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CORPORATE VICTIMS OF “VICTIMLESS CRIME”: HOW THE FCPA’S STATUTORY AMBIGUITY, COUPLED WITH STRICT LIABILITY, HURTS BUSINESSES AND DISCOURAGES COMPLIANCE

Abstract: The Foreign Corrupt Practices Act (“FCPA”), a federal law that outlaws corporate bribery of foreign officials, is the key legislation in the fight against global corruption. Unfortunately, despite the long-awaited guidance recently issued by the Department of Justice, the unpredictability and severity of FCPA enforcement, coupled with the lack of an affirmative defense in cases of adequate compliance, continues to take a substantial toll on U.S. businesses and the economy. This Note argues against strict corporate vicarious liability and evaluates the unintended effects of a broad interpretation of the FCPA on international business practices. Suggesting that current enforcement practices might actually reduce compliance, this Note evaluates several proposed solutions and advocates for a hybrid approach that would resolve the ambiguity and make compliance both feasible and economically viable.

Bribing foreign officials is wrong, but not everything governments do to prevent it is wise or proportional.

—The Economist¹

INTRODUCTION

On January 17, 2012, Marubeni Corporation, a Japanese trading company, agreed to pay the U.S. Department of Justice (DOJ) \$54.6 million in criminal penalties for its alleged participation in a conspiracy to bribe Nigerian officials in violation of the U.S. Foreign Corrupt Practices Act (“FCPA”).² Marubeni was also required to retain a corporate

¹ *A Tale of Two Laws: America’s Anti-Corruption Law Deters Foreign Investment. Britain’s Is Smarter*, ECONOMIST, Sept. 17, 2011, at 68, 68 [hereinafter *A Tale of Two Laws*], available at <http://www.economist.com/node/21529103>.

² See Press Release, Dep’t of Justice, Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$54.6 Million Criminal Penalty (Jan. 17, 2012), available at <http://www.justice.gov/opa/pr/2012/January/12-crm-060.html>.

compliance consultant and cooperate with the DOJ's investigations.³ This settlement is just one of numerous cases in which foreign companies must pay multi-million-dollar fines to the U.S. government for violations of the U.S. law, even when the questioned conduct took place in a foreign jurisdiction.⁴

The U.S. government's broad ability to penalize foreign conduct by foreign companies is made possible by the anti-bribery provisions of the FCPA, a federal law that outlaws corporate bribery of foreign officials and imposes strict penalties on violators.⁵ Although the FCPA contains two major provisions, covering both accounting and anti-bribery standards, this Note focuses exclusively on the anti-bribery provisions that apply to corrupt corporate conduct and their criminal enforcement by the DOJ.⁶

Despite being a domestic U.S. criminal law, the FCPA's anti-bribery provisions apply not only to U.S. businesses, but also to any foreign company or individual as long as any part of the bribery takes place within the United States.⁷ Companies charged with making illegal payments in violation of FCPA rules are universally condemned and are viewed as deserving their heavy punishments and multi-million dollar fines.⁸ Although this view is certainly true in many cases and the fight

³ See Daniel P. Levison & Jarod G. Taylor, *The Expansive Reach of the FCPA Extends to Japan Again: A Second Japanese Company Resolves FCPA Charges Related to a Nigerian Bribery Scandal*, MORRISON FOERSTER, 1 (Feb. 2, 2012), <http://www.mofo.com/files/Uploads/images/120130-FCPA-Japan.pdf>.

⁴ See Joe Palazzolo, *Of Top 10 FCPA Settlements, 8 Involve Foreign Companies*, WALL ST. J. CORRUPTION CURRENTS (Nov. 5, 2010, 10:49 AM), <http://blogs.wsj.com/corruption-currents/2010/11/05/of-top-10-fcpa-settlements-8-involve-foreign-companies> (noting that in 2010, the list of the top ten FCPA settlements of all time contained eight foreign businesses).

⁵ See *Lay-Person's Guide, Foreign Corrupt Practices Act, Antibribery Provisions*, U.S. DEP'T JUST. 1-2, 5, <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> (last visited Jan. 26, 2012) [hereinafter *Lay-Person's Guide*].

⁶ See 15 U.S.C. §§ 78m(b), 78dd-1-dd-3 (2006). The anti-bribery provisions are sometimes called the centerpiece of the FCPA. See ANDREW WEISSMANN & ALIXANDRA SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 1 (2010), available at http://www.instituteforlegalreform.com/sites/default/files/restoringbalance_fcpa.pdf. This Note does not discuss civil enforcement of accounting provisions by the Securities and Exchange Commission. See *infra* notes 30-253 and accompanying text.

⁷ See H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed Its Grasp?*, 26 N.C. J. INT'L L. & COM. REG. 239, 288-89 (2001).

⁸ See S. REP. NO. 95-114, at 3-4 (1977), reprinted in 1977 U.S.C.C.A.N. 4098, 4100-01 (noting that corporate bribery is "morally repugnant" and "fundamentally destructive" to the free market, and that it damages both the U.S. economy and the stability of foreign businesses).

against corruption is indeed a matter of utmost importance, this Note argues that instead of being offenders, corporations themselves are frequently victims of corporate bribery and the broad reach of the ambiguous terms of the FCPA.⁹

The ambiguity of the FCPA's terms hurts businesses.¹⁰ It causes multinational corporations to bear the significant risks of FCPA prosecution without sufficient regard to their costly efforts to comply with the anti-bribery provisions.¹¹ In November 2012, the DOJ issued a long-awaited, substantive resource guide to FCPA enforcement.¹² It is too early to tell how much this report, entitled *A Resource Guide to the U.S. Foreign Corrupt Practices Act* ("*Resource Guide*"), will affect corporations' business decisions.¹³ Some observers have noted, however, that although the report is detailed and useful, it is largely a compilation of publicly available information that was previously scattered across a variety of sources.¹⁴ The 120-page *Resource Guide* provides "little new information," and most pages simply describe the FCPA statute, related substantive laws, and earlier decisions and opinions.¹⁵ In addition, the

⁹ See *infra* notes 112–193 and accompanying text.

¹⁰ See Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257, 287 (1999); *infra* notes 163–193 and accompanying text.

¹¹ See James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233, 1235–36 (2007) (noting that current law does not provide adequate guidance to companies building their compliance policies, and offers little direction on what can be considered sufficient to safeguard companies from vicarious responsibility).

¹² See CRIMINAL DIV., U.S. DOJ & ENFORCEMENT DIV., U.S. SEC., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 1 (2012), <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf> [hereinafter RESOURCE GUIDE].

¹³ See *id.*

¹⁴ See, e.g., David Bario, *New Guidance Doesn't Mollify FCPA Critics, but Offers Cheat Sheet for Playing Fair*, AM LAW LITIG. DAILY (Nov. 14, 2012), http://www.americanlawyer.com/digest/TAL.jsp?id=1202578394090&New_Guidance_Doesnt_Mollify_FCPA_Critics_but_Offers_Cheat_Sheet_for_Playing_Fair&slreturn=20121123004159; Joe Palazzolo, *FCPA Guidance Is Here!*, WALL ST. J. L. BLOG (Nov. 14, 2012, 10:08 AM), <http://blogs.wsj.com/law/2012/11/14/fcpa-guidance-is-here> (noting that the report articulates views long held by the prosecutors and known to practitioners); Marc Rosenberg, *DOJ and SEC Issue FCPA Guidance*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Nov. 28, 2012, 9:13 AM), <http://blogs.law.harvard.edu/corpgov/2012/11/28/doj-and-sec-issue-fcpa-guidance> (noting that although the *Resource Guide* constitutes a "comprehensive overview," it does not make any changes to the DOJ's enforcement procedures); Samuel Rubenfeld et al., *The Guidance: The FCPA Bar Reacts*, WALL ST. J. CORRUPTION CURRENTS, (Nov. 14, 2012, 4:32 PM), <http://blogs.wsj.com/corruption-currents/2012/11/14/the-guidance-the-fcpa-bar-reacts> (quoting practitioners who praised the guidance as useful and significant, but noted that it was not "earthshaking" or a "panacea").

¹⁵ See Mike Koehler, *Grading the Foreign Corrupt Practices Act Guidance*, 7 WHITE COLLAR CRIME REP. 961, 963 (2012).

DOJ guidance rejects “formulaic requirements,” and instead calls for a broad, common-sense approach, leaving considerable ambiguity and discretion—and thus unpredictability—in the enforcement process.¹⁶

Corporations remain particularly vulnerable because of the FCPA’s broad jurisdictional reach, which allows for the imposition of vicarious liability on the actions of their joint venture partners, agents, or even third parties acting in far-away locations.¹⁷ Despite this vulnerability, multinational corporations lack a strong and consistent defense to FCPA accusations.¹⁸ Because of the broad terms of the statute, the limited judicial review of FCPA sanctions, and business’s hesitancy to litigate, corporations are left with little real bargaining power and often feel forced to accept prosecutors’ settlement terms, no matter how harsh.¹⁹ Federal prosecutors concede that corporations can be victims of FCPA violations perpetuated by their own executives, who abuse their position of trust and engage in unlawful conduct without authorization.²⁰ Nevertheless, today there is little a corporation can do to avoid prosecution for the unauthorized acts of its employees or the resulting hefty penalties and damaging publicity.²¹ In turn, such helplessness leads to an undesired

¹⁶ See RESOURCE GUIDE, *supra* note 12, at 56; see also Koehler, *supra* note 15, at 967 (arguing that FCPA enforcement remains obscure despite the guidance); Palazzolo, *supra* note 14 (noting that the DOJ report did not provide the “firm policy pronouncements” hoped for by the FCPA’s critics).

¹⁷ See 15 U.S.C. § 78dd-1(a) (3) (2006) (prohibiting companies from offering anything of value to “any person” with knowledge that even part of this payment will be offered to a foreign official); see also Matthew J. Kovacich, *Backyard Business Going Global: The Consequences of Increased Enforcement of the Foreign Corrupt Practices Act (“FCPA”) on Minnesota and Wisconsin*, 32 HAMLIN L. REV. 529, 556 (2009) (commenting that growth in global commerce exposes even smaller companies lacking “legal sophistication” to FCPA scrutiny); Erik Vollebregt, *Extraterritorial Reach of the FCPA: Recommendations for U.S. Medical Device Companies with Activities in Europe*, 65 FOOD & DRUG L.J. 347, 352 (2010) (noting that the globalization of commerce increases the potential for FCPA scrutiny, and citing the health care industry as a sector particularly vulnerable to FCPA review).

¹⁸ See *infra* notes 95–111 and accompanying text.

¹⁹ See WEISSMANN & SMITH, *supra* note 6, at 2–3; see also Cortney C. Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 462 (2010) (commenting on the tremendous power imbalance between corporations and the DOJ).

²⁰ See Brief for the United States at 81, *United States v. Kay (Kay II)*, 513 F.3d 432 (5th Cir. 2007) (No. 05-20604).

²¹ See Doty, *supra* note 11, at 1235–37 (commenting on the government’s growing tendency to enforce the FCPA despite existing internal compliance programs, even in situations in which a rogue employee acted alone or in which there is no evidence of company involvement); see also *infra* notes 105–111 (discussing the DOJ’s November 2012 *Resource Guide* and how its description of effective compliance fails to clarify the extent to which a business’s compliance will influence prosecutorial decisions).

and unexpected result: a significant drop in a corporation's incentive to vigorously monitor its own compliance and conduct.²²

This Note analyzes several proposed solutions that purport to reduce the ambiguity of the FCPA's application and provide guidance to the companies trying to comply with statutory requirements.²³ Highlighting the disadvantages of these solutions and addressing the reasons why the DOJ's *Resource Guide* is insufficient to resolve the problems caused by the statute's ambiguity, this Note proposes a hybrid approach that would provide companies with guidance and incentive to comply both pre- and post-indictment.²⁴ This hybrid approach would combine the features of statutory protection with modifications to the enforcement procedures.²⁵ The proposed solution involves introduction of statutory compliance defense and enhancement of DOJ leniency policy.²⁶

Part I of this Note establishes the relevant statutory background and discusses the regulatory framework of the FCPA.²⁷ Part II argues against strict corporate vicarious liability, discusses the substantial burdens imposed by the statute, and evaluates the unexpected effects of the broad interpretation of the FCPA on international business practices.²⁸ Part III analyzes proposed solutions to resolve the ambiguity and to make compliance feasible and economically viable, advocating for a hybrid approach that would provide corporations with better protection at all stages of the FCPA compliance and investigation process.²⁹

I. THE FCPA'S REGULATORY FRAMEWORK AND ITS EXPANDING APPLICATION

This Part provides an overview of the FCPA's legislative background and reviews key provisions of the statute.³⁰ It also documents the historic trend of expansion of the FCPA's application both through legislative changes and judicial interpretation.³¹

²² See *infra* notes 130–138 and accompanying text.

²³ See *infra* notes 194–238 and accompanying text.

²⁴ See *infra* notes 239–253, 121–130, 221–226, 233–238 and accompanying text.

²⁵ See *infra* notes 194–253 and accompanying text.

²⁶ See *infra* notes 194–253 and accompanying text.

²⁷ See *infra* notes 30–111 and accompanying text.

²⁸ See *infra* notes 112–193 and accompanying text.

²⁹ See *infra* notes 194–253 and accompanying text.

³⁰ See *infra* notes 32–46, 75–103 and accompanying text.

³¹ See *infra* notes 41–43, 61–65 and accompanying text.

A. *The FCPA: Purpose, Legislative History, and Enforcement*

The FCPA outlaws corporate bribery of foreign officials.³² The statute establishes criminal and civil liability for bribery of foreign officials and contains two primary sets of provisions: accounting provisions and anti-bribery provisions.³³ The accounting provisions require a corporation to keep records that accurately and fairly reflect its transactions and to maintain an adequate system of internal accounting controls.³⁴ The anti-bribery provisions, which are the focus of this Note, prohibit corrupt payments to foreign officials made to obtain or retain business.³⁵

Congress enacted the FCPA in 1977 amid controversial allegations (and voluntary admissions) that major U.S. corporations, including Lockheed Aircraft Corporation, Gulf Corporation, and Exxon Corporation, made questionable payments to foreign government officials.³⁶ Further inquiry suggested that foreign bribery was widespread, and in 1977 the Securities and Exchange Commission (SEC) issued a report in which more than 400 U.S. companies, including 177 ranked in the Fortune 500, voluntarily disclosed over \$300 million in payments to overseas government officials.³⁷ These companies included: Gulf Oil Corporation, which admitted to paying a four million dollar bribe in South Korea; Exxon Corporation, which admitted to bribes in fifteen countries; and Lockheed Aircraft, the largest U.S. defense contractor, whose “enormous pattern of bribery” included the Japanese prime minister, a Dutch prince, and the president of Italy, among others.³⁸

Widespread reports that corporate bribery was rampant prompted Congress to unanimously enact the FCPA to stop bribery of foreign officials and “to restore public confidence in the integrity of the American

³² See *Lay-Person's Guide*, *supra* note 5, at 1–2.

³³ See 15 U.S.C. §§ 78m(b), 78dd-1–dd-3 (2006); see also Thomas, *supra* note 19, at 444 (discussing the two prongs of the FCPA provisions).

³⁴ See, *supra* note 5, at 2.

³⁵ See *id.*

³⁶ See Declaration of Professor Michael J. Koehler in Support of Defendants' Motion to Dismiss Counts One Through Ten of the Indictment at 5, *United States v. Carson*, No. SACR 09-00077 JVS (C.D. Cal. May 18, 2011) [hereinafter Koehler Declaration].

³⁷ See Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 AM. J. COMP. L. SUPP. 593, 595 (2002); Aaron Einhorn, Note, *The Evolution and Endpoint of Responsibility: The FCPA, SOX, Socialist-Oriented Governments, Gratuitous Promises, and a Novel CSR Code*, 35 DENV. J. INT'L L. & POL'Y 509, 513 (2007). The alleged abuses ranged from direct bribes paid to foreign officials to “facilitating payments” made to expedite everyday bureaucratic duties. See Mike Koehler, *The Unique FCPA Compliance Challenges of Doing Business in China*, 25 WIS. INT'L L.J. 397, 400 n.9 (2007).

³⁸ See Schroth, *supra* note 37, at 595.

business system.”³⁹ Although not illegal at the time under U.S. law, these corporate bribes to foreign governments were considered a serious foreign policy problem, tarnishing the image of U.S. democracy and threatening the praised free market system.⁴⁰ Congress considered cessation of foreign corporate bribery as not only a business regulation, but also an important matter of national policy.⁴¹ During the statute’s drafting, the Senate reportedly focused on the effects of corporate bribery on foreign relationships, stressing the importance of the stability of overseas businesses.⁴² Amendments in 1988 and 1998 expanded the scope of the statute, suggesting that the FCPA’s expansive reach is intentional and supporting a broad interpretation of the FCPA’s provisions.⁴³

Two government agencies are responsible for enforcement of the FCPA: the DOJ, as the chief enforcement agency, and the SEC.⁴⁴ The SEC has authority only for civil enforcement, and may only regulate those corporations—whether domestic or foreign—that issue securities registered in the United States or are otherwise required to file periodic reports with the SEC.⁴⁵ The DOJ is in charge of all criminal enforcement of the FCPA as well as civil enforcement of the anti-bribery provisions against non-issuers.⁴⁶

³⁹ See *United States v. Kay (Kay I)*, 359 F.3d 738, 755 (5th Cir. 2004); S. REP. NO. 95-114, at 3–4 (1977), reprinted in 1977 U.S.C.C.A.N. 4098, 4101; Koehler Declaration, *supra* note 36, at 11; John P. Giraud, *Charitable Contributions and the FCPA: Schering-Plough and the Increasing Scope of SEC Enforcement*, 61 BUS. LAW. 135, 137 (2005); *Lay-Person’s Guide*, *supra* note 5, at 1–2.

⁴⁰ See S. REP. NO. 95-114, at 3–4.

⁴¹ See *id.* at 10.

⁴² See *id.* at 3–4. As a result, the statute provides for liability for *indirect* acts of bribery, such as those perpetrated by agents or third parties. H.R. REP. NO. 95-831, at 14 (1977) (Conf. Rep.), reprinted in 1977 U.S.C.C.A.N. 4121, 4126 (stating that “the conferees intend to make clear that any issuer or domestic concern which engages in bribery of foreign officials indirectly through any other person or entity would itself be liable under the bill”).

⁴³ See, e.g., S. REP. NO. 105-277, at 2–3 (1998), 1998 WL 438894; Mike Koehler, *The Facade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907, 913 (2010). The 1988 amendment added some limited exceptions and narrow affirmative defenses to the FCPA, and substantially expanded the statute’s scope and jurisdiction. See Brown, *supra* note 7, at 240; Thomas, *supra* note 19, at 446–47.

⁴⁴ See *Lay-Person’s Guide*, *supra* note 5, at 1.

⁴⁵ See *id.*; see also Koehler, *supra* note 43, at 924 (highlighting the limits of the SEC’s enforcement authority).

⁴⁶ See Koehler, *supra* note 43, at 924; *Lay-Person’s Guide*, *supra* note 5, at 2.

B. *Who Is Implicated: Broad Reach of the FCPA Anti-Bribery Provisions*

1. Domestic and Extraterritorial Jurisdiction

The anti-bribery provisions of the FCPA make it a crime to bribe foreign government officials to obtain or retain business.⁴⁷ Although it is a domestic criminal law, the FCPA has vast extraterritorial application and concerns events that involve foreign nationals in foreign countries who frequently have only attenuated relationships to the United States.⁴⁸ The jurisdiction of the anti-bribery provisions is remarkably expansive and encompasses both corporate entities and individuals.⁴⁹

The FCPA applies to “issuers,” “domestic concerns,” and any “other person” who, while within U.S. territory, performs an act in *furtherance* of prohibited payment.⁵⁰ Physical presence of the bribing party on U.S. territory is not required.⁵¹ Thus, the bribe itself does not have to take place within U.S. territory as long as some action leading to the eventual payment of the bribe occurred in the United States.⁵² This provision extends the FCPA’s reach to any foreign conduct when as little as a phone call or email can be traced back to U.S. territory, making virtually any corporation a potential target of the FCPA.⁵³

⁴⁷ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3 (2006). Payments made to a person who is not a foreign official are also illegal when such payments are made with knowledge that a portion of those payments will be offered, directly or indirectly, to a foreign official. *See id.* § 78dd-1(a)(3).

⁴⁸ *See* DONALD ZARIN, *DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT* 1–2 (1995).

⁴⁹ *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

⁵⁰ *See id.*; *see also* Koehler, *supra* note 43, at 913–14 (citing and analyzing the language of the FCPA’s anti-bribery provisions); *Lay Person’s Guide*, *supra* note 5, at 3 (defining the terms “issuer” and “domestic concern”). The definition of “issuers” includes foreign and domestic corporations that issue securities registered in the United States or that are otherwise required to file periodic reports with the SEC. *See Lay-Person’s Guide*, *supra* note 5, at 3. “Domestic concern” includes U.S. citizens, nationals, and residents, as well as any incorporated or unincorporated business entities that have their principal place of business in the United States or are organized under U.S. law. *See* 15 U.S.C. § 78dd-2(h)(1). Provisions referring to any “other person” apply to any foreign national and any business, including sole proprietorships, organized under foreign law, as long as the act was committed in furtherance of prohibited conduct that occurred in U.S. territory. *See id.* § 78dd-3(f)(1).

⁵¹ *See* Marie M. Dalton, Note, *Efficiency v. Morality: The Codification of Cultural Norms in the Foreign Corrupt Practices Act*, 2 N.Y.U. J.L. & BUS. 583, 602 (2006).

⁵² *See* Schroth, *supra* note 37, at 603.

⁵³ *See Lay Person’s Guide*, *supra* note 5, at 3; *see also* Christopher J. Duncan, *The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism?*, 1 ASIAN-PAC. L. & POL’Y J. 16, 38 (2000) (noting that a payment by an Indonesian businessman to an Indonesian government official would fall under FCPA jurisdiction if the payment was authorized using a U.S. cell phone provider).

The vast jurisdictional reach of the FCPA is based on both nationality and territoriality principles.⁵⁴ The nationality principle is based exclusively on the nationality of the company or person paying the bribe and thus provides the DOJ with jurisdiction over illicit payments made by any U.S. company or citizen.⁵⁵ Under this principle, the DOJ will have jurisdiction even if the corrupt payment was made outside the United States and without any use of an “instrumentality of interstate commerce.”⁵⁶ Under the territoriality principle, the DOJ has jurisdiction over any illicit action taken within the territory of the United States using any means or “instrumentalities of interstate commerce.”⁵⁷ A telephone call, a fax transmission, or a wire transfer using a U.S. bank account all lay a sufficient basis to create territorial jurisdiction.⁵⁸ Under this type of jurisdiction, the FCPA can reach any foreign national or company that performs any act in furtherance of a prohibited payment within the United States.⁵⁹ A foreign company can be charged with an FCPA violation based merely on the fact that a U.S. bank account was

⁵⁴ See Brown, *supra* note 7, at 278–79.

⁵⁵ See *id.*; see also *Lay-Person’s Guide*, *supra* note 5, at 3 (providing further information on liability imposed based on the nationality principle).

⁵⁶ See 15 U.S.C. § 78 dd-1(g) (extending the FCPA’s alternative jurisdiction to any U.S. national for any corrupt act that takes place outside the United States irrespective of whether any means or instrumentalities of interstate commerce were used); see also Thomas R. Snider & Won Kidane, *Combating Corruption Through International Law in Africa: A Comparative Analysis*, 40 CORNELL INT’L L.J. 691, 702 (2007) (noting that the FCPA provisions can reach acts that take place entirely in foreign jurisdictions even when no instrumentality of interstate commerce is employed). For example, under the nationality principle of jurisdiction, a U.S. company may be held liable for a corrupt payment authorized by its non-U.S. employees or agents operating entirely outside the United States, using money from foreign bank accounts, and without any involvement by personnel located within the United States. See *Lay-Person’s Guide*, *supra* note 5, at 3; see also S. REP. NO. 105-277, at 2–3 (1998), 1998 WL 438894 (proposing an amendment to the statute to include nationality jurisdiction, and noting that the FCPA now extends to the acts of U.S. businesses and citizens made in *furtherance* of bribes even when the bribes take place entirely outside of the United States). The Senate report accompanying the 1998 amendment further noted that the exercise of nationality jurisdiction over unlawful conduct is “consistent with U.S. legal and constitutional principles.” S. REP. NO. 105-277, at 2–3.

⁵⁷ *Lay-Person’s Guide*, *supra* note 5, at 3; see also Brown, *supra* note 7, at 278–79 (noting that territorial jurisdiction is one of the most common bases for extraterritorial jurisdiction, and citing the Organization of Economic Cooperation and Development (“OECD”) convention that territorial jurisdiction can be so broadly interpreted that no substantial physical link to the corrupt act is needed).

⁵⁸ See *Lay-Person’s Guide*, *supra* note 5, at 3.

⁵⁹ See *id.*

used to transfer payment between a foreign executive and a foreign government official.⁶⁰

The most recent amendment to the FCPA in 1998 solidified the statute's broad reach and significantly expanded its scope and jurisdiction.⁶¹ This amendment extended application of the FCPA to foreign companies and nationals that violate FCPA provisions while within the United States.⁶² The amended statute now applies to foreigners who may not have been physically present in the United States as long as there is a nexus between the activity in the United States and the furtherance of the prohibited payments.⁶³ The 1998 amendment also greatly extended the application of nationality-based jurisdiction to acts committed by U.S. nationals outside the United States, and removed the earlier requirements that mail or interstate commerce had to be utilized by the offender.⁶⁴ This amendment also extended the substan-

⁶⁰ See Paul R. Berger et al., *Is That a Bribe?*, 26 INT'L FIN. L. REV. 76, 76 (2007). In one case, for example, a French citizen who did not reside in the United States was charged with an FCPA violation for authorizing bribes to Costa Rican officials on behalf of his French employer, Alcatel, from his Paris office. *Id.* The jurisdictional basis for the FCPA indictment was the use of New York and Florida bank accounts. *Id.* To fall under the territorial jurisdiction of the FCPA, it is sufficient for a company (or its agent) to merely contact the United States with a phone call or e-mail made in furtherance of corrupt payment. See Zack Harmon, *Confronting the New Challenges of FCPA Compliance: Recent Trends in FCPA Enforcement and Practical Guidance for Meeting These Challenges*, in FOREIGN CORRUPT PRACTICES ACT COMPLIANCE ISSUES 51 (2010).

⁶¹ See Brown, *supra* note 7, at 240. The ongoing expansion of the FCPA's application is even clearer when it is viewed in the context of the global fight against corruption. See Sesto E. Vecchi & Kevin C. Chua, *The War Against Corruption Goes International*, J. INT'L TAX., Mar. 2001, at 8, 46; see also S. REP. NO. 105-277, at 2-3 (discussing the expansion of the FCPA's coverage and noting that such expansion is "essential" to the protection of the United States' foreign interests). The 1998 amendment, for example, was implemented to incorporate the very broad provisions of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions that were passed by the OECD and ratified by the United States. See *Kay I*, 359 F.3d at 753-54.

⁶² *Lay-Person's Guide*, *supra* note 5, at 3; see also Brown, *supra* note 7, at 291-92 (noting that during the original enactment of the FCPA in 1977 and the earlier amendments in 1988, Congress abstained from extending jurisdiction over non-U.S. individuals and entities).

⁶³ See Brown, *supra* note 7, at 303, 317. The jurisdictional reach of the amended FCPA extends virtually to any contact with the United States as long as it can be interpreted to further the FCPA violation. See *id.* The sufficient conduct might be a mere telephone call to the United States, a letter mailed to the United States, the use of air or road travel, or the clearing of a check or wire transfer of funds through a financial institution in the United States. See *id.*

⁶⁴ See Brown, *supra* note 7, at 288-89 (noting that under the 1998 amendment, a "nexus" with the United States is no longer required); *Lay-Person's Guide*, *supra* note 5, at 3; see also Einhorn, *supra* note 37, at 518-19 (discussing the 1998 amendment and noting that it expanded the jurisdiction and substance of the FCPA provisions).

tive reach of the FCPA by broadening the definitions for some of the statutory terms.⁶⁵

2. Strict Liability and the FCPA's Anti-Bribery Provisions

The FCPA is both a criminal and civil statute, and when applied in criminal proceedings by the DOJ, it requires adequate proof of intent.⁶⁶ Additionally, the conduct must be willful and corrupt.⁶⁷ Furthermore, when applied to actions of third parties, such as agents, consultants, or distributors, an additional knowledge element must be met before vicarious liability can be imposed on the parent company.⁶⁸

The safeguard afforded by the extra knowledge requirement, however, has been broadly interpreted.⁶⁹ A company is presumed to be responsible for the actions of its employees, regardless of their rank, as well as its third-party agents, regardless of whether such agents act on their own or under the company's authorization.⁷⁰ Establishing that a defendant perceived a *high probability* that a violation would occur is sufficient to fulfill the knowledge requirement; there is no requirement of

⁶⁵ See Einhorn, *supra* note 37, at 518–19. The 1998 amendment broadened the definition of “foreign official” to include employees of international organizations. See 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A) (2006); see also Brown, *supra* note 7, at 288 (discussing the expansion of the term “foreign official”). It also widened the scope of the FCPA by adding “improper advantage” to the initial list of “abuses of discretion” prohibited by the statute. See *Kay I*, 359 F.3d at 754. As a result, the statute now proscribes not only bribes to foreign officials aimed at buying any “act or decision,” but also payments that secure elusive improper advantages that would assist in obtaining or retaining business. See *id.* Courts broadly interpreted the term “improper advantage” to include payments made to the foreign officials to reduce business taxes or custom fees. See *id.*

⁶⁶ See *Kay I*, 359 F.3d at 960.

⁶⁷ See *Kay II*, 513 F.3d at 439–40; see also *United States v. Kozeny*, 664 F. Supp. 2d 369, 395 (S.D.N.Y. 2009) (suggesting, however, that if the payments were extorted, the defendant might show that he lacked the required corrupt intent). The legislative history of the FCPA indicates that “true extortion” is not covered by FCPA provisions and suggests that Congress distinguished between payments demanded by foreign officials as a price for gaining entry into the market and those made to “keep an oil rig from being dynamited.” See S. REP. NO. 95-114, at 11 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4108.

⁶⁸ See 15 U.S.C. §§ 78dd-1(a)(3), 78dd(f)(2)(B) (requiring knowledge of the existence of particular circumstances and stating that knowledge is established when a person is “aware of a high probability” of such circumstances).

⁶⁹ See *Kozeny*, 664 F. Supp. 2d at 385–86 (stating that a violation exists when “the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact”).

⁷⁰ See N.Y.C. BAR ASS'N, COMM. ON INT'L BUS. TRANSACTIONS, THE FCPA AND ITS IMPACT ON INTERNATIONAL BUSINESS TRANSACTIONS—SHOULD ANYTHING BE DONE TO MINIMIZE THE CONSEQUENCES OF THE U.S.'S UNIQUE POSITION ON COMBATING OFFSHORE CORRUPTION? 4 (2011) [hereinafter IBTC REPORT].

specific knowledge of an FCPA violation.⁷¹ In addition, willful ignorance is not a defense and is sufficient to satisfy the FCPA knowledge requirement.⁷² For example, in 2009, in *United States v. Kozeny*, the U.S. District Court for the Southern District of New York found the knowledge requirement met, and therefore an FCPA violation, where the defendant was aware of a high probability that the payments made to Azeri officials to encourage privatization of a state-owned oil company were illegal yet deliberately avoided confirming this fact.⁷³ Revealingly, during sentencing, Judge Shira A. Scheindlin acknowledged the uncertainty caused by the statute's vague knowledge requirement, noting that after presiding over this case for years, she was still not entirely sure whether one of the defendants was "a victim or a crook or a little bit of both."⁷⁴

C. *What Conduct Is Implicated: Remaining Ambiguity and Uncertainty of the FCPA's Scope*

Academics and practitioners alike continuously voice concerns that the FCPA's definitions are overly-broad and vague.⁷⁵ Many critics

⁷¹ See 15 U.S.C. § 78dd-2(h)(3); *Kay II*, 513 F.3d at 449–50. Specifically, the statute references the "conscious avoidance doctrine" in describing the knowledge requirement, noting that "when knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist." See 15 U.S.C. § 78dd-1(f)(2)(B).

⁷² 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, 378 (2011); see also *Kozeny*, 664 F. Supp. 2d at 385–86 (discussing the conscious avoidance doctrine).

⁷³ See 664 F. Supp. 2d at 386–87. The charges against one of the defendants, Bourke, made no reference to *actual* payment of bribes; instead, the defendant was charged with conspiracy to violate the FCPA by investing in a consortium that made illegal payments. See Richard Craig Smith et al., *High Profile Conviction Likely to Further Bolster FCPA Enforcement*, FULBRIGHT & JAWORSKI L.L.P. (July 13, 2009), http://www.fulbright.com/index.cfm?FUSEACTION=publications.detail&NEWPAGE=0&PUB_ID=4011&SITE_ID=494&pf=y. The *Kozeny* court considered evidence that the defendant knew corruption was rampant in the country of investment and that his co-defendant was involved in some prior misconduct abroad as ample proof of the defendant's knowledge of corrupt payments. See *Kozeny*, 664 F. Supp. 2d at 386.

⁷⁴ David Glovin, *Bourke Gets One Year in Prison in Azerbaijan Bribery Case*, BLOOMBERG (Nov. 11, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a76j6PK3anAc>.

⁷⁵ See, e.g., *Kay I*, 359 F.3d at 753–54; Doty, *supra* note 11, at 1239 (noting that "vagueness and ambiguity are the DNA of the FCPA"); Jennifer Dawn Taylor, Note, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 LA. L. REV. 861, 871, 881 (2001) (arguing that the statute is weakened by the "critical" ambiguity of some of its provisions); see also Arthur Lenhoff, *The Constructive Trust as a Remedy for Corruption in Public Office*, 54 COLUM. L. REV. 214, 214 (1954) (noting that although laws protect against particular offenses, they are inadequate to deal with corruption, a "monster with not only

claim that the FCPA is “laden with subjective judgment” and has ambiguity coded into its very DNA.⁷⁶ The current version of the FCPA’s anti-bribery provisions has seven broad elements.⁷⁷ These broad terms and the dearth of judicial interpretation create substantial uncertainty as to what constitutes a bribe under the FCPA.⁷⁸ Not surprisingly, nearly every corporate enforcement action under the FCPA in the last twenty

as many heads as Hydra, but as many shapes as Proteus; the legislature no sooner isolates and prohibits one form of official pocket-lining than another is devised”). In 2004, in *United States v. Kay (Kay I)*, the U.S. Court of Appeals for the Fifth Circuit noted that the ordinary meaning of the statutory language is “genuinely debatable and thus ambiguous.” 359 F.3d at 744.

⁷⁶ Doty, *supra* note 11, at 1239; *see also* Laura E. Longobardi, *Reviewing the Situation: What Is to Be Done with the Foreign Corrupt Practices Act?*, 20 VAND. J. TRANSNAT’L L. 431, 438 (1987) (commenting on the “inherent ambiguity” of the FCPA); Charles B. Weinograd, Note, *Clarifying Grease: Mitigating the Threat of Overdeterrence by Defining the Scope of the Routine Governmental Action Exception*, 50 VA. J. INT’L L. 509, 514–15 (2010) (remarking that FCPA provisions are “riddled with vagueness”).

⁷⁷ *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2006). The FCPA’s anti-bribery provisions make it a crime to:

- (1) willfully; (2) make use of the mails or any means or instrumentality of interstate commerce; (3) corruptly; (4) in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to; (5) any foreign official; (6) for purposes of [either] influencing any act or decision of such foreign official in his official capacity [or] inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official [or] securing any improper advantage; (7) in order to assist such [corporation] in obtaining or retaining business for or with, or directing business to, any person.

Kay II, 513 F.3d at 439–40 (citing 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a)).

⁷⁸ *See* Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 413 (2010) (commenting on the lack of official, useful guidance); Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 497 (2011) (commenting on the lack of judicial, administrative, and legislative guidance); Bonneau, *supra* note 72, at 378–79.

The scarcity of case law flows from the very nature of the statute, which until recently primarily targeted corporations. *See* Timothy P. O’Toole & Andrew Wise, *You Mean You’re Really Going to Try an FCPA Case? A Checklist of Defenses for Practitioners Handling Foreign Corrupt Practices Act Cases*, CHAMPION, Sept. 2001, at 26, 26; *see also* Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 434 (2009) (noting that between 1978 and 2000, there was an average of three prosecutions a year, and most cases that ended up in trial were resolved with little, if any, penalty); Jeffrey S. Johnston et al., *Executives and Directors in the Crosshairs: FCPA Investigations Target Individuals*, ETHISPHERE (Jan. 24, 2012), <http://anticorruption.ethisphere.com/executives-and-directors-in-the-crosshairs-fcpa-investigations-target-individuals> (noting that the DOJ historically focused on companies as FCPA violators, but has recently started enforcement against individuals, likely because corporate fines fail to punish those who are actually responsible for the violations).

years has been resolved before trial.⁷⁹ As such, some critics have suggested that in practice, the FCPA's provisions frequently mean simply what enforcement agencies want them to mean.⁸⁰

The long-awaited *Resource Guide* issued by the DOJ in November 2012 fails to clarify the FCPA's ambiguous terms.⁸¹ Although some have praised the guidance as a comprehensive and useful tool for practitioners, critics have noted that the report mostly compiles previously available information and does not add clarity to the statute's broadly defined terms.⁸² In addition, one commentator has claimed that some of

⁷⁹ See Koehler, *supra* note 43, at 932. Most FCPA enforcement actions are resolved through settlements and non-prosecution or deferred-prosecution agreements. See *id.* at 909. In addition, a number of actions have been resolved through private negotiations even before the alleged violators have been indicted. See *id.* at 910.

⁸⁰ See *A Tale of Two Laws*, *supra* note 1, at 68 (noting that, given the lack of guidance and judicial oversight, the FCPA provisions mean whatever the "aggressive prosecutor says [they do]"); see also Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. Tol. L. Rev. 99, 108 (2011) (arguing that the DOJ continued to push the limit with its enforcement theories in the absence of meaningful judicial oversight and operating against willing and cooperating defendants); Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. Rev. 781, 825 (2011) (contending that the DOJ, emboldened by companies' desire to settle, has tended to advance ambiguous and overly broad interpretations of the FCPA that "rarely, if ever, receive judicial scrutiny").

⁸¹ See Koehler, *supra* note 15, at 963, 967 (arguing that the DOJ's FCPA enforcement policies remain obscure despite the *Resource Guide* and noting that the DOJ's interpretation of key statutory terms is misleading); Edward J. Fuhr, *FCPA "Resource Guide" Released by SEC and DOJ Consistent with Previous Guidance*, HUNTON & WILLIAMS, 1 (2012), http://www.hunton.com/files/News/e31606a8-44f6-48fe-9658-97e2e3dfa2b2/Presentation/NewsAttachment/db0355ca-a117-4461-b6a5-9b414ef5a52f/FCPA_Resource_Guide_Released.pdf; Dwight Holton, *DOJ and the SEC to U.S. Business: We Expect Action on Effective Compliance Programs*, LANE POWELL D&O DISCOURSE (Nov. 16, 2012), <http://www.dandodiscourse.com/2012/11/16/doj-and-the-sec-to-u-s-business-we-expect-action-on-effective-compliance-programs> (noting the remaining ambiguity); Palazzolo, *supra* note 14 (lamenting that the *Resource Guide* does not provide "firm policy pronouncements").

⁸² See Koehler, *supra* note 15, at 963–66; Rosenberg, *supra* note 14. Indeed, the *Resource Guide* itself notes that most of the terms are broadly interpreted and that although it provides some extreme examples of what constitutes a bribe and what does not, it fails to alleviate the uncertainty for conduct in the middle of the spectrum. See RESOURCE GUIDE, *supra* note 12, at 14–23; see also Lindsey Lawyer 'Underwhelmed' by New Guidance, FCPA BLOG, <http://www.fcpa.blog.com/blog/2012/11/14/lindsey-lawyer-underwhelmed-by-new-guidance.html> (Nov. 14, 2012, 1:53 PM) (quoting Jan Handzlik, a white collar defense attorney, who argued that the new report simply restates publicly available information while providing "little guidance" or clarity); James McGrath, *Little Things Mean a Lot: The FCPA Guide on Internal Investigations*, INTERNAL INVESTIGATIONS BLOG (Dec. 12, 2012), <http://www.mcgrathgrace.com/internal-investigations-blog/little-things-mean-a-lot-the-fcpa-guide-on-internal-investigations.html> (noting that the *Resource Guide* contained nothing "unanticipated or otherwise new"); Roger M. Witten et al., *DOJ and the SEC Issue Much-Anticipated FCPA Guidance*, WILMERHALE, 1, 9 (Nov. 19, 2012), <http://www.wilmerhale.com/files/upload/DOJ%20and%20the%20SEC%20Issue%20Much-Anticipated%20FCPA%20Guidance.pdf> (noting that the guidance fails to resolve ambiguity in "some of the more controversial aspects" of the enforcement process).

the *Resource Guide's* explanations are incomplete, and at times plainly false, reflecting the prosecutors' beliefs instead of current case law.⁸³

For example, the term "anything of value" is not defined in the FCPA, and historically DOJ interpretations have included everything from cash-stuffed briefcases to charitable donations and executive training programs at U.S. universities.⁸⁴ The November 2012 *Resource Guide* confirms that the term should be broadly interpreted, and although it dedicates several examples to charitable contributions, it stops before suggesting specific factors to be considered in making the decision.⁸⁵ There is no de minimis value associated with the "anything of value" element, and prosecutors frequently take into consideration a recipient's *perception* of value.⁸⁶ By using subjective valuation of the conveyed benefit, they waded into the highly unpredictable minefield of cultural differences, and the newly issued DOJ guidance provides no substantive new information to navigate the term's ambiguity.⁸⁷

Similarly, many commentators stress the vagueness of the key term "foreign official."⁸⁸ The FCPA defines "foreign official" as any officer or

⁸³ See Koehler, *supra* note 15, at 964–65 (arguing that the guidance contains "demonstratively false" statements that have been previously rejected by courts). Professor Mike Koehler has identified several examples of what he considers "disturbing" and incomplete interpretations, involving the DOJ's explanations of terms like "foreign official" and "obtain or retain business." See *id.* at 964–66.

⁸⁴ See Koehler, *supra* note 43, at 914–15; see also Dalton, *supra* note 51, at 597–98 (noting that courts have interpreted the term "anything of value" under the FCPA and other federal statutes to include witness testimony, promises of future employment, and the hosting of golf gatherings). In 2004, for example, SEC prosecutors argued that donations made by Schering-Plough Corporation to a Polish charitable organization constituted a prohibited "thing of value" because the charity's director enjoyed the increased success of his charity, even though he never received any direct monetary payments. See Kovacich, *supra* note 17, at 539. The SEC and Schering-Plough settled the action without litigation. *Id.* at 539 n.64; see also Koehler, *supra* note 43, at 915 (noting that although the dispute between the SEC and Schering-Plough was ultimately resolved on the basis of the FCPA's accounting provisions, the lack of judicial scrutiny led this action to be "commonly viewed as broadening the 'anything of value' element of an FCPA anti-bribery violation" as well).

⁸⁵ See RESOURCE GUIDE, *supra* note 12, at 14–16.

⁸⁶ See H. Lowell Brown, *The Foreign Corrupt Practices Act Redux: The Anti-Bribery Provisions of the Foreign Corrupt Practices Act*, 12 INT'L TAX & BUS. LAW. 260, 275 (1994) (commenting that the FCPA may concern any intangible item, the value of which is determined solely by the perception of the recipient, and concluding that the item itself is not as important as the "corrupt intent with which the benefit is conferred").

⁸⁷ See Brown, *supra* note 86, at 275; Bonneau, *supra* note 72, at 378; T. Markus Funk et al., *New FCPA Guidance: No Sea Change but a Helpful Enforcement Summary*, FCPA BLOG, (Nov. 19, 2012, 5:40 AM), <http://www.fcpablog.com/blog/2012/11/19/new-fcpa-guidance-no-sea-change-but-a-helpful-enforcement-su.html>.

⁸⁸ See Koehler, *supra* note 43, at 916; see also ZARIN, *supra* note 48, at 4–17 (arguing that the term "foreign official" remains unclear); Bonneau, *supra* note 72, at 398 (noting the widespread criticism that the definition of "foreign official" is "unduly vague").

employee of a foreign government or its instrumentality.⁸⁹ As a result of the statute's broad terms, there is an ongoing debate concerning whether a state-owned enterprise can be considered as such an instrumentality.⁹⁰ The first judicial interpretations of the term surfaced in 2011 and suggested that the definition can include employees of foreign state-owned enterprises, regardless of their rank.⁹¹ The November 2012 *Resource Guide* restates from earlier court decisions the non-exclusive list of eleven common law factors that companies should consider in determining whether they are dealing with a foreign official, but provides no hypothetical examples or detailed guidance.⁹² Although the *Resource Guide* suggests that generally an entity will not be considered a foreign government instrumentality unless a foreign government owns or controls a majority of its shares, it warns that in undefined cases, an ownership stake of under fifty percent can trigger the "foreign official" definition.⁹³ Thus, a question remains about the level of governmental ownership required to consider a business a state-owned enterprise.⁹⁴

⁸⁹ 15 U.S.C. § 78dd-1(f)(1)(A) (2006).

⁹⁰ See Koehler, *supra* note 80, at 117 (arguing that inclusion of employees of state-owned entities under the definition of "foreign official" is contrary to Congress's intent); see also ZARIN, *supra* note 48, at 4–17 (noting the uncertain status of state-owned enterprises and the problems raised by the application of the statute to "quasi-governmental" bodies or state-owned enterprises undergoing privatization); Joel M. Cohen et al., *Under the FCPA, Who Is a Foreign Official Anyway?*, 63 Bus. Law. 1243, 1249–50 (2008) (commenting on the lack of guidance from the DOJ on what constitutes "instrumentalities" of foreign governments).

⁹¹ See Carson, 2011 WL 5101701, at *3–4, *10 (noting that the FCPA does not define "instrumentality" but acknowledging that state-owned enterprises could theoretically be considered instrumentalities of foreign government by referring to the inquiry as a question of fact); see also *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1110 (C.D. Cal. 2011) (holding that a state-owned enterprise may be an "instrumentality" of a foreign government for FCPA purposes).

⁹² See RESOURCE GUIDE, *supra* note 12, at 19–21; Koehler, *supra* note 15, at 965–66.

⁹³ See RESOURCE GUIDE, *supra* note 12, at 21.

⁹⁴ See *Foreign Corrupt Practices Act, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 20 (2011) [hereinafter *FCPA Hearing*] (testimony of Hon. Michael Mukasey, Former Att'y Gen. of the United States, Partner, Debevoise & Plimpton); see also *Aguilar*, 783 F. Supp. 2d at 1115 (suggesting a list of non-exclusive factors for determining whether an enterprise qualifies as an instrumentality under the statute, including whether key officers and directors are appointed by—or are themselves—government officials, and whether the entity is widely perceived to be performing governmental functions).

D. Statutory Exemptions and Affirmative Defenses

According to the 1988 amendment to the FCPA, certain payments are exempt from the FCPA's reach; this statutory exemption, however, is very limited in scope.⁹⁵ As a result of the amendment, the FCPA does not apply to "grease payments"—facilitating payments to a foreign official made to expedite routine governmental action.⁹⁶

The 1988 amendment also added two affirmative defenses for defendants in FCPA enforcement actions.⁹⁷ These defenses, however, are also narrowly tailored to apply in a limited and well-defined set of circumstances and impose few restrictions on the FCPA's expansive reach.⁹⁸ The first available defense provides that the statute does not apply if the payment was legal under the written laws of the foreign country.⁹⁹ This is a narrow defense that applies only to actions expressly authorized under foreign law; failure of the foreign government to enforce local anti-bribery laws, however, does not constitute a defense.¹⁰⁰ In addition, the FCPA does not apply to a "reasonable and bona fide expenditure" directly related to the promotion, demonstration, or explanation of products or services, or to the execution or performance of a contract with a foreign government or its agency.¹⁰¹ This defense is also narrowly construed and is usually limited to expenditures such as travel or lodging expenses.¹⁰²

⁹⁵ See *Lay-Person's Guide*, *supra* note 5, at 4.

⁹⁶ See 15 U.S.C. § 78dd-1(b); Thomas, *supra* note 19, at 446 (discussing the "grease payments" exception under the 1988 amendment). Examples of acceptable routine governmental actions include issuing permits or licenses, processing visas and other governmental papers, providing police protection, and scheduling inspections associated with contract performance. See *Lay-Person's Guide*, *supra* note 5, at 4.

⁹⁷ See Thomas, *supra* note 19, at 446–47. Unlike the statutory exemption for "grease payments," which provides that the FCPA should not apply at all and thus no enforcement action can be initiated, the affirmative defenses provide some limited protection once an FCPA investigation has started and it is determined that the FCPA's provisions apply. See *id.*; *supra* notes 95–96 and accompanying text.

⁹⁸ See, e.g., *Kay I*, 359 F.3d at 756 (holding that Congress intentionally defined the FCPA's affirmative defenses narrowly against the scope of the statute's broad reach); 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, 465–66 (2010) (commenting on the narrow scope of the affirmative defenses and arguing that the defenses are "virtually useless" in practice).

⁹⁹ See 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1).

¹⁰⁰ See David A. Gantz, *Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus*, 18 NW. J. INT'L L. & BUS. 457, 461 (1998).

¹⁰¹ See 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

¹⁰² See *id.* § 78dd-2(c)(2); see also Sheahen, *supra* note 98, at 465–66 (noting the narrow scope of the FCPA defenses and arguing that the reasonable expenditure defense is illusory at best).

Notably, the current statute does not allow for a compliance defense, and accordingly, having an internal anti-bribery policy is insufficient to safeguard a company from vicarious liability for the conduct of its employees.¹⁰³ The DOJ's internal procedures do, however, require it to consider the existence and effectiveness of a corporation's pre-existing compliance program before taking an enforcement action.¹⁰⁴ The November 2012 guidance contains a comprehensive description of an effective compliance program, and stresses the important role effective corporate compliance plays in the DOJ's prosecutorial decisions.¹⁰⁵ The guidance lists many factors considered by the DOJ, but nevertheless warns that there are no "formulaic requirements" and that prosecutors will take a common sense approach in evaluating compliance programs.¹⁰⁶ The lack of such requirements creates uncertainty for companies that seek to build compliance programs in good faith.¹⁰⁷ In addition, a company's reliance on the most comprehensive compliance program is uncertain even after the issuance of the *Resource Guide*, since this guidance is nonbinding, and in the words of the DOJ itself, cannot be "relied upon to create any rights" and does not "limit any enforcement intentions."¹⁰⁸

To provide an incentive to comply and to ensure that companies are rewarded for their good-faith efforts, adding corporate compliance to the list of available affirmative defenses has been repeatedly sug-

¹⁰³ See Doty, *supra* note 11, at 1235–36; see also *FCPA Hearing*, *supra* note 94, at 19–20 (noting that a company can be held liable for a violation committed by a rogue employee even if it has implemented a "state-of-the art" compliance program and makes good faith efforts to ensure compliance). Instead, vicarious liability is imposed regardless of the existence of a company policy prohibiting bribery or any employee training programs. See Doty, *supra* note 11, at 1235–36.

¹⁰⁴ See *FCPA Hearing*, *supra* note 94, at 11–12 (statement of Greg Anders, Acting Deputy Assistant Att'y Gen.). The DOJ argues that it "seriously considers" existing compliance and bribery-prevention programs in its indictment decisions and that it does not pursue companies because of the actions of a sole "rogue employee"; this internal policy, however, can change at any time and has yet to be tested in the courts. See *FCPA Hearing*, *supra* note 94, at 19; *Former DOJ FCPA Chief Supports FCPA Compliance Defense*, FCPA PROFESSOR (Oct. 4, 2011), <http://www.fcprofessor.com/former-doj-fcpa-chief-supports-fcpa-compliance-defense>; *House Hearing—Overview and Observations*, FCPA PROFESSOR (June 14, 2011), <http://www.fcprofessor.com/house-hearing-overview-and-observations>.

¹⁰⁵ See RESOURCE GUIDE, *supra* note 12, at 53–62.

¹⁰⁶ See *id.* at 56.

¹⁰⁷ See Koehler, *supra* note 15, at 968 (arguing that the DOJ's current position on taking existing compliance programs into account is not working); Rubenfeld et al., *supra* note 14 (quoting practitioners saying that guidance cannot provide the same certainty as a structural change to the statute and complaining that the guidance failed to formulate a comprehensive policy).

¹⁰⁸ RESOURCE GUIDE, *supra* note 12, at aii.

gested to legislators even after the issuance of the November 2012 *Resource Guide*.¹⁰⁹ It has been argued that current position of the DOJ guidelines—that proper compliance might lessen the punishment—lacks the specificity and precision necessary for it to impact business decisions.¹¹⁰ Armed with broad recommendations of best practices, instead of firm guarantees, the only way for businesses to even test the appropriateness of their compliance programs is to wait and see whether a charge will be brought—a risk few businesses are willing to take.¹¹¹

II. IMPACT ON BUSINESS PRACTICES: CORPORATE VICTIMS OF THE FCPA

This Note argues that the absence of legislative, judicial, or administrative guidance on how to comply with ambiguous statutory terms results in a host of direct and indirect costs to businesses and unnecessarily burdens corporations, leading to the loss of competitive edge and abandonment of business opportunities.¹¹² Most corporations are eager to comply with the FCPA's provisions but are unable to do so because of the ambiguity and unpredictability of enforcement.¹¹³ This Note further argues that in addition to the unnecessary and detrimental burden

¹⁰⁹ See *FCPA Hearing*, *supra* note 94, at 23–26. This affirmative defense would allow companies to defend themselves against the imposition of criminal liability for the violations of their employees or contractors who acted on their own and circumvented measures that were in place to identify and prevent violations. *Id.* at 3; Koehler, *supra* note 15, at 968. Proponents of the compliance defense point out that anti-corruption legislation in other jurisdictions, particularly in the United Kingdom, does provide for adequate compliance as an affirmative defense. See Bribery Act, 2010, c. 23, § 7(2) (Eng.). Specifically, the UK Bribery Act, the “latest word” in the global fight against corruption, which went into effect in July 2011, provides for an adequate compliance defense when a company establishes and strictly enforces effective procedures. See *id.* Some commentators argue that the availability of a compliance defense minimizes “crippling probe[s] into an otherwise blameless company.” See Koehler, *supra* note 80, at 108; Thomas, *supra* note 19, at 462; *A Tale of Two Laws*, *supra* note 1, at 68. Others counter that unlike the UK Bribery Act, which imposes strict liability for corporations that fail to prevent bribery, the FCPA only criminalizes actual or constructive knowledge of corruption and thus sufficient protection for good-faith actors is already built into the statute. See Bonneau, *supra* note 72, at 400; *A Tale of Two Laws*, *supra* note 1, at 68.

¹¹⁰ See Koehler, *supra* note 15, at 968; *DOJ/SEC's Resource Guide to the U.S. Foreign Corrupt Practices Act: Jones Day Summary and Analysis*, JONES DAY (Dec. 2012), http://www.jonesday.com/doj_sec_resource_guide_to_fcpa.

¹¹¹ See *infra* notes 224–226 and accompanying text.

¹¹² See *infra* notes 117–193 and accompanying text.

¹¹³ See Doty, *supra* note 11, at 1255 (noting that most U.S. businesses have “genuine confusion” about current FCPA requirements). As a result, harsh enforcement of ambiguous rules and lack of leniency toward those companies that do engage in good faith compliance provides little incentive for costly monitoring and might actually dissuade compliance. See Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 835–36 (1994).

on the companies themselves, current enforcement negatively affects the U.S. economy as a whole and chills international investment.¹¹⁴

This Part first discusses the challenges faced by companies that seek to comply with the statutory requirements and notes that lack of guidance can lead to decrease in compliance and self-reporting.¹¹⁵ It then analyzes the options open to the companies investigated for FCPA violations and discusses the direct and indirect costs of these options.¹¹⁶

A. *Catch-22: Preemptive Compliance in the Vacuum of Guidance*

Most U.S. businesses are eager to comply, but even the published guides on FCPA compliance note the difficulties in prescribing a recommended course of action due to the statute's ambiguous nature.¹¹⁷ The DOJ's newly issued *Resource Guide* addresses effective compliance practices, but lacks specificity and does not make any substantive clarifications or changes.¹¹⁸ The lack of guidance and a good-faith compliance defense is problematic because it prevents corporations from making informed business decisions and can lead to unexpected and undesired results.¹¹⁹

Even in the 1980s, well before the drastic expansion of the statute, Congress held hearings during which members of the business community testified that the FCPA's vague standards were hurting U.S. businesses and creating avoidable and unnecessary compliance costs.¹²⁰

¹¹⁴ See *infra* notes 182–190 and accompanying text.

¹¹⁵ See *infra* notes 117–138 and accompanying text.

¹¹⁶ See *infra* notes 139–193 and accompanying text.

¹¹⁷ See Taylor, *supra* note 75, at 878–79.

¹¹⁸ See Koehler, *supra* note 15, at 968; DOJ and SEC Publish Extensive Guidance on FCPA Compliance, FED. CONTRACTOR COMPLIANCE WATCH (Dec. 5, 2012, 10:51 AM), <http://federalcontractorcompliancewatch.com/2012/12/05/doj-and-sec-publish-extensive-guidance-on-fcpa-compliance>; McGrath, *supra* note 82.

¹¹⁹ See Arlen, *supra* note 113, at 836 (arguing that increased corporate liability might result in increased, not reduced, criminal activity); Rashna Bhojwani, Note, *Detering Global Bribery: Where Public and Private Enforcement Collide*, 112 COLUM. L. REV. 66, 98 (2012) (contending that the current statutory ambiguity can lead to reduced compliance and disclosure); see also Allen R. Brooks, Note, *A Corporate Catch-22: How Deferred and Non-Prosecution Agreements Impede the Full Development of the Foreign Corrupt Practices Act*, 7 J.L. ECON. & POL'Y 137, 154–55 (2010) (noting that informed decisions about business risks are instrumental to American entrepreneurship and arguing that statutory clarity is necessary to allow businesses to effectively evaluate their risk exposure and accurately consider all costs of compliance).

¹²⁰ See, e.g., *Business Accounting and Foreign Trade Simplification Act: Joint Hearing on S. 430 Before the Subcomm. on Int'l Fin. & Monetary Policy and the Subcomm. on Sec. of the Senate Comm. on Banking, Housing, and Urban Affairs*, 99th Cong. 1 (1986) (Statement of Chairman John Heinz) (“Complaints from the American business community about the vague and confus-

Today, the problem of uncertainty and unpredictability is exacerbated by the expansive interpretation and increased enforcement of the statute.¹²¹ There have been complaints that, to a large extent, the FCPA's "bewildering text" means whatever the prosecutor wants it to mean.¹²² Although the DOJ's November 2012 guidance contains a list of useful practices that should be considered by companies in building effective compliance programs, critics have raised several concerns: the suggestions are very broad in nature, are nonbinding, contain new, undefined elements that can be properly evaluated only with the benefit of hindsight, and are ambiguous because of their warning that implementation should vary from company to company.¹²³ In addition, the new guidance fails to mitigate corporations' uncertainty on how effective compliance will affect prosecutorial decisions, merely noting that effective compliance *may* be taken into consideration.¹²⁴

Lacking concrete guidance from the DOJ, other than broad recommendations of "best practices," and judicial interpretation of the statute, the companies that are trying to follow the rules in good faith are forced to take unsubstantiated guesses as to what is proper.¹²⁵ These companies are left on their own without knowledge of what conduct would be prosecuted under the FCPA.¹²⁶ This is a particularly costly

ing definitions and enforcement provisions in the FCPA have continued unabated since the FCPA became law in 1977. Billions of dollars of sales have been lost and continue to be lost because American businessmen have been convinced by their own Government that they should not aggressively pursue sales opportunities abroad."); *Foreign Corrupt Practices Act—Oversight: Hearing Before the Subcomm. on Telecomm. Consumer Prot. & Fin. of the Comm. on Energy & Commerce*, 97th Cong. 2 (1981–1982) (Statement of Chairman Hon. Timothy E. Wirth) ("We are being told by business and trade groups that the act is a major disincentive to exports and harmful to our national interests, our balance of trade, and our economy.").

¹²¹ See Bonneau, *supra* note 72, at 394–95. A broad and unpredictable interpretation of the knowledge requirement, for example, arguably imposes heavy burdens on companies and potentially chills legitimate business investment. See Nichols, *supra* note 10, at 287.

¹²² See *A Tale of Two Laws*, *supra* note 1, at 68.

¹²³ See Koehler, *supra* note 15, at 968; *Lindsey Lawyer "Underwhelmed" by New Guidance*, *supra* note 82; McGrath, *supra* note 82; Alexandra Wrage, *Share More. Spend Less. Reduce Risk.*, FCPA COMPLIANCE AND ETHICS BLOG (Nov. 16, 2012, 1:01 AM), <http://tfoxlaw.wordpress.com/2012/11/16/share-more-spend-less-reduce-risk>.

¹²⁴ See RESOURCE GUIDE, *supra* note 12, at 54, 56; Koehler, *supra* note 15, at 968.

¹²⁵ *FCPA Hearing*, *supra* note 94, at 3–4 (opening statement by Rep. Robert C. Scott, Ranking Member, H. Subcomm. on Crime, Terrorism, and Homeland Sec.); see also Doty, *supra* note 11, at 1255 (discussing the "policy vacuum" in which FCPA interpretation is being developed and the genuine confusion of the companies unable to determine proper conduct from the ambiguous rules).

¹²⁶ See Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 497 (2011).

method of trial and error; it is estimated that costs of preventive compliance and related internal investigations range from two to twenty million dollars.¹²⁷ Although companies do receive some benefit for self-reporting FCPA violations, it is still uncertain whether companies that make voluntary disclosures are necessarily better off.¹²⁸ The example of Siemens, which paid over a billion dollars in internal investigation costs to assist in an anti-corruption investigation, is fresh in the minds of every business executive.¹²⁹ The substantial costs of FCPA compliance and lack of guidance on how to comply lead to two opposite, but equally undesirable, results: (1) companies over comply by adopting costly and inefficient standards that nonetheless offer no immunity from DOJ prosecution, or (2) companies decline to develop anti-bribery policies, fearing that they will be liable for any infraction anyway.¹³⁰

In addition, the current regime of strict vicarious liability presents companies with conflicting and potentially perverse incentives: increased compliance and self-reporting expenditures also increases the probability that the government will detect violations, thus increasing the expected criminal liability for misconduct.¹³¹ For example, a company might feel that spending a fortune on compliance and employee training is not a good investment if leniency provided by the DOJ for compliance is inadequate to compensate for the substantial costs of

¹²⁷ See Daniel J. Grimm, *The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Successor Liability and Its Consequences*, 7 N.Y.U. J.L. & BUS. 247, 278 (2010); see also Wrage, *supra* note 123 (arguing that the current trend of growing compliance costs is unsustainable, and, in addition to escalating spending, leads to “compliance fatigue and employee cynicism”).

¹²⁸ See Robert W. Tarun & Peter P. Tomczak, *A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 212–13 (2010); see also *infra* note 161 (discussing the Siemens settlement).

¹²⁹ See Tarun & Tomczak, *supra* note 128, at 213; see also *infra* notes 161–162 and accompanying text (discussing the Siemens case and the costs of internal investigation and compliance).

¹³⁰ See IBTC REPORT, *supra* note 70, at 8; Arlen, *supra* note 113, at 835–36 (noting that strict liability can create perverse incentives actually reducing compliance); Koehler, *supra* note 43, at 1001.

¹³¹ See Arlen, *supra* note 113, at 835–36 (noting that studies of corporate behavior have suggested that if a company’s expected cost incurred by an increase in its expected criminal liability exceeds the expected benefit of the reduction in the number of violations, a company subject to strict vicarious liability will not respond by increasing its enforcement expenditures because additional compliance would only increase its expected criminal liability); see also Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 964 (2009) (arguing that the application of strict corporate liability failed to deter violations *ex ante* because corporations lacked any incentive to detect and report improper behavior).

running a compliance program.¹³² The November 2012 *Resource Guide* did not allay the ambiguity, as it merely provided that prosecutors *may* take effective compliance into consideration.¹³³ Facing the risks of a costly and lengthy trial, companies are pressured to settle, even if they have invested in the development and implementation of a thorough compliance program.¹³⁴

As a result, a company might be deterred from reporting identified violators or might choose to forego compliance altogether, merely hoping to avoid being caught.¹³⁵ This, in turn, might lead more companies to lose trust in enforcement and ignore the law, knowing that they can be penalized whether or not they invest millions in compliance.¹³⁶ Thus, exorbitant fines, coupled with the unpredictability of enforcement and a perceived lack of credit for attempted compliance, can lead to undesired results: a reduction in compliance and the incentive to investigate purported misconduct or to report detected crimes.¹³⁷ A perverse circular pattern is created. Even companies who want to comply with the FCPA and invest in internal compliance programs are typically held fully responsible for every violation; this result, in turn, diminishes companies' incentive to strive for FCPA compliance or self-report violations.¹³⁸

B. *Forced to Settle? Direct Costs of FCPA Enforcement*

FCPA enforcement has sharply risen in recent years.¹³⁹ Out of the ten largest FCPA settlements, only one occurred in 2008, and five, total-

¹³² See Arlen, *supra* note 113, at 835–36; see also WEISSMANN & SMITH, *supra* note 6, at 6 (stating that significant costs of investigation of any alleged violation are borne by the company without a guarantee that it will receive any “cooperation credit” from the government); Tarun & Tomczak, *supra* note 128, at 154 (noting that corporations governed by risk-neutral individuals might choose not to report a violation if self-reporting will result in an insubstantial reduction in the penalty and the violation is unlikely to be independently detected by the DOJ). Siemens famously spent over one billion dollars on internal compliance, yet the discount it received during settlement negotiations with the prosecutors was substantially smaller than the costs it incurred. See Tarun & Tomczak, *supra* note 128, at 223–24.

¹³³ See RESOURCE GUIDE, *supra* note 12, at 54, 56; Koehler, *supra* note 15, at 968.

¹³⁴ FCPA Hearing, *supra* note 94, at 2 (statement of Rep. F. James Sensenbrenner, Jr.).

¹³⁵ See Arlen, *supra* note 113, at 835–36; Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 FORDHAM L. REV. 775, 819 (2011) (noting the chilling effect current trends in enforcement have on voluntary reporting of corrupt behavior); Tarun & Tomczak, *supra* note 128, at 155.

¹³⁶ See Doty, *supra* note 11, at 1235.

¹³⁷ See Tarun & Tomczak, *supra* note 128, at 154.

¹³⁸ See *supra* notes 117–137 and accompanying text.

¹³⁹ See Joe Palazzolo, *FCPA Settlements Can Become Costly Burdens*, WALL ST. J., Oct. 20, 2011, at B2.

ing over \$1 billion, occurred in 2010.¹⁴⁰ In 2011 alone, criminal fines exceeded \$270 million, up from about \$11 million in 2004.¹⁴¹ For a multinational business, the consequences of a DOJ indictment are enormous, immediate, and potentially lethal.¹⁴² Due to the direct costs of a lengthy trial, costly discovery, and the harder-to-quantify indirect costs and risks of criminal indictment, corporations try to settle with the DOJ even when they believe the charges are exaggerated.¹⁴³ The risk and cost of trial for corporate defendants are so high that companies make a business decision to minimize consequences and “innocence becomes an irrelevancy.”¹⁴⁴ Thus, critics allege that concepts of innocence and guilt no longer determine judicial process in white collar crime cases, and that a company’s “choice” to settle is not a choice at all when considered in the context of the enormous costs associated with the decision to litigate.¹⁴⁵

Given that most of the charges of FCPA violations are settled before trial with little or no judicial oversight, federal prosecutors command a substantial share of lawmaking power, and therefore have significant leverage.¹⁴⁶ In his written testimony to the U.S. House of Rep-

¹⁴⁰ Richard L. Cassin, *With Magyar in New Top Ten, It's 90% Non-U.S.*, FCPA BLOG (Dec. 29, 2011, 1:28 PM), <http://www.fcpcbog.com/blog/2011/12/29/with-magyar-in-new-top-ten-its-90-non-us.html>; see also Richard L. Cassin, *Corporate Enforcement Since 2006*, FCPA BLOG (Jan. 3, 2012, 7:28 AM), <http://www.fcpcbog.com/blog/2012/1/3/corporate-enforcement-since-2006.html> (noting that in 2007, fifteen companies paid \$128 million in penalties and disgorgements, and comparing these numbers to twenty-three companies that paid \$1.8 billion in fines and disgorgements in 2010).

¹⁴¹ See Palazzolo, *supra* note 139.

¹⁴² See IBTC REPORT, *supra* note 70, at 6.

¹⁴³ See *id.*

¹⁴⁴ See Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 87 (2010).

¹⁴⁵ See Erik Paulsen, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1457 (2007); Podgor, *supra* note 144, at 87; see also Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 658 (“Settlements often have far more to do with the leverage the government enjoys than the merits of what the company did or didn’t do.” (quoting Stephen Jonas, a partner at Wilmer Hale and chair of the firm’s Investigations and Criminal Litigation Practice Group)).

¹⁴⁶ See Doty, *supra* note 11, at 1255 (citing Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 479 (1996)); see also Koehler, *supra* note 43, at 932 (commenting on the virtual absence of challenges to the DOJ’s aggressive interpretation of the statutory provisions); Paulsen, *supra* 145, at 1436, 1459 (Unable to risk a potential indictment, the corporation is thus left at the mercy of the prosecutor. . . . Without the threat of trial, however, there is no assurance that the prosecutor is acting in a judicious manner”). The lack of a compliance defense leaves companies at the mercy of federal prosecutors who may or may not take into account internal compliance programs. See *FCPA Hearing*, *supra* note 94, at 19–20 (raising the concern of “unlimited prosecutorial

representatives, former Attorney General Michael Mukasey cautioned that by negotiating resolutions before an indictment or enforcement action is filed, the DOJ “effectively control[s] the disposition of the FCPA cases they initiate and impose[s] their own extremely broad interpretation of the FCPA’s key provisions.”¹⁴⁷ As prosecutorial discretion remains largely unchecked, the uncertainty of the FCPA provisions increases, and befuddled corporations are even more likely to settle.¹⁴⁸

Direct costs of FCPA enforcement include litigation costs (for the few companies that dare to expose themselves to trial) and settlement costs.¹⁴⁹ Settlements usually involve a combination of fines, penalties and stringent requirements for future compliance.¹⁵⁰ The fines can be substantial, with statutory maximums for criminal penalties running up to two million dollars for each violation of the anti-bribery provision.¹⁵¹ In addition, if criminally convicted of an FCPA violation, the company can be required to pay a fine constituting twice the gross gains or losses.¹⁵² Despite the massive amounts involved, the settlement packages receive little, if any, judicial oversight and critics note that the cost of these settlements appears to escalate, with each new case merely establishing a new bottom line.¹⁵³

Although settling with the DOJ helps corporations save time and money on lengthy trials, it is often just the start of a very long and very costly process.¹⁵⁴ Most settlements impose stringent requirements for future compliance, under which the companies are required to revamp their compliance procedures and spend additional millions of dollars

discretion” and noting the lack of predictability about whether a corporate compliance program would result in more favorable terms during settlement).

¹⁴⁷ *FCPA Hearing*, *supra* note 94, at 22. Some critics go as far as arguing that currently there exists a policy vacuum in which the rules are created by federal prosecutors and are modified at will to fit the particular case. See Doty, *supra* note 11, at 1255.

¹⁴⁸ See Thomas, *supra* note 19, at 462 (discussing the “tremendous imbalance” of power between a prosecutor and defendant, and commenting on potential “large-scale prosecutorial abuse”); see also Koehler, *supra* note 43, at 938 (noting prosecutors’ unchecked power). Joseph Covington, a former DOJ FCPA Chief, observed that with the risks a company faces by taking a case to trial and without any real ability to contest liability, “too much power and discretion ends up in the hands of the government.” See *Former DOJ FCPA Chief Supports FCPA Compliance Defense*, *supra* note 104.

¹⁴⁹ See IBTC REPORT, *supra* note 70, at 3.

¹⁵⁰ See *id.*

¹⁵¹ See 15 U.S.C. § 78dd-2(g) (2006).

¹⁵² See 18 U.S.C. § 3571(d) (2006).

¹⁵³ See Doty, *supra* note 11, at 1237.

¹⁵⁴ See, e.g., IBTC REPORT, *supra* note 70, at 6 (noting the substantial costs incurred by lengthy trials and noting significant negative consequences of criminal indictment); Palazzolo, *supra* note 139.

on updates, maintenance, and related legal fees.¹⁵⁵ Many settlements also require installation of third-party compliance monitors, paid for by the company itself, who will police the company's FCPA compliance provisions.¹⁵⁶

Furthermore, ensuring continuous compliance substantially increases a company's pre-transactional and transactional costs.¹⁵⁷ The former involve the increased costs of due diligence efforts and expensive internal investigations of every allegation of prohibited conduct.¹⁵⁸ The latter account for substantial and recurring costs of post-transactional integration: for example, the time and resources companies now spend on post-merger integration and implementation of different compliance programs.¹⁵⁹ It has been suggested that the FCPA component of compliance annually costs large multinational businesses tens of millions of dollars.¹⁶⁰ The investigation of Siemens is a famous example of the staggering costs of compliance and due diligence.¹⁶¹ The internal investigation is estimated to have directly cost Siemens approximately \$1 billion, not including indirect costs of business disruptions to Siemens' employees during this lengthy global inquiry.¹⁶²

¹⁵⁵ See Berger et al., *supra* note 60, at 78; Palazzolo, *supra* note 139.

¹⁵⁶ See Berger et al., *supra* note 60, at 78. Siemens, which settled with the DOJ in 2008, now employs over 500 full-time compliance personnel worldwide. See Sentencing Memorandum at 22, *United States v. Siemens*, No.1:08-CR-367 (D.D.C. Dec. 12, 2008). In at least one settlement, the DOJ went as far as requiring that it be granted power to approve appointments of key company executives, including compliance counsel. See Berger et al., *supra* note 60, at 78. It is yet unclear how frequently such provisions will be used going forward and whether the DOJ will actually exercise its power to ban executive appointments, but the mere possibility of such pervasive and disruptive control over business decisions by prosecutors is chilling. See *id.*

¹⁵⁷ See IBTC REPORT, *supra* note 70, at 1–2; see also Baer, *supra* note 131, at 949–50 (expressing doubts that improvements to corporate transparency by the corporate compliance industry were proportionate to their costs).

¹⁵⁸ See IBTC REPORT, *supra* note 70, at 7, 9–10.

¹⁵⁹ See *id.* at 10.

¹⁶⁰ See *id.*

¹⁶¹ See Tarun & Tomczak, *supra* note 128, at 213. Siemens engaged in extensive internal investigation which spanned thirty-four countries and involved over 1750 interviews and 800 informational meetings. See Sentencing Memorandum, *supra* note 156, at 2, 19. In its Sentencing Memorandum, the DOJ referred to the scope of the Siemens investigation as “unprecedented.” *Id.* Over 100 million documents were collected and preserved, and it was estimated that Siemens paid for over 1.5 million hours of billable time to over 100 attorneys and 130 forensic accountants. See *id.* at 19.

¹⁶² See Tarun & Tomczak, *supra* note 128, at 213.

C. Indirect Costs of FCPA Enforcement

In addition to the multi-million dollar monetary penalties and escalating compliance costs, criminal aspects of FCPA enforcement add a host of indirect costs, including reputational damages and the potential loss of future contracts or international opportunities.¹⁶³ Collateral consequences of criminal conviction or indictment may be more devastating than imposed fines.¹⁶⁴ The damage to a company's reputation and the loss of clients and future contracts can be fatal.¹⁶⁵ In addition, companies named in FCPA investigations can lose profitable international contracts, and government contractors can face suspension or disbarment.¹⁶⁶ Even a hint of criminal involvement might lead to exclusion of U.S. companies from international opportunities or even from doing business abroad.¹⁶⁷ A company found guilty of violating the FCPA anti-bribery provisions may also be ruled ineligible to receive export licenses.¹⁶⁸

Another collateral cost of increased FCPA enforcement and the lack of an adequate compliance defense is the dramatic decrease in the competitiveness of U.S. businesses abroad caused by escalating costs of doing business.¹⁶⁹ The costs of doing business are substantially increasing because now companies have to account for and overcome obstacles that their international competitors—which are not subject to

¹⁶³ See Doty, *supra* note 11, at 1237; see also Koehler, *supra* note 37, at 397 (discussing the harsh sanctions of FCPA enforcement and noting the damage caused by the FCPA prosecution to the company's reputation).

¹⁶⁴ See Podgor, *supra* note 144, at 79.

¹⁶⁵ See *id.* (discussing Arthur Andersen's death upon criminal conviction and noting that even the later reversal of his conviction by the Supreme Court did not revive the defunct company and did not affect the company's ability to continue doing business).

¹⁶⁶ See Palazzolo, *supra* note 139; see also ZARIN, *supra* note 48, at 1-6-1-7 (discussing the impact of an indictment under the FCPA); Ned Sebelius, *Foreign Corrupt Practices Act*, 45 AM. CRIM. L. REV. 579, 598 (2008) (discussing disbarment and suspension from government contracts as sanctions for violations of the FCPA provisions). For example, Siemens AG and Alcatel-Lucent were reportedly barred from bidding on several contracts after the firms announced their FCPA settlements. See Palazzolo, *supra* note 139.

¹⁶⁷ See Doty, *supra* note 11, at 1237. It is possible that companies settling with the DOJ to avoid a criminal charge might be barred from future World Bank financial projects. See WORLD BANK, GUIDELINES: SELECTION AND EMPLOYMENT OF CONSULTANTS BY WORLD BANK BORROWERS § 1.22 (rev. 2010), available at <http://siteresources.worldbank.org/INTPROCUREMENT/Resources/ConGuid-10-06-RevMay10-ev2.pdf>.

¹⁶⁸ *Lay-Person's Guide*, *supra* note 5, at 6.

¹⁶⁹ See Doty, *supra* note 11, at 1237 (noting that unchecked FCPA enforcement can lead to a company's exclusion from foreign markets, either due to the increased costs of doing business or the company's deliberate decision to avoid potentially problematic countries altogether).

FCPA scrutiny—do not currently face.¹⁷⁰ This significant disparity in regulation and enforcement between those companies that are subject to FCPA scrutiny and those that are not frequently results in increased prices of company products as businesses pass on the extra costs to consumers.¹⁷¹ It is estimated that the FCPA's anti-bribery provisions have cost up to \$1 billion annually in lost U.S. export trade.¹⁷² Furthermore, the companies subject to FCPA scrutiny might lose attractive business opportunities if their foreign joint venture partners are unwilling to adopt costly compliance measures and become exposed to the risk of an FCPA investigation.¹⁷³

In addition, many companies, fearing FCPA complications, might choose to forego some attractive international opportunities in jurisdictions where the culture of corruption is so prevalent that compliance efforts—no matter how thorough and costly—fail to sufficiently reduce enforcement risks.¹⁷⁴ FCPA enforcement has been compared to de facto sanctions on countries where corruption is rife, as many American companies simply avoid corruption-prone states, thereby losing lucrative business opportunities in their attempts to avoid prosecution.¹⁷⁵ As a result, uncertainties about FCPA enforcement lead to non-pursuit or abandonment of business deals that would have been completed otherwise.¹⁷⁶ Such chilling of international investment and abandonment of opportunities in developing countries stands in direct opposition to the business-promoting goals pursued by Congress when the FCPA was enacted.¹⁷⁷

¹⁷⁰ See IBTC REPORT, *supra* note 70, at 7. U.S. companies now have to incorporate large compliance and monitoring costs in their budgets—something that many of their international competitors still do not have to do. See *id.*

¹⁷¹ See *id.* at 2–3.

¹⁷² See WEISSMANN & SMITH, *supra* note 6, at 6.

¹⁷³ See IBTC REPORT, *supra* note 70, at 7.

¹⁷⁴ See *id.*; see also Stevenson & Wagoner, *supra* note 135, at 818–20 (noting the FCPA's chilling effect on commerce and arguing that businesses are likely to forego profitable opportunities in emerging markets fearing FCPA violation); Yockey, *supra* note 80, at 824 (noting that a recent Dow Jones survey found that 51% of companies have delayed, and 14% have cancelled, foreign ventures due to uncertainty over FCPA enforcement).

¹⁷⁵ See *A Tale of Two Laws*, *supra* note 1, at 68; see also IBTC REPORT, *supra* note 70, at 1 (noting that current trends in enforcement chill international mergers as more U.S. companies walk away from purchases of foreign businesses fearing that they might acquire costly liabilities); Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 371 (2010) (arguing that the current enforcement regime constitutes de facto sanctions).

¹⁷⁶ See IBTC REPORT, *supra* note 70, at 1–2.

¹⁷⁷ See S. REP. NO. 95-114, at 3–4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4100–01.

D. Hidden Costs: Unexpected Consequences of Increased Enforcement

Aggressive enforcement of vague rules can potentially lead to another unexpected result—an increase of litigation among corporations.¹⁷⁸ Competitors might bring a suit after losing a foreign contract and allege that the contract was lost because of the defendant's illegal bribes.¹⁷⁹ Time will tell if disgruntled or vindictive companies will use DOJ indictments to make frivolous claims just to expose their competitors to the high costs of DOJ review.¹⁸⁰ Furthermore, in a foreign culture where allegations come easy and evidence is not readily available, the mere threat of DOJ investigation can become powerful leverage for less scrupulous corporations against their competitors.¹⁸¹

The effect of the FCPA's aggressive enforcement, however, goes beyond substantial penalties and compliance costs imposed on specific companies and industrial sectors.¹⁸² By creating an asymmetry in global competition, FCPA enforcement can arguably tax the U.S. economy as a whole and chill business activity.¹⁸³ U.S. companies lose their competi-

¹⁷⁸ See Vega, *supra* note 78, at 456–57, 466 (remarking that the FCPA allows for a private course of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (“RICO”) or under federal antitrust laws if the contested conduct violates the anti-bribery provisions). Although the FCPA does not provide an express or implied private right of action, the components of an FCPA violation are often similar to those of RICO, which expressly allows private rights of action, and as a result private litigants might use RICO to bring a claim against a competitor that violated the anti-bribery provisions of the FCPA. See Raymond J. Dowd, Note, *Civil RICO Misread: The Judicial Repeal of the 1988 Amendments to the Foreign Corrupt Practices Act*, 14 *FORDHAM INT'L L.J.* 946, 946–47 (1991); see also Jason E. Prince, *A Rose by Any Other Name? Foreign Corrupt Practices Act-Inspired Civil Actions*, *ADVOC.*, Apr. 2009, at 22 (arguing that plaintiffs “are increasingly making an end-run around the FCPA’s lack of a private right of action through an array of FCPA-inspired civil suits”).

¹⁷⁹ See *Lay-Person’s Guide*, *supra* note 5, at 6.

¹⁸⁰ See Vega, *supra* note 78, at 456–57 (noting a sharp increase in private lawsuits alleging FCPA violations and suggesting that former business partners, vindictive competitors, or terminated employees can resort to private litigation on FCPA grounds to get compensation).

¹⁸¹ See *IBTC REPORT*, *supra* note 70, at 16 (noting that companies that are not subject to the FCPA can use the threat of the DOJ’s aggressive and costly enforcement to their own advantage).

¹⁸² See *IBTC REPORT*, *supra* note 70, at 1–2.

¹⁸³ See *id.*; see, e.g., Nichols, *supra* note 10, at 287 (noting that the FCPA’s vagueness and its failure to distinguish between illegal and allowable conduct “possibly chills what might be legitimate business activity”); 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, 418 (2011) (arguing that the current trend of FCPA enforcement “counterproductively chill investments in certain markets by discouraging corporate entry into transitioning economies”); Dionne Searcey, *In Antibribery Law, Some Fear Inadvertent Chill on*

tive edge because of the significantly increased cost of doing business abroad, which prevents companies from growing and developing their businesses, and thus negatively affects the U.S. economy.¹⁸⁴ The unpredictability of FCPA enforcement further causes many foreign corporations to avoid registration in the United States in an effort to avoid the FCPA's jurisdiction.¹⁸⁵ Between 2007 and 2011, at least sixty companies removed their stock from U.S. stock exchanges citing "high administrative, regulatory and other costs" associated with a U.S. listing.¹⁸⁶ Similarly, it has been suggested that concerns about the aggressive and frequently unpredictable application of the FCPA makes foreign companies reluctant to invest in U.S. businesses or register their securities in the United States because of fears of falling under the FCPA's jurisdiction.¹⁸⁷ Such apprehension on behalf of foreign businesses reportedly contributed to a substantial decrease in the relative share of Initial Public Offerings (IPOs) listed on U.S. exchanges.¹⁸⁸ In 2010, for example, only one of the ten largest global IPOs took place in the United States.¹⁸⁹ Thus, unpredictable and aggressive FCPA enforcement decreases the attractiveness of the U.S. market to international businesses that fear FCPA scrutiny and negatively affects the competitiveness of U.S. businesses abroad.¹⁹⁰

In addition, stringent FCPA enforcement may actually exacerbate global corruption.¹⁹¹ The unpredictability of FCPA scrutiny frequently

Business, WALL ST. J., Aug. 6, 2009, at A9 (discussing the possible chilling effect of FCPA enforcement).

¹⁸⁴ See IBTC REPORT, *supra* note 70, at 1–2, 7; see also Taylor, *supra* note 75, at 868–69 (contending that U.S. businesses are "extremely disadvantaged" as compared to their foreign competitors, which are not subject to FCPA jurisdiction); Gene Koretz, *Bribes Can Cost the U.S. an Edge*, BUS. WK., Apr. 15, 1996, at 30, 30, available at <http://www.businessweek.com/archives/1996/b3471041.arc.htm#B3471043> (reporting that within five years of the FCPA's enactment, direct investment by U.S. businesses in countries known for corruption problems "declined markedly" while investment by foreign competitors in those countries "sharply accelerated").

¹⁸⁵ See IBTC REPORT, *supra* note 70, at 21.

¹⁸⁶ See *id.* at 21 & n.77 (noting that the substantial costs incurred by compliance with FCPA provisions, augmented by uncertainty of the statutory provisions, were important but not the only costs that influenced companies in their decisions to delist their stock). Daimler, for example, made such an announcement just one month after the company agreed to a \$185 million FCPA settlement. See *id.* at 21 n.78.

¹⁸⁷ See *id.* at 1.

¹⁸⁸ See *id.* at 21.

¹⁸⁹ See *2010 Global IPO Market Review and 2011 Outlook: China: The New IPO Capital*, RENAISSANCE CAPITAL, 15 (Jan. 3, 2011), <http://www.renaissancecapital.com/ipohome/review/2010review.pdf>.

¹⁹⁰ See *supra* notes 185–189 and accompanying text.

¹⁹¹ See IBTC REPORT, *supra* note 70, at 22.

scars U.S. firms away from certain transactions and even certain jurisdictions rife with corruption.¹⁹² This leaves developing nations inundated by less scrupulous, non-U.S. firms which operate under less restraining regulations and benefit from the absence of strong and ethical competition.¹⁹³

III. WEIGHING PROPOSED SOLUTIONS

This Part analyzes proposed solutions made by critics and legislators that seek to resolve the FCPA's ambiguity and make compliance both feasible and economically viable.¹⁹⁴ This Part further addresses shortcomings of the most common approaches and suggests a hybrid strategy that would better address both the companies' concerns and the DOJ's enforcement agenda.¹⁹⁵

This Note argues that in the FCPA context, the application of strict vicarious liability to a company for the unauthorized violations of its corporate agents is inefficient and counterproductive.¹⁹⁶ Though instituted to enhance compliance and prevent wrongdoing, the FCPA frequently leads to unexpected results, dissuading corporations from investigating possible misconduct and discouraging them from reporting detected crimes because increased compliance expenditures would also increase the probability of government detection.¹⁹⁷ Companies must decide whether to voluntarily self-report the detected misconduct, and

¹⁹² See Andy Spalding, *Beyond Balance IV: New Players, Same Playing Field*, FCPA BLOG (Feb. 3, 2012, 4:28 AM), <http://www.fcpablog.com/blog/2012/2/3/beyond-balance-iv-new-players-same-playing-field.html>.

¹⁹³ See Andy Spalding, *American Values or Chinese Profits?*, FCPA BLOG (May 23, 2011 7:18 AM), <http://www.fcpablog.com/blog/2011/5/23/american-values-or-chinese-profits.html>; see also Spalding, *supra* note 192 (noting that when companies subject to FCPA jurisdiction are forced out of competition by companies whose transaction costs are lower because they operate outside the FCPA's reach, the latter pay bribes and "engage in other socially destructive forms of business conduct without fear of penalty").

¹⁹⁴ See *infra* notes 206–238 and accompanying text.

¹⁹⁵ See *infra* notes 221–226, 233–253 and accompanying text.

¹⁹⁶ See Arlen, *supra* note 113, at 835–36 (noting that strict liability can create perverse incentives); see also William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1365–66 (1999) (calling the reasons behind extending strict vicarious liability "shallow and inadequate"); *supra* notes 117–138 and accompanying text (discussing the failure of strict liability policy to ensure corporate compliance).

¹⁹⁷ See Tarun & Tomczak, *supra* note 128, at 154; see also Arlen, *supra* note 113, at 835–36 (noting that studies of corporate behavior suggested that if the company's expected cost incurred by an increase in its expected criminal liability exceeds the expected benefit of the reduction in the number of violations, a company subject to strict vicarious liability will not respond by increasing its enforcement expenditures because additional compliance would only increase its expected criminal liability).

even after release of November 2012 guidance they face considerable uncertainty about whether disclosure will reduce the sanctions or instead expose them to massive liability.¹⁹⁸ Risk-neutral businesses would frequently choose not to report misconduct if they believed the reduction they receive is insubstantial and the misconduct itself is unlikely to be independently detected by law enforcement.¹⁹⁹ The government, however, cannot readily detect FCPA violations, and cooperation by companies is crucial to the successful fight against corruption.²⁰⁰ Thus, enforcement of the FCPA should provide sufficient incentives for companies to comply with the statutory provisions and report detected misconduct to authorities if necessary.²⁰¹

To date, most of the suggested solutions advocate for a compliance defense or various leniency schemes.²⁰² Such approaches have positive effects on compliance and thus contribute to long-term reduction of misconduct.²⁰³ Alone, however, each is insufficient to provide companies with guidance or resolve the power imbalance between the prosecution and businesses fearing the enormous costs associated with an FCPA indictment.²⁰⁴ This Note suggests a hybrid approach, combining the institution of a statutory compliance defense with the introduction of a formal leniency program.²⁰⁵

¹⁹⁸ See Koehler, *supra* note 15, at 968; Tarun & Tomczak, *supra* note 128, at 154.

¹⁹⁹ See Tarun & Tomczak, *supra* note 128, at 154–55.

²⁰⁰ See Arlen, *supra* note 113, at 835–36.

²⁰¹ See, e.g., Tarun & Tomczak, *supra* note 128, at 192 (advocating that to induce “self-reporting by corporations, all else equal, reduced perceptions as to the likelihood of independent detection by law enforcement absent corporate self-reporting must be counteracted by increased mitigation”); Bhojwani, *supra* note 119, at 93 (recommending the increase of independent detection of FCPA violations or reduction of sanctions for voluntary self-disclosure as possible ways to provide incentives for compliance).

²⁰² See, e.g., *FCPA Hearing*, *supra* note 94, at 23 (advocating for the creation of a compliance defense); WEISSMANN & SMITH, *supra* note 6, at 7 (recommending the creation of a compliance defense); Doty, *supra* note 11, at 1234 (advocating a new regulatory filing system that would afford a safe harbor to complying businesses); Tarun & Tomczak, *supra* note 128, at 156 (proposing a leniency program modeled after one currently used by the DOJ’s Antitrust Division).

²⁰³ See Tarun & Tomczak, *supra* note 128, at 236 (noting that clear and predictable policies provide incentive for compliance, cooperation, and self-disclosure).

²⁰⁴ See *infra* notes 221–226, 233–238 and accompanying text.

²⁰⁵ See *infra* notes 239–253 and accompanying text.

A. *Legislative Change: Creation of a Statutory Defense of Adequate Compliance*

One of the most supported proposals to resolve the above outlined FCPA problems involves legislative changes to the statute.²⁰⁶ Proposed changes include clarification of vague and overly broad statutory terms and the creation of an affirmative defense of adequate compliance.²⁰⁷ The existence of an internal compliance policy is currently insufficient to safeguard a company from liability for the violations of its employees.²⁰⁸ Instead of encouraging compliance, rigid enforcement coupled with the lack of an adequate compliance defense reduces a company's incentive to invest in internal anti-bribery policies and to monitor and report any identified violations.²⁰⁹ The creation of a statutory compliance defense has been suggested as a solution to the undesired effect of reduced compliance.²¹⁰ The adequate compliance defense would not be absolute; a company would still need to show that it *reasonably* implemented and maintained an anti-bribery program.²¹¹ Meeting these conditions would only afford a rebuttable presumption that the company as an entity is not liable for the FCPA violations of its rogue employees.²¹² Nonbinding and advisory in nature, the November 2012 *Resource Guide* suggests only general principles of best practices, and does not provide specific recommendations or reliable guidance as to how compliance might affect prosecutorial decisions.²¹³

²⁰⁶ See *FCPA Hearing*, *supra* note 94, at 23 (advocating for the creation of a compliance defense); WEISSMANN & SMITH, *supra* note 6, at 7.

²⁰⁷ See *FCPA Hearing*, *supra* note 94, at 23–28; see also Taylor, *supra* note 75, at 862 (arguing that the FCPA should be further clarified to promote compliance).

²⁰⁸ See Doty, *supra* note 11, at 1235–36; see also *FCPA Hearing*, *supra* note 94, at 19 (noting that a company can be held liable for violations committed by a rogue employee even if it has implemented a “state-of-the art” compliance program and makes a good faith effort to ensure compliance).

²⁰⁹ See *supra* notes 135–138 and accompanying text.

²¹⁰ See Arlen, *supra* note 113, at 835–36.

²¹¹ See Doty, *supra* note 11, at 1243–44, 1249; Koehler, *supra* note 145, at 609–10; *House Hearing—Overview and Observations*, FCPA PROFESSOR (June 14, 2011), <http://www.fcpaprofessor.com/house-hearing-overview-and-observations>. But see DAVID KENNEDY & DAN DANIELSEN, BUSTING BRIBERY: SUSTAINING THE GLOBAL MOMENTUM OF THE FOREIGN CORRUPT PRACTICES ACT, 6 (2011), available at <http://www.harvardiglp.org/wp-content/uploads/The-Foreign-Corrupt-Practices-FINAL.pdf> (arguing that by creating a compliance defense, Congress would insulate companies from responsibility for their violations, allowing them to hide behind “fig leaf” compliance).

²¹² See Doty, *supra* note 11, at 1245.

²¹³ See Koehler, *supra* note 15, at 968; *Lindsey Lawyer “Underwhelmed” by New Guidance*, *supra* note 82; McGrath, *supra* note 82; *supra* notes 110–111 and accompanying text.

Experience in other countries further supports the creation of a compliance defense.²¹⁴ Anti-bribery legislation in the United Kingdom, enacted in 2010, established adequate internal compliance as an affirmative defense and so far there has not been any suggestion that the defense has been abused by corporations.²¹⁵ Additionally, twelve signatories to the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention, including Australia, Germany, Sweden, and Switzerland, also have some form of working compliance defense.²¹⁶

The advantage of this statutory solution is that it will increase compliance with the FCPA and provide businesses with sufficient incentive to identify and self-report violations.²¹⁷ Given that FCPA crimes are hard to detect by outsiders, proactive compliance by businesses can substantially decrease the rate of violations.²¹⁸ This statutory solution will also give businesses some protection from prosecutors, who can no longer prosecute compliant corporations for the acts of a single employee.²¹⁹ By providing businesses with an affirmative defense, this solution will reduce the power disparity between prosecutor and prosecuted that is intrinsic to the FCPA.²²⁰

²¹⁴ See *The Compliance Defense Around the World*, FCPA PROFESSOR (June 28, 2011), <http://www.fcpaprofessor.com/the-compliance-defense-around-the-world>.

²¹⁵ See Bribery Act, 2010, c. 23, § 7 (Eng.) (noting that a corporation can prove in its defense that it had in place adequate procedures designed to prevent persons associated with it from undertaking prohibited conduct); WEISSMANN & SMITH, *supra* note 6, at 12–13; Jon Jordan, *The Adequate Procedures Defense Under the UK Bribery Act: A British Idea for the Foreign Corrupt Practices Act*, 17 STAN. J.L. BUS. & FIN. 25, 32–33 (2011–2012). Companies trying to invoke the adequate compliance defense under the Bribery Act must first satisfy the rigid criteria set out by the United Kingdom’s Ministry of Justice, which ensure that the defense is not easily manipulated by paper compliance. See MINISTRY OF JUSTICE, *THE BRIBERY ACT 2010: GUIDANCE 20–31* (2011), available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> (discussing in detail six guiding principles to be applied in consideration of adequate compliance defense).

²¹⁶ See *The Compliance Defense Around the World*, *supra* note 214.

²¹⁷ See WEISSMANN & SMITH, *supra* note 6, at 13; see also *FCPA Hearing*, *supra* note 94, at 26 (contending that the creation of a compliance defense would increase compliance with the FCPA’s provisions and provide businesses with needed protection from costly liability resulting from the acts of rogue employees acting without authorization).

²¹⁸ See Arlen, *supra* note 113, at 835–36, 835 n.10 (arguing that white collar crimes are difficult for the government to detect and since government must rely on the information disclosed by the companies themselves, it is important to provide sufficient incentive).

²¹⁹ See WEISSMANN & SMITH, *supra* note 6, at 13; Sarah Baumgartel, *Nonprosecution Agreements as Contracts: Stolt-Nielsen and the Question of Remedy for a Prosecutor’s Breach*, 2008 WIS. L. REV. 25, 58 n.145.

²²⁰ See WEISSMANN & SMITH, *supra* note 6, at 13; Thomas, *supra* note 19, at 462 (noting the current “tremendous imbalance” of power between the prosecution and businesses under investigation).

The significant disadvantage of this solution, however, is that without further changes, it will not add sufficient clarity or predictability to the enforcement process.²²¹ Yes, companies will be able to defend themselves in any action by the DOJ, but they still will be forced to guess whether the FCPA applies in each specific situation.²²² Furthermore, given the trend toward a broad interpretation of the FCPA, companies will need guidance in designing and implementing an adequate compliance defense—without such guidance, the defense will be meaningless.²²³ Lastly, there is a possibility that companies will not use the defense because to use an affirmative defense, a company must actually engage in litigation.²²⁴ Given the high direct and indirect costs of litigating FCPA matters, companies will strive to avoid situations in which an affirmative defense might become relevant.²²⁵ As a result, although creation of a statutory compliance defense has been advocated heavily by practitioners and academics, when employed alone it is unlikely to resolve the uncertainty companies are currently facing or significantly affect the power imbalance between law enforcement and businesses.²²⁶

B. *The DOJ Initiative: Regulatory Provisions*

Another approach that would alleviate the ambiguity currently facing companies is the introduction of formal leniency policies.²²⁷ Such policies would provide incentives to companies to report corporate crimes and enable businesses to make informed decisions by requiring the DOJ to convey clearly and predictably how the sanctions could be reduced for those companies that self-report violations.²²⁸ Although the DOJ currently takes compliance into consideration, the available dis-

²²¹ See *supra* notes 75–94 and accompanying text (reviewing the vagueness of the current statutory terms, the resulting uncertainty of what constitutes compliance, and the unpredictability of enforcement).

²²² See *supra* notes 75–111 and accompanying text.

²²³ See Howard Sklar, *Against an FCPA Compliance Defense*, FORBES (Oct. 18, 2011, 4:32 PM), <http://www.forbes.com/sites/howardsklar/2011/10/18/against-an-fcpa-compliance-defense>; see also Cohen et al., *supra* note 90, at 1269–70 (commenting on the lack of sufficient guidance to ensure adequate compliance).

²²⁴ See Sklar, *supra* note 223.

²²⁵ See Podgor, *supra* note 144, at 87; Sklar, *supra* note 223; see also *supra* notes 139–177 and accompanying text (discussing in detail the direct and indirect costs of FCPA prosecution).

²²⁶ See *supra* notes 206–225 and accompanying text.

²²⁷ See Doty, *supra* note 11, at 1234; Tarun & Tomczak, *supra* note 128, at 156, 190 (proposing a leniency policy similar to those currently employed by the DOJ in its antitrust prosecutions).

²²⁸ See Tarun & Tomczak, *supra* note 128, at 190.

count is not known until the very end of investigation, and thus self-reporting is still too risky for businesses contemplating reporting an FCPA crime.²²⁹ The introduction of formal policies, clearly communicated in advance, would help businesses make a decision to invest in compliance.²³⁰ To further incentivize proactive compliance, such policies might differentiate between leniency applied before and after an investigation has begun.²³¹ This approach would provide greater certainty and predictability to corporations of the benefits of self-reporting violations, and would thus have the potential to reduce the misconduct.²³²

There are several disadvantages to the leniency proposal.²³³ First, despite ensuring increased cooperation with law enforcement, the leniency solution on its own also fails to address concerns about the ambiguity of the FCPA's terminology or to alleviate the pressure to settle to avoid substantial direct and indirect costs incurred by litigation.²³⁴ Second, the solution also fails to guide businesses in their attempt to build a compliance program: instead of interpreting the FCPA's requirements, this solution merely provides an incentive to disclose the identi-

²²⁹ See *FCPA Hearing*, *supra* note 94, at 11–12, 19 (statements of Greg Anders, Acting Deputy Assistant Att'y Gen., and Hon. Michael Mukasey, Former Att'y Gen., Partner, Debevoise & Plimpton); Koehler, *supra* note 15, at 968.

²³⁰ See Tarun & Tomczak, *supra* note 128, at 180, 190 (citing the Deputy Assistant Attorney General, who oversees the Antitrust Division's enforcement program as saying that "transparency and predictability" are "key component[s] in the success of the [Antitrust] Division's . . . Corporate Leniency Program"); see also Cohen et al., *supra* note 90, at 1269–70 (noting that most companies want to comply with the rules but are hurt by lack of clear guidance); Doty, *supra* note 11, at 1239 ("Consistency and predictability are not matters of grace granted to corporate citizens at the government's pleasure; the government *owes* consistency and predictability to public corporations . . . and to management and directors who want to know the 'how-to-do-it' of compliance in these circumstances.").

²³¹ See Tarun & Tomczak, *supra* note 128, at 176, 191–92. Another proposed form of leniency program includes a modified "evidentiary privilege" rule, under which any information voluntarily disclosed by a company can be used in prosecution of the violators but not against the company itself. See Arlen, *supra* note 113, at 865 ("Such a privilege would remove the distortions created by pure strict vicarious liability because increased corporate enforcement expenditures would not increase the corporation's probability of being found liable."). This privilege is broader than standard immunity and privilege rules in that it would "prohibit the use of any information created by the corporation against it," although the company could still be prosecuted on information obtained from other sources. *Id.* at 865 n.92.

²³² See Tarun & Tomczak, *supra* note 128, at 214–15.

²³³ See *infra* notes 234–238 and accompanying text.

²³⁴ See *supra* notes 139–177 and accompanying text (outlining direct and indirect costs of FCPA enforcement).

fied violation.²³⁵ Third, some critics argue that the application of the leniency program, borrowed from the DOJ's antitrust prosecution, is simply improper in the FCPA context.²³⁶ In antitrust prosecutions, often the goal is to uncover cartels; rewarding a cooperating company that assists in the investigation does not prevent the DOJ from prosecuting the rest of the businesses in the alleged cartel.²³⁷ In the FCPA context, however, there is usually only one violator involved; thus, rewarding a cooperating company might leave no one else responsible—and punishable—for the crime.²³⁸

C. A Hybrid Solution

Most U.S. businesses are eager to comply with the FCPA but are perplexed by the vagueness of the current requirements.²³⁹ It is the role of both legislators and regulators to dispel this confusion.²⁴⁰ This Note advocates for a hybrid approach that would combine the introduction of a statutory compliance defense with the creation of a DOJ leniency policy.²⁴¹ A compliance defense, a statutory change promulgated by legislators, can be used by companies when litigation has already commenced.²⁴² Alternately, a comprehensive leniency policy, initiated by the regulatory agencies, can be invoked pre-indictment.²⁴³ Thus, a hybrid approach would provide protection to businesses at any stage of investigative inquiry.²⁴⁴

In addition, such a hybrid approach would make compliance economically viable by providing companies with incentives to institute costly compliance programs, self-report violations, and cooperate with

²³⁵ See *supra* notes 117–138 and accompanying text (noting the challenges businesses currently face as they try to guess what compliance really means); *supra* notes 228–233 (discussing the increased self-reporting that would accompany a formal leniency policy).

²³⁶ Michael Volkov, *FCPA Reform and Corporate Leniency*, JDSUPRA (Mar. 8, 2012), <http://www.jdsupra.com/legalnews/fcpa-reform-and-corporate-leniency-21801>.

²³⁷ See *id.*

²³⁸ See *id.*

²³⁹ See Doty, *supra* note 11, at 1255.

²⁴⁰ See *id.*

²⁴¹ See *supra* notes 206–238, 242–253 and accompanying text; *infra* notes 239–253 and accompanying text.

²⁴² See *supra* notes 206–226 and accompanying text; see also Sklar, *supra* note 223 (noting that affirmative defenses, such as adequate compliance, can be used only after a company has engaged in the litigation process).

²⁴³ See *supra* notes 227–238 and accompanying text; see also Tarun & Tomczak, *supra* note 128, at 176, 191–92 (discussing the application of leniency policies before indictment and even before the start of formal investigation).

²⁴⁴ See *supra* notes 206–238 and accompanying text.

law enforcement.²⁴⁵ At the same time, this approach provides companies with needed leverage in negotiations with aggressive prosecutors, who, in the absence of judicial oversight, have unfettered discretion in the enforcement of ambiguous terms.²⁴⁶

Although this hybrid solution in itself does not provide instructions or clarify ambiguous statutory terms, it does reduce uncertainty and provides companies with more leverage.²⁴⁷ This hybrid solution enables companies to defend themselves and challenge the DOJ's position, and thus diminishes the absolute discretion currently enjoyed by prosecutors.²⁴⁸ Therefore, a combination of legislative and regulatory changes will turn current enforcement from an authoritative prosecutorial monologue into a more collaborative and productive dialogue between prosecutors and companies.²⁴⁹ This dialogue will benefit all.²⁵⁰ Companies will have a greater voice in the investigations, and as a result will have more incentive to invest in compliance or report detected violations.²⁵¹ The DOJ will benefit from enhanced compliance procedures.²⁵² And the economy will benefit as a result of fewer bribes and stricter compliance.²⁵³

CONCLUSION

The broad terms of the anti-bribery provisions, dearth of judicial decisions, and little specific official guidance from the DOJ creates substantial uncertainty for companies trying to comply with stringent FCPA provisions. Recent guidance issued by the DOJ and SEC was praised as a useful and comprehensive resource but critics have repeatedly noted

²⁴⁵ See *supra* notes 196–238 and accompanying text; see also *FCPA Hearing*, *supra* note 94, at 26 (arguing that a compliance defense would increase compliance with the FCPA and provide needed protection to businesses from costly liability for the acts of rogue employees); Cohen et al., *supra* note 90, at 1269–70 (noting that most companies want to comply with the rules but are hurt by the lack of clear guidance).

²⁴⁶ See *supra* notes 196–238 and accompanying text; see also Thomas, *supra* note 19, at 462 (discussing the “tremendous imbalance” of power between prosecutor and defendant and commenting on potential “large-scale prosecutorial abuse”).

²⁴⁷ See WEISSMANN & SMITH, *supra* note 6, at 18; Thomas, *supra* note 19, at 462; *supra* notes 235–245 and accompanying text.

²⁴⁸ See *supra* notes 194–238 and accompanying text.

²⁴⁹ See *supra* notes 194–238 and accompanying text.

²⁵⁰ See *supra* notes 194–238 and accompanying text.

²⁵¹ See *supra* notes 131–138 and accompanying text.

²⁵² See *supra* notes 131–138 and accompanying text.

²⁵³ See *supra* notes 191–193 and accompanying text; see also Arlen, *supra* note 113, at 835–36, 835 n.10 (arguing that white collar crimes are difficult for the government to detect and it is therefore important to provide sufficient incentive to disclose).

that the report mostly compiles in one place publicly available information and does not provide any real clarity or new information. Regardless of the efforts companies extend to implement internal compliance policies, there is no provision for a compliance defense and a company can be indicted for an unauthorized action of a single rogue employee. The substantial costs associated with litigating in federal courts and the dire reputational consequences of indictment force most businesses to settle with the DOJ before trial. In the absence of judicial oversight, federal prosecutors end up with a significant and largely unchecked share of lawmaking and interpretive authority.

A hybrid approach, combining the introduction of a statutory compliance defense (available only after litigation has started) with leniency policies clearly delineating the scope of expected compliance and providing discounts for compliance and cooperation (available at the pre-indictment stage during negotiations with the DOJ), would protect businesses at all stages of an investigation. This approach would make compliance economically viable by providing companies with incentives to engage in thorough compliance, self-report violations, and cooperate with enforcement, while also providing businesses leverage in negotiations with the DOJ. Most importantly, however, increased compliance and clear incentives for self-reporting will identify more violations and contribute to an overall reduction of corporate bribery.

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