. SECURITIES AND EXCHANGE COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012), *available at* http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf [hereinafter RESOURCE GUIDE].

[18] *See* Jon Jordan, *The Need for a Comprehensive International Foreign Bribery Compliance Program, Covering A to Z, in an Expanding Global Anti-Bribery Environment*, 117 PENN. ST. L. REV. 89, 90 (2012).

[19] *See id.*

[20] *See* Bribery Act, 2010, c. 23 (Eng.).

[21] *See* R. Zachary Torres-Fowler & Kenneth Anderson, *The Bribery Act's New Approach to Corporate Hospitality*, 52 VA. J. INT'L L. DIG. 39, 41 (2011) (noting that the FCPA exempts certain payments made by corporations but that the Bribery Act is broader and treats these same payments as violations of the law).

[22] *See* Lee G. Dunst, et al., *Hot Off the Press: Resettling the Global Anti-Corruption Thermostat to the UK Bribery Act*, 12 BUS. L. INT'L 257, 262 (2011).

sider eliminating aspects of the FCPA, but also implementing some of the Bribery Act's provisions into the current statutory scheme.

I. BACKGROUND

A. The FCPA's Origin & Legislative History

The contextual framework of the FCPA's enactment is necessary to understand the *Resource Guide's* potential impact.[23] The FCPA is a product of the Watergate scandal that plagued the 1970s.[24] In the wake of the scandal, evidence arose of illegal contributions from U.S. corporations to the re-election campaign of President Richard Nixon.[25] This eventually led to an investigation by the SEC, which discovered a series of questionable payments made by U.S corporations domestically and abroad.[26] An SEC report found that foreign leaders directly received many of these payments.[27] Outrage concerning these dubious payments eventually led to congressional action.[28]

By the mid-1970s, Congress actively sought to enact legislation that could curb illegal payments in foreign markets.[29] Leaders in both the House of Representatives and the Senate believed these payments were a significant foreign policy concern.[30] These improper payments threatened to irreparably damage the reputation of the United States abroad.[31] The questionable payment scandal also caused significant international outcry.[32] Congress faced added pressure to demonstrate to the world that the U.S. government did not tolerate corruption.[33] This led directly to the passage of the FCPA, a comprehensive piece of legislation that combated bribery overseas in a brand new way.[34]

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[23] *See* GREANIAS & WINDSOR, *supra* note 7, at 59.

[24] *See* DONALD R. CRUVER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT: A GUIDE FOR U.S. FIRMS DOING BUSINESS IN THE INTERNATIONAL MARKETPLACE 1 (1994).

[25] *See* GREANIAS & WINDSOR, *supra* note 7, at 17.

[26] *See id.* at 17–23.

[27] *See id.* at 23.

[28] *See* CRUVER, *supra* note 24, at 4–5.

[29] *See id.* at 5.

[30] *See* GREANIAS & WINDSOR, *supra* note 7, at 60–61.

[31] *See* Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 934–35 (2012).

[32] *See* GREANIAS & WINDSOR, *supra* note 7, at 59.

[33] *See id.*

[34] *See* DON ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT 1–3 (1995); Lynne Baum, *Foreign Corrupt Practices Act*, 35 AM. CRIM. L. REV. 823, 824 (1998).

B. The FCPA's Structure & Key Provisions

The FCPA uses a multi-faceted approach to tackle foreign bribery.[35] The law combines accounting provisions with anti-bribery provisions.[36] Both sections amend the Securities and Exchange Act of 1934.[37] The accounting provisions deal primarily with record keeping.[38] The major anti-bribery provisions include: (1) the parties that fall under the FCPA; (2) the definition of a "foreign official;" and (3) the kind of payment covered by the statute.[39]

1. The Accounting Provisions

The FCPA's accounting provisions place a burden on corporations to keep adequate records.[40] First, corporations must "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."[41] Secondly, corporations must maintain a system of internal controls to prevent illegal payments.[42] Both of these duties help enforce the FCPA, by allowing government officials to subpoena records and uncover illegal payments more easily.[43] The accounting provisions apply to illegal payments and can also affect corporations that do not keep adequate records of domestic or innocuous transactions.[44] The provisions apply only to issuers on a United States-based stock exchange.[45]

2. The Anti-Bribery Provisions

The FCPA's anti-bribery provisions have a broader scope than the accounting provisions because they cover not only issuers, but also individuals.[46] Therefore, the anti-bribery obligations do not apply exclusively to U.S. corporations.[47] The anti-bribery provisions provide that the FCPA applies to payments made to "foreign officials"—individuals who work for a foreign gov-

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[35] *See* Kari Lynn Diersen, *Foreign Corrupt Practices Act*, 36 AM. CRIM. L. REV. 753, 755 (1998).

[36] *See id.*

[37] *See* John P. Giraudo, *Charitable Contributions and the FCPA: Schering-Plough and the Increasing Scope of SEC Enforcement*, 61 BUS. LAW. 135, 139 (2005).

[38] *See* Diersen, *supra* note 35, at 755–56.

[39] *See id.* at 759–61.

[40] *See* Amy Deen Westbrook*, Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 507 (2011).

[41] *See* 15 U.S.C. § 78m(b)(2)(A) (2012).

[42] *See id.* § 78m(b)(2)(B).

[43] *See* Cherie O. Taylor, *The Foreign Corrupt Practices Act: A Primer*, 17 CURRENTS: INT'L TRADE L.J. 3, 4 (2008).

[44] *See id.*

[45] *See* Baum, *supra* note 34, at 825.

[46] *See* Thomas McSorley, *Foreign Corrupt Practices Act*, 48 AM. CRIM. L. REV. 749, 758 (2011).

[47] *See id.*

ernment or an agency of that government.[48] The statute also applies to people who act in an official capacity for a foreign government.[49] The FCPA is not intended, however, to reach payments given to private organizations not affiliated with a government.[50] Historically, the DOJ and SEC interpret "foreign official" broadly.[51]

Another aspect of the anti-bribery provisions concern payments that are *not* illegal.[52] Simple expenditures (referred to in the FCPA as "facilitating payments") made to expedite the delivery of an item, for example, do not fall under the purview of the law.[53] Because it is not always easy to ascertain what constitutes such a payment, the FCPA makes practical concessions to differences in conducting business overseas by allowing less blameworthy behavior, such as simple grease payments.[54] Grease payments "expedite or . . . secure the performance of a *routine* governmental action."[55] The anti-bribery provisions also create affirmative defenses for payments that are legal in the foreign State in question and for "reasonable and bona fide expenditures, such as travel . . . ."[56]

3. The FCPA's Enforcement History and Scheme

The federal government rarely prosecuted corporations under the FCPA for several decades after its 1977 enactment.[57] DOJ actions typically involved instances where corporations themselves voluntarily disclosed FCPA violations.[58] Corporations tended to "self-report" for leniency from prosecution.[59] Fittingly, just as the FCPA was a response to a scandal, it took a major scandal to change the perspective on the law.[60]

The disaster at Enron in 2001 caused the federal government to re-evaluate the FCPA's utility as a method of combating corporate corruption.[61] The Enron managers' illegal activity shined new light on the vitality of corporate regulation and demonstrated the increased need for a regulatory tool.[62]

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[48] *See* Taylor, *supra* note 43, at 5.
[49] *See id.*
[50] *See* ZARIN, *supra* note 34, at 4–11.
[51] *See* DEMING, *supra* note 9, at 11.
[52] *See* Ned Sebelius, *Foreign Corrupt Practices Act*, 45 AM. CRIM. L. REV. 579, 591 (2008).
[53] *See id.*
[54] *See* DEMING, *supra* note 19, AT 16; GREANIAS & WINDSOR, *supra* note 7, at 5.
[55] 15 U.S.C. § 78dd-1(b) (2012) (emphasis added).
[56] 15 U.S.C. § 78dd-1(c)(1)–(2).
[57] *See id.*
[58] *See* Westbrook, *supra* note 40, at 495.
[59] *See* Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1449 (2008).
[60] *See* Savage, *supra* note 13.
[61] *See id.*
[62] *See id.*

Accordingly, beginning with the Bush Administration, the DOJ and SEC sought to more aggressively pursue companies that violated the FCPA.[63]

Enforcement and interpretation of the FCPA is dual-pronged.[64] The SEC handles civil enforcement of the law's accounting provisions against public corporations and the DOJ handles all criminal enforcement.[65] Because corporate bribes are often unreported, the agencies frequently undertake parallel actions.[66] Unlike other statutes, changes in interpretation of the FCPA generally do not come from any judicial interpretation of the law.[67] Most corporations in violation of the FCPA choose to settle with the government and pay fines, rather than go to trial.[68] This avoids the heavy stigmas associated with criminal or civil adjudication.[69] The lack of trials, however, means minimal case law on the FCPA exists.[70] Accordingly, interpretation of the statute is placed in the hands of the agencies that enforce it—the DOJ and the SEC.[71]

To alleviate this emphasis on agency interpretation, the FCPA provides administrative relief for corporations seeking advice as to whether their behavior might violate the statute.[72] Corporations can request an FCPA Opinion Procedure Release (Opinion Release).[73] An Opinion Release is a non-binding assessment of facts posed by corporate parties.[74] The DOJ then interprets the issue to determine if an enforcement action should be brought.[75] This is a fact specific inquiry that is inherently narrow and, by design, incapable of expressing a broad interpretation of the FCPA.[76]

With increased prosecutions in the last decade, lobby groups have pressed the DOJ and SEC for a wider-reaching interpretation of the FCPA.[77] These or-

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[63] *See id.*

[64] *See* Timothy W. Schmidt, Note, *Sweetening the Deal: Strengthening Transnational Bribery Laws Through Standard International Corporate Auditing Guidelines*, 93 MINN. L. REV. 1120, 1125 (2009); *see also* Westbrook, *supra* note 40, at 495 & n.14 (explaining how the SEC manages civil enforcement of the FCPA against public companies, while the DOJ manages all criminal enforcement of the FCPA as well as civil enforcement against private companies).

[65] *See* Westbrook, *supra* note 40, at 495.

[66] *See* Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of its Decade of Resurgence*, 43 IND. L. REV. 389, 396 (2010).

[67] *See* Westbrook, *supra* note 40, at 560.

[68] *See* Savage, *supra* note 13.

[69] *See id.*

[70] *See* Giraudo, *supra* note 37, at 142.

[71] *See* Westbrook, *supra* note 40, at 562.

[72] *See id.* at 564.

[73] *See* Westbrook, *supra* note 40, at 564. Opinion Releases are much more common from the DOJ than the SEC, which has not issued one since 1981. *See id.* at 563–64.

[74] *See id.* at 564.

[75] *See id.*

[76] *See id.*

[77] *See* Savage, *supra* note 13.

ganizations felt that clarification of the law could help corporations operate lawfully in this new landscape of escalated FCPA enforcement, thus preventing future prosecutions.[78] In response, the DOJ and SEC promulgated the *Resource Guide* to streamline FCPA interpretation between the two agencies and provide clearer rules to corporations.[79] This development did not occur in a vacuum, as the United States is not the only State in recent years to take new actions against foreign bribery.[80]

C. The Origin and Basic Structure of the United Kingdom's Bribery Act

For many years after the FCPA's passage in 1977, the United States remained alone in its decision to criminalize foreign bribery.[81] Other states reacted slowly to the rise of corporate corruption.[82] Eventually, in 1997, numerous states signed an international convention concerning foreign bribery.[83] Gradually, the international community continued its response with individual State statutes similar to the FCPA.[84]

Against this backdrop, the United Kingdom enacted the Bribery Act in 2010.[85] In many respects, the Bribery Act is broader than the FCPA.[86] The Bribery Act covers both domestic and foreign bribery, but for purposes of comparison to the FCPA, the relevant provisions are contained within the statute's foreign bribery section.[87]

The Bribery Act, however, differs from the FCPA in notable ways.[88] Unlike the FCPA, the Bribery Act contains no accounting provisions requiring

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[78] *See id.*

[79] *See* RESOURCE GUIDE, *supra* note 17.

[80] *See* Jordan, *supra* note 18, at 96.

[81] *See* Schmidt, *supra* note 64, at 1125–28.

[82] *See id.* at 1126.

[83] *See* Andrea Dahms & Nicolas Mitchell, *Foreign Corrupt Practices Act*, 44 AM. CRIM. L. REV. 605, 624 (2007) (detailing the adoption of the Convention on Combating Foreign Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) by the Organisation for Economic Co-operation and Development (OECD)). The OECD currently consists of thirty four member states, including the United States. *Members and Partners*, ORG. FOR ECON. CO-OPERATION AND DEV., http://www.oecd.org/about/membersandpartners/ (last visited Mar. 31, 2014).

[84] *See* DAVID KENNEDY & DAN DANIELSON, OPEN SOC'Y FOUND., BUSTING BRIBERY: SUSTAINING THE GLOBAL MOMENTUM OF THE FOREIGN CORRUPT PRACTICES ACT 5 (2011), *available at* http://iris.lib.neu.edu/cgi/viewcontent.cgi?article=1102&context=slaw_fac_pubs.

[85] *See* Jordan, *supra* note 18, at 96.

[86] *See id.* at 39–40.

[87] *See* Bribery Act, 2010, c. 23, § 6.

[88] *See* Eric Engle, *I Get By With a Little Help from My Friends? Understanding the U.K. Anti-Bribery Statute, By Reference to the OECD Convention and the Foreign Corrupt Practices Act,* 44 INT'L LAW 1173, 1182–83 (2010) (detailing some of the differences between the FCPA and the Bribery Act).

corporations to report illicit payments.[89] Additionally, the Bribery Act explicitly applies to any person who bribes a "foreign public official," rather than just to any corporation who makes such a bribe.[90] Furthermore, unlike the FCPA, the Bribery Act has no defense for "facilitating payments."[91] Finally, the Bribery Act includes an entirely unique defense for corporations that institute adequate procedures to prevent foreign bribery.[92]

II. Discussion

A. Interpretation of the FCPA Before the Resource Guide

The FCPA is nearly 40 years old.[93] Nonetheless, because there is a dearth of case law, many of its terms remain largely undefined and ambiguous.[94] The FCPA's dual-tiered enforcement mechanism has bred confusion and augmented concerns over the legislation.[95] The SEC rarely issues administrative rulings on the FCPA.[96] Therefore, prior to the *Resource Guide*, the greatest source of information concerning the SEC's interpretation of the FCPA stemmed from civil actions brought against corporations.[97] On the other hand, the DOJ issues several Opinion Releases per year to provide corporations with guidance in determining whether their behavior might potentially break the law.[98] Both of these methods of FCPA interpretation, however, contain flaws.[99]

1. SEC Case Law

The SEC enforces the accounting provisions of the FCPA against public corporations.[100] Over the years, only a few major cases dealing with this aspect of the law have gone to trial.[101] Most of the decisions in these cases are non-

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[89] *See* Bribery Act, 2010, c. 23, § 6.
[90] *See id.*
[91] *See id.*
[92] *See id.*
[93] *See* H. Lowell Brown, *Avoiding Bribery When Doing Business Overseas: A Primer on the Foreign Corrupt Practices Act*, 20 Me. B.J. 78, 78 (2005).
[94] *See* Westbrook, *supra* note 40, at 563; Stacy Williams, *Grey Areas of FCPA Compliance*, 17 Currents: Int'l Trade L.J. 14, 15 (2008).
[95] *See* Greanias & Windsor, *supra* note 7, at 85.
[96] *See* Westbrook, *supra* note 40, at 563.
[97] *See* Giraudo, *supra* note 37, at 142.
[98] *See* Westbrook, *supra* note 40, at 565.
[99] *See id.* at 564 ("The FCPA Opinion Procedure Releases are generally narrow, limited to the specific facts presented, and are not legally binding precedent."); Giraudo, *supra* note 37, at 142.
[100] *See* Melysa Sperber, *Foreign Corrupt Practices Act*, 39 Am. Crim. L. Rev. 679, 686 (2002).
[101] *See id.*

binding, but some representative cases nonetheless offer value towards understanding how the SEC interprets the statute.[102]

The first time an SEC action advanced to a full trial was a major development that provided the judiciary with the opportunity to fully evaluate and interpret the FCPA's accounting provisions.[103] In that case, *S.E.C. v. World-Wide Coin Investments* (*World-Wide*), the court attempted to clarify the FCPA's accounting provisions. The court determined that corporations did not need to be perfectly accurate when keeping accounting records, but that essentially any physical manifestation of corporate information could be considered such a record.[104] The court read the FCPA as providing far-reaching powers to the SEC to audit a corporation's internal affairs.[105] This case compelled Congress to amend and clarify the FCPA's accounting provisions.[106] These clarifications, however, did not have the intended effect, and corporations still clamored to determine how to interpret ambiguous terms such as "in reasonable detail."[107]

More recently, the SEC took actions that strongly articulated the agency's interpretation of the internal controls provision of the FCPA.[108] In the 2000 case of *S.E.C. v. International Business Machines Corp.* (*IBM*), the SEC viewed a bribe paid by members of IBM's wholly owned Argentinian subsidiary as prima facie evidence of inadequate internal controls, despite a lack of evidence that IBM had actual knowledge of the bribe.[109] Additionally, in the 2004 case of *S.E.C. v. Schering-Plough*, a corporation again faced scrutiny under the FCPA for the actions of a subsidiary.[110] Schering-Plough, a pharmaceutical company with worldwide distribution, had a subsidiary in Poland that made charitable contributions to a historical foundation whose president also oversaw a regional Polish health authority.[111] The SEC saw this connection as improper, alleging that Schering-Plough's internal controls failed to identify that these payments were not made for charitable purposes, but to influence the director of the health fund.[112]

These cases exemplify key issues inherent in utilizing SEC case law to counsel corporations on how to adhere to the accounting provisions of the

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[102] *See id.*

[103] *See* Kathleen A. Lacey & Barbara Crutchfield George*, Expansion of SEC Authority into Internal Corporate Governance: The Accounting Provisions of the Foreign Corrupt Practices Act (A Twentieth Anniversary Review),* 7 J. TRANSNAT'L L. & POL'Y 119, 138 (1998).

[104] *See id.*

[105] *See* Giraudo, *supra* note 37, at 143.

[106] *See* Lacey & George, *supra* note 103, at 142.

[107] *See id.* at 145.

[108] *See* Giraudo, *supra* note 37, at 144, 147.

[109] *See id.* at 144.

[110] *See id.* at 147.

[111] *See id.* at 147–48.

[112] *See id.*

FCPA.[113] Their utility is limited because so few cases proceed to trial and those that do are not broad enough to be adequately helpful.[114] Cases like *IBM* and *Schering-Plough* simply demonstrate extreme instances where the SEC chose to enforce the FCPA.[115] But because those actions settled, they are not binding determinations of how the accounting provisions should be interpreted.[116] Even a case that proceeded to trial like *World-Wide* is not entirely useful since it fails to interpret the accounting provisions as they currently stand.[117] Corporations accused of violating the anti-bribery provisions also find little help from prior DOJ interpretations of the law.[118]

2. DOJ Opinion Releases

Because SEC case law is limited, DOJ Opinion Releases are the more common source of information concerning FCPA enforcement.[119] These Opinion Releases are non-binding.[120] If, however, an action is brought against a corporation that requested an Opinion Release, the corporation can make a rebuttable presumption that it complied with the FCPA if it followed the DOJ's recommendations.[121] To obtain an Opinion Release, a party must request that the DOJ rule on a given set of facts.[122] The agency reviews the facts and determines whether the party violated the FCPA.[123] Because Opinion Releases are narrowly tailored to fact-specific situations they do not provide broad interpretations of particular provisions.[124] Even so, there are still several recent

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[113] *See* Giraudo, *supra* note 37, at 142; Westbrook, *supra* note 40, at 562–63.

[114] *See* Westbrook, *supra* note 40, at 562–63.

[115] *See* Giraudo, *supra* note 37, at 144, 152 ("*Schering-Plough* may, in the end, be no more than a case with egregious facts.").

[116] *See id.* at 144, 148 (noting how in both *IBM* and *Schering-Plough* the corporations in questions settled with the SEC); *see also* Westbrook, *supra* note 40, at 562 ("Corporate settlements . . . are subject to little or no judicial scrutiny, respectively, and therefore the . . . SEC's aggressive enforcement theories have not been meaningfully reviewed.").

[117] *See* Lacey & George, *supra* note 103, at 142–46 (noting how Congress amended the accounting provisions in the wake of *World-Wide*).

[118] *See* Westbrook, *supra* note 40, at 564–65.

[119] *See id.* at 563–64.

[120] *See* Roger M. Witten et al., *Prescriptions for Compliance with the Foreign Corrupt Practices Act: Identifying Bribery Risks and Implementing Anti-Bribery Controls in Pharmaceutical and Life Sciences Companies*, 64 BUS. LAW. 691, 702–03 (2009).

[121] *See* 28 C.F.R. § 80.10 (2013).

[122] *See* Westbrook, *supra* note 40, at 564.

[123] *See id.*

[124] *See* 28 C.F.R. § 80.10 ("These procedures enable issuers and domestic concerns to obtain an opinion . . . as to whether certain specified, prospective—not hypothetical—conduct conforms with . . . the antibribery provisions of the Foreign Corrupt Practices Act."); Westbrook, *supra* note 40, at 564.

Opinion Releases that are illustrative of how the DOJ interpreted and applied the anti-bribery provisions prior to the publication of the *Resource Guide*.[125]

Opinion Releases have attempted to clarify a number of different issues that arise under the FCPA's anti-bribery provisions.[126] One such issue is the actions of foreign subsidiaries.[127] For instance, in 2010, the DOJ handled a situation in which a foreign regulator demanded that a corporation's foreign subsidiary make a grant to other local companies.[128] The U.S. corporation raised concerns that this required grant could violate the FCPA.[129] The DOJ decided that there was no violation because the foreign subsidiary took action to ensure that the grants were not used for a corrupt purpose.[130] The DOJ also issued an Opinion Release stating that similar due diligence insulated a corporation from FCPA liability in the context of a joint venture.[131] Similarly, another Opinion Release determined that funds used to acquire a foreign corporation should not be considered a payment under the law.[132]

Opinion Releases have also been used to solicit guidance regarding the definition of a "foreign official."[133] One corporation, for example, sought to determine whether a consultant with contracts representing a foreign government could be considered a "foreign official."[134] The DOJ did not bring an action because even though such consultants *could* be seen as "foreign officials," in the particular case the consultant did not act on behalf of a foreign government.[135]

In another case, a corporation requested an Opinion Release regarding payments made to a member of a royal family.[136] The DOJ mentioned that membership in a royal family did not automatically mean that person is a "for-

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[125] *See* Westbrook, *supra* note 40, at 565.

[126] *See generally* U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT OPINION PROCEDURE RELEASE NO. 10-02 (July 16, 2010), at 5–7 (subsidiary actions) [hereinafter RELEASE NO. 10-02]; U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT OPINION PROCEDURE RELEASE NO. 08-02 (June 13, 2008), at 1 (corporate acquisition) [hereinafter RELEASE NO. 08-02]; U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT OPINION PROCEDURE RELEASE NO. 2001-01 (May 24, 2001), at 1 (joint venture) [hereinafter RELEASE NO. 2001-01].

[127] *See* RELEASE NO. 10-02, *supra* note 126, at 1–2.

[128] *See id.*

[129] *See id.* at 2.

[130] *See id.* at 5.

[131] *See* RELEASE NO. 2001-01, *supra* note 126, at 1–2.

[132] *See* RELEASE NO. 08-02, *supra* note 126, at 4.

[133] *See* U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT OPINION PROCEDURE RELEASE NO. 12-01 (Sept. 18, 2012), at 1 [hereinafter RELEASE NO. 12-01]; U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT OPINION PROCEDURE RELEASE NO. 10-03 (Sept. 1, 2010), at 3–4 [hereinafter RELEASE NO. 10-03].

[134] *See* RELEASE NO. 10-03, *supra* note 133, at 1.

[135] *See id.* at 4.

[136] *See* RELEASE NO. 12-01, *supra* note 133, at 1.

eign official."[137] The DOJ applied a totality of the circumstances test, and declined to take action because the royal family member did not hold any official role within the government.[138] Therefore, the family member had no formal influence over governmental decisions, and payments made did not fall under the FCPA.[139]

Opinion Releases have also discussed the type of payments potentially allowed by the FCPA to provide guidance on how various expenses could be considered "reasonable and bona fide expenditures" and therefore not illegal under the law.[140] For instance, one corporation wished to pay expenses for twenty journalists from China.[141] The DOJ did not bring an enforcement action because the expenses were reasonable under the circumstances and in promotion of the firm's services, and therefore covered under the "bona fide expenditure" exception.[142] Similarly, the DOJ held that travel expenses paid to foreign officials to learn more about a corporation's services, and payments made to host foreign officials for the same purpose, also fall under the bona fide expenditure exception.[143]

These Opinion Releases only serve as DOJ commentary on a specific set of facts.[144] This, in combination with their rarity, means that Opinion Releases cannot reliably serve as a template for FCPA enforcement.[145] If a corporation's behavior falls into a grey area not represented by any current Opinion Release, it might find itself with no guidance in determining if its behavior violates the FCPA.[146] In such a case, one of the few ways for that corporation to insulate itself from FCPA enforcement is for it to apply for an Opinion Release.[147] This

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[137] *See id.* at 5.

[138] *See id.* at 7.

[139] *See id.*

[140] *See* U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT OPINION PROCEDURE RELEASE NO. 12-02 (Oct. 18, 2012), at 1–2 [hereinafter RELEASE NO. 12-02]; U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT OPINION PROCEDURE RELEASE NO. 11-01 (June 30, 2011), at 1–3 [hereinafter RELEASE NO. 11-01]; U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT OPINION PROCEDURE RELEASE NO. 08-03 (July 11, 2008), at 1–3 [hereinafter RELEASE NO. 08-03].

[141] *See* RELEASE NO. 08-03, *supra* note 140, at 1.

[142] *See id.* at 3; 15 U.S.C. § 78dd-2(c)(2)(A) (2012).

[143] *See* RELEASE NO. 12-02, *supra* note 140, at 1–2; RELEASE NO. 11-01, *supra* note 140, at 1–2.

[144] *See* Westbrook, *supra* note 140, at 564 ("To obtain [an Opinion Release], a company must make a formal inquiry, along with a complete and, where possible, documented description of the proposed conduct.").

[145] *See id.* at 564–65 (noting how the DOJ issued three or fewer Opinion Releases from 2008–2010, and how their specificity cannot settle the present nebulousness surrounding the FCPA).

[146] *See id.* at 575 ("[Opinion] Releases are by design particularistic rather than general, and reactive rather than standard-setting."); *see also* 28 C.F.R. § 80.5 (2013) ("An [Opinion Release] shall have no application to any party which does not join in the request for the opinion.").

[147] *See* 28 C.F.R. § 80.10; Cort Malmberg & Allison B. Miller, *Foreign Corrupt Practices Act*, 50 AM. CRIM. L. REV. 1077, 1099 (2013). If the DOJ states in an Opinion Release that it "does not intend

is, however, costly and time consuming.[148] Not every corporation can take the time to utilize this administrative procedure.[149] The alternative, therefore, is to either forego the business or risk the possibility of an enforcement action.[150] Perhaps equally problematic, Opinion Releases only apply to the DOJ, so a corporation could still face liability from another agency, like the SEC, even if its prospective behavior gained tacit approval from the DOJ through an Opinion Release.[151]

3. Common Issues Surrounding FCPA Compliance

Many of the FCPA's provisions face intense scrutiny.[152] The lack of judicial review in agency decisions contributes to an environment in which the courts rarely buffer prosecutorial aggression in pursuing FCPA actions.[153] An additional criticism, often advanced by interest groups working on behalf of corporations, is that the FCPA is too broad.[154] This criticism also focuses on the fact that the law is largely interpreted solely by the agencies in charge of enforcing it.[155] Though groups such as the Chamber of Commerce fall short of advocating for the FCPA's outright repeal, they contend that the law requires significant amendment in order for corporations to reasonably comply.[156] Without it, they argue, U.S. firms might struggle to compete in foreign markets.[157]

Additionally, if the terms of the statute are too vague, they may unconstitutionally provide inadequate notice of the law to defendants.[158] Many of the

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to prosecute . . . but subsequently brings an enforcement action . . . the [corporation] is entitled to a rebuttable presumption of compliance with the FCPA." Malmberg & Miller, *supra*, at 1099.

[148] *See* Westbrook, *supra* note 40, at 564 (outlining how it can take up to thirty days to receive a response from the DOJ to an Opinion Release request); *see also* 28 C.F.R. § 80.8.

[149] See Barry J. Pollack & Annie Wartanian Reisinger, *Lone Wolf or the Start of a New Pack: Should the FCPA Guidance Represent a New Paradigm in Evaluating Corporate Criminal Liability Risks?*, 51 AM. CRIM. L. REV. 121, 127 (2014).

[150] *See id.*

[151] *See* William Nelson, *No Good Deed Goes Unpunished: Charitable Contributions and the Foreign Corrupt Practices Act*, 11 DEPAUL BUS. & COM. L.J. 331, 347 (2013).

[152] *See* Williams, *supra* note 94, at 14 ("[T]he recurring problem is that some of the terms used in the FCPA statute are not defined, therefore, providing no clear guidance as to what corporations are supposed to do and not supposed to do."); *see also supra* text accompanying notes 114–171.

[153] *See* Eric J. Smith, Comment, *Resolving Ambiguity in the FCPA Through Compliance with the OECD Convention on Bribery of Foreign Public Officials*, 27 MD. J. INT'L L. 377, 384 (2012).

[154] *See* Cohn, *supra* note 12.

[155] *See* Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. TOL. L. REV. 99, 141 (2011).

[156] *See id.*

[157] *See* Cohn, *supra* note 12.

[158] *See* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). The Supreme Court illustrated this key constitutional requirement of criminal laws when it stated:

ambiguous terms explicated by the FCPA might therefore fail to provide fair notice.[159] Where the FCPA has been challenged in court, the cases have sometimes involved challenges based on vagueness.[160] Courts are reluctant, however, to accede to this criticism.[161] The DOJ and SEC released the Resource Guide with this critical atmosphere in mind.[162]

B. The Resource Guide

The *Resource Guide*, published in November 2012, is a 120 page outline detailing how the DOJ and SEC view the FCPA.[163] The *Resource Guide* is not intended to be binding upon any party.[164] Rather, it is a source of information on the FCPA for corporations and corporate counsel.[165] The *Resource Guide's* purpose is to educate, and thereby prevent FCPA violations.[166] The *Resource Guide* attempts to do this by offering a summary of the FCPA's provisions, as well as detailing certain factors and principles that affect FCPA enforcement.[167] It touches on both the accounting and anti-bribery provisions.[168]

1. The *Resource Guide* and the Accounting Provisions

The *Resource Guide* approaches the accounting provisions of the FCPA by dissecting both the books and records provision and the internal control provision of the law.[169] Within the context of the books and records provision, the *Resource Guide* notes that the duty to keep records is qualified by the fact that the records need only be "in reasonable detail."[170] According to the *Re-*

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.

Id.

[159] *See* United States v. Kay, 513 F.3d 432, 439–40 (5th Cir. 2007) (outlining defendants' claim that the FCPA failed to give fair notice as to whether their conduct was illegal).

[160] *See id.*

[161] *See id.* at 446 (holding that the FCPA provided defendants with fair notice).

[162] *See* Cohn, *supra* note 12.

[163] *See* Joseph W. Yockey, *Choosing Governance in the FCPA Reform Debate*, 38 J. CORP. L. 325, 363 (2013).

[164] *See* RESOURCE GUIDE, *supra* note 17, at ii.

[165] *See id.*

[166] *See id.* at 2.

[167] *See id.* at c. 2–3, 5.

[168] *See id.* at c. 2–3.

[169] *See id.* at c. 2.

[170] *See id.* at 39

source Guide, the mere fact that the law only requires records to be in reasonable detail does not mean that corporations can mischaracterize the true nature of a transaction.[171] Referring to a bribe as a commission or royalty fee, for example, would still violate the FCPA.[172] The *Resource Guide* also reiterates that even in instances where the anti-bribery provisions do not apply, the failure to keep adequate records can expose a corporation to liability.[173]

The *Resource Guide* also clarifies that internal controls should conform to what satisfies a prudent official.[174] This allows corporations flexibility to adapt to what will most properly work for their organization.[175] The *Resource Guide* advises corporations with a greater risk of engaging in corrupt behavior to enact more stringent internal compliance programs.[176]

2. The *Resource Guide* and the Anti-Bribery Provisions

a. Parties Subject to the Anti-Bribery Provisions

The *Resource Guide* also provides information concerning the FCPA's anti-bribery provisions.[177] When deciding what party can be brought under the jurisdiction of the statute, the *Resource Guide* offers tips for determining whether a client falls under the law.[178] An entity is subject to the anti-bribery provisions if it is (1) an "issuer," (2) a "domestic concern," or (3) "certain persons and entities . . . acting while in the territory of the United States."[179]

According to the *Resource Guide*, an issuer is any company listed on a U.S. security exchange, or any company that trades in stocks and must file with the SEC.[180] A domestic concern is either a citizen, national, or resident of the United States, or an entity that is organized under U.S. law, or has its primary source of business in the United States.[181] The FCPA also covers foreign

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[171] *See id.*

[172] *See id.*

[173] *See id.*

[174] *See id.*

[175] *See id.*; Roger M. Witten, Kimberly A. Parker & Jay Holtmeier, *DOJ and SEC Issue Much Anticipate FCPA Guidance*, WILMER HALE (Nov. 19, 2012), at 6, *available at* http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/PDFs/DOJ-and-SEC-Issue-Much-Anticipated-FCPA-Guidance.pdf ("The [Resource] Guide recognizes . . . that internal controls systems should be designed to fit the circumstances and risks of particular companies. For example . . . a financial services company's internal controls may differ from a manufacturing company's.").

[176] *See* RESOURCE GUIDE, *supra* note 17, at 40.

[177] *See id.* at c. 2.

[178] *See id.* at 10–12; *see also* Witten, Parker & Holtmeier, *supra* note 175, at 1 (detailing the Resource Guide's position on the jurisdiction of the FCPA).

[179] RESOURCE GUIDE, *supra* note 17, at 10.

[180] *See id.* at 11.

[181] *See id.*

nationals or corporations that are acting on behalf of a domestic concern.[182] Finally, the FCPA is also triggered when a foreign national or entity engages in the furtherance of a bribe while in the United States.[183]

b. The Definition of a Foreign Official

The *Resource Guide* also attempts to clarify what constitutes a foreign official.[184] Looking to the language of the statute, the *Resource Guide* states that payments are illegal when made to anyone either working for a foreign government or on behalf of a foreign government.[185] According to the *Resource Guide*, it does not matter if that person is a low level employee or the Minister of Defense.[186] A "foreign official" must also work in "a department, agency, or instrumentality of a foreign government."[187] According to the *Resource Guide*, the FCPA is broad enough to include employees of State-owned and State-controlled entities, but this is a fact-specific determination.[188] Finally, the *Resource Guide* notes that bribes made to officials of certain public international organizations, like the World Bank and the International Monetary Fund, are also illegal under the FCPA.[189]

c. Affirmative Defenses

The *Resource Guide* also attempts to explain some of the affirmative defenses to the FCPA.[190] When a corporation seeks to claim that the law of a foreign country allows a particular payment, the *Resource Guide* emphasizes that this defense only applies if the law explicitly permits such a payment.[191] The *Resource Guide* also offers advice on the FCPA's "bona fide expenditure" defense.[192] As part of this defense, travel and lodging expenses are only allowed if they either promote the corporation's services, or are required to perform a contract with the foreign government in question.[193] As with other provisions, the *Resource Guide* makes it clear that such determinations are fact-specific.[194] The *Resource Guide* further offers tips to corporations to ensure that a travel

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[182] *See id.*
[183] *See id.*
[184] *See id.* at 20.
[185] *See id.*
[186] *See id.*
[187] *Id.*
[188] *See id.*; Witten, Parker & Holtmeier, *supra* note 175, at 5.
[189] *See* RESOURCE GUIDE, *supra* note 17, at 21.
[190] *See id.* at 23–26.
[191] *See id.* at 23.
[192] *See id.* at 24.
[193] *See id.*
[194] *See id.*

expense is a bona fide expenditure, such as making sure that the expenses are reasonable, refraining from pre-selecting which foreign officials travel, and not advancing funds, among others.[195]

The *Resource Guide* extensively discusses the facilitating payments exception to the FCPA.[196] The exception applies only when the payment is for routine governmental action, such as processing visas, and supplying utilities.[197] Importantly, the *Resource Guide* explains that any payment made to influence a decision to award business is *not* a facilitating payment.[198] Additionally, any action within a foreign official's discretion is not considered a facilitating payment.[199] The size of a payment does not determine whether it is a facilitating payment or a bribe; rather, the inquiry focuses on the purpose of the payment.[200] Finally, the *Resource Guide* is clear that simply labeling a payment as a facilitating payment does not make it so.[201]

3. Considerations Influencing FCPA Enforcement

Lastly, the *Resource Guide* outlines the factors that the DOJ utilizes to determine whether to bring an enforcement action under the FCPA.[202] The DOJ relies on the U.S. Attorneys' Manual, which serves as guidance for all federal prosecutors.[203] In chapter 9-28.000 of the U.S Attorneys' Manual, the DOJ outlines the principles governing prosecution of business organizations.[204] The *Resource Guide* recognizes and outlines these nine factors.[205] These factors are: (1) the nature and seriousness of the offense; (2) the pervasiveness of wrongdoing within the corporation; (3) any history of similar misconduct; (4) any timely and voluntary disclosure and willingness to cooperate; (5) any pre-existing compliance program; (6) remedial actions taken; (7) collateral consequences, as well as the impact on the public arising from the prosecution; (8) the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and (9) the adequacy of non-criminal remedies.[206] The SEC con-

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[195] *See id.*
[196] *See id.* at 25; Witten, Parker & Holtmeier, *supra* note 175, at 4–5.
[197] *See* RESOURCE GUIDE, *supra* note 17, at 25.
[198] *See id.*
[199] *See id.*
[200] *See id.*
[201] *See id.*
[202] *See id.* at c. 5.
[203] *See id.* at 52–53.
[204] *See* DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, c. 9-28.000 [hereinafter U.S. ATTORNEYS' MANUAL].
[205] *See* RESOURCE GUIDE, *supra* note 17, at 53.
[206] *See id.*; U.S. ATTORNEYS' MANUAL, *supra* note 204, at 9-28.300.

siders similar factors when deciding whether or not to enforce the FCPA.[207] These factors include: (1) the egregiousness of the violation; (2) whether the harm created hurts a particular group of victims; (3) whether the harm is ongoing; (4) whether the harm can be investigated efficiently; and (5) whether the harm was particularly large.[208]

4. Reaction to the *Resource Guide*

The *Resource Guide's* publication in late 2012 was met with mixed reviews.[209] Some felt the *Resource Guide* materially articulated the DOJ and SEC's enforcement scheme.[210] Others believed the *Resource Guide* failed to break new ground.[211] Specifically, in February 2013, the Chamber of Commerce, along with thirty other organizations, issued a letter to the DOJ and SEC in response to the *Resource Guide*.[212] The groups commented that the *Resource Guide* failed to clearly define terms like foreign official, adequately account for corporate compliance programs, and limit corporate liability for the actions of foreign subsidiaries.[213]

C. Interpretation of the Bribery Act

Corporations conducting business overseas are no longer subject to only the FCPA.[214] As the oldest foreign bribery statute, the FCPA has long influenced the application of other laws, such as the United Kingdom's 2010 Bribery Act.[215] For many years in foreign states like the United Kingdom, there existed no formal statutes combating foreign bribery.[216] Many U.S. corpora-

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[207] *See* RESOURCE GUIDE, *supra* note 17, at 53.

[208] *See id.*

[209] *See* Patrick J. O'Toole, Jr., Caroline K. Simons & Jaclyn Essinger, *FCPA Guidance: A Murky Road for Compliance*, BOSTON.COM (Feb. 7, 2013), http://www.boston.com/business/blogs/global-business-hub/2013/02/fcpa_guidance_a.html (last visited Mar. 31, 2014).

[210] *See id.*

[211] *See id.*

[212] *See* Press Release, U.S. Chamber of Commerce, Business Community Responds to FCPA Enforcement Guidance by DOJ and SEC (Feb. 18, 2013), *available at* https://www.uschamber.com/press-release/business-community-responds-fcpa-enforcement-guidance-doj-and-sec (last visited Apr. 16, 2014).

[213] *See id.*

[214] *See* Kevin Cooper & Reema Shour, *Bribery Act Update: Worldwide Anti-Corruption Initiatives: A Comparison of UK and US Legislation*, INCE & CO INT'L LLP, 3–4 (2003), *available at http://incelaw.com/documents/pdf/legal-updates/bribery-act-update-february-2013*.

[215] *See* F. Joseph Warin et al., *The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 TEX. INT'L L.J. 1, 7 (2010). *See generally* Bribery Act, 2010, c. 23 (citing date of enactment as April 8, 2010).

[216] *See* Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 98 (2010).

tions objected that the FCPA therefore placed them at a disadvantage vis-à-vis foreign competitors.[217] This does not mean, however, that the United Kingdom did not combat foreign bribery prior to the law's passage.[218] Before the Bribery Act, the British system consisted of a collage of legislation and the common law.[219] This system bred confusion and created numerous loopholes for corporations to exploit.[220] The U.K. Parliament passed the Bribery Act in response to this unwieldy system and to comply with international norms.[221]

The Bribery Act is much broader than the FCPA in a variety of ways.[222] The Bribery Act does not contain any provisions comparable to the accounting provisions in the FCPA, but its anti-bribery provisions are more extensive.[223] For instance, section seven of the Bribery Act criminalizes the failure to prevent bribery, a crime uniquely separate from any liability found in the FCPA.[224] The Bribery Act's potential jurisdiction is also more substantial than that of the FCPA because it extends to any entity doing business in the United Kingdom, no matter where that entity is incorporated.[225] In contrast, the FCPA

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[217] *See id.* at 98–99. Partly due to these complaints, the United States pushed for the adoption of the OECD Convention. *See id.*

[218] *See* ORG. FOR ECON. CO-OPERATION AND DEV. [OECD] WORKING GRP. ON BRIBERY IN INT'L BUS., UNITED KINGDOM: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION, PHASE I BIS REPORT 2 (2002), *available at* http://www.oecd.org/dataoecd/12/50/2498215.pdf (outlining U.K. law prior to the Bribery Act).

[219] *See id.* According to an OECD report on the United Kingdom's progress in implementing the OECD Convention, examples of U.K. bribery law prior to the passage of the Bribery Act included the common law, as well as three criminal statutes. *See id.* These were "the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916)." *Id.*

[220] *See* OECD WORKING GRP. ON BRIBERY IN INT'L BUS., UNITED KINGDOM: PHASE 2: REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS ¶ 181 (2005), *available at* http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/34599062.pdf ("It is widely recognised that the current substantive law governing bribery in the UK is characterized by complexity and uncertainty."); THE LAW COMM'N, CONSULTATION PAPER NO 185: REFORMING BRIBERY: A CONSULTATION PAPER, ¶ 11.43 (2007) (U.K.), *available at* http://lawcommission.justice.gov.uk/docs/cp185_Reforming_Bribery_consultation.pdf (outlining loopholes in U.K. bribery law).

[221] *See* Bruce W. Bean & Emma H. MacGuidwin, *Expansive Reach—Useless Guidance: An Introduction to the U.K. Bribery Act 2010*, 18 ILSA J. INT'L & COMP. L. 323, 324 (2012); Jon Jordan, *Recent Developments in the Foreign Corrupt Practices Act and the New UK Bribery Act: A Global Trend Towards Greater Accountability in the Prevention of Foreign Bribery*, 7 N.Y.U. J. L. & BUS. 845, 864 (2011).

[222] *See* Jon Jordan, *The Adequate Procedures Defense Under the UK Bribery Act: A British Idea for the Foreign Corrupt Practices Act*, 17 STAN. J.L. BUS. & FIN. 25, 28 (2011).

[223] *See* Dunst et al., *supra* note 22, at 262.

[224] Bribery Act, 2010, c. 23, § 7; *see* Jordan, *supra* note 222, at 28.

[225] *See* Warin et al., *supra* note 215, at 28 ("Section 7 applies to any entity that is a 'relevant commercial organization' . . . seemingly sweep[ing] into the Bribery Act's ambit virtually all major

only applies to foreign corporations that either issue on a stock exchange or can be considered a domestic concern for having their *principal* place of business in the United States.[226]

In addition, the Bribery Act, without defining what an "associated person" is, holds corporations strictly liable for preventing such persons from committing bribery.[227] This creates potential criminal liability for corporations not only for the actions of officers and employees, but for those of shareholders as well.[228] The Bribery Act includes a defense to these charges not found in the FCPA.[229] An entity is not liable for failing to prevent bribery if it "had in place adequate procedures designed to prevent persons associated with [the corporation] from undertaking such conduct."[230] Some have since called for a similar provision in the FCPA's statutory scheme.[231]

Another major difference between the FCPA and the Bribery Act is that the Bribery Act lacks a defense for facilitating payments.[232] This exposes corporations doing business in the United Kingdom to greater potential liability.[233] It could also create conflicts with the accounting provisions of the FCPA.[234] A corporation needing to document that it made a facilitating payment might be in compliance with the FCPA, but in violation of the Bribery Act.[235] Furthermore, the Bribery Act does not share the FCPA's bona fide expenditures defense.[236] This means that simple expenses for travel could be considered prima facie violations of the Bribery Act.[237] Recent guidance from the U.K. govern-

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multinational corporations—the vast majority of which conduct some business in the United Kingdom."). Section 7's jurisdictional scope could be even greater than the FCPA's. *See id.*

[226] *See* RESOURCE GUIDE, *supra* note 17, at 11.

[227] *See* Engle, *supra* note 88, at 1184.

[228] *See id.*

[229] Bribery Act, 2010, c. 23, § 7(2); Jordan, *supra* note 222, at 28.

[230] Bribery Act, 2010, c. 23, § 7(2).

[231] *See id.*

[232] *See id.* (lacking any exception to bribe payments); *see also* MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE ABOUT PROCEDURES WHICH RELEVANT COMMERCIAL ORGANISATIONS CAN PUT INTO PLACE TO PREVENT PERSONS ASSOCIATED WITH THEM FROM BRIBING (Section 9 of the Bribery Act 2010), ¶¶ 44–47 (2011) (U.K.), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181762/bribery-act-2010-guidance.pdf [hereinafter Ministry of Justice Guidance] (detailing the U.K. government's view towards facilitating payments).

[233] See Jacqueline L. Bonneau, Note, *Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement*, 49 COLUM. J. TRANSNAT'L L. 365, 388–89 (2011).

[234] *See id.* at 389.

[235] *See id.*

[236] *See* Torres-Fowler & Anderson, *supra* note 21, at 40–41.

[237] *See id.* at 41.

ment, however, indicates that a bona fide expenditure defense may be implicitly read into the Bribery Act.[238]

III. ANALYSIS

The DOJ and SEC hoped the *Resource Guide* would clarify the major provisions of the FCPA.[239] Even if non-binding, the *Resource Guide* should, at least in theory, help corporations comply with the law.[240] There is evidence, however, that the *Resource Guide* has done little to achieve its intended goal.[241] In fact, it has likely done no more than reiterate the DOJ's and SEC's interpretation of the statute.[242] Rather than simply regurgitating old policy, the DOJ and SEC should have made a greater effort to give corporations a clear path to follow.[243] In many ways, the Bribery Act offers this clarity more effectively than the FCPA.[244] Therefore, one way to better serve the congressional goals which prompted enactment of the FCPA—to provide corporations with the clarity they desperately seek while maintaining a statutory scheme broad enough to combat foreign bribery in a forceful manner—may be to amend the law to conform more closely with the Bribery Act.[245] A thorough examination

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[238] *See* MINISTRY OF JUSTICE GUIDANCE, *supra* note 232, ¶¶ 26–32. Because section 6 of the Bribery Act requires "an intention for a financial or other advantage to influence [an] official," these expenditures might not violate the law because officials might otherwise receive these costs from their governments, and therefore cannot be said to be an "advantage." *See id.* ¶ 27.

[239] *See* RESOURCE GUIDE, *supra* note 17, at Prologue.

[240] *See id.*; *see also* COVINGTON & BURLING LLP, AN ANALYSIS OF THE FCPA RESOURCE GUIDE 1 (2012), http://www.cov.com/files/Uploads/Documents/Advisory_FCPA_Resource_Guide.pdf ("[T]he *Guide* contains few surprises, but it does helpfully confirm advice that practitioners have given clients . . . .").

[241] *See* SHEARMAN & STERLING LLP, FCPA DIGEST OF CASES AND REVIEW RELEASES RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977 xix (Philip Urofsky et al. eds., 2013), *available at* http://www.shearman.com/~/media/Files/NewsInsights/Publications/2013/01/Shearman%20%20Sterlings%20Recent%20Trends%20and%20Patterns%20i__/Files/View%20full%20January%202013%20iFCPA%20Digesti/FileAttachment/FCPADigestJan2013_010213.pdf [hereinafter FCPA DIGEST] ("For the most part, the *Guide* does not break new ground and instead confirms and consolidates the agencies' previous interpretations of the FCPA's scope and terms.").

[242] *See id.*

[243] *See* Rebecca Koch, Note, *The Foreign Corrupt Practices Act: It's Time to Cut Back the Grease and Add Some Guidance*, 28 B.C. INT'L & COMP. L. REV. 379, 380 (2005) (noting the weakness and ineffectiveness of the FCPA's provisions). Without clear guideline to follow, courts may find aspects of the law too vague. *See* United States v. Bodmer, 342 F. Supp. 2d 176, 189 (S.D. N.Y. 2004).

[244] *See* James D. Painter, *The New U.K. Bribery Act—What U.S. Lawyers Need to Know*, 82 PA. B.A. Q. 172, 172 (2011).

[245] *Compare* 15 U.S.C. §§ 78dd-1 to -3 (2012) (lacking an adequate procedures defense), *with* Bribery Act, 2010, c. 23, §§ 6-7 (containing an adequate procedures defense).

of the *Resource Guide* is nonetheless necessary to determine where it adequately provides clarity and where it does not.[246]

A. The Adequacy of the Resource Guide

The *Resource Guide* is an attempt by the DOJ and SEC to educate corporations on the FCPA.[247] It fails, however, to adequately provide clarification for the FCPA's terms.[248] The *Resource Guide* does not augment the understanding of the FCPA beyond what actions against corporations and Opinion Releases already provide and therefore does not offer a sufficient solution to the vagueness inherent in the FCPA.[249] This is especially true because the *Resource Guide* rejects a discreet, formulaic approach in favor of a more holistic approach.[250] Considerable unpredictability concerning FCPA enforcement remains because the *Resource Guide* does little to alter the public's perception of both the accounting and anti-bribery provisions.[251]

1. Adequacy of the *Resource Guide's* Approach to the Accounting Provisions

The *Resource Guide* offers little added clarification regarding the accounting provisions of the FCPA.[252] For instance, in describing the books and records provision, the *Resource Guide*, much like *World-Wide*, simply mimics the FCPA itself—stating that this provision requires corporations to provide records that are in reasonable detail.[253] The only guidance the *Resource Guide* provides is flatly stating that "reasonable detail" is what a prudent officer would do.[254] Consequently, this clause remains arcane to corporate officers.[255]

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[246] *See* Pollack & Reisinger, *supra* note 149, at 123 (posing the question of whether the Resource Guide is the proper tactic to decipher the issue of the FCPA's ambiguity).

[247] *See* RESOURCE GUIDE, *supra* note 17, at Prologue.

[248] *See* FCPA DIGEST, *supra* note 241, at xix. *See generally* RESOURCE GUIDE, *supra* note 17 (failing to clarify many of the FCPA's ambiguities).

[249] *See* RESOURCE GUIDE, *supra* note 17, at c. 2–3; Joel M. Cohen et al., *Under the FCPA, Who Is a Foreign Official Anyway?*, 63 BUS. LAW. 1243, 1263–67 (2008).

[250] *See* Irina Sivachenko, Note, *Corporate Victims of "Victimless Crime:" How the FCPA's Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance*, 54 B.C. L. REV. 393, 410 (2013).

[251] *See id.*

[252] *See* RESOURCE GUIDE, *supra* note 17, at c. 3; FCPA DIGEST, *supra* note 241, at xix.

[253] *See* RESOURCE GUIDE, *supra* note 17, at 39; *see also* 15 U.S.C. § 78m(b)(1)(A) (2012); S.E.C. v. World-Wide Coin Inv., Ltd., 567 F. Supp. 724, 749 (N.D. Ga. 1983).

[254] *See* RESOURCE GUIDE, *supra* note 17, at 39; GIBSON, DUNN & CRUTCHER LLP, *Decoding FCPA Enforcement: The U.S. Government Issues Comprehensive Guidance on the Foreign Corrupt Practices Act*, GIBSON DUNN PUBLICATIONS (Nov. 19, 2012) at 14, *available at* http://www.gibsondunn.com/publications/Documents/DecodingFCPAEnforcement-USGovernment-ComprehensiveGuidance.pdf.

Without further detailing what may or may not be prudent, the *Resource Guide* does not provide a workable standard.[256] Without such a standard, corporations are still left in limbo with respect to what might constitute a violation of the books and records provision.[257] It would provide greater clarity if the *Resource Guide* offered a clear threshold for when records are "in reasonable detail."[258] This would allow corporations to more easily assess whether their behavior is in conformance with the FCPA.[259]

The *Resource Guide* also does not offer enough guidance to corporations on the internal controls provision.[260] The only potentially helpful advice the *Resource Guide* offers is that there is no specific set of controls that the SEC expects to see when examining a corporation's internal controls.[261] This, however, only serves to create confusion.[262] A corporation might believe it is conforming to the prudent controls of its type of industry, only to discover it has not conformed to SEC expectations.[263] Again, the FCPA would be better served by clearer standards that corporations could easily follow.[264]

Furthermore, the *Resource Guide* does nothing to solve the flaws inherent in the accounting provisions themselves.[265] Requiring corporations to maintain adequate records and implement internal controls to prevent foreign bribery places a heavy burden on any corporation wishing to do business overseas.[266] This is even more true because not only does the FCPA essentially demand that

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[255] *See* Mike Koehler, *The Unique FCPA Compliance Challenges of Doing Business in China*, 25 WIS. INT'L L.J. 397, 411–12 (describing the broadness of the books and records provisions).

[256] *See* GIBSON, DUNN & CRUTCHER LLP, *supra* note 254, at 14 (outlining how while the *Resource Guide* implies that minor mischaracterizations in books and records might not be seen as FCPA violations, this is not a certainty).

[257] *See id.*

[258] *See* RESOURCE GUIDE, *supra* note 17, at 39; Witten, Parker & Holtmeier, *supra* note 175, at 6.

[259] *See* Witten, Parker & Holtmeier, *supra* note 175, at 6.

[260] *See* RESOURCE GUIDE, *supra* note 17, at 39; Witten, Parker & Holtmeier, *supra* note 175, at 6.

[261] *See* RESOURCE GUIDE, *supra* note 17, at 40.

[262] *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, 576–77 (2012) (detailing the lack of direction from the SEC concerning what constitutes a valid internal control).

[263] *See* RESOURCE GUIDE, *supra* note 17, at 40; *see also* Pacini, *supra* note 262, at 577 (noting how the SEC has a variety of factors to determine if controls are adequate rather than a clearer guideline).

[264] *See* Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 795 (2011). The combination of the internal controls provision and the demand for bribes overseas makes compliance "a constant challenge (or 'nightmare') for firms operating in markets where corruption is endemic." *Id.*

[265] *See* RESOURCE GUIDE, *supra* note 17, at c. 3; *see also* S.E.C. v. World-Wide Coin Inv., Ltd., 567 F. Supp. 724, 751 (N.D. Ga. 1983) ("The main problem with the internal accounting provisions of the FCPA is that there are no specific standards by which to evaluate the sufficiency of controls . . . .").

[266] *See* H. Lowell Brown, *The Corporate Director's Compliance Oversight Responsibility in the Post Caremark Era*, 26 DEL. J. CORP. L. 1, 48 (2001).

corporations admit to committing bribery overseas in their books, but corporations may be subject to the accounting provisions even if they *have not* committed bribery at all.[267] This potentially punishes corporations twice for any bribe they might offer to a foreign official.[268] This runs counter to the stated purpose of the FCPA because it often creates cross-conflicts, as a corporation trying to remain in accordance with the accounting provisions can still violate the anti-bribery provisions.[269]

This is especially true when considering how the DOJ and SEC, according to the *Resource Guide*, could hold a corporation liable for the actions of a subsidiary under principles of agency law.[270] In such a case, the *Resource Guide* suggests that a corporation will want to demonstrate to the SEC that it had adequate internal controls that should have prevented the subsidiary's violation.[271] Under the principles the SEC uses to decide when to bring civil actions, this may allow the corporation to avoid sanctions.[272] Admitting that the parent corporation had enough control over the subsidiary to try to control it internally, however, might open up the corporation to criminal liability.[273]

2. Adequacy of the *Resource Guide's* Approach to the Anti-Bribery Provisions

The *Resource Guide* also does not offer adequate guidance on how to comply with the FCPA's anti-bribery provisions.[274] As with the accounting provisions, the *Resource Guide* offers little analysis on the anti-bribery provisions beyond that which the Opinion Releases have already provided.[275] For example, with respect to the definition of a foreign official, the *Resource Guide* offers only the cryptic notion that it may be difficult in states not orga-

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[267] *See* RESOURCE GUIDE, *supra* note 17, at 39; Witten, Parker & Holtmeier, *supra* note 175, at 6 (outlining how the SEC can pursue FCPA actions even when the elements of the anti-bribery provisions are not present).

[268] *See* 15 U.S.C. § 78dd-1 (2012); Witten, Parker & Holtmeier, *supra* note 175, at 6.

[269] *See* Arthur F. Mathews, *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, 312 (1998) (describing how the accounting provisions cover all assets of a corporation, not just those used for corrupt foreign payments).

[270] *See* RESOURCE GUIDE, *supra* note 17, at 27.

[271] *See id.* at 55.

[272] *See id.*

[273] *See id.* at 27. According to the Resource Guide, "[i]f an agency relationship exists, a subsidiary's actions and knowledge are imputed to its parent." *Id.*

[274] *See id.* at c. 2; *see also* Sivachenko, *supra* note 250, at 408 (describing how the Resource Guide lists factors that a corporation could use to determine if they were dealing with a foreign official, but provides no further detail).

[275] *See* Pollack & Reisinger, *supra* note 149, at 137–38 ("[The *Resource Guide*] makes no sharp departure from current practice. Rather, the [Resource Guide] . . . expressly confirms preexisting enforcement practices . . . .").

nized like the United States to determine whether an individual actually works for a department of that State's government.[276] This does nothing other than leave corporations with the difficult task of investigating every connection a person that they are dealing with abroad may have to a foreign government.[277]

The *Resource Guide* does no better with regard to the affirmative defenses of the FCPA.[278] First, it offers no comfort when it suggests that the local law defense only applies when the foreign government explicitly allows bribes.[279] Most states that have de facto lawful bribery environments still have enacted laws that make bribery illegal de jure.[280] Therefore, this FCPA defense is essentially useless in most cases.[281] Furthermore, when discussing the bona fide expenditure defense, the *Resource Guide* essentially admits that there is no real guidance that can be offered to corporations.[282] The *Resource Guide* states that the analysis of whether a payment constituted a bona fide expenditure is fact specific.[283] This places the burden on corporations to take a totality of the circumstances test to determine if that payment is too personal to be considered a bona fide expenditure.[284] This vagueness makes it hard to actually utilize the bona fide expenditure defense.[285]

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[276] *See* RESOURCE GUIDE, *supra* note 17, at 20.

[277] *See* Witten, Parker & Holtmeier, *supra* note 175, at 4.

[278] *See* RESOURCE GUIDE, *supra* note 17, at 23–25; *see also* Witten, Parker & Holtmeier, *supra* note 175, at 2–3 (detailing how the *Resource Guide* fails to address issues concerning affirmative defenses of the FCPA).

[279] *See* RESOURCE GUIDE, *supra* note 17, at 23; Witten, Parker & Holtmeier, *supra* note 175, at 3. In fact, the advice offered by the *Resource Guide* may even appear to be a "different standard than what is required under the [local law defense]." *See* Witten, Parker & Holtmeier, *supra* note 175, at 3.

[280] *See* Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419, 425 (1999).

[281] *See id.*

[282] *See* RESOURCE GUIDE, *supra* note 17, at 24; *see also* Witten, Parker & Holtmeier, *supra* note 175, at 2–3 (pointing out issues with the *Resource Guide's* interpretation of this defense).

[283] *See* RESOURCE GUIDE, *supra* note 17, at 24.

[284] *See id.*; White Collar Crime & Corporate Investigations Practice Group, *DOJ and SEC Issue Long-Awaited Resource Guide to the Foreign Corrupt Practices Act*, DRINKER BIDDLE (Nov. 2012), at 4, *available at* http://www.drinkerbiddle.com/Templates/media/files/Memos%20And%20Newsletters/White%20Collar%20Criminal%20Defense/2012/November/DOJ%20and%20SEC%20Issue%20Long%20Awaited%20Resource%20Guide.pdf (noting how the *Resource Guide* outlines nine factors corporations can use to determine if an expenditure falls under the defense).

[285] *See* Robert C. Blume & J. Taylor McConkie, *Navigating the Foreign Corrupt Practices Act: The Increasing Cost of Overseas Bribery*, 36 COLO. LAW 91, 94 (2007) ("Personal gifts masquerading as business expenditures will not qualify for this defense. Rather, the defense covers payments such as travel and lodging expenses, as well as small samples of the company's products."). What could constitute an unlawful gift, however, remains "a gray area." *See* Heidi L. Hansberry, Comment, *In Spite of Its Good Intentions, the Dodd-Frank Act Has Created an FCPA Monster*, 102 J. CRIM. L. & CRIMINOLOGY 195, 218 (2012); Marsha Z. Gerber & Elaine L. Lawson, *Business Entertainment "Texas Style" Here and Abroad*, 75 TEX. B.J. 536, 536 (2012).

This is not to say that the *Resource Guide* offers no useful clarifications of the FCPA's terms.[286] The *Resource Guide* satisfactorily describes what is considered a "facilitating payment" by offering specific examples.[287] Further, it provides beneficial advice to corporations, such as describing how the size of a facilitating payment is irrelevant when determining whether it should be exempt from the FCPA.[288] Therefore, corporations can clearly understand that when they offer payments to foreign officials to obtain innocuous, every-day items such as utilities, they may be able to avoid criminal liability under the FCPA.[289]

One of the most helpful aspects of the *Resource Guide* is its summary of the principles that both the DOJ and the SEC use to decide when to enforce the FCPA.[290] This section of the *Resource Guide* offers some key assistance for corporations hoping to avoid FCPA enforcement actions.[291] It details how corporations may forestall criminal or civil liability if they avoid massive harm, put in place adequate compliance programs, or quickly show remorse for their actions.[292] Outlining the factors considered by the U.S. Attorneys' Manual, however, does not solve all of the issues concerning the FCPA because these factors are non-binding and only serve to guide federal prosecutors.[293] The decision to bring an FCPA enforcement action is still ultimately within the discretion of a particular U.S. Attorney's office.[294] The same can be said for civil proceedings under the SEC.[295] If the FCPA's underlying issues are not solved,

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[286] *See* Steven Tyrrell et al., *The Wait is Over: DOJ and SEC Release Resource Guide to FCPA*, WEIL, GOTSHAL & MANGES LLP (Nov. 15, 2012), at 1, *available at* http://www.weil.com/files/upload/Weil_Alert_Anti_Corruption_November_2012.pdf.

[287] *See id.* (stating that part of what the *Resource Guide* does right is provide hypotheticals regarding what constitutes such payments); *see also* RESOURCE GUIDE, *supra* note 17, at 24–25. When it comes to "bona fide expenditures," the *Resource Guide* simply outlines factors a corporation can use to determine if a payment is permissible. *See id.* at 24. Conversely, the *Resource Guide* gives specific examples of the kinds of payments that fall under the "facilitating payments" defense. *See id.* at 25.

[288] *See id.*at 24–25.

[289] *See id.*

[290] *See id.* at 52–53; *see also* Tyrrell et al., *supra* note 286, at 1.

[291] *See* RESOURCE GUIDE, *supra* note 17, at 52–53; *see also* Witten, Parker & Holtmeier, *supra* note 175, at 9. This is not to say that this section of the *Resource Guide* is perfect. *See id.* The factors listed in the *Resource Guide* do not necessarily translate to DOJ or SEC non-action in practice. *See id.* (noting how the factors that might help a corporation avoid prosecution listed in the *Resource Guide* are actually present in many cases where the DOJ or SEC *did* prosecute).

[292] *See* RESOURCE GUIDE, *supra* note 17, at 53.

[293] *See* United States v. Furrow, 100 F. Supp.2d 1170, 1178 (C.D. Cal. 2000) ("Case law is clear on this point: the guidelines, like any other provision in the USAM, do not create any substantive rights.").

[294] *See* U.S. ATTORNEYS' MANUAL, *supra* note 204, at 9-2.030.

[295] *See* SEC. & EXCHANGE COMM'N DIV. OF ENFORCEMENT, ENFORCEMENT MANUAL § 1.1 [hereinafter SEC MANUAL].

any guidance corporations take away from the *Resource Guide* or the U.S. Attorneys' Manual will not resolve the difficulties inherent in compliance.[296]

B. Solutions to the Issues Surrounding the FCPA

To correct the issues associated with the FCPA, reformers must first identify what is more important—narrowing the law's scope or providing corporations with guidance on the law's vague terms.[297] Making the law clearer and more efficient would increase corporate compliance with the FCPA.[298] This would eliminate the issue of vagueness that is one of the real roots of the problem concerning FCPA compliance.[299] Clarifying the FCPA through amendments would address these issues, even if in some ways this remedial measure would broaden the scope of the statute.[300]

A major flaw of the FCPA is the dual-pronged nature of its enforcement.[301] Corporations are forced to comply with the requirements of two different agencies, each with its own goals for FCPA enforcement.[302] Although the *Resource Guide* may serve as a way to bind the two agencies' interpretation of the FCPA together, this is not enough.[303] The fact that parallel proceedings are constantly hanging over corporations means that they will almost always prefer to pay sanctions or criminal fines rather than taking an action to trial.[304] This prevents the development of any significant jurisprudence regarding the language of the FCPA.[305] Thus, the only major source of information concerning the FCPA comes from the federal agencies tasked with enforcing the law

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[296] *See* RESOURCE GUIDE, *supra* note 17; U.S. ATTORNEYS' MANUAL, *supra* note 204; SEC MANUAL, *supra* note 295.

[297] *See* Koehler, *supra* note 155, at 140–41 (describing congressional scrutiny of the FCPA concerning both its breadth and ambiguity).

[298] *See* Cohen et al., *supra* note 249, at 1245–46 (advocating for clearer definitions of FCPA terms to help corporations).

[299] *See id.* at 1250. One example of how vagueness in the FCPA affects corporations is how "the DOJ and SEC have declined to provide guidance so that companies may proactively determine whether their customers and business partners are 'instrumentalities.'" *See id.*

[300] *See* Cohen et al., *supra* note 249, at 1270 (emphasizing the importance of providing clarity to the FCPA's provisions).

[301] *See* GREANIAS & WINDSOR, *supra* note 7, at 85.

[302] *See id.*

[303] *Compare* RESOURCE GUIDE, *supra* note 17, at Prologue (noting that the *Resource Guide* is a joint effort by the DOJ and SEC to provide clarity), *with* Witten, Parker & Holtmeier, *supra* note 175, at 1 ("The [Resource Guide], is not an FCPA watershed . . . as some may have hoped.").

[304] *See* Savage, *supra* note 13.

[305] *See* Lacey & George, *supra* note 103, at 121 (noting that there is only one case interpreting the original FCPA); *see also* Giraudo, *supra* note 37, at 142 ("There is very little case history involving the accounting provisions of the FCPA.").

and the inadequacies of their interpretation of the statute are rampant.[306] If Congress eliminated the pressure of enforcement actions from both the DOJ and SEC, the FCPA might be better equipped to evolve over time and clarify its vague terms through the process.[307]

Another more practical solution, however, would be to amend the FCPA to provide more clarity to corporations.[308] This could be done in a few ways.[309] First, terms such as in reasonable detail could be amended further.[310] There is some precedent for this, as Congress already amended the accounting provisions.[311] By explaining what it means to be a prudent officer, Congress could provide enough clarity to ensure that corporations do not struggle to abide by the accounting provisions of the FCPA.[312]

Congress also needs to add more explicit clarification to the FCPA's definition of a foreign official.[313] Currently, the FCPA simply states that a foreign official is someone who works for, or works in an official capacity for, a foreign government.[314] The lack of clear boundaries surrounding this term means that the DOJ can essentially unilaterally define when an individual is and is not a foreign official.[315] If more clarification existed about what official capacity meant, corporations would have a better sense of which individuals fall under the FCPA.[316] This would allow them to make smarter decisions, and therefore avoid breaking the law.[317]

Furthermore, Congress should consider amending the various affirmative defenses in the FCPA.[318] Though it is important to offer defenses to criminal

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[306] *See* Williams, *supra* note 94, at 15. The effect of leaving FCPA interpretation to agencies can be dramatic, according to at least one practicing attorney:

> [T]he FCPA does not contain a definition for instrumentality. So why does that matter? Because the [DOJ] believes that every single employee regardless of rank or position of an instrumentality is a foreign official. Under this view, the lowest employee up to the very top employee of that very entity, if it is considered an instrumentality, are foreign officials.

Id.

[307] *See* GREANIAS & WINDSOR, *supra* note 7, at 85.

[308] *See* Cohen et al., *supra* note 249, at 1270.

[309] *See id.*

[310] *See* Lacey & George, *supra* note 103, at 144–46.

[311] *See id.*

[312] *See* RESOURCE GUIDE, *supra* note 17, at 39; GIBSON, DUNN & CRUTCHER LLP, *supra* note 254, at 14.

[313] *See* Cohen et al., *supra* note 249, at 1270.

[314] *See* RESOURCE GUIDE, *supra* note 17, at 20.

[315] *See* Cohen et al., *supra* note 249, at 1270.

[316] *See id.*

[317] *See id.*

[318] See Kyle P. Sheahen, *I'm Not Going to Disneyland: Illusory Affirmative Defenses Under the Foreign Corrupt Practices Act*, 28 WIS. INT'L L.J. 464, 489 (2010).

laws, these defenses are too vague, because they offer little practical guidance to corporations trying to utilize them to comply with the FCPA.[319] The bona fide expenditures defense is particularly difficult to ascertain.[320] The *Resource Guide* draws the conclusion that the fact-specific analysis turns on whether the expense is too personal.[321] But corporations can justify many personal expenses as having a legitimate business purpose.[322] If Disney wished to send officials from China to Disney World in an attempt to convince them to open an amusement park in Beijing, for instance, would this constitute a bona fide expenditure?[323] According to the *Resource Guide*, it is difficult to say.[324]

The *Resource Guide* offers some factors to guide corporations trying to determine the adequacy of a bona fide expenditure defense in advance of prosecution, but the DOJ can still consider the totality of the circumstances and unilaterally decide whether the defense succeeds because a payment is a business expense, or fails because the payment is intended to entice and influence an official.[325] This grey area is difficult to maneuver.[326] It would be much more efficient for the FCPA to eliminate this exception, thus broadening the FCPA's jurisdiction while providing more clarity to the law.[327] This would be consistent with the United Kingdom's Bribery Act, which offers no bona fide expenditure defense at all.[328]

Finally, the Bribery Act should be used as an example of a foreign bribery statute that, though broad, has clearer and more concise terms that provide more clarity than the current terms of the FCPA.[329] Congress should consider matching the Bribery Act, and the consensus of the international community,

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[319] *See id.*

[320] *See* RICHARD L. CASSIN, BRIBERY ABROAD: LESSONS FROM THE FOREIGN CORRUPT PRACTICES ACT 63 (2008). Criticism of the defense is that it is redundant: the FCPA outlaws only "corrupt" payments, therefore, "bona fide expenditures" cannot, by definition, violate the FCPA. *See id*; *see also* 15 U.S.C. §§ 78dd-1 to -3 (2012) ("It shall be unlawful . . . to make use of . . .interstate commerce *corruptly* in furtherance of an offer, payment . . . to . . . foreign official[s].") (emphasis added).

[321] *See* RESOURCE GUIDE, *supra* note 17, at 24.

[322] *See* Sheahen, *supra* note 318, at 478.

[323] *See* RESOURCE GUIDE, *supra* note 17, at 24; Witten, Parker & Holtmeier, *supra* note 175, at 2–3 (detailing issues with the bona fide expenditure exception).

[324] *See* RESOURCE GUIDE, *supra* note 17, at 24; Witten, Parker & Holtmeier, *supra* note 175, at 2–3.

[325] *See* RESOURCE GUIDE, *supra* note 17, at 24; Witten, Parker & Holtmeier, *supra* note 175, at 2–3.

[326] *See* Sheahen, *supra* note 318, at 489.

[327] *See id.*

[328] *See* Bribery Act, 2010, c. 23 § 6.

[329] *See* Elizabeth K. Spahn, *Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption*, 23 IND. INT'L & COMP. L. REV. 1, 21 (2013) (describing the Bribery Act as the strictest law regarding foreign bribery to date).

by eliminating the facilitating payment exception to the FCPA.[330] Once again, the exception hurts corporations more than it helps by making the statute more ambiguous and therefore more difficult to follow.[331] After the *Resource Guide*, however, the need to eliminate this exception might not be as great.[332] The *Resource Guide* does an adequate job of explaining what should and should not constitute a facilitating payment.[333] Even so, amending the FCPA to eliminate the exception should be favored because even with it, U.S. corporations are still subject to liability under foreign laws like the Bribery Act when they make facilitating payments.[334] Therefore, Congress should not shy away from eliminating the facilitating payment defense because corporations would be better served by knowing that *any* payment to a foreign official might be considered a bribe.[335]

Revising the FCPA could also help alleviate criticism that the law is too anti-business.[336] Congress could emulate the Bribery Act, and amend the FCPA to add an adequate procedures defense.[337] Currently, the FCPA incorporates an idea similar to an adequate procedures defense by requiring corporations to maintain internal controls in the accounting provisions.[338] Instead of making this something corporations need to do, however, it might be more logical to provide it as a means for corporations to avoid FCPA liability.[339] This would allow the law to be broader, because corporations could avoid criminal or civil sanctions by demonstrating that they had adequate procedures in place to pre-

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[330] *See* Bribery Act, 2010, c. 23, §§ 6–7 (lacking the bona fide expenditure defense); *see also* 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, 881–82 (2011) (outlining how the OECD has called the United States, and all under signatory nations to the OECD Convention, to outlaw this exception).

[331] *See* OECD WORKING GRP. ON BRIBERY, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED STATES ¶ 76 (2010), *available at* http://www.oecd.org/unitedstates/UnitedStatesphase3reportEN.pdf (noting how business representatives called for more clarity about the scope of the exception).

[332] *See* RESOURCE GUIDE, *supra* note 17, at 25; Tyrrell et al., *supra* note 286, at 1.

[333] *See* RESOURCE GUIDE, *supra* note 17, at 25; Tyrrell et al., *supra* note 286, at 1.

[334] *See* Jordan, *supra* note 330, at 923.

[335] *See id.*

[336] *See* ANDREW WEISSMANN & ALIXANDRA SMITH, U.S. CHAMBER FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 7 (2010), *available at* http://openairblog.files.wordpress.com/2011/10/us-chamber-of-comm-amending-the-fcpa.pdf (listing five potential reforms to the FCPA that could provide the business community with more clarity about the law).

[337] *See* Philip Urofsky et al., *How Should We Measure the Effectiveness of the Foreign Corrupt Practices Act? Don't Break What Isn't Broken—The Fallacies of Reform*, 73 OHIO ST. L.J. 1145, 1172 (2012).

[338] *See* RESOURCE GUIDE, *supra* note 17, at 40.

[339] *See* Jordan, *supra* note 222, at 55–56.

vent foreign bribery from taking place.[340] This defense could help corporations concerned that they are being held responsible for their foreign subsidiaries because it would provide an easy to meet standard for a defense.[341]

Conclusion

Each year, corporations spend billions of dollars in markets outside the United States. Now that the DOJ and the SEC are increasingly enforcing the FCPA, these transactions have the potential to expose U.S. and foreign corporations to massive civil and criminal fines. Congress had valid intentions when it enacted the FCPA in 1977. Nonetheless, the FCPA falls short in solving the problem of foreign bribery. The FCPA does not provide enough clarity to corporations and corporate council. The *Resource Guide's* attempt at clarity does not do enough. Accordingly, the United States should look to its closest ally and adopt some of the provisions of the United Kingdom's Bribery Act.

[340] *See id.* at 56–58.
[341] *See id.*