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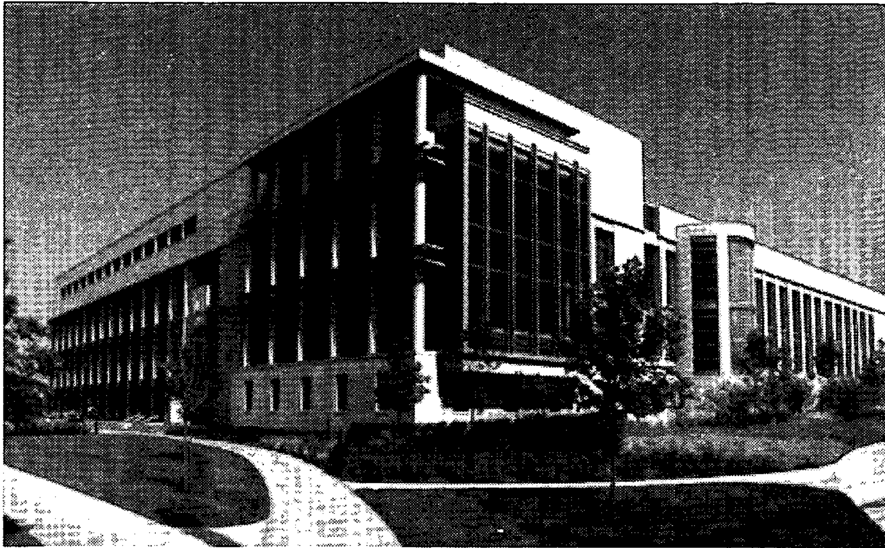

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IMPLEMENTING GLOBAL ANTI-BRIBERY NORMS: FROM THE FOREIGN CORRUPT PRACTICES ACT TO THE OECD ANTI-BRIBERY CONVENTION TO THE U.N. CONVENTION AGAINST CORRUPTION

Elizabeth K. Spahn*

The thirty-fifth anniversary of the US Foreign Corrupt Practices Act ("FCPA")[1] is an opportune time to note the very successful globalization of values embodied in this remarkable statute. When the FCPA was first enacted in 1978, the United States stood alone in criminalizing bribes paid to foreign officials to obtain business abroad. By 2012, thirty-nine major economic powers have ratified the OECD Anti-Bribery Convention[2] and 165 nations are states parties[3] to the United Nations Convention Against Corruption.[4]

I. EVOLVING NORMS INFLUENCING THE US FCPA

Centuries of colonial experience by Western powers were based on the premise that global trade required bribing local "black tyrants" as the former British Governor General of Bengal, circa 1787, indelicately put it.[5]

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1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78dd-1 *et seq.*) [hereinafter FCPA].

2. *See* Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, S. TREATY DOC. NO. 105-43, 37 I.L.M. 1, *available at* http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/38028044.pdf [hereinafter Convention on Combating Bribery]; ORG. FOR ECON. CO-OPERATION AND DEV., OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS: RATIFICATION STATUS AS OF APRIL 2012 (2012), *available at* http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/40272933.pdf.

3. *United Nations Convention Against Corruption: UNCAC Signature and Ratification Status*, UNITED NATIONS OFF. ON DRUGS AND CRIME, http://www.unodc.org/unodc/en/treaties/CAC/signatories.html (last visited Jan. 23, 2013).

4. *See* UNITED NATIONS OFF. ON DRUGS AND CRIME, UNITED NATIONS CONVENTION AGAINST CORRUPTION (2004), *available at* http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

5. Padideh Ala'i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption*, 33 VAND. J. TRANSNAT'L L. 877, 884-85 (2000). Professor Ala'i's primary source of legal history analyzes the British House of Commons impeachment and British House of Lords trial of the Governor-General of Bengal, Warren Hastings. *Id.* at 833. The use of racial stereotyping was endemic by those

Bribing home country officials was unacceptable in "civilized" Christian (white) Western nations during that era.[6] The racial, religious, and cultural double standard of that era was stark, and it is today unacceptable.[7]

The anti-corruption norm, of course, is deeply embedded in American culture from the time of our own colonization by the British Empire. Anti-corruption sentiment was an important impetus for the American Revolution itself. The infamous seditious libel trial of New York newspaper editor John Peter Zenger is often cited for its importance in developing First Amendment free speech and free press law, as well as for its importance in establishing jury trial as a fundamental American right.[8]

But it should never be forgotten that what triggered the arrest in the first place was John Peter Zenger publishing articles about the corruption of British colonial Governor of New York William Cosby.[9] Alexander Hamilton made his New York legal debut by successfully defending printer Zenger.[10] Free press advocates note that thirty-five percent of journalists

---

who defended the practice of bribery abroad as well as by anti-bribery reformers. Hastings specifically recruited "black tyrants" to run his operations in Bengal because, in Hastings' view, they were easier to control and intimidate than the licentious and debauched expatriated whites. *See id.*

6. Elizabeth Spahn, *International Bribery: The Moral Imperialism Critiques*, 18 MINN. J. INT'L L. 155, 189-90 (2009). [hereinafter Spahn, *Moral Imperialism Critiques*].

7. *Id.* at 190-91.

8. *See, e.g.*, KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 762-63 (17th ed. 2010).

9. The British Governor of New York, William Cosby, was "quick-tempered, haughty, unlettered, jealous, and above all greedy" according to his political opponents. *See* JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW-YORK WEEKLY JOURNAL 2 (Stanley Katz ed., Harvard Univ. Press 2d ed. 1972). Governor Cosby arrived in New York after removal from a post in Minorca where he had been accused of various crimes of extortion by the native aristocracy. *See* WILLIAM L. PUTNAM, JOHN PETER ZENGER AND THE FUNDAMENTAL FREEDOM 21-22 (1997) ("Colonial governors consisted 'most often of members of aristocratic families whose personal morals, or whose incompetence, were such that it was impossible to employ them nearer home.'"); *see also* Paul Finkelman, *Politics, the Press, and the Law: The Trial of John Peter Zenger*, *in* AMERICAN POLITICAL TRIALS 25, 26 (Michael R. Belknap ed., 1994) (describing Governor Cosby as "venal and overbearing").

Governor Cosby was embroiled in political disputes over the spoils of the governorship with Rip Van Dam of the Dutch New York clans, eventually alienating the powerful Morris family. Cosby stripped Lewis Morris of the prestigious Chief Justice position after Morris refused to render an opinion in favor of Cosby, thereby launching the political vendettas culminating in the trial of orphan printer and general good guy John Peter Zenger. *See* ALEXANDER, *supra*, at 3-6. My thanks to Barry Stearns for this research.

10. Zenger's lawyers James Alexander and William Smith were the leading lawyers in New York. They were disbarred after challenging the authority of two Supreme Court judges appointed by Governor Cosby. ALEXANDER, *supra* note 9, at 18-19. The scarcity of New York lawyers forced the Morris faction to look to Philadelphia lawyer Alexander Hamilton, reputedly the "best lawyer in America." *Id.* at 21. Bostonians of course believe John Adams to be the best lawyer of that era in America. We all agree that Alexander Hamilton was a very fine lawyer. Hamilton won the Zenger case, articulating what would eventually become

killed worldwide since 1992 are reporting on crime and corruption at the time of death.[11]

Yet despite evolving norms regarding racial and cultural double standards during the eras of decolonization and desegregation, bribing foreign officials to get business done abroad remained astonishingly commonplace. The impetus for change came about not from human rights or decolonization anti-imperialism activists but rather from a most unlikely source, a US Securities and Exchange Commission ("SEC") prosecutor.

Stanley Sporkin, an attorney and certified public accountant, was Director of Enforcement for the SEC during the Republican administrations of Presidents Nixon and Ford, known today as the Watergate era of the 1970s.[12] Puzzled by testimony regarding illegal campaign contributions by corporations to the Committee to Re-Elect President Nixon ("CREEP"), Sporkin began investigating how those illegal payments were recorded in the corporate books.[13] He discovered foreign as well as domestic payments.[14] "[O]ver 400 U.S. [sic] companies admitted making questionable or illegal payments in excess of $300 million to foreign government officials, politicians and political parties. This included 117 of the top Fortune 500 corporations."[15] While not everybody was bribing to obtain business abroad prior to the FCPA, it appeared that about twenty-four percent of Fortune 500 companies were admitted bribe payers prior to the enactment of the FCPA.

A. Morality and Efficient Free Market Competition

The early norms of the FCPA did not emphasize the racial or colonial double-standard problem. In the earliest phase, two normative values were articulated—morality and efficient free market competition. The 1977 House Report stated:

> It [bribery] is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. . . . [I]t rewards corruption instead of efficiency and puts pressure on ethical

American values of free speech and free press. Central among them is the right to criticize the overlords for corruption.

11. FRANK SMYTH, COMM. TO PROTECT JOURNALISTS, CPJ JOURNALIST SECURITY GUIDE: COVERING THE NEWS IN A DANGEROUS AND CHANGING WORLD 28 (2012), *available at* http://cpj.org/security/guide.pdf.

12. Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look At the Foreign Corrupt Practices Act on its Twentieth Birthday*, 18 NW. J. INT'L L. & BUS. 269, 271 (1998).

13. *Id.*

14. *Id.* at 272.

15. *Id.*

> enterprises to lower their standards or risk losing business . . . .[16]

The twin values, morality[17] and free market competition, provided the initial bases for enacting the FCPA. The economic impact on American business was perceived by many at that time as enhanced if bribery abroad could be eliminated.

Early economic research, led by Susan Rose-Ackerman of Yale, reflected an emerging view that bribery causes more economic harm than it fixes.[18] Allowing American businesses to compete on the merits, freed from the inefficient and unproductive expense of bribery, would enhance American competitiveness abroad.

B. Unfair Competition – Leveling the Playing Field

Although the 1977 House Report cited several examples of American businesses competing successfully abroad without bribing,[19] complaints from the business sector became more insistent. Led by General Electric's General Counsel, Fritz Heimann,[20] by 1988 the normative discussion

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16. H.R. REP. NO. 95-640, at 4-5 (1977).

17. Every legal system and every major religion condemns bribery, dating back to the Code of Hammurabi, which prohibits bribing judges. John Noonan in his landmark book *Bribes* leads the scholarship in this area. *See generally* JOHN T. NOONAN, BRIBES (1984); *see also* Spahn, *Moral Imperialism Critiques*, *supra* note 6.

18. *See generally* SUSAN ROSE ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY (1978). *See also* Joseph Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, *in* POLITICAL CORRUPTION: READINGS IN COMPARATIVE ANALYSIS 566-67 (Arnold J. Heidenheimer ed., 1978); Nathaniel H. Leff, *Economic Development through Bureaucratic Corruption*, 8(3) AM. BEHAV. SCIENTIST 8, 8-14 (1964); Colin Leys, *What is the Problem about Corruption?*, 3(2) J. OF MODERN AFR. STUD. 215, 215-30 (1965); James C. Scott, *The Analysis of Corruption in Developing Nations*, 11 COMP. STUD. IN SOC'Y & HIST. 315, 315-41 (1969). By the late 1970s, many leading economists rejected an earlier 1960's view that bribery 'greases the wheels' of commerce. Elizabeth Spahn, *Nobody Gets Hurt?*, 41 GEO. J. INT'L L. 861, 864-869 (2010) [hereinafter Spahn, *Nobody Gets Hurt?*] (providing an overview of research by economists on the negative impacts of bribery). Modern economists by 2013 as I write have largely reached a consensus that bribery causes very substantial macro and micro-economic harm, especially when the impact of bribery is viewed over a longer time period than a single or short-term transaction.

19. *See* H.R. REP. NO. 95-640, at 5 (1977); *see also* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, § 5003(d)(2)(A)(ii), 102 Stat. 1107 (1988) (requiring the President to report to Congress on actions that might be taken in the event that negotiations failed to "eliminate any competitive disadvantage of United States businesses").

20. *See* Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 J. LEGAL STUD. 141, 154 (2002); *see also* Barbara Crutchfield George et al., *The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes Toward Corruption in Business Transactions*, 37 AM. BUS. L.J. 485,

shifted to establishing a competitive "level playing field" for all business globally.[21]

Rather than abolish the FCPA when facing unfair bribe-based competition from abroad, influential US business leaders of the 1980s era sought to extend anti-bribery norms to their non-US competitors.[22] A cynic might view the effort to extend anti-corruption norms rather than reduce them as *realpolitik*, recognition that norms tend to be sticky; few politicians want to be caught voting to protect bribery.

However, the facts show that Mr. Heimann, General Electric's General Counsel—a leader in the US Chamber of Commerce—was also a founding member of the US chapter of Transparency International, the early leading non-governmental organization challenging global corruption.[23] His active work for Transparency International continued long after he retired from General Electric.[24] Apparently, some American business leaders of that era believed that global anti-corruption norms were in their best business interests as well as morally correct.[25]

Concern about unfair competition by non-US businesses permitted to bribe abroad (and in some cases to deduct foreign but of course not domestic bribes[26]) was a normative approach gaining momentum in the United States. This shift in emphasis might be viewed as the origins of effective globalization of FCPA norms of morality and efficient competitive free markets as described by the 1977 House Report.

The 1988 Amendments to the FCPA directed the US Executive Branch to negotiate with the Organization for Economic Cooperation and Development ("OECD")[27] for an anti-bribery convention binding all OECD member states.[28] (The OECD is a multi-lateral organization including

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496 (2000) (describing the various positions of European governments during the initial Bush administration negotiations); Elizabeth K. Spahn, *Multi-Jurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 VA. J. INT'L L. 1, 10-11 (2013) [hereinafter Spahn, *Multi-Jurisdictional Bribery*].

21. Sporkin, *supra* note 12, at 275-76; *see also* Spahn, *Multi-Jurisdictional Bribery*, *supra* note 20.

22. Sporkin, *supra* note 12, at 273.

23. *See infra* notes 45-50 and accompanying text discussing the founding of Transparency International.

24. *See generally* INTERNATIONAL CHAMBER OF COMMERCE, FIGHTING CORRUPTION: INTERNATIONAL CORPORATE INTEGRITY HANDBOOK (Francois Vincke & Fritz Heimann eds., 3rd ed. 2008).

25. *Id.*

26. For a more detailed discussion of the tax treatment of bribes in various OECD nations prior to adoption of the OECD Convention, see Elizabeth Spahn, *Local Law Provisions Under the OECD Anti-Bribery Convention*, 39 SYRACUSE J. INT'L L & COM. 249, 261-65 (2012) [hereinafter Spahn, *Local Law Provisions*].

27. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §5003(d)(1), 102 Stat. 1107, 1107-1574 (codified as amended at 15 U.S.C. §§ 78dd-1 (1994)).

28. *See, e.g.*, Convention on Combating Bribery, *supra* note 2.

almost all the most economically powerful nations.[29]) Two US administrations attempted to convince major OECD economic powers such as the United Kingdom, Japan, Canada, France, and Germany to adopt an anti-bribery convention.[30] The negotiation strategies employed by President George Herbert Walker Bush (Republican) and President Bill Clinton (Democrat) are amusing as well as notable.

A series of domestic political corruption scandals in Europe, combined with the Clinton administration's hardball tactics (reportedly threatening to disclose to the press names of OECD nation's corporations as the world's top bribe payers[31]) eventually led to the adoption of the OECD Anti-Bribery Convention in 1998.[32]

The normative discussion also broadened during the Clinton administration. In addition to general morality, appeals to rational, competitive free markets, and leveling the playing field for global business, by 1998 the discourse expanded to include two additional norms – development economics and respect for local (foreign) law.

C. Democracy and Development

The fourth normative justification for globalizing FCPA values by 1998 included economic development,[33] apparently influenced by the US Department of State.[34] Economic research correlating bribery with adverse

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29. *See generally Members and Partners*, ORG. FOR ECON. CO-OPERATION AND DEV., http://www.oecd.org/about/membersandpartners/ (last visited Jan. 23, 2013).

30. Abbott & Snidal, *supra* note 20, at 162.

31. *Id.* at 164-66.

32. *See* Convention on Combating Bribery, *supra* note 2; *see also* THE OECD CONVENTION ON BRIBERY: A COMMENTARY (Mark Pieth et al. eds., 2007). The Anti-Bribery Convention has more signatories than the OECD itself. As of April 2012, with Russia ratifying the OECD Anti-Bribery Convention, there are thirty-nine ratified states. *See* ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 2.

33. Between the 1970s and 1980s, the World Bank also increasingly focused on the negative economic consequences of systemic corruption. ODD-HELGE FJELDSTAD & JAN ISAKSEN, ANTI-CORRUPTION REFORMS: CHALLENGES, EFFECTS AND LIMITS OF WORLD BANK SUPPORT 1 (2008), *available at* http://siteresources.worldbank.org/EXTPUBSECREF/Resources/Fjeldstad_anticorruption.pdf. The Bank focused on governance issues ("managerial capacity") as a polite euphemism for the embarrassing problem of demands for bribes by corrupt foreign officials, see discussion below. Later, around 2002 to 2004, the Bank expanded its focus to also include corrupt bribe payers (World Bank contractors) by enhancing its debarment sanctions. *See* THE WORLD BANK, WORLD BANK GROUP SANCTIONS REGIME - AN OVERVIEW 10-11 (2010), *available at* http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/Overview-SecM2010-0543.pdf.

34. *See* Kevin E. Davis, *Why Does the United States Regulate Foreign Bribery: Moralism, Self-Interest or Altruism?*, 67 N.Y.U. ANN. SURV. AM. L. 497, 503-04 (2012); *see also* Kevin E. Davis, *Self-Interest and Altruism in the Deterrence of Transnational Bribery*, 4 AM. L. & ECON. REV. 314 (2002). While Professor Davis terms the development norm 'altruistic' it is certainly also possible to view economic development as self-interested by

impact on democracies by undermining economic development was now included in the debate.[35] The democracy and development norm has since become standard in FCPA discussions added to the earlier norms of morality, free competitive markets, and a level playing field for global trade.[36]

The democracy and development norms evolved during the 1970s and 1980s led by World Bank economists.[37] During the 1960s and 1970s, most multi-lateral development agencies, as well as researchers, avoided the embarrassing topic of corruption in developing economies.[38] After a series of project failures, particularly in Africa, in 1983 the World Bank established a unit on governance.[39] The World Bank's Legal Department of that era objected to what they viewed as potential political interference;[40] the projects were cast in more politically neutral terms of "managerial capacities."[41]

From 1990 to 1996, the unacceptable rate of investment failure, especially in Africa, and increasing pressure from donors for governance reform contributed to enhance focus on corruption problems among foreign officials.[42] "In October 1996, World Bank President James Wolfensohn set new precedents by speaking out against the 'the cancer of corruption.'"[43] The World Bank's focus initially emphasized governance reforms on the demand side; by 2002 the Bank began to substantially strengthen debarment sanctions for supply side bribe payers.[44]

Another early major leader in articulating the negative impacts of corruption on economic development is the leading anti-bribery non-governmental organization, Transparency International ("TI"). TI was

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global trading powers. The House Report itself states that less corruption makes a nation more attractive for foreign investment, as does the Executive branch, which termed it a strategic and economic imperative. *Id.* at 504-05; *see also* H.R. REP. NO. 105-802, at 10 (1998).

35. Spahn, *Nobody Gets Hurt?*, *supra* note 18, at 883 (discussing economics research regarding declining Gini coefficients).

36. *President William J. Clinton: Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998*, THE AMERICAN PRESIDENCY PROJECT (Nov. 10, 1998), http://www.presidency.ucsb.edu/ws/index.php?pid=55254.

37. FJELDSTAD & ISAKSEN, *supra* note 33.

38. *Id.*

39. *See id.*; *see also* WORLD BANK INDEP. EVALUATION GRP., PUBLIC SECTOR REFORM: WHAT WORKS AND WHY? 13 (2008), *available at* http://siteresources.worldbank.org/EXTPUBSECREF/Resources/psr_eval.pdf (summarizing the World Bank's history of engagement with anti-corruption public governance reforms).

40. WORLD BANK INDEP. EVALUATION GRP., *supra* note 39, at 13.

41. *Id.* Other factors influencing these developments included the fall of communism and the need for second generation reforms. *Id.* at 14.

42. *Id.*

43. *Id.*

44. *See* THE WORLD BANK, *supra* note 33.

founded in 1993 by Peter Eigen,[45] who saw the direct damage to local people done by corruption. While working for the World Bank in Africa, Eigen observed overpriced, unnecessary and damaging (so-called white elephant) projects designed to maximize rent-seeking (bribery) opportunities for corrupt local officials, which then increased the national debt of the looted and increasingly impoverished developing nation.[46]

Eigen left the World Bank to found Transparency International, originally based in Hamburg, Germany. In 1995, an intern at TI, Johan Graf Lambsdorff,[47] developed a corruption perceptions index, which accidentally leaked to *Der Spiegel*,[48] eventually becoming the influential and controversial Corruption Perceptions Index ("CPI") ranking the perception of various nations' propensity for corruption (demanding bribes).[49] In 1999, TI began publishing the Bribe Payers Index ("BPI"), which ranked nations' multi-national corporations propensity for paying bribes to obtain business abroad.[50]

D. Respect for Local (Foreign) Law

Although democracy and development norms became widely known and discussed during the 1990s, a fifth norm - respect for local (foreign) sovereigns - also emerged during the 1988 Amendments to the FCPA. Often overlooked in FCPA debates, the local law provision embodies a crucial norm about respect for foreign sovereigns. If the payment, gift, or hospitality was "lawful under the written laws" of the receiving official's state, it does not constitute a criminal bribe under the FCPA.[51]

The FCPA's local law provision establishes normative diversity regarding which transactions are classified as illegal "bribes" and which are classified as permissible "gifts."[52] Rather than imposing a one-size-fits-all US definition of "bribe" versus "gift," the FCPA places the power to define an acceptable gift in the hands of the local (foreign) legal system.[53] The

45. *Transparency International (TI)*, INT. ASS'N OF ANTI-CORRUPTION AUTHORITIES (Feb. 20, 2012), http://www.iaaca.org/AntiCorruptionAuthorities/ByInternationalOrganizations/NonGovernmentalOrganization/201202/ t20120220_807871.shtml.

46. Peter Eigen, *Removing a Roadblock to Development*, INNOVATIONS: TECH., GOVERNANCE, GLOBALIZATION, Spring 2008, at 21-25, *available at* http://www.policyinnovations.org/ideas/policy_library/data/01499/_res/id=sa_File1/ INNOVATIONS_Eigen_TI.pdf.

47. JOHANN G. LAMBSDORFF, THE INSTITUTIONAL ECONOMICS OF CORRUPTION AND REFORM 161 (2007).

48. Eigen, *supra* note 46, at 31.

49. *Corruption Perceptions Index*, TRANSPARENCY INT'L, http://www.transparency.org/research/cpi/ (last visited Jan. 23, 2013).

50. *Transparency International (TI)*, *supra* note 45.

51. 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1) (1998).

52. *Id.*

53. *Id.*

local law provision establishes an objective, written standard for cross-border criminal law enforcement cooperation while permitting flexibility in local sovereign powers to regulate permissible foreign gifts and hospitality to their own officials in accordance with their own customs and values.[54]

Many nations have extensive, transparent written laws and regulations governing gifts to and entertainment of local officials.[55] The local law provision provides global traders with a safer path to building relationships with foreign officials: Obey the local laws. Providing legal advice regarding local gifts and hospitality laws around the world has become an important compliance service offered by a variety of vendors.[56]

The provision is hard due to recognition in US criminal law of the diversity of values around the world regarding legitimate gifts and hospitality. The local law provision rebuts the charge that the FCPA is a form of US moral imperialism imposing its naïve values on hapless sovereigns abroad. The value choices at all times remain with local (foreign) sovereigns to define acceptable gifts and hospitality for their officials.

The US statute merely gives comity - legal respect to the foreign local laws. The truly remarkable act of permitting foreign sovereigns to define criminal law and domestic US tax treatment of gift and hospitality payments is international comity at a very high level.[57] (Similar language was incorporated in the OECD Convention, Commentaries 7 and 8, and explicitly in the domestic laws of several OECD member states.[58])

E. Human Rights and the Rule of Law

More recently a sixth norm emerged. As a global grassroots movement against corruption appears to be taking root, President Barack Obama in 2010 described corruption as "a profound violation of human rights."[59] When kleptocratic elites give and take bribes with impunity, the

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54. *Id.*

55. *See, e.g*, Spahn, *Local Law Provisions*, *supra* note 26, at 284-90 (discussing local regulations governing gifts and entertainment to officials in Japan and Hong Kong).

56. *See, e.g*, ETHIXBASE, https://ethixbase.com/ (last visited Jan. 23, 2013). EthiXbase is an online searchable subscription database, in English, of the local laws governing gifts and hospitality for over 135 nations.

57. Spahn, *Local Law Provisions*, *supra* note 26, at 270-76 (discussing the FCPA provision and the decision in United States v. Kozeny, 582 F. Supp. 2d 535 (S.D.N.Y. 2008) which interprets the FCPA local law defense).

58. Convention on Combating Bribery, *supra* note 2, at Commentaries 7-8. For a more detailed discussion of the OECD local law provisions, see Spahn, *Local Law Provisions*, *supra* note 26, at 267-69, 276-90.

59. Press Release, The White House, Remarks by the President at the Millennium Development Goals Summit in New York, New York (Sept. 22, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/09/22/remarks-president-millennium-

rule of law itself is in peril. The impact falls most heavily on the poor in developing economies,[60] on legitimate businesses trying to compete globally as if there were a rational competitive market,[61] and on hapless consumers of sub-standard products of every class worldwide.[62]

Although the articulation of values has evolved over the thirty-five years of the FCPA, the American commitment to challenging corruption abroad as well as at home has not often wavered.[63] While partisan battles are often very sharp, both Republican and Democratic administrations from President Gerald Ford (R) and President George W. Bush (R) to President Jimmy Carter (D) and President Barack Obama (D) have consistently committed their administrations to combatting bribery abroad. President Herbert Walker Bush (R) tried valiantly to overcome the resistance of our allies, and President Bill Clinton (D) succeeded in negotiating the OECD Anti-Bribery Convention. Opposing bribery, at home and abroad, is a fundamental, shared, non-partisan American value supporting a relatively consistent domestic economic and foreign policy strategy over thirty-five tumultuous years.

The FCPA model focuses solely on the supply side bribe payers. By disciplining our own influential US corporate citizens (corrupt bribe payers) first, rather than preaching at bribe takers (corrupt foreign officials), the FCPA is a classic example of walking the walk rather than just talking the talk.[64]

Taking on the political, legal, and economic burden of changing what have been highly profitable bribery based business models for some of the most powerful economic actors in human history – US-based multinational corporations – has been no small task. Americans can be justly proud of our efforts.

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development-goals-summit-new-york-new-york.

60. *See* developmental economics discussions, *supra* notes 33 and 37-41.

61. Spahn, *Nobody Gets Hurt?*, *supra* note 16, at 884-89.

62. *Id.* at 894-98.

63. *But see, e.g.*, Richard L. Cassin, *No Punishment for 'Hero' Giffen*, THE FCPA BLOG (Nov. 22, 2012, 1:13 AM), http://www.fcpablog.com/blog/2010/11/22/no-punishment-for-hero-giffen.html; David Glovin, *Seven-Year Kazakh Bribery Case Ends with 'Sputtering' Misdemeanor Plea*, BLOOMBERG (Aug. 6, 2010, 6:20 PM), http://www.bloomberg.com/news/2010-08-06/oil-consultant-giffen-to-plead-guilty-to-misdemeanor-after-bribery-charges.html. The United States was also very sharply criticized by UK's Lord Justice Thomas for weakness in the prosecution of the Delaware corporation Innospec. *See infra* notes 107, 110-12.

64. *See, e.g.*, *Matthew* 7:3-5.

II. IMPLEMENTING GLOBAL ANTI-BRIBERY NORMS: SUPPLY SIDE ("ACTIVE") PAYING BRIBES

A. OECD Anti-Bribery Convention Enforcement

Explicitly modeled on the FCPA, the 1998 OECD Anti-Bribery Convention ("OECD Convention") is widely recognized as a landmark accomplishment in anti-bribery law reform.[65] The OECD Convention requires signatory states to ban paying bribes (often described as supply side, or active bribery) to foreign officials to do business abroad.[66] The Convention itself, like the FCPA, does not address receiving bribes (sometimes described as demand side or passive bribery discussed below in Section III).

Thirty-nine major economic powers have ratified the OECD Convention, including Russia, as of April, 2012.[67] Brazil's ratification was effective in 2002.[68] The People's Republic of China ratified the United Nations Convention Against Corruption ("UN CAC", discussed below) and enacted domestic Chinese laws criminalizing bribery to foreign officials,[69] but China has not yet joined the OECD Convention.[70] China's energetic enforcement of its domestic anti-bribery laws is legendary,[71] including

65. Eigen, *supra* note 46, at 29. Eigen, founder and Chair of the Advisory Counsel of Transparency International (a non-government organization), termed the OECD Anti-Bribery Convention a "quantum leap in the efforts to fight corruption." *Id.*

66. *See* Convention on Combating Bribery, *supra* note 2. The terms "active" (paying a bribe) and "passive" (receiving a bribe) bribery are frequently used in European law. *See, e.g.*, Criminal Law Convention on Corruption, Council of Europe, Jan. 27, 1999, 38 I.L.M. 505 *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm; *Glossary*, ANTI-CORRUPTION RESOURCE CENTRE, http://www.u4.no/glossary/ (last visited Jan. 23, 2013).

67. ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 2.

68. *Id.*

69. Eric Carlson, *China's Overseas Bribery Law One Year On*, THE FCPA BLOG (May 29, 2012, 3:28 AM), http://www.fcpablog.com/blog/2012/5/29/chinas-overseas-bribery-law-one-year-on.html. Beijing-based attorney Eric Carlson also advises foreign investors about Chinese enforcement of domestic anti-bribery laws. *See* Eric Carlson, *China's Domestic Bribery Laws Impact Foreign Investors*, THE FCPA BLOG (July 10, 2012, 12:28AM), http://www.fcpablog.com/blog/2012/7/10/chinas-domestic-bribery-laws-impact-foreign-investors.html.

70. For more detailed analysis of China's anti-corruption enforcement, see Spahn, *Local Law Provisions*, *supra* note 26, at 258-61. *See generally* THE FCPA BLOG, CHINA ANTI-CORRUPTION HANDBOOK (Q4 2012), *available at* https://ethixbase.com/chinaanticorruptionhandbook (introduction by Richard L. Cassin). In addition, The FCPA Blog contributor Chua Guan Cheong, under the title "China Corruption Blotter," provides weekly updates regarding China's anti-corruption enforcement. *See* Entries by Chua Guan Cheong, THE FCPA BLOG, http://www.fcpablog.com/blog/author/chua (last visited Jan. 23, 2013).

71. *See* Margaret K. Lewis, *Presuming Innocence, or Corruption, in China*, 50 COLUM. J. TRANSNAT'L L. 287 (2012); Minxin Pei, *Explaining China's Corruption Paradox*, WALL ST. J. (June 11, 2012, 12:24 PM), http://online.wsj.com/article/ SB10001424052702303918204577446

using the death penalty for bribery convictions (to date only for Chinese nationals).[72] India, which is struggling with corruption issues in its domestic internal politics,[73] is the sole major economic power without a statute criminalizing bribery abroad as of 2012.[74] India finally ratified the UN CAC in 2011.[75]

Signing a multi-lateral convention and enacting laws banning bribery abroad are not the same thing as effective enforcement. From 1998 until approximately 2005-06, there was little actual enforcement from OECD Convention signatories other than the United States.[76] The first decade of the OECD Convention focused primarily on harmonizing formal written criminal and tax laws of the member states.

By 2007 the OECD Convention Working Group's focus shifted toward greater enforcement by nations other than the United States.[77] Led by legendary Swiss criminal law professor, Dr. Mark Pieth,[78] the OECD

021540060982.html?mod=googlenews_wsj (analyzing the harm done by corruption to China's economic development); *see also* YASHENG HUANG, SELLING CHINA: FOREIGN DIRECT INVESTMENT DURING THE REFORM ERA (William Kirby ed., 2003) (discussing the negative impacts of corruption and foreign direct investment on the development of domestic entrepreneurs in China); Chua Guan Cheong, *China Corruption Blotter*, THE FCPA BLOG (Sept. 26, 2012, 12:07 AM), http://www.fcpablog.com/blog/2012/9/26/china-corruption-blotter-september-26-2012.html. The China Compliance Digest blog provides frequent descriptions in English of numerous Chinese corruption prosecutions. *See, e.g.*, *China Compliance Digest*, ETHIXBASE, https://ethixbase.com/chinacompliancedigest/ (last visited Jan. 23, 2013). *But see* Andrew Brady Spalding, *The Irony of International Business Law: U.S. Progressivism and China's New Laissez-Faire*, 59 UCLA L. REV. 354 (2011) (suggesting that China takes a laissez-faire hands off approach to corruption enforcement).

72. *See, e.g.*, *In China, Death Row Billionaire Names Accomplices*, THE FCPA BLOG (Feb. 29, 2012, 4:28 AM), http://www.fcpablog.com/blog/2012/2/29/in-china-death-row-billionaire-names-accomplices.html; Richard L. Cassin, *China's Clean Up Continues*, THE FCPA BLOG (Sept. 10, 2010, 7:28 AM), http://www.fcpablog.com/blog/2010/9/10/chinas-clean-up-continues.html. Australian citizen Stern Hu escaped the death penalty in China. *See* David Barboza, *China Sentences Rio Tinto Employees in Bribe Case*, N.Y. TIMES (March 29, 2010), http://www.nytimes.com/2010/03/30/business/global/30riotinto.html?pagewanted=all&_r=0.

73. Hanishi T. Ali et al., *Regional and Comparative Law- India*, 46 INT'L LAW. 553, 553-56 (2012).

74. India is "examining" prohibiting bribery abroad. *See id.* at 554.

75. Samuel Rubenfeld, *India Ratifies UN Convention Against Corruption*, WALL. ST. J. BLOG (May 12, 2011, 5:54 PM), http://blogs.wsj.com/corruption-currents/2011/05/12/india-ratifies-un-convention-against-corruption; Ali et al., *supra* note 73, at 554.

76. *See* Spahn, *Multi-Jurisdictional Bribery*, *supra* note 20.

77. *Id.*

78. Mark Pieth is Professor of Criminal Law and Criminology at University of Basel, Chairman of the Board of the Basel Institute on Governance, Chairman of the OECD Working Group on Bribery in International Business Transactions, and Member of Swiss Federal Gaming Commission. *See About Mark Peith*, MARK PIETH: PROFESSOR OF CRIM. L. AND CRIMINOLOGY, http://www.pieth.ch/about_mark_pieth/ (last visited Jan. 23, 2013).
Dr. Pieth has published extensively in English and in German on anti-bribery, as well as other multi-lateral criminal enforcement issues. *See Publications,* MARK PIETH: PROFESSOR

Working Group's *tour de table* meetings of prosecutors from the thirty-nine signatory nations appear to be highly effective in coordinating enforcement efforts.[79]

Germany led with its dramatic prosecution of Siemens (including dawn raids on Siemens' offices and homes of senior executives)[80] in cooperation with the US Department of Justice.[81] France referred a major bribery scandal involving several multi-national oil companies doing business in Nigeria to the United States as well as prosecuted its own French oil company (Elf-Aquitaine, now Total).[82] The United Kingdom, which had suffered a very embarrassing initial failure to prosecute BAE bribery of Saudi royal family members due to political interference by then Prime Minister Tony Blair,[83] was able to eventually sanction although not debar BAE in cooperation with the United States.[84]

OF CRIM. L. AND CRIMINOLOGY, http://www.pieth.ch/nc/publications/ (last visited Jan. 23, 2013).

79. Abbott & Snidal, *supra* note 20, at 166–67; *See* ORG. FOR ECON. CO-OPERATION & DEV. WORKING GRP. ON BRIBERY, ANNUAL REPORT 26 (2008), *available at* http://www.oecd.org/dataoecd/21/24/44033641.pdf. For an example agenda, see ORG. FOR ECON. CO-OPERATION & DEV., PROSECUTORS' MEETING: DETECTION, INVESTIGATION & PROSECUTION OF FOREIGN BRIBERY 24 (2007), *available at* http://www.oecd.org/dataoecd/8/37/39770035.pdf.

80. *Siemens (Foreign Bribery Actions)*, THE TRACE COMPENDIUM, https://www.traceinternational2.org/compendium/view.asp?id=124 (last visited Jan. 23, 2013). The TRACE Compendium, with concise, accurate summaries and links to original source documents, is an excellent research tool for the *Siemens* case, as well as other bribery prosecutions. *See Search Compendium*, THE TRACE COMPENDIUM, http://www.traceinternational.org/Knowledge/Compendium.html (last visited Jan. 23, 2013).

81. *See* Press Release, Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), *available at* http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html ("The Department and the SEC closely collaborated with the Munich Public Prosecutor's Office in bringing these cases.").

82. *See Halliburton/KBR*, THE TRACE COMPENDIUM, https://www.traceinternational2.org/compendium/view.asp?id=15 (last visited Jan. 17, 2013); Barbara Crutchfield George & Kathleen A. Lacey, *Investigation of Halliburton Co./TSKJ's Nigerian Business Practices: Model for Analysis of the Current Anti-Corruption Environment on Foreign Corrupt Practices Act Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 503, 507 (2006); *see also* Spahn, *Multi-Jurisdictional Bribery*, *supra* note 20, at 27-31 nn.139-58.

83. *See* Susan Rose-Ackerman & Benjamin Billa, *Treaties and National Security*, 40 N.Y.U. J. INT'L L. & POL. 437, 456-60 (2008); *BAE Systems*, THE TRACE COMPENDIUM, https://www.traceinternational2.org/compendium/view.asp?id=140 (last visited Jan. 23, 2013).

84. *Settlement of BAE Systems Corruption Cases: Significant Issues of Concern*, TRANSPARENCY INT'L (Feb. 11, 2010, 10:27 AM), http://www.transparency-usa.org/documents/TIUKBAE.pdf; *see* Jessica Tillipman, *The Foreign Corrupt Practices Act & Government Contractors: Compliance Trends and Collateral Consequences*, BRIEFING PAPERS, Aug. 2011, at 13; *see also* Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big To Debar?*, 80 FORDHAM L. REV. 775, 799, 801-02 (2011).

B. US Enforcement of the FCPA

The OECD Convention agreement among the major economic powers set the stage for expanded US enforcement of the FCPA. During the administration of US President George W. Bush, enforcement of the FCPA accelerated exponentially both in terms of raw number of cases as well as ambitious prosecutions of complex grand corruption bribery schemes.[85] Mark Mendelsohn, Deputy Chief of the US Department of Justice's Fraud Unit from 2004 to 2010 was widely respected during his tenure as the FCPA's leading prosecutor.[86]

As enforcement increased so did criticism particularly from nations such as India, among others, where elites are accustomed to receiving bribes from deep pocket foreign investors. [87] These critiques progressed from crude versions of cultural relativism[88] to claims of violated local sovereignty[89] to more nuanced claims that anti-bribery laws are equivalent to 'sanctioning' nations where corruption is widespread.[90]

Enforcement patterns under the FCPA in particular have been criticized on several grounds[91] including claims that the United States over-

85. Cortney C. Thomas, Note, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 439-40 (2010).

86. For a summary of some of Mark Mendelsohn's accomplishments enforcing the FCPA, see Richard L. Cassin, *Goodbye, Mr. Mendelsohn*, FCPA BLOG (Apr. 14, 2010, 7:18 AM), http://www.fcpablog.com/blog/2010/4/14/goodbye-mr-mendelsohn.html.

87. *See* Ali'a, *supra* note 5.

88. *See* Spahn, *Moral Imperialism Critiques*, *supra* note 6.

89. *See, e.g.*, *Extraterritorial Law and International Norm Internalization*, 124 HARV. L. REV. 1280, 1285-90 (2011) (discussing the FCPA and the OECD Anti-Bribery Convention). This note critiques US and OECD jurisdiction because of "lack of consent" to jurisdiction by non-OECD nations. This argument inexplicably ignores specific statutory provisions of the FCPA that explicitly textually incorporate (foreign) local law into the US statute. The OECD Anti-Bribery Convention has similar provisions incorporating (foreign) local law explicitly. *See* Spahn, *Local Law Provisions*, *supra* note 26. "Non-consenting" nations merely need to enact their own domestic laws or regulations defining which gifts or entertainment their officials may legally accept from foreign business interests. This would provide a complete defense to prosecutions of bribe payers under the US FCPA or equivalent OECD Anti-Bribery Convention nations' statutes.

90. *See generally* Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351 (2010). The highly debatable empirical evidence for the sanctions theory is examined *infra* note 99.

91. Mike Koehler, an assistant professor at Southern Illinois University Law School, is the most aggressive US critic of the FCPA in general and particularly of the US Department of Justice. Koehler is the self-proclaimed "FCPAProfessor" with his own blog established in 2009 and was a leading influence behind the failed 2010 US Chamber of Commerce efforts to "reform" the FCPA. *See* Dan Froomkin, *Dems Ask U.S. Chamber If Firms That Bribed Are behind Its Push to Weaken Anti-Bribery Law*, HUFFINGTON POST (May 22, 2012, 8:55 PM), http://www.huffingtonpost.com/2012/05/22/foreign-corrupt-practices-act-chamber-of-

enforces against "foreign" multi-national corporations[92] and/or that the United States uses anti-bribery enforcement as a foreign policy tool to reward allies and punish enemies.[93]

An important quantitative analysis of US enforcement patterns under the FCPA by Nicolas Mclean was released in May 2012.[94] This analysis of actual enforcement data provides an empirical basis for assessment of FCPA enforcement patterns. Examining cross-national patterns in FCPA enforcement from 2000 to 2011,[95] Mclean finds that enforcement actions are commensurate with both levels of US foreign investment and with variations in corruption levels.[96] Whether the FCPA deters US foreign investment leaving corrupted nations vulnerable to so-called "black knights"[97] is highly debatable under current economic studies.[98] What empirical evidence does demonstrate is that bilateral frameworks for securities enforcement cooperation enhance FCPA enforcement.[99]

Foreign policy considerations were not significant factors in US

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commerce-lobbying_n_1536739.html. Richard L. Cassin, who founded the influential FCPAblog.com in 2007, has suggested that Koehler's academic interpretations of the FCPA (particularly the "foreign official" definition) are being tested by naïve criminal defendants through expensive and risky criminal trials, with some resulting in hefty prison sentences. Richard L. Cassin, *On This Appeal Hang the Lives of Men*, FCPA BLOG (May 22, 2012, 6:08 AM), http://www.fcpablog.com/blog/2012/5/22/on-this-appeal-hang-the-lives-of-men.html (citing seven and fifteen years in prison respectively in one of the recent test cases). (Disclosure: I am one of many "Contributing Editors" to the FCPA Blog, which is a purely honorary unpaid title. I do not engage in the practice of law for either defense or prosecution in bribery cases; I am a full-time tenured law professor.)

92. Using the term "foreign" for a "multi"-national corporation seems contradictory. By definition, the corporation operates in multiple jurisdictions. Equally puzzling is the persistence of the term "extra"-territorial for jurisdiction asserted over corporations seeking access to United States or United Kingdom capital markets or corporations seeking access to natural resources or labor supplies.

93. *See, e.g.*, Balakrishnan Rajagopal, *Corruption, Legitimacy and Human Rights: The Dialectic of the Relationship*, 14 CONN. J. INT'L L. 495, 496 (1999). *But see* Spahn, *Moral Imperialism Critiques*, *supra* note 6, at 182-86 (rebutting the argument that the United States uses anti-bribery enforcement as a foreign policy tool to reward allies and punish enemies).

94. Nicolas M. Mclean, *Cross-National Patterns in FCPA Enforcement*, 121 YALE L. J. 1970 (2012).

95. *Id.* at 1989.

96. *Id.* at 2011 ("This relationship is robust to the inclusion of various controls, including GDP per capita and region-fixed effects.").

97. Spalding, *supra* note 71, at 367.

98. *See* Mclean, *supra* note 94, at 1980 n.35, 2010-11 & n.111; *see also* Nikolaus Schuttauf, *Repeal Anti-Bribery Legislation? A Defense of Laws Promoting Clean Business and Transparent Governments*, 46 NEW ENG. L. REV. 617, 633-41 (2012) (noting that anti-bribery laws are only one of several factors influencing foreign direct investment ("FDI")). Stability in government is a more significant influence on FDI than anti-bribery laws. *Id.* at 635-36. A reliable legal system with enforceable property rights, enforceable contract law and an effective judiciary are highly significant influences on FDI. *Id.* at 636-39. Finally, the health of the local population (human capital) influences FDI significantly. *Id.* at 639-41.

99. Mclean, *supra* note 94, at 2011.

FCPA enforcement patterns Mclean's data showed. Examining matched voting patterns in the United Nations, military alliances, and democratic governance as proxies for US foreign policy considerations,[100] Mclean finds that "U.S. foreign policy considerations are generally not associated with cross-national variation in FCPA enforcement, once other relevant factors (such as GDP per capita, regional fixed effects, FDI, and corruption levels) are controlled for."[101]

The data reveal that "the best predictor of the number of FCPA enforcement actions in a given country is the level of that country's experience with actual recorded corruption, rather than simply the relative level of corruption perceptions . . . ."[102] Enforcement of the FCPA from 2000 to 2011 appears to be consistent with the OECD Convention's requirement in Article 5 that prosecutions shall not be influenced by national economic or political interests.[103]

Some criticisms that anti-bribery law enforcement is politically biased are blatant excuses by self-interested corrupt bribe givers and takers.[104] However, some of the politicization critique arises from weary cynicism after repeated, ineffective domestic corruption crackdowns. A very important article by Professor Xin Frank He of the University of Hong Kong, for example, examines in detail the ways that domestic anti-bribery crackdowns were used to increase bribe amounts and centralize control over bribe revenues in Beijing, China.[105]

Two recent US cases have generated fears that the commitment to anti-bribery law enforcement may not be as firm under the administration of President Barack Obama as it was under President George W. Bush. In an ironic turn of events, joint prosecutions of the Innospec cases by the United States and the United Kingdom[106] revealed that the United Kingdom's Lord Justice Thomas viewed the United States as too soft in anti-bribery

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100. *Id.* at 1992-93.

101. *Id.* at 2011.

102. *Id.*

103. *Id.*at 2003; ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 2, at art. 5.

104. The claims of outraged sovereignty by the President of Kazakhstan, for example, ring hollow given the scope of the bribes he personally took. *See generally* Elizabeth Spahn, *Discovering Secrets: Act of State Defenses to Bribery Cases*, 38 HOFSTRA L. REV. 163 (2009) [hereinafter Spahn, *Discovering Secrets*]. Kazakhstan then tried to interfere directly and through lobbying in a domestic US criminal prosecution of a US citizen for violating US law, claiming Kazakhstan's sovereignty should be respected. *Id.* at 188-89.

105. *See* Xin Frank He, *Sporadic Law Enforcement Campaigns as a Means of Social Control: A Case Study From a Rural-Urban Migrant Enclave in Beijing*, 17 COLUM. J. ASIAN L. 121 (2003), *summarized in* Spahn, *Moral Imperialism Critiques*, *supra* note 6, at 217-22; *see also* XIAOBO LU, CADRES & CORRUPTION: THE ORGANIZATIONAL INVOLUTION OF THE CHINESE COMMUNIST PARTY (2000); HUANG, *supra* note 71; YASHENG HUANG, CAPITALISM WITH CHINESE CHARACTERISTICS: ENTREPRENEURSHIP AND THE STATE (2008).

106. For a more detailed discussion of the Innospec cases during 2010-2012, see Spahn, *Multi-Jurisdictional Bribery*, *supra* note 20.

enforcement effort.[107] Innospec, a Delaware based corporation, manufactured a lead additive for gasoline.[108] After US Clean Air Act reforms, Innospec's management looked for new markets for the lead-based additives. Innospec developed a business model from its London office to bribe legislators and other influential officials in Indonesia to delay adopting clean air regulations.[109] The joint US-UK prosecutions coordinated both jurisdiction and penalties.[110]

In his sentencing opinion, UK Lord Justice Thomas termed the penalties agreed to between Innospec and the US Department of Justice "wholly inadequate" in light of the serious crimes Innospec committed.[111] The financial penalties were relatively low because the firm faced insolvency, a justification Lord Justice Thomas found not sufficient, but in the interests of cooperation in the joint prosecution, he deferred to the US settlement terms.[112]

A second case of potential US enforcement weakness is the notorious Kazakhstan bribery case involving millions of dollars, furs, jewelry, and jet skis allegedly given in return for oil and gas contracts.[113] After a seven-year effort to prosecute alleged bagman New York lawyer James Giffen, the case ended in 2010 with Giffen pleading to a misdemeanor tax charge, apparently after the Central Intelligence Agency refused to turn over documents in the case.[114] $84 million in assets under the name of the

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107. *Id.* at 35 n.190 (*inter alia,* bribing Indonesian politicians to delay clean air laws limiting lead additives to gasoline, damaging the people of Indonesia and the environment).

108. For a more detailed discussion of the various Innospec prosecutions which also included bribery in Iraq under Saddam Hussein and violations of US trade embargos with Cuba, see *id.* at 31-39 nn.159-216.

109. Press Release, Serious Fraud Off., Innospec Limited Prosecuted for Corruption by the SFO (Mar. 18, 2010), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/innospec-limited-prosecuted-for-corruption-by-the-sfo.aspx.

110. R v. Innospec Ltd., [2010] EW Misc (EWCC) 7, [19], [20] (Lord Thomas L.J.) (Eng.).

111. *Id.* at [40].

112. *See id.* at [41], [42], [43]. Lord Justice Thomas also expressed concern that insolvency of a corporation was not a sufficient reason to approve such a low fine, but he deferred to the United States' lead role in compliance and monitoring provisions. *Id.* at [48i], [49].

113. Nursultan Nazarbaev, President of Kazakhstan, and Nurlan Balgimaev, Oil Minister, allegedly took at least $105 million cash laundered through seven US and Swiss banks, plus millions of dollars in jewelry, furs, jet skis and snowmobiles, tuition, vacations, and money to pay off credit cards. Spahn, *Discovering Secrets, supra* note 104, at 169-70.

114. *See* Letter from Preet Bharara, U.S. Attorney, to William J. Schwartz, Esq., Counsel for James H. Giffen (Aug. 6, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/giffen/08-06-10giffen-plea-agree.pdf (becoming the Giffen Plea Agreement); Press Release, U.S. Attorney's Office, New York Merchant Bank Pleads Guilty to FCPA Violation; Bank Chairman Pleads Guilty to Failing to Disclose Control of Foreign Bank Account (Aug. 6, 2010), *available at* http://www.justice.gov/usao/nys/pressreleases/August10/giffenjamespleapr.pdf; U.S. v. Giffen, 379 F. Supp. 2d 337, 341 (S.D.N.Y. 2004).

Kazakhstan Ministry of Finance on deposit with Swiss bank Pictet & Cie was apparently forfeited to the United States as part of Giffen's plea agreement.[115]

New York federal District Court Judge, William H. Pauley III, described Giffen as a "patriot" and a "hero," evidently because of Giffen's efforts to assist Cold War Soviet Jews emigrating during the 1980s. Judge Pauley's comments provoked widespread outrage (and thinly disguised glee from oligarchs abroad opposing corruption reform efforts[116]) by global anti-corruption commentators.[117]

The *Giffen* outcome provides ammunition to those who claim the United States engages in selective prosecutions based on economic and political advantages in violation of the OECD Convention's Article 5 mandate.[118] The *Giffen* case is equivalent to the embarrassment suffered by the UK in the *Saudi/BAE* case discussed above.

It is true that a CIA/strategic interest defense will not be available to ordinary bribe payers charged with FCPA violations.[119] Mclean's quantitative analysis demonstrates that, on the whole, FCPA prosecutions

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115. *Kazakhstan Oil Mining / James Giffen - Mercator Corporation Case*, STOLEN ASSET RECOVERY INITIATIVE, http://star.worldbank.org/corruption-cases/node/18529 (last visited Jan. 23, 2013).

116. Telephone Conference Call by Journalists in Asia with Robert O. Blake, Jr., Assistant Sec'y, Bureau of South and Cent. Asian Affairs, Wash., D.C. (Dec. 15, 2010), *available at* http://bishkek.usembassy.gov/tr_12_16_10.html.

117. *See* Lisa Brennan, *In Stunning End to Kazakh Bribe Case, Judge Lauds Giffen as a 'Patriot'*, MAIN JUSTICE (Nov. 19, 2010, 10:15 PM), http://www.mainjustice.com/justanticorruption/2010/11/19/in-stunning-end-to-kazakh-bribe-case-judge-lauds-giffen-as-a-patriot/; Steve LeVine, *Was James Giffen Telling the Truth?*, FOREIGN POLICY (Nov. 19, 2010, 4:04 PM), http://oilandglory.foreignpolicy.com/posts/2010/11/19/was_james_giffen_telling_the_truth; Joanna Lillis, *Kazakhgate Bribery Saga Fizzles Out amid Claims of Cold War Heroism*, EURASIANET (Nov. 23, 2010, 3:11 AM), http://www.eurasianet.org/node/62428; Richard L. Cassin, *No Punishment for 'Hero' Giffen*, FCPA BLOG (Nov. 22, 2010, 1:13 AM), http://www.fcpablog.com/blog/2010/11/22/no-punishment-for-hero-giffen.html.

118. *Kazakhstan-USA: Judge Lauds James Giffen as "a Patriot,"* FERGHANA NEWS (Nov. 22, 2010), http://enews.fergananews.com/news.php?id=1929&mode=snews.

> According to *Kommersant*, US observers were shocked by such outcome. In the interview to Voice of America Michael Perlis, which was involved in the development of law on foreign corruption, said the verdict was 'the failure of federal public prosecutors.' In the opinion of Mark Shulman, head of Pace [U]niversity [L]aw [S]chool in New York, the pullback of US attorneys from initial charges may be reasoned by recent negotiations between the USA and Kazakhstan. After [a] few months of consultations [the] Kazakh government agreed to open [a] few air-corridors for American troops in Afghanistan.

Id. In a statement to *Kommersant*, Mark Shulman said, "Sometimes US national interest may be more important than the arguments of public prosecution office." *Id.*

119. Mike Koehler, *The Giffen Gaffe*, FCPA PROFESSOR (Aug. 9, 2010, 12:02 AM), http://fcpaprofessor.blogspot.com/2010/08/giffen-gaffe.html.

are not influenced by foreign policy considerations.[120] The *Giffen* debacle may be an isolated failure, but real harm nevertheless is done to the idea of the rule of law: a neutral, professional, and independent legal system in the United States.

While the US judicial system has historically been relatively weak in general when faced with executive branch foreign policy or national security claims,[121] in the bribery law reform context the consequences of this weakness are potentially significant. In the battle for hearts and minds, the effort to develop globally shared normative values that bribery is a crime and should be punished by law, exceptions for the rich and famous, for the influential and well-connected, and for those with large oil reserves are especially damaging.

The normative power of the anti-corruption reform effort is fundamentally one of fairness: equal justice under law. Criminal law applies not only to the poor, but to the rich and well-connected. This fundamental policy is undermined by exceptions based on economic advantage such as Kazakh or Saudi oil reserves.

Because of the negative impact on the credibility and legitimacy of bribery law enforcement, and in light of the understandable cynicism of those who have experienced repeated, ineffective domestic corruption crackdowns in nations such as China, Russia, Brazil, and India, the issue of politicized prosecutions is now central. This is especially true in nations where anti-corruption crackdowns have been used domestically as a tool of political discipline to punish political opponents while corruption of political allies goes unpunished.

As global anti-bribery enforcement efforts enter their second decade, potential problems of selective prosecutions, failure to prosecute, or under-prosecution because of political or economic advantage in violation of the OECD Convention Article 5 are the most important issues to watch. Susan Rose-Ackerman and Benjamin Billa have an important article analyzing this issue in the context of the UK's BAE/Saudi problem.[122] Mclean's quantitative analysis of the actual data is an invaluable tool to ensure that prosecutions go "where the evidence takes them" in a professional, politically neutral manner.[123]

The OECD Working Group is highly competent and well situated to

120. *See supra* notes 98-99 and accompanying text.

121. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION (1997); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran- Contra Affair*, 97 YALE L.J. 1255, 1295-96 (1988); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990). *But see* Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT'L L. 507, 528-29 (2011).

122. Rose-Ackerman & Billa, *supra* note 83, at 456-60.

123. For a discussion of the Mclean analysis, see *supra* notes 94-96, 98-99.

monitor Article 5 problems should they arise. In addition, enforcement cooperation between OECD Convention states is tempered by enforcement competition, including both assistance (as in the *BAE* prosecutions) and transparent criticism (as in the *Innospec* cases).

The SEC adopted strict new transparency rules regulating payments by oil and gas companies and others in extraction mining industries in August 2012.[124] The European Union is expected to follow soon.[125] Canada, which itself has substantial natural resources, may also consider regulations requiring transparent payments.[126] The new US regulations requiring transparency in payment for access to natural resources[127] are the culmination of a long campaign by a coalition of several important non-governmental organizations including Revenue Watch,[128] Publish What You Pay,[129] and Global Witness.[130]

C. The Future of Supply Side Enforcement

With the ratification of the UK Bribery Act, the US FCPA is no

124. *See* Press Release, Sec. and Exch. Comm'n, Disclosure of Payments by Resource Extraction Issuers (Aug. 22, 2012), *available at* http://www.sec.gov/rules/final/2012/34-67717.pdf; *SEC Adopts Rules Requiring Payment Disclosures by Resource Extraction Issuers*, U.S. SEC (Aug. 22, 2012), http://www.sec.gov/news/press/2012/2012-164.htm; Daniel Kaufmann, *SEC's Day of Reckoning on Transparency: Dodd-Frank Section 1504 on Disclosure of Natural Resource Revenues*, BROOKINGS (Aug. 21, 2012), http://www.brookings.edu/research/opinions/2012/08/21-dodd-frank-kaufmann; C.M. Matthews, *Initial Reactions: Businesses Score on Conflict Minerals, Lose on Extractive Industry Disclosures*, WALL ST. J. (Aug. 22, 2012, 5:01 PM), http://blogs.wsj.com/corruption-currents/2012/08/22/initial-reactions-businesses-score-on-conflict-minerals-lose-on-extractive-industry-disclosures/.

125. *See* Mark Tran, *EU Legislatures Aim for Tougher Law on Oil, Gas and Mining Payments*, THE GUARDIAN (Sept. 19, 2012, 2:00 AM), http://www.guardian.co.uk/global-development/2012/sep/19/eu-tougher-transparency-law-extractive. *But see* Christian Humborg, *Why Doesn't Germany Support Detailed Transparency for the Oil, Mining Industries?*, TRANSPARENCY INT'L (July 26, 2012), http://blog.transparency.org/2012/07/26/why-doesnt-germany-support-detailed-transparency-for-the-oil-mining-industries/.

126. *See* VANCOUVER SUN, *U.S. Adopts a Strong Anti-Corruption Measure –Will Canada?*, PUBLISH WHAT YOU PAY (Aug. 26, 2012), http://www.publishwhatyoupay.org/resources/us-adopts-strong-anti-corruption-measure-%E2%80%94-will-canada.

127. *See* Frank Vogl, *Sunshine on the Horizon for Oil, Gas and Mining Cash*, TRANSPARENCY INT'L (Aug. 24, 2012), http://blog.transparency.org/2012/08/24/sunshine-on-the-horizon-for-the-oil-gas-and-mining-cash/; ESCAPING THE RESOURCE CURSE (Macartan Humphreys et al. eds., 2007); TRANSPARENCY INT'L, EXTRACTIVE INDUSTRIES TRANSPARENCY: THE BENEFITS OF EU LEGISLATION TO AFRICAN CITIZENS 2 (2012), *available at* http://www.soros.org/sites/default/files/extractive-industry-transparency-20120626.pdf.

128. *See generally* REVENUE WATCH INST., http://www.revenuewatch.org/ (last visited Jan. 23, 2013).

129. *See generally About Us*, PUBLISH WHAT YOU PAY, http://www.publishwhatyoupay.org/about (last visited Jan. 23, 2013).

130. *See generally* GLOBAL WITNESS, http://www.globalwitness.org/ (last visited Jan. 23, 2013).

longer the benchmark for anti-bribery law enforcement. The UK Bribery Act of 2010, which finally took effect in 2012, is now the strictest and most feared criminal anti-bribery law. It prohibits both supply (active/paying) and demand (passive/taking) side bribery in addition to prohibiting business to business (B2B/commercial) bribery.[131] Nevertheless, US FCPA enforcement will not abate in the foreseeable future. Prosecuting complex grand corruption global bribery conspiracies requires significant prosecutorial resources and expertise. Although the FCPA statute itself is significantly weaker than the UK Bribery Act, the expertise of enforcement personnel in the US Department of Justice is still more developed than the UK's Serious Fraud Office as of 2012.[132] German prosecutors have been increasingly effective in enforcement as well.[133] China has also prosecuted foreign business personnel, although not as vigorously as it prosecutes Chinese officials taking bribes.[134] French courts recently affirmed the largest fine in a French corruption case in the amount of 630 million Euros.[135]

The 2012 Transparency International Progress Report for OECD Convention Enforcement shows some improvement. Canada, Austria, and Australia are the most improved from the prior report.[136] Laggards (no

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131. While detailed examination of the UK Bribery Act is beyond the scope of this article, the article by Bruce Bean and Emma H. MacGuidwin, *Unscrewing the Inscrutable: The UK Bribery Act 2010*, in this Indiana International & Comparative Law symposium issue examines the UK Bribery Act in detail. 23 IND. INT'L & COMP. L. 63 (2013). *See also, e.g.*, Jon Jordan, *Recent Developments in the Foreign Corrupt Practices Act and the New UK Bribery Act: A Global Trend towards Greater Accountability in the Prevention of Foreign Bribery*, 7 N.Y.U. J. L. & BUS. 845, 864-65 (2011); Jon May, *The New British Invasion: Will the U.K. Bribery Act of 2010 Eclipse the FCPA?*, CHAMPION, 28, 29 (Mar. 2012); 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, 8 (2010).

132. The saga of the UK's SFO has been checkered, even before the BAE/Saudi scandal. More recently the SFO has faced potentially crippling budget cuts, which may render the Bribery Act ineffective in terms of actual enforcement. Alistair Craig, *U.K. Anti-Corruption Enforcement Threatened by Budget Cuts*, FCPA BLOG (Sept. 27, 2012, 5:45 AM), http://www.fcpablog.com/blog/2012/9/27/uk-anti-corruption-enforcement-threatened-by-budget-cuts.html.

133. In 2011, German prosecutors recovered a €149 million fine against Ferrostaal for bribery in the sale of submarines to Greece. Leslie A. Benton et al., *Anti-Corruption*, 46 INT'L LAW. 353, 364 (2012).

134. Australian CEO Matthew Ng was sentenced by the Guangzhou Intermediate Court to thirteen years in Chinese prison for bribery and embezzlement. *Id.* at 363.

135. *Id.* at 364. The French case involved bribery in the sale of frigates to Taiwan; the case was over twenty years old. *Id.*

136. *Compare* FRITZ HEIMANN & GILLIAN DELL, EXPORTING CORRUPTION? COUNTRY ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION PROGRESS REPORT 6, 12-14, 16-17 (2012), *available at* http://www.transparency.org/whatwedo/pub/exporting_corruption_country_enforcement_of_the_oecd_anti_bribery_conventio, *with* FRITZ HEIMANN ET AL., PROGRESS REPORT 2011: ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION 8-9 tbl.A

enforcement) in foreign bribery prosecutions continue to be Ireland, Poland, Czech Republic, South Africa, Israel, Greece, New Zealand, and Estonia.[137] Russia, having joined the OECD Anti-Bribery Convention in 2012, will be watched with great interest world-wide.

Although the raw number of lagging enforcement nations is high, most of them with the exception of Brazil ("little enforcement") are relatively smaller economies. In terms of percentage of world exports, nineteen nations comprising fifty-three percent of world exports are classified as active or moderate enforcers as of 2012.[138] This is up slightly from the 2011 report.[139] It is also important to note that raw counts of cases prosecuted may not reflect enforcement effectiveness if states are pursuing very complex grand corruption bribery cases.

Where one nation proves unable or unwilling to enforce anti-bribery laws against favored national champion corporations (in violation of Article 5's prohibition against political or economic favoritism in prosecutions), other nations can and do step up.[140] Enforcing against 'foreign'[141] multinationals is not only possible but now relatively frequent under the OECD Convention.[142] Jurisdiction under the domestic statutes of active enforcers such as the United States and now the UK is quite broad.[143]

Enforcement competition between nations, including but not limited to OECD Convention signatories, is likely to increase as revenue starved states look to large fines and penalties available under domestic anti-bribery criminal statutes.[144] In addition, the expansion of whistleblower bounties in the United States[145] provides a lucrative path toward leveling the playing

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(2011), *available at* http://www.transparency.org/whatwedo/pub/progress_report_2011_enforcement_of_the_oecd_anti_bribery_convention.

137. HEIMANN & DELL, *supra* note 136, at 6; *Fighting Foreign Bribery: Prosecutions Making It Harder for Companies*, TRANSPARENCY INT'L (Sept. 6, 2012), http://www.transparency.org/news/feature/fighting_foreign_bribery_prosecutions
_making_it_harder_for_companies.

138. HEIMANN & DELL, *supra* note 136, at 6.

139. Sixteen nations comprising fifty percent of world exports were active or moderate enforcers according to the 2011 report. HEIMANN & DELL, *supra* note 136, at 5.

140. For example, the United States assisted the United Kingdom in prosecuting BAE despite domestic political interference by Prime Minister Blair. *See supra* notes 83-84. For further development of the enforcement competition argument, see Spahn, *Multi-Jurisdictional Bribery*, *supra* note 20.

141. *See supra* note 92.

142. *See supra* notes 80-81 and accompanying text (discussing the *Siemens* case).

143. *See, e.g.*, *Extraterritorial Law and International Norm Internalization*, *supra* note 89, at 1285-90 (2011) (discussing the FCPA and the OECD Anti-Bribery Convention).

144. However, it should be noted that under the FCPA fines and penalties are paid into the general Treasury funds rather than retained by the enforcing agencies. Mclean, *supra* note 94, at 1978 n.28.

145. *See* Susan Rose-Ackerman & Sinead Hunt, *Transparency and Business Advantage: The Impact of International Anti-Corruption Policies on the United States National Interest*, 67 N.Y.U. ANN. SURV. AM. L. 433, 448 (2012); Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARV. J. ON

field against unfair competition from those continuing to cling to old bribe-abroad business models.

In the event that enforcement competition proves insufficient to change bribe-abroad business models, debarment remedies which have to date been relatively under-deployed, appear to be coming to the forefront. The much-touted mandatory debarment sanction of the European Union has yet to be deployed frequently[146] as plea agreements may be carefully structured to avoid it.[147] The US debarment process is not especially effective at this point in time.[148] Serious debarment action currently seems to be from the multi-lateral lending banks.

The World Bank, in particular, appears to be effectively increasing the likelihood of debarment sanctions against contractors for paying bribes.[149] The World Bank's Sanctions Regime adopted its current two-tiered structure in 2004 based on the recommendations of the 2002 Thornburgh Report.[150] The 2007 Volker Recommendations further strengthened the sanctioning structures.[151] Early temporary suspension was adopted in 2009 and other important reforms tightened standards and closed loopholes in 2010.[152]

LEGIS. 303, 318-19 (2012); Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 444-47 (2012); Joe Androphy et al., *The Intersection of the Dodd-Frank Act and the Foreign Corrupt Practices Act: What All Practitioners, Whistleblowers, Defendants and Corporations Need to Know*, 59 THE ADVOC. 19, 19-21 (2012).

146. *See* TRANSPARENCY INT'L, RECOMMENDATIONS FOR THE DEVELOPMENT AND IMPLEMENTATION OF AN EFFECTIVE DEBARMENT SYSTEM IN THE EU 2-3 (2006), *available at* http://www.eib.org/attachments/strategies/TI_EU_debarment_recommendations.pdf; *see also* Sope Williams, *The Mandatory Exclusions for Corruption in the New EC Procurement Directives* 31 E.L. REV. 711 (2006); Sue Arrowsmith et al., *Self-Cleaning as a Defence to Exclusions for Misconduct–An Emerging Concept in EC Public Procurement Law?*, 18 PUBLIC PROCUREMENT L. REV. 257 (2009). My thanks to Jessica Tillipman for this research.

147. *See* Peter B. Clark & Jennifer A. Suprenant, *Siemens-Potential Interplay of FCPA Charges and Mandatory Debarment under the Public Procurement Directive of the European Union*, *in* AM. BAR ASS'N CTR. FOR CONTINUING LEGAL EDUC. NAT'L INST., WHITE COLLAR CRIME, at B-74, B-75, B-76 (2009), *available at* http://www.americanbar.org/content/dam/aba/events/criminal_justice/London/Session1_Clark_ Siemens.authcheckdam.pdf.

148. *See* Tillipman, *supra* note 82 (providing an overview of the US debarment procedures); *see also* Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big To Debar?*, 80 FORDHAM L. REV. 775 (2011).

149. *Sanction Systems at the World Bank*, THE WORLD BANK, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOFFEVASUS/0,,menuPK: 3601066~pagePK:64168427~piPK:64168435~theSitePK: 3601046,00.html (last visited Jan. 23, 2013).

150. THE WORLD BANK, WORLD BANK GROUP SANCTIONS REGIME - AN OVERVIEW 10-11 nos.1, 3-4 (2010), *available at* http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/Overview-SecM2010-0543.pdf.

151. *Id.* at 12-13 no.10.

152. *Id.* at 13-16 nos.13-25. For a truly intimidating flow chart of the Sanctions Procedures, see THE WORLD BANK, SANCTIONS SYSTEM FLOW CHART, *available at* http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/ETS_Flowchart_Version_10.20.10.pdf.

Another major breakthrough occurred as the influential Regional Development Banks[153] recently joined together in a landmark effort to coordinate their efforts for mandatory cross-debarment of contractors violating anti-bribery provisions of their contracts.[154] One hundred and eleven firms and individuals had been cross-debarred between 2010 when the agreement was signed and April, 2012.[155] A list of currently debarred firms and individuals is available, for free, on the World Bank's website.[156] Although in depth examination of the Regional Development Banks' and the World Bank's sanctions efforts is beyond the scope of this article, it is an emerging topic in global anti-corruption law and currently under-written in the legal scholarship.[157]

The multi-pronged supply side enforcement strategy of the FCPA, with the new SEC Extractive Industries transparency regulations, and OECD Convention cooperative and competitive enforcement by thirty-nine economic powers, augmented by increased potential for debarment from the World Bank and the Regional Development Banks, have real potential to reduce both the frequency and the amounts of bribery abroad over time.

As loopholes are shut on the supply side for bribe payers, threats from corrupt foreign officials demanding bribes become increasingly empty. "Bribe me or I'll take my country's business elsewhere" is an empty threat if there is nowhere else to take their corrupt demands. Selling out your country for personal gain becomes more difficult when there are fewer buyers.

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153. The cross-debarment agreement includes the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank Group, and the World Bank. Press Release, Transparency Int'l, TI-USA Welcomes Multilateral Development Banks' Cross-Debarment Agreement (Apr. 9, 2010), *available at* http://www.transparency-usa.org/documents/4-9-10TIUSAReleaseonCrossDebarment.pdf.

154. THE WORLD BANK, *supra* note 150, at 16-17 no.26.

155. Stephan Zimmerman, *Cross Debarment Two Years On*, TRACE BLOG (Apr. 11, 2012), http://traceblog.org/2012/04/11/cross-debarment-two-years-on/.

156. *See World Bank List of Ineligible Firms & Individuals*, THE WORLD BANK, http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984 (last visited Jan. 17, 2013); *see also Evaluation and Suspension Officer Determinations in Uncontested Proceedings*, THE WORLD BANK, http://go.worldbank.org/G7EO0UXW90 (last visited Jan. 23, 2013).

157. *See* Todd J. Canni, *Debarment is No Longer Private World Bank Business: An Examination of the Bank's Distinct Debarment Procedures Used for Corporate Procurements and Financed Projects*, 40 PUB. CONT. L.J. 147 (2010); Susan Rose-Ackermann, *The Role of the World Bank in Controlling Corruption*, 29 LAW & POL'Y INT'L BUS. 93 (1997); Bruce Zagaris & Shaila Lakhani Ohri, *The Emergence of an International Enforcement Regime on Transitional Corruption in the Americas*, 30 LAW & POL'Y INT'L BUS. 53 (1999); Stuart H. Deming, *Anti-Corruption Policies: Eligibility and Debarment Practices at the World Bank and Regional Development Banks*, 44 INT'L LAW. 871 (2010).

III. IMPLEMENTING GLOBAL ANTI-BRIBERY NORMS: DEMAND SIDE ("PASSIVE") TAKING BRIBES

One frequent criticism of both the US FCPA and the OECD Anti-Bribery Convention is that unlike the new UK Bribery Act,[158] neither of the older legal regimes address the demand side of bribery transactions (corrupt foreign officials taking bribes is sometimes also termed 'passive' bribery).[159] Business people frequently view demands from officials for payments, gifts, and hospitality as a form of 'extortion'[160] and view themselves as victims twice over – once from a greedy foreign official and a second time from prosecutors in their home state. It seems deeply unfair that bribe payers go to jail, while bribe receivers continue their crimes with impunity, enjoying lavish lifestyles with the proceeds of their crimes.

The term 'extortion' has a very specific legal meaning under both the US FCPA and the OECD Anti-Bribery Convention. 'Extortion' under current US FCPA law does *not* extend to threats to economic or business advantage (pay me or I'll take my business elsewhere); under current US FCPA law, true extortion is limited to threats of violence (pay me or I'll blow up your oil rig).[161] Commentary 7 of the OECD Anti-Bribery Convention also specifically excludes defenses based on threats to business advantage.[162] This is a very important legal distinction as Russia enters the OECD Convention because older Soviet-style legal systems often permitted bribery defenses based on economic or business threats, while the US and

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158. Jordan, *supra* note 131, at 864.

159. Sometimes, of course, the official taking bribes is not passive at all; he or she is demanding and perhaps even threatening unless bribes are paid. Sometimes, of course, the bribe payer is initiating and pushing the corrupt payment on a foreign official.

160. *See* Klaw, *supra* note 145, at 320-24. Professor Klaw of South Korea argues for including an economic extortion defense to the FCPA based on comparisons with domestic US bribery laws. He disagrees with the holding of the *Kozeny* court limiting extortion under the FCPA to violent situations and excluding economic threats. *Id.* at 333-35. Professor Klaw does not address the OECD Convention Commentary 7, which also excludes economic threats as a defense. Like Professor Yockey discussed below, Klaw relies on a pre-*Kozeny*, pre-OECD Convention law review article not purporting to address the specialized language of the FCPA to define extortion. *Id.* at n.125 (citing James Lindgren, *The Elusive Distinction between Bribery and Extortion: From the Common-Law to the Hobbs Act*, 35 UCLA L. REV. 815, 825 (1988)). *See also* Joseph W. Yockey, *Solitication, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 795-800 (2011). Yockey apparently relies on a 1993 article defining extortion which pre-dates both the *Kozeny* case and the OECD Convention provisions discussed below. *Id.* at n.67 (citing James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695, 1699 (1993)). Yockey apparently also disagrees with the opinion in the *Kozeny* case. *Id.* at 817.

161. US v. Kozeny, 582 F. Supp. 2d 535, 538-40 (S.D.N.Y. 2008). For more detailed discussion of the "extortion" issue under both the FCPA and the OECD Convention, see Spahn, *Local Law Provisions*, *supra* note 26, at 273-76.

162. ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 2, at 14-19.

OECD systems limit extortion defenses to threats of violence.[163]

The frustration that enforcement is focused primarily on the supply side of bribe payers is shared by multi-national corporations as well as exploited local people directly suffering under systemically corrupted regimes. There is some reason to hope that increasing global supply side enforcement against bribe payers has now set the stage for serious enforcement efforts on the demand side of corrupt officials.

A. US Enforcement Against Demand Side Bribe Takers

Domestic US law provides limited avenues for addressing demand-side crimes where the official is foreign. Although the FCPA itself does not assert jurisdiction over corrupt foreign officials taking bribes, the United States recently used money laundering criminal statutes to reach three foreign government official bribe takers and their assets in the Haiti Telecoms cases.[164]

A second tool under US law is Presidential Proclamation 7750 (President George W. Bush, Republican), which allows the US Department of State to deny visas to corrupt foreign officials, their families and friends.[165] Because US law requires secrecy in visa matters[166] observers are hard-pressed to determine whether and how frequently this power is actually used. A WikiLeaks document did disclose a memo recommending

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163. Spahn, *Local Law Provisions*, *supra* note 26, at 276, 281-83.

164. The United States Convicted Haitian telecommunications officials Robert Antoine, Jean Rene Duperval, and Patrick Joseph were convicted of laundering bribe money. Antoine received a reduced sentence of eighteen months for cooperation with the US prosecution. Judgment, United States v. Antoine, No. 1:09-21010-CR-M ARTINEZ-3 (S.D. Fla., May 29, 2012) *available at* http://www.fedseclaw.com/uploads/file/Antoine_2012_05_29_Amended_Judgment.pdf; William McGrath, *FCPA Cooperation: Robert Antoine Receives a Sentence Reduction in Haiti Teleco*, FEDERAL SECURITIES LAW BLOG (June 1, 2012), http://www.fedseclaw.com/2012/06/ articles/foreign-corrupt-practices-act-1/fcpa-cooperation-robert-antoine-receives-a-sentence-reduction-in-haiti-teleco/#axzz28ibVOcFk. Duperval was sentenced to nine years in US prison. Press Release, Dep't of Justice, Former Haitian Government Official Sentenced to Nine Years in Prison for Role in Scheme to Launder Bribes (May 21, 2012), *available at* http://www.justice.gov/opa/pr/2012/May/12-crm-656.html. Joseph received a one year and one day sentence. C.M. Matthews, *Haitian Official Gets 1 Year in Florida Telecom FCPA Case*, WALL ST. JOURNAL (July 9, 2012, 3:20 PM), http://blogs.wsj.com/corruption-currents/2012/07/09/haitian-official-gets-1-year-in-florida-telecom-fcpa-case/. For an overview of the various prosecutions in the Haiti telecommunications bribery cases in which a Miami based company bribed Haitian government officials, see *Haiti Teleco*, The TRACE COMPENDIUM, https://www.traceinternational2.org/compendium/view.asp?id=38 (last visited Jan. 23, 2013).

165. Presidential Proclamation 7750 To Suspend Entry as Immigrants or Nonimmigrants of Persons Engaged in or Benefiting from Corruption, 69 Fed. Reg. 2287, 2287-89 (Jan. 14, 2004), *available at* http://www.gpo.gov/fdsys/pkg/FR-2004-01-14/pdf/04-957.pdf.

166. 8 U.S.C. § 1184 (2009); *see* Daniel M. Torrence, Note, *Ideological Exclusions: A Prior Restraint Analysis*, 11 HASTINGS COMM. & ENT. L.J. 335, 359 (1989).

denial of visas because of corruption for Kenyan citizen Aaron Gitonga Ringera and members of his family in 2009.[167]

It would be very helpful to global bribery law reform efforts if the secrecy requirements for visa denials under Presidential Proclamation 7750 could be statutorily exempted. Publically naming kleptocrats as banned from entry to the United States would facilitate equivalent visa bans in other globally desirable locations as well. Limiting the abilities of kleptocrats, their families,[168] and their cronies to enjoy their loot abroad will provide a significant crimp in their lifestyles. Cooperation between nations, especially those with highly desirable locations for the rich and infamous, is crucial.

France seized eleven luxury cars in downtown Paris belonging to the son of increasingly impoverished[169] Equatorial Guinea's dictator Teodoro Obiang Nguema Mbasogo in August 2012.[170] The son, Teodoro Nguema Obiang Mange ("Nguema"), is now wanted on money laundering charges in France.[171] The US Department of Justice sought civil forfeiture of Nguema's allegedly stolen assets in 2011.[172] The DOJ filed an *in rem* civil asset forfeiture suit against some of his US assets in the hilariously named "One White Crystal Covered 'Bad Tour' Glove" lawsuit on June 11, 2012.[173] Among the named assets are the Michael Jackson glove, a $35

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167. Richard L. Cassin, *Leaked Cable Reveals Kenya Visa Case*, FCPA BLOG (Sept. 6, 2011, 2:28 PM), http://www.fcpablog.com/blog/2011/9/6/leaked-cable-reveals-kenya-visa-case.html.

168. Perhaps an exception should be made for younger family members seeking educational opportunities abroad? Exposure to viewpoints that condemn looting one's native country for personal gain could be helpful to changing normative values in the next generation of local elites in developing nations. However, education sometimes provides a cover for lavish lifestyles as in the case of the notoriously flamboyant Teodoro Nguema Obiang Mange whose tuition at conservative Christian Pepperdine University was paid allegedly by bribe money from a Houston, Texas oil company doing business with his allegedly corrupt father. *See infra* notes 170-76.

169. *See generally* UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2011 (2011), *available at* http://hdrstats.undp.org/images/explanations/GNQ.pdf. Equatorial Guinea ranks 136th out of 187 countries on the U.N. Human Development Index. *Id.* at 2.

170. Maia De La Baume, *A French Shift on Africa Strips a Dictator's Son of His Treasures*, N.Y. TIMES (Aug. 23, 2012) http://www.nytimes.com/2012/08/24/world/europe/for-obiangs-son-high-life-in-paris-is-over.html.

171. *See Teodoro Nguema Obiang Mbasogo/Teodoro Nguema Obiang Mangue*, STOLEN ASSET RECOVERY INITIATIVE, http://star.worldbank.org/corruption-cases/node/18584 (last visited Jan. 23, 2013); Vivienne Walt, *Teodorin Obiang: The Dictator's Son with a Malibu Mansion and a Warrant for His Arrest*, TIME (July 16, 2012), http://world.time.com/2012/07/16/teodorin-obiang-the-dictators-son-with-a-malibu-mansion-and-a-warrant-for-his-arrest/.

172. Press Release, Dep't of Justice, Department of Justice Seeks to Recover More Than $70.8 Million in Proceeds of Corruption from Government Minister of Equatorial Guinea (Oct. 25, 2011), *available at* http://www.justice.gov/opa/pr/2011/October/11-crm-1405.html.

173. The 118 page complaint details Nguema's extravagant lifestyle. Docket No. CV2:

million Malibu mansion, and a fleet of luxury cars in California.[174] Two Beverly Hills lawyers are also named for allegedly assisting Nguema in setting up shell accounts after banks refused to do business with him under his own name.[175] The bribe money allegedly came from Houston, Texas-based oil and gas companies.[176]

The most promising tools currently available to punish, and one hopes eventually deter, grand corruption on the demand side are money laundering criminal prosecutions,[177] asset recovery,[178] and visa denials. Although no single tool will provide a silver bullet cure, as evinced by the continuing impunity of Zimbabwe's Robert Mugabe,[179] they at least provide a start. The United States cannot do this alone; asset recovery cooperation, and perhaps competition, must be multi-lateral, particularly among more developed nations having desirable lifestyle options or reputations for bank secrecy.

For US FCPA defense lawyers, their frustrated corporate clients, and the US Chamber of Commerce lobby, it is important to move beyond parochial obsessions with domestic US law and complaints that they are victims. The most important enforcement developments today are coming from abroad, especially on the demand side.

B. Multi-Lateral Efforts to Combat Demand Side Corruption: The Inter-American Convention Against Corruption and other Regional Conventions

The very first multi-lateral anti-corruption convention addressed both supply-side (active) and demand-side (passive) bribery. The Inter-American Convention Against Corruption (IACAC) was adopted in 1996.[180] Thirty-

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11-3582-GW-SS (on file with author).

174. Guy Adams, *Teodoro Nguema Obiang: Coming to America (to Launder his Millions?)*, THE INDEP. (June 16, 2012), http://www.independent.co.uk/news/world/americas/teodoro-nguema-obiang-coming-to-america-to-launder-his-millions-7855043.html.

175. *Id.* The lawyers named are Michael J. Berger and George Nagler.

176. *Id.* Houston based oil company Ocean Energy allegedly paid Nguema's tuition at conservative Christian Pepperdine University in California. He dropped out after five months.

177. The OECD Financial Action Task Force is a leader in global anti-money laundering cooperation. *See generally Who We Are*, FIN. ACTION TASK FORCE, http://www.fatf-gafi.org/ (last visited Jan. 23, 2013).

178. The World Bank/United Nations Office of Drug and Crime Control joint project, the Stolen Asset Recovery Project ("StAR") is a leader in global asset recovery. *See generally Home*, STOLEN ASSET RECOVERY INITIATIVE, http://www1.worldbank.org/finance/star_site/ (last visited Jan. 23, 2013). *See also* Mark Vlasic & Gregory Cooper, *Beyond the Duvalier Legacy: What New "Arab Spring" Governments Can Learn from Haiti and the Benefits of Stolen Asset Recovery*, 10 NW. U. J. INT'L HUM. RTS. 19 (2011).

179. Mugabe, for example, purchased a house reputed to cost $5.7 million USD in 2008 in lovely Hong Kong. Ishaan Tharoor, *Mugabe's Home Away from Zimbabwe: Hong Kong?*, TIME (Feb. 23, 2009), http://www.time.com/time/world/article/0,8599,1881248,00.html.

180. Organization of American States, Inter-American Convention Against Corruption,

four nations of the Organization of American States (OAS) ratified the Convention.[181] Unlike the OECD Anti-Bribery Convention (adopted two years later in 1998), the IACAC was not primarily a US initiative, nor is it modeled on the US FCPA. The IACAC is generally viewed as a "personal triumph" for Venezuelan President Rafael Caldera.[182]

Both active and passive bribery are banned under Article VI of the IACAC.[183] While the IACAC, like the OECD Convention, does require signatories to ban paying bribes abroad in Article VI (b), the primary focus of the Inter-American Convention is on the demand side of corrupt officials soliciting or accepting anything of value, Article VI (a).[184] Preventive measures are at the forefront of the IACAC, which requires states to establish codes of conduct for public officials as well as systems to implement and enforce ethical standards in Article III.[185]

Public officials are required to disclose their assets, and explain any significant increase in assets that cannot reasonably be attributed to lawful earnings under Article IX (Illicit Enrichment).[186] Requiring public officials to disclose and explain any significant increase in assets is a powerful weapon to address demand-side bribery. However, in many common law legal systems, placing the burden of proof on the defendant public official may violate presumption of innocence requirements. In civil law systems apparently this is less of a hurdle.

Asset recovery is also a major focus under the IACAC, as nations suffering from corrupt domestic officials seek to regain the loot – often stashed in banks abroad – usually in developed economies. New York, London, Dubai, Switzerland, the Channel Islands, Lichtenstein, Macau, and the Cayman Islands are all popular spots to stash illegal bribe assets. Article XV is dedicated to furnishing assistance among members for asset recovery.[187] Article XVI prohibits bank secrecy as a rationale for denying

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Mar. 29, 1996, 35 I.L.M. 724, *available at* http://www.oas.org/juridico/english/treaties/b-58.html [hereinafter IACAC]. *See also Anti-Corruption Portal of the Americas*, ORG. OF AMERICAN STATES, http://www.oas.org/juridico/english/fightcur.html (last visited Jan. 17, 2013); Giorleny D. Altamirano, *The Impact of the Inter-American Convention Against Corruption*, 38 U. MIAMI INTER-AM. L. REV. 487 (2007); Bruce Zagaris, *Developments in the Institutional Architecture and Framework of International Criminal and Enforcement Cooperation in the Western Hemisphere*, 37 U. MIAMI INTER-AM. L. REV. 421 (2006).

181. *Signatories and Ratifications B-58: Inter-American Convention Against Corruption*, ORG. OF AMERICAN STATES, http://www.oas.org/juridico/english/Sigs/b-58.html (last visited Jan. 23, 2013). Six of the thirty-four are also signatories to the OECD Anti-Bribery Convention.

182. Zagaris, *supra* note 180, at 506 ("Venezuelan President Rafael Caldera . . . had promoted adoption of the IACAC for many years following the failures of some of the major banks in Venezuela and allegations of corruption that led to those failures.").

183. IACAC, *supra* note 180, art. VI, para. 1.

184. *Id.*

185. *Id.*, art. III, para. 1-3.

186. *Id.*, art. IX.

187. *Id.*, art. XV.

information or assistance to a requesting State Party.[188] (The OECD Financial Action Task Force ("FATF") has a vigorous global anti-money laundering program,[189] and the World Bank's StAR asset recovery program under the UN Convention is discussed below).

With the primary focus on the demand side – public officials soliciting or accepting bribes – the IACAC statement of norms differs in emphasis from the FCPA. Where the FCPA emphasis is on global competition, the IACAC emphasizes economic development, which is particularly undermined by organized crime, especially in illicit narcotics.[190] While the FCPA focuses on preventing deep-pocket global traders from paying bribes, the IACAC focuses on preventing public officials from soliciting bribes, and on recovering the proceeds of crime.

The IACAC is implemented through a follow-up mechanism known as MESICIC.[191] Although MESICIC has official documents and materials available in English on its well-organized website, there is little independent research and analysis available from legal scholars. It would be exceptionally helpful as the global anti-corruption legal scholarship develops if legal scholars fluent in Spanish and Portuguese would research domestic implementation efforts of several of the IACAC provisions, including Article IX (Illicit Enrichment), Articles XV (Asset Recovery), and Article XVI (Bank Secrecy).

Because the IACAC is the oldest convention with these provisions, it has the most experience in implementation. Sharing information about the successes and failures, especially for provisions implementing disclosure of public officials' assets, and asset recovery will be very helpful for other nations under the United Nations Convention Against Corruption (see discussion below).

Other regional anti-corruption conventions were also adopted focusing on both supply- and demand-side bribery. The European Union adopted extensive anti-corruption provisions during the 1990s and the EU has very able legal scholars who are better situated than I to analyze them.[192] The African Union also adopted a regional anti-corruption convention coming into force in 2006, which has also been extensively

188. *Id.*, art. XVI, para. 1.

189. *Who We Are*, *supra* note 177.

190. IACAC, *supra* note 180 (see specifically the Preamble).

191. *Anti-Corruption Portal of the Americas*, *supra* note 180; *What is the MESICIC?*, ORG. OF AMERICAN STATES, http://www.oas.org/juridico/english/mesicic_intro_en.htm (last visited Jan. 23, 2013).

192. *See, e.g.*, Peter W. Schroth & Ana Daniela Bostan, *International Constitutional Law and Anti-Corruption Measures in the European Union's Accession Negotiations: Romania in Comparative Perspective*, 52 AM. J. COMP. L. 625 (2004); Laura Ferola, *Anti-Bribery Measures in the European Union: A Comparison with the Italian Legal Order*, 28 INT'L J. LEGAL INFO. 512 (2000).

analyzed by able legal scholars.[193]

C. Multi-Lateral Efforts to Combat Demand Side Corruption: the United Nations Convention Against Corruption

While the IACAC was the first and served as a model, the real globalization of the movement to address demand-side corruption came through the United Nations Convention Against Corruption ("UNCAC"), which entered into force in 2005.[194] As of December 2012, there are 165 States Parties and 140 Signatories to the UNCAC.[195] The UN Convention addresses five topics: prevention, criminalization and law enforcement measures, international cooperation, asset recovery, and technical assistance and information exchange. Various forms of corruption such as trading in influence, abuse of power, and various acts of corruption in the private sector are also addressed.

In September, 2011, the UNCAC launched a sophisticated website with a searchable electronic database of corruption-related legislation and jurisprudence for over 175 countries.[196] "TRACK", the acronym for Tools and Resources for Anti-Corruption Knowledge, will greatly facilitate independent analysis of the progress in law reforms under UNCAC. The TRACK database permits searches by country, by Convention Article topic, by type of legal system, and by governance structure. TRACK also provides research and sharing information for anti-corruption practitioners, including enforcement agencies.[197]

The normative bases for UNCAC are similar to those of the Inter-American Convention.[198] Economic development, concerns about transnational organized crime, and commitment to the rule of law are among the major values articulated in the Preamble to the Convention. The

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193. *See* John Mukum Mbaku, *The International Dimension of Africa's Struggle against Corruption*, 10 ASPER REV. INT'L BUS. & TRADE L. 35, 61-67 (2010); Lucky Biyce Jatto Jnr, *Africa's Approach to the International War on Corruption: A Critical Appraisal of the African Union Convention on Preventing and Combating Corruption*, 10 ASPER REV. INT'L BUS. & TRADE L. 79, 82-94 (2010).

194. *United Nations Convention Against Corruption*, *supra* note 3; *United Nations Convention Against Corruption*; Contemporary Practice of the United States Relating to International Law, 98 AM. J. INT'L L. 169, 182 (Sean D. Murry ed., 2004).

195. *United Nations Convention Against Corruption: UNCAC Signature and Ratification Status*, *supra* note 3.

196. *On Track Against Corruption*, TRACK, http://www.track.unodc.org/Pages/home.aspx (last visited Jan. 23, 2013).

197. *Network of Practitioners*, TRACK, http://www.track.unodc.org/Practitioners/Pages/practitioners-networks.aspx (last visited Jan. 23, 2013).

198. *See* UNITED NATIONS CONVENTION AGAINST CORRUPTION, GENERAL ASSEMBLY RESOLUTION 58/4 OF 31 OCTOBER 2003, at 2, 5-6 (2004), *available at* http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf; IACAC, *supra* note 180.

role of anti-corruption norms in grassroots movements is rising; increasingly, they are seen as fundamental rights.[199]

Recovery of assets is a major concern for UNCAC countries pursuing the assets of former leaders and other officials accused of or found to have engaged in corruption. In cooperation with the World Bank, the StAR asset recovery project was launched, providing technical expertise to nations seeking to recover looted assets.[200] The OECD and StAR issued an important joint report in March 2012 on identification and quantification of the proceeds of bribery.[201] Asset recovery is, in my opinion, the most exciting area currently developing in global anti-corruption reforms on the demand (passive) side.

IV. CONCLUSION

On the supply side, enforcement cooperation and competition among OECD Convention nations disciplining multi-national bribe payers appears to be highly effective. On the demand side, anti-money laundering law enforcement and facilitating asset recovery of bribe revenues as well as embezzled state assets will provide an economic incentive to reform systemically corrupted nations. If corrupt officials cannot safely stash their loot in First World banks, stocks, or real estate to ensure a comfortable lifestyle exit strategy for themselves, their family and friends, it may encourage legitimate rather than corrupt wealth acquisition. At least it will make it more difficult and risky for corrupt bribe takers and their clans to enjoy the stolen loot in desirable locations abroad.

Although thirty-five years may seem painfully slow, in comparison to other major global law reforms of profitable but unacceptable business models, it seems to be on track. The abolition of the transatlantic slave trade, a highly profitable business model, took about sixty years with Britain and especially the British Navy leading virtually alone while other nations, including the US and Brazil, lagged in enforcement until the very

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199. See, for example, Juliet Sorenson's interesting article detailing the role of anti-corruption norms in the Arab Spring revolutions and subsequent developments. Juliet Sorenson, *Ideals without Illusions: Corruption and the Future of a Democratic North Africa*, 10 NW. U. J. INT'L HUM. RTS. 202, 207-08 (2012). Sorenson contrasts North Africa's struggles with corruption with the successful anti-corruption efforts of Botswana and Hong Kong. *Id.* at 223-31.

200. *See Home*, *supra* note 178; *Open-Ended Intergovernmental Working Group on Asset Recovery*, UNITED NATIONS OFF. ON DRUGS AND CRIME, http://www.unodc.org/unodc/en/treaties/CAC/working-group2.html (last visited Jan. 17, 2013); Vlasic & Cooper, *supra* note 178, at 18-25.

201. ORG. FOR ECON. CO-OPERATION AND DEV., IDENTICATION AND QUANITIFICATION OF THE PROCEEDS OF BRIBERY (2012), *available at* http://www.oecd.org/daf/briberyininternationalbusiness/50057547.pdf.

end of that era.[202] Some African tribal chiefs who profited from the slave trade were slow to accept the demise of that now-discredited model of global trade. Some merchants adapted, finding less risky profits in other aspects of global trade (tea, spices, opium); other merchants were unable to adapt.[203] One transatlantic merchant slaver was eventually hanged by the United States as a pirate.

Bribery, like murder, rape, slavery or other crimes, will still occur despite criminal laws being vigorously enforced. Law cannot totally abolish criminal acts or catch every criminal. But laws do change as norms evolve. Increasingly people around the world understand that bribe givers and bribe takers are real criminals doing real harm to real people.

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202. The analogy to the abolition of the transatlantic slave trade business model is developed in more detail in Spahn, *Multi-Jurisdictional Bribery, supra* note 20.

203. Professor Peter Henning compares dependence on bribery as a business model to drug addiction, very difficult to change. He holds out hope for rehabilitation efforts. Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1437, 1428-29 (2009).

FOREIGN CORRUPT PRACTICES — THE GROWTH AND LIMITATIONS OF CANADIAN ENFORCEMENT ACTIVITY

Neil Campbell, Elisabeth Preston & Jonathan O'Hara*

INTRODUCTION

Canada's foreign corruption avoidance legislation is the Corruption of Foreign Public Officials Act ("CFPOA").[1] The CFPOA was enacted in 1999, more than two decades after the path-breaking US Foreign Corrupt Practices Act ("FCPA")[2] and over a decade before the United Kingdom brought into force the Bribery Act 2010 ("UK Bribery Act").[3] While Canadian enforcement activity initially was slow to materialize, it is now accelerating.

The CFPOA is deliberately similar in many ways to the US FCPA. This allows the many Canadian businesses with US operations (and vice versa) to have compatible cross-border compliance programs. However, two key limitations set the Canadian regime apart from its southern neighbor. The CFPOA does not assert jurisdiction over acts of corruption committed entirely outside of Canada, and the CFPOA appears not to apply to the non-profit sector. Aside from these two areas, the CFPOA is a robust regime which necessitates careful compliance activity by Canadian companies and individuals carrying on business abroad.

DEVELOPMENT OF THE CANADIAN LEGISLATION

The CFPOA was enacted in response to the Organization for Economic Cooperation and Development's anti-bribery convention ("OECD Convention").[4] Canada signed the OECD Convention in late 1997 and ratified it in late 1998.[5]

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1. Corruption of Foreign Public Officials Act, S.C. 1998, c. 34 (Can.) [hereinafter CFPOA].

2. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78m, 78dd-1 *et seq.*, 78ff (1998) [hereinafter FCPA].

3. Bribery Act 2010, 2010, c. 23 (U.K.) [hereinafter UK Bribery Act].

4. Organization for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD DAFFE/IME/BR(97)20, Dec. 17, 1997, 337 I.L.M. 9 [hereinafter OECD Convention].

5. DEPARTMENT OF JUSTICE- CANADA, THE CORRUPTION OF FOREIGN PUBLIC OFFICIALS ACT: A GUIDE, 1- 2 (May 1999), *available at* http://www.justice.gc.ca/eng/dept-min/pub/cfpoa-lcape/index.html [hereinafter DOJ Guide].

Canada is also a party to the Inter-American Convention Against Corruption[6] but did not sign it until mid-1999 and ratified it in mid-2000.[7] Canada signed the United Nations Convention Against Corruption[8] in mid-2004 and ratified it in late 2007.[9] Canada did not make any changes to the CFPOA in order to comply with either of these two conventions, likely because these conventions generally are less onerous than the OECD Convention. Thus, the OECD Convention has been the primary international instrument driving Canada's foreign corruption avoidance regime.

OVERVIEW OF THE CFPOA REGIME

Consistent with the OECD Convention, the CFPOA seeks to curtail corrupt practices by Canadians and Canadian businesses operating abroad. More specifically, it focuses on acts of bribery or similar activities geared toward securing advantages in return for such activities. The core bribery offense in the CFPOA is prescribed in section 3 (which is very similar to both the FCPA and the OECD Convention):[10]

> 3. (1) Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official
>
> (a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or
>
> (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

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6. Organization of American States, Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M 724 [hereinafter Inter-American Convention].

7. *Signatures and Ratifications B-58: Inter-American Convention Against Corruption*, Organization of American States, http://www.oas.org/juridico/english/sigs/b-58.html (last visited Feb. 5, 2013).

8. United Nations Convention Against Corruption, G.A. Res. 58/4, Annex, U.N. Doc A/RES/58/4 (Oct. 31, 2003), *available at* http://unpan1.un.org/intradoc/groups/public/documents/un/unpan038988.pdf [hereinafter UN Convention].

9. Signatory and Ratification Status for United Nations Convention against Corruption, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-14&chapter=18&lang=en (last visited Feb. 5, 2013).

10. *Cf.* FCPA, *supra* note 2, §§ 78dd-1(a)-2(a), 3(a); *cf.* OECD Convention, *supra* note 4, art. 1, ¶ 1.

> (2) Every person who contravenes subsection (1) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.[11]

While the CFPOA does not refer to monetary penalties, it does specify that bribery is an indictable offense rather than a summary conviction offense. The Criminal Code provides that, for indictable offenses where the offense provision does not specify a maximum, the fine for a convicted corporation is at the discretion of the Court.[12] This means that there is no maximum monetary penalty to the amount a corporation could be fined when convicted of the foreign bribery offense.[13]

ENFORCEMENT ACTIVITY

The history of prosecutions under the CFPOA is limited and recent. The federal government reported in 2011 that two prosecutions (both successful) have been completed to date.[14] Charges have been laid in a third case and Canada has approximately twenty additional foreign corruption investigations underway.[15]

The Hydro Kleen *Case*

In Canada's first prosecution under the CFPOA, Hydro Kleen Systems Inc. (Hydro Kleen) pleaded guilty to making various bribery payments to a senior US immigration inspector employed at the Calgary International Airport.[16]

The inspector, unbeknownst to his government employer, had set up a consulting business on the side.[17] In his capacity as a consultant, the inspector advised Hydro Kleen on the best ways for their employees to enter the United States on work visas by explaining what to say to immigration officials when asked, and drafting letters and documents required to enter the United States.[18] One of Hydro Kleen's competitors,

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11. CFPOA, *supra* note 1, § 3.

12. Criminal Code, R.S.C. 1985, c. C-46, §735(1)(a) (Can.) [hereinafter Criminal Code].

13. CFPOA, *supra* note 1.

14. *Corporate Social Responsibility – Bribery and Corruption, The Twelfth Annual Report to Parliament*, Foreign Affairs and International Trade Canada (Oct. 17, 2011) http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/12-report-rapport.aspx?view=d [hereinafter 12th Report to Parliament]; *See also Her Majesty the Queen v.* Griffiths Energy International (2013), E-File No.:CCQ13GRIFFITHSENER, Action No. 130057425Q1, (Can. Alta. Q.B.).

15. *Id.*

16. *Id.*

17. R. v. Watts, [2005] A.J. 568, para. 48 (Can. Alta. Q.B.).

18. *Id.* at paras. 56-57.

which did not experience the same level of success in bringing its employees across the border, hired a private investigator who directly observed an incident where a manager at Hydro Kleen handed over an envelope to the US inspector in return for another envelope.[19]

A subsequent Royal Canadian Mounted Police ("RCMP") investigation led to charges against Hydro Kleen, its president, and an employee.[20] It was determined that Hydro Kleen had paid C$28,300 in bribes.[21] Hydro Kleen pleaded guilty to one count of bribery, contrary to section 3(1)(a) of the CFPOA.[22] The other charges were stayed. Hydro Kleen paid a fine of C$25,000 (*i.e.* 88% of the improper payments).[23]

In the course of accepting the sentence recommended by the prosecution and defense counsel, Justice Sirrs highlighted the international implications of corrupt behavior:

> Where someone is dealing in international trade, especially with the United States, who is our closest and most important trading partner, matters that involve corruption that might interfere with trade are of much importance to Alberta. . . . [It is important] that trade with the United States be seen to be honest and of high ethical standards in order to avoid further complications that affect people that maybe are not even in the oil industry, because of the fact of our reputations gained concerning the business practices of Albertans.[24]

Justice Sirrs also described the fine as "significant" and accepted it after noting that a guilty plea was entered and responsibility was accepted,[25] both of which are mitigating factors in sentencing for criminal offenses given the sentencing objectives in the Criminal Code.[26]

It is ironic that the country whose official was involved in Canada's first conviction is Canada's largest trading partner and the jurisdiction which has led the development of foreign corrupt practices enforcement. In rankings published by Transparency International, a non-profit organization

19. David Elzinga, *A Steep Price,* CA MAGAZINE, (Nov. 2010), *available at* http://www.camagazine.com/archives/print-edition/2010/nov/regulars/camagazine43455.aspx.

20. *Id.*

21. R. v. Watts, at para. 20.

22. *Id.* at paras. 20-21.

23. *12th Report to Parliament, supra* note 14. The US inspector was convicted of accepting secret commissions contrary to section 426(1)(a)(ii) of the Criminal Code and was sentenced to six months in prison and then deported to the United States. *Id.*

24. R. v. Watts, at paras. 181-82.

25. *See id.* at paras. 184, 188.

26. Criminal Code, *supra* note 12, at 718(f).

that seeks to reduce corruption, the United States is ranked 19th with a score of 73.[27] Canada, in comparison, is currently ranked 9th with a score of 84.[28]

The Niko Resources *Case*

The second prosecution under the CFPOA was also resolved with a guilty plea. The magnitude of the bribe was somewhat larger, but the penalty was much more substantial.

In 2005, an explosion at a gas field in Bangladesh owned by Niko Resource (Niko) caused local villagers to call for compensation.[29] In order to minimize the amount ordered for compensation, two Niko representatives delivered a C$190,000 Toyota Land Cruiser to Energy Minister A.K.M. Mosharraf Hossain, the official largely responsible for handling the matter in the Bangladesh government.[30]

After a lengthy investigation, the RCMP laid charges and Niko agreed to plead guilty.[31] The prosecutor and Niko's counsel recommended that the court impose a total fine of C$9,499,000 (5,000% of the value of the bribe), which was accepted as an appropriate sentence.[32] Niko was also given probationary terms for three years.[33]

At the sentencing hearing, Justice Brooker remarked upon the seriousness of the behavior from a public perspective saying bribery "tarnishes the reputation of Alberta and of Canada [and] ... is an embarrassment to all Canadians. . . . [T]he fact that a Calgary-headquartered oil and gas company has bribed a foreign government official is a dark stain on Calgary's proud reputation as the energy capital of Canada."[34]

In addition, the prosecutors submitted cases under the US FCPA as sentencing precedents, and these were given consideration by the Court.[35]

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27. TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 20122, 3 (2012) (noting the lowest ranking is 174th, occupied by Somalia, North Korea, and Afghanistan, each with a score of 8), *available at* http://www.transparency.org/cpi2012/results [hereinafter TI CORRUPTION INDEX].

28. *Id.*

29. JOHN W. BOSCARIOL, A DEEPER DIVE INTO CANADA'S FIRST SIGNIFICANT FOREIGN BRIBERY CASE: NIKO RESOURCES, (McCarthy Tetrault LLP Publications, Nov. 2011), *available at* http://www.mccarthy.ca/article_detail.aspx?id=5640.

30. 12th Report to Parliament, *supra* note 14, at 5. Bangladesh has a TI Corruption Index rating of 26, resulting in a rank of 144th. TI Corruption Index, *supra* note 27.

31. R. v. Niko Resources Ltd. (2011), E-File No.: CCQ11NIKORESOURCES, ¶¶ 64-66 (Can. Alta. Q.B.).

32. BOSCARIOL, *supra* note 29, at 4.

33. R. v. Niko Resources Ltd. (2011) ¶ 64.

34. BOSCARIOL, *supra* note 29, at 4.

35. *Id.*

While Canada had received criticism about weak enforcement activity, the *Niko* case sends a clear signal that the Canadian authorities are prepared to bring proceedings and obtain meaningful penalties.

The Karigar *Case*

The Canadian authorities have charged Nazir Karigar under the CFPOA in respect of his efforts to obtain a security equipment contract with Air India worth C$100,000,000 in 2005.[36] Karigar allegedly gave C$250,000 to a political associate of the Indian Civil Aviation Minister, Praful Patel.[37] Air India eventually backed out of its plans to buy the equipment. Mr. Patel has denied any wrongdoing, as has Mr. Karigar.[38]

A high-profile prosecution is currently in progress. At this stage only limited details are publicly available based on recent media reports.[39] The preliminary hearing took place in September 2012.[40] Karigar is defending in part on the basis of a jurisdictional argument.[41] The case can be expected to generate important jurisprudence on this point and potentially on the application of the CFPOA to individuals, including the approach to penalties.

Investigations Related to SNC-Lavalin

The Canadian authorities usually keep CFPOA investigations confidential until charges are laid. However, targets may make disclosures related to investigations in order to comply with securities law requirements. For example, in September 2011, SNC-Lavalin confirmed media reports that it was the subject of a CFPOA investigation related to a US$1,200,000,000 World Bank bridge project in Bangladesh.[42] Recent

36. Greg McArthur et al., *Canadian Accused of Bribing Cabinet Minister in India Is a Test Case for Canada's Foreign Anti-Corruption Law*, THE GLOBE AND MAIL (Sept. 6, 2012), http://m.theglobeandmail.com/news/politics/canadian-accused-of-bribing-cabinet-minister-in-india/article2323342/.

37. *Id.* (India has a TI Corruption Index rating of 36, resulting in a rank of 94th. TI Corruption Index, *supra* note 27, at 7.)

38. McArthur, *supra* note 36.

39. *Id.*

40. *Id.*

41. *Id.* Closing arguments are expected to begin in March 2013. *See* DAVID MARTIN & CASEY LEGGET, F'OREIGN CORRUPT PRACTICES:ISSUES AND DEVELOPMENTS IN THE CANADIAN CONTEXT (2013), *available at* http://martinandassociates.ca/wp-content/uploads/2013/02/Foreign-Corrupt-Practice-Issues-and-Developments-in-the-Canadian-Context.pdf.

42. *See* Press Release, SNC-Lavalin, Clarification on the RCMP Investigation (Sept. 6, 2011), *available at* http://www.snclavalin.com/news.php?lang=en&id=1527&action=press_release_details&paging=1¤t_%E2%80%A6; *see also* Andrea Shalal-Esa & Tim Ahmann, *Canadian Authorities Probing Employees of SNCLavalin*

media reports indicated two new developments: that RCMP investigators would arrive in Bangladesh sometime in late June 2012 to share and collect more information from the anti-corruption commission in Bangladesh,[43] and that two former SNC-Lavalin executives would be tried on corruption charges in 2013.[44]

There is also a separate investigation of SNC-Lavalin by authorities in India in relation to alleged bribery involving the Power Minister and other officials in India's Kerala state in 1997, but this appears to pre-date the enactment of the CFPOA and there has not been any confirmation of a parallel Canadian investigation.[45] More recently, in February 2012, SNC-Lavalin disclosed that it was conducting an internal investigation into C$35,000,000 of unexplained payments, but the company has not confirmed whether this involves potential foreign corruption issues and/or the company's widely-publicized relationship with the son of former Libyan leader, Moammar Gadhafi.[46] By June 2012, the unexplained amount had risen to C$56,000,000.[47] Although a shareholder suit was filed in May, two former employees whom the company blames for the missing millions could not be served: Riadh Ben Aissa (jailed in Switzerland) and Stephane Roy (not locatable).[48]

Group (Sept. 2, 2011), http://www.reuters.com/article/2011/09/03/us-worldbank-canada-idUSTRE78206C20110903.

43. The Canadian Press, *SNC-Lavalin Accused of Offering Bribes to Six Bangladeshi Officials: Report* (June 21, 2012), *available at* retasite.files.wordpress.com/2012/06/reta-canadian-press-art-june-21-2012.pdf.

44. The Canadian Press, *Ex-SNC Lavalin Executives to Face Corruption Charge in Court Next Year,* FINANCIAL POST, (June 25, 2012), http://business.financialpost.com/2012/06/25/ex-snc-lavalin-executives-to-face-corruption-charge-in-court-next-year/. The preliminary hearing for the two executives, Ramesh Shah, former VP, and Mohammad Ismail, former director of international projects, is set for April 8-19, 2013. *Id.*

45. *See SNC-Lavalin Deny Bribing Kerala Politicians*, THE NEW INDIAN EXPRESS, (June 12, 2009), http://newindianexpress.com/states/kerala/article106707.ece.

46. *See* Press Release, SNC–Lavalin, SNC–Lavalin Provides Update on Announcement of 2011 Financial Results and Impact on 2011 Outlook (Feb. 28, 2012), www.snclavalin.com/news.php?lang=en&id=1685&action=press_release_details&paging=1&start=26; *see also* Paul Waldie, *SNC–Lavalin Probes Mystery Payments* GLOBE & MAIL, (Feb. 28, 2012), http://www.theglobeandmail.com/globe-investor/snc-lavalin-probes-mystery-payments/article533489/.

47. Stewart Bell & Adrian Humphreys, *Lawsuit against Former SNC-Lavalin Executives Linked to Gaddafi Escape Plot Can Continue: Judge,* NATIONAL POST, (June 28 2012), http://news.nationalpost.com/2012/06/28/lawsuit-against-former-snc-lavalin-executives-linked-to-gaddafi-escape-plot-can-continue-judge/.

48. *Id.* Two former executives allegedly were also responsible for awarding a contract to Cynthia Vanier, who was subsequently arrested in Mexico for allegedly trying to smuggle Gaddafi's son Saadi to Mexico. *Id.* On July 17, 2012, the Canada Border Services Agency said it was taking steps to deport an Australian private security contractor, Gary Peters, who had ties to Gadhafi and Ms. Vanier. Mr. Peters has told reporters that he helped members of the Gaddafi family escape Libya, and his testimony forms part of the evidence against Ms. Vanier. *See also Security Contractor with Gaddafi Ties to Face Deportation Hearing,*

Future Enforcement Activity

We expect that there will be an increasing flow of prosecutions under the CFPOA. In part, this is a reflection of the existing pipeline of investigations and the profile of the *Karigar* and SNC-Lavalin matters.[49] More generally, there is regular media and public sensitivity about corporate wrongdoing. While controversial proposals to make Canadian companies subject to domestic review in respect to their overseas environmental and human rights practices were not enacted in the prior Parliament,[50] the present Conservative Government has passed legislation requiring minimum mandatory sentencing for fraud over C$1,000,000,[51] and it used the Parliamentary majority it obtained in 2011 to push through "tough on crime" reforms[52] which include mandatory jail time for some white collar as well as other crimes, when a custodial sentence is imposed.[53]

Canada's international policy interests point in the same direction. For example, the Canadian Government is seeking to expand trade and investment links with China (including a bilateral investment treaty awaiting ratification[54]), India (including a bilateral trade agreement awaiting ratification[55]and free trade agreement negotiations[56]), Asia more generally (*e.g.* joining the Trans-Pacific Partnership negotiations[57]), and Europe (free

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NATIONAL POST (July 17, 2012), http://news.nationalpost.com/2012/07/17/security-contractor-with-gaddafi-ties-to-face-deportation-hearing/.

49. *See generally* 12th Report to Parliament, *supra* note 14.

50. *See generally* Canada, Bill C-300, An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries, 2nd Session, 40th Parliament, 57-58 Elizabeth II, 2009 (first reading Feb. 9, 2009).

51. Standing up for Victims of White Collar Crime Act, S.C. 2011, c. 6, s. 2 (Can.) (amending s. 380 of the Criminal Code). The Ontario Court of Appeal has also recently issued an important decision which signals that substantial prison terms are normally appropriate in commercial fraud cases. *See* R. v. Drabinsky (2011), 2011 O.A.C. 582, at paras. 157-60 (Can. Ont. C.A.).

52. *See generally* An Act to Enact the Justice for Victims of Terrorism Act and to Amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and Other Acts, S.C. 2011-2012, c. 10 (Can.).

53. *Id.*

54. *See Background on the Canada-China Foreign Investment Promotion and Protection Agreement Negotiations (FIPA)*, FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA, http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-chine.aspx?lang=eng&view=d (last modified Nov. 30, 2012).

55. *See Canada-India Foreign Investment Promotion and Protection Agreement (FIPA) Negotiations,* FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA, http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/ india-inde.aspx?lang=eng&view=d (last modified Nov. 7, 2012).

56. *See Canada-India Free Trade Agreement Negotiations*, FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA, http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/india-inde.aspx?view=d (last modified Dec. 18, 2012).

57. *See, e.g. Minister Fast Highlights Prosperity-Generating Benefits of Canada's*

trade agreement negotiations[58]). We expect that Canada's level of commitment to foreign corrupt practices enforcement is likely to be of increasing interest to OECD members and other countries whose companies will be competing for business opportunities with Canadian multinationals.

The importance of foreign corrupt practices enforcement is receiving widespread visibility through record-breaking US fines against companies such as Siemens (US$800,000,000), Halliburton/KBR (US$57,000,000), BAE Systems (US$400,000,000), and others.[59] The vigorous UK Bribery Act 2010, which covers facilitating payments[60] (that are subject to exceptions in the CFPOA,[61] FCPA[62] and OECD Convention[63]) and which, under many circumstances, applies to the activities of non-UK affiliates,[64] has further heightened the attention on foreign corrupt practices. These developments can be expected to provide incentives to the Canadian Government to demonstrate that the CFPOA is being enforced diligently. However, there are two areas where the scope of Canadian law has important gaps.

THE LIMITED JURISDICTIONAL BASIS OF THE CFPOA

Foreign corrupt practices inherently involve cross-border activity. There are two main bases for countries to establish jurisdiction over offenses in this area: territoriality and nationality. As a general matter,

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Inclusion in Trans-Pacific Partnership Talks, FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA, http://www.international.gc.ca/media_commerce/comm/news-communiques/2012/05/03a.aspx?lang=eng&view=d (last modified May 4, 2012); *e.g., Trans-Pacific Partners Invite Canada to the Table, Canada to Join Trade Talks with Asia-Pacific Nations*, CBC NEWS, http://www.cbc.ca/news/politics/story/2012/06/19/pol-g20-harper-obama-tpp-mexico.html (last updated June 19, 2012, 1:37 PM ET).

58. *Canada-EU Trade Agreements, Opening New Markets in Europe,* FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA, http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/can-eu.aspx?view=d (last modified Jan. 15, 2013).

59. *See, e.g.* Joe Palazzolo, *Another US Company Bumped off FCPA Top 10 List*, WALL ST. J. BLOG (Apr. 6, 2011, 4:37 PM) http://blogs.wsj.com/corruption-currents/2011/04/06/another-us-company-bumped-off-fcpa-top-10-list/. It should be noted that US pleas may cover securities law or other violations in addition to *FCPA* offenses.

60. UNITED KINGDOM MINISTRY OF JUSTICE, THE BRIBERY ACT 2010 – GUIDANCE ABOUT PROCEDURES WHICH RELEVANT COMMERCIAL ORGANIZATIONS CAN PUT INTO PLACE TO PREVENT PERSONS ASSOCIATED WITH THEM FROM BRIBING (2010), at paras. 44-45, *available at* http://www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-guidance.pdf.

61. CFPOA, *supra* note 1, §3(4).

62. *See generally* FCPA, *supra* note 2.

63. Organization for Economic Co-operation and Development (OECD), *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, at para. 9 (1997) (adopted by the Negotiating Conference on Nov. 21, 1997).

64. *See generally* UK Bribery Act, *supra* note 3, § 6 (the UK Bribery Act broadly defines "associated person").

common law countries including Canada,[65] tend to use the territoriality principle as a primary basis for jurisdiction[66] in most areas of law.[67] In contrast, civil law countries are much more likely to apply their laws to acts of their nationals which occur outside their borders.[68]

Canada only asserts jurisdiction over foreign corruption offenses on the basis of territoriality – *i.e.* conduct which occurs in whole or in part within Canadian borders.[69] Unlike many other jurisdictions, it does not assert jurisdiction over Canadian nationals when they are acting entirely outside Canada.[70]

In contrast, the FCPA asserts jurisdiction over "domestic concerns", which include but are not limited to US nationals acting outside the country:

> (1) The term "domestic concern" means--
> (A) any individual who is a citizen, national, or resident of the United States; and
> (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.[71]

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65. Canada is predominantly a common law jurisdiction, except for the province of Quebec, whose local laws are based on a civil law system. *See Canada's System of Justice: Where Our Legal System Comes from*, DEP'T OF JUSTICE, http://www.justice.gc.ca/eng/dept-min/pub/just/03.html (last modified Mar. 8, 2012).

66. In this context, jurisdiction refers to the legal competence to make laws governing a particular topic, commonly known as "prescriptive jurisdiction"; this is distinguished from "enforcement jurisdiction"—the circumstances under which a state has the legal competence to enforce its laws against an individual or an entity. *See generally* JOHN CURRIE, PUBLIC INTERNATIONAL LAW 332-352 (2d ed. 2008). See also an early articulation of the differences between these two aspects of jurisdiction in The Case of the SS "Lotus" (Fr. v. Turk.) (1927), P.C.I.J. (Ser. A) No. 10, paras. 45-46, *available at* http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm.

67. *See, e.g.* CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 42 – 84 (2008).

68. *Id.*

69. *See, e.g.* A. Timothy Martin, *Canadian Law on Corruption of Foreign Public Officials*, 10 NAT'L J. CONST. L. 189, 193 (1999).

70. There are other principles under which states may claim jurisdiction in respect of international matters such as where a state's nationals are injured or where the state's interests are affected. These other principles will not be addressed in this paper because they have not generally been applied as a basis for asserting jurisdiction over foreign corruption offenses.

71. FCPA, *supra* note 2, § 78dd-2(h).

Similarly, the United Kingdom asserts jurisdiction over bribery offenses committed by its nationals occurring outside UK territory. Sections 12(2) and (3) of the UK Bribery Act together stipulate that if a bribery offense occurs outside of the United Kingdom, and the person has a close connection with the United Kingdom, then proceedings can be commenced in any part of the United Kingdom.[72] "Close connection" is defined as a British citizen, a body incorporated under the law of any part of the United Kingdom, or various other analogous situations.[73]

Canada's liberal approach to jurisdiction on a territorial basis

The primary basis for Canada's approach to criminal law jurisdiction generally is the "territorial principle."[74] This stems from the notion that a state has sovereign jurisdiction over all matters occurring within its borders. Canada's general preference for the territorial approach is demonstrated in two statutes. First, Canada's federal *Interpretation Act* states that: "Every enactment applies to the whole of Canada, unless a contrary intention is expressed in the enactment."[75] Second, and more specifically applicable to the CFPOA, is the *Criminal Code,* which governs all criminal offenses except to the extent provided in other legislation. It expresses the default position that Canada will not assert jurisdiction over an offense which occurs outside Canada. It states, in part, "Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada."[76]

These provisions do not mean that the Canadian authorities can only prosecute offenses which were wholly committed inside Canada. The courts have interpreted territoriality more broadly to encompass activity that has a real and substantial connection to Canadian territory. In *Libman,*[77] Justice La Forest of the Supreme Court of Canada, speaking for the whole Court, held:

> I might summarize my approach to the limits of territoriality in this way. As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern

72. UK Bribery Act, *supra* note 3, § 12 (2) – (3).

73. *Id.*, 12(4) and 8(1).

74. CURRIE, *supra* note 66, at 341.

75. Interpretation Act, R.S.C. 1985, c. I-21.

76. Criminal Code, *supra* note 12, at 6(2). The reference to "discharge" refers to absolute or conditional discharges, both of which are provided for in §730 of the *Criminal Code* and would constitute forms of sanction in relation to an offense.

77. Libman v. The Queen, [1985] 2 S.C.R. 178 (Can.).

academics, it is sufficient that there be a "real and substantial link" between an offence and this country.[78]

The *Libman* test can result in a reasonably expansive approach to territoriality. A sufficient connection to Canada may exist where part of the offense occurred in Canada, even though other important parts did not. For example, a sufficient connection for the offense of murder was found where one Canadian assaulted another Canadian in the Dominican Republic, and the victim died (an important element of the offense) after returning to Canada.[79] Similarly, the Competition Bureau regularly asserts jurisdiction over international cartels that involve direct or even indirect sales to Canadian customers on the basis that such transactions have a real and substantial link to Canada; Canadian courts have accepted numerous guilty pleas on this basis.[80]

With respect to corruption of foreign officials, neither the CFPOA nor any other Act of Parliament contains a contrary provision which would displace section 6(2) of the Criminal Code. Thus the "real and substantial link" jurisprudence applies to the CFPOA. However, as discussed more fully below, this test may not reach bribery that occurs entirely or predominantly outside of Canada. The charge in the *Karigar* case (noted above) was challenged in a motion filed on April 30, 2012, on the grounds that the Canadian courts lack jurisdiction.[81] This challenge may clarify what constitutes a "real and substantial link" in the case of a foreign corruption charge.

Canada's assertion of nationality-based jurisdiction for certain other offenses

It is accepted at international law that a state can assert jurisdiction over the acts of its nationals, wherever those nationals may be. The basis for this type of jurisdiction is commonly known as the "nationality principle."[82]

Canada exceptionally asserts jurisdiction on a basis other than territoriality. Most notably, Section 7 of the Criminal Code establishes jurisdiction to prosecute certain offenses even where there is no territorial

78. *Id.* at para. 74.

79. R. v. Ouellette, 126 C.C.C. (3d) 219 (Que. Sup. Ct. 1998).

80. *See, e.g.*, J. WILLIAM ROWLEY & A. NEIL CAMPBELL, JURISDICTION AND LITIGATION DEVELOPMENTS IN CANADIAN COMPETITION LAW 2-4, (New York State Bar Association Antitrust Committee Meeting, Oct. 6, 2004) (2004).

81. Shannon Kari, *Threshold of Anti-corruption Law Tested*, THE LAWYER'S WEEK (Apr. 27, 2012), http://www.lawyersweekly-digital.com/lawyersweekly/3148?pg=4#pg4. *See also* MARTIN & LEGGET, *supra* note 41.

82. CURRIE, *supra* note 66, at 345.

basis.[83] Most of the offenses listed in Section 7 can be prosecuted based on the nationality theory of jurisdiction including child sex tourism, terrorism, torture, crimes against internationally protected persons, hostage taking, and offenses relating to nuclear material.[84] War crimes and crimes against humanity can also be prosecuted on the basis of a nationality theory of jurisdiction.[85]

Canada's international obligations regarding jurisdiction over foreign corruption offenses

Canada is required by the OECD Convention to take jurisdiction over foreign corruption offenses that occur wholly or partially in its territory.[86] Similarly, Canada is required by the UN Convention to take jurisdiction over foreign corruption offenses that occur with its territory.[87] The Inter-American Convention has the same type of jurisdiction requirement regarding offenses committed in a party's territory.[88] Canada's liberal application of the territoriality principle using the real and substantial link standard meets these obligations.

The UN Convention also requires Canada to assert jurisdiction over corruption offenses which occur onboard a Canadian flagged vessel or on an aircraft registered under Canadian law.[89] The Criminal Code provides for Canadian jurisdiction over offenses committed on Canadian ships and aircraft.[90] The assertion of Canadian jurisdiction beyond a purely territorial basis in these contexts is consistent with the UN Convention requirements.

The OECD Convention contains a second jurisdictional requirement, which relates to nationality. It states, in part: "Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles."[91]

83. Criminal Code, *supra* note 12, at 7.
84. *Id.* at 7(3) - (4.1).
85. *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, § 8(a)(i).
86. OECD Convention, *supra* note 4, art. 4(1).
87. UN Convention, *supra* note 8, art. 42(1)(a).
88. Inter-American Convention, *supra* note 6, art. V(2).
89. UN Convention, *supra* note 8, art. 42(1)(b).
90. Criminal Code, *supra* note 12 at 7(2.1) & 2.2 (ships), 7(1) & (2) (aircraft).
91. OECD Convention, *supra* note 4, at 4(2). The Inter-American Convention also seems to impose a nationality requirement on parties, but its text and context (*i.e.* not being in Article V (Jurisdiction)) make the requirement's application to Canada less clear than the OECD Convention requirement. Article VIII of the Inter-American Convention states, "Subject to its Constitution and the fundamental principles of its legal system, each State Party shall prohibit and punish the offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory, and businesses domiciled

Immediately after the CFPOA was enacted, Canada's apparent non-compliance with this aspect of the OECD Convention was identified.[92] The OECD Working Group on Bribery in International Business Transactions ("OECD Working Group")[93] has performed three reviews of the Canadian implementation of the OECD Convention,[94] each of which has criticized Canada's decision not to assert jurisdiction on a nationality basis.[95]

1. *The 1999 OECD Report*

The OECD's first review of the CFPOA in 1999 stated: "Canada explained that territorial jurisdiction is very broadly interpreted by Canadian courts and, in its opinion, that it is a very effective basis of jurisdiction. Some concerns were expressed that Canada's decision not to assert nationality jurisdiction could create a gap in the coverage of its implementing legislation."[96]

During the investigation that preceded this first report, Canada cited three then-recent cases in other areas of law in support of the argument that Canada has an effective basis to prosecute foreign corruption offenses because of the broad interpretation Canada takes to territorial jurisdiction.[97]

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there, to a government official of another State..." Inter-American Convention, *supra* note 6, at art.VIII.

92. *See, e.g.*, Martin, *supra* note 69.

93. The OECD Working Group, which is supported by the OECD's Directorate for Financial and Enterprise Affairs, periodically reviews foreign corrupt practices enforcement in its member states. See, *OECD Working Group on Bribery in International Business Transactions*, OECD: BETTER POLICIES FOR BETTER LIVES http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/oecdworkinggrouponbriberyininternationalbusinesstransactions.htm (last visited Feb. 5, 2013).

94. OECD, CANADA – REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION (July 1999), *available at* http://www.oecd.org/dataoecd/13/35/2385703.pdf [hereinafter 1999 OECD REPORT]; OECD, CANADA - PHASE 2: REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION OF COMBATING BRIBERY IN INTERNATIONAL BUSINESS (Mar. 2004), *available at* http://www.oecd.org/dataoecd/20/50/31643002.pdf [hereinafter 2004 OECD REPORT]; OECD, CANADA – PHASE 3: REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS (Mar. 2011), *available at* http://www.oecd.org/dataspeed/55/25/47438113.pdf [hereinafter 2011 OECD REPORT].

95. TRANSPARENCY INT'L, PROGRESS REPORT 2011 – ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION 25 (May 2011), *available at* http://www.transparency.ca/Reports/CPI&OtherReports/201107-OECD-2011-Progress_Report.pdf.

96. 1999 OECD REPORT, *supra* note 94, at 24.

97. *See id.* at 12-13, (citing Canada (Human Rights Commission) v. Canadian Liberty Net, [1998] 1 S.C.R. 626, United States of America v. Lépine, [1994] 1 S.C.R. 286, and R. v. Hammerbeck (1993), R.F.L. (3d) 265, 26 B.C.A.C. 1).

2. *The 2004 OECD Report*

The OECD's second review of the CFPOA issued in 2004 disagreed that Canada's broad application of the territorial principle was sufficient:

> The lead examiners are not convinced that territorial jurisdiction under Canadian law is broad enough to enable the effective application of the offence under the CFPOA. In their view an element of the offence would likely be required by the courts to have taken place in Canada. In addition, the lead examiners note that, although it has generally been the policy of Canada to only take extraterritorial jurisdiction where there has been a treaty obligation to do so, there have been exceptions to this rule. The lead examiners therefore recommend that the Government of Canada reconsider its position in this respect.[98]

In March 2006, the Canadian Government provided its follow-up response to the 2004 OECD Report. Canada stated:

> The Convention does not require Parties to exercise jurisdiction on the basis of nationality. Article 4 of the Convention requires Parties to review whether its current basis for jurisdiction is effective to fight corruption of foreign public officials and take remedial steps if it is not. Canada conducted such a review and is of the view that territorial jurisdiction, as interpreted by Canadian courts, is effective to fight corruption. . . . Canada's position would be reconsidered if there was evidence that nationality jurisdiction is necessary to implement the Convention effectively.[99]

Canada's position was that article 4(4) of the *Convention* is the applicable standard and that article 4(2) was not applicable because Canada does not normally assert jurisdiction on a nationality basis.[100] Article 4(4) of the OECD Convention provides that "[e]ach Party shall review whether its

98. 2004 OECD REPORT, *supra* note 94, ¶ 77.

99. OECD, CANADA: PHASE 2, FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS ON THE APPLICATION OF THE CONVENTION AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, 21 (June 2006), *available at* http://www.oecd.org/dataoecd/5/6/36984779.pdf [hereinafter FOLLOW-UP TO 2004 REPORT].

100. *Id.*

current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps."[101]

Presumably in response to the concerns raised by the 1999 and 2004 OECD reports, in May 2009, the Canadian Government introduced Bill C-31[102] to amend the CFPOA (and certain other statutes). The proposed amendment would have given the Canadian authorities jurisdiction to prosecute Canada's foreign corruption offense on the basis of nationality:

> 4. (1) Every person who commits an act or omission outside Canada that, if committed in Canada, would constitute an offence under section 3 [Bribing a Foreign Official] — or a conspiracy to commit, an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence under that section — is deemed to have committed that act or omission in Canada if the person is
>
> (a) a Canadian citizen;
>
> (b) a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act who, after the commission of the act or omission, is present in Canada; or
>
> (c) a public body, corporation, society, company, firm or partnership that is incorporated, formed or otherwise organized under the laws of Canada or a province.[103]

In the Parliamentary debates on this Bill, a member of the Conservative party (which was the party in power as a minority government in 2009, [104] and at the time of writing is in power as the majority government[105]) justified these amendments in the following manner:

> Most of the time, these [foreign corruption] offences are committed in a foreign country. . . Nationality jurisdiction

101. OECD Convention, *supra* note 4, art. 4(4).

102. Canada, Bill C-31, An Act to Amend the Criminal Code, the Corruption of Foreign Public Officials Act and the Identification of Criminals Act and to Make a Consequential Amendment to Another Act, 2nd Sess., 40th Parl., cl. 38 (2009).

103. *Id.*

104. *40th Parliament of Canada Profile*, PARLIAMENT OF CANADA, http://www.parl.gc.ca/parlinfo/Files/Parliament.aspx?Item=8714654b-cdbf-48a2-b1ad-57a3c8ece839&Language=E (last visited Feb. 5, 2013).

105. *41st Parliament of Canada Profile*, PARLIAMENT OF CANADA, http://www.parl.gc.ca/parlinfo/Files/Parliament.aspx?Item=1924d334-6bd0-4cb3-8793-cee640025ff6&Language=E (last visited Feb. 5, 2013).

> would allow Canada to prosecute offences of foreign bribery committed outside Canada by Canadians, permanent residents of Canada and Canadian corporations without having to provide evidence of a link between Canada and the offence. This would facilitate prosecutions of foreign bribery cases.[106]

Bill C-31 was not was passed into law before the end of the Fortieth Parliament.[107] The head of Transparency International Canada has called for the reintroduction of the Bill.[108]

3. The 2011 OECD Report

The OECD's third report on the CFPOA, issued in 2011, is more pointed in its criticism of what the OECD Working Group considers to be Canada's narrow scope of jurisdiction:

> 119. The lead examiners do not share Canada's view and believe that the absence of nationality jurisdiction leaves a substantial loophole in the coverage of the CFPOA, and needlessly poses a substantial hurdle to investigation and prosecution in obliging authorities to prove a 'real and substantial link' to the territory of Canada.
> 120. The lead examiners consider that Canada is applying an overly restrictive interpretation to Article 4(2) of the Convention...[109]

The OECD Working Group also emphasized that the nature of foreign corruption is that the act of bribery often occurs in the foreign country. Thus, it believes that a state must assert nationality jurisdiction to effectively combat foreign corruption.[110]

Assessment of Canada's arguments for not asserting jurisdiction based on nationality

As noted above, Canada contends that, because it does not regularly

106. *House of Commons Debates*, No. 116 (Nov. 24, 2009) (statement of Brent Rathgeber), *available at* http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4254820&Language=E&Mode=.

107. *House Government Bill C-31: Status of the Bill*, PARLIAMENT OF CANADA : LEGISINFO, http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&Bill=C31&Parl=41&Ses=1 (last visited Feb. 5, 2013).

108. Pablo Fuchs, *Anti-bribery Laws: The Net Tightens*, CANADIAN CORP. COUNS. ASS'N MAG., Winter 2011, at 16, *available at* http://ccca.dgtlpub.com/2011/2011-12-31/pdf/Anti-bribery_laws_Keeping_your_company_out_of_trouble.pdf.

109. 2011 OECD REPORT, *supra* note 94, ¶¶ 119-20.

110. *Id.* ¶120.

assert jurisdiction on the basis of nationality, the opening phrase in article 4(2) of the *OECD Convention* does not require Canada to exercise such jurisdiction.[111] Rather, Canada asserts that article 4(2) is aimed at other states, such as those under the civil law tradition, who regularly assert jurisdiction on the basis of nationality.[112]

However, the literal wording of article 4(2) of the OECD Convention would suggest that the territoriality and nationality branches of jurisdiction are each freestanding requirements that are supplemented – not limited – by the additional requirement to take remedial action where necessary as set out in article 4(4).

Section 7 of the Criminal Code and Bill C-31 both demonstrate that, as a general matter, Canada "has jurisdiction to prosecute its nationals for offences committed abroad" even though it has only chosen to implement this jurisdictional reach in respect of certain behaviors. The ability to do so would appear to be sufficient to activate the requirement in the opening phrase of article 4(2). This in turn would lead to the obligation under the OECD Convention that Canada "shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official . . . ."[113]

Canada also continues to claim that, given the broad application of the territorial principle, which merely requires a real and substantial link to Canada to establish jurisdiction, it has an effective regime to combat foreign corruption offenses. For example, the Canadian agencies charged with investigating and prosecuting offenses under the CFPOA, the Royal Canadian Mounted Police (RCMP) and the Public Prosecution Service of Canada (PPSC), have told OECD investigators that:

> [P]olice and prosecutors are willing to pursue a case of foreign bribery with a broad understanding in mind of what amounts to a "real and substantial link" to the territory of Canada and to do so until either the Canadian courts say this is going too far, or until nationality jurisdiction is introduced into law.[114]

While the stated enthusiasm of enforcement officials is a positive step in combating foreign corruption offenses, it may prove inadequate when an attempt to apply the CFPOA to non-Canadian actions of Canadian nationals is challenged before the courts (as in the pending *Karigar* case described above).

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111. *Id.* ¶¶ 117-18.
112. *Id.*
113. OECD Convention, *supra* note 4, art. 4 (1).
114. 2011 OECD REPORT, *supra* note 94, ¶ 116.

Scenarios where Canada's lack of jurisdiction based on nationality leaves a gap

Canada is the only party to the OECD Convention not to have established jurisdiction on a nationality basis.[115] Canada's territorially-limited jurisdiction over foreign corruption offenses leaves a gap in the international foreign corruption regime. The gap almost certainly applies to conduct of Canadian nationals that occurs wholly outside Canada. There is also a gap in respect to other conduct of such nationals which does not have a connection to Canada that is sufficiently "real and substantial" -- even if there may have been some minimal connection to Canadian territory.

Many transnational corporations are based in OECD member states. A substantial portion of the bribes of foreign officials are likely to come from nationals of an OECD state, either from individual citizens or organizations based in (or constituted under the laws of) an OECD member state.[116] In the states where corruption is the biggest problem, the domestic anti-corruption regime is likely to be ineffective, or possibly non-existent. This makes enforcement on the basis of nationality particularly important because the ability to prosecute the party giving the bribe will be the primary deterrent to corruption. Even if the public official in the recipient jurisdiction is subject to prosecution, deterring corruption requires the ability to take action against the payor as well.

The potential for multi-jurisdictional overlap

In certain situations, Canada's nationality gap in respect to payers of bribes could be overcome through enforcement by another state that may have a basis for jurisdiction. Particularly obvious candidates include the United States and the United Kingdom.

Under the FCPA, the United States has jurisdiction over corporations which are registered with the US Securities Exchange Commission (SEC) to issue securities.[117] Thus, if a Canadian corporation was registered as an issuer with the SEC (as many are, given the importance of the US capital markets) and that corporation gave a bribe anywhere in the world to a foreign official, it would appear that the US authorities would have jurisdiction to prosecute the corporation (regardless of whether the bribery took place within US territory).

Under the UK Bribery Act, the United Kingdom has jurisdiction to

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115. *See* FOLLOW-UP TO 2004 REPORT, *supra* note 99, ¶ 9; *See also* Andrew Thompson & Prakash Narayanan, *Canada Lags in Combating International Bribery*, THE LAWYERS WKLY., Apr. 1, 2011, at 15.

116. These two attributes are the most common indicators of an organization's nationality. *See* CURRIE, *supra* note 66, at 346.

117. FCPA, *supra* note 2, §§ 78dd-1(a)-2(a), 3(a).

prosecute for failure to prevent bribery in respect of all corporations and partnerships which carry on any business in the United Kingdom.[118] The UK authorities can prosecute such corporations for failing to prevent bribery if any person (including legal persons) performing services for or on behalf of the corporation bribes a foreign official.[119] Examples of persons who may perform services for or on behalf of a corporation include subsidiaries, agents or employees.[120] Assuming that a Canadian corporation does some business in the United Kingdom (which many do, given the close economic and historical ties between the countries), or that it is an affiliate of a UK corporation, and the Canadian corporation bribed a foreign official anywhere in the world, it would appear that, depending on the facts, the UK authorities could have jurisdiction to prosecute the corporation for failing to prevent bribery (regardless of whether the bribery took place within UK territory).[121]

Enforcement by US or UK authorities would be a circuitous way to combat foreign corruption by Canadian companies. Investigations and prosecutions may or may not occur depending upon a variety of factors including available resources and access to relevant evidence. This approach may also not be fully effective because such foreign states are less likely to have jurisdiction over the individual Canadian citizens paying the bribes, even where those Canadian citizens are acting as employees or agents of a corporation that is within their jurisdiction. In any event, even if other countries have the potential to fill Canada's jurisdictional gap in certain situations, this is not a persuasive reason for Canada to ignore its international obligations.

LACK OF COVERAGE OF THE NON-PROFIT SECTOR

The second key limitation in Canada's foreign corruption regime is that it appears to ignore the significant number of organizations that do not operate on a for-profit basis. There are hundreds of not-for-profit organizations or other non-governmental organizations that are active in countries grappling with poverty, political instability, and the challenges of social and economic development. Many of these countries have high Transparency International Corruption Index scores,[122] and not-for-profit organizations are at risk of becoming involved in corruption activities.[123]

118. UK Bribery Act, *supra* note 3, §§ 7(5), 8.

119. *Id.* § 7.

120. *Id.* § 8.

121. *Id.* § 7.

122. *See* TI CORRUPTION INDEX, *supra* note 27.

123. *See, e.g.*, TRANSPARENCY INTERNATIONAL UK, ET AL., ANTI-BRIBERY PRINCIPLES AND GUIDANCE FOR NGOS 7 – 8 (June 2011), *available at* http://www.transparency.org.uk/our-work/publications/10-publications/128-anti-bribery-principles-and-guidance-for-ngos.

The CFPOA bribery offense contains an element requiring the bribe to be made "in order to obtain or retain an advantage in the course of business."[124] This element is significant given how the CFPOA defines "business" *as* "any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere *for profit*."[125]

In the Parliamentary debates when the CFPOA was being enacted, the Minister of Foreign Affairs acknowledged that it did not address not-for-profit organizations.[126] However, there was a suggestion that individual transactions could be examined to determine if they were for-profit or not, rather than looking at the character of the entity involved.[127] This transaction-by-transaction approach appears to be reflected in the Department of Justice's guide to the CFPOA, which states: "The Act targets the bribery by any person of a foreign public official when the transaction is for profit."[128]

As of the date of writing, the CFPOA's application to potentially profitable transactions made by not-for-profit organizations has not been interpreted by the courts. However, the statutory provision focuses on business entities rather than transactions, and enforcement activities to date have focussed on business entities. This has been the case despite periodic concerns involving public officials profiting from aid or relief work for their own benefit.[129]

The scope of Canada's international obligations with respect to not-for-profits

Neither the OECD Convention nor the UN Convention explicitly limits their application to for-profit organizations or transactions. Both conventions refer to "business." While such references could be interpreted as suggesting that they are not aimed at non-profit undertakings, this

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124. *See* CFPOA, *supra* note 1, at 2.

125. *Id.* at 1 (emphasis added). *See also* Martin, *supra* note 69, at 197.

126. *Debates of the Senate (Hansard), 1st Session, 36th Parliament, Volume 137, Issue 100, Dec. 3, 1998*, PARLIAMENT OF CANADA, http://www.parl.gc.ca/Content/Sen/Chamber/361/Debates/ 100db_1998-12-03-e.htm (last visited Feb. 5, 2013) [hereinafter Senate CFPOA *Hansard*].

127. *Id.* at 1540.

128. DOJ Guide, *supra* note 5, at 5.

129. *See, e.g.*, *Cleaning up - Can the Global Fund to Fight Aids, Tuberculosis and Malaria Restore its Reputation as the Best and Cleanest in the Aid Business?*, THE ECONOMIST (Feb. 17, 2011), *available at* http://www.economist.com/node/18176062; John Cook, *Wyclef Jean's Corrupt Charity Is Still Very, Very Corrupt*, GAWKER (Nov. 29 2011), http://gawker.com/5863554/wyclef-jeans-corrupt-charity-is-still-very-very-corrupt; *New Corruption Charges against the Red Cross and Other Charities*, ASIANEW.IT (Aug. 18, 2011, 3:22 PM), http://www.asianews.it/news-en/New-corruption-charges-against-the-Red-Cross-and-other-charities-22395.html.

approach has not been adopted outside Canada. The Inter-American Convention does not even refer to "business," but merely to corruption in terms of providing "advantages" in exchange for acts or omissions of a government official.[130]

The full title of the OECD Convention is the "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions." Article 1(1) establishes the requirement to criminalize the act of bribing foreign officials in the following manner:

> [E]ach Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage *in the conduct of international business*.[131]

Canada's position is that the OECD Convention is aimed at for-profit business.[132] It has also attempted to focus on transactions rather than organizations: "Business transactions imply a profit motive. Therefore, the Convention applies to transactions that are carried on to generate some form of profit."[133] The OECD Working Group on Bribery takes the opposing position.

1. *The 2004 OECD Report*

In its second report on CFPOA, the OECD Working Group observed that the OECD Convention does not distinguish between for-profit and not-

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130. Inter-American Convention, *supra* note 6, art. VII.

131. OECD Convention, *supra* note 4, art. 7 (emphasis added). *Cf.* UN Convention, *supra* note 8, at arts. 16(1), 26(4) The counterpart provision in the UN Convention is article 16(1), which is very similar to article 1(1) of the OECD Convention (including the references to business), except that there is no reference to "any person". Article 16(1) of the UN Convention is nonetheless broadly phrased, because the wording requires the state to criminalize the act of bribing a foreign official without any reference to the type of natural or legal person that perpetrated the act. Article 26(4) of the UN Convention also requires that states shall ensure that legal persons are subject to effective and dissuasive sanctions. The Inter-American Convention counterpart is article VI(1), and is also broadly worded.

132. Senate CFPOA *Hansard*, *supra* note 126, at 28 (statement of Mr. Axworthy, Minister of Foreign Affairs).

133. FOLLOW-UP TO 2004 REPORT, *supra* note 99, at 20.

for-profit entities.[134] It recommended amending the definition of "business" in Section 2 of the CFPOA to remove the for-profit requirement.[135] The report concluded that this was a significant limitation having regard to Canada's large non-profit sector (which consisted of 180,000 organizations employing 10% of the Canadian workforce as of 2001).[136] It stated: "[T]he explanations of the Canadian authorities did not convincingly dispel concerns about the possibility of the non-application of the CFPOA to non-profit companies, and the lead examiners believe that such a gap in the CFPOA would result in the non-coverage of a sizable sector in the Canadian economy."[137]

Even the possibility of classifying individual transactions as "for profit" concerned the OECD Working Group. It noted that "the 'for-profit' requirement might enable for-profit companies to escape the application of the CFPOA in certain circumstances by describing the transactions in question as not for profit."[138]

2. *The 2011 OECD Report*

The *2011 OECD Report* largely repeated the criticisms of the 2004 OECD Report. As additional support countering Canada's "for profit" only position, the OECD Working Group pointed out that Article 1 of the OECD Convention states: "Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for *any person* intentionally to offer, promise or give any undue pecuniary or other advantage."[139]

Through the use of the "any person" terminology, the OECD Working Group is of the view that the OECD Convention is to be applied broadly, without regard to the profit motives of the organization giving a bribe. In addition, the *2011 OECD Report* pointed out that Canada is the only state that has included a "for profit" requirement in the bribery offense.[140]

During the investigation leading up to the *2011 OECD Report*, the OECD investigators met with representatives from the RCMP, the PPSC, Department of Justice, the Department of Foreign Affairs and International

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134. 2004 OECD REPORT, *supra* note 94, ¶ 66. The 1999 OECD REPORT did not address the non-profit limitation in CFPOA.

135. *Id.* ¶ 70.

136. *Id.* ¶ 69.

137. *Id.* ¶ 70.

138. *Id.*

139. 2011 OECD REPORT, *supra* note 94, ¶ 21; OECD Convention, art. 1 (emphasis added).

140. 2011 OECD REPORT, *supra* note 94, ¶ 15. In response, Canada again relied on the inclusion of the term "business" in the title and the text of the OECD Convention to imply a "for profit" requirement into the Article 1 obligations. *See id.* ¶¶ 23-24.

Trade (DFAIT), and the Canada Revenue Agency (CRA).[141] Among these Canadian authorities there was disagreement as to whether the "for profit" requirement would operate on a transaction-by-transaction basis (the transactional approach) or would depend on the nature of the organization involved (the organizational approach).[142] This disagreement between key government agencies fortified the OECD Working Group's view that the "for profit" requirement in the CFPOA should be amended, given the possibility that uncertainty could undermine the deterrent effect of the law and/or hinder enforcement.[143]

Assessment of Canada's arguments regarding the "for profit" limitation in the CFPOA

Some Canadian enforcement officials take a broad view of the potential application of CFPOA, notwithstanding the Canadian government's formal position. For instance, "[a] representative of one of the RCMP International Anti-Corruption teams stated that the RCMP will investigate allegations of foreign bribery without considering the impact of the 'business for profit' requirement, unless the courts determine what consequences, if any, the requirement has on the scope of the CFPOA."[144]

However, enthusiasm on the part of enforcement officials is not a substitute for possible legal limitations that may be determined by courts which must construe criminal statutes strictly in favor of the accused.[145] At a minimum, the "for profit" reference in the CFPOA definition of business must have some meaning and will likely require a choice to be made between the organizational and the transactional interpretation.

As a general matter, it is possible for non-profit organizations to engage in business transactions including purchases and sales of goods and services. If the Canadian courts interpret the "for profit" requirement of the CFPOA on the basis of the "organizational approach," then the substantial number of Canadian enterprises in the not-for-profit sector would effectively be exempted from the CFPOA.[146] This could result in the odd situation where for-profit organizations that may be small and in some cases not operating profitably, could be subject to investigation and prosecution

141. 2011 OECD Report, *supra* note 94, ¶ 1, Annex 2.

142. *Id.* ¶¶ 19 – 24.

143. *Id.* ¶¶ 21-22.

144. *Id.* ¶ 20.

145. *See, e.g.*, RUTH SULLIVAN, STATUTORY INTERPRETATION 223-25 (2d ed. 2007).

146. As discussed earlier, other states such as the United States and the United Kingdom have expansive approaches to jurisdiction. Those other states may have jurisdiction over the actions of Canadian not-profits in certain situations. However, for the same reasons discussed in respect of nationality-based jurisdiction above, reliance on foreign states is not an adequate substitute for appropriate enforcement action by Canada.

while sizeable not-for-profits which transact on a very significant scale internationally would be ignored.

The alternative possible interpretation of "for profit" is the "transactional approach." If the courts look at the nature of the transaction to determine whether CFPOA applies, this could be problematic for two reasons. The first concern is that the transactional approach would introduce substantial uncertainty into the law. The characterization of individual transactions could be a very fact-driven process, involving a wide range of evidence relating to the broader context, economics, and motives for the transaction. The second disadvantage is that the transactional approach could permit both non-profit and for-profit enterprises to engage in bribery for some types of activities. Possible examples include transactions that may not be directly motivated by profit or may not be directly profitable as implemented. Bribery would then become permissible under Canadian law for certain types of activities that were sufficiently removed from profit generation.

Some Canadian authorities have stated that they will apply either the organizational approach or the transactional approach, as the circumstances require.[147] There are four possible types of transactions to consider: (i) profitable transactions by a for-profit entity; (ii) transactions that are unprofitable or unrelated to profit by a for-profit entity; (iii) profitable transactions by a non-profit entity; and (iv) transactions that are unprofitable or unrelated to profit by a non-profit entity. Presumably the "either organizational or transactional approach" would mean that everything done by a for-profit organization (categories i and ii) is captured by the CFPOA, and that for-profit transactions by a not-for-profit organization (category iii) would also be captured (and only category iv would be beyond the statutory reach). However, this approach may not be accepted by a court interpreting a criminal statute which, as noted above, must be construed strictly in favor of the accused.[148]

In our view, a Canadian court is likely to select one of the organizational or the transactional approaches, rather than the either/or option. The organizational approach seems most likely to be adopted by a court. Aside from the aforementioned complexities and uncertainty that would arise from examining individual transactions, section 2 of the CFPOA, which is the origin of the "for profit" requirement, speaks in organizational terms (*i.e.*, the phrase "profession, trade, calling [...] for profit" refers not to individual activities or transactions, but rather to the nature of the entity as a whole).[149] If Canadian courts do adopt this

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147. 2011 OECD REPORT, *supra* note 94, ¶ 24.

148. SULLIVAN, *supra* note 145, at 223-25.

149. While the phrase "undertaking of any kind carried on in Canada or elsewhere for profit", on its own, could mean a single transaction or other activity, the term undertaking is often used in Canadian legislation to refer to business entities rather than

interpretation, the OECD Working Group concerns about the coverage of CFPOA will continue to exist.

CONCLUSION

Enforcement of Canada's anti-foreign-corruption regime had a slow start but is becoming increasingly vigorous and higher profile. It is facilitated by a broad approach to territorial jurisdiction based on a "real and substantial link" test that applies to some situations where conduct occurs partly within and partly beyond Canadian borders.

However, the CFPOA has two important limitations. First, Canada does not assert jurisdiction over foreign corruption offenses on the basis of nationality. Second, the application of the CFPOA appears to be limited to "for profit" businesses. Among the signatories to the OECD Convention, these exceptions are both unique to Canada. Both of these limitations also appear to be in breach of Canada's obligations under the OECD Convention and have raised international concern.

The courts may have the opportunity to clarify these limitations sooner rather than later since the Canadian authorities charged with investigating and prosecuting bribery offenses have numerous foreign corruption investigations in progress. The authorities have also expressed their willingness to test the scope of CFPOA in these areas and to let the courts decide whether they have gone too far. The defense in the upcoming *Karigar* prosecution will be the first important test.

ADDENDUM

Prior to finalization of this article for publication, the Canadian Government introduced proposed amendments to the CFPOA.[150] They will add nationality jurisdiction and address the not-for-profit issue noted in this paper, as well as removing the exemption for facilitating payments, creating a new books and record offense, and raising the maximum penalty to 14 years imprisonment.[151]

In addition, a fourth CFPOA case was brought against Griffiths Energy.[152] It pleaded guilty and was fined C$10 million in respect of a C$2

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transactions. In addition, the "associated words" rule of statutory interpretation (*noscitur a sociis*) (*see* SULLIVAN, *supra* note 145, at 175) indicates that the preferred meaning of "undertaking" should accord with the other entity-oriented terminology in the definition of business.

150. Canada, Bill S-14, An Act to Amend the Corruption of Foreign Public Officials Act, 1st Sess., 41st Parl., (2013).

151. *Id.*

152. *Her Majesty the Queen v.* Griffiths Energy International (2013), E-File No.:CCQ13GRIFFITHSENER, Action No. 130057425Q1, (Can. Alta. Q.B.).

million bribe paid to the wife of the Chadian ambassador to Canada in respect of oil and gas development agreements in the Republic of Chad.[153]

153. *See generally* MCMILLAN LLP, COOPERATING FIRM AGREES TO PENALTY EQUAL TO 5 TIMES THE AMOUNT OF FOREIGN BRIBE (2013), *available at* http://mcmillan.ca/cooperating-firm-agrees-to-penalty-equal-to-5-times-the-amount-of-foreign-bribe.

UNSCREWING THE INSCRUTABLE: THE UK BRIBERY ACT 2010

Bruce W. Bean & Emma H. MacGuidwin*

INTRODUCTION

On December 17, 1997 the United Kingdom, a founding member of the Organization for Economic Cooperation and Development ("OECD"), signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention" or "Convention").[1] This Convention obligates signatory states to criminalize bribery of foreign public officials by those seeking to obtain or retain business. The UK Bribery Act 2010 (the "Bribery Act" or the "Act"),[2] enacted after more than a decade of debate, delay, and desultory deliberation, is the culmination of the United Kingdom's extraordinarily extended effort to update its antiquated corruption legislation and thus comply with its obligations under the OECD Convention.

The Bribery Act is a wholesale revision of all United Kingdom domestic bribery and corruption statutes, some dating from the nineteenth century. The Act applies to both domestic and foreign bribery. In this article we review the operative provisions of the Bribery Act and then focus on a shocking new crime: the failure of a commercial enterprise to prevent a bribe. This crime, which requires no criminal intent and no knowledge of the offending bribe, will ensnare many non-UK businesses involved in cross border transactions. This is so because the Bribery Act contains an expansive concept of what may be deemed a bribe under the Act and because the jurisdictional reach of the Act is unparalleled. The Act also provides that the offending bribe need not be committed by an employee of the company. Any "associated person" may trigger the strict liability crime

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1. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, *available at* http://www.oecd.org/dataoecd/4/18/38028044.pdf [hereinafter OECD Convention].

2. Bribery Act, 2010, c.23, (U.K.) [hereinafter Bribery Act]

of "failing to prevent bribery." The sole defense companies have to this crime is the nigh impossible task defense of demonstrating that the company had "adequate procedures" in place to prevent such bribery. Moreover, since the Act characterizes small facilitation payments, currently made all over the world in the ordinary course of traveling or conducting business, as "bribes", business as now conducted may have already triggered the Bribery Act's strict liability crime of failing to prevent bribery. Furthermore, this will be the case even for a non-UK business if it is found to be "carry[ing] on a business, or part of a business, in any part of the United Kingdom[.]"[3] The surprising hypocrisy of Parliament criminalizing facilitation payments and, in certain instances, hospitality expenditures, while acknowledging that these are daily occurrences by both UK and non-UK companies, seems inexplicable. It is certainly indefensible.

Part I outlines the United Kingdom's leisurely pace of bringing its laws into compliance with the OECD Convention – a process that began on December 17, 1997 and was completed more than thirteen years later on July 1, 2011, when the Bribery Act finally became effective. Part II analyzes three offenses created by the Bribery Act – bribing another person,[4] requesting or agreeing to receive a bribe,[5] and bribery of a foreign public official.[6] Part III explores what in our view is the most egregious aspect of the Bribery Act, the strict liability corporate crime of failing to prevent bribery,[7] a crime that requires no *mens rea* and triggers unlimited fines. Parts I to III of this article draw on language from our previous article, *Expansive Reach – Useless Guidance: An Introduction to the UK Bribery Act 2010*.[8]

Part IV probes the expansive scope of what is deemed a "bribe" under the Bribery Act. Once a bribe is alleged, a non-UK business doing only a part of its business in the United Kingdom will be guilty of failing to prevent a bribe even when such bribe was paid by a non-employee or other person over whom the now automatically guilty company has no operational control. In such a case, the sole defense available to the presumptively guilty company is to satisfy the burden of proving that, despite the occurrence of the alleged bribe that it failed to prevent, that company had in place adequate procedures designed to prevent that very bribe! We intend to show that the Bribery Act's operative provisions, particularly the strict liability provisions and the treatment of facilitation

3. *Id.* § 7(5).

4. *Id.* § 1.

5. *Id.* § 2.

6. *Id.* § 6(1)–(4).

7. *Id.* § 7.

8. Bruce W. Bean & Emma H. MacGuidwin, *Expansive Reach – Useless Guidance: An Introduction to the UK Bribery Act 2010*, 18 ILSA J. INT'L & COMP. L. 325 (2012) [hereinafter *Expansive Reach*].

and hospitality payments, are unprecedented in their jurisdictional reach and cannot realistically be enforced. We conclude by commenting on concerns relating to the Bribery Act's violations of due process and the European Convention on Human Rights. The Bribery Act cannot hope to effect, in a legitimate way, Parliament's goal of ending bribery in the United Kingdom and elsewhere.

I. WITH ALL DELIBERATE DELAY: THE SORDID SAGA OF THE ULTIMATE BIRTH OF THE UK BRIBERY ACT

This part outlines the genesis and development of global anti-bribery legislation, beginning with the history of the United States Foreign Corrupt Practices Act, the predecessor of all modern anti-bribery efforts. We then explore the background of the OECD Convention and the role it played in the development and enactment of the Bribery Act. We also trace the long and tortuous history of the United Kingdom's efforts to comply with the OECD Convention by finally enacting the Bribery Act after more than a decade of debate and delay by Parliament.

A. The US Foreign Corrupt Practices Act

The United States began the global campaign to eliminate bribery and corruption in international business transactions in 1977 with the enactment of the Foreign Corrupt Practices Act ("FCPA").[9] The FCPA, a curious artifact of the Watergate Scandal,[10] has two operative provisions. The first is that businesses keep accurate books and records of their financial transactions. This provision is enforced by the Securities and Exchange Commission.[11] For this article, the more important FCPA provision is the

9. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, as amended by Title V of the Omnibus Trade & Competitiveness Act of 1988, Pub. L. No. 100-418, secs. 5001-03, 102 Stat. 1415, 1415-25 (codified as amended at 15. U.S.C. §§ 78m(b)(2), 78m(b)(3), 78dd-1, 78dd-2, 78ff (1994)).

10. The Watergate investigation revealed corporate "slush funds" as the source of contributions to the committee to reelect President Nixon, as well as to make "questionable payments" overseas. This led to an investigation by the Securities and Exchange Commission, which ultimately led to enactment of the Foreign Corrupt Practices Act. A description of the genesis of the FCPA is found in an article by Stanley Sporkin, Head of Enforcement at the Securities and Exchange Commission at the time the FCPA was being drafted in the mid-1970's. *See*, Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday*, 18 NW. J. INT'L L. & BUS. 269, 271 (1998).

11. U.S. DEP'T OF JUSTICE, *Foreign Corrupt Practices Act: An Overview*, http://www.justice.gov/criminal/fraud/fcpa/ (last visited Mar. 4, 2013). CRIMINAL DIVISION OF THE U.S. DEP'T. OF JUSTICE & THE ENFORCEMENT DIVISION OF THE U.S. SEC, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 4 – 5 (Nov. 14, 2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf (hereinafter RESOURCE

prohibition against bribing foreign government officials to obtain or retain business.[12] This portion of the FCPA is enforced by the Department of Justice.[13]

It is important to note that the FCPA was amended in 1988 to make explicit that the FCPA does not prohibit "grease" or "facilitation" payments. Such payments are excluded from the definition of bribe when they are not "corrupt," that is, when such payment is not intended to obtain or retain business but simply to secure a "routine governmental action," such as approvals, licenses, permits, and the like, that are not subject to a foreign government official's discretion.[14] The 1988 amendments also included a direction from Congress to the Executive Branch to end the competitive disadvantage US companies believed that they faced when no other nation criminalized bribes to foreign officials by urging other nations to similarly outlaw overseas bribery.[15] This latter requirement ultimately resulted in negotiation and approval of the OECD Convention.

B. The OECD and Other Anti-Bribery Conventions

In 1997, twenty years after the FCPA went into effect, OECD member nations completed preparation of the OECD Convention. The OECD Convention obligates parties to enact domestic legislation criminalizing bribery of foreign government officials.[16] Subsequent to negotiation of the Convention, five other anti-bribery conventions have

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GUIDE TO THE FCPA). The Bribery Act does not contain a requirement that a company maintain accurate books and records. Such a provision is contained in Part 15 of the UK Companies Act 2006, Section 386.

12. RESOURCE GUIDE TO THE FCPA, *supra* note 11, at 4 – 5.

13. *Id.*at 5.

14. 15 U.S.C. § 78dd-1(b)-3(b) (1998); S. REP. NO. 100-85, at 53 (1987); H.R. REP. NO. 100-40, pt. 2, at 77 (1987).

A "routine governmental action" is only ordinarily and commonly performed by a foreign official in obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; processing governmental papers; providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; or providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration. The term does not include any decision by a foreign official whether or on what terms to award new business to or to continue business with a particular firm. 15 U.S.C. § 78dd-1(f)(3).

15. *See, e.g.*, James R. Hines, Jr., *Forbidden Payment: Foreign bribery and American Business after 1977* (Nat'l Bureau of Econ. Research, Working Paper No. 5266, 1995).

16. OECD Convention, *supra* note 1, at art.1 § 1. "Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."

been negotiated, four of which are now in effect. The five are as follows:

- United Nations Convention Against Corruption, Oct. 31, 2003.[17]
- Council of Europe Civil Law Convention on Corruption, Nov. 4, 1999.[18]
- Council of Europe Criminal Law Convention, Jan. 27, 1999.[19]
    - Council of Europe, Additional Protocol to the Criminal Law Convention on Corruption, May 15, 2003.[20]
- Organization of American States, Inter-American Convention Against Corruption, Mar. 29, 1996;[21] and
- African Union Convention on Preventing and Combating Corruption, July 11, 2003.[22]

The broadest in scope of these international expressions of disapproval of bribery and corruption is the United Nations Convention Against Corruption, which binds 140 states and has twenty additional nations currently dealing with ratification.[23]

C. The Adequacy of Prior UK Corruption Legislation

The United Kingdom is an original member of the OECD and was an initial signatory of the OECD Convention in December 1997. As noted, the Convention requires parties to enact domestic legislation to make it a crime to pay bribes overseas in pursuit of business. After signing the OECD Convention, the British government took the position that its existing domestic anti-bribery legislation satisfied this requirement. This existing

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17. U.N. Convention Against Corruption, GA Res. 58/4 (Oct. 31, 2003), *available at* http://www.unodc.org/unodc/en/treaties/CAC/.

18. Council of Europe, Civil Law Convention on Corruption, Nov. 4, 1999, E.T.S. no. 174, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm.

19. Council of Europe, Criminal Law Convention on Corruption, Jan. 27, 1999, E.T.S. no. 173, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm

20. Council of Europe, Additional Protocol to the Criminal Law Convention on Corruption, May 15, 2003, E.T.S. No. 173, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/191.htm.

21. Organization of American States, Inter-American Convention against Corruption, Mar. 29, 1996, 35 I.L.M. 724, *available at* http://www.oas.org/juridico/english/treaties/b-58.html.

22. African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5, *available at* http://www.africa-union.org/root/au/documents/treaties/treaties.htm.

23 *See* United Nations Convention Against Corruption: UNCAC Signature and Ratification Status as of 09 November 2012, UNITED NATIONS OFFICE ON DRUGS AND CRIME, http://www.unodc.org/unodc/en/treaties/CAC/signatories.html (last visited Mar. 4, 2013).

legislation included: the Public Bodies Corrupt Practices Act 1889,[24] the Prevention of Corruption Act 1906,[25] and the Prevention of Corruption Act 1916[26] (collectively, the "Prevention of Corruption Acts 1889-1916").[27] Notwithstanding this official position, at the time of signing the OECD Convention others disagreed, observing that the Prevention of Corruption Acts 1889-1916 did not adequately address overseas bribery, since there had *never* been such a prosecution by the United Kingdom.[28] Indeed, until 1988, bribes paid overseas were tax deductible in the United Kingdom.[29] One official entity with special expertise in this area, the UK Law Commission, an independent body that periodically reviews the laws of England and Wales,[30] flatly contradicted the government position by declaring immediately after the OECD Convention had been signed: "Under the present law, the English courts do not have jurisdiction to try a criminal offence unless the last act or event necessary for its completion occurs within the jurisdiction." [31] Very clearly, however, the Bribery Act criminalizes acts of companies, even non-UK registered companies, which take place entirely outside the United Kingdom.

The OECD has established a Working Group to periodically monitor compliance with the mandates of the OECD Convention by nations that have signed the Convention.[32] Each time the Working Group addressed UK compliance, it found it to be lacking. In 2008 the Working Group formally reported:

> Overall, the Group is disappointed and seriously concerned with the unsatisfactory implementation of the Convention by the UK. The Working Group is particularly concerned that the UK's continued failure to address deficiencies in its

24. Public Bodies Corrupt Practices Act,1889, 52 & 53 Vict., c. 69 (U.K.).

25. Prevention of Corruption Act,1906, 6 Edw. 7, c. 34 (U.K.).

26. Prevention of Corruption Act 1916, 6 & 7 Geo. 5, c. 64 (U.K.).

27. Public Bodies Corrupt Practices Act 1889 ("the 1889 Act") is concerned only with corruption in *public* bodies, while the Prevention of Corruption Act 1906 ("the 1906 Act") extends the law of corruption to *all* agents. The Prevention of Corruption Act 1916 ("the 1916 Act") applies only to persons "in the employment of [Her] Majesty or any Government Department or a public body." THE LAW COMMISSION, LEGISLATING THE CRIMINAL CODE: CORRUPTION (LC248) 13 - 15 (Mar. 3, 1998) [hereinafter LEGISLATING THE CRIMINAL CODE: CORRUPTION].

28. *Id.* at 24.

29. Such deductions were eliminated in 1988. Income and Corporation Taxes Act, 1988, c. 1 (U.K.).

30. The Law Commissions Act, 1965, c. 22 (U.K.).

31. LEGISLATING THE CRIMINAL CODE: CORRUPTION, *supra* note 27, at 103.

32. *Bribery in International Business: OECD Working Group on Bribery—Annual Report*, OECD: BETTER POLICIES FOR BETTER LIVES, http://www.oecd.org/daf/briberyininternationalbusiness/oecdworkinggrouponbribery-annualreport.htm (last visited Mar. 4, 2013).

> laws on bribery of foreign public officials and on corporate liability for foreign bribery has hindered investigations. The Working Group reiterates its previous 2003, 2005 and 2007 recommendations that the UK enact new foreign bribery legislation at the earliest possible date.[33]

D. Background on Revision of UK Corruption Laws

In 1995, two years prior to completing negotiations for the OECD Convention, the UK Parliament convened a Committee on Standards in Public Life to address allegations that public officials in England operated in "a pervasive atmosphere of 'sleaze', in which sexual, financial and governmental misconduct were indifferently linked."[34] Referring to opinion polling conducted in 1985 and 1994, the Committee noted that "comparing 1985 with 1994, suggests that the level of public distrust of, and alienation from, [Members of Parliament], already high 10 years ago, has grown substantially since."[35] The report of its findings, known as the Nolan Report, recommended a reconsideration of the three corruption laws constituting the "Prevention of Corruption Acts 1889-1916."[36] A separate Parliamentary Select Committee on Standards in Public Life then reviewed the Nolan Report and confirmed the need to replace the century-old bribery acts, which had previously been called for nearly two decades earlier in the Salmon Report.[37] The UK government then called upon the Law

33. OECD, UNITED KINGDOM: PHASE 2*BIS* REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 4 (2008), *available at* http://www.oecd.org/dataoecd/23/20/41515077.pdf.

34. COMMITTEE ON STANDARDS IN PUBLIC LIFE, STANDARDS IN PUBLIC LIFE, 1995, ¶ 10 at 106 (U.K.).

35. *Id.*, ¶ 16 at 107.

36 *See* HOME OFFICE, THE PREVENTION OF CORRUPTION, CONSOLIDATION AND AMENDMENT OF THE PREVENTION OF CORRUPTION ACTS 1889-1916: A GOVERNMENT STATEMENT, June 1997, *available at* http://www.publications.parliament.UK/pa/jt199899/jtselect/jtpriv/43/8012002.htm; *see also* THE LAW COMMISSION, REFORMING BRIBERY (LC 313) 12(2008-9) *available at* http://lawcommission.justice.gov.UK/docs/cp185_Reforming_Bribery_report.pdf [hereinafter LAW COMMISSION, REFORMING BRIBERY 2008].

37. "The Salmon Commission in 1976 recommended that such doubt should be resolved by legislation, but this has not been acted upon. We believe that it would be unsatisfactory to leave this issue outstanding when other aspects of the law of Parliament relating to conduct are being clarified. We recommend that the Government should now take steps to clarify the law relating to the bribery of or the receipt of a bribe by a Member of Parliament. This could usefully be combined with the consolidation of the statute law on bribery which Salmon also recommended, which the government accepted, but which has not been done. This might be a task which the Law Commission could take forward." COMMITTEE ON STANDARDS IN PUBLIC LIFE, STANDARDS IN PUBLIC LIFE, 1995, ¶ 104 at 43 (U.K.).

Commission to reconsider these laws.[38]

In March 1998, the Law Commission published an extensive report, "Legislating the Criminal Code: Corruption,"[39] which included a draft Corruption Bill. The Report was "welcomed" by the Government.[40] A working group within the Government, established to draft a suitable law, apparently "worked" for five years to produce a draft of the bill, which "largely reflected the draft Bill appended to the [1998 Law] Commission's report."[41] Although the Law Commission's analysis had been before Parliament and the public since March 1998, the reaction of a Parliamentary Joint Committee to the 2003 draft law was adverse.[42] At the end of 2003, the Government issued a report challenging some of the Joint Committee's proposed amendments to the 2003 draft Corruption Bill and setting forth perceived shortcomings in the Joint Committee's adverse findings.[43]

In December 2005, two years after the Joint Committee Report and eleven years after the United Kingdom signed the OECD Convention, the Government, through the Home Office, sought public comment (referred to in the United Kingdom as a "consultation") on the Prevention of Corruption Acts 1889-1916.[44] By March 2007, thirty years after the FCPA was enacted, the results of this consultation were made public.[45] The bottom line of the consultation was simply that there was no consensus on the approach a new act should take.[46]

A significant development during this period, and one which appears to have moved the government and Parliament to finally take definitive action, was the BAE Systems plc ("BAE") bribery scandal. In December 2004, BAE, the largest defense contractor in the United Kingdom, first publicly confirmed that it was being investigated by the Serious Fraud Office (the "SFO")[47] for bribing public officials of Saudi Arabia in

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38. *See, e.g.*, Bribery Bill, 2010, H.L. Bill [69] (Eng.); Ministry of Justice, Bribery: Draft Legislation, Explanatory Notes ¶¶ 5-6.

39. LEGISLATING THE CRIMINAL CODE: CORRUPTION, *supra* note 27, 1998, The Law Commission 248 (U.K.).

40. MONTY RAPHAEL, BLACKSTONE'S GUIDE TO THE BRIBERY ACT , ¶ 2.63, at 23 (2010).

41. *Id.*

42. JOINT COMMITTEE ON THE DRAFT CORRUPTION BILL, DRAFT CORRUPTION BILL REPORT AND EVIDENCE, 2002-3, H.L. 157, H.C. 705 (U.K.).

43. HOME DEPARTMENT,THE GOV'T REPLY TO THE REPORT FROM THE JOINT COMM. ON THE DRAFT CORRUPTION BILL, 2002-3, H.L. 157, H.C. 705 (U.K.).

44. HOME OFFICE, BRIBERY: REFORM OF THE PREVENTION OF CORRUPTION ACTS AND SFO POWERS IN CASES OF BRIBERY OF FOREIGN OFFICIALS: A CONSULTATION PAPER (Dec. 2005), *available at* http://www.docstoc.com/docs/71020623/1-BRIBERY-Reform-of-the-Prevention-of-Corruption-Acts-and-SFO-.

45. THE LAW COMMISSION, REFORMING BRIBERY: A CONSULTATION PAPER (LC185) 23 (2007) [hereinafter LAW COMMISSION, CONSULTATION PAPER] *available at* http://lawcommission.justice.gov. UK/docs/cp185_Reforming_Bribery_consultation.pdf.

46. *Id.* at 25.

47. The Serious Fraud Office is the UK entity that investigates and prosecutes serious

connection with a major defense contract known as the AL Yamamah transaction.[48] The size of the alleged bribes, $1 billion, the alleged involvement of each British Prime Minister - Margaret Thatcher, John Major, and Tony Blair[49] - and the television appearance of Saudi Prince Bandar bin Sultan apparently conceding the receipt of these bribes and saying "So what?"[50] generated a great deal of media interest.[51]

Nevertheless, in December 2006 the Ministry of Justice announced that the SFO's investigation of BAE had been terminated.[52] The cancellation of the investigation of BAE bribery immediately led to a challenge by two non-governmental organizations.[53] An April 2008 decision of the High Court found that the SFO had improperly terminated its investigation.[54] The House of Lords overturned this decision in July

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fraud and currently is responsible for enforcing the Bribery Act 2010. *See Who We Are*, SERIOUS FRAUD OFFICE, www.sfo.gov.uk/about-us/who-we-are.aspx (last visited Mar. 4, 2012). The SFO was established by the Criminal Justice Act 1987. One of the functions of the office is to "investigate any suspected offence which appears to [the Director of the SFO] on reasonable grounds to involve serious or complex fraud." Criminal Justice Act, 1987, c. 38, §1 (U.K.).

48. The Al Yamamah transaction extended over several decades and involved BAE supplying military aircraft, air defense and other systems to the Kingdom of Saudi Arabia. The Financial Times referred to this transaction as the "biggest sale ever, of anything, to anyone." David White & Robert Mauthner, *Britain's Arms Sale Of The Century*, FIN. TIMES (London), July 9, 1988, at 7.

49. Panorama's principal allegation is that BAE, with approval of the UK's Ministry of Defence, made payments worth hundreds of millions of pounds over two decades to bank accounts under the personal control of Prince Bandar bin Sultan, the son of Prince Sultan bin Abdul Aziz who has been the Saudi Defence Minister since 1962. The documentary suggests that some of the payments were for the personal expenditure of Prince Bandar bin Sultan. The allegations raise further concerns about the shelving of the SFO investigation. They suggest that, since 1985, successive British governments under Prime Ministers Margaret Thatcher, John Major and Tony Blair have used Ministry of Defence bank accounts to facilitate corrupt payments to a foreign official. *The Story So Far . . . Background to the legal challenge*, CONTROL BAE REOPEN THE SAUDI CORRUPTION INQUIRY (Feb. 13, 2008), http://www.controlbae.org.UK/ background/review.php.

50. Aljazeera News Arabic, *Bandar Bin Sultan Saudi Money Is Mine and I Do What I Want With It*, YOUTUBE.COM (Jan. 10, 2009), http://www.youtube.com/watch?v=FeXT3tuH6ls.

51. *See, e.g. Saudi Prince 'Received Arms Cash,'* BBC NEWS (June 7, 2007), http://news.bbc.co.uk/2/hi/uk_news/6728773.stm

52. Press Release, Serious Fraud Office, BAE Systems PLC/Saudi Arabia (Dec. 14, 2006), *available at* http://www.sfo.gov.UK/press-room/latest-press-releases/press-releases-2006/bae-systems-plcsaudi-arabia. aspx.

53. *See The Story So Far . . . Background to the Legal Challenge*, CONTROL BAE REOPEN THE SAUDI CORRUPTION INQUIRY (Feb. 13, 2008), http://www.controlbae.org.UK/background/ review.php. ("On 18 December 2006, four days after the SFO announcement, The Corner House and Campaign Against Arms Trade wrote to the UK Government arguing that the SFO's decision was unlawful and should be reversed. The legal challenge centred on the UK's obligations under the Organisation for Economic Co-operation and Development (OECD) Anti-bribery Convention, which Britain signed in 1997.").

54. R (on the Application of Corner House Research and Campaign Against Arms Trade) v. The Dir. of the Serious Fraud Office, [2008] EWHC 714.

2008.[55] It was during this four-year period of great public interest in the BAE matter that Parliament considered the Corruption Bill.

In March 2007, the government once again asked the Law Commission to "undertake a thorough review of our bribery laws with a view to fundamental reform and in so doing to look at the full range of structural options for the scheme of bribery offences."[56] Accordingly, in November 2007, the Law Commission sought public comment on its new analysis of the bribery laws through yet another consultation.[57] One year later, in October 2008, the Law Commission once again published a report and proposed a draft law, this time focusing, not on "corruption," but specifically on bribery.[58] Just a few months later, at the end of March 2009, the Ministry of Justice released its version of the bribery bill.[59] A Joint Parliamentary Committee held further hearings on the March 2009 draft bribery bill and issued its final report in July 2009, *thirty-two years after enactment of the FCPA*.[60] During these hearings, a prominent London lawyer in July 2009 gave testimony that presents an understated view of the long process that culminated in the introduction of the Bribery Act.[61] Jeremy Carver, a former partner at Clifford Chance and prominent in the activities of Transparency International, an international anti-corruption organization, commented upon the years of delay, public consultations, and redrafts of the Bribery Bill:

> If any piece of legislation has been consulted on, it is this one. The difficulty, of course, has been that each body that has triggered a consultation, whether it is the Government, whether it is the Law Commission or previous parliamentary committees, has of course continued to receive the two points of view: one that says we must have legislation, it should be clear, it should be decisive and it should stop present malpractices, and the other says that, yes, we have legislation [sic] but basically we want to continue to do what we have always been doing and we do

55. House of Lords, Session 2007-08 [2008] UKHL 60, R v Dir. of the Serious Fraud Office, [2008] UKHL 60, A.C. (H.L.) (appeal taken from Eng.).

56. Written Ministerial Statements, Envtl. Food and Rural Affairs, Envtl. Council (Mar. 5, 2007), *available at* http://www.publications.parliament.UK/pa/cm200607/cmhansrd/cm070305/wmstext/70305m0001.htm.

57. *See* LAW COMMISSION, CONSULTATION PAPER, *supra* note 45.

58. *See* LAW COMMISSION, REFORMING BRIBERY 2008, *supra* note 36.

59. Bribery Bill, 2010, H.L. Bill [69] (Eng.); Ministry of Justice, Bribery: Draft Legislation.

60. JOINT COMMITTEE HOUSE OF COMMONS, REPORT, H.C. 430-I and H.L. 115-I (U.K.).

61. UNCORRECTED TRANSCRIPT OF ORAL EVIDENCE PUBLISHED AS HC 430 VI (June 11, 2009), *available at* http://www.publications.parliament.UK/pa/jt200809/jtselect/jtbribe/uc430-vi/uc43002.htm.

not want to risk losing British business.[62]

Four months later, the Bribery Bill 2009 was introduced into the House of Lords.[63] From there, it was relatively speedily passed by both houses of Parliament, receiving Royal Assent on April 8, 2010. Even then, however, this law did not immediately go into effect. As described in Part III.C., *infra,* Section 9 of the Bribery Act required the government to publish guidance prior to the effective date of the Act to help businesses understand how to comply with the incomprehensible requirements of Section 7, the crime of failing to prevent bribery.[64] The Ministry of Justice published final guidance to the Bribery Act 2010 on March 30, 2011 ("Guidance").[65] The Bribery Act 2010 became effective on July 1, 2011.[66]

Regardless of the years of delay, the Bribery Act is now in effect. We analyze the operative provisions of the Act in Parts II, III, and IV, *infra.*

II. BRIBERY ACT: SECTIONS 1, 2, AND 6

In Part II, we discuss three of the four substantive provisions of the Bribery Act. Section 1 of the Act prohibits what has been referred to as "active" bribery – the offering or payment of something of value to another.[67] Unlike the exclusively foreign focus of the FCPA, Section 1 applies to domestic UK bribery as well.[68] Section 2, dealing with "passive bribery," proscribes receipt of a bribe.[69] This offense also has general applicability, including within the United Kingdom. Section 6 outlines the offense of bribing a foreign public official.[70]

A. Section 1: Bribery of Another Person

Section 1 sets forth the offense of bribing another person, or what is

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62. *Id.*

63. *See* TIMOTHY EDMONDS & OONAGH GAY, BRIBERY BILL [HL], BILL NO 69, RESEARCH PAPER 10/19 1, 6 (Mar. 2010).

64. Bribery Act, *supra* note 2, § 7.

65. *See generally* MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE (2010) [hereinafter Guidance] *available at* http://www.justice.gov.UK/downloads/legislation/bribery-act-2010-guidance.pdf. *See also* Bribery Act, *supra* note 2, § 9.

66. Guidance, *supra* note 65, at 2.

67. Bribery Act, *supra* note 2, § 1.

68. Indeed, the first prosecution under the Bribery Act was for receipt of a domestic bribe by an administrative officer in a magistrate's court in Redgate, England. *See* Press release, The Crown Prosecution Service, Court officer admits taking bribe in first prosecution under Bribery Act (Oct. 14, 2011), *available at* http://www.cps.gov.UK/news/press_releases/127_11/index.html.

69. Bribery Act, *supra* note 2, § 2.

70. *Id.* § 6.

referred to as "active bribery."[71] This section provides as follows:

> (1) A person ("P") is guilty of an offence if either of the following cases applies.
> (2) Case 1 is where—
> (a) P offers, promises or gives a financial or other advantage to another person, and
> (b) P intends the advantage—
> (i) to induce a person to perform improperly a relevant function or activity, or
> (ii) to reward a person for the improper performance of such a function or activity.
> (3) Case 2 is where—
> (a) P offers, promises or gives a financial or other advantage to another person, and
> (b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.
> (4) In case 1 it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.
> (5) In cases 1 and 2 it does not matter whether the advantage is offered, promised or given by P directly or through a third party.[72]

Section 1 prohibits a person (either directly or indirectly) from offering, promising, or giving a financial or other advantage to another. This is a general bribery offense applicable both within the United Kingdom and abroad. An offense under Section 1 includes not only payments of money, but also offers, promises, or gifts of "financial or other advantage."[73] Any such action constitutes a Bribery Act offense even without carrying through with the offer or promise of a payment or advantage; the offer or promise completes the offense.[74] A Section 1 offense is limited to circumstances where the party making the payment intends the "advantage" so proffered to induce the recipient to improperly perform an act or to reward the recipient for having done so.[75] The offense is also completed when a party offers such an advantage knowing that

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71. *Expansive Reach*, *supra* note 8, at 325-26.
72. Bribery Act, *supra* note 2, § 1.
73. *Id.* § 1(2)(a).
74. *Id.* § 1(3).
75. *Id.* § 1(2)(b).

acceptance of the advantage will result in the improper performance of a relevant function or activity.[76]

The key distinction between case 1 and case 2 described in Subsections (2) and (3) of Section 1 of the Act is the person to whom the advantage is offered. In case 1, it does not matter whether the person to whom the advantage is offered is the same person who is to perform, or has performed, the activity. In case 2, the person whose acceptance of the advantage constitutes an improper performance must be the same person to whom the advantage is offered. Moreover, in case 1, the advantage must be intended to induce or reward the improper performance of a relevant function or activity, whereas in case 2, the acceptance of the advantage itself is the improper performance. In summary, a person offering an "advantage" as described in Section 1 is guilty of active bribery if this was done with intent either to induce the recipient to act improperly or to reward the recipient for having done so. The offeror is also guilty of bribery where the recipient's acceptance or agreement to accept is itself improper.

B. Section 2: Acceptance of a Bribe

Section 2 of the Act describes the offense of "passive bribery," in which the perpetrator requests or agrees to *receive* a bribe. This section provides:

> (1) A person ("R") is guilty of an offence if any of the following cases applies.
> (2) Case 3 is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person).
> (3) Case 4 is where—
>> (a) R requests, agrees to receive or accepts a financial or other advantage, and
>> (b) the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.
>
> (4) Case 5 is where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity.
> (5) Case 6 is where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is

76. *Id.* § 1(3)(b).

> performed improperly—
>
> (a) by R, or
>
> (b) by another person at R's request or with R's assent or acquiescence.
>
> (6) In cases 3 to 6 it does not matter—
>
> (a) whether R requests, agrees to receive or accepts (or is to request, agree to receive or accept) the advantage directly or through a third party,
>
> (b) whether the advantage is (or is to be) for the benefit of R or another person.
>
> (7) In cases 4 to 6 it does not matter whether R knows or believes that the performance of the function or activity is improper.
>
> (8) In case 6, where a person other than R is performing the function or activity, it also does not matter whether that person knows or believes that the performance of the function or activity is improper.[77]

For this offense, one does not need to receive a bribe, but merely ask for or agree to receive it, and the bribe need not be monetary. It can be a simple "advantage." As with active bribery, the action must be improper: the actor needs to do, or intend to do, something wrong. The improper conduct could be intended to be done by a third party, or a third party could be the source of the bribe.[78] As we have noted elsewhere, "the irony of labeling this offense as passive bribery, and yet defining the four cases constituting varieties of the receipt of a bribe using the term 'requests,' was apparently lost on Parliament."[79] As UK Professor Peter Alldridge has remarked: "Calling it passive bribery...rather misses [the] point."[80]

C. Sections 3 and 4: "Relevant Function or Activity" and "Improper Performance"

Sections 3 and 4 of the Act set forth the broad range of activities to which the Act applies and the meaning of "improper" performance as used in Section 1. As noted, a Section 1 offense is committed where the "advantage" is intended to either induce a person to perform improperly a relevant function or activity or reward a person for the improper performance of such a function or activity.[81] The same offense is committed

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77. Bribery Act, *supra* note 2, § 2.

78. *Id.* § 2(6).

79. *Expansive Reach, supra* note 8.

80. Peter Alldridge, *Reforming Bribery: Law Commission Consultation Paper 185: (1) Bribery Reform and the Law—Again*, 2008 CRIM. L. R. 671, 681 (2008).

81. Bribery Act, *supra* note 2, § 1(2)(b).

where a person offers, promises, or gives a financial or other advantage to another, and such person knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.[82]

1. "Relevant Function"

Section 3 provides:

> (1) For the purposes of this Act a function or activity is a relevant function or activity if—
> (a) it falls within subsection (2), and
> (b) meets one or more of conditions A to C.
> (2) The following functions and activities fall within this subsection—
> (a) any function of a public nature,
> (b) any activity connected with a business,
> (c) any activity performed in the course of a person's employment,
> (d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporate).
> (3) Condition A is that a person performing the function or activity is expected to perform it in good faith.
> (4) Condition B is that a person performing the function or activity is expected to perform it impartially.
> (5) Condition C is that a person performing the function or activity is in a position of trust by virtue of performing it.
> (6) A function or activity is a relevant function or activity even if it—
> (a) has no connection with the United Kingdom, and
> (b) is performed in a country or territory outside the United Kingdom.
> (7) In this section "business" includes trade or profession.[83]

Thus, a "relevant function or activity" includes any public or business activity performed in the course of employment[84] that also meets one of three conditions: it is normally expected to be performed in good faith, is performed impartially, or is performed by a person in a position of trust.[85] It

82. *Id.* § 1(2)(b), (3).
83. *Id.* § 3.
84. *Id.*
85. *Id.* §3 (3, 4, 5).

must be emphasized that the acting party is guilty even where the relevant function or activity is carried out abroad; such activity need not have *any* connection to the United Kingdom, and the measure of what is "improper" is determined by UK standards, not by those of the foreign country where the bribing occurs.[86] This application of UK standards to transactions occurring in foreign nations with different societal mores and cultures will doubtless trigger accusations of "cultural imperialism" comparable to those previously raised in connection with application of the FCPA.[87]

2. "Improper Performance"

Section 4 provides:

> (1) For the purposes of this Act a relevant function or activity—
>
> (a) is performed improperly if it is performed in breach of a relevant expectation, and
>
> (b) is to be treated as being performed improperly if there is a failure to perform the function or activity and that failure is itself a breach of a relevant expectation.
>
> (2) In subsection (1) "relevant expectation"—
>
> (a) in relation to a function or activity which meets condition A or B, means the expectation mentioned in the condition concerned, and
>
> (b) in relation to a function or activity which meets condition C, means any expectation as to the manner in which, or the reasons for which, the function or activity will be performed that arises from the position of trust mentioned in that condition.
>
> (3) Anything that a person does (or omits to do) arising from or in connection with that person's past performance of a relevant function or activity is to be treated for the purposes of this Act as being done (or omitted) by that

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86. *Id.* §§ 4, 5.

87. *See*, e.g., Christopher J. Duncan, *The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism*, 1 ASIAN-PAC. L. & POL'Y J. 16F (2000); Elizabeth Spahn, *International Bribery: The Moral Imperialism Critiques*, 18 MINN. J. INT'L L. 155, 156 (2009); Padideh Ala'i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade against Corruption*, 33 VAND. J. TRANSNAT'L L. 877, 881 (2000); *see also Expansive Reach*, *supra* note 8, at 328 n. 25.

> person in the performance of that function or activity.[88]

Thus, according to this section, a relevant function or activity is performed improperly if it is performed in breach of a relevant expectation, or if there is a failure to perform the function or activity, and that failure is a breach of a relevant expectation.[89]

3. "British "Expectations"

Section 5 of the Act elaborates on the term "expectation," as that term is used in Sections 3 and 4, and makes perfectly clear that the test of what is expected is a test of expectations in the United Kingdom.[90] The full text of Section 5 is as follows:

> (1) For the purposes of sections 3 and 4, *the test of what is expected* is a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned.
> (2) In deciding what such a person would expect in relation to the performance of a function or activity where the performance is not subject to the law of any part of the United Kingdom, *any local custom or practice is to be disregarded* unless it is permitted or required by the written law applicable to the country or territory concerned.
> (3) In subsection (2) "written law" means law contained in—
>
> > (a) any written constitution, or provision made by or under legislation, applicable to the country or territory concerned, or
> > (b) any judicial decision which is so applicable and is evidenced in published written sources.[91]

Once again, the Bribery Act requires that UK standards apply to conduct that occurs in other nations. The breach of a relevant expectation, for purposes for Section 4, follows a reasonableness test, based only on what is considered "reasonable" in the United Kingdom, and any local custom or practice is generally to be disregarded.

88. Bribery Act, *supra* note 2, § 4.
89. *Id.*
90. *Id.* § 5(1).
91. *Id.* § 5 (emphasis added).

D. Section 6: Bribery of a "Foreign Public Official"

Section 6 of the Act is the section that most directly parallels the FCPA offense of bribery of a foreign public official. Section 6 describes this offense as follows:

> (1) A person ("P") who bribes a foreign public official ("F") is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official.
> (2) P must also intend to obtain or retain—
> (a) business, or
> (b) an advantage in the conduct of business.
> (3) P bribes F if, and only if—
> (a) directly or through a third party, P offers, promises or gives any financial or other advantage—
> (i) to F, or
> (ii) to another person at F's request or with F's assent or acquiescence, and
> (b) F is neither permitted nor required by the written law applicable to F to be influenced in F's capacity as a foreign public official by the offer, promise or gift.
> (4) References in this section to influencing F in F's capacity as a foreign public official mean influencing F in the performance of F's functions as such an official, which includes—
> (a) any omission to exercise those functions, and
> (b) any use of F's position as such an official, even if not within F's authority.[92]

To trigger liability under the Bribery Act, the bribe must be paid to a foreign public official. Who qualifies as such an official is defined in Section 6(5):

> "Foreign public official" means an individual who—
> (a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory),
> (b) exercises a public function—

92. *Id.* § 6(1)-(4).

> (i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or
> (ii) for any public agency or public enterprise of that country or territory (or subdivision), or
> (c) is an official or agent of a public international organisation.[93]

This definition closely tracks the definition included in the OECD Convention:

> For the purpose of this Convention:
> a) "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization.[94]

A "public international organization" is defined in Section 6 of the Bribery Act:

> "Public international organisation" means an organisation whose members are any of the following—
> (a) countries or territories,
> (b) governments of countries or territories,
> (c) other public international organisations,
> (d) a mixture of any of the above.[95]

Furthermore, the Ministry of Justice asserts in the Guidance that an offense under Section 6 has no jurisdictional limit: a foreign public official includes anyone, whether elected or appointed, who holds a legislative, administrative, or judicial position of any kind of a country or territory outside the United Kingdom, and includes:

> [A]ny person who performs public functions in any branch of the national, local or municipal government of such a

93. *Id.* § 6(5).

94. OECD Convention, Article 1, subsection 4(a), *available at* http://www.oecd.org/dataoecd/4/18/38028044.pdf (emphasis added).

95. Bribery Act, 2010, c.23, § 6(6) (U.K.).

> country or territory or who exercises a public function for any public agency or public enterprise of such a country or territory, such as professionals working for public health agencies and officers exercising public functions in state-owned enterprises.[96]

Such an official "can also be an official or agent of a public international organisation, such as the [United Nations] or the World Bank."[97]

The policy underlying Section 6 addresses "the need to prohibit the influencing of decision making in the context of publicly funded business opportunities by the inducement of personal enrichment of foreign public officials or to [*sic*] others at the official's request."[98] While such activity is likely to involve conduct amounting to improper performance of a relevant function or activity, to which Section 1 applies, the Guidance explains that Section 6 does not require proof of improper performance or an intention to induce such performance. "[T]he exact nature of the functions of the persons regarded as foreign public officials is often very difficult to ascertain with any accuracy, and the securing of evidence will often be reliant on the co-operation of the state any such officials serve."[99] The Guidance states that "it is not the Government's intention to criminalise behaviour where no such mischief occurs, but merely to formulate the offence to take account of the evidential difficulties referred to above."[100] However, this statement provides no useful "guidance" at all, and will serve only to trouble those who regularly interact with foreign public officials and will now have to worry about their every move.

E. Section 12: Jurisdictional Nexus to the United Kingdom

Section 12 sets forth the scope of jurisdiction of the various operative provisions of the Bribery Act. Subsections (1) through (4) apply to Sections 1, 2, and 6 of the Act and are standard and unexceptional. They provide as follows:

> Offenses under this Act: territorial application

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96. Guidance, *supra* note 65, at ¶ 22 (emphasis added).

97. *Id.* This expands slightly on the text of the OECD Convention, which provides that a foreign public official means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization. OECD Convention, *supra* note 87, *available at* http://www.oecd.org/dataoecd/4/18/38028044.pdf.

98. Guidance, *supra* note 65, at ¶ 23.

99. *Id.*

100. *Id.*

(1) An offence is committed under section 1, 2 or 6 in England and Wales, Scotland or Northern Ireland if any act or omission which forms part of the offence takes place in that part of the United Kingdom.
(2) Subsection (3) applies if—
(a) no act or omission which forms part of an offence under section 1, 2 or 6 takes place in the United Kingdom,
(b) a person's acts or omissions done or made outside the United Kingdom would form part of such an offence if done or made in the United Kingdom, and
(c) that person has a close connection with the United Kingdom.
(3) In such a case—
(a) the acts or omissions form part of the offence referred to in subsection (2)(a), and
(b) proceedings for the offence may be taken at any place in the United Kingdom.
(4) For the purposes of subsection (2)(c) a person has a close connection with the United Kingdom if, and only if, the person was one of the following at the time the acts or omissions concerned were done or made—
(a) a British citizen,
(b) a British overseas territories citizen,
(c) a British National (Overseas),
(d) a British Overseas citizen,
(e) a person who under the British Nationality Act 1981 was a British subject,
(f) a British protected person within the meaning of that Act,
(g) an individual ordinarily resident in the United Kingdom,
(h) a body incorporated under the law of any part of the United Kingdom,
(i) a Scottish partnership.
(5) An offence is committed under section 7 irrespective of whether the acts or omissions which form part of the offence take place in the United

Kingdom or elsewhere.[101]

This jurisdictional nexus to the United Kingdom is traditional. The territorial basis for jurisdiction is explicit in Subsection (1).[102] Nationality jurisdiction is set out in Subsection (2).[103] Under Subsection 2, a natural person subject generally to UK laws is subject to the Bribery Act even when acting outside the United Kingdom. These provisions are parallel to provisions of the FCPA as most recently amended in 1998 to comply with the OECD Convention.[104]

Subsection (5), however, thrusts the Act into a new, perilously overbroad area of hitherto untested, and in our view unjustified jurisdiction. "An offence is committed under section 7 *irrespective* of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere."[105] This Parliamentary language contrasts starkly with the 1998 opinion of the legal experts on the Law Commission previously cited in Part I.C: "Under the present law, the English courts do not have jurisdiction to try a criminal offence unless the last act or event necessary for its completion occurs within the jurisdiction."[106]

SFO Senior Staff have explained that the test for jurisdiction is whether the company in question carries out business in the United Kingdom, and that this is also a fact-specific inquiry to be made on a case-by-case basis.[107] This means that to resolve each particular factual setting, the defendant non-UK business entity must go to trial – incurring significant costs and delays to determine whether it is actually subject to the expansive grasp of the Bribery Act. The SFO has also made quite clear that it "intends to assert broad jurisdiction under the provisions of the Bribery Act."[108] This jurisdictional overreach of the Bribery Act applies only to Section 7, which creates the unique, strict corporate liability crime of failing to prevent a bribe, which does not require fault or any inkling of *mens rea*. Given the central role of London in many aspects of international business, this crime may apply to almost all transnational businesses, including those with only the slightest connection to the United Kingdom. Furthermore, as detailed in Part IV, *infra*, the Bribery Act's version of a "bribe" includes

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101. Bribery Act, *supra* note 2, § 12.

102. *Id.* § 12(1).

103. *Id.* § 12(2).

104. *See* Prohibited Foreign Trade Practices by Persons Other Than Issuers or Domestic Concerns 15 U.S.C. § 78dd-3(a), (f)(1) (2011).

105. Bribery Act, *supra* note 2, § 12(5) (U.K.) (emphasis added).

106. THE LAW COMMISSION, *supra* note 31, at 103.

107. *See generally* GUIDANCE, *supra* note 65, ¶ 34.

108. *UK Serious Fraud Office Discusses Details of UK Bribery Act*, GIBSON DUNN, http://www.gibsondunn.com/publications/pages/UKSeriousFraudOfficeDiscussion-RecentlyEnactedUKBriberyAct.aspx (Sept. 7, 2010) [hereinafter Dunn Article].

expenditures routinely made by businesses today.

III. SECTION 7: YOU ARE GUILTY

The Bribery Act's Section 7, "Failure of commercial organisations to prevent bribery," is innovative, unprecedented, and indefensible as applied to non-UK registered businesses. It is a strict liability crime applicable to a business "doing business or a part of a business in the UK."[109] While the Bribery Act has several unclear, ambiguous provisions, Section 7 is by far the most objectionable. As we explained in Part II.D, *supra*, Subsection 12(5) of the Bribery Act imposes no territorial limits on the applicability of the unique crime of "failure to prevent bribery." As described more fully in Part IV B, *infra*, following its careful review of the issue, the Law Commission's draft bribery bill did *not* include strict liability for failing to prevent bribery. Because London is a world class financial center, travel hub, and attractive international destination, the crime of failing to prevent a bribe is potentially applicable to most of the world's business entities that have cross border operations.

As its justification for asserting this vast extraterritorial reach for the Bribery Act, the SFO reported that it has been approached by UK companies complaining about competitors in foreign countries that are paying bribes. The SFO recognized the disadvantage compliance with the Act will pose and stated that one of its objectives is "to prevent ethical companies from being competitively disadvantaged by the actions of other companies whether they are within or outside the UK."[110] This is somewhat ironic since no UK firm, including BAE, had ever been prosecuted in the United Kingdom for overseas bribery until 2009. This was twelve years after the OECD Convention was signed, when the first, and only, violation was penalized as the result of a company *self-reporting* a breach of the United Nations Iraq Oil for Food sanctions.[111]

We now turn to a closer analysis of the offending provisions of Section 7. This section reads in relevant part:

> (1) A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending—
>
> (a) to obtain or retain business for C, or
>
> (b) to obtain or retain an advantage in the conduct

109. Bribery Act, *supra* note 2, § 7(5).

110. Dunn Article, *supra* note 108, at 4.

111. Press Release, Serious Fraud Office, *Maybe & Johnson Ltd: Former executives jailed for helping finance Saddam Hussein's government*, (Feb. 23, 2011), *available at* http://www.sfo.gov.UK/press-room/latest-press-releases/press-releases-2011/mabey--johnson-ltd-former-executives-jailed-for-helping-finance-saddam-hussein's-government.aspx.

of business for C.

(2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.

(3) For the purposes of this section, A bribes another person if, and only if, A—

(a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or

(b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.

. . . .

(4) See section 8 for the meaning of a <u>person associated</u> with C and see section 9 for a duty on the Secretary of State to publish guidance.[112]

To fully appreciate the broad scope of Section 7, we need to determine the meaning of "relevant commercial organization" and of "person associated" with such an organization. In the Bribery Act, these terms are ambiguous, elusive, and open-ended.

A. Relevant Commercial Organization

The application of Section 7 to a UK commercial enterprise is not troubling. Such an organization is a "body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere)," or "a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere)."[113] This portion of the definition is unexceptional, reflecting traditional territorial jurisdiction. UK domiciled entities are subject to the strict criminal liability of Section 7 (with only the defense set out in Section 7(2)).[114] It is well accepted that if an organization is established in any part of the "United Kingdom," Parliament has the power to legislate as it sees fit.[115]

As described *infra*, however, Parliament determined that Section 7 is equally applicable to "(b) any other body corporate (*wherever incorporated*) which carries on a business, or *part of a business*, in any part of the United Kingdom, [or] . . . (d) any other partnership (*wherever*

112. Bribery Act, *supra* note 2, § 7(1-4) (emphasis added).

113. *Id.* § 7(5).

114. *Id.* § 7(2).

115. The term "United Kingdom" is defined in Section 12 of the Bribery Act as England, Wales, Scotland, and Northern Ireland, and does not include British "overseas territories" such as Bermuda, the Falkland Islands, or the British Virgin Islands. *See Id.* § 12.

formed) which carries on a business, or *part of a business*, in any part of the United Kingdom. . . ."[116] Jurisdiction over a non-UK company "which carries on a business" in the United Kingdom is unobjectionable. The overly broad aspect of this provision is found in the phrase "*which carries on ... part of a business, in any part of the United Kingdom.*"[117] We find no explanation of what "carries on ... part of a business" might entail in either the Act or the Guidance. Speeches by current and former UK officials from the SFO or Ministry of Justice similarly offer no useful clue to the meaning of this phrase.[118] The Ministry of Justice did seek to ease concerns by stating:

> The Government would not expect... the mere fact that a company's securities have been... admitted to trading on the London Stock Exchange, in itself, to qualify that company as carrying on a business or part of a business in the UK and therefore falling within the definition of a 'relevant commercial organisation' for the purposes of section 7.[119]

This should have been good news for the many foreign companies which have secured listings on, for example, the London Stock Exchange. However, Richard Alderman, at the time head of the SFO, the agency principally charged with enforcing the Bribery Act, flatly contradicted the Ministry by stating his view of SFO jurisdiction.

> Asked whether all companies listed in the UK potentially fall under the remit of the Bribery Act, he said: "Exactly. You bet we will go after foreign companies. This has been misunderstood. If there is an economic engagement with the UK then in my view they are carrying on business in the UK.[120]

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116. *Id.* §§ 7(5)(b), 7(5)(d) (U.K.) (emphasis added).

117. *Id.* (emphasis added).

118. *See*, e.g., Richard Alderman, Dir., Serious Fraud Office, Speech at British Bankers Association Financial Crime Office, (Nov. 29, 2011) *available at* http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2011/british-bankers'-association-financial-crime-conference.aspx; *Bribery Act In Force July 2011: Ken Clark's Statement In Full*, THEBRIBERACT.COM (last visited Sept. 26, 2012 5:34 PM) http://thebriberyact.com/2011/03/30/bribery-act-in-force-from-july-1-ken-clarkes-statement-in-full/ (last visited Nov. 7, 2012).

119. GUIDANCE, *supra* note 65, ¶ 36.

120. Jonathan Russell, *Serious Fraud Office Risks Clash with Ministry of Justice over Bribery Act*, THE TELEGRAPH, (Jul. 1, 2011, 5:45 AM BST), http://www.telegraph.co.uk/finance/yourbusiness/bribery-act/8609486/Serious-Fraud-Office-risks-clash-with-Ministry-of-Justice-over-Bribery-Act.html. "Foreign companies with any kind of business link with the UK

If a listing on a stock exchange in London fits within this new term, "economic engagement," what about a syndicated credit facility that includes London banks? What about the occasional sale of a product or the increasingly common provisions in international agreements which provide for dispute resolution in London, either in the Commercial Courts or at the London Court of International Arbitration? Perhaps the English courts will one day resolve this uncertainty.[121] For the present it is extremely unsettling for companies that might be ensnared by Alderman's grandiose view of his jurisdiction under the Bribery Act to see authoritative UK spokesmen expounding inconsistent views on what is, by any measure, an extraordinarily far-reaching provision.

B. *"Adequate Procedures" Defense*

Parliament claimed to ameliorate the draconian impact of the automatic imposition of criminal liability for failing to prevent a bribe by offering one possible defense to the crime, the marvelously labeled "adequate procedures" defense. Section 7(2) provides, "But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct." [122] With the establishment of the strict liability Section 7 offense, when seeking to find liability in a legal entity, the prosecutor need no longer search for the person representing the "controlling mind" of the company.[123] No criminal intent or knowledge, no guilty mind or *mens rea*, is required for this crime. If a "bribe" within the Bribery Act's very broad meaning of that term occurs,[124]

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have been put on notice by the head of the Serious Fraud Office that they will be fair game once the biggest overhaul of the nation's bribery laws in a generation comes into force. Richard Alderman, the agency's director, is charging his investigators with rooting out bribery anywhere in the world when the legislation is introduced on July 1. The Bribery Act's sweeping powers mean that companies based overseas come under the SFO's jurisdiction if they have any business link with the UK, such as being listed here." Caroline Binham, *SFO Chief Warns of New Global Reach*, FINANCIAL TIMES (May. 23, 2011, 10:34 pm), http://www.ft.com/intl/cms/s/0/8c056ce2-8562-11e0-ae32-00144feabdc0.html#axzz1im4KhsYA.

121. *See*, e.g., GUIDANCE, *supra* note 65, ¶ 34 "The courts will be the final arbiter as to whether an organization 'carries on a business' in the UK taking into account the particular facts in individual cases." *Id.*; Dunn Article, *supra* note 108, at 2 ("However, they made clear that the test for jurisdiction is simply whether the company in question carries out business in the United Kingdom. They noted that case law relating to this question will not necessarily be relevant to determining jurisdiction, and this will be a matter of fact in each case, clarifying that the SFO intends to assert broad jurisdiction under the provisions of the Bribery Act.").

122. Bribery Act, *supra* note 2, § 7(2).

123. The "controlling mind" element of a corporate prosecution under prior UK law required proof that a very senior executive of the defendant corporation actively and knowingly affected the bribe. This is the stated explanation for why there were so few corporate defendants prosecuted under the Prevention of Corruption Acts 1889-1916. *See, e.g.*, Tesco Ltd. v. Nattrass, [1971] A.C. 153 (H.L.) 160-61 (appeal taken from Eng.) (U.K.).

124. For discussion of grease and hospitality payments, *see* Part IV A., *infra*.

the corporate or other commercial entity is guilty, despite having no knowledge of the alleged bribe and despite having taken no affirmative act in connection with this "crime." To avoid this automatic guilty verdict, the company must prove that it "had in place adequate procedures designed to prevent persons associated with [the company] from undertaking such conduct."[125]

Use of the term "adequate" is curious, since obviously had the procedures actually been adequate, the bribery would not have occurred in the first place.[126] Substitution of the term "reasonable" was considered and rejected in Parliament. [127] The UK Law Commission published a Summary of its Recommendations, which explained the Section 7 defense in the following terms: "[I]t will generally be sufficient guidance to those in a position to make payments to say: *Do not make payments to someone (or favour them in any other way) if you know that this will involve someone in misuse of their position.*" [128] However, this statement is perfectly circular. To say one cannot engage in bribery because it is bribery is unusually unhelpful. When the Law Commission Report was being considered by legislators, testimony to the Joint Committee of Parliament considering the draft Bribery Bill challenged the public policy basis of Section 7: "We fail to see why public policy should require that individual's actions be criminalized and for the individual to then to rely on a prosecutor's discretion, on whether with hindsight, the public interest requires a prosecution."[129] The final version of the Act retained the strict liability provision of the draft along with the adequate procedures defense.

C. The Ministry of Justice's "Guidance"

In the clearest possible acknowledgement of the unique challenge posed by Section 7 and its sole affirmative defense, Parliament included in the Act a highly unusual provision. Section 9[130] requires that the UK

125. Bribery Act, *supra* note 2, § 7(2).

126. *See* Joseph Heller, *Catch 22* (Simon & Schuster 1996) (1955).

127. PUBLIC BILL COMMITTEE, BRIBERY BILL AMENDMENTS, H.C. 55-69 (Mar. 16, 2010) (U.K.), *available at* http://www.publications.parliament.uk/pa/cm200910/cmpublic/bribery/100316/pm/100316s03.htm

128. THE LAW COMMISSION, REFORMING BRIBERY (LAW COM NO 313), 2008, at xvii, (U.K.) *available at* http://lawcommission.justice.gov.uk/docs/cp185_Reforming_Bribery_report.pdf.

129. Memorandum submitted by Herbert Smith LLP to Joint Comm., (BB 49) (Jun. 2009) *available at* http://www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/memo/430/ucm4902.htm (U.K.).

130. Section 9 provides, in relevant part: "The Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1)." Bribery Act, *supra* note 2, § 9.

government provide guidance to the business community to explain how to comply with the strict liability offense of "Failing to Prevent Bribery." Upon careful review of the Ministry of Justice Guidance, published in final form in March 2011, eleven months after the Bribery Act was enacted, one can only conclude that the Guidance is not a useful guide to complying with the Act and avoiding Section 7 liability.

In his March 2011 Introduction to the final Guidance, Kenneth Clarke, the Justice Minister, offered this disclaimer of responsibility: "The question of whether an organisation had adequate procedures in place to prevent bribery in the context of a particular prosecution is a matter that can only be resolved by the courts taking into account the particular facts and circumstances of the case."[131] Thus, the Justice Minister confirmed that the question of how a company is to comply with Section 7 of the Act is actually impossible to describe. While the Guidance characterizes Section 7(2) as a "full defense" to a violation of the strict liability crime of failing to prevent bribery, it makes clear that the burden is on the guilty organization to prove this defense providing that "[i]n accordance with established case law, the standard of proof which the commercial organisation would need to discharge in order to prove the defence, in the event it was prosecuted, is the balance of probabilities."[132]

Rather than offering a clear route to satisfactory compliance with Section 7, something we may presume Parliament had in mind when it required the Guidance to be published prior to the entire Act becoming effective,[133] the Justice Ministry's Guidance simply repeats that the seemingly impossible burden is upon the guilty company to prove that its procedures were adequate, despite the failure of those procedures. While the Guidance offers six principles that serve as criteria to be used in determining whether companies had in place "proportionate procedures" for preventing bribery, the Ministry acknowledged that these principles "are intended to be flexible and outcome focused, allowing for the huge variety of circumstances that commercial organisations find themselves in."[134] Thus, companies cannot practically rely on the Guidance to assist them with the "huge variety" of scenarios in which they might find themselves.

It bears emphasizing that the Guidance itself, while mandated by Section 9,[135] is not law, does not have the force of law, and merely expresses what some in the current Government think, hope, or believe. Even if the Guidance was clear, and it is not, it could not be relied upon.

131. *See* GUIDANCE, *supra* note 65, ¶ 4.

132. GUIDANCE, *supra* note 65, ¶ 33.

133. Bribery Act, *supra* note 2, § 9.

134. GUIDANCE, *supra* note 65, at p. 20.

135. "The Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1)." Bribery Act, 2010, c.23, § 9 (U.K.).

The Courts may find it interesting that the Guidance provides that decisions to prosecute must be guided by a "common sense" approach.[136] But this is not an especially useful guide for business, and the courts will certainly come to their own independent conclusions. Governments change. And once an ambitious prosecutor has made the decision to proceed under a particular set of attractive facts, and the media seek to boost sales by hyping another "corporate scandal" on its 24/7 news cycle, stale statements of the intentions of a prior government will likely provide little protection for a business automatically found guilty under Section 7.

IV. SO THEN, WHAT IS "BRIBERY?"

Our review of the phrase "part of a business" in Part III.A. *supra* established that almost any commercial organization engaged in international business may find itself subject to prosecution under the Bribery Act. Given the unhelpful nature of the Guidance and the apparent attempt by Parliament to regulate international transactions with precious little connection with the United Kingdom, it is vital to fully understand just how broad the scope of the term "bribe" is as used in the Act if a company is to avoid the unlimited fines of the automatic crime of failing to prevent a bribe.

A. The New Definition of Bribe

Section 7 applies to a "relevant commercial organization."[137] In the globalized world of the twenty-first century where, for many purposes, electronic communications and the ease of international travel have virtually eliminated sovereign borders for businesses, any "relevant commercial organization," no matter its jurisdiction of organization or its primary business focus, may become subject to the Bribery Act if it can be argued that such organization does "part" of its business in the UK. Given the borderless application of the Bribery Act promised by its enforcers, we do need to understand the boundaries of what constitutes an actionable "bribe" under the Act. To make clear the expansive scope of the Bribery Act, we consider the meaning of "associated person," and two additional terms: "facilitation" payments and "hospitality" expenses.

1. "Associated Person"

Section 7 provides that the act constituting the alleged "bribe"

136. GUIDANCE, *supra* note 65, at 2, 15. "And, as I hope this guidance shows, combating the risks of bribery is largely about common sense, not burdensome procedures." GUIDANCE, *supra* note 65, at 2.

137. Bribery Act, *supra* note 2, § 7(5).

triggering potential criminal liability can be made by "a person associated with" such organization as long as that person had the intent to obtain or retain business or an "advantage" for such organization.[138] The Bribery Act defines an "associated person" in Section 8:

> (1) For the purposes of section 7, a person ("A") is associated with C if (disregarding any bribe under consideration) A is a person who performs services for or on behalf of C.
> (2) The capacity in which A performs services for or on behalf of C does not matter.
> (3) Accordingly A may (for example) be C's employee, agent or subsidiary.
> (4) Whether or not A is a person who performs services for or on behalf of C is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between A and C.
> (5) But if A is an employee of C, it is to be presumed unless the contrary is shown that A is a person who performs services for or on behalf of C.[139]

The potential for expansive use of this definition by SFO prosecutors is starkly evident. Subsection (4) explains that "all the relevant circumstances" are more significant than the nature of the actual relationship of that individual to the organization. This renders the term "associated person" even more ambiguous and significantly expands the potential reach of this strict criminal law.[140] Based upon a straightforward reading of Subsection 8(5), executives and other employees of an organization are presumed to be associated with an organization.[141] We have to accept that *all* employees, even temporary or part-time employees, are subject to the presumption in Subsection 8(5) that places the burden of proof upon the company to establish that the particular employee who is said to have effected a bribe was not, under "all the relevant circumstances," performing services "for or on behalf of" the company.

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138. *Id.* § 7(1)(a)-(b).

139. *Id.* § 8.

140. It is interesting to note that, Richard Alderman, SFO Chief until April 2012, has contested the fairly obvious conclusion that the Bribery Act contains a number of ambiguities. Alderman has said: "Let me also say that I disagree with the comment that the Bribery Act is unclear. It is a model of clarity and has been widely praised." Mike Koehler, *A Conversation with Richard Alderman - Director of the United Kingdom Serious Fraud Office*, at 5 (Oct. 4, 2010) (unpublished working paper), *available at* http://ssrn.com/abstract=1687299.

141. Bribery Act, *supra* note 2, § 8(5).

But who or what is an agent under Subsection (3) of Section 8? In the FCPA, "agent" likewise is not defined.[142] However, the US common-law definition of "agent" would likely be applied to the FCPA. Under the common law, "[a]n agent is a person or entity that has been either explicitly or implicitly authorized to act on behalf of [a principal]"; "[w]hen the agent acts within the scope of its authority, the principal can be held liable for the agent's actions."[143] As reported FCPA cases reveal, local "consultants" have been used in an attempt to circumvent the FCPA's bribe standard.[144] Hiring local persons to act on behalf of a company is a common practice in international business. Having such persons handle payments to local officials is a practice well known to prosecutors. Including local consultants who clearly *do* perform services for a business as "agents" for purposes of determining "associated person" is essential and not at all controversial. However, business in the twenty-first century also necessarily involves reliance upon many other types of what may be colloquially referred to as agents. These may include a very wide scope of persons and other businesses – delivery and maintenance people, designers, computer programmers, etc., all of whom perform services and may thus be deemed "associated" with a business. Commercial organizations, subject to, or that may be subject to, the Act would certainly benefit from *useful* guidance on how to avoid liability when dealing with such agents.

With respect to the term "subsidiary" in Subsection 8(3), Parliament has not singled this term out for special treatment, but rather, has lumped subsidiaries together with "employee" and "agent." It is logical to agree with Parliament's decision to overcome the long-standing fictional "separate existence" of a corporate subsidiary and to accept that acts taken by a *wholly-owned* subsidiary are, in fact, acts done "for or on behalf of" its

142. The FCPA provides, "[i]t shall be unlawful for any domestic concern . . ., or for any officer, director, employee, or agent of such domestic concern . . ., to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, [or] promise to pay ... anything of value to . . . any person, while knowing that all or a portion of such money . . . will be offered, given, or promised, directly or indirectly, to any foreign official . . . for purposes of ... influencing any act or decision of such foreign official . . . in his . . . official capacity . . . ." Anti-Bribery and Books & Records Provisions of the Foreign Corrupt Practices Act (FCPA), Prohibited Foreign Trade Practices by Domestic Concerns, 15 U.S.C. § 78dd-2(a) (2004).

143. Joseph P. Covington ET AL., JENNER & BLOCK'S FOREIGN CORRUPT PRACTICES ACT (FCPA) BUSINESS GUIDE, 15 (2012), *available at* http://jenner.com/system/assets/assets/6349/original/Jenner_20_26_20Block_20FCPA_20Business_20Guide_2012.pdf?1334067320 (citing JONATHAN M. PURVER, AMERICAN JURISPURDENCE PROOF OF FACTS, LIABILITY OF PARENT CORPORATION FOR ACTS OF SUBSIDIARY, § 2 (2d 2009)).

144. *See, e.g.*, Sherman & Sterling, LLP, *FCPA Digest of Cases and Review Releases Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977*, FCPA Digest, Jan. 3, 2012, at 2, 22, (discussing *United States v. Maxwell Technologies*, No. 3:11-00329 (S.D. Cal. 2011)).

parent.[145] Genuine questions, however, arise under Section 8 for joint ventures and for subsidiaries that are not wholly-owned. Where ownership of a subsidiary is shared with others, the subsidiary may well still be performing services for or on behalf of the company. Is that partial parent always to be held responsible for bribes made by such subsidiary? Even for entities organized under the laws of a foreign jurisdiction? Even for bribes completely unrelated to the services such subsidiary or joint venture does perform for the company? Even when the company has "adequate procedures" overall, but because of its partial ownership arrangement, does not have operational control of the joint venture or subsidiary where the bribe occurred? These questions arise because the Act does not specify what is to be done when such situations arise, and the Guidance does not help at all.

The Guidance does not distinguish between wholly-owned and partially-owned subsidiaries.[146] Rather, the Ministry of Justice focuses on the overall intent requirement of the Act, stating that "[w]ithout proof of the required intention [to obtain or retain business or an advantage in the conduct of business for the organization], liability will not accrue through simple corporate ownership or investment, or through the payment of dividends or provision of loans by a subsidiary to its parent."[147] The Ministry further states, in unhelpful language, that the question of "adequacy of bribery prevention procedures will depend in the final analysis on the facts of each case, including matters such as the level of control over the activities of the associated person . . ."[148] Thus, the Ministry once again states the not-so-helpful assertion that ultimate liability is fact-specific, will rest on the context of each case, and thus must be determined by a court.

Further questions concern entities in a company's supply chain. As the Guidance points out, "an organisation is likely only to exercise control over its relationship with its contractual counterparty" and persons who contract with that counterparty "will be performing services for the counterparty and not for other persons in the contractual chain."[149] The confusion arising from the numerous parties that may be involved in such transactions would provide an aggressive prosecutor with an opportunity to expand the scope of the Act even further. While many laws that businesses

145. *See, e.g.*, *Mazza v. Verizon Washington D.C., Inc.*, 852 F. Supp. 2d 28, 41 (D.D.C. 2012) ("Disregarding the separate identities of a corporate parent and its subsidiary is . . . a rare exception grounded in equity considerations, and is only to be applied when adherence to the fiction of the separate existence of the corporation would sanction a fraud or promote injustice." *Id.* (internal quotations and citations omitted).

146. *See generally* GUIDANCE, *supra* note 65, ¶¶ 33-43.

147. GUIDANCE, *supra* note 65, ¶ 42.

148. GUIDANCE, *supra* note 65, ¶ 43.

149. GUIDANCE, *supra* note 65, ¶ 39.

face are carefully crafted with somewhat ambiguous terms, providing prosecutors with the flexibility essential to address novel situations, Section 7 of the Bribery Act establishes a corporate crime requiring no affirmative act and with no element of *mens rea*. Thus, the possibility exists that a person only marginally associated with a company which is only marginally connected to the United Kingdom, may commit an act, whether deliberately or inadvertently, that triggers the strict criminal liability and unlimited fines of the Bribery Act. Such ambiguities in the Act are ill-advised.

2. Facilitation Payments

Unlike the FCPA, which explicitly permits facilitation payments,[150] the Bribery Act provides no exception for what are referred to as "grease payments," "speed money," "tea money," or "facilitation payments." As described in the FCPA, these are the payments made to facilitate or expedite routine government action that international travelers may experience even in non-commercial circumstances.[151] The Ministry of Justice, in an attempt to justify the Act's hardline stance on facilitation payments, provides in the Guidance:

> As was the case under the old law, the Bribery Act does not (unlike US foreign bribery law) provide any exemption for such payments. The 2009 Recommendation of the Organisation for Economic Co-operation and Development [OECD] recognises the corrosive effect of facilitation payments and asks adhering countries to discourage companies from making such payments. Exemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and

150. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (1998). For a description of the legislative history of the FCPA as it relates to facilitation payments and the addition in 1988 of explicit language authorizing these payments, see Michael S. Diamant & Jesenka Mrdjenovic, *Don't You Forget About Me: The Continuing Viability of the FCPA's Facilitating Payments Exception*, 73 OHIO ST. L. J. 19, 19 (2012) *available at* http://moritzlaw.osu.edu/students/groups/oslj/files/2012/06/Furthermore.Diamant.pdf.

151. The FCPA defines "routine governmental action" as "only an action which is ordinarily and commonly performed by a foreign official in—(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 of goods 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." 15 U.S.C. §§ 78dd-1(f)(3)(A)(i)–(v), 78dd-3(f)(4)(A), 78dd-2(h)(4)(A).

> other associated persons, perpetuate an existing 'culture' of bribery and have the potential to be abused.[152]

The Guidance explains that these payments could trigger either the Section 6 offense or, "where there is an intention to induce improper conduct, including where the acceptance of such payments is itself improper, the section 1 offense and therefore potential liability under section 7."[153]

Various explanations of the United Kingdom's position on facilitation payments, however, contain acknowledgements that a strict prohibition of all such payments will not be easily enforced. The Home Office noted in its December 2005 invitation for consultation on bribery and corruption laws:

> There is no exemption for facilitation payments under our law: the making of any payment would be an offence under our law, if corruptly made. However, *given the need to be realistic about the situations that may be faced in some overseas countries*, the following statement has been made, with the agreement of the Director of Public Prosecutions: "*We do not think it is desirable for UK law to apply differently overseas to the way it applies in the UK. We do not tolerate "facilitation payments" to UK officials.* However it is difficult to envisage circumstances in which the making of a small "facilitation payment", extorted by a foreign official in countries where this is normal practice, would of itself give rise to a prosecution in the UK. *The making of such payments may well, however, be illegal under the law of the country concerned.*"[154]

Likewise, Richard Alderman, Director of the SFO at the time the Guidance was first published, acknowledged the difficulty with prohibiting facilitation payments, stating in part:

> *I do not expect facilitation payments to end the moment the Bribery Act comes into force.* What I do expect though is for corporates who do not yet have a zero tolerance approach to these payments, to commit themselves to such an approach and to work on how to eliminate these

152. Guidance, *supra* note 65, ¶ 45.

153. Guidance, *supra* note 65, ¶ 44.

154. *Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials - A Consultation Paper*, NORTHERN IRELAND OFFICE, ¶ 27 (Dec. 2005), (emphasis added).

payments over a period of time.[155]

Mr. Alderman has never explained how his "zero tolerance" for facilitation payments could be implemented "over a period of time" while complying with the absolute prohibition of such payments under the Act. Alderman's "solution" is one only a government regulator, totally immersed in the politics of London and totally removed from the realities of the world outside London, could offer.

As mentioned above, the United States' FCPA explicitly does not prohibit "facilitating" or "expediting" payments made to government officials for performing clerical or ministerial activities, or other "routine governmental actions."[156] However, in practice, the precise meaning of "facilitating" payment under the FCPA remains unclear. The exception has been narrowed by government enforcement actions and settlements.[157] In its Bribery Act Guidance, the Ministry of Justice does not shed light on Alderman's "zero tolerance" approach to facilitation payments.[158] Rather, it ignores the conclusions of the Home Office in 2005[159] and informs us that "[e]xemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing 'culture' of bribery and have the potential to be abused."[160] It is surely exasperating for businesses seeking to comply with the Bribery Act to realize that the Act flatly outlaws and thus automatically criminalizes, what Parliament and the SFO acknowledge are common practices around the world.

Mr. Alderman's prosecutors did offer criteria that they would consider in evaluating whether to prosecute a company that does make facilitation payments after the effective date of the Bribery Act. Specifically, the SFO has said that it would examine:

1. whether the company has a clear issued policy regarding such payments,
2. whether written guidance is available to relevant

155. Richar Alderman, Director, Serious Fraud Office, Hosted by Salans, Managing corruption risk in the real world, (Apr. 7, 2011) (emphasis added) *available at* http://www.sfo.gov.uk/about-us/our-views/director%27s-speeches/speeches-2011/salans---bribery-act-2010.aspx.

156. *See* 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b); *see infra* note 170.

157. *See e.g.*, Cheryl A. Krause & Elisa T. Wiygul, *FCPA Compliance: The Vanishing "Facilitating Payments" Exception?*, FIN. FRAUD L. REP., 730, 730-31 (2010). *available at* http://www.dechert.com/files/Publication/53b317c3-d963-4ca6-9cbc-23cc76fa60d2/Presentation/PublicationAttachment/12e5a22a-daea-4d72-adc1-3048bfa33fb2/FCPA%20Compliance.pdf.

158. *Infra* note 175.

159. *Infra* note 174.

160. Guidance, *supra* note 65, at ¶ 45.

employees as to the procedure they should follow when asked to make such payments,
3. whether such procedures are being followed by employees,
4. if there is evidence that all such payments are being recorded by the company,
5. if there is evidence that proper action (collective or otherwise) is being taken to inform the appropriate authorities in the countries concerned that such payments are being demanded,
6. whether the company is taking what practical steps it can to curtail the making of such payments. [161]

If the SFO is satisfied with the answers to these questions, the company, while still in technical breach of the law, will not be prosecuted for making facilitation payments. As noted, there is no current guidance, learning, or lore on what are the "practical steps" demanded by item 6 in this list to eliminate such a ubiquitous practice. Even if such practical steps as might be created did satisfy prosecutors at the SFO, this is far from a "safe harbor." Prosecutors change, especially recently at the SFO.[162] Perhaps more important, business involves economic risk taking. Adding regulatory and legal uncertainty to these economic risks must, at the margin, hurt business.

Moreover, the United Kingdom's past treatment of facilitation payments demonstrates that it has not actually taken the hardline approach that it is now propounding. While it is technically true that facilitation or "grease" payments have always been prohibited under English law, it is equally true that no prosecutions were ever attempted for such payments made overseas. Furthermore, notwithstanding the Justice Ministry's citing of the 2009 OECD "Recommendation," the OECD Convention does not require that these payments be outlawed. Commentary 9 to the OECD Convention as *originally* published provided:

> Small "facilitation" payments do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of paragraph 1 and,

161. *See* Barry Viton & Richard Kovalevsky Q.C., *Facilitation Payments*, THEBRIBERYACT.COM, http://thebriberyact.com/facilitation-payments/ (last visited Mar. 4, 2013).

162. The following senior officials at the SFO have recently left the SFO: Kathleen Harris, former Head of SFO Fraud Business Group, now at Arnold & Porter-London; Charles Montieth, SFO's former Head of Assurance, now at White & Case; Robert Amaee, now at Covington & Burling; Helen Garlick, former SFO assistant director, now at Fulcrum Chambers; Richard Alderman, former Head of SFO 2008-2012, now retired.

> accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action. [163]

While this statement criticized facilitation payments, calling them a "corrosive phenomenon," neither this revised statement nor the Convention calls for their criminalization. Moreover, the revised 2009 language of Commentary 9 cited in the Guidance merely states that such payments are "generally illegal in the foreign country concerned but are tolerated for many reasons when made to induce public officials to perform their official functions," and, like the original commentary, states that "criminalisation by other countries does not seem a practical or effective complementary action."[164]

In fact, the OECD Council's most recent stance on facilitation payments, set forth in a formal Recommendation in November 2009,[165] contained only the following:

> VI. [The Council] **RECOMMENDS**, in view of the corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law that Member countries should:
>
> i) undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon;
>
> ii) *encourage companies* to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments are generally illegal in the countries where they are made, and must in all

163. Organisation for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents*, OECD.ORG, 15 (2011), http://www.oecd.org/dataoecd/4/18/38028044.pdf. *See also* Jon Jordan, *The OECD's Call for an End to "Corrosive" Facilitation Payments and the International Focus on the Facilitation Payments Exception Under the Foreign Corrupt Practices Act*, 13 U. PA. J. BUS. L. 881, 896-97 (2011).

164. OECD, *supra* note 156, at 15. *See also* Jordan, *supra* note 156, at 896-902.

165. OECD, *supra* note 156, at 22.

> cases be accurately accounted for in such companies' books and financial records.[166]

By flatly calling for the end of facilitation payments overseas and for criminalizing those who fail to prevent them, Parliament has gone well beyond the OECD's call to "encourage *companies* to prohibit or discourage" facilitation payments. Where the OECD has urged *companies* to take steps to "prohibit or discourage the use of small facilitation payments," Parliament has, we believe, consciously taken the politically expedient, but completely unrealistic, position of making it a crime to make such payments. Bribery and corruption have been part of human society for thousands of years.[167] For certain, more than 30 years of experience with the FCPA has not led to any perceptible reduction in the amount of corruption in international business.

Moreover, the SFO Senior Staff has "stated that a company's policies should address the possibility of such payments being made, incorporating the relevant [Attorney General] and Ministry of Justice Guidance in this regard."[168] The Staff explained that the SFO takes a sympathetic approach toward "emergency facilitation payments," and offered an example: a visitor to a foreign country requires an inoculation and is offered the choice of paying $5 to be inoculated with a clean needle, or not paying and being inoculated with a used needle. They stated that in this case, prosecution is unlikely if the payment is made.[169] Thus, the SFO Staff has also acknowledged the difficulty with an outright prohibition on facilitation payments.

Incongruously, the Ministry of Justice has also conceded in the Guidance that eradicating facilitation payments will be no small feat:

> The [UK] Government does, however, recognise the problems that commercial organisations face in some parts of the world and in certain sectors. The eradication of facilitation payments is recognised at the national and

166. *Id.* (emphasis added).

167. Consider this quotation from 2500 years ago: "Just as it is impossible not to taste the honey (or the poison) that finds itself at the tip of the tongue, so it is impossible for a government servant not to eat up, at least, a bit of the king's revenue. Just as fish moving under water cannot possibly be found out either as drinking or not drinking water, so government servants employed in the government work cannot be found out (while) taking money for themselves." Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 J. ECON. LITERATURE 1320, 1320 (1997) (citing R.P. KANGLE, INTERPRETING KAUTILIYA, ARTHASASTRA, 4th Century B.C., (1979)). This is further illustrated in Bruce W. Bean, *Hyperbole, Hypocrisy and Hubris in the Aid-Corruption Dialog*, 41 GEO. J. INT'L L. 781, 786 (2010).

168. Dunn Article, *supra* note 108, at 2.

169. *Id.*

> international level is a long term objective that will require economic and social progress and sustained commitment to the rule of law in those parts of the world where the problem is most prevalent.[170]

The Bribery Act makes it a crime to make facilitation payments even as the government makes clear that eliminating the *need* to make them cannot be accomplished, except, perhaps in the "long term." Why did Parliament take such a position? There are several possible contributing factors. Parliament was doubtless sensitive to the years of criticism from the OECD Working Group and from international NGOs like Transparency International. Domestic groups, such as the two that immediately challenged the termination of the SFO's investigation of BAE in December 2006, The Cornerhouse and the Campaign Against the Arms Trade,[171] were also successful in generating media interest in the failure of Parliament to comply with the need for legislation called for by the OECD Convention. There was also the wish to restore the United Kindoms's reputation after the international media excoriated UK hypocrisy over the BAE scandal.[172] An additional factor was the contemporaneous "Rotten Parliament" scandal directly implicating almost 400 members of Parliament in inappropriate or fraudulent claims for reimbursement of allowances and expenses at precisely the moment Parliament was contemplating finally complying with the requirements of the OECD Convention.[173] In its embarrassment over

170. GUIDANCE, *supra* note 65, ¶ 46.

171. *See supra* text accompanying note 47; *see e.g.*, News Release, CAAT and Corner House confident as appeal begins in Lords, CONTROLBAE.ORG..uk (Jul. 6, 2008) *available at* http://www.controlbae.org.uk/press/release2008-07-06.php .

172. A hint of this may be detected in the following statement from Jack Straw, Minister of Justice, which was included in the Foreword to the March 2009 draft Bribery Bill that had been reported on by the joint Committee in July 2009: "The United Kingdom is recognised as one of the least corrupt countries in the world. We are proud of the high ethical standards we uphold in *public and commercial* life. But we must not rest on our laurels. Bribery is by its very nature insidious; if it is not kept in check it can have potentially devastating consequences." (emphasis added).

173. "Briefly, in 2009, London's Daily Telegraph ran a series of articles exposing a major breach of trust by more than half the Members of Parliament. Parliament fought to keep the information confidential but the Telegraph received leaked computer disks and published detailed expense filings of British members of Parliament. The British public was outraged to learn that they, the taxpayers, were, in effect, funding as reimbursable Parliamentary expenses everything from gardening and tennis court repairs to flat-screen TVs and even pornographic videos . . . ." Paul Hechinger, *Infamous British Political Scandals: Expenses and the "Rotten Parliament,"* BBC AMERICA (Jan. 11, 2012), http://www.bbcamerica.com/anglophenia/2012/01/infamous-british-political-scandals-expenses-and-the-%E2%80%98rotten-parliament%E2%80%99/ (Of the 392 Members of parliament implicated, some had used public funds to pay mortgages on their relatives' homes. The disclosures resulted in lengthy investigations, many resignations, the implementation of new

both the BAE and Rotten Parliament scandals, Parliament enacted an unusually draconian Bribery Act.

What is a non-UK company expected to do to comply with the Act? If the choices are either knowingly violate the Bribery Act or stop doing business "in those parts of the world" where bribery is common, these are not wonderful alternatives. It will be more likely that a non-UK business simply avoid all contact with London and the United Kingdom, a surely unintended consequence of Parliament's much delayed enactment of the Bribery Act. The dilemma facing non-UK companies involved in international business is stark, as illustrated by an example from the United States. A Board of Directors has a clear obligation under Delaware law to establish procedures designed to insure that its company does not violate "positive law."[174] It is plainly illegal under the Bribery Act to make facilitation payments, except in "emergencies," such as threats involving "loss of life, limb or liberty," where prosecution is unlikely.[175] But if the price were $1000, is prosecution still "unlikely?" Is "unlikely" comfort enough for the Board? And what policy should a Board of Directors of a company that perhaps does some small "part" of its business in the UK establish given the clear direction from Delaware courts that the Board's fiduciary obligation is to make certain company employees do not intentionally violate the law?

It is clear that the so-called "continued outlawing" of facilitation payments under the Bribery Act is one of the most problematic aspects of the law. Given the extreme position the SFO has taken with respect to the jurisdictional reach of the Act, purporting to ensnare all organizations that have some connection with the United Kingdom, one can perhaps be forgiven for suggesting that Parliament, knowing that US-based companies are permitted to make facilitation payments and observing that the

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expense rules and accounting, and enormous embarrassment. The scandal of the "Rotten Parliament," as it came to be called, also resulted in criminal charges, convictions, and prison sentences. *Id.*). *See also British Parliament Expense Abuses*, NYTIMES.COM (Feb. 5, 2010), http://topics.nytimes.com/topics/reference/timestopics/organizations/b/british_parliament/expense_ abuses/index.html.

174. The Delaware Supreme Court established the test for "director oversight," which contemplates that a director must act in good faith in *In re Walt Disney Co. Derivative Litigation*, by adopting the test set forth in the lower court opinion. 906 A.2d 27 (Del. 2006) ("The good faith required of a corporate fiduciary includes not simply the duties of care and loyalty...but all actions required by a true faithfulness and devotion to the interests of the corporation and its shareholders. A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, *where the fiduciary acts with the intent to violate applicable positive law*, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties." *Id. at* 67 (emphasis added).).

175. "It is recognised that there are circumstances in which individuals are left with no alternative but to make payments in order to protect against loss of life, limb or liberty. The common law defence of duress is very likely to be available in such circumstances." GUIDANCE, supra note 65, ¶ 48.

overwhelming majority of multinational enterprises investigated and fined by US officials under the FCPA in recent years have been non-US firms deliberately targeted relevant commercial organizations established in the United States.[176] Such targeting perhaps satisfied a goal of some involved in preparing the Bribery Act of *reestablishing* the United Kingdom as a global leader in fighting corruption, following the embarrassment of the BAE and Rotten Parliament scandals.[177]

3. *Hospitality Payments*

In addition to the intractable problem posed by small facilitation payments for companies squarely within the scope of the Bribery Act, and perhaps those doing only very occasional business in the United Kingdom, the Bribery Act presents further issues for business entertainment costs, known in the Act as "hospitality payments." With regard to these payments, the Ministry of Justice has explained:

> Bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the Act to criminalise such behaviour.[178]

The Guidance states that for an entertainment expense to amount to a bribe, there must be "an intention for a financial or other advantage to influence the official in his or her official role and thereby secure business or a business advantage."[179] The Guidance further restates its familiar refrain: "In many cases, . . . the question as to whether such a connection [between the advantage offered and the intention to secure a business advantage] can be established will depend on the totality of the evidence which takes into account all of the surrounding circumstances." [180] A determination based upon such a "totality of the evidence" can only be authoritatively made by a court.

The examples offered in the Guidance demonstrate that whether a

176. *See, e.g.*, Leslie Wayne, *Foreign Firms Most Affected by a U.S. Law Barring Bribes*, N.Y. TIMES, (Sept. 3, 2012), http://www.nytimes.com/2012/09/04/business/global/bribery-settlements-under-us-law-are-mostly-with-foreign-countries.html?_r=2&ref=business.

177. *See* JOINT COMMITTEE ON THE DRAFT BRIBERY BILL, DRAFT BRIBERY BILL, 2008-9, H.C. 430-I & H.L. 115-I, ¶ 88 (U.K.).

178. GUIDANCE, *supra* note 65, ¶ 26.

179. GUIDANCE, *supra* note 65, ¶ 27.

180. *Id.* ¶ 28.

hospitality payment would be found to be illegal depends heavily on context.[181] The Guidance provides that while expenditure levels are not the only consideration in determining whether a Section 6 offense, bribery of a foreign public official, has been committed:

> [I]n the absence of any further evidence demonstrating the required connection, it is unlikely, for example, that incidental provision of a routine business courtesy will raise the inference that it was intended to have a direct impact on decision making, particularly where such hospitality is commensurate with the reasonable and proportionate norms for the particular industry; e.g. the provision of airport to hotel transfer services to facilitate an on-site visit, or dining and tickets to an event.[182]

However, the Guidance once again proves itself to be virtually useless to the many companies actually doing business while aware of their obligation to comply with the Bribery Act. Most companies operating internationally now have "compliance officers" whose sole function is to instruct their employers as to what conduct is permitted under the Act. Can a company compliance officer function effectively when her best option is to wait to see whether the SFO prosecutes hospitality?

Indeed, the UK government spokesman at the time of Parliament's consideration of the Bribery Act acknowledged, in January 2010, the scope of the problem with criminalizing hospitality payments:

> We recognise that corporate hospitality is an accepted part of modern business practice and the Government is not seeking to penalize expenditure on corporate hospitality for legitimate commercial purposes. But lavish corporate hospitality can also be used as a bribe to secure advantages and the offences in the Bill must therefore be capable of penalising those who use it for such purposes. ... Corporate hospitality would...trigger the offence only where it was proved that the person offering the hospitality intended the recipient to be influenced to act improperly.[183]

One commentator nicely frames this gray area: "Fixing the appropriate borderline between generous hospitality ... and the criminal giving and

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181. *Id.* ¶ 31.

182. *Id.* ¶ 30.

183. Letter from Lord Tunnicliffe to Lord Henley of the House of Lords, (Jan. 14, 2010), *available at* http://www.justice.gov.UK/publications/docs/letter-lord-henley-corporate-hospitality.pdf.UK

taking of unconscionable, material advantages on the other, is not easy to capture in language suitable for forensic use."[184] The accuracy of this statement is plain. While conceding the difficulty of the distinction between "lavish" and "legitimate" forms of hospitality, Parliament, the Ministry of Justice, and the SFO could have done better.

The FCPA includes an affirmative defense[185] that is somewhat more descriptive:

> It shall be an affirmative defense to actions under subsection (a) or (g) of this section that--
>
> ....
>
> (2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to--
>
> (A) the promotion, demonstration, or explanation of products or services; or
>
> (B) the execution or performance of a contract with a foreign government or agency thereof.[186]

Thus, the FCPA has a somewhat more realistic and flexible approach to the criminalization of hospitality payments than does the Bribery Act. However, Parliament did not have the foresight, or possibly the intent, to offer a similar defense for companies that are subject to the Bribery Act's provisions; instead, companies can rely only on the Guidance's admonition that each situation involving hospitality expenditures will be fact-specific.

Surely the business community needs and deserves more from Parliament's mandated "guidance" than to merely hope that the reputation damage that an SFO investigation would engender and the huge expense of litigation would not be triggered each time a business lunch is recorded on its books. Unfortunately, this is one more example of the Bribery Act's unjust mandates, and only time will tell how such cases will actually be prosecuted it is not likely that many companies will remain unscathed for what are most likely legitimate business expenditures. In keeping with this theme, in the next section we discuss the lack of due process inherent in the

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184. G. R. Sullivan, *Reforming Bribery: Law Commission Consultation Paper 185- (2), Reforming the Law of Bribery (LCCP No. 185): Bribery Outside England and Wales: Corporate Liability; Defences; Consent to Prosecution*, Crim. L, Rev. 687-701 (2008).

185. A second affirmative defense, but one of no real practical use, is to establish that "*the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country.*" 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1) (2012).

186. 15 U.S.C. § 78dd-1 (c).

Act's criminalizing failure to prevent bribery.

B. Comment on Strict Liability, Due Process, and ECHR Article 6(2)

The total absence of due process in the Section 7 strict liability crime is clear.

When in 2008 the Law Commission was directed for the second time in ten years to review existing laws on bribery, the Commission was specifically requested to draft a bill which would include provisions that "are fair and non-discriminatory in accordance with the European Convention on Human Rights (ECHR) and the Human Rights Act 1998."[187]

Article 6(2) of the European Convention provides that "[e]veryone charged with a criminal offense shall be presumed innocent until proved guilty according to law."[188] Article 6 of the UK Human Rights Act, entitled Right to a Fair Trial, similarly provides: "[i]f it is a criminal charge you are presumed innocent until proved guilty according to law and have certain guaranteed rights to defend yourself."[189] The strict liability for a commercial organization under Section 7 of the Bribery Act contravenes these mandates.

Taking heed of its mandate to prepare a draft that complied with the ECHR and the Human Rights Act and having taken specific advice from UK legal experts on this point, the Law Commission's draft bill included a failure to prevent bribery provision, but one which did not violate Article 6(2).[190] This provision differed in two major respects from the provision in the final Bribery Act. The corporate failure to prevent bribery offense was limited to businesses organized in England or Wales and thus was well within traditional notions of territorial jurisdiction. Second, the bribe triggering the charge of failing to prevent a bribe had to *result from negligence* of a person responsible for preventing such bribe.[191] Six months later, in March 2009, the Ministry of Justice, having reviewed the Law Commission's report, submitted its draft bill to Parliament.[192] The Ministry of Justice draft retained the negligence element[193] but extended the law's jurisdictional grasp by not limiting its jurisdiction to businesses organized in England and Wales. Rather, the draft submitted to Parliamentary review

187. *See* LAW COMMISSION, CONSULTATION PAPER, *supra* note 45, at p. 14.

188. EUROPEAN CONVENTION ON HUMAN RIGHTS, Art. 6(2), Nov. 4, 1950, 3213 U.N.T.S. 221, *available at* http://www.hri.org/docs/ECHR50.html#Convention.

189. Human Rights Act, 1998, c. 42, sch. 1 *available at* http://www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/I/chapter/5/data.pdf.

190. LAW COMMISSION, CONSULTATION PAPER, *supra* note 44, at pp. 164-65.

191. *Id.* at 164.

192. MINISTRY OF JUSTICE, BRIBERY ACT DRAFT LEGISLATION, 2009, Cm. 7570, at p. 1 (U.K.) *available at* http://www.official-documents.gov.uk/document/cm75/7570/7570.pdf.

193. *Id.* § 5(1)(c).

made the offense applicable to any business "which carries on a business, or part of a business, in England, Wales or Northern Ireland."[194]

During Parliament's consideration of the government draft, certain non-governmental organizations and individuals proposed to eliminate the negligence element, arguing that this provision offered only a "narrow and complex solution to a pressing problem."[195] Professor Jeremy Horder, the Law Commission's expert on criminal law, disagreed. As stated in the Report of the Joint Committee that reviewed the government's draft law:

> Professor Horder acknowledged the greater simplicity of dropping negligence as an element of the offence, but he did not believe that it would be fair to convict a company for the criminal act of its employee or agent without requiring the prosecution to prove that the company was itself at fault. He distinguished bribery as a "step up" in seriousness from any existing strict liability offence under health and safety or other legislation:
>
> > [It] is very different from attributing causal consequences, like earwigs in tins or deaths occurring on ships or wherever it may be, to a company . . . . You can only fairly, in my view, connect a deliberate act of bribery by an employee or agent to a company via the company's own fault, if I could put it that way, or here we have got it as 'a responsible person or number of persons'.[196]

The directors of both the SFO and the Crown Prosecution Service testified before Parliament's Joint Committee and agreed with Professor Horder as to the unfairness of eliminating the negligence element from the Section 7 crime.[197] Parliament ignored the opinions of the Law Commission's expert, Professor Horder, and legal conclusions of those responsible for enforcing UK law and eliminated the negligence element from the Section crime of failing to prevent bribery. Parliament attempted to justify its approach by citing the "everyone else is doing it" defense, finding that strict liability would not be unfair "given the parallel with the approach taken in other leading countries."[198] The Joint Committee did

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194. *Id.* § 5(7).

195. JOINT COMMITTEE ON THE DRAFT BRIBERY BILL, DRAFT BRIBERY BILL, 2008-9, H.C. 430-I & H.L. 115-I, ¶ 76 (U.K.), *citing* BRIBERY: CORPORATE LIABILITY UNDER THE DRAFT BILL 2009, CRIM. L. REV. 479 (2009).

196. *Id.* ¶ 83.

197. *Id.*

198. *Id.* ¶ 9. The other leading countries to which Parliament referred were the United

receive testimony on enforcement of anti-bribery laws in other jurisdictions, but no consideration was given to the unique provision in the bill applying it to businesses not organized in the United Kingdom. This strict liability offense will surely be tested in court as a violation of the ECHR's requirement of the presumption of innocence standard.

CONCLUSION

In this article we have summarized the extended history that led to the enactment of the UK Bribery Act 2010, the UK legislation required to comply with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. After signing the OECD Convention, the British government took the position that its existing domestic anti-bribery legislation satisfied this requirement. However, others disagreed, and the OECD Working Group established to monitor compliance consistently found UK compliance to be lacking. The UK government set about reforming its existing corruption legislation, based on the recommendation of the Nolan Report and the Parliamentary Select Committee on Standards in Public Life that reform was necessary. However, the "reform" process consisted of more than a decade of debating, consulting, and infighting as various government bodies dragged their feet on agreeing on a final version of a new corruption law, specifically targeting bribery. When the Bribery Act was finally enacted, *more than thirty years after the FCPA went into effect*, the result, as we have shown, was, in a word, disappointing, despite Parliament's apparent goal of ending bribery in the United Kingdom and everywhere.

The offenses of active and passive bribery cover a wide spectrum of conduct and would benefit from more clear-cut, definitive guidance from the Ministry of Justice. Moreover, various terms in the Bribery Act emphasize the overly broad jurisdictional reach of the Act, which will surely have unintended consequences for companies abroad. For example, as we have discussed regarding "relevant function or activity," the acting party is guilty even where the relevant function or activity is carried out abroad. The activity need not have any connection to the United Kingdom, and the measure of what is "improper" is determined by UK standards, not by those of the foreign country where the bribing occurs. Furthermore, a relevant function or activity is performed improperly if it is performed in breach of a relevant expectation, or the failure to perform is a breach of a relevant expectation. However, the breach of a relevant expectation follows a reasonableness test, based only on what is considered "reasonable" in the United Kingdom. Likewise, an offense under Section 6, pertaining to bribery of a foreign public official, has no jurisdictional limit: a foreign public official includes anyone, whether elected or appointed, who holds a

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States, Australia, Switzerland, Finland, Italy and Austria.

legislative, administrative, or judicial position of any kind of a country or territory outside the United Kingdom.

Most importantly, we have shown in particular that the strict liability corporate offense of failure to prevent bribery is an unprecedented attempt to govern international business transactions with only the vaguest connection to the United Kingdom. The Act also broadens the definition of "bribe" to include the types of small facilitation payments regularly found to be essential when traveling or operating in some developing nations. Furthermore, Parliament has permitted only a single defense to its strict crime of failing to prevent a bribe. Perhaps recognizing the absurd nature of the "adequate procedures" defense, Parliament demanded that the government publish guidance explaining how a business could comply with the "Alice in Wonderland" defense of proving its procedures were adequate despite their failure. Clearly, the Ministry of Justice's Guidance fails to provide meaningful guidance on this crucial question. Finally, we noted that in enacting Section 7, Parliament ignored the due process standard established by the ECHR and the United Kingdom's own Human Rights Act.

The Bribery Act 2010 is the disappointing result of years of delay and deliberation on the part of both the government and Parliament. The hardships that companies now face in attempting to comply with the Act are just beginning. The contours of the Bribery Act will be fully known only as the judiciary construes this law. The unintended consequences of Parliament's apparent need to enact what can only be called a truly draconian anti-bribery law in order to overcome the embarrassment of the government's role in the BAE scandal, the oft-criticized dozen years of procrastination before the Bribery Act was passed, and its own Allowances and Expenses scandal will be forthcoming for years.

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

Beverley Earle* & Anita Cava**

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 zealousness 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

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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.fcpablog.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 FCPA[7] 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 prosecution[11] 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 payments[13] 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).

13. 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.

14. *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)).

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

16. 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, even in countries where graft is commonplace, it is not in fact legal.[19]

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 jurisdiction[21] 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 discussion[23] and academic analysis[24] 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 fact[27] 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*"),

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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" law[45] 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, THENATIONAL, 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

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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 conviction[65] and many were dismissed due to prosecutorial misconduct.[66] In particular, the

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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.fcpaprofessor.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

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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]lmost 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

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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.

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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.

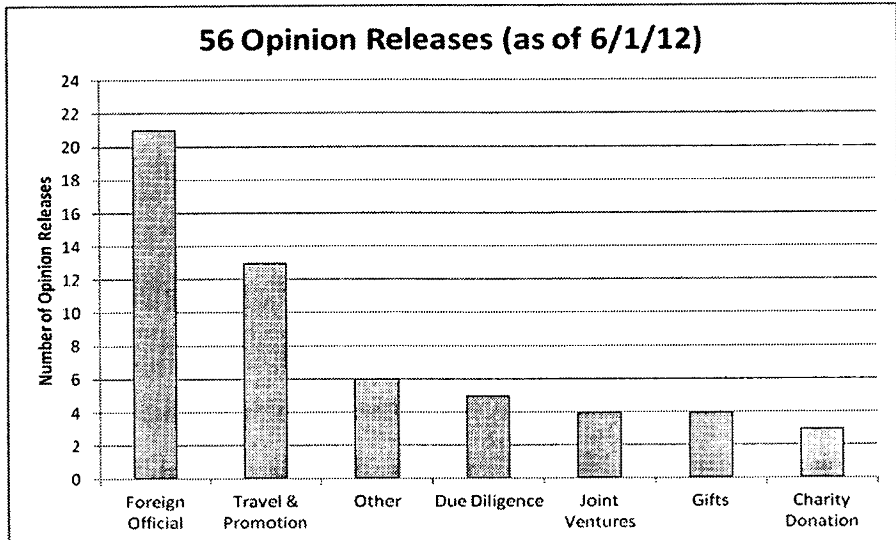

Figure 1 - DOJ FCPA *Opinion Procedure Releases*[91]

Table 1 - Inventory of *Opinion Releases*[92]

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-

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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.fcpaprofessor.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.fcpaprofessor.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

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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]

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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 Rubenfeld, *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

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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/phrma_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

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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).

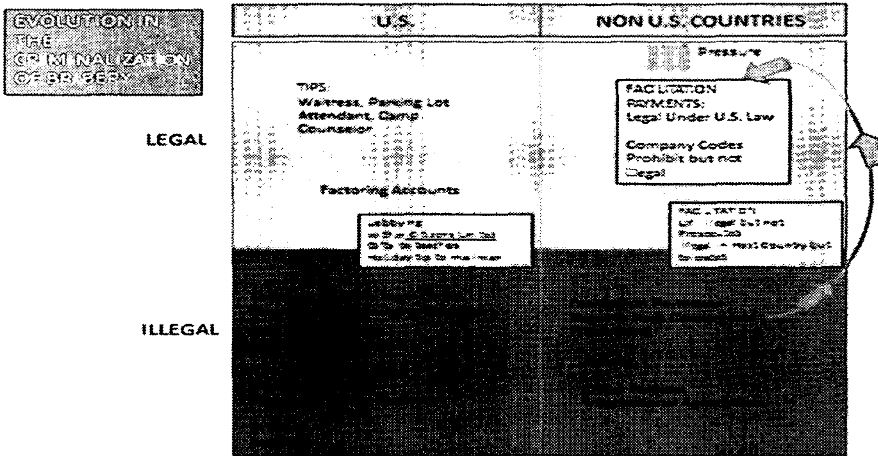

Figure 2 - Evolution in the Criminalization of Bribery

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 environment[145] 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:

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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

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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

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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

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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 Danielson, *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_fcpa.pdf).

> corruption . . . .[173]
>
> 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

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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]

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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

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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-Guillaum 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,

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Feb. 15, 2013).

206. *Id.*

207. *Cf. Roger Clemons 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 concern[210] 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

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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*).