

WHEN IS A BRIBE NOT A BRIBE? A RE-EXAMINATION OF THE FCPA IN LIGHT OF BUSINESS REALITY

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ABSTRACT

The Foreign Corrupt Practices Act (FCPA) ushered in an era where the mantra was zero tolerance for illegal behavior. Yet the enforcement climate did not match the rhetoric and many in business did not take this legal obligation seriously. In 1988, Congress amended the FCPA to permit so-called "facilitation payments," thereby reflecting the reality of business. The amendment made explicit that some technical bribes might actually be paid not to obtain or retain business, but instead merely to move goods off a dock or to get them through customs. Ultimately the OECD nations joined the United States in the 1990s by passing the Anti-Bribery Convention and moving the community of nations towards a common understanding of the necessity of taking a legal stand against bribery. The United Kingdom and other countries have also passed new legislation to curtail the practice of bribery. Enforcement actions increased dramatically in the United States after President Bush and the new U.K. law reinforced this new enforcement environment. Yet questions persist: Has the zealotry to eradicate bribery, fueled by the great harm it does to a country's development, overshadowed common sense and business reality in a narrow set of cases?

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Is a bribe sometimes not a bribe? If facilitation payments are legal under United States law, why are companies prohibiting them? Who is a foreign official in a world where hospitals are often run by the state? Are all doctors then foreign officials? Can there be no drug company subsidization of conferences? In the context of the world economic slowdown, there is an increase in companies reporting that they are justified in paying money to win business. As pressures intensify on businesses and employees to secure contracts, the temptation is omnipresent during tough economic times to secure business by any means necessary. This paper will examine the dilemma posed by a goal of strict enforcement of anti-bribery legislation and its contradictions with some practical realities. We will review proposals to revise the FCPA and propose a more limited set of revisions.

INTRODUCTION: THE DILEMMA

The environment surrounding actual implementation of the anti-bribery requirements of regulations and codes around the world is in a state of flux. An especially difficult tension exists for any business conducting its affairs in the United States or in the United Kingdom today: it must navigate between the legal prohibitions on the corrupting influence of paying and accepting bribes and the practical recognition of both major regulatory schemes that, in certain cultures and situations, “facilitating payments” are absolutely necessary to ensure both personal safety and the safety of goods on the foreign dock or customs-house.

This paper seeks to explore the landscape of this business reality by examining the enforcement and compliance milieu thirty-plus years after the United States adopted the Foreign Corrupt Practices Act of 1977 (hereinafter the “FCPA”),¹ but only a year after the United Kingdom followed suit in enacting a more draconian—at least on paper—statute, the United Kingdom Bribery Act (hereinafter the “UKBA”).² We also consider

1. See Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 & 78dd-2 (2012)). The Act was amended by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, and the International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, 112 Stat. 3302. The FCPA was amended in 1988 by the Omnibus Trade and Competitiveness Act (OTCA), Pub. L. No. 100-418, §§ 5001–5003, 102 Stat. 1107, 1415–1425. The OTCA specifically amended 15 U.S.C. §§ 78m, 78dd-1, 78dd-2 (2012). For a discussion of the amendments, see Alan F. Holmer & Judith H. Bello, *The 1988 Trade Bill: Savior or Scourge of the International Trading System?*, 23 INT'L LAW. 523 (1989) and Beverley H. Earle, *Foreign Corrupt Practices Act Amendments: The Omnibus Trade and Competitiveness Act's Focus on Improving Investment Opportunities*, 37 CLEV. ST. L. REV. 549 (1989) (discussing the importance to business of these changes).

2. The UK Bribery Act, 2010, c. 23, available at <http://www.legislation.gov.uk/ukpga/2010/23>. For an excellent summary, see generally Ivonne Mena King, Alexander J. Kramer & Jacqueline N. Acosta, *The US FCPA and the UK Bribery Act: Raising the Bar for Anti-*

the Organisation for Economic Co-operation and Development (hereinafter the “OECD”), whose pronouncements are increasingly influential in shaping the enforcement climate.³

In Part I, we briefly lay out the familiar contours of the FCPA as well as the relatively new framework of the UKBA. Both have explicit provisions relevant to this query and yet both reveal deep ambivalence about business reality, leaving the international business community to fend for itself in adopting compliance policies. The OECD’s own suggested *Guidelines* have shifted in the past few years, further highlighting the depth of the international ambivalence.

In Part II, we focus on the dilemma posed by this state of affairs, asking questions any multinational business would ask while attempting to parse the statutory language surrounding “foreign officials,” “facilitating payments,” and the particular understanding of that grey area, “hospitality.” Beyond examining terms, we examine the Department of Justice’s (hereinafter the “DOJ”) *Opinion Releases* to illustrate the US government’s interpretation of this language as well as the United Kingdom’s *Guidance to Prosecutors*, recently updated with language that highlights the dilemma under consideration here. On the business side, we consider how a representative sector of industry handles the question of when is a bribe not a bribe through a review of the pharmaceutical industry’s self-regulatory efforts and the general policies of specific pharmaceutical companies. We conclude by attempting to paint a picture of bribery as the practical matter we believe it is currently understood to be.

Proposals for change that were the focus of 2011 legislative hearings in the United States as well as substantive revisions to the FCPA recently proposed by the United States Chamber of Commerce are the focus of Part III of this paper. We offer a critique of the proposals and our own modest proposal for change in Part IV.

I. LEGAL CONTEXT: THE FCPA, THE UKBA AND THE OECD

A. *The FCPA and the 1988 Amendments*

For two hundred years, the United States of America apparently did business in a similar way to the rest of the world, greasing palms held out by public officials and others in a position to make a deal go forward. In the 1970s, a Presidential resignation and a wave of legal and administrative investigations revealed a pattern and practice of US corporations bribing foreign officials.⁴ In particular, a 1976 scandal involving Lockheed Martin

Corruption Programs, 1949 PLI/CORP. 419 (2012).

3. The OECD formally criticized the FCPA’s facilitation exception in 2010. See Robert N. Walton & Michael L. Whitener, *Our Own Backyard*, FCPA BLOG (Nov. 1, 2010, 6:02 AM), <http://www.fcpcbog.com/blog/2010/11/1/our-own-backyard.html>.

4. Michael V. Seitzinger, *Foreign Corrupt Practices Act*, CSR REPORT TO CONGRESS

paying \$1.4 million to the Japanese Prime Minister to secure a contract for its L-1011 jet dominated the news.⁵ Soon, over 400 corporations admitted authorizing significant payments to foreign officials to secure lucrative contracts for their companies.⁶ To fix this perceived failure of business ethics, Congress enacted the FCPA⁷ which prohibited bribery and imposed accounting controls.

The FCPA focuses on conduct that offers something of “value” to “foreign public officials” in order to influence their official decisions,⁸ especially with respect to “obtaining or retaining business.”⁹ The accounting provision, requiring accurate books and records, subjects an issuer to strict liability for inaccuracies of any sort; neither official knowledge nor materiality is required.¹⁰ A public entity may potentially be liable under the FCPA even if its officers were not aware of the inaccuracies, if they are considered immaterial and even if they do not include bribes; however, the Securities and Exchange Commission (SEC) has stated that without evidence of knowledge or reckless conduct, it will not seek prosecution¹¹ Foreign issuers may be liable under the accounting

(Mar. 3, 1999). For a detailed description of the events leading up to the adoption of the FCPA, see Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT'L L. 345 (2000).

5. See Lori Ann Wallin, *The Gap Between Promise and Practice in the Global Fight Against Corruption*, 6 ASPER REV. INT'L BUS. & TRADE L. 209, 209–11 (2006). It is interesting to note that a similar fact pattern involving BAE bribes for Saudi purchases triggered the push for the Bribery Act recently enacted by the United Kingdom. See F. Joseph Warin, Charles Falconer & Michael S. Diamant, *The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 TEX. INT'L L.J. 1 (2010).

6. *Foreign Corrupt Practices Act Antibribery Provisions*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> (last visited Feb. 14, 2013) (discussing background of the FCPA).

7. See Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 & 78dd-2 (2012)). The Act was amended by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, and the International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, 112 Stat. 3302.

8. 15 U.S.C. § 78dd-1(a), (f) (2012) (issuers); 15 U.S.C. § 78dd-2(a), (h)(2)(A) (2012) (domestic concerns); 15 U.S.C. § 78dd-3(a), (f)(2)(a) (2012) (“persons other than issuers and domestic concerns”).

9. 15 U.S.C. § 78dd-1(a) (2012) (issuers); 15 U.S.C. § 78dd-2(a) (2012) (domestic concerns); 15 U.S.C. § 78dd-3(a) (2012) (“persons other than issuers and domestic concerns”).

10. 15 U.S.C. § 78m(b)(2) (2012). See Andrea Dahms & Nicolas Mitchell, *Foreign Corrupt Practices Act*, 44 AM. CRIM. L. REV. 605, 609–13 (2007) for a detailed outline of the current accounting requirements under the FCPA.

11. Justin F. Marceau, *A Little Less Conversation, A Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt Practices Act*, 12 FORDHAM J. CORP. & FIN. L. 285, 298–300 (2007) (discussing agency law and the FCPA); Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 AM. J. COMP. L. 593, 601–04 (2002) (summarizing the effect of the

provisions even if a corrupt payment occurs entirely outside the United States. The mere filing of a periodic report with the SEC or a single transaction with a U.S. bank is sufficient to trigger the obligations of the FCPA.¹²

The inquiry is thus in three parts: What is value? Who is an official? And what does “obtaining or retaining business” mean? This section of the FCPA must also be read in the context of the modifications made in 1988 that allowed certain facilitating payments¹³ and recognized limited affirmative defenses, considered further below.

In its initial iteration, the FCPA staked out ground that proved far more than it could enforce or police.¹⁴ Congress later formally recognized that it might be necessary to facilitate or “grease” a transaction once a deal had been reached by amending the statute in 1988 to address certain realities of the marketplace.¹⁵ Accordingly, certain “facilitating payments” were carved out of the prohibitions of the FCPA, defined as “any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a *routine governmental action* by a foreign official, political party, or party official.”¹⁶ (Emphasis added).

“Routine governmental action” is defined as:

[A]n action which is ordinarily and commonly performed by a foreign official in—

1988 amendments).

12. Oren Gleich & Ryan Woodward, *Foreign Corrupt Practices Act*, 42 AM. CRIM. L. REV. 545 (2005) (summarizing the key features of the FCPA and analyzing its implementation); *Foreign Corrupt Practices Act: An Overview*, U.S. DEP’T OF JUSTICE, <http://www.usdoj.gov/criminal/fraud/fcpa/> (last visited Feb. 15, 2013).

13. 15 U.S.C. § 78dd-1(f)(3)(B) (2012) (issuers); 15 U.S.C. § 78dd-2(h)(4) (2012) (domestic concerns); 15 U.S.C. § 78dd-3(f)(4)(A) (2012) (“persons other than issuers and domestic concerns”). See also H.R. Rep. No. 100-579, at 921 (1988) (Conf. Rep.) (noting examples).

14. H.R. Rep. No. 100-418, at 921–23 (1988) (Conf. Rep.), reprinted in 1988 U.S.C.C.A.N. 1949, 1954–56. The conference agreement defined “lawful payment” as “a payment to a foreign official [that] is ‘lawful under the written laws and regulations of the foreign official’s country.’” *Id.* at 1955.

15. See Jennifer Dawn Taylor, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 LA. L. REV. 861, 869 n.57 (2001) (citing Robert S. Levy, Note, *The Antibribery Provisions of the Foreign Corrupt Practices Act of 1977: Are They Really as Valuable as We Think They Are?*, 10 DEL. J. CORP. L. 71, 82 (1985)).

16. 15 U.S.C. § 78dd-1(b), -2(b), -3(b) (2012).

17. 15 U.S.C. § 78dd-1(f)(3)(A)(2012) (issuers); 15 U.S.C. § 78dd-2(h)(4)(A) (2012) (domestic concerns); 15 U.S.C. § 78dd-3(f)(4)(A) (2012) (“persons other than issuers and domestic concerns”) (emphasis added). See also Philip Nichols, *Who Allows Facilitating Payments?*, 14 AGORA WITHOUT FRONTIERS 303 (2009) (Greece), available at <http://idec.gr/iier/new/CORRUPTION%20CONFERENCE/Nichols-facilitating-payments.pdf>.

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit across country;

(iv) providing phone service, power and water supply, loading and unloading cargo or protecting perishable products or commodities from deterioration;

or
(v) actions of a similar nature.¹⁷

The affirmative defenses created by these amendments include allowing facilitation payments when there is proof that any payment made is lawful under the written laws and regulations of the local country.¹⁸ In reality,¹⁹ even in countries where graft is commonplace, it is not in fact legal.

In addition, reasonable entertainment expenses —often referred to as hospitality expenses —may be allocated to foreign officials if proved to be a “bona fide expenditure[] such as travel and lodging . . . related to . . . promotion . . . of products . . . or execution or performance of a contract”²⁰ Intended to bring the FCPA into congruence with the principles adopted by the OECD, the 1998 amendments to the FCPA brought some foreign nationals under its jurisdiction²¹ and expanded its reach beyond US borders.²²

Significantly, in order to qualify for the “facilitation payments”

17. 15 U.S.C. § 78dd-1(f)(3)(A)

18. H.R. Rep. No. 100-418, at 921–23 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1949, 1954–56. The conference agreement defined “lawful payment” as “a payment to a foreign official [that] is “lawful under the written laws and regulations of the foreign official’s country.” *Id.* at 1955.

19. Philip M. Nichols, *The Business Case for Complying with Bribery Laws*, 49 AM. BUS. L. J. 325, 352–67 (2012) (analyzing the depth and scope of local laws prohibiting bribery of domestic and foreign officials).

20. 15 U.S.C. §§ 78dd-1(c)(2), -2(c)(2), -3(c)(2) (2012). This issue is the topic of two Department of Justice *Opinion Procedure Releases* discussed *infra* note 87 and accompanying text.

21. 15 U.S.C. § 78dd-1(f) (2012). *See* Dahms & Mitchell, *supra* note 10, at n.8 and accompanying text. *See also supra* note 4-6 for a comprehensive review of the events leading up to the adoption of both the FCPA and the OECD Convention.

22. 15 U.S.C. § 78dd-1(g) (2012) (issuers); 15 U.S.C. § 78dd-2(i) (2012) (domestic concerns).

exception, the expense must be accurately recorded to meet the FCPA's internal controls requirement. Obviously, then, a number of tensions are inherent in this provision for any business: determining whether the payment is a bribe or not; determining whether the host country laws permit the practice and, if they do not, recognizing that prosecution might result from the receiving end; and finally, the conundrum created by actually documenting payments in a fashion that will certainly invite scrutiny but will otherwise create criminal risk. Not surprisingly, then, the FCPA's exception for facilitation and reasonable entertainment expenses has been the subject of judicial discussion²³ and academic analysis²⁴ as the business world has attempted to weave it into everyday decision-making.

Indeed, this fact is in stark relief at the moment: the facilitation exception is likely to be a major legal issue in any government investigation into the recent allegations of bribery by Wal-Mart of Mexico.²⁵ Indeed, it is possible that the Wal-Mart case will force serious discussion of the crux of the facilitation exception: if the political culture of a country requires certain payments from "all similarly situated businesses," then it is possible to argue that competition is not disrupted and that the payment is in fact a "routine government action."²⁶ In other words, the payment is a function of simple business reality in the host country, Mexico, currently in the throes of general chaos. One must wonder: does this characterization tend to remove the question from the judge and give it to the jury to decide as a question of fact²⁷ or will it tend to move the government closer to repealing the facilitation payment exception?²⁸

B. OECD and Facilitation Payments

All member countries and five non-member states adopted the OECD's landmark Convention on Combating Bribery of Foreign Public

23. *United States v. Kay*, 359 F.3d 738, 751 (5th Cir. 2004) ("[R]outine governmental action does not include the issuance of every official document or every inspection" but rather "very narrow categories of largely non-discretionary, ministerial activities performed by mid-or-low-level foreign functionaries.").

24. Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 818-20 (2011). See also F. Joseph Warin et al., *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VA. L. & BUS. REV. 33, 62-63 (2010); Nichols, *supra* note 16.

25. David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 21, 2012, at A1, available at http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?_r=2.

26. Daniel Knight, *Facilitation Payments: An Australian Perspective*, FCPA BLOG (July 13, 2012, 8:02AM), <http://www.fcpablog.com/blog/tag/facilitating-payments>.

27. *Id.*

28. Elizabeth K. Spahn, *Repeal the Facilitation Payment Loophole*, FCPA BLOG (Apr. 26, 2012, 1:28AM), <http://www.fcpablog.com/blog/2012/4/26/repeal-the-facilitation-payment-loophole.html>.

Officials in International Business Transactions (hereinafter the "OECD Convention")²⁹ in 1997 after years of discussion and debate. On a policy level, the OECD Convention was the first united effort to address corruption by the signatory countries. On a practical level, it set the precedent of prohibiting the common practice of deducting bribes as a business expense.³⁰ All signatories now have adopted laws against corruption, even if enforcement is both cumbersome and inconsistent.³¹

Under the OECD Convention, signatories agree to regular, in-depth monitoring of efforts made to combat corruption. Interestingly, the first iteration of the OECD Convention did not prohibit facilitation payments and the associated Commentary to the Convention allows an exception for "small" facilitation payments, calling on member programs to support good governance initiatives but stating that "criminalisation . . . does not seem a practical or effective complementary action."³² Improper contributions and payments to foreign political parties and candidates were not discussed and neither was the extent to which bribery of family members of public officials should be considered corruption.³³

The OECD regularly issues *Guidelines* as well as *Recommendations* to enhance its effort to combat corruption.³⁴ Particularly, in November of 2009, the OECD issued its *Recommendation for Further Combating Bribery of Foreign Public Officials* (hereinafter, the "*Recommendation*"),

29. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 [hereinafter OECD Anti-Bribery Convention]. For a list of the thirty-nine countries that are party to the OECD Anti-Bribery Convention, see *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of April 2012*, OECD, <http://www.oecd.org/corruption/oecdantibriberyconvention.htm> (last visited Feb. 14, 2013).

30. Mark Pieth, *Ten Years On: The Fight Against Foreign Bribery*, OECD OBSERVER, May 2010, http://www.oecdobserver.org/news/fullstory.php/aid/3253/Ten_years_on:_The_fight_against_foreign_bribery.html.

31. *Fighting Bribery in International Business Deals*, OECD POLICY BRIEF, Sept. 2008, at 4–6 (describing the enforcement mechanism), <http://www.oecd.org/dataoecd/55/44/41360706.pdf>; see also Pieth, *supra* note 30 (noting that although the enforcement mechanism is "the gold standard," it is not uniform).

32. OECD Anti-Bribery Convention, *supra* note 29, at Commentary Art.1, ¶ 9. Commentaries to the Convention were adopted by the Negotiating Conference on November 21, 1997. See Jon Jordan, *The OECD's Call for an End to "Corrosive" Facilitation Payments and the International Focus on the Facilitation Payments Exception Under the Foreign Corrupt Practices Act*, 13 U. PA. J. BUS. L. 881, 896–903 (2011).

33. Posadas, *supra* note 4, at 381 (footnotes omitted).

34. For example, in May of 2006, the OECD adopted guidelines requiring companies seeking export guarantees from first world governments to declare whether any of their staff had been charged with or convicted of bribing foreign officials. These guarantees, worth approximately \$60 billion per year, were viewed as a significant factor in closing large projects, but were often given without any inquiry into the "clean hands" of the recipient. Michael Peel & Hugh Williamson, *OECD Says Companies Must Reveal Record on Bribery*, FIN. TIMES, May 16, 2006, at 8.

calling on thirty-eight State Parties to the OECD Convention to attend to the roles of agents and third-party intermediaries and to “periodically review policies and approach on small facilitation payments.”³⁵ In 2010, the OECD Working Group on Bribery, the committee group in charge of the monitoring process, took the United States to task with its recommendation during Phase 3 evaluations of the record on anti-corruption efforts, specifically suggesting “further attention [to] policies on and approach to facilitation payments”³⁶ In taking this position, the OECD mirrored the approach taken by most US corporations, 87% of which prohibit facilitation payments as a matter of internal policy.³⁷

Important to our discussion to follow, the *Good Practice Guidance on Internal Controls, Ethics and Compliance*, Annex II of the *Recommendations* and adopted by the OECD in 2010, suggests a number of “good practices for ensuring effective internal controls, ethics and compliance programmes or measures for the purpose of detecting or preventing bribery,” including specifically recommending that “business organizations . . . play a leading role in providing anti-bribery information, advice and training to companies, especially small- and medium-sized enterprises.”³⁸ Areas of specific concern include the following familiar list which is, “applicable to all directors, officers, and employees, and applicable to all entities over which a company has effective control, including subsidiaries, on, *inter alia*, the following areas:

- i) gifts;
- ii) hospitality, entertainment and expenses;
- iii) customer travel;
- iv) political contributions;
- v) charitable donations and sponsorships;
- vi) facilitation payments; and
- vii) solicitation and extortion”³⁹

This list illustrates shared concerns, but does not offer much more

35. *Government Agrees to Step Up Fight Against Bribery*, OECD, Sept. 12, 2009, http://www.oecd.org/document/34/0,3746,en_21571361_44315115_44232739_1_1_1_1,00.html.

36. *Annual Report*, OECD WORKING GROUP ON BRIBERY (2010), at 23, <http://www.oecd.org/dataoecd/7/15/47628703.pdf> [hereinafter OECD WORKING GROUP ON BRIBERY].

37. *Global Anti-Bribery and Corruption Survey 2011*, KPMG, 2011, at 17, http://www.kpmg.com/UK/en/IssuesAndInsights/ArticlesPublications/Documents/PDF/Advisory/23816NSS_Global_ABC_Survey.PDF; *OECD Calls for End to Facilitating Payments Exception*, JONES DAY, Dec. 2009, http://www.jonesday.com/oecd_calls/ (placing the figure at 80%).

38. OECD WORKING GROUP ON BRIBERY, *supra* note 36, at 63 & 13.

39. *Id.* at 63-64.

information. Although the OECD makes efforts to monitor developments in its member countries regarding these business-related expenses, research reveals little evidence of any meaningful implementation of policies targeting these concerns. Indeed, although fifteen of the G20 members are party to and have implemented the OECD's Convention and in doing so have committed to strengthening legal and other measures to combat bribery,⁴⁰ little evidence of any public movement by either OECD or G20 member states is available.⁴¹ Although the OECD purports to publish information about the civil, criminal, and administrative efforts made by their member states, the data made public is in gross terms by country.⁴²

C. *The United Kingdom Bribery Act*

International business attention is now firmly focused on the UKBA as this law, enacted in 2010 and in effect since July 1, 2011, quite radically ups the ante of the FCPA in several respects.⁴³ A document issued by the United Kingdom Ministry of Justice titled, "*The Bribery Act of 2010: Guidance*" (hereinafter, the "*Guidance*") offers guidance to the business aspects of the new statute. The Forward to this document catches one's attention, as it is intended to do:

Bribery blights lives. Its immediate victims include firms that lose out unfairly. The wider victims are government and society, undermined by a weakened rule of law and damaged social and economic development. At stake is the principle of free and fair competition, which stands diminished by each bribe offered or accepted.⁴⁴

Partly in response to a government scandal involving the paying of bribes by BAE Systems, the United Kingdom has crafted what some

40. *First Monitoring Report of the G20 Anti-Corruption Working Group to G20 Leaders on Individual and Collective Progress Made by G20 Countries in the Implementation of the Seoul Action Plan*, OECD, 2011, at 2, <http://www.oecd.org/dataoecd/19/32/49234763.pdf>.

41. Transparency International recently issued a report critical of OECD and G20 enforcement efforts in these areas, suggesting they are "standing still," *Standing Still? What the World's Biggest Economies Are Doing About Corruption*, TRANSPARENCY INT'L, Apr. 5, 2012, http://www.transparency.org/news/feature/standing_still_what_the_worlds_biggest_economies_are_doing_about_corruption.

42. *2010 Data on Enforcement of the Anti-Bribery Convention*, OECD WORKING GROUP ON BRIBERY, Apr. 2011, <http://www.oecd.org/dataoecd/47/39/47637707.pdf>.

43. See *infra* note 45.

44. *The Bribery Act 2010: Guidance*, MINISTRY OF JUSTICE (U.K.), at 2, Mar. 2011, <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>. [hereinafter *Bribery Act 2010: Guidance*]

international businesses view as a “draconian” law⁴⁵ that is now a benchmark of international understanding of improper bribery.

The basic framework of the UKBA is rather straightforward and addresses four main areas of criminal liability: (1) active bribery, which is defined to mean “offering, promising or giving a bribe in exchange for improper performance of a function or activity”; (2) passive bribery, which includes “requesting, agreeing to receive or accepting a bribe” in the same context; (3) the familiar “bribing a foreign public official”; and (4) the much discussed “corporate offence” with its “adequate procedures defense.”⁴⁶ Oddly, the UKBA does not exactly define the term “bribe,”⁴⁷ a conundrum we will consider in Part II of this paper.

The UKBA does add certain elements to the international enforcement arena that are beyond the scope of the FCPA. Most critical is the specific criminalization of both private bribery and the activity of agents and external third parties who “perform business” on behalf of a business entity, not “simply” provide it with supplies.⁴⁸ Of specific importance is the fact that any party that does business in the United Kingdom is subject to the law, whether or not the improper “function or activity” in question has any connection to the United Kingdom.⁴⁹

Further explaining the contours of the new law, the United Kingdom Ministry of Justice *Guidance* provides some insight into the government’s enforcement agenda. Two elements apply here: (1) the explanation of prohibited entertainment and (2) gifts and the government’s understanding of facilitation payments. Both elements seem to be less a matter of strict application of the statute and more a matter of prosecutorial discretion. With respect to the former, the touchstone will be “reasonable and proportionate” in light of industry norms, legitimate business needs, and transparency.⁵⁰ As to the latter, the subject of Part II of this paper, the

45. Saleha Way, *UK Faces a Dilemma over Its Proposed Draconian Bribery Legislation*, Feb. 22, 2011, THE NATIONAL, <http://www.thenational.ae/thenationalconversation/industry-insights/economics/uk-faces-a-dilemma-over-its-proposed-draconian-bribery-legislation> (Bribery Act “lumbers business” by criminalizing certain business behavior even acceptable under the FCPA, especially facilitation payments); *See also* Nigel Page ed., *Serious Economic Crime: A Boardroom Guide to Prevention and Compliance*, SERIOUS FRAUD OFFICE (U.K.), 2011, <http://www.seriouseconomiccrime.com/ebooks/Serious-Economic-Crime.pdf>.

46. The U.K. Bribery Act, 2010, c.23, §7 & 13. *See also* *UK Bribery Act: Current Enforcement Trends*, BINGHAM MCCUTCHEN LLP, at 2, Mar. 2012, <http://www.bingham.com/Publications/Files/2012/03/Thought-Piece-UK-Bribery-Act-Current-Enforcement-Trends> [hereinafter *Current Enforcement Trends*].

47. *Current Enforcement Trends*, *supra* note 46, at 2.

48. *The Bribery Act, Quick Start Guide*, MINISTRY OF JUSTICE (U.K.), at 2-3, <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-quick-start-guide.pdf> (last visited Feb. 14, 2013).

49. *Current Enforcement Trends*, *supra* note 46, at 4.

50. *See also* *Current Enforcement Trends*, *supra* note 46, at 3–4. [note possible OECD criticism to this more relaxed approach.]

Guidance perhaps raises more questions than it answers.

On the one hand, it indicates that the Government does not intend to pursue corporate facilitation payments that are proper under the written law of the host country.⁵¹ But at the same time, there is an explicit declaration that the elimination of such payments is a “long term objective” of the UKBA and a clear nod to prosecutorial discretion in each case.⁵² This might be influenced by two important factors:

a proactive approach involving self-reporting and remedial action . . . and a clear and appropriate policy setting out procedures to be followed if facilitation payments are requested, accompanied by adherence to such policies. This reinforces the importance of an effective compliance programme, since policies and procedures, and a culture of internal reporting, will weigh against prosecution.⁵³

As in the United States, enforcement elements of the UKBA are being developed in real time. On May 17, 2012, the United Kingdom Ministry of Justice announced a proposal to adopt deferred prosecution agreements not currently part of the enforcement landscape and invited comments until August 9, 2012.⁵⁴ Unlike the process in the United States where the company negotiates with the DOJ, the United Kingdom proposes that an independent judge would supervise the agreement to ensure that it is “fair, in the public interest and that the conditions properly reflect the nature of the wrongdoing including reparations made to victims.”⁵⁵

II. EXAMINING REGULATORY AMBIVALENCE: STATUTORY INTERPRETATIONS VERSUS BUSINESS REALITY

A. Penalties and Individual Prosecutions under the FCPA

The FCPA provides for both civil and criminal penalties for violation of either its anti-bribery or accounting requirements.⁵⁶ Prior to 2000, few

51. *Bribery Act 2010: Guidance*, *supra* note 44.

52. *Id.*

53. *Current Enforcement Trends*, *supra* note 46, at 4.

54. *Deferred Prosecution Agreements: Overview*, MINISTRY OF JUSTICE (U.K.), <https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements> (last visited Feb. 13, 2013).

55. Barry Vitou & Richard Kovalevsky, *Ministry of Justice Publishes Deferred Prosecution Agreement Consultation*, THEBRIBERYACT.COM (May 17, 2012), <http://thebriberyact.com/2012/05/17/breaking-ministry-of-justice-publishes-deferred-prosecution-agreement-consultation/>.

56. Civil penalties for the former include up to \$10,000 per violation for both corporate and individual defendant; criminal fines may be up to \$2 million per violation for corporations and up to \$100,000 per violation and prison time of up to five years for

reported cases and relatively light fines characterized the enforcement of the statute.⁵⁷ Between 1995 and 2000, the DOJ averaged less than one completed investigation per year.⁵⁸ The climate dramatically changed almost overnight,⁵⁹ resulting in enormous liability for companies not able or willing to detect the change in the air. For example, in 2008, Siemens, a German conglomerate, paid over a billion dollars in fines (\$450 million to the DOJ, \$350 million to the SEC for related charges, and \$533.6 million to European authorities) to settle charges for their agents travelling regularly to South America and elsewhere with suitcases of cash to further their business interests.⁶⁰ The next year, Halliburton and Kellogg Brown and Root, LLC (KBR) also settled FCPA charges for a \$402 million fine.⁶¹ Further, in 2010, BAE Systems pled guilty to, among other things, conspiring to “make false statements about its Foreign Corrupt Practices

individuals. Failure to comply with the accounting requirements may result in criminal penalties of up to \$25 million for the corporation and individuals may face fines of up to \$5 million and 20 years in jail. See 15 U.S.C. §§ 78dd-3(d)-(e), 78ff (2012) (outlining penalties for violations of the FCPA).

57. Charlie Savage, *With Wal-Mart Claims, Greater Attention on a Law*, N.Y. TIMES (Apr. 25, 2012), <http://www.nytimes.com/2012/04/26/business/global/with-wal-mart-bribery-case-more-attention-on-a-law.html> (“It always had teeth . . . The United States government was just never interested in biting,” quoting Professor Rachel Brewster of Harvard University). See Marceau, *supra* note 11, at 290-95 (discussing the U.S. Department of Justice’s increased vigor in recent FCPA prosecutions); Philip Segal, *Coming Clean on Dirty Dealing: Time for a Fact-Based Evaluation of the Foreign Corrupt Practices Act*, 18 FLA. J. INT’L L. 169 (2006) (surveying all reported FCPA enforcement actions and concluding that the FCPA has been “greatly under-enforced”). See also Steven Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 231-32 (arguing, generally, that the FCPA ignores cultural norms of gift-giving and is overly intrusive).

58. Patti Waldmeir, *Bribery Is Not Just a Cost of Doing Business*, FIN. TIMES, April 5, 2007.

59. See *Transcript of Press Conference Announcing Siemens AG and Three Subsidiaries Pled Guilty to Foreign Corrupt Practices Act Violations*, U.S. DEP’T OF JUSTICE (Dec. 15, 2008), <http://www.justice.gov/opa/pr/2008/December/08-opa-1112.html> (“From 2001 to 2004, the Department [of Justice] resolved or charged 17 FCPA cases. For the period 2005 to 2008, that number [was] 42 resolutions, representing an increase of more than 200 percent . . . compared to the prior four-year period.”). In late 2009, Assistant Attorney General Lanny A. Breuer announced, “Since 2005, we have brought 57 cases—more than the number of prosecutions brought in the almost 30 years between the enactment of the FCPA in 1977 and 2005.” Lanny A. Breuer, *Prepared Keynote Address to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum*, Nov. 12, 2009, http://www.ehcca.com/presentations/pharmacongress10/breuer_2.pdf.

60. *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines*, U.S. DEP’T OF JUSTICE (Dec. 15, 2008), <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html> (“[B]ribery was nothing less than standard operating procedure for Siemens.”).

61. *Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine*, U.S. DEP’T OF JUSTICE (Feb. 11, 2009), <http://www.justice.gov/opa/pr/2009/February/09-crm-112.html>.

Act compliance program....”⁶² Despite the DOJ’s efforts in heightening corporate awareness of the commands of the FCPA with large fines, it decided that “to have a credible deterrent effect, people have to go to jail.”⁶³ Individual prosecutions increased “from six in 2006 to 48 in 2010.”⁶⁴

Ironically, the DOJ has lost much credibility through this initiative as only one of its individual prosecutions has resulted in a conviction⁶⁵ and many were dismissed due to prosecutorial misconduct.⁶⁶ In particular, the

62. *BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine*, U.S. DEP’T OF JUSTICE, Mar. 1, 2010, <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html>.

63. Alberto Gonzalez, Richard Westling & William Athanas, *Forecasting the Future of FCPA Enforcement*, CORPORATE COUNSEL (May 9, 2012), available at <http://www.law.com/jsp/cc/PubArticleFriendlyCC.jsp?id=1202552821910> (quoting *Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007*, 22 CORPORATE CRIME REPORTER 36 (2008)). See also *Record Setting: Esquenazi Sentenced to 15 Years, Rodriguez to 7 Years*, FCPA PROFESSOR (Oct. 26, 2011), <http://www.fcprofessor.com/record-setting-esquenazi-sentenced-to-15-years-rodriguez-to-7-years> [hereinafter *Record Setting*]

Yesterday, in the Southern District of Florida (a district quickly earning the distinction of handing out the toughest FCPA sentences in the country . . . Judge Jose Martinez sentenced Joel Esquenazi to a record-setting 15 years . . . and co-defendant Carlos Rodriguez to 7 years The previous record for an FCPA sentence was in April 2010 when Charles Jumet was sentenced to a then record 7.25 years (67 months on an FCPA charge, 20 months on a false statement charge). In the DOJ’s release . . . Assistant Attorney General Lanny Breuer stated as follows. ‘This sentence – the longest sentence ever imposed in an FCPA case – is a stark reminder to executives that bribing government officials to secure business advantages is a serious crime with serious consequences. A company’s profits should be driven by the quality of its goods and services, and not by its ability and willingness to pay bribes to corrupt officials to get business. As today’s sentence shows, we will continue to hold accountable individuals and companies who engage in such corruption.’ Esquenazi and Rodriguez were two of the defendants in the so-called Haiti Teleco case, the largest FCPA enforcement action in history (minus the manufactured Africa Sting case) in terms of individual defendants – 12. As noted in [a] prior post, the Haiti Teleco case stands in stark contrast to many corporate FCPA enforcement actions (enforcement actions that sometimes involve tens or hundreds of millions of dollars in bribe payments) that often yield no individual enforcement actions. Indeed, as noted in [another] prior post, since 2008 approximately 70% of corporate DOJ FCPA enforcement actions have not (at least yet) resulted in any DOJ charges against company employees.

Id.

64. Alberto Gonzalez, Richard Westling & William Athanas, *Forecasting the Future of FCPA Enforcement*, CORPORATE COUNSEL, May 9, 2012, available at <http://www.law.com/jsp/cc/PubArticleFriendlyCC.jsp?id=1202552821910>.

65. See *Record Setting*, *supra* note 63.

66. Roger M. Witten, *The Foreign Corrupt Practices Act and International Anti-*

“African Sting” cases and the Lindsey Manufacturing case stand as examples of what one judge ruefully called, “a long and sad chapter” in the government’s enforcement history.⁶⁷

Quite obviously, until recently, most individuals and corporations have chosen to plea bargain rather than risk trial in FCPA cases. Consequently, the interpretation of what these words mean has been left to the expansive view of the DOJ and not otherwise challenged.⁶⁸ As of 2012, the legal landscape in FCPA has shifted as parties have risked trial and have prevailed, although perhaps not exactly on the merits of the actual charge.

One must also understand that many companies flatly prohibit facilitating payments despite the law’s acceptance of them.⁶⁹ A facilitating payment is distinguished from a bribe because it is not to secure the business and it is not “corruptly” offered. However, this line is not always clear.

B. The UKBA

1. Facilitation Payments

Effective July 2011, the UKBA purports to limit facilitating payments but it remains to be seen how this will be enforced given the lack of allocated resources. More importantly, the *Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions* lists “Public Interest Considerations” that should be taken into account before the prosecutors initiate any action. These considerations also make special mention of facilitation payments, noting: “There is no exemption in respect of facilitation payments. They were illegal under the

Corruption Developments, 1949 PLI/CORP 89 (2012) (discussing *United States v. Noriega*, No. 2:10-cr-01031-AHM (C.D. Cal. Feb. 28, 2011) (“Lindsey Manufacturing” case), *United States v. Carson*, No. 8:09-cr-00077-JVS (C.D. Cal. Feb. 21, 2011) and *United States v. O’Shea*, No. 4:09-cr-00629 (S.D. Tex. Jan. 3, 2012)); Paul T. Friedman & Demme Doufekias, *United States: Most Severe Setback to DOJ Thus Far in FCPA Prosecutions: Judge Dismisses All Charges in Africa Sting Case*, MORRISON & FOERSTER (Mar. 1, 2012), <http://www.mondaq.com/unitedstates/x/166392/White+Collar+Crime+Fraud/Most+Severe+Setback+To+DOJ+Thus+Far+In+FCPA+Prosecutions+Judge+Dismisses+All+Charges+In+Africa+Sting+Case>.

67. Friedman & Doufekias, *supra* note 66.

68. Cf. Michael B. Mukasey & James C. Dunlop, *Can Someone Please Turn on the Lights? Bringing Transparency to the Foreign Corrupt Practices Act*, 13(1) ENGAGE 31 (2012), available at <http://www.fed-soc.org/publications/detail/can-someone-please-turn-on-the-lights-bringing-transparency-to-the-foreign-corrupt-practices-act>.

69. *Deloitte Anti-Corruption Practices Survey 2011: Cloudy with a Chance of Prosecution?*, 1957 PLI/CORP 559, 567 (2012) (“[A]most half of the executives said their company prohibited facilitating payments in all cases. . . . For the remaining executives, 36 percent said facilitating payments were allowed with pre-approval. . . .”) [hereinafter *Cloudy with a Chance of Prosecution?*].

previous legislation and the common law and remain so under the Act.”⁷⁰ Despite this ban on such payment, the document outlines “[f]actors tending against prosecution” under the following circumstances:

- A single small payment likely to result in only a nominal penalty . . . ;
- The payment(s) came to light as a result of a genuinely proactive approach involving self-reporting and remedial action . . . ;
- Where a commercial organization has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have been correctly followed;
- the payer was in a vulnerable position arising from the circumstances in which the payment was demanded.⁷¹

The tension is evident: the United Kingdom appears to take a very strict position in not allowing facilitation payments, but the *Guidance* is quite relaxed in terms of which cases the government might choose to bring. In particular, it appears that if a company has a policy about how to deal with this problem and reports it, then the prosecutors would not proceed. Similarly, the last factor noted above recognizes that a person could be in a “vulnerable position” and thus believe they have no choice but to pay. This statement is quite broad and undefined.⁷²

If you were asked to pay to protect your employees, would you? This was precisely the dilemma faced by Chiquita Brands International and its executives, including one who was both a distinguished attorney and former Chairman of the SEC.⁷³ Yet could you find yourself in legal difficulty? Yes. The DOJ reportedly gave “serious consideration to filing such charges after the company had pleaded guilty and paid a \$25 million fine for making protection payments to a right wing militia in Colombia, in violation of United States law”⁷⁴ (but not the FCPA). “In an exercise of

70. *Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions*, SERIOUS FRAUD OFFICE (U.K.), at 9, www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf (last visited Feb. 13, 2013) [hereinafter *Joint Prosecution Guidance*].

71. *Id.*

72. For a discussion of the problems with broad and undefined statements, see Dershowitz, *infra* note 142 and accompanying text.

73. Heidi White et al., *Chiquita and the Department of Justice*, INSTITUTE FOR CORPORATE ETHICS (Feb. 2, 2012), http://www.corporate-ethics.org/pdf/case_studies/BRI-1008_Chiquita_and_Department_of_Justice.pdf.

74. Neil A. Lewis, *No Charges for Chiquita Executives*, N.Y. TIMES (Sept. 13, 2007), <http://query.nytimes.com/gst/fullpage.html?res=9C0CE4DA1731F930A2575AC0A9619C8>.

prosecutorial discretion,” the DOJ elected not to file charges.⁷⁵ If your product were in danger of being stolen from a dock or if there could be some other potential harm to you or to your product, you could make the payment under the *Guidance* but you would be obligated to report it. US businesses have been asking for this common sense recognition of other factors that go into a calculus of whether to bring charges against companies that make facilitation payments.

2. Hospitality and Promotional Expenditures

As noted above, in assessing whether hospitality and promotion expenses are legal under the UKBA, British enforcement authorities suggest they will use notions of common sense: Are expenditures “reasonable and proportionate” or “lavish and extravagant.”⁷⁶ More specifically, they will determine:

whether there is evidence that the payment is to induce someone to improperly perform their duties with a view to obtaining a business advantage. A payment may be looked at as a bribe if it is related in time to some actual or anticipated business with the recipient, particularly where some form of competitive process is involved. This has been coined the “improper performance test.”⁷⁷

In April 2012, a new Director of the SFO, David Green, brought with him a new approach to enforcement, perhaps responding to certain criticism regarding a more relaxed approach than the international community expected.⁷⁸

The *Guidance* also addresses “hospitality and promotional expenditures.” Expenditures must be “reasonable, proportionate and made

75. *Id.*

76. *Bribery Act of 2010: Guidance*, *supra* note 44, at 12.

77. Nicole Sprinzen, *Litigation: It's the Little Things that Make a Difference*, INSIDE COUNSEL (June 7, 2012), <http://www.insidecounsel.com/2012/06/07/litigation-its-the-little-things-that-make-a-diffe?page=4>. quoting British Bankers' Association, *Bribery Act 2010, Practical Implementation Issues For the Banking Sector*, Dec. 2011, at 36, <http://bba.org.UK/media/article/bribery-act-2010-guidance>.

78. “[T]he Organization for Economic Cooperation and Development (OECD) in its Working Group Phase 3 Report on Implementing the OECD Anti-Bribery Convention under the Bribery Act [criticized the SFO] for its practice of attempting to settle cases civilly wherever possible, and particularly in cases where a company self-reports misconduct.” Sprinzen, *supra* note 77. Director David Green aspires to address “the perception [that] has emerged over the last few years that perhaps there is more willingness to compromise than to prosecute.” *Id.*, quoting Caroline Binham, *New SFO Director Pledges Tougher Stance*, FIN. TIMES (U.K.), Apr. 26, 2012, <http://www.ft.com/cms/s/0/6d8b01de-8fa0-11e1-98b1-00144feab49a.html>.

in good faith”⁷⁹ The inquiry becomes: was there an element of trying to influence the official? The SFO sees a correlation between lavishness and impropriety, but the *Guidance* notes that lavishness is “just one factor” and “other factors might include that the hospitality or expenditure was not clearly connected with legitimate business activity or concealed.”⁸⁰ As an example, the *Guidance* suggests that taking clients to a match “designed to cement good relations or enhance knowledge in the organisation’s field” [sic] would not show an intent to bribe.⁸¹ Nor would an offer to transport a foreign official to see your hospital in another country or a “fine dining” experience and baseball game which were part of a visit to your factory be suspect, whereas a vacation at a five star resort would raise an “inference” of illegal activity.⁸²

C. DOJ Opinion Releases

When does a “facilitation payment” cross the line and become a bribe? Is it based on the intent? What is value? When does paying for travel and promotion expenses amount to a bribe? Is it a matter of lavishness? Is there a bright line between how much and how little? The answer is clearly no—the line is anything but clear.

Although US prosecutors suggest they have never gone after de minimis cases,⁸³ this is not of great comfort or a guarantor of certainty to business people. Neither does the existence of a DOJ “*Opinion Procedure Release*” comfort companies trying to do business in this environment. Since 1980, more than half of the fifty-six DOJ’s *Opinion Releases* have addressed either the problem of dealing with a foreign official or travel and promotion expenses.⁸⁴ Specifically, twenty-one *Opinion Releases* have looked at the issue of “foreign official” (either doing business with one or a relative of one) and thirteen have addressed travel and promotion

79. *Joint Prosecution Guidance*, *supra* note 70, at 10.

80. *Id.*

81. *Id.* at 10.

82. *Id.* at 14. *But see* Roger M. Witten, *Anti-Corruption Enforcement Developments: 2011 Year in Review and 2012 Preview*, 1949 PLI/CORP 89, 98 (2012) (discussing a 2011 IBM settlement of \$10 million for over 100 instances of problems with IBM-China’s entertainment practices and a 2011 settlement with AON for \$16.26 related to the entertainment of third parties in Egypt, Vietnam, Indonesia, United Arab Emirates, Myanmar, Bangladesh and Costa Rica.).

83. *Foreign Corrupt Practices Act: Hearing Before the Subcommittee on Crime, Terrorism and Homeland Security of the Committee on the Judiciary of the House of Representatives*, 112 Cong. 56 (2011) (statement of Greg Andres, Deputy Assistant Att’y Gen., Criminal Division, U.S. Dep’t of Justice).

84. *See infra* notes 91-92 (Figure 1 - DOJ FCPA Opinion Procedure Releases, p. 24; Table 1 - Inventory of Opinion Releases, pp. 25-27.)

expenses.⁸⁵ The term “foreign official” is used broadly and yet many of the *Opinion Releases* give preliminary approval of the described arrangement despite the fact that the person is a foreign official.⁸⁶ While several of the *Opinion Releases* have included specific dollar figures, the majority have been approved with an unspecified dollar amount. At least one *Opinion Release* approved a spouse’s travel expense.⁸⁷ Four involved gifts and three addressed the donation to a charity (including a large \$10 million dollar outlay for a medical facility).⁸⁸ Many of the *Opinion Releases* involving the issue of foreign officials seek waivers and permission to pay a governmental official, but try to clarify that it is not to secure a contract or, in several cases, that the payment is required by law.⁸⁹ Of the thirteen that involved travel and promotion, only four disclosed a specific dollar amount and only two identified the payor, but seven identified the nationality of the recipient.⁹⁰ Although the fifty-six *Opinion Releases* in thirty-two years shows that counsels are not rushing to use this mechanism, one can conclude that certain ambiguity in the law exists in two particular areas—foreign official and travel/promotion expense—that if clarified would help all legitimate businesses trying to abide by the law.

85. *Opinion Procedure Releases*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/opinion> (1993-2001) (last visited Feb. 13, 2013); *Review Procedure Releases*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/review> (1980-1992) (last visited Feb. 13, 2013).

86. See *supra* note 85. See also *infra* Table 1 - Inventory of Opinion Releases pp. 25-27, which lists twenty-one opinions dealing with the term “foreign official.” But see *Eleventh Circuit Asked to Define “Foreign Official” Under FCPA*, AM. LAW. LITIG. DAILY (May 15, 2012), available at <http://www.law.com/jsp/cc/PubArticleFriendlyCC.jsp?id=1202553419587> (discussing appellate brief filed for Rodriguez and Esquenazi who are appealing their 2011 sentences and arguing that the “act does not support an expansive interpretation of “instrumentality”” and thus the people were not foreign officials).

87. *Review Procedure Releases*, U.S. DEP’T OF JUSTICE, No. 83-02, July 26, 1983, available at <http://www.justice.gov/criminal/fraud/fcpa/review/1983/r8302.pdf>.

88. See *infra* notes 91-92

89. See, e.g., *Opinion Procedure Release*, U.S. DEP’T OF JUSTICE, No. 07-03, Dec. 21, 2007, <http://www.justice.gov/criminal/fraud/fcpa/opinion/2007/0703.pdf>; *Review Procedure Releases*, U.S. DEP’T OF JUSTICE, No. 88-01, May 12, 1988, available at <http://www.justice.gov/criminal/fraud/fcpa/review/1988/r8801.pdf>.

90. See *infra* note 92.

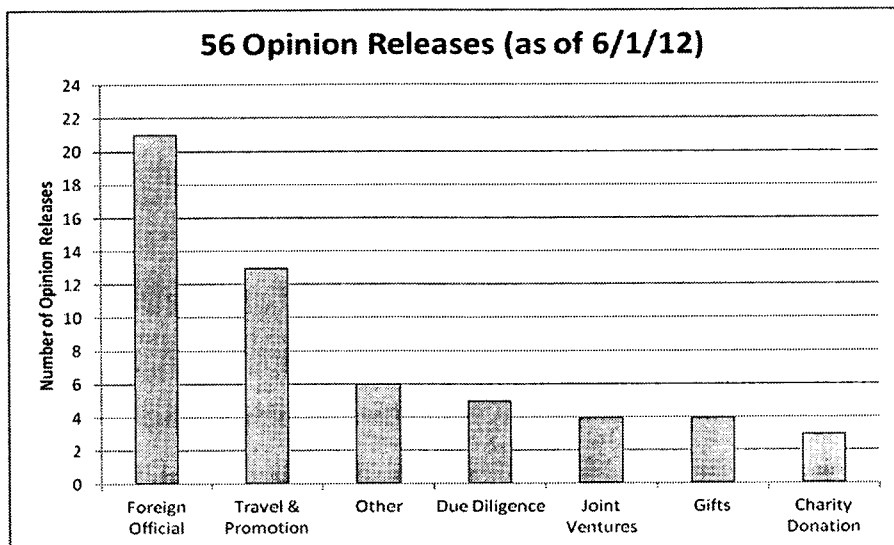


Figure 1 - DOJ FCPA Opinion Procedure Releases⁹¹

Table 1 - Inventory of Opinion Releases⁹²

56 as of 6/1/12

Foreign Official (FO) (21 items)

- 10-03 (consultant is foreign agent)
- 10-01 (required by contract to hire FO)
- 07-03 (payment to judge required for processing of an estate)
- 06-02 (subsidiary hires foreign law firm, do not know if FO; paid 0.6% of foreign exchange)
- 01-02 (American and foreign company enter into consortium, foreign company's chairman is FO)
- 00-01 (law firm partner is FO)
- 96-02 (American company hires state owned enterprise (SOE) as marketing representative)
- 95-03 (relative of FO)
- 94-01 (subsidiary enters into contract with director of SOE for

91. Figure created by authors from *Opinion Procedure Releases*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/opinion> (1993-2001) (last visited Feb. 15, 2013) and *Review Procedure Releases*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/review> (1980-1992) (last visited Feb. 15, 2013).

92. Table created by authors from *Opinion Procedure Releases*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/opinion> (1993-2001) (last visited Feb. 15, 2013) and *Review Procedure Releases*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/review> (1980-1992) (last visited Feb. 15, 2013).

- consulting assistance @ \$20,000 for year)
- 93-01 (director's fee to FO)
 - 88-01 (company constructing facility in Mexico must pay government and agent \$362,000 for debt/equity swap)
 - 87-01 (fee to international marketing organization (10%) to British co. that will then sell to Nigerian government)
 - 86-01 (three companies pay three members of parliament in Great Britain and Malaysia between \$36,000 and \$60,000 each per year to represent their businesses)
 - 85-03 (pay former government official)
 - 85-02 (pay former government official)
 - 84-01 (hire relative of FO)
 - 82-04 (hire relative of FO)
 - 82-03 (pay government agency)
 - 82-02 (fee to temporary government official)
 - 80-02 (employee running for office, could become FO)

Travel and Promotional Expenses (13)

- 11-01 (two days)
- 08-03 (an organization pays lodging and travel expenses for twenty journalists of Chinese SOE to attend press conference about NGO)
- 07-02 (six-day trip for six officials before six-week internship starts for foreign insurance regulators)
- 07-01 (four-day trip for six officials on "educational and promotional" tour of U.S. site)
- 04-04 (five foreign officials' "study tour" for drafters of new legislation on mutual insurance, \$16,875)
- 04-03 (law firm to sponsor ten-day trip for twelve officials from China to educate them about labor and employment laws)
- 04-01 (law firm sponsors 1.5-day law seminar in China)
- 96-01 (non-profit to sponsor ten people for environmental training in the United States at \$10,000 to \$15,000 a year)
- 92-01 (company to provide training on petroleum industry to Pakistani officials, \$200,000 annually; Pakistan laws require this)
- 85-01 (ARCO, constructing a chemical plant in France, invites French officials to the United States to inspect a facility (unusual because company is named))
- 83-03 (Dept. Agriculture of Missouri and company pay Singapore official for 10 day visit to Missouri for inspections)
- 83-02 (pay for FO and wife to extend vacation and visit U.S. facilities; \$5,000)
- 82-01 (Missouri Dept. of Agriculture to host ten Mexican FO to show products for sale)

Due Diligence (5)

- 08-02 (Halliburton to acquire U.K. company but does not have time to do due diligence beforehand)
- 08-01 (Fortune 500 company to buy foreign company, of which majority owner is foreign government)
- 04-02 (JP Morgan Partners and others to purchase ABB Ltd., a company in the oil and gas business involving Nigeria, Angola and Kazakhstan, with 115 lawyers and 44,700 man hours)
- 03-01 (U.S. company. to purchase another U.S. company with operations overseas and found payments to FO)
- 01-03 (U.S. company bid to foreign government for equipment with help of dealer, may have made payment)

Other (6)

- 98-02 (payment to an individual as International Consultant to help with sale of military training programs; recipient is private NGO)
- 98-01 (pay \$30,000 to Nigerian Ports Authority for "community compensation")
- 97-01 (hiring representative with shady past)
- 84-02 (small payment to low level government employee to facilitate transfer of branch to a foreign company)
- 83-01 (California company to use Sudan company as agent but head of Sudan company appointed by President of Sudan)
- 80-03 (company hiring a West African attorney)

Joint Venture (4)

- 01-01 (U.S. and French company)
- 95-02 (2 companies to enter into joint venture with foreign government)
- 81-01 (Bechtel to do business with SGV, a Philippine company)
- 80-04 (Lockheed Martin and a Saudi company will do business with an airline company owned by the Saudi government)

Gifts (4)

- 09-01 (sample units to hospital, \$1.9 million)
- 06-01 (U.S. company in Switzerland to pay government in African country \$25,000 to help enforce anti-counterfeit laws)
- 80-01 (pay for children's tuition of honorary official)
- 81-02 (samples to FO)

Charity /donations (3)

10-02 (\$1.42 million to microfinance entity of government)

97-02 (build elementary school)

95-01 (\$10 million to build medical facility)

Interestingly, “facilitation payments” were not specifically inquired about in the *Opinion Releases*. However, *Opinion Release 84-02* (listed under “Other” in Table 1), which queried about a small payment to a low-level foreign official to transfer a branch to a foreign company, could be construed as a “facilitation payment.”⁹³ Similarly, *Opinion Release 98-01* (also listed under “Other”) involved \$30,000 in “community compensation” for the Nigerian Ports Authority, which could also be considered a facilitation payment.⁹⁴ While there were inquiries about large gifts and charity donations, these are not the kind of “facilitation payments” envisioned by the 1988 amendments. One wonders why more questions regarding facilitation payments are not submitted to the DOJ. Conjecture suggests that “facilitation payments” are made on the spur of the moment, i.e. to move goods off the dock, and companies do not perceive they have the luxury of time to submit a query. If paid, facilitation payments should be recorded as such. Companies may have much stricter requirements, including advance permission and limits on payments, if they allow such payments at all.⁹⁵

What does to “obtain or retain business” mean? While this seems clear, it is not. In an early US case, a small business owner pled guilty to a violation of the FCPA because he offered money to an agent who allegedly gave money to a foreign official so the seller would be paid for the milk powder he had already delivered overseas.⁹⁶ Although Mr. Herzberg, the seller, believed that he had not violated the law, it was cost effective and provided certainty of punishment and costs to enter a plea agreement rather than the expensive and unpredictable route of testing the government’s theory. A \$20,000 fine and probation was the cheaper exit.⁹⁷ This section continues to have a broad reading both by the DOJ’s interpretation and court cases.⁹⁸ Philip Urofsky, a former DOJ official and now an attorney with Shearman and Sterling, LLP, has noted that payments to “custom or

93. See *supra* note 93.

94. *Id.*

95. See generally *Cloudy with a Chance of Prosecution?*, *supra* note 69, at 567.

96. *Exhibit B: Stipulated Facts and Application of the United States Sentencing Guidelines*, U.S. DEP’T OF JUSTICE, May 23, 1994, <http://www.justice.gov/criminal/fraud/fcpa/cases/vitusa/1994-05-23-vitusa-stipulated-facts.pdf>.

97. *Id.* at 2.

98. *Id.*

tax officials to reduce duties and taxes, to expedite customs clearances or to evade import regulations” have all been interpreted to violate this section.⁹⁹ In *United States v. Kay*, American Rice executives authorized payment to Haitian officials to reduce taxes on imports. The company self-reported, but the individuals nevertheless were tried, convicted, fined and sentenced to thirty-seven months and sixty-three months in prison, respectively.¹⁰⁰ There does not appear to be a backpedaling on this broad interpretation by either the courts or the DOJ. The most recent wins by defense counsel in several cases have been mentioned in Part I.

While defining a foreign official may seem simple, it is actually more complex than first appearance would suggest. There is no question that a Minister of Defense of Country X, responsible for weapon procurement, is a foreign official under the FCPA. But what about a doctor in a community hospital run by the government in poor country Y? Does it depend on his position, or does the fact that he is a state employee amount to being considered a foreign official? Even if the doctor is deemed a foreign official, would it be considered a bribe if he or she accepted money from a pharmaceutical company to attend a conference about diabetes in the capitol which he or she otherwise would not be able to afford to attend? Is the pharmaceutical company risking prosecution by proceeding with this model of professional continuing education? Is this simply an academic problem and not a real life dilemma? The *Opinion Procedures* address this dilemma in part but do not definitely resolve the ambiguities; the *Industry Codes* discussed below reveal increasing concern, as well as ambivalence below the surface.

The situation described above is not an academic dilemma but rather a very real problem for many doctors working in South America, China and parts of Europe, as well as for companies that market to such professionals. While in the United States many doctors are not government employees, private hospitals are taking steps to limit drug companies' ability to sponsor lunches, dinners and other kinds of gifts that might possibly skew a doctor's interest in prescribing medications for other than the patient's best interests (e.g. kickbacks and other incentives), but this is based on a sense of ethics and not on the FCPA. Yet not all doctors work at Massachusetts General Hospital or the Cleveland Clinic. Many pharmaceutical companies and

99. Philip Urofsky, *Recent Trends and Patterns in FCPA Enforcement, January 2012*, 1949 PLI/CORP 167, 188 (2012) (mentioning the *Panalpina* cases).

100. *Id.* But cf. Editorial, *Justice's Bribery Racket*, WALL ST. J., Feb. 16, 2012, at A12 (describing the Justice Department as launching “creative prosecution,” which because of some failures has given “a legal black eye [this phrase needs a grammatical object],” and commenting that “the Obama Administration’s overzealous prosecution is leading to uncertainty and injustice” and that “Congress and the courts need to curtail this latest antibusiness crusade”); Mike Koehler, *The Facade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907 (2010).

associations have *Guidelines* about how to handle such promotions, sponsorships and the like,¹⁰¹ discussed in the following section.

D. The Role of the Private Sector

To reiterate, the conundrum highlighted here is very real and associated with potentially high economic and personal costs for making a decision deemed “wrong” by a court after the fact. The DOJ has explicitly acknowledged that “it is entirely possible, under certain circumstances and in certain countries, that nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a drug product in a foreign country will involve a “foreign official” within the meaning of the FCPA.”¹⁰² In recent enforcement actions, the DOJ has focused on health care providers as “foreign officials” and has fiercely pursued global pharmaceutical companies, often highlighting travel and hospitality expenses deemed to be improper.¹⁰³

Internationally, the director of the United Kingdom’s SFO echoed these sentiments in remarks made in 2010 to the Association of the British Pharmaceutical Industry (hereinafter the “ABPI”), a group that sets self-

101. Gregory Husisian, *The Foreign Corrupt Practices Act: Risk-Management and Compliance Strategies for Life Sciences and Pharmaceutical Companies*, 1949 *PLI/CORP* 455, 476 (2012).

102. See Breuer, *supra* note 59, at 1:

I would like to share with you this morning one area of criminal enforcement that will be a focus for the Criminal Division in the months and years ahead – and that’s the application of the Foreign Corrupt Practices Act (or “FCPA”) to the pharmaceutical industry. According to PhRMA’s 2009 Membership survey, close to \$100 billion, or roughly one-third, of total sales for PhRMA members were generated outside of the United States, where health systems are regulated, operated and financed by government entities to a significantly greater degree than in the United States. As a result, a typical U.S. pharmaceutical company that sells its products overseas will likely interact with foreign government officials on a fairly frequent and consistent basis. In the course of those interactions, the industry must resist short-cuts. It must resist the temptation and the invitation to pay off foreign officials for the sake of profit. It must act, in a word, lawfully.

The exact same sentiment was reiterated by then Acting Attorney General Gary Grindler at the 2010 Compliance Congress. See *Acting Deputy Attorney General Gary G. Grindler Speaks at the 2010 Compliance Week Conference*, U.S. DEP’T OF JUSTICE (May 25, 2010), <http://www.justice.gov/dag/speeches/2010/dag-speech-100525.html>. See also *Stay Tuned for More*, FCPA PROFESSOR (May 2, 2011), <http://www.fcprofessor.com/stay-tuned-for-more-2>; Gardiner Harris & Natasha Singer, *U.S. Inquiry of Drug Makers Is Widened*, N.Y. TIMES, Aug. 14, 2010, at B1, available at http://www.nytimes.com/2010/08/14/health/policy/14drug.html?_r=4&ref=todayspaper.

103. Breuer, *supra* note 59, at 2. See also *Stay Tuned for More*, FCPA PROFESSOR, May 2, 2011, <http://www.fcprofessor.com/stay-tuned-for-more-2>; Harris & Singer, *supra* note 103.

regulating standards for the industry widely seen as best practices around the world. Suggesting that his office was working closely with the DOJ and the SEC by specifically sharing information on the pharmaceutical industry,¹⁰⁴ he sounded a warning that was heard. Acting quickly, the ABPI revised its code regarding promotions and announced that, effective January 1, 2011, proper promotional aids would be limited to “medical and educational goods and services which enhance patient care, or benefit the NHS and maintain patient care.”¹⁰⁵ Although appropriate promotions may have the name of the company providing them, they may not reference specific drugs and cannot be for personal benefit, even if minimal. Accordingly, coffee mugs and surgical gloves are examples of formerly ubiquitous promotions now improper under ABPI Guidelines.¹⁰⁶

The ABPI also offers “[g]uidance on collaboration between healthcare professionals and the pharmaceutical industry”¹⁰⁷ in which specific attention is paid to appropriate hospitality: it must be “secondary to the main purpose of any meeting . . . and must never be excessive or out of proportion to the main purpose of the meeting.”¹⁰⁸ Gifts, grants and donations to health professionals and related institutions are also addressed and explained in the *Code of Practice* and its *Guidelines*. The Prescription Medicine Code of Practice Authority (PMCPA) administers the ABPI *Codes of Practice* and investigates alleged abuses of its standards.¹⁰⁹

Identical concerns are raised by another major industry group, the International Federation of Pharmaceutical Manufacturers and Associations (hereinafter the “IFPMA”), an international body whose code serves as a “floor” upon which national codes may build to address local concerns. It also serves as the self-regulatory organization in countries where more robust compliance efforts do not yet exist.¹¹⁰ The IFPMA updated and expanded its *Code of Pharmaceutical Marketing Practices* (hereinafter, the

104. Barry Vitou & Richard Kovalevsky, *SFO's Stark Warning to Pharmaceutical Companies: Act Now or Take Your Medicine*, THEBRIBERYACT.COM, Nov. 6, 2010, <http://thebriberyact.com/2010/11/06/sfos-stark-warning-to-pharmaceutical-companies-act-now-or-take-your-lumps/>.

105. *Code of Practice for the Pharmaceutical Industry*, PRESCRIPTION MEDICINE CODE OF PRACTICE AUTHORITY, 2012, at 26, <http://pmcpa.org.uk/files/ABPI%20Code%202012.pdf> [hereinafter *Code of Practice*]

106. *Id.* at 27. See also *Reputation*, ASS'N OF THE BRITISH PHARM. INDUS., <http://www.abpi.org.uk/our-work/reputation/Pages/default.aspx> (last visited Feb. 15, 2013).

107. *Guidance on Collaboration Between Healthcare Professionals and the Pharmaceutical Industry*, ASS'N OF THE BRITISH PHARM. INDUS., <http://www.abpi.org.uk/our-work/library/guidelines/Documents/Guidance%20on%20collaboration.pdf> (last visited Feb. 13, 2013).

108. *Id.* at 3.

109. *Code of Practice*, *supra* note 106.

110. *IFPMA Code of Practice*, INT'L FED'N OF PHARM. MFRS. & ASS'NS, Mar. 5, 2012, <http://www.policymed.com/2012/03/international-federation-of-pharmaceutical-manufactures-and-associations-ifpma-code-of-practice.html>.

“Code”) in March 2012 to more effectively address pharmaceutical company interactions with medical schools and hospitals, patient organizations, and healthcare professionals, especially physicians. It, too, focuses on areas relevant to this discussion: clarifying proper payments to healthcare professionals for speaking, meetings, and other services; defining gifts and promotions as distinct from “items of medical utility” and requiring both to be modest in value; eliminating mention of cultural courtesy gifts; and requiring medical samples to be marked as such.¹¹¹ A special note regarding “Guidance on Values” requires the IFPMA member associations to offer a “precise value” in local currency for promotional items of “nominal value” as well as for items of medical utility of “modest value.”¹¹²

The extent to which public sentiment has shifted regarding when is ‘not a bribe’ a bribe is thrown into stark relief when comparing the 2006 iteration of the IFPMA *Code*, which took the remarkable step at the time of prohibiting cash as gifts, to the detailed descriptions of permissible interactions now in place. Indeed, one analyst notes:

The revised IFPMA Code reflects the global industry trend to self-regulate pharmaceutical industry sales and marketing practices in the absence of clear regulatory guidance. The evolution of such Codes of Conduct also reflects recognition of an increasingly aggressive regulatory enforcement environment in which many in the industry are not certain of regulatory expectations or the limits of commercial speech. The revised IFPMA Code is also timely in view of the recent focus in the United States and elsewhere on practices relating to interactions with health care professionals, as evidenced by government investigations and actions under the Foreign Corrupt Practices Act (United States), the Bribery Act (United Kingdom) and other countries.¹¹³

111. *Id.* See also *Overview of the Revised International Federation of Pharmaceutical Manufacturers & Associations (IFPMA) Code of Practice*, ARNOLD & PORTER LLP, Mar. 2012, at 4–12, http://www.arnoldporter.com/resources/documents/Advisory%20Overview_Revised_International_Federation_Pharmaceutical_Manufacturers_&_Associations_IFPMA_Code_Practice.pdf [hereinafter *Overview of the Revised IFPMA Code*] (providing a chart comparing the 2006 IFPMA Code to the 2012 IFPMA Code).

112. *IFPMA Code of Practice*, INT’L FED’N OF PHARM. MFRS. & ASS’NS, 2012, § 7.5.4, http://www.ifpma.org/fileadmin/content/Publication/IFPMA_Code_of_Practice_2012.pdf.

113. James S. Cohen et al., *IFPMA Releases Revised Code for Interactions with Health Care Professionals and Other Stakeholders*, ASS’N OF CORPORATE COUNSEL, Mar. 16, 2012, <http://www.lexology.com/library/detail.aspx?g=f7894a7f-92fd-4967-9130-90d691054c87>. See also Samuel Rubinfeld, *Pharma Code Revamp Follows US Industry*, WALL ST. J.

Enforcement under the IFPMA *Code* is left to each member country to handle under its own codes, unless there is no national code or appropriate law in the country where the complaint originates. If the IFPMA *Code* is found to have been breached, IFPMA will publish the name of the offending company; where there is a complaint but no breach, a summary of the case is made available on its website.¹¹⁴ Of course, critics look more to the walk than to the talk: in the past five years only four enforcement actions have been taken by the IFPMA in the form of public disclosure of violation of the *Code*, although more cases have been handled by member organizations.¹¹⁵

Likewise, the European Federation of Pharmaceutical Industries and Associations (EFPIA) promulgated a *Code on the Promotion of Prescription-Only Medicines to, and Interactions with, Healthcare Professionals* with amendments effective January 1, 2012.¹¹⁶ Again, the focus of this code is to highlight the risk associated with promoting drugs in a manner that may be perceived as corrupt even if the transaction is relatively modest or even de minimis.

Similar to its international counterparts, the US industry group, PhRMA, issued its updated voluntary *Code on Interactions with Healthcare Professionals* effective January 2009. It specifically permits providing meals to physicians as part of informing them about medicines on the condition that the meals “(a) are modest as judged by local standards; (b) [not] part of an entertainment or recreational event; and (c) are provided in a manner conducive to informational communication.”¹¹⁷ Entertainment and recreational enticements such as tickets to sporting events, the theater, or to a vacation spot are prohibited, even if modest in value or secondary to an educational purpose.¹¹⁸ Specific attention is given to “continuing medical education grants,” which must not be seen as “an inducement to prescribe or recommend a particular medicine or course of treatment.”¹¹⁹ Cash gifts may not be given directly to a healthcare professional for conference support, but may be offered to the conference sponsor on the

CORRUPTION CURRENTS BLOG, Mar. 1, 2012, <http://blogs.wsj.com/corruption-currents/2012/03/01/pharma-code-revamp-follows-us-industry-sweep/>.

114. *Overview of the Revised IFPMA Code*, *supra* note 111, at 3.

115. Reuters, *Global Drug Industry Tightens Anti-Corruption Code*, LAHORE TIMES, Mar. 4, 2012, available at <http://www.lhrtimes.com/2012/03/04/global-drug-industry-tightens-anti-corruption-code/>.

116. *EFPIA Code on the Promotion of Prescription-Only Medicines to, and Interactions with, Healthcare Professionals*, EUROPEAN FED'N OF PHARM. INDUS. & ASS'NS, June 14, 2011 (amended), available at http://www.efpia.eu/sites/www.efpia.eu/files/EFPIA%20Code_Promotion_HCP_-_11.06.14_FINAL_EDITING_07-08-11-mcp-20110630-002-EN-v1_1.pdf.

117. *Code on Interactions with Healthcare Professionals*, PHARM. RESEARCH & MFRS. OF AM., 2008, at 4, available at http://www.phrma.org/sites/default/files/108/pharma_marketing_code_2008.pdf.

118. *Id.* at 5.

119. *Id.* at 6.

condition that the sponsor retains authority over content decisions.¹²⁰

Finally, Congress has taken a step toward clarifying the conversation about what is “value” in the pharmaceutical context. The Physician Payment Sunshine Act, proposed in 2009 by Senators Charles Grassley (R-Iowa) and Herb Kohl (D-Wisconsin) and embedded in the Patient Protection and Affordable Care Act, sets up a two-step process to create transparency regarding “payments and other transfers of value provided to physicians and teaching hospitals for a wide array of purposes—from consulting to food and travel.”¹²¹ The statute offers a list of payments to be reported, ranging from “gift, food, entertainment, travel or trip” to the more obvious “dividends, profit distribution, stock or stock option grant” if worth more than ten dollars.¹²² The data must be recorded effective January 1, 2012, reported in March 2013, and posted on public and searchable databases starting September 2013 and every year thereafter.¹²³ It appears that although the industry giants are already reporting transactions with healthcare entities, most are waiting for the implementing regulations to become effective.¹²⁴

Very obviously, the private sector is confused by the state of the law both in the United States and abroad; predictably, it is reacting in a rather rational manner. The Deloitte *Anticorruption Practices Survey 2011*¹²⁵ of 276 executives revealed that 47% of companies prohibited facilitating payments in *all* cases, 36% allowed them with preapproval and only 5% allowed them with no restrictions.¹²⁶ Of the combined percentage of companies that permit some type of facilitating payment, 4% allowed between \$250-\$499; 7% allowed up to \$500; 13% percent allowed \$100-

120. *Id.* at 12.

121. Physician Payments Sunshine Act of 2009, S. 301, 111th Cong. (2009) (later incorporated as § 6002 of the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010)) [hereinafter *Physician Payments Sunshine Act*]. “On December 19, 2011, the Centers for Medicare & Medicaid Services (CMS) published a proposed rule implementing the Physician Payments Sunshine Act During the sixty-day comment period, CMS received over 300 comments from a wide range of stakeholders.” *Information on Implementation of the Physician Payments Sunshine Act*, CMS BLOG (May 3, 2012), <http://blog.cms.gov/2012/05/03/information-on-implementation-of-the-physician-payments-sunshine-act/>.

122. *Physician Payments Sunshine Act*, *supra* note 121. See also *Physician Payment Sunshine Provisions: Patient Protection Affordable Care Act Passed the House*, POLICY & MEDICINE (Mar. 22, 2010), available at <http://www.policymed.com/2010/03/physician-payment-sunshine-provisions-patient-protection-affordable-care-act.html>.

123. Arlene Weintraub, *New Health Law Will Require Industry to Disclose Payments to Physicians*, KAISER HEALTH NEWS (Apr. 26, 2010), <http://www.kaiserhealthnews.org/Stories/2010/April/26/physician-payment-disclosures.aspx>.

124. *Id.*

125. *Cloudy with a Chance of Prosecution?*, *supra* note 69, at 567.

126. *Id.*

\$249; 23% allowed under \$100; and 53% had no restrictions.¹²⁷

Interestingly, Deloitte reported that “[r]elatively few executives were very confident in the effectiveness of their company’s anticorruption program”¹²⁸ and noted that “many companies are now eliminating these payments” to be safe.¹²⁹

In several areas, executives at larger companies were more likely to perceive greater risk. Given the widespread use of third parties to provide services, raw materials or manufactured goods, 63 percent of executives at larger companies believed the use of third parties posed a significant risk, compared to 33 percent of those at smaller companies. Similarly, 35 percent of executives from larger companies perceived significant risk from entertainment or business development expenses related to government business or to government relations while only 19 percent of those at smaller companies shared that concern.¹³⁰

The smaller companies do not have the resources to mount serious compliance efforts and they do not necessarily even appreciate the risk they are facing.¹³¹ This study demonstrates the concerns executives have in trying to operate within this landscape and still comply with both domestic and foreign laws.¹³²

Ernst & Young also conducted a survey and reported “15% of surveyed firms think cash payments to win business can be justified if they help companies survive an economic downturn compared with 9% last year.”¹³³ Is that number a reflection of hard-nosed willingness to breach laws perceived to be unjust or at a minimum, unclear? Or, is it instead a

127. *Id.*

128. *Id.* at 568.

129. *Id.* at 567.

130. *Id.* at 569.

131. See Beverley Earle, *Because It's the Bottom Line: The Need for Corporate Compliance Programs for Small- and Medium-Size Businesses*, 25 BUS. FORUM: J. SCH. BUS. & ECON. 3, 3–6 (2000) (discussing how the Organizational Sentencing Guidelines in 1991 ensnared many small businesses).

132. *Id.*

133. *You Get Who You Pay For: The Economic Case for Bribery*, ECONOMIST, June 2, 2012, available at <http://www.economist.com/node/21556255/print> (discussing an Ernst & Young global fraud survey noting that 39% of businesses believe that corruption is “common” where they operate; citing research that shows the efficacy of bribing and the return on investment for some firms but also noting that “[a]nother paper, by Jonathan Karpoff of the University of Washington, Scott Lee of Texas A&M University and Gerald Martin of American University, found that American firms facing bribery-enforcement action lose 9% of their market value, mostly because they have other problems with misrepresentation and fraud.”).

reflection of progress in reducing the willingness to make such payments from earlier and presumably higher levels? The efforts of the pharmaceutical industry to keep abreast of and even ahead of the legal curve point to the latter, in our opinion. Nonetheless, international sentiment seems to be moving in the direction of more regulation of even the smallest of payments that might be perceived to be facilitating business.

E. The International Direction on the Issue of Facilitation Payments

A survey conducted of thirty-nine signatory countries of the OECD Convention found that eleven of the thirty-nine had adopted the facilitation exception including Australia, Austria, Canada, Greece, South Korea, New Zealand, Slovak Republic, South Africa, Spain, Switzerland, and the United States.¹³⁴ Countries that in theory do not allow such payments include Argentina, Belgium, Brazil, Bulgaria, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Ireland, Israel, Italy, Japan, Luxembourg, Mexico, Netherlands, Norway, Poland, Portugal, Russia, Slovenia, Sweden, Turkey and the United Kingdom.¹³⁵ Yet, we know from the detailed discussion of the U.K. law that although theoretically not allowed, these instances will not be prosecuted they are not given for a corrupt purpose and are essentially a “grease payment.”¹³⁶

Similar to the US Physician Sunshine Act, France proposed a law that requires more disclosure of industry interactions with health care professionals and hospitals. In what has been called a “draconian” law,¹³⁷ the so-called French Sunshine Act mandates disclosure of anything of value starting in August 2012. The nature of “value” has not yet been defined, but an amount of approximately 150 Euros has been discussed.¹³⁸ Other European countries are considering enacting specific pharmaceutical industry disclosure mandates, while others still treat the issue as arising under their anti-bribery framework.¹³⁹

134. Andy Spaulding, *Facilitating Payments (De)mystified (Part II)*, FCPA BLOG (June 13, 2012), <http://www.fcpablog.com/blog/2012/6/13/facilitating-payments-demystified-part-ii.html>.

135. *Id.*

136. See OECD Anti-Bribery Convention, *supra* note 29, at Commentary Art.1, ¶ 9.

137. Declan Butler, *France Toughens Conflict Rules*, NATURE (Oct. 11, 2011), available at <http://www.nature.com/news/2011/111011/full/478169a.html>.

138. *France: A “Sunshine Act” for the Healthcare Industry*, COVINGTON & BURLING LLP (Jan. 20, 2012), <http://www.cov.com/files/Publication/a9966e5e-0fa3-467a-b78c-428aaa262fd3/Presentation/PublicationAttachment/79d4ac88-ac3f-4841-a2c1-4a5f917b6ecf/France%20-%20A%20Sunshine%20Act%20for%20the%20Healthcare%20Industry.pdf>.

139. *Interactions Between Life Sciences Companies and Health Care Professionals: Can the French Sunshine Act Push Transparency So Far?*, BAKER & MCKENZIE LEGAL ALERT (Apr. 13, 2012), http://www.bakermckenzie.com/files/Publication/976c4652-1c6d-4fa6-adb8-f85705a23f05/Presentation/PublicationAttachment/d4893957-c26b-403c-97b5-0a6f93019cc9/al_paris_frenchsunshineact_apr12.pdf.

F. The Possibility of Change

The evolution of law and public opinion about bribery is an interesting one. When the FCPA was enacted in 1978, many thought it was laughable and would never be taken seriously. There was insignificant progress for twenty years, and then the OECD embraced the principles of the FCPA in the OECD Convention. This signaled a sea change in thought leaders' opinions about the evils of bribery and the possibility of eradicating it.¹⁴⁰ Yet just as drunk driving has evolved from inevitable fact of life to being a crime, world opinion has shifted toward eradicating bribery.¹⁴¹ It will increase the pressure on the activity and eventually push for a more rare violation of law in foreign countries. The following graphic illustrates the model of change.

140. For a review of the literature see generally Beverley Earle & Anita Cava, *Are Anti-Corruption Efforts Paying Off? International and National Measures in the Asia-Pacific Region and Their Impact on India and Multinational Corporations*, 31 U. HAW. L. REV. 59, 66-70 & nn. 38-47 (2008) (discussing and citing, inter alia, KIMBERLY ANN ELLIOT, *CORRUPTION AND THE GLOBAL ECONOMY* (Kimberly Ann Elliot ed., 1997); INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION (Susan Rose-Ackerman, ed., 2006); JOHN T. NOONAN, *BRIBES* (1984); SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* (1999); SUSAN ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY* (1978); Beverley Earle, *The United States' Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument*, 14 DICK. J. INT'L L. 207 (1996); Beverley H. Earle, *Foreign Corrupt Practices Act Amendments: The Omnibus Trade and Competitiveness Act's Focus on Improving Investment Opportunities*, 37 CLEV. ST. L. REV. 549 (1989); Paolo Mauro, *Corruption and Growth*, 110 Q. J. ECON. 681 (1995); Susan Rose-Ackerman, *Political Economy of Corruption*, in *CORRUPTION AND THE GLOBAL ECONOMY* 31-60 (Kimberly Ann Elliot ed., 1996); Andrei Schleifer & Robert Vishny, *Corruption*, 108 Q. J. ECON. 599 (1993); Claire Taylor, *Bribery in Athenian Politics Part II: Ancient Reaction and Perceptions*, 48 GREECE & ROME 154 (2001); *Bribonomics: Does Corruption Hinder Economic Growth?*, *ECONOMIST*, Mar. 19, 1994).

141. Beverley Earle & Anita Cava, *Are Anti-Corruption Efforts Paying Off? International and National Measures in the Asia-Pacific Region and Their Impact on India and Multinational Corporations*, 31 U. HAW. L. REV. 59, 85 (2008) (making the analogy to drunk driving).

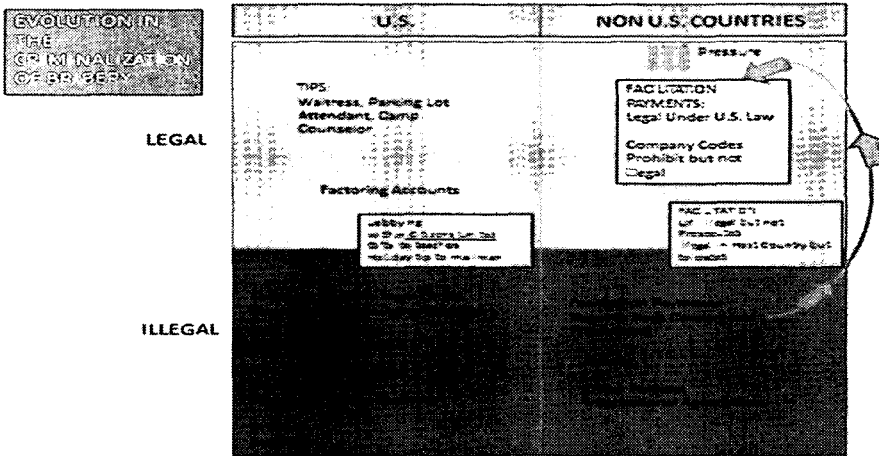


Figure 2 - Evolution in the Criminalization of Bribery

Alan Dershowitz, the Felix Frankfurter Professor of Law at Harvard Law School, has cautioned that:

[t]he criminal law should be limited to... ‘Hamlet decisions.’ Before a person is charged with serious crime, the government should have to prove beyond a reasonable doubt that the defendant actually engaged in a ‘to be or not to be’ decision – to be a felon or not to be a felon, to step over a clear line that separates criminality from sin.¹⁴²

He further reminds us that criminalizing conduct that is vague and not well understood serves to undermine the basis of our republic. Yet as the court in *United States v. Kay*¹⁴³ stated, persons prosecuted for violation of the FCPA only needed to know “generally that their actions were

142. Alan Dershowitz, *Edwards Jury Got It Exactly Right*, CNN OPINION (May 31, 2012), http://articles.cnn.com/2012-05-31/opinion/opinion_dershowitz-edwards-verdict_1_reasonable-doubt-criminal-case-criminal-justice-system?_s=PM:OPINION.

There is no reason to believe that John Edwards ever made that decision because the law governing his conduct is vague, subjective and unclear in the extreme. At the time of the founding of our Republic there was a common expression that said that a criminal law must be so clear that a potential defendant ‘can read it while running and still understand it.’ The law under which Edwards was tried was so unclear that a bevy of lawyers could not understand it while sitting and studying it for hours . . . If Congress wants to criminalize what Edwards was accused of doing, let it enact a clear law that gives fair warning to all politicians that they may not accept any gifts regardless of intent. I doubt Congress will pass such a law.

143. *United States v. Kay*, 200 F. Supp. 2d 681 (S.D. Tex. 2001), *aff’d following remand*, 513 F.3d 432 (5th Cir. 2007).

illegal.”¹⁴⁴ They did not have to possess specific knowledge about the statute. Given that the FCPA has been in place for thirty-four years, it is fair to say that people understand that bribery is unlawful. Yet, even some people can be mistaken about what constitutes a permissible facilitation payment and whether their decisions qualify for “allowed” promotional expenses. Thus, a number of proposals to correct perceived errors of the legislation have been proffered.

III. EXAMINING CURRENT PROPOSALS FOR FCPA REFORM

Michael B. Mukasey, a partner at Debevoise & Plimpton, LLP and a former federal judge and United States Attorney General, speaks for a group of business people who have raised concerns about the current FCPA enforcement environment¹⁴⁵ and makes the following argument:

In our view, these expansive interpretations and aggressive FCPA enforcement actions stray far from the FCPA's basic purpose: preventing corruption and bribery. It is largely pointless to punish corporations whose executives, for example, had no knowledge of misconduct occurring at a subsidiary, perhaps prior to its acquisition, or that had programs and policies designed to prevent the very conduct that took place. Such enforcement actions do not deter because a corporation cannot be deterred from doing something it did not set out to do in the first place. Instead, such enforcement punishes companies' management for not correctly anticipating the prosecutor's latest theory about the reach of the FCPA. This places U.S. corporations at unease by subjecting them to the possibility of large, unforeseen civil and criminal penalties for conduct they are often powerless to define and therefore powerless to prevent.¹⁴⁶

We believe, however, that these problems could be mitigated, and the FCPA strengthened, by few relatively simple fixes. Because the FCPA will never be heavily litigated—thus depriving the courts of the opportunity to clarify its murky text—Congress must speak clearly about

144. *Kay*, 513 F.3d at 446–51. See also *Client Alert: United States Supreme Court Denies Certiorari in Controversial Foreign Corrupt Practices Act Case: Expansive Enforcement of the FCPA Likely to Continue*, CHADBOURNE & PARKE LLP, Oct. 13, 2008, <http://www.chadbourne.com/clientalerts/2008/fcpa/>.

145. Mukasey & Dunlop, *supra* note 68, at 31.

146. *Id.*

what conduct does and does not violate the FCPA.¹⁴⁷

He proposes six changes to the statute, including adding a “compliance defense,” “[c]larify[ing] the meaning of ‘foreign official,’” “[i]mprov[ing] the procedures for guidance and advisory opinions from [the] DOJ,” “[l]imit[ing] criminal successor liability for acquiring companies,” “[a]dd[ing] a ‘willfulness’ requirement for corporate criminal liability,” and “limit[ing] a company’s liability for acts of a subsidiary not known to the parent.”¹⁴⁸

Representative James F. Sensenbrenner of Wisconsin, the chair of the Subcommittee on Crime Terrorism and Homeland Security, opened hearings on the FCPA on June 14, 2011 by stating:

America is suffering through a severe and prolonged economic downturn. Businesses that are trying to comply with the FCPA assert that the law is being enforced in a vague and impenetrable manner. Because the risks of prosecution are so great, with million-dollar fines and possible prison sentences, companies would rather settle with the Justice Department than go to court.¹⁴⁹

Both sides of the debate voiced strong opinions at the hearing. Not surprisingly, Greg Andres, Deputy Assistant Attorney General of the DOJ’s Criminal Division, defended the existing statute and prosecutions for violations of its prohibitions. He argued that the department provided sufficient guidance via the *Opinion Procedures* and touted that process as “unique in U.S. criminal law.”¹⁵⁰ His written statement offered a detailed listing of recent enforcement actions and he specifically pointed out that, contrary to the claim that the term “foreign official” is not clear, there are five advisory opinions addressing the definition of that term.¹⁵¹

Furthermore, Judge Mukasey raised the business argument in support of in comments supporting his six proposed amendments to the FCPA:

The system now in place has conflicting incentives. On the one hand, an effective compliance program can hold out a

147. *Id.*

148. *Id.*

149. *Foreign Corrupt Practices Act: Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary of the House of Representatives*, 112 Cong. 2 (2011) (statement of Rep. and Chairman Sensenbrenner Jr.).

150. *Id.* at 7 (testimony of Greg Andres, Deputy Assistant Attorney General, Criminal Division, U.S. Dep’t of Justice).

151. *Id.* at 17 (written statement of Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, U.S. Dep’t of Justice).

qualified promise of indeterminate benefit should a violation occur and be disclosed. On the other hand, if all that can be achieved is a qualified and indeterminate benefit, there is a perverse incentive not to be too aggressive lest wrongdoing be discovered, and there is a resulting tendency of standards to sink to the level of the lowest common denominator, or at best something that is only a slight improvement over it. This Catch-22 policy doesn't really serve anyone's interest.¹⁵²

He made reference to Title VII of the Civil Rights Act of 1964, which allows a compliance defense, underlining its importance as an incentive for companies to work to prevent this problem.¹⁵³

George Terwilliger, a partner at White & Case, LLP also testified, stating:

At the outset, I would like to put my further remarks in this context. I favor the fair enforcement of sensible anticorruption statutes because corrupt markets cannot be free markets. In international commerce specifically, a level playing field is essential to free-market competition, and I believe American businesses are well positioned to succeed in free and fair competition

But there is another less desirable effect that results from the combination of greatly stepped up enforcement combined with the uncertainty of the precise legal parameters of conduct subject to the requirements and proscriptions of this statute. That hidden effect is the cost imposed on our economic growth when companies forgo business opportunity out of concern for FCPA compliance risk. This hurts the creation of jobs and the ability of U.S. companies to compete with companies elsewhere that do not have to concern themselves with uncertainties of the terms of requirements of the FCPA.¹⁵⁴

Adding to the chorus of concern, Shana-Tara Regon, Director of White Collar Crime Policy, National Association of Criminal Defense Lawyers, also addressed the committee, stating:

152. *Id.* at 19 (testimony of the Honorable Michael Mukasey, former Attorney General, Partner, Debevoise & Plimpton LLP).

153. *Id.* at 19.

154. *Id.* at 37 (testimony of George J. Terwilliger, III, Partner, White & Case).

Because there has been so little judicial scrutiny of FCPA enforcement theories, right now the FCPA essentially means whatever the DOJ and SEC says it means.

Significantly, DOJ has been allowed to use the law as if it were virtually a strict liability statute, meaning that actual knowledge of wrongdoing does not need to be proved. Such an application is inconsistent with notions of fundamental fairness. In addition, because the reach of the FCPA is so vast and its provisions so amorphous, DOJ now oversees and regulates virtually all American companies and individuals seeking to do business abroad in ways that those who created the FCPA never could have envisioned.¹⁵⁵

She noted that although Deputy Assistant Attorney General Andres said that they would not go after “de minimus activity,” “[w]e need more clarity in the law.”¹⁵⁶ In her written comments, Director Regon further stated:

Defining broad categories of conduct as criminal will not eliminate all wrongdoing and criminalizing vast swaths of activity will not make America a better place. Indeed, for the first 100 years of our history, we had no federal prisons (except to house soldiers) and we started off with only three federal crimes—treason, piracy and counterfeiting. Now we have over 4,450 federal criminal laws on the books plus so many additional criminal provisions hidden in the federal regulatory scheme that no one has yet been able to count them. The average American is likely unaware of most of the criminal laws that could subject him or her to prosecution by the government. Many federal criminal statutes are duplicative of state criminal laws, and many more are duplicative of each other. Further, these federal laws are sometimes written broadly, with vague terms, and supported by questionable constitutional authority.

The FCPA is emblematic of the serious problem of over-criminalization. While the FCPA properly seeks to prevent and redress serious misconduct, its language and

155. *Id.* at 46 (testimony of Shana-Tara Regon, Director, White Collar Crime Policy, National Association of Criminal Defense Lawyers).

156. *Id.* at 47.

application have led to unintended consequences [W]e join many other organizations, on both the left and the right in the call for some much-needed commonsense reform in this area, particularly reforms that will strengthen the mens rea requirements of the statute and bring clarity, uniformity and fairness to its enforcement.¹⁵⁷

Deputy Assistant Attorney General Andres asserted, "the Department of Justice has never prosecuted somebody for giving a cup coffee to a foreign official, a martini, two martinis, a lunch, a taxi ride, or anything like that. And it is not clear that those acts in and of themselves would evidence an intent to bribe somebody."¹⁵⁸ When asked then if he would object to excluding coverage over de minimis payment, Deputy Assistant Attorney General Andres replied: "I would, for a few reasons. One small de minimis payment paid over time on multiple occasions can amount to a more significant bribe if, in fact, there is an intent to bribe. I think the relevant consideration is not the amount of the bribe but rather the intent"¹⁵⁹

However, Deputy Assistant Attorney General Andres' dismissal of this problem for companies was undercut by Judge Mukasey, who stated:

The taxi ride example is for real. It occurred at a company in which somebody worked overtime, was given a taxi because the trains had stopped running, and then some nervous counsel found out about it, reported it to the Justice Department and was told that it probably wasn't a violation but to go back and investigate the entire circumstances of the relationship with that company and come up with a result of that investigation to determine that no illegal payments had been made. A couple of hundred thousand dollars later it was determined that, in fact, there had been no violation.¹⁶⁰

This underscores many businesses' viewpoint of the cost of this broad

157. *Id.* at 47 & 53 (written testimony of Shana-Tara Regon, Director, White Collar Crime Policy, National Association of Criminal Defense Lawyers) (citations omitted); *cf.* HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009) (discussing the problem of over-criminalization).

158. *Foreign Corrupt Practices Act: Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary of the House of Representatives*, 112 Cong. 56 (2011) (testimony of Greg Andres, Deputy Assistant Attorney General, Criminal Division, U.S. Dep't of Justice, in response to a question by Rep. Robert Bobby Scott of Virginia).

159. *Id.*

160. *Id.* at 56-57 (testimony of the Hon. Michael Mukasey, former Attorney General, Partner, Debevoise & Plimpton LLP).

legislation on the bottom line.

Representative Conyers illustrated the opposite viewpoint in the hearing. He rebutted that there is over-criminalization by the DOJ or a problem with vagueness. He disputed that there had been a lot of cases, noting that there have been only 140 cases in ten years.¹⁶¹

Deputy Assistant Attorney General Andres confirmed that there were guiding sources already available for companies.¹⁶² Although seemingly contradicting Representative Conyers, Deputy Assistant Attorney General Andres suggested that there are more prosecutions now because: (1) email has made the world smaller and information moves more quickly; and 2) because Sarbanes-Oxley requires CEOs to verify financial statements and in so doing, these CEOs recognized their problems with bribery which resulted in self-reporting and consequently more enforcement.¹⁶³ Deputy Assistant Attorney General Andres stated:

Just so I am clear, with respect to whether or not we can, there are within the statute exceptions for reasonable and bona fide promotional expenses. There are also other exceptions that cover legitimate business expenses. So if a cup of coffee is given to a foreign official without an intent to bribe that individual, we would not be able to bring that case because there is not the requisite intent to bribe.¹⁶⁴

However, the problem with this analysis is, how does a corporation have an intent to bribe?¹⁶⁵

A number of parties also submitted statements to the hearing committee but did not testify. Global Witness, a non-governmental organization, reiterated the need to curb bribery by stating, "In short, for the U.S. to roll back any of its ground-breaking anti-bribery law at this critical juncture when the rest of the world is finally starting to match its standard, would be an abdication of its leadership role on this important issue."¹⁶⁶

Karen Lissakers, Director of Revenue Watch Institute, concurred that the Chamber of Commerce has picked an odd time "to assault" the

161. *Id.* at 60 (testimony of the Hon. John Conyers, Jr., a Representative in Congress from the State of Michigan and Ranking Member, Committee on the Judiciary).

162. *Id.* at 62 (testimony of Greg Andres, Deputy Assistant Attorney General, Criminal Division, U.S. Dep't of Justice).

163. *Id.* at 63.

164. *Id.* at 64.

165. *Cf. id.* at 64 (testimony of Mr. Terwilliger, Partner, White & Case LLP) ("The problem with a willfulness requirement for corporations is just what General Mukasey mentioned. Corporations can't think; only individuals can think. And therefore any ascribing of an intent to a corporation is really artificial because the corporation itself is artificial.")

166. *Id.* at 80 (written testimony of Global Witness).

FCPA.¹⁶⁷ She continued: “Congress should reject any effort to weaken the US anti-bribery statute and instead continue to advance policies that promote honest business and transparent and accountable governance around the world.”¹⁶⁸

CREW, Citizens for Responsibility and Ethics in Washington, D.C., argued that Congress should “protect and maintain the Foreign Corrupt Practices Act,” and that a “materiality requirement ignores the reality of how bribery works.”¹⁶⁹ They continued:

Congress understood when enacting the FCPA that corruption often takes the form of small “gifts” or payments made repeatedly over time. A stream of benefits is often part of a larger scheme. Moreover, a review of enforcement action shows small gifts made over time have never been the primary basis for FCPA actions, which instead focus on larger payments.¹⁷⁰

The Open Society Foundation agreed: The “U.S. should focus on encouraging worldwide enforcement, not crippling a statute that has been the model for international anti-bribery legislation.”¹⁷¹ In 2011, the Foundation also issued a paper written by Professors David Kennedy of Harvard University and Dan Danielsen of Northeastern University School of Law titled, “Busting Bribery: Sustaining the Global Momentum of the FCPA” that responded to the proposals of amendments to the FCPA included in the document issued in October 2010 by the U.S. Chamber of Commerce Institute for Legal Reform, entitled “Restoring Balance.”¹⁷²

[T]he Chamber proposes to change the Act in ways that would substantially undermine the possibility for successful enforcement of America's anti-bribery commitments. The Chamber's proposed amendments would also set back decades of progress in the global struggle against

167. *Id.* at 81 (written testimony of Karin Lissakers, Director, Revenue Watch Institute).

168. *Id.* at 83.

169. *Id.* at 86 (written testimony of Citizens for Responsibility and Ethics in Washington).

170. *Id.*

171. *Id.* at 87 (written testimony of The Open Society Foundation).

172. David Kennedy & Dan Danielsen, *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act*, OPEN SOCIETY FOUNDATIONS, Sept. 2011, <http://www.opensocietyfoundations.org/sites/default/files/Busting%2520Bribery2011September.pdf> [hereinafter *Busting Bribery*] (responding to *Restoring the Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, Oct. 2011, http://www.instituteforlegalreform.com/sites/default/files/restoringbalance_fcpc.pdf).

corruption¹⁷³

In addition, the Chamber's proposals would needlessly hamstring what has been a judicious and increasingly effective use of prosecutorial discretion to encourage compliance and isolate the most egregious violations.¹⁷⁴

They dispute that prosecutorial overreach is a problem and they dismiss it as being speculative.

This is not the moment for the United States to abandon its decades-long leadership in the struggle to bend the culture of global business away from scourge of corruption. Widespread corruption abroad imposes enormous costs on American business, damages the global business environment and undermines the integrity and effectiveness of governments. A culture of corruption raises the costs of penetrating foreign markets and undermines predictability and business confidence. It imposes particular hardships on small and medium sized American enterprises seeking to participate in the global economy. Fighting these obstacles to American business has required a long-term commitment by the U.S. government and by American companies to change the climate for global commercial activity and the culture of business-government relations in countries across the world.¹⁷⁵

Professors Kennedy and Danielson conclude:

As the global campaign turns toward strengthened enforcement and the administrative routinization of anti-corruption commitments, it will be particularly important for American authorities, led by the DOJ and the SEC, to retain the traditional flexibility, their commitment to a level playing field, and their emphasis on private sector compliance and monitoring as the most effective tools in the battle against corruption. The Chamber's misleading rhetoric notwithstanding, the global trends are all good, the

173. *Busting Bribery*, *supra* note 173, at 5.

174. *Id.* at 6.

175. *Id.* at 8.

FCPA is working and new legislation is not necessary.¹⁷⁶

The dichotomy between the two sides is clear.

Subsequent to this hearing, the DOJ promised to issue clarifying guidelines in 2012.¹⁷⁷ To date, however, none have been issued.

The Chamber of Commerce and thirty-three other groups, including the American Institute of Certified Public Accountants, wrote a letter in February of 2012, suggesting items the DOJ might incorporate into any guidelines:¹⁷⁸

[W]e believe that modest legislative revisions and clarifications of the FCPA remain the best option for providing the certainty needed by the regulated community. Nevertheless, the formal guidance that we understand you will provide in 2012 should carry sufficient precedential weight to be reliable and meaningful for businesses seeking to comply with the FCPA.¹⁷⁹

The letter focused on several items including:

1. The Definition of “Foreign Official” and “Instrumentality”¹⁸⁰: Noting that these terms have been defined “broadly” but not in a “uniform” way, and citing the benchmark *Lindsey Manufacturing* case, the letter points out:

Courts have treated the issue as multi-faceted and highly fact specific, holding recently that Congress did not intend either to include or to exclude *all* state-owned enterprises from the ambit of the FCPA, and that whether a state-owned enterprise qualifies as an “instrumentality” is a question of fact for the jury to decide based upon a variety of factors, including the level of investment in the entity by a foreign state, the foreign state’s

176. *Id.* at 52.

177. Lanny Breuer, *Assistant Attorney General Lanny A. Breuer Speaks at the 26th National Conference on the Foreign Corrupt Practices Act*, U.S. DEP’T OF JUSTICE, Nov. 8, 2011, <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html>.

178. Letter to the Honorable Lanny A. Breuer (Assistant Att’y Gen., Criminal Division, Dep’t of Justice) & Robert Khuzami (Director of Enforcement, U.S. Securities & Exchange Comm’n) from the U.S. Chamber of Commerce et al., Feb. 21, 2012, http://www.instituteforlegalreform.com/sites/default/files/FCPA%20Guidance%20Letter-2-21-12_4_.pdf [hereinafter Letter to the Honorable Lanny A. Breuer].

179. *Id.* at 10.

180. *Id.* at 2.

characterization of the entity and its employees, the purpose of the entity's activities, the entity's obligations and privileges under the foreign state's law, the circumstances surrounding the entity's creation and the foreign state's extent of ownership of the entity.¹⁸¹

Consideration of Compliance Programs in Enforcement Decisions: Although the DOJ's *Principles of Federal Prosecution of Business Organizations* mentions "pre-existing compliance programs" and the SEC in the so-called *Seaboard* report mentions "factors," the Chamber believes these are not specific enough to be helpful.¹⁸² They are seeking more than a recitation of the elements of a good program.¹⁸³ The Chamber wants guidance that establishes "standards that businesses may adopt and incorporate as part of their compliance programs, and [that] identify the specific components that the Department and SEC consider to be essential to a robust FCPA compliance program."¹⁸⁴ This is difficult to quantify.

2. Parent-Subsidiary Liability: The Chamber argues that the SEC has taken a position, although not tested in court, that "a parent company can be liable for a subsidiary's violations of the anti-bribery provisions even when the subsidiary's improper acts were undertaken without the parent's knowledge, consent, assistance or approval"¹⁸⁵ This has caused consternation and no doubt adds to the costs of due diligence in acquisitions.¹⁸⁶

3. Successor Liability: The Chamber is concerned with *Opinion Release 08-02* and the implications for pre- and post-acquisition due diligence, which seemingly required extraordinary measures to avoid criminal prosecution.¹⁸⁷

4. De Minimis Gifts and Hospitality: The Chamber disputes the claim that the DOJ does not prosecute de minimis cases.¹⁸⁸ They argue for specific examples akin to the *Guidance* offered as part of the UKBA.¹⁸⁹

181. *Id.* (citing *United States v. Aguilar*, 831 F. Supp. 2d 1180 (C.D. Cal. Feb. 28, 2011) ("Lindsey Manufacturing" case) and *United States v. Carson*, No. 8:09-cr-00077-JVS (C.D. Cal. Feb. 21, 2011)).

182. *Id.* at 4.

183. *Id.*

184. Letter to the Honorable Lanny A. Breuer, *supra* note 178.

185. *Id.* at 6.

186. *Id.*

187. *Id.* at 6.

188. *Id.* at 7.

189. *Id.*

5. *Mens Rea* Standard for Corporate Criminal Liability: Is it possible for a Company to be guilty of a crime even when no one in the company is charged and when no one is “in authority”?¹⁹⁰

6. Declination Decisions: If the DOJ made known their decisions about declining to prosecute albeit without identifying company information, this could be helpful for companies in the same way that *Opinion Releases* are (at least theoretically) helpful except that there are only fifty-six of these. If every declination summary were published, companies could follow trends.¹⁹¹

7. Other Issues: These include situations involving relatives of a government official, charity organizations' ties with officials, and apprentice programs to a customer where a government has an interest.¹⁹²

Based upon the legislative hearing in 2011, the DOJ did not seem receptive to any of these matters. Yet the *Guidance* has assuaged some fears that the UK law will be applied in a way to entrap legitimate and law abiding companies, so a similar interpretative statement from the DOJ would lessen the anxiety that unnecessary dollars will be spent documenting what a company has lawfully done.

IV. A SUGGESTED PROPOSAL

Amending the FCPA would be a fruitless and quixotic exercise in this political climate. Neither party would waste political capital to do this for such an unclear goal of somehow “improving” the statute.

Instead, the DOJ has a clear opportunity to issue comprehensive guidelines embracing a “rule of reason” in enforcement of the FCPA and clarifying what would not trigger an enforcement action. The UKBA has been hailed as a much tougher law in part because it does not allow “facilitation payments” and has a broader reach of application. Yet its small enforcement budget has rendered it underwhelming in all but the apprehension it has generated in the business community and the business it has created for compliance consultants. Guidance need not go as far as the Chamber of Commerce has suggested but could be effective even if more limited. We suggest simply the following:

- Reiterate and clarify the legality of facilitation payments.
- This is a transitional strategy. Once enforcement picks up in other countries, companies will avoid these types of payments as well. Almost a majority of US companies already have chosen not to permit these legal payments.¹⁹³ The financial limits of these payments should

190. Letter to the Honorable Lanny A. Breuer, *supra* note 178.

191. *Id.* at 9.

192. *Id.* at 9-10

193. *Cloudy with a Chance of Prosecution?*, *supra* note 69. See also *India's Chief*

be delineated and a process to record and monitor them should be set in place. (See Figure 2, page 143).

- Revise the Opinion Release Procedure.
- The Procedure should be revised to make it more inviting to companies to use. It could be made anonymous like HIV testing, or attorneys could make the request based upon an undisclosed client similar to the process for whistleblower complaints under the Dodd-Frank Act.¹⁹⁴ The time to answer a request should also be shortened so that companies would be encouraged to use the process. Lastly, there should be a formal recognition and credit of the attempt to secure guidance in the Sentencing Guidelines unless there was a mischaracterization or a failure to follow what was outlined in the Opinion query.
- Clarify the affirmative defense of entertainment and travel promotional expense by way of example to both developing countries and developed countries. Would dinner at Lutece and Yankees ticket be allowed? Olympic tickets? A week's worth of Olympic tickets?
- Publish "Declination" decisions thereby giving guidance on what was deemed to not trigger prosecution. Currently these decisions are reported anecdotally in the paper and not available for easy review.
- Clarify who is a "foreign official" through a list of examples culled from the *Opinion Procedure* letters as well as by incorporating answers to questions raised in the hearings and letter from the Chamber to the DOJ.
- Make clear that a compliance program with reporting could be used as a defense in any case and used to show the company's genuine efforts to address problems. Does it make sense for companies to focus so many hours on compliance issues (more than 100,000) given the economic slowdown?
- Support best practices in industry. For example, let companies support conferences for doctors who may also be foreign officials attending a conference for medical continuing education.

CONCLUSION

We do not condone corruption and do not in any way advocate abandoning the push to eradicate corruption and bribery on a global level. One need not look far to identify examples of harm caused by awarding

Economic Advisor Wants to Legalise Some Kinds of Bribe Giving, ECONOMIST, May 7, 2011, at 80, available at <http://www.economist.com/node/18652037> (discussing Kaushik Basu's idea of making "harassment bribes" where you have to pay "to get things to which [you are] legally entitled" and granting immunity and encouraging complaint filing).

194. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

contracts to the highest briber as opposed to the entity most qualified to provide the good or the service. In a recent examination of the effects of bribing on business, Professor Elizabeth Spahn suggests the following as examples of real harm to real people that are likely caused by bribery:

Fifty-one people died from contaminated toothpaste manufactured abroad. Fake baby formula killed dozens of infants. Lead and other toxins are found in children's toys manufactured abroad. Dogs and cats died after consuming pet food poisoned with melamine. Vast amounts of imported drywall used in residential home construction in America turned out to be so contaminated with toxins that the homes are literally uninhabitable.¹⁹⁵

Other experts concur. In a dramatic talk, Dennis McInerney, Chief of the Fraud Section of the DOJ, pointed to a singed "baby warmer" and alluded to the burns and scarring suffered by premature babies in an unnamed developing country who were placed in defective incubators purchased by corrupt hospital administrators.¹⁹⁶

Professor Philip Nichols outlines more structural harms caused by corruption based on bribery: weaker governments that make poor decisions, a distorted decision-making process, economic fragility, weakened connection between the government and its people and decreased quality of life.¹⁹⁷ It is generally agreed that a high incidence of bribery is associated with low economic growth,¹⁹⁸ and some suggest that in fact bribes are like "sand in the wheels"¹⁹⁹ of business. These and other urgent public policy and human safety concerns are at stake in considering the issue of bribery.²⁰⁰

195. Elizabeth Spahn, *Nobody Gets Hurt?*, 41 GEO. J. INT'L L. 861, 893–94 (2010) (citations omitted) (offering a thoughtful analysis of the harms generated by bribes in the global marketplace).

196. Dennis McInerney, Chief, Dep't of Justice Fraud Section, Luncheon Speaker at The Third Annual National Institute on the Foreign Corrupt Practices Act, AMERICAN BAR ASSOCIATION, Washington, D.C. (Oct. 21, 2010) (notes on file with authors).

197. Philip M. Nichols, *The Psychic Costs of Violating Corruption Laws*, 45 VAND. J. TRANSNAT'L L. 145, 156–66 (2012) (study of bribery based on discussions about bribery with relevant actors in Singapore and Malaysia).

198. Spahn, *supra* note 195, at 870–71 (citations omitted).

199. See Pierre-Guillaume Meon & Khalid Sekkat, *Does Corruption Grease or Sand the Wheels of Growth?*, 122 PUBLIC CHOICE 69 (2005) (concluding that corruption has a negative impact on both growth and investment).

200. Robert Amaee, Head of the Anti-Corruption and Proceeds of Crime Units at the Serious Fraud Office (U.K.), Speech at World Bribery and Corruption Compliance Forum (Sept. 14, 2010), available at <http://www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2010/world-bribery-and-corruption-compliance-forum.aspx>.

Yet, global reform need not require demonizing companies trying to make a legitimate profit in the still-imperfect global marketplace. Business should not be branded as the enemy in the current environment; rather, government needs to work with the private sector to clarify the FCPA legislation. The law's open invitation to work within existing systems as necessary to accomplish the business need leaves enormous discretion to the criminal division of the DOJ, which has proved to be a rather ineffective and inefficient arbiter of late. We can agree that millions of dollars in government resources should neither be used pursuing de minimis issues nor for branding individuals and companies as criminal for making subjective decisions with which the government disagrees.²⁰¹

Given that statutory change is unrealistic, the United States might be wise to borrow the United Kingdom's two-fold strategy of issuing "guidance" and focusing on the most serious cases while (presumably) giving credit for genuine efforts made by businesses to restrict improper payments. As we have pointed out, the companies most able to afford it have adopted the policy of forbidding any payments at all. According to one industry executive, these policies are taken very seriously: a tip for a delivery to the home is permissible while any person making any delivery to the corporate office must walk away empty-handed. This is a global policy applicable to the US public servant, the letter carrier, as strongly as to the foreign public servant charged with arranging for goods to be transferred on the dock.²⁰² Another example of the move toward zero tolerance is evident in pharmaceutical giant AstraZeneca's policy on marketing to healthcare professionals unveiled in April of 2011, which aims to establish "global standards of ethical sales and marketing practice"²⁰³ and to support those efforts through training, reporting, and compliance efforts.²⁰⁴ With respect to marketing to physicians, the new policy is that the company will "no longer pay for delegate registration, accommodation and other associated costs for healthcare professionals or other external people to attend meetings We only cover travel costs to local meetings and conferences where the cost is minimal."²⁰⁵ Creative means to bring the

201. Cf. David Zucchino, *Closing Arguments in John Edwards Trial*, L.A. TIMES, May, 18, 2012, available at <http://articles.latimes.com/2012/may/18/nation/la-na-john-edwards-20120518> (quoting the former lead lawyer for Senator John Edwards: "This is a case that should define the difference between someone committing a wrong and committing a crime . . . the difference between a sin and a felony"; Edwards was found not guilty on one charge and there was a hung jury on the other charges).

202. Interview with C-level compliance officer at a major pharmaceutical company (on file with authors).

203. *Sales and Marketing Practice*, ASTRAZENECA, <http://www.astrazeneca.com/Responsibility/Sales-and-Marketing-Practice> (last visited Feb. 15, 2013).

204. *Id.*

205. *Marketing to Healthcare Professionals*, ASTRAZENECA, <http://www.astrazeneca.com/Responsibility/Sales-and-Marketing-Practice/Marketing-to-healthcare-professionals> (last visited

education to physicians otherwise unable to attend educational conferences are being explored, including providing video and podcast links on a limited basis.²⁰⁶

The more serious issue is the obstacles faced by the small- and medium-sized businesses without the resources to adopt and enforce blanket prohibitions. In these cases, the guidance and clarity together with recognition for genuine efforts may offer a balance to the uneven scale of justice. Given that any facilitation payments as well as promotion and hospitality payments must be recorded as such, proactive emphasis on accurate record keeping would serve to incrementally move the needle toward creating a more transparent environment. The pharmaceutical industry's recent emphasis on public disclosure of all payment, reached through both internal and external pressure, might serve as a model for other business transactions.

In the final analysis, it might be the court of public opinion that finally decides when a bribe is not a bribe.²⁰⁷

POSTSCRIPT

In November 2012, the Department of Justice issued the long promised "Resource Guide to the U.S. Foreign Corrupt Practices Act" (*Guide*).²⁰⁸ The purpose was to provide additional information to businesses and individuals on compliance with the FCPA. The DOJ stated:

[t]he Guide takes a multifaceted approach, setting forth in detail the statutory requirements while also providing insight into DOJ and SEC enforcement practices through hypotheticals, examples of enforcement actions and anonymized declinations, and summaries of applicable case law and DOJ opinion releases.²⁰⁹

While the *Guide* is not groundbreaking, it is useful because the DOJ and SEC attorneys, in this ninety page document with 418 footnotes, t,

Feb. 15, 2013).

206. *Id.*

207. *Cf. Roger Clemens Acquitted on All Charges in Perjury Trial*, CBS NEWS, June 18, 2012, http://www.cbsnews.com/8301-400_162-57455533/roger-clemens-acquitted-on-all-charges-in-perjury-trial/ (noting the jury's rejection of the prosecution's view of Clemens' actions as crimes); *SEC Adopts Rules to Establish Whistleblower Program*, SECURITIES & EXCHANGE COMM'N, May 25, 2011, <http://www.sec.gov/news/press/2011/2011-116.htm>.

208. *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, DEP'T OF JUSTICE / SEC. & EXCH. COMM'N, Nov. 14, 2012, <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf> [hereinafter *Guide*]; see also Press Release, *SEC and Justice Department Release FCPA Guide*, SEC. & EXCH. COMM'N, Nov. 14, 2012, <http://www.sec.gov/news/press/2012/2012-225.htm>.

209. Press Release, *supra* note 1.

bring together examples from recent prosecutions, plea bargains, opinion releases and cases. It could be a helpful compilation because the information is not easily accessed in one place and reflects the government's position at this time.

The *Guide* addresses the long expressed concern²¹⁰ that companies have to spend money defending giving a cup of coffee to a foreign official. The *Guide* states:

This is difficult to envision any scenario in which provision of cups of coffee, taxi fare, or company promotional items of nominal value would ever evidence corrupt intent, and neither DOJ nor SEC has ever pursued an investigation on the basis of such conduct. DOJ's and SEC's enforcement actions have focused on small payments and gifts only when they comprise part of a systemic or longstanding cause of conduct that evidences a schema to corruptly pay foreign officials to obtain or retain business. These assessments are necessarily fact specific.²¹¹

An example of how this *Guide* may be helpful is in the discussion under the heading of "Cash" in Section 2 under the Anti-Bribery heading.²¹² Included in this section (without footnotes so it is unclear whether they are hypotheticals or from investigations) "\$12,000 . . . [for] visits to wineries and dinners . . . \$10,000 . . . on dinners and drinks, and entertainment . . . a trip to Italy for eight Iraqi government officials that consisted primarily of sightseeing and included \$1,000 in "pocket money" for each official . . . a trip to Paris for a government official and his wife . . . [with] touring . . . via a chauffeur-driven vehicle."²¹³

There are more specifically listed examples with footnotes of improper expenditures like two week trips for sightseeing and not training purposes and included \$500 to \$1000 a day in spending money.²¹⁴ Also in this section is a list of nine instances that could be helpful in distinguishing what are "reasonable and bonafide expenditures."²¹⁵ These nine instances are drawn from Opinion Releases. There has not been a great deal of analysis of Opinion Releases, excluding this paper, so one strength of the *Guide* is that its authors have tried to discern important rules of conduct

210. See *Foreign Corrupt Practices Act: Hearing*, *supra* note 157 (seemingly referencing a comment made by Deputy Assistant Attorney General Greg Andres stating that no one had been prosecuted for giving another a cup of coffee).

211. *Guide*, *supra* note 208, at 15.

212. *Id.* at 15-16.

213. *Id.* at 16.

214. *Id.*

215. *Id.* at 24.

from these Opinion Releases. As an example, the *Guide* lists “Do not select the particular officials . . . or else select them based on pre-determined, merit based criteria”²¹⁶ or “Do not . . . pay . . . cash”²¹⁷ and “Pay . . . directly to . . . vendors”²¹⁸

In Section 3 (the Accounting provisions), there is a list without footnotes that categorizes how bribes have been “mischaracterized,” essentially itemizing red flags.²¹⁹ The list includes: “Commissions or Royalties, Consulting Fees, Sales and Marketing Expenses, Scientific Incentives or Studies, Travel or Entertainment Expenses, Rebates or Discounts, after sales service Fees, Miscellaneous Expenses, petty Cash Withdrawals, Free Goods, Intercompany Accounts, Supplier/Vendor Payments, Write-offs, ‘Customs-Intervention’ Payments.”²²⁰ The *Guide* points out that without adequate controls, there are likely to be other consequences besides potential FCPA violations, noting “(c)ompanies with ineffective internal controls often face risks of embezzlement and self-dealing by employees, commercial bribery, export control problems, and violations of other U.S. and local laws.”²²¹

The use of case studies without footnotes although not precedent or controlling, does give counsel more illustrations of current DOJ analysis. There is a disclaimer in the beginning of the *Guide* providing that “it does not in any way limit the enforcement intentions or litigating positions of the U.S. Department of Justice, the U.S. Securities and Exchange Commission, or any other U.S. government agency.”²²² Yet if a company did exactly what was outlined in the *Guide*, it could be very helpful in negotiating with the DOJ or SEC. The “Compliance Program Case Study”²²³ makes reference to a financial institution’s robust compliance program and a declination of prosecution against that institution, which had not uncovered a Chinese official’s deception about his personal ownership of a SPV (special purpose vehicle). The section does offer a helpful examination of declinations by the DOJ and the SEC. - five public companies and one private company.²²⁴ Justification for declinations include a company’s active involvement in compliance, self-reporting, follow up to set the situation right, internal disciplinary action including termination of responsible employees and improved training and monitoring.²²⁵

216. *Id.*

217. *Guide*, *supra* note 208, at 24.

218. *Id.*

219. *Id.* at 39.

220. *Id.*

221. *Id.* at 40.

222. *Id.* at the second page of the document which is not numbered.

223. *Guide*, *supra* note 208, at 61.

224. *Id.* at 77-79.

225. *Id.*

The initial reaction to the *Guide* has been mixed.²²⁶ The long-anticipated document is not groundbreaking in providing any new DOJ interpretations, but it does offer some modest assistance by having information collected in one place.

An exegesis of the Guide would be an appropriate subject of another article.

226. Joe Palazzolo & Christopher M. Matthews, *Bribery Law Dos and Don'ts*, WALL ST. J., Nov. 15, 2012, at B1 (discussing the reactions of both individuals and various groups to the *Guide*).

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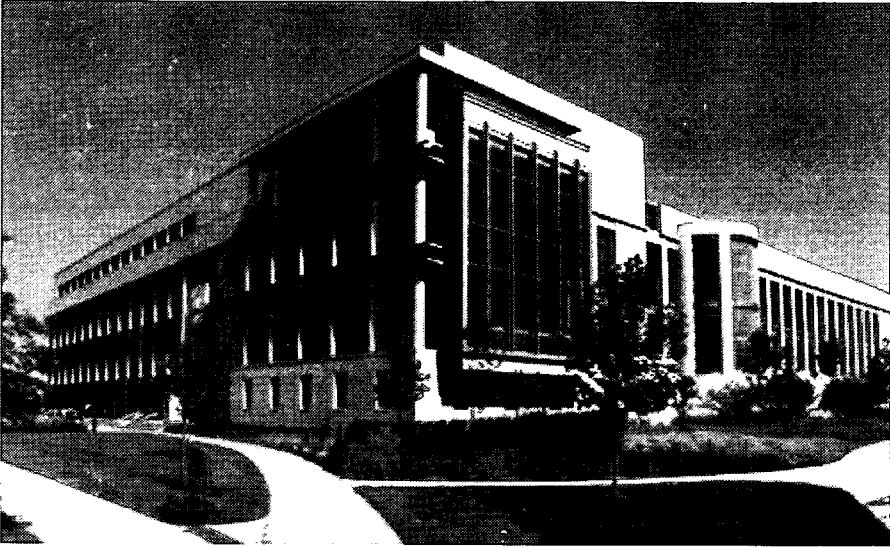
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