

MINIMIZING THE MENACE OF THE FOREIGN CORRUPT PRACTICES ACT

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In the second half of the twentieth century, the United States decided to crack down on foreign corruption as part of its attempt to stop the spread of communism abroad. Pursuant to this goal, Congress passed the Foreign Corrupt Practices Act (FCPA), which generally prohibits American corporations from bribing foreign officials.

This Note examines the various problems associated with the FCPA: the disadvantages created by the FCPA's creation of an uneven playing field for American corporations, the inherent ambiguity of the FCPA's language, and the subsequent excessive compliance costs created for U.S. corporations operating abroad. In addition, this Note addresses the United States' uneven enforcement of the FCPA, and the Act's effect in foreign countries where certain forms of "bribery" are considered the price of doing business.

In light of the problems created by the FCPA for both U.S. corporations and the foreign countries in which they operate, this Note ultimately recommends that the ambiguous bribery provisions of the FCPA should be clarified or repealed entirely and the problem of corruption in foreign countries reassessed.

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I. INTRODUCTION

In the second half of the 20th century, the United States decided to quash foreign corruption as part of the fight against the spread of communism.¹ One of the methods by which the U.S. government sought to reach its goal was by prohibiting American corporations from paying foreign officials with money, gifts, or services, in return for actions that would favor their companies. Lawmakers in the United States called these payments “bribes.”²

To implement this strategy, the U.S. Congress passed the Foreign Corrupt Practices Act (FCPA).³ Generally, the FCPA prohibits firms from bribing foreign officials for business purposes, and instills certain accounting requirements.⁴ Quashing corruption is an admirable goal, but by applying the same definitions of bribery and corruption that are used in the United States to foreign nations, who have their own well-developed belief systems, morals, corporate and governmental practices, the United States has overstepped its position as a participant in the global economy.

This Note will address various arguments regarding the supposed value of the FCPA, its original purpose (and how well current enforcement is achieving that purpose), and how to amend the FCPA so that it does not injure either American corporations or foreign nations. This Note will also suggest how the bribery portions of the FCPA should be amended, or the FCPA should be thrown out altogether. Part II discusses the relevant history of the issues the FCPA was designed to address,

1. See Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 939–41 (2012).

2. See *id.* at 976.

3. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. § 78dd (2006)).

4. See *id.*

the history of the FCPA itself, and the recent increase in attention the FCPA has received. Part III analyzes arguments for and against the bribery provisions of the FCPA, as well as the strengths and weaknesses of these arguments. Part IV argues that the bribery portion of the FCPA should be significantly altered to allow SEC registered businesses to compete on a level playing field in foreign countries, particularly in emerging markets. Alternatively, the FCPA should be scrapped altogether and replaced with a system that is more respectful to the culture and economic structure of foreign countries.

II. BACKGROUND AND HISTORY OF THE FCPA

When the FCPA was passed in 1977, it was the first law of its kind in the world. While it was common for laws to prohibit bribery within one's own country, the FCPA was the first to govern the conduct of domestic businesses in their relationships and interactions with foreign officials in foreign countries.⁵

Generally, the FCPA consists of a bribery portion, which prohibits the bribing of foreign officials, and an accounting provision, which sets forth rules regarding books and record keeping.⁶ The bribery provisions of the FCPA are generally enforced by the U.S. Department of Justice (DOJ), and the accounting provisions are generally enforced by the U.S. Securities and Exchange Commission (SEC).⁷

The FCPA was rarely enforced for the first two decades of its existence.⁸ Over the last decade, however, it has been enforced much more regularly.⁹ The DOJ has proudly celebrated that:

[S]ince 2001, the Department has substantially increased its focus on FCPA violations. Already the world's leading prosecutor of foreign bribery offenses, the Department brought more FCPA prosecutions in the last five years than in all of the previous 26 years dating back to passage of the FCPA statute in 1977. In 2007, the Department brought 16 enforcement actions, compared to four in

5. Koehler, *supra* note 1, at 929.

6. 15 U.S.C. § 78dd (2006); *see also* Lillian V. Blageff, 1 FOREIGN CORRUPT PRACTICES ACT REPORTER § 1:1 (2d ed.), last updated Aug. 2013.

7. Blageff, *supra* note 6, at § 1:1.

8. Cherie O. Taylor, *The Foreign Corrupt Practices Act: A Primer*, CURRENTS: INT'L TRADE L.J., Winter 2008, at 3 ("During its first three decades of existence, 1977-2007, the FCPA was enforced but nowhere near the levels reached in 2007 and 2008.")

9. *See* Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 492-96, 522 (2011) ("In 2010, the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) agreed to settle charges against: (1) the Dutch construction company Snamprogetti Netherlands B.V. for \$365 million; (2) the French construction and engineering firm Technip SA for \$338 million; (3) U.K. defense contractor BAE Systems PLC for \$400 million; (4) German automaker Daimler AG for \$185 million; and the global freight forwarding company Panalpina World Transport (Holding) Ltd., along with six other companies in the oil services industry, for a total of \$236.5 million. . . . In 2009, Halliburton Company and its former engineering and construction unit, Kellogg, Brown & Root, Inc. (KBR), both U.S. companies, settled with the DOJ and SEC for \$579 million. The German company Siemens AG agreed to pay \$800 million in 2008. These days, violating a thirty-year-old U.S. statute known as the [FCPA] comes at a steep price.")

2002. While enforcement actions against corporations have increased, so too have prosecutions of individuals. In 2007, eight individual defendants either were indicted or pleaded guilty.¹⁰

Though the DOJ does not discuss them, this recent spike in FCPA prosecutions has various effects, many of which are negative both for American corporations and the foreign countries these laws are ostensibly designed to protect.¹¹

Like the DOJ, the SEC has also increased its enforcement in recent years.¹² In 2000, the SEC brought the only FCPA enforcement action, which resulted in a total fine of \$300,000.¹³ In contrast, the following tables list DOJ and SEC FCPA enforcement actions for the year 2010:

TABLE 1. DOJ CORPORATE FCPA (OR RELATED)
ENFORCEMENT ACTIONS

Company	Fine
Lindsey Manufacturing	N/A
Mercator	\$32,000
Noble	\$2.6 million
Universal	\$4.4 million
Tidewater	\$7.4 million
Alliance One International	\$9.45 million
Transocean	\$13.4 million
Innospec	\$14.1 million
ABB	\$19 million
Royal Dutch Shell	\$30 million
Pride International	\$32.6 million
Panalpina	\$70.6 million
Alcatel-Lucent	\$92 million
Daimler	\$93.6 million
Technip	\$240 million
Snamprogetti Netherlands	\$240 million
BAE Systems	\$400 million
	Total: \$1.27 billion

10. OFFICE OF THE ATTORNEY GEN., DEP'T OF JUSTICE (DOJ), THE ACCOMPLISHMENTS OF THE U.S. DEPARTMENT OF JUSTICE 2001-2009 at 31 (2009), available at <http://www.usdoj.gov/opa/documents/doj-accomplishments.pdf>.

11. See *A Forum Devoted to the Foreign Corrupt Practices Act*, FCPA PROFESSOR, <http://www.fcprofessor.com/fcpa-101#q18> (last visited Jan. 14, 2014) ("Professional fees and expenses (lawyer fees, forensic accounting fees, data retrieval, analysis, etc) associated with FCPA scrutiny often exceed fine and penalty amounts assessed by the DOJ and/or SEC. For instance, Wal-Mart has disclosed pre-enforcement professional fees and expenses equating to approximately \$1.2 million per working day in connection with its FCPA scrutiny. Avon Products has disclosed approximately \$300 million in professional fees and expenses since becoming the subject of FCPA scrutiny.")

12. Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. TOL. L. REV. 99, 100-05 (2011).

13. *Id.*

TABLE 2. SEC CORPORATE FCPA ENFORCEMENT ACTIONS¹⁴

<u>Company</u>	<u>Penalty/Disgorgement</u>
RAE Systems	\$1.25 million
Universal	\$4.6 million
Noble	\$5.6 million
GlobalSantaFe	\$5.86 million
Transocean	\$7.3 million
Tidewater	\$8.3 million
Alliance One International	\$10 million
Innospec	\$11.2 million
Panalpina	\$11.3 million
Royal Dutch Shell	\$18.1 million
General Electric	\$23.4 million
Pride International	\$23.5 million
ABB	\$39 million
Alcatel-Lucent	\$45.4 million
Daimler	\$91.4 million
Technip	\$98 million
Snamprogetti/Eni	\$125 million
Natco Group	\$65,000
Veraz Networks	\$300,000
	Total: \$530 million

As shown by these tables, the DOJ and SEC imposed approximately \$1.8 billion in corporate fines, penalties, and disgorgement under the FCPA in 2010. From 2000 to 2010, then, the amount of imposed fines increased by \$1.799 billion, when the laws these fines have been imposed under have been on the books since 1977. Why the sudden change? To answer this question, the events surrounding the implementation of the FCPA must be examined.

14. *Id.*

A. *Origins of the FCPA*

In 1977, when Congress passed the FCPA, the United States was embroiled in a war against communism.¹⁵ Passage of the FCPA was a direct response to a SEC report, which revealed that more than 400 U.S. corporations and other businesses, including some of the largest and most prestigious firms in the United States, paid out more than \$300 million to foreign officials for reasons that were deemed “questionable.”¹⁶ The SEC report itself was necessitated by the Watergate scandal, and the public relations problems the U.S. government found itself confronting in foreign countries as a result.¹⁷ The U.S. government was extremely concerned that global consumer confidence in the business community of the United States was faltering.¹⁸ The United States had been holding itself out as the bastion of goodness in the fight against communism, and Watergate and several other scandals in the 1970’s greatly injured this image.¹⁹

1. *Implementation and Preceding Events*

The supposedly “questionable” payments were generally made either to foreign officials or were political contributions to foreign and domestic political parties and campaigns.²⁰ These payments varied from the bribery of foreign officials (often to secure some type of favorable action by a foreign government for the payer’s business associates) to payments made to persuade government representatives to discharge certain ministerial or clerical duties, refrain from passing certain unfavorable laws, or to overlook the business activities of a certain person or entity.²¹

“Bananagate” was one such scandal that preceded the implementation of the FCPA. Bananagate was uncovered in 1975, after the President and CEO of United Brands Company committed suicide by jumping out of the window of a skyscraper in New York City.²² After the suicide, investigators sifting through documents in his office discovered

15. Blageff, *supra* note 6, at § 1:1.

16. *Id.*

17. Koehler, *supra* note 1, at 943–46.

18. Blageff, *supra* note 6, at § 1:1.

19. Taylor, *supra* note 8, at 3.

20. Blageff, *supra* note 6, at § 1:1.

21. *Id.*

22. Beth S. Dorris, *The Limited Waiver Rule: Creation of an SEC-Corporation Privilege*, 36 STAN. L. REV. 789, 794 n.21 (1984); Melissa Kelly Hurst, *Eliminating Bribery in International Business Transactions*, 6 J. INT’L L. & PRAC. 111, 118–19 (1997) (“One of the most prominent corporate bribery scandals of the Watergate era involved [t]he dramatic exposure of United Brands misconduct occurred after the suicide of its prominent chief executive officer, Eli Black, whose death followed the commencement of an SEC investigation into a \$1.25 million payment, authorized by Black, to the President of Honduras, apparently to avoid the imposition of a confiscatory export duty on bananas. Bananagate shifted the focus of both SEC and popular attention from illegal domestic political contributions to the broader issues arising out of foreign and commercial bribery.”) (quoting John C. Coffee, *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1009, 1115 (1977)) (internal quotations omitted).

that United Brands had paid the President of Honduras to encourage him to reduce taxes on banana exports.²³

Bananagate was the first scandal of its kind. It exposed the previously well concealed but generally widespread practice of U.S. corporations paying foreign officials to ease their tax and regulatory burdens in foreign countries.²⁴ Bananagate also exposed the lack of any substantive laws to obstruct or punish this practice.²⁵

The discovery and subsequent investigation of the conditions that led to Bananagate also set the stage for the 1976 unearthing of the ethically questionable activities of the Lockheed Corporation and its worldwide efforts to bribe senior ministers of friendly foreign governments.²⁶ Officials of the Lockheed Aircraft Corporation had paid various foreign officials to favor their products,²⁷ particularly by encouraging the sale of Lockheed aircraft in those countries.²⁸ Lockheed officials admitted that they had repeatedly paid Japanese businessmen and government officials but argued that these payments were a customary practice in Japan and for multinational corporations generally.²⁹

Though this argument was not without merit, Lockheed received an inordinate amount of attention for these payments because the corporation had recently been the recipient of a \$250 million federal loan, which was intended to keep the company out of an impending bankruptcy (and therefore not intended to be paid to foreign officials).³⁰ Because other countries perceived the U.S. government to be closely tied to Lockheed—both because of the large loan and because Lockheed was the largest U.S. defense contractor—the U.S. government was extremely sensitive regarding the foreign perception of these payments.³¹

As the investigation into Lockheed continued, it was discovered that officials in the company had made payments to government officials in Italy and the Netherlands, as well as Japan.³² Congress was troubled in particular by the payments to officials in Italy.³³ Communism had begun to strongly influence Italian politics, and Congress was concerned that Italians would not look kindly on an American government committed to

23. Hurst, *supra* note 22, at 118–19.

24. Dorris, *supra* note 22, at 794 n.21.

25. *Id.*

26. H. Lowell Brown, *The Corporate Director's Compliance Oversight Responsibility in the Post Caremark Era*, 26 DEL. J. CORP. L. 1, 35–36 n.120 (2001) (citing Coffee, Jr., *supra* note 22, at 1115–16 (1977)).

27. BEN R. RICH & LEO JANOS, *SKUNK WORKS: A PERSONAL MEMOIR OF MY YEARS AT LOCKHEED* 11 (1994).

28. Mark K. Kmetz, *Disclosure of Grand Jury Materials to Foreign Authorities Under Federal Rule of Criminal Procedure 6(e)*, 70 VA. L. REV. 1623, 1631–33 (1984).

29. *Id.* at 1631.

30. Koehler, *supra* note 1, at 935.

31. See 122 CONG. REC. 30, 336 (1976) (daily ed. Sept 14, 1976).

32. *Foreign Payments Disclosure: Hearings Before the Subcomm. on Consumer Prot. and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 94th Cong. 2 (1976).

33. See *The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on Int'l Econ. Policy of the H. Comm. on Int'l Relations*, 94th Cong. 2 (1975).

fighting the spread of communism in Italy but unable to stem corruption in their own corporations.³⁴

Following Bananagate and the Lockheed discovery, the U.S. government wanted to foster worldwide consumer confidence in U.S. corporations by encouraging “morally sound” business practices, both in the United States and in the business practices of U.S. corporations in foreign countries.³⁵ The SEC, which had previously focused on illegal political contributions from U.S. corporations to U.S. politicians, began to focus on the bribery of foreign politicians and regulators by U.S. corporations.³⁶

Senator Frank Church, chairman of the Subcommittee on Multinational Corporations (otherwise known as the “Church Committee”) was a strong proponent of laws to force disclosure when U.S. corporations made payments to foreign officials for the purpose of influencing their decisions and policies.³⁷ He believed that these payments undermined the fight against communism, because the payments were “sowing corruption” among U.S. allies.³⁸ In a 1975 hearing regarding the payment of monies by U.S. corporations to foreign governments for political purposes, Senator Church discussed the recent Watergate scandal and that those investigations had revealed that American corporations were making illegal political contributions to American politicians.³⁹ Regarding payments to officials in foreign countries, Senator Church stated that “several multinational corporations had failed to report to their shareholders millions of dollars of offshore payments in violation of the Securities laws of the United States. . . . The [SEC] is understandably concerned that the disclosure requirements of U.S. laws are complied with.”⁴⁰

Senator Church went on to discuss the foreign policy consequences of these payments by U.S. corporations, particularly their effect on the fight against communism, and noted “what we are concerned with is not a question of private or public morality. What concerns us here is a major issue of foreign policy for the United States.”⁴¹

Even in this fearful, strongly anticommunist U.S. political environment of the 1970’s, however, some Congressional leaders understood the potential for misuse of government power that could result in forcing American mores on foreign governments. In another 1975 Senate hearing, Senator John Tower argued that there was no clear answer to the

34. See *Foreign Payments Disclosure*, *supra* note 32, at 2.

35. See *The Activities of American Multinational Corporations Abroad*, *supra* note 33, at 3–5.

36. Hurst, *supra* note 22, at 119.

37. Koehler, *supra* note 1, at 932.

38. Joe Palazzolo, *From Watergate to Today, How FCPA Became So Feared*, WALL ST. J., Oct. 2, 2012, <http://online.wsj.com/article/SB10000872396390444752504578024791676151154.html>.

39. *Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corps. of the S. Comm. on Foreign Relations*, 94th Cong. 1 (1975) (statement of Sen. Frank Church, Chairman, Subcomm. on Multinational Corps., S. Comm. on Foreign Relations).

40. *Id.*

41. *Id.*

question of whether it was “morally right for an American company to operate within the mores and folkways of the society in which they are trying to do business?”⁴² Arguing that the question deserved further debate and discussion, Senator Tower noted that he was not “prepared to give a snap answer”⁴³ Senator Tower’s argument, namely that just because a practice was considered morally wrong in the United States did not mean that it was morally wrong in another country, and that perhaps multinational U.S. corporations should follow the morals of the society in which they were operating, would be the focus of much anti-FCPA feeling in the future.⁴⁴

The dissenters lost out in the end. The legislation that followed from this anticommunist, antiscandal era criminalized payments made by U.S. corporations to foreign officials to influence their policies toward American businesses.⁴⁵

In 1988, Congress amended the FCPA via the Omnibus Trade and Competitiveness Act.⁴⁶ These amendments were intended to polish and refine the FCPA⁴⁷ and contained procedures to signify “the potential illegality of an anticipated foreign business transaction.”⁴⁸ In some ways, Congress appeared to be reducing the reach of the FCPA; notably, these amendments created exceptions for certain payments, known as “grease” payments, and certified the “reasonable and bona fide expenditure” affirmative defense.⁴⁹

In other ways, however, Congress tightened the FCPA’s enforcement procedures to make it a more effective tool for fighting corruption. They removed the Eckhardt Amendment,⁵⁰ which had contained a “condition precedent” to the prosecution of employees of corporations for FCPA offenses.⁵¹ The Amendment required the corporation to be convicted of FCPA violations *before* its directors or officers could be prosecuted.⁵² While this provision had been added at the behest of the SEC, it caused severe problems for the DOJ and was therefore removed.⁵³ This change untied the enforcement of FCPA violations from the corporation itself, which made it easier for both the SEC and DOJ to go after individuals, and generally made it easier to prosecute FCPA violations.⁵⁴

42. *Lockheed Bribery: Hearings Before the S. Comm on Banking, Hous., and Urban Affairs*, 94th Cong. 12 (1975) (statement of Sen. John Tower, Member, S. Comm. on Banking, Hous., and Urban Affairs).

43. *Id.*

44. *Id.*

45. *Id.*

46. Blageff, *supra* note 6, at § 1:1.

47. *Id.*

48. Stephen J. DeCosse & Susan S. Katcher, *Newly Amended Foreign Corrupt Practices Act*, WIS. LAW., July 1990, at 23, 24.

49. Blageff, *supra* note 6, at § 1:1.

50. *Id.*

51. Richard L. Cassin, *We Ask, and Answer, A Question*, FCPA BLOG (May 5, 2008, 11:18PM), <http://www.fcpliblog.com/blog/2008/5/6/we-ask-and-answer-a-question.html>.

52. Blageff, *supra* note 6, at § 1:1.

53. Cassin, *supra* note 51.

54. *See id.*

The FCPA continued to be amended over the years according to the perceived effectiveness and importance of its provisions.⁵⁵ For example, the International Anti-Bribery and Fair Competition Act of 1998 (International Anti-Bribery Act) was signed into law by President Clinton on November 10, 1998.⁵⁶ The Act implemented the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions which was one of the first global conventions aimed at reducing corruption in international business transactions.⁵⁷ “In implementing the Convention, the International Anti-Bribery Act revised the Securities Exchange Act of 1934 (Exchange Act) and the FCPA to prohibit conduct intended to secure improper advantages from foreign officials.”⁵⁸ The FCPA was revised to “expand [its] jurisdiction to cover foreign persons or corporations in the United States, U.S. persons or corporations outside the United States, and extended application of the FCPA to officials of public international organizations.”⁵⁹ The Convention took effect on February 15, 1999.⁶⁰

2. *Recent Amendments and Important New Legislation*

Though corporations may have been concerned by early incarnations of the FCPA, it was so rarely enforced that it quickly fell off their radar.⁶¹ Corporations’ response to the FCPA changed after the passage of the Sarbanes-Oxley Act of 2002.⁶² Sarbanes-Oxley requires public companies to maintain “an adequate internal control structure and procedures for financial reporting”⁶³ and was passed in response to huge corporate accounting scandals at Enron and WorldCom.⁶⁴ In the aftermath of these scandals, there was an increase in global awareness of bribery and financial fraud at large corporations, which was subsequently followed by a substantial increase in FCPA enforcement in the United States.⁶⁵

Notably, Sarbanes-Oxley makes senior executives in corporations personally liable for their company’s recordkeeping.⁶⁶ The added responsibility prompted many companies to self-report potential violations of the FCPA.⁶⁷ As an additional incentive, the DOJ and SEC began to

55. See, e.g., 15 U.S.C. § 78dd (2012) (prohibiting foreign trade practices by domestic concerns).

56. Blageff, *supra* note 6, at § 1:1.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. See Westbrook, *supra* note 9, at 492–96, 522.

62. The Sarbanes-Oxley Act of 2002 (Pub.L. 107–204, 116 Stat. 745, enacted July 30, 2002).

63. 15 U.S.C. § 7262(a)(1).

64. See also *Five Years Under the Thumb*, THE ECONOMIST (Jul. 26 2007), available at <http://www.economist.com/node/9545905>.

65. Laura E. Kress, Note, *How the Sarbanes-Oxley Act Has Knocked the “SOX” Off the DOJ and SEC and Kept the FCPA on Its Feet*, 10 PITT. J. TECH. L. & POL’Y 1, 2 (2009).

66. Palazzolo, *supra* note 38.

67. *Id.*

hold out the prospect of more lenient treatment to companies that self-reported potential FCPA violations.⁶⁸

This change in policy prompted one of the largest changes in general FCPA enforcement, as companies began to conduct internal investigations of their foreign subsidiaries.⁶⁹ By using huge financial incentives to encourage companies to discover and snuff out any potential FCPA violations, the FCPA unintentionally became the monster that it is today. This change is the main reason FCPA compliance has become so expensive.⁷⁰ Companies found it difficult to comply with a statute that was so vague and had such a sparse history of enforcement; even taking a foreign official out for drinks could be examined under the microscope of the newly revamped FCPA.⁷¹

Today most countries have some law against the bribery of their own officials.⁷² In the last decade, as more attention has been paid to the FCPA in the United States, even more countries have become involved in the fight against corruption by passing laws against bribery. For example, *The United Nations Convention Against Corruption* was signed by 140 countries when it was ratified in 2003; as of November 2013, 170 countries had signed (including the European Union).⁷³ This UN Convention covers five main areas in which countries can fight bribery: preventive measures, criminalization and law enforcement, international cooperation, asset recovery, and technical assistance and information exchange.⁷⁴

68. *Id.* (“Congress passed the Sarbanes-Oxley Act, in response to huge accounting scandals at Enron Corp. and WorldCom. The law requires managers and auditors to create controls within a company to ensure the accuracy of its financial reporting. It also places more responsibility on senior executives, who must personally attest to their company’s recordkeeping. Lawyers say that, in turn, prompted more companies to come forward to alert the Justice Department and SEC to potential violations of the FCPA they had uncovered internally, and the agencies held out the prospect of more lenient treatment to companies that did so.”).

69. *See id.*

70. *See id.*

71. *See* CRIMINAL DIV. OF THE U.S. DEP’T OF JUSTICE AND THE ENFORCEMENT DIV. OF THE U.S. SEC. AND EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 17–18 (2012) [hereinafter GUIDE]. Regarding taking public officials out for drinks, the Guide gives the following example of a situation which would not be in violation of the FCPA: “At the trade show, Company A invites a dozen current and prospective customers out for drinks, and pays the moderate bar tab. Some of the current and prospective customers are foreign officials under the FCPA. Is Company A in violation of the FCPA? [Answer:] No . . . the FCPA was not designed to prohibit all forms of hospitality to foreign officials. While the cost here may be more substantial than the beverages, snacks, and promotional items provided at the booth, and the invitees specifically selected, there is still nothing to suggest *corrupt intent*.” *Id.* (emphasis added). Though the limited facts of this example do not suggest a “corrupt intent,” the Guide does not clarify what would be considered a “corrupt intent.” Furthermore, the tab is “moderate”—but what is considered a “moderate” tab? The Guide offers no further guidance.

72. Blageff, *supra* note 6, at § 1:1.

73. U.N. Office on Drugs and Crime, United Nations Convention Against Corruption (May, 29 2013), <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>. [hereinafter CONVENTION AGAINST CORRUPTION].

74. U.N. Office on Drugs and Crime, UNODC’s Action Against Corruption and Economic Crime (2013), <http://www.unodc.org/unodc/corruption/index.html>.

B. FCPA in Practice

Even this fairly recent antibribery trend, however, is focused on stopping bribery of officials in the country where the laws are being passed. Until very recently, the United States was alone in its prohibition of the bribery of other countries' officials under the FCPA, which was a major disadvantage to U.S. companies conducting business abroad.⁷⁵ Because U.S. corporations had to abide by strict rules regarding payments that other corporations did not, their overall costs of doing business were much higher than those of corporations based in other countries.⁷⁶ Only recently have international efforts focused on the bribery of foreign officials, most notably with the OECD Convention, but also from efforts by the Organization of American States (OAS), the United Nations, and the World Bank.⁷⁷ These organizations worked to cut down on the supposedly adverse economic effects of bribery and corruption in international business transactions.⁷⁸

U.S. businesses are disadvantaged in other ways as well. U.S.-based corporations, for example, have complained for many years that foreign countries allow their corporations to deduct the bribes that they pay in the course of doing business.⁷⁹ The tax-deductibility of bribes for foreign corporations makes it difficult for U.S. corporations to compete and can greatly hurt U.S. companies' efforts to obtain and retain business.⁸⁰ U.S. corporations, therefore, have been generally pleased with emerging efforts from other countries and governmental bodies to stem corruption and to stop their corporations from deducting these bribes.⁸¹ Still, compliance with the FCPA and its many gray areas remains a complicated, expensive, and hazy concern for U.S. companies.⁸²

One positive is that other countries are now more knowledgeable about the FCPA because of the length of time in which it has been in existence.⁸³ Therefore, the need to explain the FCPA to companies in those countries is not as great. Furthermore, the FCPA's provisions are sometimes welcomed by foreign politicians who want to uphold an unpolluted reputation to constituents when awarding contracts to foreign firms.⁸⁴

75. Blageff, *supra* note 6, at § 1:1.

76. *See id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *See id.*

82. *Id.*

83. *Id.* ("The twenty-plus years of FCPA enforcement has also made foreigners a bit more savvy as to what restrictions U.S. companies are under—the need to explain the FCPA is not as great, and its provisions are now welcomed by some foreign politicians who want to uphold a 'clean' reputation to constituents when awarding contracts to foreign firms.")

84. *Id.*

Unfortunately for U.S. and foreign businesses alike, there is not much guidance provided on the FCPA.⁸⁵ The DOJ released a 130-page Resource Guide to the U.S. Foreign Corrupt Practices Act in November 2012.⁸⁶ Reactions have been mixed; some say that the Guide contains helpful examples of common situations that employees of U.S. corporations may find themselves in abroad and what they can do in those situations to avoid the wrath of the SEC and DOJ;⁸⁷ others complain that the Guide does little more than poorly restate the same murky principles that were already in existence.⁸⁸

It is important to note that the Guide is not binding in any way⁸⁹ and does not limit the enforcement capabilities of the SEC or DOJ, or any other U.S. government agency.⁹⁰ Because it is not binding legal precedent, it is only so helpful, as companies are willing to risk that government regulators will stand by the hypothetical situations that are presented in the Guide and not try to argue, for example, that while a cup of coffee with a foreign official is okay, a glass of wine is certainly not.⁹¹ A general explanation of the structure of the FCPA follows.

85. *Id.*

86. GUIDE, *supra* note 71.

87. Joe Palazzolo & Christopher M. Matthews, *U.S. Attempts to Clarify Antibribery Law*, WALL ST. J., Nov. 15, 2012, at B1, available at <http://online.wsj.com/article/SB10001424127887324735104578118850181434228.html> (“The 130-page document is the most comprehensive effort by the U.S. Justice Department and the Securities and Exchange Commission to respond to complaints from companies that ambiguity in the Foreign Corrupt Practices Act has forced them to abandon business in high-risk countries and spend millions of dollars investigating themselves. Authorities dusted off the Watergate-era law—which bars bribery of foreign officials—last decade and have since used the statute to extract billions of dollars in penalties from dozens of major corporations. . . . The memo offers pragmatic advice, particularly in one area of major concern for corporate compliance departments: gifts, travel and entertainment. ‘It is difficult to envision any scenario in which the provision of cups of coffee, taxi fare, or company promotional items of nominal value would ever evidence corrupt intent,’ the guidance says. The same goes for ‘a small gift or token of esteem or gratitude.’ On the other hand, bankrolling a \$12,000 birthday trip for a government official that includes visits to wineries is ill-advised, the agencies say. Broadly, the memo recites positions long held by the government and avoids rigid policy pronouncements. . . . The document says, for example, what to do if a company uncovers evidence of potential bribes while conducting due diligence on a company it recently acquired. The short answer: Stop the bribe, report it to the government and institute reforms at the acquired company. The agencies say that an acquiring company that follows such steps is unlikely to face prosecution.”).

88. *Id.*

89. GUIDE, *supra* note 71, at Inside Cover.

90. *The Top Ten Take-Aways from the DOJ and SEC "Resource Guide to the U.S. Foreign Corrupt Practices Act,"* SIDLEY AUSTIN NEWS & INSIGHTS BLOG (Nov. 30, 2012), <http://www.sidley.com/The-Top-Ten-Take-Aways-from-the-DOJ-and-SEC-Resource-Guide-to-the-US-Foreign-Corrupt-Practices-Act-11-30-2012/>.

91. GUIDE, *supra* note 71, at 14–15 (“In enacting the FCPA, Congress recognized that bribes can come in many shapes and sizes—a broad range of unfair benefits—and so the statute prohibits the corrupt ‘offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of *anything of value* to’ a foreign official. An improper benefit can take many forms. While cases often involve payments of cash (sometimes in the guise of ‘consulting fees’ or ‘commissions’ given through intermediaries), others have involved travel expenses and expensive gifts. Like the domestic bribery statute, the FCPA does not contain a minimum threshold amount for corrupt gifts or payments. Indeed, what might be considered a modest payment in the United States could be a larger and much more significant amount in a foreign country. Regardless of size, for a gift or other payment to violate the statute, the payor must have corrupt intent—that is, the intent to improperly influence the government official. The corrupt intent requirement protects companies that engage in the ordinary and legitimate promotion of their businesses while targeting con-

1. *Accounting Provisions*

The accounting obligations apply only to “issuers,” companies required to register their securities or file reports with the SEC, colloquially known as public companies.⁹² Generally, they prohibit accounting that is “off-the-books;”⁹³ specifically, the Exchange Act requires issuers to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”⁹⁴

The accounting provisions consist of two main parts. Under the “books and records” provision, issuers must create and maintain books, records, and accounts in reasonable detail that accurately and fairly reflect an issuer’s transactions and the disposition of an issuer’s assets.⁹⁵ Under the “internal controls” provision, issuers must create and maintain a system of internal accounting controls that are sufficient to assure that their upper-management has control, authority, and responsibility over the corporation’s assets.⁹⁶ These provisions also provide for enforcement of laws beyond the FCPA, by ensuring that all public companies account for their assets and liabilities accurately and in reasonable detail; the DOJ and SEC often use these provisions for various enforcement purposes unrelated to the FCPA.⁹⁷ The accounting provisions also contain a narrow exception related to both national security and the protection of classified information that is solely intended to prevent the disclosure of classified information.⁹⁸

2. *Bribery Provisions*

The FCPA’s bribery provisions prohibit certain persons from exchanging anything of value with a foreign official for business purposes.⁹⁹ The persons restricted from making such payments include: “domestic concerns,” or all U.S. persons and businesses; “issuers,” or U.S. and foreign public companies listed on stock exchanges in the United States, or

duct that seeks to improperly induce officials into misusing their positions. Thus, it is difficult to envision any scenario in which the 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. Moreover, as in all areas of federal law enforcement, DOJ and SEC exercise discretion in deciding which cases promote law enforcement priorities and justify investigation. Certain patterns, however, have emerged: DOJ’s and SEC’s antibribery enforcement actions have focused on small payments and gifts only when they comprise part of a systemic or long-standing course of conduct that evidences a scheme to corruptly pay foreign officials to obtain or retain business. These assessments are necessarily fact specific.”)

92. See Taylor, *supra* note 8, at 4 n.30.

93. GUIDE, *supra* note 71, at 38.

94. 15 U.S.C. § 78m(b)(2)(A) (2012).

95. *Id.*

96. *Id.* § 78m(b)(2)(B).

97. GUIDE, *supra* note 71, at 38.

98. See 15 U.S.C. § 78m(b)(3)(A); see also H.R. REP. No. 94-831, at 11 (1977), available at <http://www.justice.gov/criminal/fraud/fcpa/history/1977/corruptrpt-94-831.pdf>.

99. See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2012).

those that must file reports with the SEC; and certain foreign persons and businesses while they are under “territorial jurisdiction.”¹⁰⁰

The FCPA bribery provisions forbid:

- (1) an issuer or domestic concern, an officer, director, employee, or agent of such firm or any stockholder acting on behalf of such firm, or any person;
- (2) [from] using the mails or any means of interstate commerce;
- (3) corruptly;
- (4) in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or the authorization of the giving of anything of value;
- (5) to any foreign official, political party, candidate for political office, or other person knowing that the payment to that other person would be passed on to one of the others above;
- (6) for purposes of influencing any act or decision of such foreign official in his or her official capacity or inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or inducing such foreign official to use his or her influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality in order to obtain or retain business for or with, or to direct business to, any person, or for the purpose of securing any improper advantage.¹⁰¹

All of these elements must be met in order to convict an individual or business of an FCPA violation.

The intentions of the person making the payment are taken into account; to violate the FCPA, a person must act “corruptly.”¹⁰² A “corrupt” payment or exchange of value is one intended to persuade the recipient to abuse their power as a foreign official to direct business to the payor or to the payor’s interests.¹⁰³ While some payments, notably so-called “grease” payments, are exempted, most payments to foreign officials could potentially fall under the umbrella of this rule.¹⁰⁴

100. GUIDE, *supra* note 71, at 2.

101. Blageff, *supra* note 6, at § 1:2.

102. See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2012).

103. H.R. REP. NO. 95-640, at 7–8 (1977) (“The word ‘corruptly’ is used to in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position.”).

104. GUIDE, *supra* note 71, at 26. The *Guide* offers the following Hypothetical as a guide to these types of facilitating payments: “Company A is a large multi-national mining company with operations in Foreign Country, where it recently identified a significant new ore deposit. It has ready buyers for the new ore but has limited capacity to get it to market. In order to increase the size and speed of its ore export, Company A will need to build a new road from its facility to the port that can accommodate larger trucks. Company A retains an agent in Foreign Country to assist it in obtaining the required permits, including an environmental permit, to build the road. The agent informs Company A’s vice president for international operations that he plans to make a one-time small cash payment to a clerk in the relevant government office to ensure that the clerk files and stamps the permit applications expeditiously, as the agent has experienced delays of three months when he has not made this ‘grease’ payment. The clerk has no discretion about whether to file and stamp the permit applications once the requisite filing fee has been paid. The vice president authorizes the payment. A few months

C. Penalties for FCPA Infringement

The penalties for FCPA violations under the Federal Sentencing Guidelines are severe.¹⁰⁵ The Guidelines note the danger of heavy fines and the potential for incarceration for the perpetrators of the illegal acts.¹⁰⁶ Because the position or importance of the foreign governmental official within the foreign nation's government does not matter, and because the illegal bribe can be "anything of value,"¹⁰⁷ it can be very easy to trigger a violation.

1. Sanctions: Criminal

The DOJ is responsible for investigating and prosecuting all criminal charges under the FCPA.¹⁰⁸ Corporations and other business entities can face up to \$2 million in criminal sanctions for violating the antibribery provisions of the FCPA.¹⁰⁹ Individuals, including officers, directors, agents, and stockholders, can face individual fines of up to \$100,000 and five years in prison.¹¹⁰ For violations of the accounting and record-keeping provisions, corporations and other business entities are subject to fines of up to \$25 million; individuals can be subject to a \$5 million fine and up to 20 years in prison.¹¹¹ Furthermore, since the removal of the Eckhardt Amendment in 1988, employees can be prosecuted independently of the corporation or other business entity that employs

later, the agent tells the vice president that he has run into a problem obtaining a necessary environmental permit. It turns out that the planned road construction would adversely impact an environmentally sensitive and protected local wetland. While the problem could be overcome by rerouting the road, such rerouting would cost Company A \$1 million more and would slow down construction by six months. It would also increase the transit time for the ore and reduce the number of monthly shipments. The agent tells the vice president that he is good friends with the director of Foreign Country's Department of Natural Resources and that it would only take a modest cash payment to the director and the 'problem would go away.' The vice president authorizes the payment, and the agent makes it. After receiving the payment, the director issues the permit, and Company A constructs its new road through the wetlands. Was the payment to the clerk a violation of the FCPA? No. Under these circumstances, the payment to the clerk would qualify as a facilitating payment, since it is a one-time, small payment to obtain a routine, non-discretionary governmental service that Company A is entitled to receive (i.e., the stamping and filing of the permit application). However, while the payment may qualify as an exception to the FCPA's antibribery provisions, it may violate other laws, both in Foreign Country and elsewhere. In addition, if the payment is not accurately recorded, it could violate the FCPA's books and records provision. Was the payment to the director a violation of the FCPA? Yes. The payment to the director of the Department of Natural Resources was in clear violation of the FCPA, since it was designed to corruptly influence a foreign official into improperly approving a permit. The issuance of the environmental permit was a discretionary act, and indeed, Company A should not have received it. Company A, its vice president, and the local agent may all be prosecuted for authorizing and paying the bribe." *Id.*

105. Blageff, *supra* note 6, at § 1:1.

106. *Id.*

107. *Id.* § 1:2.

108. See Kress, *supra* note 65, at 1.

109. *Id.* at 7.

110. GUIDE, *supra* note 71, at 68.

111. *Id.*

them.¹¹² Fines imposed on individual employees cannot be paid by the employer.¹¹³

In certain particularly grievous examples of FCPA violation, the courts can impose even higher fines than those listed here; for example, courts can fine a defendant up to twice the benefit the defendant sought to gain by paying the bribe.¹¹⁴

2. *Sanctions: Civil*

The enforcement authority for civil sanctions under the FCPA is the SEC.¹¹⁵ Civil sanctions have been imposed more laxly.¹¹⁶ The FCPA does not require knowledge on the part of corporate officers to bring a civil enforcement action for violation of the accounting and record-keeping provisions against them.¹¹⁷ Instead, the standard is a “preponderance of evidence” that must be “beyond a reasonable doubt.”¹¹⁸

Fines for civil violations of the FCPA can also be extremely high. Companies can face tens of thousands of dollars in civil sanctions if they are caught violating the FCPA.¹¹⁹ As with the criminal provisions of the FCPA, “officers, directors, stockholders, employees and agents of the company may . . . face civil sanctions for violating the Act”¹²⁰ Furthermore, and more importantly: “companies may not pay for any fines that are imposed on individuals.”¹²¹ This means that a corporation cannot indemnify or protect its employees, management or board from censure for FCPA violations. This separation between the corporation and its employees serves to make individuals more aware of their actions, since they alone are responsible for them. This separation could also, however, encourage corporations to let certain individuals take all of the credit, blame, and punishment for FCPA violations without any concern for retribution from the government.

Under the Sentencing Guidelines chart, a “point system” is used to calculate the penalties.¹²² Some mitigating factors are allowed to lower the total number of points added, which would therefore lessen the penalty.¹²³ In general, pleading guilty and accepting responsibility for one’s actions reduces the calculation,¹²⁴ but there is no guarantee of this reduc-

112. Blageff, *supra* note 6, at § 1:1.

113. GUIDE, *supra* note 71, at 68.

114. *See id.*

115. *See* Kress, *supra* note 65, at 8.

116. *See id.* at 10.

117. *Id.* at 8.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Blageff, *supra* note 6, at § 1:1.

123. *Id.*

124. *Id.*

tion. Moreover, serving as a member of the company's upper management raises liability for an individual.¹²⁵

Other factors that could affect the fine for a company include prior criminal history of members of upper management, or of the employee who perpetrated the illegal payments, efforts to "obstruct justice" by the company (which could include lying to enforcement officials, losing paperwork needed to document an illegal payment, or any other activity designed to keep U.S. officials from discovering, prosecuting, or fining potentially guilty parties), a company's voluntary cooperation with the DOJ's investigation, the size of the company itself (the larger the company, the more sophisticated its enforcement policies are expected to be), and the anticipated benefit of the transaction to the company or to the foreign government that received the illegal payment.¹²⁶ The 1998 amendment to the FCPA makes foreign nationals (1) employed by or (2) acting as agents of U.S. companies subject to civil penalties, in addition to the criminal penalties.¹²⁷ These incidents have been some of the most attention-grabbing of the recent FCPA media coverage.¹²⁸

Besides massive fines and potential jail time, there are additional potential penalties. It is possible for a court to "order probation for up to five years if the company has more than fifty employees and the company does not have an effective compliance and ethics program, or if the company had engaged in similar misconduct within five years prior."¹²⁹ Furthermore, firms who violate the FCPA may be barred from doing business with the federal government. An indictment alone may automatically lead to a suspension of this right.¹³⁰

3. *FCPA Enforcement Against Foreign Nationals*

As noted above, some of the FCPA-related news that has garnered the most attention lately is the prosecution of foreign officials.¹³¹ In *United States v. Jeong*, the Fifth Circuit affirmed the jurisdiction of the United States regarding charges brought against Gi-Hwan Jeong, a South Korean national, under the FCPA.¹³² The Fifth Circuit also interpreted the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, greatly expanding the purview of this convention on American affairs when they applied the *Convention* to the FCPA.¹³³

125. *Id.*

126. *Id.*

127. *Id.*

128. See, e.g., Samuel Rubinfeld, *Former Haitian Official Claims He Isn't a "Foreign Official,"* WALL ST. J. BLOG (Feb. 8, 2013, 5:24 PM), <http://blogs.wsj.com/corruption-currents/2013/02/08/former-haitian-official-claims-he-isnt-a-foreign-official/>.

129. See Kress, *supra* note 65, at 8.

130. U.S. DEP'T OF JUSTICE, LAY-PERSON'S GUIDE TO THE FCPA, available at <http://insct.syr.edu/wp-content/uploads/2013/02/lay-persons-guide.pdf>; see also Kress, *supra* note 65, at 9.

131. See, e.g., Rubinfeld, *supra* note 128.

132. 624 F.3d 706, 707–08 (5th Cir. 2010).

133. *Id.* at 711; see also Blageff, *supra* note 6, at § 1:3.

In 2008, Jeong was convicted in South Korea of paying U.S. public officials for their assistance in obtaining a very lucrative telecommunications contract.¹³⁴ The South Korean courts sentenced Jeong to time served and ordered him to pay a fine.¹³⁵ Later that year, the U.S. government induced Jeong to travel from South Korea to Dallas, Texas.¹³⁶ He was arrested upon arrival in Dallas and subsequently indicted on the basis of the same bribery scheme for which he had already been convicted in South Korea.¹³⁷

Jeong's alleged FCPA violation involved the Army and Air Force Exchange Service (AAFES).¹³⁸ In 2001, the AAFES solicited bids for a telecommunications contract in South Korea,¹³⁹ in which AAFES agreed to pay \$206 million over ten years for Internet service and related telecommunication services at U.S. military bases in South Korea.¹⁴⁰ By bribing two AAFES employees (U.S. public officials), Jeong successfully won the contract for his company, Samsung Rental Company, Limited (SSRT), and maintained it for several years despite allegedly poor performance.¹⁴¹

Clifton Choy (the AAFES Services Program Manager of the Pacific Region, who was responsible for operations in several countries including South Korea) and Henry Lee Holloway (an AAFES general store manager who directed operations at several military bases in South Korea), were the recipients of the bribes.¹⁴² The bribes began in October 2001 and continued through 2006, when a former SSRT employee reported Jeong's conduct to a unit of the U.S. Air Force Office of Special Investigations (AFOSI) in South Korea.¹⁴³

The Korean National Police and AFOSI began investigating SSRT and Holloway in mid 2006, and the two agencies agreed to share information.¹⁴⁴ As a result of the investigations, AAFES ended the contract with SSRT in 2007.¹⁴⁵ The Ministry of Justice in South Korea charged Jeong with "violating a law that prohibits bribery of a foreign public official in connection with international trade."¹⁴⁶

Jeong was convicted in early 2008, but the United States continued to investigate the bribery scheme after Jeong's conviction.¹⁴⁷ AAFES invited Jeong to the United States in November 2008 under the guise of discussing his claims that AAFES owed money to another one of his

134. *Jeong*, 624 F.3d at 708.

135. *Id.* at 708–09.

136. *Id.* at 709.

137. *Id.*

138. *Id.* at 708.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 708–09.

143. *Id.* at 708.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

companies.¹⁴⁸ Unbeknownst to Jeong, however, the United States had obtained an arrest warrant for him, and he was arrested in Dallas on November 18, 2008 and indicted on charges of violating the FCPA.¹⁴⁹

Jeong moved to dismiss the indictment but lost in the trial court.¹⁵⁰ On appeal, Jeong argued again that his prosecution in the United States violated Article 4.3 of the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, of which both the United States and South Korea are signatories.¹⁵¹ Second, and in the alternative, he argued that the United States expressly and impliedly waived its jurisdiction to prosecute him and that his indictment was therefore invalid.¹⁵²

In holding that the United States did have jurisdiction to prosecute Jeong, the Fifth Circuit noted that the plain language of Article 4.3 did not prohibit two signatory countries from prosecuting the same offense, but only established when such countries must consult on jurisdiction.¹⁵³ The Fifth Circuit went on to state: “[W]e are ill-equipped to consider how the prosecution of a foreign national might, if at all, impact diplomatic relations between two countries. In this case, the Executive Branch chose to prosecute Jeong in the United States, and we may evaluate only the specific arguments Jeong raises on appeal.”¹⁵⁴

According to *United States v. Jeong*, then, under the FCPA the U.S. government has the right to lure foreign nationals to U.S. soil so as to arrest and prosecute them for alleged crimes committed in a foreign country. As exemplified by *Jeong*, the powers claimed under the FCPA continue to reach new (alarming) heights.

III. DISCUSSION

Part III aims to analyze the FCPA as it is implemented currently. It will discuss the strengths and weaknesses of the current implementation and the effects it has on U.S. corporations and the foreign countries in which they do business. Section A will evaluate the costs of compliance for both U.S. companies and foreign nations, as well as for the United States. Section B discusses the difficulties U.S. firms experience in trying to comply with the FCPA’s ambiguous provisions and analyzes the inherent moral issues raised when imposing American morals on foreign nationals.

148. *Id.* at 709.

149. *Id.*

150. *Id.*

151. *Id.* at 710.

152. *Id.*

153. *Id.* at 711.

154. *Id.* at 713.

A. *Costs of Compliance*

Since it has become clear that FCPA enforcement will be a major focus of the SEC and DOJ, firms have struggled with finding ways to comply with the FCPA to avoid enormous fines, criminal charges, or both. But these are not the only costs of FCPA compliance; by trying to force American morals and values on foreign countries, the FCPA could be doing serious harm to the delicate economic structures some countries have built to maximize the safety and quality of life of their citizens.¹⁵⁵

The recent *Guide* from the DOJ attempts to clarify some provisions of the FCPA.¹⁵⁶ The *Guide* is not binding precedent, but instead lists factors to be considered rather than a concrete set of rules which corporations can apply.¹⁵⁷ There are many problems with the currently available definitions and guidelines in the FCPA.¹⁵⁸

1. *Monetary Costs*

One of the costs of compliance is the creation of new, complex internal compliance structures.¹⁵⁹ Companies are forced to meticulously govern the daily operations of a foreign subsidiary to make sure that money is not being exchanged improperly, and this close governance is extremely expensive.¹⁶⁰ For example, Avon Products Inc., Weatherford International Ltd., and Wal-Mart Stores Inc. spent almost a combined \$500 million investing in their own internal practices over the last decade—essentially doing the government's work for them—and shared their results with the government, hoping to lessen any potential penalties they might incur.¹⁶¹ Most of the money was spent on attorneys' and accountants' fees and on fees for other professionals who were hired to look for any possible violations of the FCPA and to improve the companies' internal antibribery controls.¹⁶²

Even though they are already expending vast amounts of money, companies have found it difficult to comply with the FCPA when they are not entirely sure when a violation has occurred because the FCPA is so vague.¹⁶³ Compliance costs U.S. firms in other ways as well; U.S. firms operating in foreign countries are less competitive, particularly in international transactions, because they have to spend so much money on

155. See Ashby Jones, *The Costs of Compliance Grow*, WALL ST. J., Oct. 12, 2012, at B4.

156. See generally GUIDE, *supra* note 71 (generally clarifying the various provisions of the FCPA).

157. *Id.* at 87.

158. See Rubinfeld, *supra* note 128.

159. Jones, *supra* note 155.

160. *Id.*

161. Joe Palazzolo, *FCPA Inc.: The Business of Bribery: Corruption Probes Become Profit Center for Big Law Firms*, WALL ST. J. (Oct. 1, 2012), <http://online.wsj.com/article/SB10000872396390443862604578028462294611352.html>.

162. *Id.*

163. Scott P. Boylan, *Organized Crime And Corruption in Russia: Implications for U.S. and International Law*, 19 FORDHAM INT'L L.J. 1999, 2016–17 (1996).

compliance efforts.¹⁶⁴ Concerns over the expense of compliance with the FCPA are not limited to the firms themselves, either; many commentators have noted that “the FCPA has reduced U.S. companies’ international competitiveness”¹⁶⁵

Because of the perceived expense, most corporations settle rather than fight the fines in court. For example, in 2008, the German corporation Siemens AG paid \$1.6 billion in fines to settle bribery allegations; at the time, this was the largest-ever FCPA settlement.¹⁶⁶ In 2012, Pfizer Inc. paid \$60 million to settle bribery allegations.¹⁶⁷ A related issue that has arisen because of the tendency of firms to settle is that there is very little case law addressing what portions of the FCPA mean, making it difficult for corporations to comply with its provisions. For example, companies struggle with determining what a “foreign official” is.¹⁶⁸

If a company or individual is accused of an FCPA violation, there are additional costs, even if they are eventually acquitted. Damage to a corporation or individual’s reputation can cause huge, incalculable losses.¹⁶⁹ There is also the possibility of shareholder lawsuits brought on by perceived poor management that results in an investigation.¹⁷⁰ All of these potentialities have high costs that are difficult to quantify, and certainly must make those vulnerable to FCPA prosecution extremely nervous.

2. *Problems with Enforcing Open Access*

FCPA supporters argue that, whatever the monetary costs, supporting a law that seeks to stop corruption in foreign nations is a worthwhile endeavor. These supporters note that the FCPA was not enacted to invigorate the U.S. economy but to recognize an important moral principle and to work to support that principle.¹⁷¹ One Justice Department official has argued, “[c]ompliance with the new Act may not be costless for the United States. But living up to one’s principles rarely is.”¹⁷²

The problem with this justification for the FCPA, however, is that many foreign countries do not share these principles with the United States.¹⁷³ The FCPA forces U.S. principles and standards on foreign countries, which may have different principles, or may be at different

164. Taylor, *supra* note 8, at 4.

165. Lisa Harriman Randall, *Multilateralization of the Foreign Corrupt Practices Act*, 6 MINN. J. GLOBAL TRADE 657, 674 (1997).

166. Ashby Jones, *Extradition Is Hurdle in FCPA Prosecutions*, THE WALL ST. J. (Oct. 2, 2012, 6:14 PM), <http://online.wsj.com/article/SB10000872396390444004704578028430536186670.html>.

167. Palazzolo, *supra* note 161 (“Drug maker Pfizer Inc. agreed this year to pay \$60 million to settle bribery allegations, admitting to having bribed doctors, hospital administrators and regulators in several countries to prescribe medicines.”).

168. Jones, *supra* note 155.

169. *Id.*

170. *Id.*

171. Randall, *supra* note 165, at 676.

172. *Id.*

173. *Id.* at 679–80 n.180.

stages in their economic development and so require different standards. Not only do foreign countries not share these principles, but in some foreign countries, the system they have built on payments that the FCPA would consider “bribery” is a system that keeps citizens safe from violent private-sector factions.¹⁷⁴ Economists have argued that the social order in some third-world countries requires a system of morals and principles that is fundamentally different from that in the United States.¹⁷⁵ If these countries want peace and prosperity to exist at all, certain behaviors that may be considered unsavory to American palates must be allowed and even endorsed.¹⁷⁶

One such theory suggests that while “[t]he upper-income, advanced industrial countries of the world today all have market economies with open competition, competitive multi-party democratic political systems, and a secure government monopoly over violence,” such systems are not the only type that exist in the world.¹⁷⁷ Countries that are colloquially called third-world countries, and middle and low-income developing countries, are “limited access orders” that must preserve peace and equilibrium in a fundamentally different way than countries with greater access to resources, like the United States.¹⁷⁸

In limited access orders, like all countries before the advent of the 19th century, the government “does not have a secure monopoly on violence,” and citizens must take action to protect themselves from the various factions that threaten their persons and their livelihoods.¹⁷⁹ To effect this protection, the culture of these countries will organize itself around efforts to regulate and control violence among these factions, without the assistance of the recognized government.¹⁸⁰

In many limited access orders, government officials divide up control of the economy amongst themselves and these factions and collect “rents” (a diplomatic word for “bribes”) from their own sector.¹⁸¹ Outbreaks of random violence reduce the rents that can be collected, so these factions and the government officials that support them have strong incentives to maintain peace.¹⁸² To make these efforts worth their while, however, these factions and the government officials that support them must limit access to, and competition with, their section of the economy.¹⁸³ This need for control leads to a very different concept of morality and a unique social order with a fundamentally different logic

174. *Id.* at 673.

175. See Douglass C. North et al., *Limited Access Orders in the Developing World: A New Approach to the Problems of Development* abstract (The World Bank Independent Evaluation Group Country Relations Division, Policy Research Working Paper No. 4359, 2007).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

than the open access order of the United States.¹⁸⁴ In these societies, this system of rents (or bribes) is keeping civilians safe.

Without offering these economies a system that can control the violence as successfully as the one they have created, it is unfair and even immoral for the United States to enforce its morals and social order on these countries, especially if the cost of doing so is more violence.

While proponents of the FCPA will argue that stopping U.S. firms from bribing foreign officials is unlikely to cause violence in these countries, this argument still cuts against the idea that it is the United States' moral duty to stamp out corruption in these foreign countries. The argument is especially toothless when one considers that this supposed corruption (by U.S. standards) may be what is keeping the citizens of these countries safe from random outbreaks of violence.¹⁸⁵

Perhaps because they recognize that they do not share American values on issues of bribery, foreign countries are often unwilling to extradite violators of the law.¹⁸⁶ These countries see the supposed "bribery" payments as the normal costs of conducting business, and certainly not a transgression that deserves criminal sanctions.¹⁸⁷ When the United States charges individuals with violating the FCPA and yet cannot extradite or prosecute them, it engenders disrespect for other laws of the United States and for U.S. enforcement of laws on foreign soil generally. Even some U.S. judges have been hesitant to sanction the prosecution of American firms for following the business customs of foreign countries.¹⁸⁸

This problem is exemplified in the infamous "Africa Sting," where the Federal Bureau of Investigation (FBI) tried to conduct a sting operation to catch gun makers and suppliers paying bribes.¹⁸⁹ In 2010, the FBI arrested twenty-one people, executives and employees of gun makers and other law-enforcement product suppliers at a Las Vegas gun show.¹⁹⁰ Prosecutors accused those arrested of scheming to pay bribes to government officials in Gabon for a military contract from the government.¹⁹¹ The scheme, however, was a creation of the FBI for the purposes of conducting a sting operation; there was no contract, and no actual officials from Gabon were involved.¹⁹² U.S. District Judge Richard Leon criti-

184. *Id.*

185. See GUIDE, *supra* note 71, at 27. The Guide itself notes that the employees of companies operating in dangerous countries may need to make "payments" to keep themselves safe from threats of violence or from actual violence. *Id.* ("Businesses operating in high-risk countries may face real threats of violence or harm to their employees, and payments made in response to imminent threats to health or safety do not violate the FCPA. If such a situation arises, and to ensure the safety of its employees, companies should immediately contact the appropriate U.S. embassy for assistance.")

186. Jones, *supra* note 155.

187. *Id.*

188. *Id.* 155 ("Federal judges have sharply questioned the government's tactics in a handful of high-profile cases brought under the FCPA . . .").

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

cized the scheme and threw out the charges against most of the defendants, reprimanding the FBI for its “aggressive conspiracy theory.”¹⁹³

3. *Problems on the Demand Side*

Even when firms have implemented outrageously expensive compliance programs, and the U.S. government has justified the imposition of American morals onto foreign nations, U.S. corporations still face many difficulties when conducting business in foreign countries.

Bribery is a part of normal business transactions in some foreign countries. For example, some U.S. corporations and other businesses have reported that they are asked to pay extra money to customs officials every time they move goods across the borders of some countries.¹⁹⁴

Regardless of the circumstances of the payment, the FCPA is unforgiving in its refusal to allow these types of payments. Even in the case of extortion, whether in the form of economic extortion to protect investments in foreign countries or payments to keep employees safe and out of foreign prisons, the FCPA has enforced its bribery and accounting provisions.¹⁹⁵

The SEC, for example, recently filed an FCPA action against the NATCO Group, a U.S. oil and gas company, on account of payments they made to prosecutors in Kazakhstan.¹⁹⁶ These payments were made because the prosecutors threatened to fine or jail employees of the company if they did not pay certain cash “fines.”¹⁹⁷ The SEC acknowledged that these employees were extortion victims but charged NATCO anyway because of alleged accounting violations.¹⁹⁸

The frequency of bribe solicitation in foreign countries is impossible to account for accurately. A recent Transparency International Survey of more than 2500 executives in twenty-six countries, however, found that approximately forty percent of these executives had been asked to pay a bribe from a governmental authority in a foreign country.¹⁹⁹ Certain industries and companies had much higher rates, however, sometimes as high as sixty percent.²⁰⁰

193. *Id.*

194. See Philip Urofsky, *Extortionate Demands Under the Foreign Corrupt Practices Act*, 26 WHITE COLLAR CRIME REP. 848, 884 (2008); see also *United States v. Kay*, 359 F.3d 738, 740 (5th Cir. 2004).

195. Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 795–97 (2011).

196. WILLKIE FARR & GALLAGHER LLC, CLIENT MEMORANDUM: SEC BRINGS FCPA CHARGES BASED ON EXTORTED PAYMENTS 1 (Jan. 20, 2010) [hereinafter WILLKIE MEMORANDUM], available at http://www.willkie.com/files/tbl_s29Publications%5CFileUpload5686%5C3209%5CSEC%20Brings%20FCPA%20Charges%20Based%20On%20Extorted%20Payments.pdf.

197. *Id.*

198. *Id.*

199. TRANSPARENCY INT’L, GLOBAL CORRUPTION REPORT 2009: CORRUPTION AND THE PRIVATE SECTOR, 4 (2009), available at http://files.transparency.org/content/download/107/431/file/2009_GCR_EN.pdf.

200. *Id.*

The line between extortion and bribery is often quite fuzzy in these situations, and even though companies are not supposed to be prosecuted for being victims of extortion under the FCPA, the NATCO example shows that extortion is not a perfect defense.²⁰¹

Because corporations fear an environment where everyone else is paying and accepting bribes when they cannot, one solution for corporations may be to simply pull out of these markets.²⁰² This solution is not ideal for either the corporation, which cannot do business in a potentially lucrative market, or the foreign nation, which loses a potentially valuable source of jobs, taxes, and other legal revenue.

B. *Difficulties with Compliance*

Though only bribes that are made for the express reason of promoting business practices are forbidden,²⁰³ that may not be enough to encourage businesses to make new inroads in foreign countries.

1. *Enforcement Is Uneven*

While the accounting provisions of the FCPA are enforced regularly,²⁰⁴ the bribery portion of the law was rarely enforced before 2000 and has only been enforced heavily since 2007.²⁰⁵

In fact, “[f]rom 1977 to 1988, the DOJ initiated only twenty antibribery cases under the FCPA, and the SEC only three.”²⁰⁶ The few cases that went to trial resulted in minimal penalties for the corporations or individuals prosecuted; often the penalty consisted only of an injunction to prohibit the corporation from violating the FCPA in the future.²⁰⁷

This has resulted in a vacuum of case law regarding the FCPA. When corporations do not have a substantial body of case law to use in defending themselves from FCPA charges, they are much more likely to settle, afraid that the charges will stick and they will have to pay substantial fines. Thus, the lack of precedent creates a cycle of settlements: the lack of case law makes companies more likely to settle, which results in

201. WILKIE MEMORANDUM, *supra* note 196, at 1.

202. Yockey, *supra* note 195, at 800–01.

203. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (2012).

204. Peter J. Henning, *Taking Aim at the Foreign Corrupt Practices Act*, N.Y. TIMES, Apr. 30, 2012, <http://dealbook.nytimes.com/2012/04/30/taking-aim-at-the-foreign-corrupt-practices-act/> (“The books and records provision is enforced regularly, most recently in the conspiracy prosecution of a former managing director of Morgan Stanley for hiding deals with a Chinese official. The Justice Department and the S.E.C. share authority over enforcement, which means companies have to deal with two sets of investigators whenever a potential violation comes to light.”).

205. *Id.* (“For the first 30 years or so after its enactment, the antibribery portion of law was used sporadically. Only a handful of cases were brought each year against companies, almost always ending in settlements involving a modest fine, and even fewer involved individuals. Prosecutors have now made enforcement of the law a priority, and more industries have been caught up in investigations.”).

206. Daniel Pines, *Amending The Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 192 (1994).

207. *Id.* at 192–93.

less case law, which results in more settlements.²⁰⁸ Because of this cycle, companies are largely in the dark about major components of the law.²⁰⁹

There are also avenues available for companies to get around the law. While fines may be unavoidable, individuals can avoid prosecution by hiring foreign intermediaries who are not in danger of being extradited to the United States.²¹⁰

2. *Provisions Are Vague*

Perhaps the principal reason why corporations struggle to comply with the FCPA is that the statute itself is so vague. Its vagueness is evidenced by the recent *Guide* to the FCPA, published by the DOJ and SEC.²¹¹ The *Guide* is 130 pages of unofficial suggestions on how corporations can comply with the FCPA. The value of the *Guide* is limited because it is not binding precedent.

Though proponents of the FCPA argue that its vagueness is an advantage (essentially, that if corporations cannot determine exactly what FCPA violations will get them in trouble with the DOJ and SEC, then they cannot find creative means of getting around its provisions), this argument points to the FCPA being an example of a revenue grab, and not a true method to fight corruption. In fact, if one of the purposes of the FCPA is to protect foreign nations by stopping corruption, then the vagueness of the FCPA is self-defeating.

The minimal enforcement of the FCPA for the first two decades of its existence contributed to this ineffectiveness by reducing agency incentive to clarify FCPA provisions.²¹² Because of minimal enforcement, the courts were also unable to clarify the FCPA's terms.²¹³ The problem is that "[w]ithout clearly defined terms and requirements, the FCPA proves ineffective in providing guidance for U.S. corporations."²¹⁴

Many problems have arisen as a result of the FCPA's general vagueness. Much business has been lost because corporations are afraid that they might be in violation of the FCPA's terms. For example, some corporations, "afraid of violating the terms of the FCPA, withdraw from contracts . . . while others might agree to contracts that they wrongly believe conform with the Act."²¹⁵ The contracts that the firms withdraw from may have been beneficial not only to the U.S. firm, but to the foreign country in need of U.S. capital. Because of the FCPA, however, neither entity will benefit because U.S. corporations are afraid to fall within the purview of the FCPA.

208. Jones, *supra* note 155.

209. *Id.*

210. Henning, *supra* note 204.

211. See generally GUIDE, *supra* note 71.

212. Pines, *supra* note 206, at 195.

213. *Id.*

214. *Id.*

215. *Id.* at 195–96.

Other potential problems loom. Some scholars have argued that “there is a strong likelihood that numerous other firms may engage in rather obvious bribery arrangements, believing that the vagueness means that the chances of being caught, prosecuted, and severely punished are slight.”²¹⁶ Again, these consequences are detrimental to both U.S. corporations and the foreign nation, and to the stated purposes and objectives of the FCPA.²¹⁷

The problems of vagueness and uneven enforcement are tied together here; the vagueness has resulted because of the lack of enforcement, and uneven enforcement has led to a void when it comes to case law regarding the FCPA. It is undisputed that court action, and therefore more case law, “could rectify some of the gray areas in the [FCPA].”²¹⁸ Courts have clarified some of the hazy portions of the Act already, but not enough. The Supreme Court, for example, held that the Act of State doctrine will not bar consideration of cases involving bribery of foreign officials.²¹⁹ It can be inferred from this holding that an act of state “will not bar prosecution under the FCPA.”²²⁰

Other federal courts have also interpreted the FCPA. In *United States v. Castle*, the Fifth Circuit held that foreign officials cannot be prosecuted for conspiracy to violate the FCPA.²²¹ That case, however, did not directly discuss the FCPA, but only bribes paid to foreign officials generally.

Courts have agreed that these standards are vague,²²² but have stopped short of saying they are unenforceable. The Fifth Circuit in *United States v. Kay* held that even where an indictment of the officials of a grain-exporting corporation failed to allege that the officials sent any money for bribes through interstate commerce—an essential element of enforcing the bribery provision of the FCPA²²³—the indictment sufficiently alleged that the officials used interstate commerce “in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the

216. *Id.* at 196.

217. *Id.*

218. *Id.*

219. *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 409–10 (1990).

220. *Pines*, *supra* note 206, at 196 (“Greater court action could rectify some of the gray areas in the Act. Already, the courts have clarified several hazy portions of the FCPA. The Supreme Court has held that the Act of State doctrine will not bar consideration of cases involving bribery of foreign officials. It may thus be inferred that the act of state will not bar prosecution under the FCPA. Other federal courts have also interpreted the FCPA in various ways: foreign officials cannot be prosecuted for conspiracy to violate the FCPA; only bribes that are made for the express reason of promoting business practices are forbidden; the FCPA does not apply to violations that occurred prior to the Act’s creation in 1977; and executors of an estate cannot recover bribes paid to foreign officials.”) (footnotes omitted).

221. *United States v. Castle*, 925 F.2d 831, 856 (5th Cir. 1991) (holding that Canadian officials could not be prosecuted for receiving a bribe from a U.S. company under conspiracy to violate the FCPA); *Pines*, *supra* note 206, at 196.

222. *See Pines*, *supra* note 206, at 195–97; *see also United States v. Kay*, 513 F.3d 432, 444 (5th Cir. 2007) (noting that the FCPA contains an ambiguous provision).

223. *See supra* Part II.B.2.

giving of anything of value . . .”²²⁴ The Fifth Circuit held that this was enough to constitute an FCPA violation.²²⁵

By affirming the FCPA convictions, the Fifth Circuit expanded the reach of the FCPA and essentially mooted the “interstate commerce” requirement of the FCPA, as it is difficult to imagine a situation in which a corporation or individual would not use interstate commerce in furtherance of “an offer, payment, promise to pay, or authorization of the payment of any money . . . or anything of value”²²⁶

IV. RECOMMENDATION

The problem with arguing that the FCPA should not include an anti-bribery provision is that ending the corruption in foreign countries seems like an inherently positive outcome. Of course corruption is bad, and of course corruption needs to end; this idea is built into the American psyche.²²⁷ However, the consequences of enforcing the FCPA are great. The costs of compliance with the FCPA are high, both for U.S. corporations and for foreign nations, and injuring the fragile economies of third-world countries is a likely side effect. In addition, some of the foundational reasons for implementing the FCPA in the first place have been shown to be suspect.²²⁸

Because the FCPA in its current form is not the best way for the United States to encourage corporations and individuals to engage in moral behavior, the suggestions listed in this Part offer potential solutions to the problem of foreign and domestic corruption. One solution would be to simply allow payments to foreign officials; another would be to clarify the FCPA’s bribery prohibitions. Finally, some commentators have recommended allowing a Private Right of Action as a way to focus the efforts of the FCPA.²²⁹

A. Allow Payments to Foreign Officials

The simplest way to stop all of the problems caused by the FCPA would be to allow corporations to make payments to foreign officials, essentially throwing out the FCPA and starting over.

This approach would certainly erase the problems arising from the costs of compliance as well as the demand-side issue. U.S. corporations may still complain that businesses incorporated in other countries can

224. *Kay*, 513 F.3d at 439 (internal quotation marks omitted).

225. *Id.*

226. *Id.*

227. See GUIDE, *supra* note 71, at Forward (“Corruption has corrosive effects on democratic institutions, undermining public accountability and diverting public resources from important priorities such as health, education, and infrastructure. When business is won or lost based on how much a company is willing to pay in bribes rather than on the quality of its products and services, law-abiding companies are placed at a competitive disadvantage—and consumers lose.”).

228. See *supra* Part III.A.2.

229. See, e.g., Pines, *supra* note 206, at 216–228.

make tax-deductible bribes, while U.S. corporations cannot, but they would likely prefer this inconvenience over the immense fines and potential jail time they currently face for FCPA violations.

Furthermore, this solution would protect the economies of third world countries that have developed to stop breakouts of random violence.²³⁰

There are, however, problems with this approach as well. The United States holds itself out to be the moral model for the world; if the FCPA were repealed, it would appear as though the United States were backing down from all of its prior claims.²³¹ This problem would be more relevant if the United States were still embroiled in a fight against communism. Communism, however, is not the threat that it was in the 1970's, and stopping its spread is no longer a priority of the U.S. government. As such, the reasons supporting the FCPA's passage in the first place no longer apply; so perhaps the law should be thrown out and redrawn in acknowledgement of this fact.

The U.S. government could also work with developing countries that are trying to stamp out bribery on their own.²³² If the U.S. government can work to lessen the demand for corrupt payments, then this will lessen the pressure on U.S. corporations to comply both with the FCPA and the foreign governments in whose countries they are operating.²³³ This would also help to improve the United States' reputation in foreign countries, which was a tangential reason behind the original passage of the FCPA. This reasoning certainly still applies today.

B. Clarify the Bribery Prohibitions

As discussed above, one of the biggest problems for U.S. corporations regarding FCPA enforcement is the fact that the bribery provision is so vague, which leads to uneven enforcement.²³⁴ If the bribery portion of the FCPA were clarified, so that corporations were better able to plan their business strategies in accordance with the FCPA standards, then their costs of compliance would be drastically reduced. This would also support the original reasons for the implementation of the FCPA: to help foreign countries fight corruption (and to encourage consumer confidence in the U.S. economy).²³⁵

The law should be changed so that bribery is more clearly defined as paying a "foreign official" to do something that is illegal, under either the U.S. laws or under the laws of that country. The current interpretation of the FCPA, that bribery is any payment that is made to a "foreign official" so that they act outside of their official duties, is too broad. Often-

230. See *supra* Part III.A.2.

231. See Yockey, *supra* note 195, at 827.

232. Randall, *supra* note 165, at 679.

233. *Id.*

234. See *supra* Part III.B.1.

235. See *supra* Part II.

times this so-called “bribery” is the cost of doing business in a foreign country and would not be considered bribery there. When taking an official out for dinner or drinks to celebrate the conclusion of a deal can be considered bribery, then the FCPA is seriously dampening the ability of corporations to do business.

Regardless of how the law is changed, the immense strain that the FCPA as it is currently enforced puts on corporations and foreign nations is reason enough to investigate ways to alter that enforcement. The FCPA should be rewritten so that it fulfills its original purpose and actually stops behavior that is detrimental to foreign nations, and not just behavior that the United States unilaterally deems to be “corrupt.”

V. CONCLUSION

In conclusion, the bribery portion of the Foreign Corrupt Services Act should be clarified, or the FCPA repealed and the problem of corruption in foreign countries reassessed. The FCPA has created huge costs of compliance for companies, which disadvantages U.S. corporations and businesses working abroad.²³⁶ The FCPA is also enforced unevenly and without clear direction.

What the FCPA fails to account for is that, in many foreign countries, dinners, trips, and payments are the price of doing business. These traditions have existed for centuries and will not be stamped out simply because the SEC and DOJ begin fining U.S. corporations and imprisoning the employees of these corporations; the opportunities will simply go to other corporations without a U.S. nexus, who know how to play the game.

An alternative solution would be removing the bribery portion of the FCPA altogether and starting fresh with more clearly constructed, well thought-out provisions that actually accomplish the goals of reducing U.S.-led corruption in foreign countries, without attacking the cultures and long-established business practices of those countries. Because the FCPA is unclear and difficult to enforce, it would be more equitable for the United States to simply let international business transactions take place and instead focus on establishing laws that target the actual causes of truly corrupt behavior, rather than aiming at easy but ineffective targets chosen solely for the purpose of increasing the revenue of the U.S. government.

236. See *supra* Part III.A.

