

Conspicuous Prosecution in the Shadows: Rethinking the Relationship Between the FCPA’s Accounting and Anti-Bribery Provisions

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ABSTRACT: The Foreign Corrupt Practices Act (“FCPA”) criminalizes foreign bribery by (1) American defendants; (2) defendants who trade stocks in the United States or register with the SEC; and (3) foreign defendants who act in furtherance of foreign bribery while inside the United States. It imposes accounting requirements on some potential defendants. Congress meant the FCPA to help developing countries eliminate bribery, and, in so doing, advance U.S. economic and political interests.

However, the FCPA has some fundamental flaws—flaws which U.S. enforcement agencies have particularly abused of late. The FCPA is vague. The reticence of defendants to go to trial has kept the courts from clarifying it and allowed prosecutors to interpret it however they like. The FCPA is also imperialist. These problems can be rectified by repealing the anti-bribery provisions and replacing them with a modified accounting requirement inspired by but independent from the accounting provisions.

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I. INTRODUCTION

For enforcement of the Foreign Corrupt Practices Act (“FCPA”)—the high-profile U.S. statute that criminalizes certain foreign corrupt payments—2016 was a year for the record-books. The Securities and Exchange Commission (“SEC”) filed more FCPA corporate enforcement actions than it ever had before.¹ And the Department of Justice (“DOJ”) filed 6.5 times as many as it had in 2015.² SEC and DOJ complaints were full of questionable legal theories.³ For example, in eight cases, the alleged bribe recipients were health care workers, despite little evidence that they satisfied the FCPA’s foreign official requirement.⁴ Supposed corrupt payments took the form of free beers and rounds of golf,⁵ despite occasional assurances by DOJ and SEC officials that they do not pursue trivial payments.⁶ Because JP Morgan’s subsidiary supposedly hired friends and relatives of Chinese officials as

1. Mike Koehler, *The FCPA’s Record-Breaking Year*, 50 CONN. L. REV. 91, 105 (2018).

2. *See id.* at 98.

3. *Id.* at 93–94.

4. *Id.* at 120–21. Under the foreign official requirement, the recipient of the bribe must generally be a foreign government official, foreign political party or candidate to fall within the scope of the FCPA. *See infra* text accompanying note 124.

5. Koehler, *supra* note 1, at 111.

6. *See infra* note 201 and accompanying text.

interns, JP Morgan was forced to pay the SEC \$130 million.⁷ Yet the SEC cited no authority to support its assertion that giving an internship to an official's friend or relative constituted an unlawful payment.⁸ The First Circuit had actually just ruled to the contrary.⁹ Moreover, it is unlikely that JP Morgan possessed the requisite mens rea.¹⁰ And yet almost every corporate defendant settled or otherwise resolved the action without a fight,¹¹ and the DOJ and the SEC each made more money from FCPA corporate settlements than they ever had before.¹² Agency officials knew the corporations would settle because fighting the charges would be costlier than settling.¹³

This Note argues that the FCPA started with honorable goals, but that it is not working. It is an especially vague statute. Courts have not and will not clarify it because FCPA cases virtually never wind up in open court. Given the lack of judicial oversight, a clear statute with bright-line rules is necessary to put defendants on notice and prevent abuse by prosecutors. While global bribery is a serious problem, the FCPA anti-bribery provisions are imperialist. Rather than helping developing countries hold their leaders accountable for violating domestic bribery laws, the FCPA holds foreign business leaders accountable for violating U.S. laws. In the process, the FCPA imposes American rules and values on foreign countries rather than helping those countries implement their own anti-bribery laws. Along the way, it ensures that wrongdoers abroad pay their penalties to U.S. enforcement agencies not

7. Press Release, S.E.C., JPMorgan Chase Paying \$264 Million to Settle FCPA Charges (Nov. 17, 2016), <https://www.sec.gov/news/pressrelease/2016-241.html>.

8. Koehler, *supra* note 1, at 126–27.

9. *Id.* at 129–30 (citing *United States v. Tavares*, 844 F.3d 46, 54–55 (1st Cir. 2016)).

10. *Id.* at 127. Arthur Levitt, a former chairman of the SEC, recently wrote a compelling op-ed expressing his view of such enforcement actions:

[M]y father was New York state comptroller . . . [Y]es, I probably got at least one or two jobs as a result of knowing people, including my first job as a trainee for Life magazine. But according to financial regulators now looking into the hiring practices of major U.S. banks and multinationals in China—some of which have employed members of influential Chinese families—anyone who once hired me might have been violating ethical and legal standards. Securities and Exchange Commission regulators now suggest that such hiring overseas is a form of untoward influence, akin to bribing foreign officials to win business. The accusation is scurrilous and hypocritical. If you walk the halls of any institution in the U.S.—Congress, federal courthouses, large corporations, the White House, American embassies and even the offices of the SEC—you are likely to run into friends and family members of powerful and wealthy people.

Arthur Levitt, 'Influence Peddling' Makes the World Go Round, WALL ST. J. (Dec. 25, 2013, 3:55 PM), <https://www.wsj.com/articles/8216influence-peddling8217-makes-the-world-go-round-1388004902>.

11. Koehler, *supra* note 1, at 99.

12. *Id.* at 107.

13. See *infra* notes 103–05 and accompanying text. The defendants did not settle because they found the government's reading of the law defensible. See Jean Eaglesham et al., *Wall Street Pushes Back on Foreign Bribery Probe*, WALL ST. J. (Apr. 29, 2015, 7:24 PM), <https://www.wsj.com/articles/wall-street-pushes-back-on-foreign-bribery-probe-1430349863>.

the countries they actually hurt. In so doing, the FCPA achieves none of its goals.

These problems with the FCPA's anti-bribery provisions cannot be eliminated through amendment. It is impossible to make the provisions' application to every hypothetical scenario clear. Thus, aggressive prosecutors will always be able to apply these provisions in creative ways—knowing they will never have to defend their applications in court. Rather, the solution begins with repeal of the FCPA's anti-bribery provisions and ends with passage of a modified accounting requirement—inspired by but independent from the FCPA's much lower-profile accounting provisions. Instead of generating a windfall for U.S. enforcement agencies, the reported information will be used to empower foreign governments to address bribery within their borders.

Part II of this Note explains the honorable goals behind the FCPA, and how the statute is designed to serve those goals. Part III explains how it is failing those goals as U.S. enforcement agencies exploit flaws in that design. Part IV explains how reformers can repeal the anti-bribery provisions, and pass a modified accounting requirement to bring the FCPA in line with the objectives it was meant to serve. Part V concludes.

II. UNDERSTANDING THE FCPA

The FCPA prohibits “issuers” and “domestic concerns” from making certain foreign corrupt payments.¹⁴ The statute defines “issuers” as any company that has stocks registered with the SEC or has to file reports with the SEC.¹⁵ It defines “domestic concerns” as U.S. citizens or residents, or companies that are incorporated in the United States or have their principle place of business in the United States¹⁶ The FCPA prohibits “other persons” from undertaking any act while in the United States, or through the mail, wires or instrumentalities of interstate commerce, in furtherance of a foreign corrupt payment.¹⁷ “Other persons” are any individuals or companies which are not domestic concerns or issuers.¹⁸ The FCPA also requires “issuers” to report various financial transactions to the SEC, regardless of their legality.¹⁹ This Part explains the history behind its passage, amendments and more recent rise to prominence, and then breaks down the elements of each provision as best understood today.

14. See *infra* Section II.C.1.

15. See *infra* Section II.C.1.a.

16. See *infra* Section II.C.1.a.

17. See *infra* Sections II.C.1.a–b.

18. See *infra* Section II.C.1.a.

19. See *infra* Section II.C.2.

A. REASONS FOR PASSAGE

The FCPA became law in 1977.²⁰ The legislative history reveals several objectives. By 1977, bribery by U.S. companies abroad had become rampant.²¹ Members of Congress believed bribery was bad economics, both in the United States and abroad.²² It undermined confidence in the free market, and hindered the free market's ability to ensure that the most competitive companies got the business.²³ The members also believed that bribery by U.S. companies was bad for America politically.²⁴ It undermined America's image abroad, and strengthened the hand of foreign political parties opposing closer ties with the U.S.²⁵ There was also an altruistic desire to help the developing world rid itself of bribery—for development and philosophical reasons.²⁶ Congress amended the FCPA in 1988 to add some exceptions and affirmative defenses.²⁷

With the FCPA, the United States became the first country to ban foreign bribery,²⁸ but many other countries have since passed similar laws.²⁹ In 1997,

20. U.S. DEP'T OF JUSTICE & U.S. SEC. EXCH. COMM'N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 3 (2012), <https://www.documentcloud.org/documents/515229-a-resource-guide-to-the-u-s-foreign-corrupt.html>.

21. H.R. REP. NO. 95-640, at 4 (1977), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/houseprt-95-640.pdf> (“More than 400 corporations have admitted making questionable or illegal payments. The companies, most of them voluntarily, have reported paying out well in excess of \$300 million in corporate funds to foreign government officials, politicians, and political parties. These corporations have included some of the largest and most widely held public companies in the United States; over 117 of them rank in the top Fortune 500 industries.”).

22. *Id.* at 4–5 (“[Bribery] is bad business . . . It erodes public confidence in the integrity of the free market system. It short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business.”); S. REP. NO. 95-114, at 4 (1977), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/senaterpt-95-114.pdf>.

23. U.S. DEP'T OF JUSTICE, *supra* note 20, at 3.

24. *Id.*

25. *Id.*; see also H.R. REP. NO. 95-640, at 5 (“Bribery of foreign officials by some American companies casts a shadow on all U.S. companies. The exposure of such activity can damage a company's image, lead to costly lawsuits, cause the cancellation of contracts, and result in the appropriation of valuable assets overseas.”).

26. Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 949 (2012) (“[I]t's to the great interest of every country that the people who sell to them don't bribe. Now if [the United States] ha[s] a reputation of being the one country that enforces the law and everything that we sell is sold on the basis of merit and competition and not on the basis of bribery, . . . that's an enormous advantage [to the United States].” (quoting Senator Proxmire, *Foreign and Corporate Bribes: Hearings Before the Sen. Comm. on Banking, Hous., and Urban Affairs*, 94th Cong. 63 (1976))).

27. U.S. DEP'T OF JUSTICE, *supra* note 20, at 3.

28. Koehler, *supra* note 26, at 930.

29. U.S. DEP'T OF JUSTICE, *supra* note 20, at 7.

the United States and other OECD members signed the OECD Anti-Bribery Convention, in which they each agreed to pass foreign anti-bribery laws.³⁰

In 1998, President Clinton approved some amendments to the FCPA, which, among other things, increased the statute's application to foreign entities and individuals.³¹ Congress passed the amendments in part to bring the FCPA closer to compliance with the OECD Convention.³² However, the FCPA still differs from the OECD language in important respects.³³ In his signing statement, President Clinton reaffirmed many of the FCPA's original goals and lauded America's leadership in eliminating international bribery.³⁴

B. THE FCPA TAKES CENTER STAGE

Although Congress first passed the FCPA in 1977, FCPA enforcement has exploded in the last decade.³⁵ In 2007, the DOJ filed 22 FCPA enforcement actions while the SEC filed 21.³⁶ In no previous year had the DOJ filed more than seven or the SEC more than eight.³⁷ In 2016, the SEC filed a record 29, and the DOJ 25 enforcement actions, totaling more than \$2.4 billion in sanctions.³⁸ Prior to 2006, the record for total sanctions in one year was only slightly above \$70 million.³⁹

30. Organization of Economic Cooperation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 1, May 23, 1997, C(97)123/FINAL ("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.").

31. See U.S. DEP'T OF JUSTICE, *supra* note 20, at 4.

32. See *id.* (expanding the group of potential defendants to include foreign persons was likely the most significant change).

33. See *infra* notes 70–73 and accompanying text.

34. William J. Clinton, President of the United States, International Anti-Bribery and Fair Competition Act of 1998 Signing Statement (Nov. 10, 1998), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/signing.pdf> ("The United States has led the effort to curb international bribery. We have long believed bribery is inconsistent with democratic values, such as good governance and the rule of law. It is also contrary to basic principles of fair competition and harmful to efforts to promote economic development . . . We will continue our leadership in the international fight against corruption.").

35. DOJ and SEC Enforcement Actions, STAN. L. SCH., <http://fcpa.stanford.edu/statistics-analytics.html> (last visited Oct. 26, 2018); see also Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 782 (2011) ("The . . . DOJ . . . recently said that enforcing the FCPA . . . is now its top priority—'second only to fighting terrorism.'" (quoting Chris Colbridge, *New Bumps and Tolls Along the Road to FCPA Settlements*, KIRKLAND & ELLIS LLP: CLIENT INFO. (Nov. 1, 2009), <https://www.kirkland.com/sitecontent.cfm?contentID=223&itemID=2929>)).

36. DOJ and SEC Enforcement Actions, *supra* note 35.

37. *Id.*

38. *Id.*

39. *Id.*

This spike in enforcement has spawned an industry of public and private personnel focused on the FCPA. In 2010, the SEC established a special taskforce devoted solely to FCPA enforcement.⁴⁰ In 2016, the DOJ increased the taskforce's budget by more than half, adding ten new prosecutors and three new teams of FBI agents.⁴¹ And as White & Case partners Michael Kendall and Kevin Bolan report: "Once a niche practice developed by only some law firms, white-collar defense has become a core practice with national and international scope at most large American law firms."⁴² FCPA enforcement is a major driver of the growth in private white-collar defense practices.⁴³

Attorney General Jeff Sessions recently announced that he intended to continue aggressively prosecuting the FCPA. He stated:

[T]he Department of Justice remains committed to enforcing all the laws. That includes laws regarding corporate misconduct, fraud, foreign corruption and other types of white-collar crime One area where this is critical is enforcement of the Foreign Corrupt Practices Act (FCPA) We will continue to strongly enforce the FCPA and other anti-corruption laws.⁴⁴

Endorsed by Republican and Democratic Administrations alike, the FCPA will likely remain a major force in federal criminal law and international business. An assessment of whether the FCPA's growing enforcement is consistent with Congress' goals and how the statute might be revised to better achieve those goals is overdue.

40. Carol A. Poindexter et al., Trends in Federal White Collar Prosecutions, W.L. PRACTICAL LAW PRACTICE NOTE 9-503-0747, at 20 (2016).

41. *Id.*

42. Michael Kendall & Kevin Bolan, *Criminal Defense: White-Collar*, U.S. NEWS & WORLD REP., <http://bestlawfirms.usnews.com/criminal-defense-white-collar/overview> (last visited Oct. 26, 2018).

43. See Charles D. Weisselberg & Su Li, *Big Law's Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms*, 53 ARIZ. L. REV. 1221, 1236 (2011); see also Joe Palazzola, *FCPA Inc: The Business of Bribery—Corruption Probes Become Profit Center for Big Law Firms*, WALL ST. J. (Oct. 2, 2012), <https://www.wsj.com/articles/SB100008723096390443862604578028462294611352> ("The [FCPA] has become big business for the lawyers who delve into the operations of companies in response to an investigation by the Justice Department and the Securities and Exchange Commission—or to avoid one. The result is a mini-industry of investigators and white-collar criminal-law practices").

44. Jeff Sessions, U.S. Attorney General, Remarks at Ethics and Compliance Initiative Annual Conference (Apr. 24, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual>. But see Stephen Choi & Mitu Gulati, *Trump v. Obama: U.S. SEC Anti-Corruption Enforcement Actions Scorecard*, PROGRAM ON CORP. COMPLIANCE & ENFORCEMENT N.Y.U., <https://wp.nyu.edu/compliance-enforcement/2017/10/09/trump-v-obama-u-s-sec-anti-corruption-enforcement-actions-scorecard> (last visited Oct. 26, 2018) (showing that FCPA enforcement is down so far under the Trump Administration notwithstanding Attorney General Session's statement, but noting that it is too early to know whether that represents an actual policy shift).

C. HOW IT WORKS

This Note focuses on two sections of the FCPA: (1) the anti-bribery provisions; and (2) the accounting provisions. Although not a focus of this Note, this Section also briefly addresses how the FCPA—a mostly criminal statute—can result in civil liability as well.

1. The Anti-Bribery Provisions

To convict a defendant of violating the FCPA's anti-bribery provisions, the government must prove three basic requirements: (1) covered defendant; (2) actus reus; and (3) mens rea. It must also show the defendant's actions do not fall within the "grease payment" exception.⁴⁵ Defendants may defeat the prosecution by establishing one of two affirmative defenses.⁴⁶

i. Covered Defendant

The FCPA's anti-bribery provisions apply to three basic defendants: (1) "issuers;" (2) "domestic concerns;" and (3) "other persons."⁴⁷ The statute defines "issuers" as any company that has stocks registered with the SEC or

45. 15 U.S.C. §§ 78dd-1 to 78dd-3 (2012); JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS 530-35 (2016). The FCPA anti-bribery provisions state the following:

It shall be unlawful for [a covered defendant] which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to . . . (1) any foreign official . . . (2) any foreign political party or official thereof or any candidate for foreign political office . . . or (3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

15 U.S.C. § 78dd-1(a).

46. 15 U.S.C. §§ 78dd-1(c) to 78dd-3(c).

47. *Id.*; O'SULLIVAN, *supra* note 45, at 531.

has to file reports with the SEC.⁴⁸ It defines “domestic concerns” as U.S. citizens or residents, and business entities that are incorporated in the United States or have their principle places of business in the United States.⁴⁹ It defines “other persons” as any individual or company which is not a domestic concern or issuer.⁵⁰ Covered defendants are on the hook for the conduct of their agents.⁵¹

However, the FCPA sweeps more broadly than the three categories suggest. There is no separate charge for aiding and abetting; aiders and abettors are guilty as principals.⁵² The DOJ may also prosecute individuals and companies for conspiring to commit an FCPA violation.⁵³ Courts usually exercise jurisdiction over every member of a conspiracy, so long as at least one conspirator is within the scope of the FCPA.⁵⁴

ii. *Actus Reus*

To violate the FCPA, a covered defendant must offer or make a payment of a “thing of value.”⁵⁵ The payment or offer must be to a covered recipient.⁵⁶ Covered recipients include “any foreign official . . . any foreign political party or [party] official . . . or any foreign political . . . candidate.”⁵⁷ A defendant also violates the FCPA by knowingly making the payment or offer to anyone who will “directly or indirectly” transmit the payment or offer to a covered recipient.⁵⁸

For “other persons,” the government must prove an additional element. Other persons must undertake an action inside the United States or “make use of the mails or any means or instrumentality of interstate commerce” “in furtherance of” the corrupt payment or offer.⁵⁹ However, because the DOJ

48. 15 U.S.C. § 781; *id.* § 780(d).

49. *Id.* § 78dd-2.

50. *Id.* § 78dd-3.

51. *Id.* §§ 78dd-1 to 78dd-3.

52. 18 U.S.C. § 2; H.R. REP. NO. 95-640, at 8 (1977), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/houseprt-95-640.pdf>.

53. *See, e.g.*, *United States v. MacAllister*, 160 F.3d 1304, 1307 (11th Cir. 1998) (“The general rule is that a conspiracy to violate the criminal laws of the United States, in which one conspirator commits an overt act in furtherance of that conspiracy within the United States, is subject to prosecution in the district courts.”); *United States v. Winter*, 509 F.2d 975, 982 (5th Cir. 1975) (“The case law clearly establishes that the District Court has jurisdiction over a conspiracy and all those proved to be conspirators if the conspiracy is designed to have criminal effects within the United States and if there is sufficient proof that at least one of the conspirators committed an overt act in furtherance of the conspiracy within the territorial jurisdiction of the District Court.”).

54. *Winter*, 509 F.2d at 982.

55. 15 U.S.C. § 78dd-1 (a)(3).

56. O’SULLIVAN, *supra* note 45, at 532.

57. 15 U.S.C. § 78dd-1 (a).

58. *Id.* § 78dd-1 (a)(3).

59. *Id.* § 78dd-3.

can prosecute co-conspirators,⁶⁰ other persons can still be prosecuted without satisfying this additional element if they conspired with another person who did, or with any issuer or domestic concern.⁶¹

iii. *Mens Rea*

Finally, to convict the defendant, the government must prove the defendant committed the act (the payment or offer) while possessing three related mental states.⁶² Much remains unclear about how these mental states apply because of a paucity of cases.⁶³ First, the defendant must have made the payment or offer “corruptly.”⁶⁴ Second, the defendant must make the payment or offer with the “purpose[] of . . . influencing” the covered recipient to commit a qualifying act.⁶⁵ Qualifying acts include:

(A) (i) influencing any act or decision of such [covered recipient] in his official capacity, (ii) inducing such [covered recipient] to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such [covered recipient] to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.⁶⁶

However, merely intending to produce a qualifying act is insufficient.⁶⁷ For example, a defendant does not satisfy the mens rea requirement merely by “corruptly” making a payment with the intent to “secur[e] any improper advantage.” That is because there is a third mens rea requirement—the “business purpose test.”⁶⁸

To satisfy the “business purpose test,” the defendant must intend that the qualifying act will “assist [the defendant] in obtaining or retaining business for or with, or directing business to, any person.”⁶⁹ If a defendant bribed a foreign official just so the official would look favorably on his company, he would not violate the FCPA. The favorable attitude might constitute an “improper advantage,” but would not “direct business to any person.” If he believed the official would be more likely to award his company a contract as

60. See *supra* notes 53–54 and accompanying text.

61. E.g., *United States v. MacAllister*, 160 F.3d 1304, 1307 (11th Cir. 1998); *United States v. Winter*, 509 F.2d 975, 982 (5th Cir. 1975).

62. 15 U.S.C. § 78dd-1(a).

63. See O’SULLIVAN, *supra* note 45, at 535.

64. 15 U.S.C. § 78dd-1(a).

65. *Id.*

66. *Id.*

67. See *id.*; Mike Koehler, *Grading the Foreign Corrupt Practices Act Guidance*, WHITE COLLAR CRIME REP. at 4–5 (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189072.

68. See 15 U.S.C. § 78dd-1(a)(1)–(3); *United States v. Kay*, 359 F.3d 738, 755–56 (5th Cir. 2004); Koehler, *supra* note 67, at 5.

69. 15 U.S.C. § 78dd-1(a)(1)–(3); *Kay*, 359 F.3d at 755–56.

a result of the more favorable attitude, then the business purpose test might be satisfied.⁷⁰ This marks a major departure from the OECD Convention, which recommends criminalization of a corrupt payment made to secure an improper advantage *or* direct business to an individual.⁷¹ Congress considered scrapping the business purpose test in its 1998 amendments, but ultimately chose to leave the language as is.⁷²

Even with these three mens rea requirements, the FCPA allows for pretty broad application.⁷³ The FCPA anti-bribery provisions are inchoate.⁷⁴ Thus, while an intent to influence an official to direct business is required, the bribe-giver is guilty even if she does not succeed in influencing the official, or the official does not receive or accept the bribe.⁷⁵ An executive can be guilty if she directs an employee to find an official to bribe, even if the employee never locates a suitable official.⁷⁶

iv. Exceptions and Affirmative Defenses

The FCPA's ban on bribery includes an exception for so-called "grease payments."⁷⁷ Section 78dd-1 (b) states that the anti-bribery provisions "shall not apply to any facilitating or expediting payment . . . 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."⁷⁸ The DOJ calls it a "narrow exception."⁷⁹ Its guidelines say that "[e]xamples of 'routine governmental action' include processing visas, providing police protection or mail service, and supplying utilities like phone service, power, and water."⁸⁰ Whether a payment is a bribe or grease payment depends on its purpose not its size, though especially large payments may be difficult to construe as grease payments.⁸¹

70. See *Kay*, 359 F.3d at 755-56.

71. See *supra* note 30 and accompanying text.

72. See *Kay*, 359 F.3d at 753-55; Koehler, *supra* note 67, at 5.

73. See *Kay*, 359 F.3d at 755-56.

74. U.S. DEP'T OF JUSTICE, *supra* note 20, at 14.

75. See Press Release, Dep't of Justice, SEC Sues Monsanto Company for Paying a Bribe: Monsanto Settles Action and Agrees to Pay a \$500,000 Penalty Monsanto Also Enters into Deferred Prosecution Agreement with Department of Justice (Jan. 6, 2005), <https://www.sec.gov/litigation/litreleases/lr19023.htm> (announcing defendant accepted responsibility and signed a DPA although it never received any benefit from the alleged bribe).

76. See U.S. DEP'T OF JUSTICE, *supra* note 20, at 14.

77. An exception is not an affirmative defense. Although the exact definition of a grease payment is unclear, the government must prove beyond a reasonable doubt that the alleged bribe was not a grease payment. See *Kay*, 359 F.3d at 749.

78. 15 U.S.C. § 78dd-1 (b) (2012).

79. U.S. DEP'T OF JUSTICE, *supra* note 20, at 25.

80. *Id.*

81. *Id.*

There are also two affirmative defenses to a charge under the FCPA's anti-bribery provisions: (1) the "local law defense" and (2) the "reasonable and bona fide expenditure" defense.⁸² Under the local law defense, a defendant is not guilty if she can prove that the foreign bribe or proposed bribe was legal under the foreign country's written laws or regulations.⁸³ There must actually be a written law stating that the act was legal; the absence of any law stating it was illegal is not a defense.⁸⁴ The fact that the act was common practice in the country is also not a defense.⁸⁵ The second defense concerns reimbursing officials for business-related "reasonable and bona fide expenditure[s], such as travel and lodging expenses."⁸⁶

v. Penalties

Penalties are severe. An individual convicted under the issuer or domestic concern section faces up to five years in prison;⁸⁷ an individual convicted under the "other person" section faces up to 20 years.⁸⁸ A corporation faces a fine of up to \$2 million under the issuer section and up to \$25 million under the other two.⁸⁹

2. The Accounting Provisions

Unlike the anti-bribery provisions, the FCPA's accounting provisions apply only to issuers.⁹⁰ Although the accounting provisions are part of the FCPA, they require issuers to extensively document their financial situations.⁹¹

82. 15 U.S.C. § 78dd-1(c).

83. *Id.*

84. H.R. REP. NO. 100-576, at 922 (1977) (Conf. Rep.), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/tradeact-100-418.pdf> ("The Conferees wish to make clear that the absence of written laws in a foreign official's country would not by itself be sufficient to satisfy this defense.").

85. Aaron G. Murphy, *The Migratory Patterns of Business in the Global Village*, 2 N.Y.U. J.L. & BUS. 229, 240 (2005) ("[B]ecause this defense only acknowledges 'written laws,' it excludes any customs, norms, or other informal 'rules' of behavior that might operate in a given society.").

86. 15 U.S.C. § 78dd-1(c)(2).

87. *Id.* § 78dd-2(g)(2)(A); *id.* § 78dd-3(e)(2)(A).

88. *Id.* § 78ff(c)(2)(A).

89. *Id.* § 78dd-2(g)(2)(A); *id.* § 78dd-3(e)(2)(A); *id.* § 78ff(c)(2)(A).

90. U.S. DEP'T OF JUSTICE, *supra* note 20, at 38.

91. 15 U.S.C. § 78m(b)(2)(A); U.S. DEP'T OF JUSTICE, *supra* note 20, at 38. The accounting provisions state the following:

Every issuer . . . shall—(A) 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; (B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—(i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

Issuers must “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”⁹² To compel companies to exercise proper supervision and ensure accurate records, issuers must also “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances” of compliance.⁹³ Thus, while any payment to a foreign government official must be included, all sorts of transactions having nothing to do with the anti-bribery provisions must be reported as well.⁹⁴ That is because the accounting provisions are about preventing more than just foreign bribery. The accounting provisions empower the SEC to ensure that its accounting requirements provide “for the proper protection of investors and to insure fair dealing in the security”⁹⁵—a broader goal than just preventing bribery.

Willful violation of any part of the accounting provisions is a crime.⁹⁶ Individual violators of the accounting provisions face a maximum sentence of 20 years in prison.⁹⁷ Corporations face a maximum fine of \$25 million.⁹⁸ Because companies engaged in bribery often do not report their bribes, enforcement agencies often have the option of issuing criminal charges for violation of either the accounting or anti-bribery provisions or both.⁹⁹

While the statute only applies to issuers, it requires an issuer to document its foreign and domestic affiliates and subsidiaries and ensure their compliance with the accounting requirements.¹⁰⁰ If the issuer owns 50% or less of a company, the issuer only has to “proceed in good faith to use its influence, to the extent reasonable under the issuer’s circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with [the requirements].”¹⁰¹ People who are not issuers, such as “domestic concerns” and “other persons,” can still be

(iii) access to assets is permitted only in accordance with management’s general or specific authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences

15 U.S.C. § 78m(b)(2)(A)–(B).

92. 15 U.S.C. § 78m(b)(2)(A).

93. *Id.* § 78m(b)(2)(B).

94. *Id.* § 78(m)(b)(2)(A); U.S. DEP’T OF JUSTICE, *supra* note 20, at 39–42.

95. 15 U.S.C. § 78m(a).

96. U.S. DEP’T OF JUSTICE, *supra* note 20, at 44–45.

97. 15 U.S.C. § 78ff(a); U.S. DEP’T OF JUSTICE, *supra* note 20, at 68.

98. 15 U.S.C. § 78ff(a); U.S. DEP’T OF JUSTICE, *supra* note 20, at 68.

99. O’MELVENY & MYERS LLP, FOREIGN CORRUPT PRACTICES ACT: AN O’MELVENY HANDBOOK 28–29 (7th ed. 2013).

100. U.S. DEP’T OF JUSTICE, *supra* note 20, at 43.

101. 15 U.S.C. § 78m(b)(6).

criminally liable for conspiring to or aiding and abetting violation of the accounting provisions.¹⁰²

3. Civil Liability

The FCPA does not contain a private cause of action, though FCPA enforcement actions may result in some related civil litigation like shareholder derivative lawsuits.¹⁰³ The government may also pursue civil penalties of up to \$16,000 for each violation of the anti-bribery provisions (by any corporation that violated or any individual who willfully violated).¹⁰⁴ It may also pursue up to \$725,000 and \$150,000 for corporations and individuals violating the accounting provisions (though penalties may not exceed the company's net gain for the violation).¹⁰⁵

III. PROBLEMS WITH THE FCPA

This Part argues that crucial sections of the FCPA's anti-bribery provisions are incredibly vague, and explains why courts have been unable to clarify them. It breaks down the practical consequences that result—both the uncertainties this vagueness creates for business people abroad and the disturbing strategies enforcement agencies use to fill the void. This Part goes on to argue that the FCPA is imperialist.

A. THE FCPA IS VAGUE

As Latham & Watkins attorney Aaron Murphy wrote, “U.S. companies face a statute loaded with compliance nightmares, the Foreign Corrupt Practices Act.”¹⁰⁶ Key phrases in the covered recipient, mens rea and other sections of the anti-bribery provisions are incredibly vague. Most FCPA prosecutions involve foreign officials as covered recipients. In practice, it is

102. U.S. DEP'T OF JUSTICE, *supra* note 20, at 45.

103. Mike Koehler, *Just Because “the FCPA Is Not Commonly the Subject of Litigation” Does Not Create a Substantial Federal Interest in State Law Claims Related to the FCPA*, LEXIS NEXIS NEWSROOM (Mar. 26, 2015), <https://www.lexisnexis.com/legalnewsroom/corporate/b/fcpa-compliance/archive/2015/03/26/just-because-the-fcpa-is-not-commonly-the-subject-of-litigation-does-not-create-a-substantial-federal-interest-in-state-law-claims-related-to-the-fcpa.aspx>; see also Mike Koehler, *Foreign Corrupt Practices Act Ripples*, 3 AM. U. BUS. L. REV. 391, 392–93 (2014) (“[S]ettlement amounts in an actual FCPA enforcement action are often only a relatively minor component of the overall financial consequences that can result from FCPA scrutiny or enforcement in this new era.” Expenses include “(i) pre-enforcement action professional fees and expenses; (ii) settlement amounts in an actual FCPA enforcement action; and (iii) post-enforcement action professional fees and expenses FCPA scrutiny and enforcement can further negatively impact a company’s business operations and strategy in a variety of ways from: market capitalization; to cost of capital; to merger and acquisition activity; to impeding or distracting a company from achieving other business objectives; to private shareholder litigation; to offensive use of the FCPA by a competitor or adversary to achieve a business objective or to further advance a litigating position.”).

104. 15 U.S.C. § 78dd-2(g)(1)(B); *id.* § 78dd-3(e)(1)(B); *id.* § 78ff(c)(2)(C).

105. Securities Exchange Act § 21B(b) (1934) (codified at 15 U.S.C. § 78u-2(b)(3)).

106. Murphy, *supra* note 85, at 244.

very unclear how broadly the term “foreign official” applies.¹⁰⁷ The FCPA’s mens rea requirements include a host of vagaries, including that the payment must be made “corruptly” to entice the foreign official to direct business to someone “improper[ly].” It should come as no surprise that terms like “corruptly” and “improper” are very unclear.¹⁰⁸ The payment to the official must also be a “thing of value” to violate the FCPA, and it is unclear what valuable means (only of a certain market value and above? Or does it matter how much the recipient subjectively values it?).¹⁰⁹ It is also unclear which corrupt payments qualify as lawful “grease payments.”¹¹⁰ The FCPA does almost nothing to answer these questions.¹¹¹

While statutory clarity is always necessary to ensure fair notice to defendants and rein in prosecutorial discretion, there is perhaps no area in criminal law where it is more essential. Corporations fear the reputational damage of a prosecution more than the fines, and they are also armed with the resources to make trial unpleasant for prosecutors.¹¹² Thus, in the last 20 years, prosecutors and defendants have resolved every FCPA enforcement action against a corporation (and almost every action against an individual) quietly with a deferred prosecution agreement (“DPA”), non-prosecution agreement (“NPA”), plea or settlement.¹¹³ With so few cases actually winding up in court, there are virtually no published federal appellate opinions (and few opinions at all) clarifying the FCPA.¹¹⁴

Enforcement officials have seemed generally content with this state of opacity.¹¹⁵ Although the FCPA’s 1988 amendments directed the DOJ to release enforcement guidelines, it did not do so until 2012, and the 2012 Guidelines are highly questionable.¹¹⁶ The Sixth Circuit advised the DOJ to promulgate guidelines in 1990, but the DOJ declined.¹¹⁷ In 2011, Nathaniel Edmonds, DOJ Fraud Section Assistant Chief, had this to say regarding

107. See *infra* Section III.A.1.

108. See *infra* Section III.A.2.

109. See *infra* Section III.A.3.

110. See *infra* Section III.A.4.

111. See *infra* Sections III.A.1–4.

112. See Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade Resurgence*, 43 IND. L. REV. 389, 410 (2010); Michael Volkov, *FCPA Enforcement Actions and Reputational Damage*, VOLKOV L. BLOG (Aug. 30, 2016), <https://blog.volkovlaw.com/2016/08/fcpa-enforcement-actions-reputational-damage>.

113. Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907, 932 (2010).

114. *Id.* at 909–10; see also Andrew Weissmann on the FCPA, C-SPAN, at 00:52 (Aug. 29, 2016), <https://www.c-span.org/video/?c4618539/andrew-weissmann-fcpa> (“The grayness of a statute that is enforced against corporations is particularly heinous because there’s no way to actually have that litigated as a realistic matter.”).

115. See Koehler, *supra* note 67, at 1.

116. *Id.* (“[T]he Guidance is an advocacy piece and not a well-balanced portrayal of the FCPA as it is replete with selective information, half-truths, and, worse, information that is demonstratively false . . . [D]espite the Guidance, much about FCPA enforcement remains opaque.”).

117. *Id.*

defendants challenging the DOJ's legal theories (specifically regarding the foreign official debate)¹¹⁸: "It's not necessarily the wisest move for a company Quibbling over the percentage ownership or control of a company is not going to be particularly helpful as a defense."¹¹⁹

Some have characterized the FCPA as broad,¹²⁰ and in some ways it is.¹²¹ But the more honest answer is that we do not know whether key sections of the FCPA apply broadly or narrowly. The statute does not tell us. Normally, when a statute (particularly a criminal statute) does not draw bright lines, the courts step in, find what clues they can from the text and legislative history, and draw them for us. That is not happening with FCPA prosecutions. Because of the lack of judicial oversight, and because much of the FCPA is vague enough to leave room for argument, prosecutors can claim that all kinds of foreign payments violate the FCPA when neither the payer nor Congress would have ever expected that. Even when the text, legislative history, or cases suggest a payment does not violate the FCPA, prosecutors can dream up a reason why it does and file charges, knowing they will not have to defend their legal theories in court.¹²² The data shows prosecutors are frequently doing just that. This is increasingly earning the DOJ and SEC a lot of easy money, and resulting in a number of unfair prosecutions. Perhaps more importantly, it creates incredible uncertainty about what U.S. and even foreign companies can do in foreign countries—making it harder for everyone to do business. This status quo flies in the face of the FCPA's noble goals.

1. What Is a Foreign Official?

FCPA prosecutions are usually predicated on alleged payments to "foreign officials."¹²³ The FCPA defines such officials only as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or . . . public international

118. See *infra* Section III.A.1.

119. See Supplement to Defendant's Reply in Support of Amended Motion to Dismiss Counts One Through Ten of the Indictment at 5, *United States v. Carson*, No. 09-00077-JVS, 2011 WL 5101701 (C.D. Cal. May 18, 2011), <http://fcpa.stanford.edu/fcpac/documents/4000/003239.pdf>; Michael B. Mukasey & James C. Dunlop, *Can Someone Please Turn on the Lights? Bringing Transparency to the Foreign Corrupt Practices Act*, 13 FED. SOC. CRIM. L. & PROC. 30, 32 (2012); Mike Koehler, *Recent DOJ Statements at Issue in Carson "Foreign Official" Challenge*, FCPA PROFESSOR (May 6, 2011), <http://fcpaprofessor.blogspot.com/2011/05/recent-doj-statements-at-issue-in.html>.

120. See U.S. DEP'T OF JUSTICE, *supra* note 20, at 29.

121. See *infra* Section III.B.

122. See *infra* notes 163–66 and accompanying text.

123. See *The "Foreign Officials" of 2017*, FCPA PROFESSOR (Jan 22, 2018), <http://fcpa.professor.com/foreign-officials-2017>.

organization.”¹²⁴ The FCPA does not explain what an “instrumentality” is.¹²⁵ It also does not explain how far the terms “employee” or “official capacity” extend.¹²⁶ The DOJ has provided little guidance.¹²⁷

The uncertainty about these terms becomes a real problem in many developing countries (where most FCPA violations occur).¹²⁸ In many of these countries, the lack of a clear definition with clear boundaries allows prosecutors to claim that almost everyone is a foreign official if they want to. That is not what Congress intended, but with so little judicial oversight, no one is telling prosecutors that.¹²⁹

Uncertainty surrounding “instrumentality” is a particular problem in post-communist states, including major markets like China.¹³⁰ Some 30 years ago, China’s government owned virtually everything in China, and in many cases the government still officially owns much of the country, even if it does not behave as such in practice.¹³¹ Since the FCPA does not define what an instrumentality of the government is, the DOJ can claim that just about everyone and everything in countries like China are instrumentalities of the government.¹³²

State-owned enterprises (“SOEs”) are a great example. With the rise of emerging markets like China and India, the global share of major corporations that are state owned has increased. In 2014, 23% of the Global Fortune 500 companies were state owned, up from 9% in 2005.¹³³ Without text or legislative history supporting this assertion, enforcement officials have made clear that they consider majority state-owned enterprises to be instrumentalities.¹³⁴ In some enforcement actions, prosecutors have even prosecuted defendants for payments to employees of companies in which a foreign government owns a *minority* stake.¹³⁵ This breadth of enforcement and uncertainty about who is a public official creates practical problems:

The practical consequence is that it can be impossible for companies subject to the FCPA to know with certainty whether a company it

124. 15 U.S.C. § 78dd-1(f)(1)(A) (2012).

125. Yockey, *supra* note 35, at 820.

126. *Id.*

127. *Id.*

128. See John Walton et al., *Map: Which Country Pays the Most Bribes?*, BBC (July 9, 2013), <http://www.bbc.com/news/business-23231318>.

129. See Mike Koehler, *The Foreign Corrupt Practices Act Under the Microscope*, 15 U. PA. J. BUS. L. 1, 41 n.139 (2012).

130. Murphy, *supra* note 85, at 244.

131. See *id.*

132. See *id.*

133. PWC, STATE-OWNED ENTERPRISES: CATALYSTS FOR PUBLIC VALUE CREATION? 6 (2015); see also *id.* at 4 (“SOEs . . . appear to be an enduring feature of the economic landscape and will remain an influential force globally for some years to come.”).

134. Murphy, *supra* note 85, at 244–45.

135. *Id.*

does business with falls within this definition. Can you buy the salesman a fancy dinner in the hope of swaying him to buy your products . . . ? Can you even bring coffee and donuts to the pitch meeting? These are real problems when you can't determine whether the person across the table is a foreign official.¹³⁶

There is also uncertainty concerning how far the term “employee” extends. If a state-owned enterprise is an instrumentality, does that make every employee of it a foreign official? Is a doctor at a public hospital a foreign official? What about the janitor?¹³⁷ We do not know the legal answer to those questions, because these cases are seldom litigated in open court, but the DOJ and SEC have answered them in the affirmative.¹³⁸

Enforcers have also treated government contractors as foreign officials.¹³⁹ This can make life essentially impossible in some developing countries. For example, in much of India, “toll collectors,” who are under government contract, wait along certain roads, and do not allow cars to pass without payment of tolls.¹⁴⁰ These collectors are notorious for charging more than the government toll and keeping the difference.¹⁴¹ It is hard to imagine doing business in a country without being able to travel it freely; what is a business person to do if that forces her to violate the FCPA?¹⁴²

Many of these creative applications of the term foreign official are not the exception. If anything, they have become the norm. From 2009 to 2014, depending on the year, 42% to 81% of corporate enforcement actions entailed employees of state-run or state-owned companies.¹⁴³ Despite all of these enforcement actions, the courts have unsurprisingly had few contested cases with which to set precedent. Only one of the thirteen circuits has ever considered the issue of when a state-owned enterprise may be an instrumentality, and its opinion has been strongly criticized.¹⁴⁴

136. *Id.*

137. Beverley Earle & Anita Cava, *When Is a Bribe Not a Bribe?: A Re-Examination of the FCPA in Light of Business Reality*, 23 *IND. INT'L & COMP. L. REV.* 111, 112 (2013).

138. Mukasey & Dunlop, *supra* note 119, at 32 (“Both DOJ and the SEC consider all employees of an instrumentality—regardless of their position—‘foreign officials.’ This means that, in theory, payments to low-level employees (such as clerks, purchasing staff, spec writers) at an entity in which a foreign government has partial—even minimal—ownership could result in FCPA liability.”).

139. Sundar Narayanan, *Is Your Next Compliance Problem at a Toll Booth in Delhi?*, *FCPA BLOG* (Jan. 20, 2016, 9:28 AM), <http://www.fcpublog.com/blog/2016/1/20/sundar-narayanan-is-your-next-compliance-problem-at-a-toll-b.html>.

140. *See id.*

141. *See id.*

142. *See id.* (explaining why Indian toll collectors as contractors likely qualify as foreign officials and why payments to them probably would not be protected as grease payments).

143. Mike Koehler, *The “Foreign Officials” of 2014*, *FCPA PROFESSOR* (Jan. 14, 2015), <http://fcprofessor.com/the-foreign-officials-of-2014>.

144. *See, e.g., id.*; Mike Koehler, *11th Circuit “Foreign Official” Decision—Perspective Including as to the Court’s Flawed Reasoning*, *FCPA PROFESSOR* (June 12, 2014), <http://fcprofessor.com/11th->

2. Mens Rea

i. What Does “Corruptly” Mean?

The mens rea requirement of “corruptly” is vague, and the FCPA does not define it.¹⁴⁵ *United States v. Liebo* is the only federal appellate opinion to take up the meaning of “corruptly,” and it provides no help.¹⁴⁶ In *Liebo*, the defendant was convicted for giving honeymoon airplane tickets to a consular at the Niger Embassy in Washington DC.¹⁴⁷ The defendant argued that he was entitled to an instruction that if the jury found he intended only to gift the consular, then there was no corrupt motive.¹⁴⁸ The Eighth Circuit rejected that claim, but its holding did little aside from further confuse observers as to what the word “corruptly” meant.¹⁴⁹ It upheld a jury instruction “that ‘an act is “corruptly” done if done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.’”¹⁵⁰ The act must already be voluntary and intentional to satisfy the other mens rea requirements of the FCPA, so those words do nothing to explain what the word “corruptly” adds.¹⁵¹ “[B]ad purpose” is completely unhelpful.¹⁵² And the intent to do something unlawful (i.e. something that would violate the FCPA) is totally circular.¹⁵³ It does not tell us what mental state violates the FCPA.¹⁵⁴

ii. The Blurry Line Between the Other Two Mens Rea Elements

It is enforcement officials’ treatment of the anti-bribery provisions’ two other mental states that is particularly troubling. The FCPA states a bribe must be for the purpose of influencing a foreign official to commit a qualifying act, such as giving the defendant an “improper advantage” (hereafter called the “improper advantage” requirement).¹⁵⁵ And inducing the qualifying act must be for the purpose of “obtaining or retaining business . . . or directing

circuit-foreign-official-decision-perspective-including-as-to-the-courts-flawed-reasoning (explaining that the Eleventh Circuit focused on pre-enactment rather than enacting legislative history in allowing SOEs to qualify as instrumentalities under certain circumstances).

145. See 15 U.S.C. § 78dd-1(f) (2012).

146. *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991); ROBERT W. TARUN, BASICS OF THE FOREIGN CORRUPT PRACTICES ACT: WHAT EVERY GENERAL COUNSEL, TRANSACTIONAL LAWYER AND WHITE COLLAR CRIMINAL LAWYER SHOULD KNOW 4 (2006).

147. *Liebo*, 923 F.2d at 1310.

148. *Id.* at 1312.

149. *Id.*; see Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 270 (1997).

150. *Liebo*, 923 F.2d at 1310.

151. Salbu, *supra* note 149.

152. *See id.*

153. *See id.*

154. *See id.*

155. *See supra* Section II.C.1.iii.

business to, any person” (hereafter called the “business purpose” requirement).¹⁵⁶ This double mens rea requirement differentiates the FCPA from the OECD Convention, which requires a showing of only one of the two.¹⁵⁷ Congress considered scrapping the double requirement in 1998, but decided not to.¹⁵⁸

These two provisions are vague—in part because they use and do not define unclear terms like “improper.”¹⁵⁹ The greater confusion though surrounds the interplay between the “improper advantage” and “business purpose” requirement.¹⁶⁰ Can the business the company receives be the improper advantage, or are those two requirements separate?¹⁶¹ The DOJ has actually taken it a step further and argued that it only has to prove one of the two requirements, irrespective of the plain language and legislative history contradicting that assertion.¹⁶²

United States v. Kay is the only federal appellate opinion which interprets the interplay between the “improper advantage” and “business purpose” requirements.¹⁶³ In *Kay*, the defendants bribed Haitian customs officials for reduced customs and sales taxes.¹⁶⁴ Federal prosecutors argued that a corrupt payment merely to “secur[e] any improper advantage” was enough to satisfy all FCPA anti-bribery mens rea elements.¹⁶⁵ Because this kind of bribe to customs officials would always provide an improper advantage, prosecutors argued no further mens rea showing was required.¹⁶⁶ Noting that the FCPA’s plain language and legislative history flatly contradicted that argument, the Fifth Circuit rejected it.¹⁶⁷ It allowed the indictment to go forward, but held: “[B]ribes paid to foreign officials in consideration for unlawful evasion of customs duties and sales taxes *could* [violate the FCPA] . . . [only if it is] shown that the bribery was intended to produce an effect . . . that would ‘assist in obtaining or retaining business.’”¹⁶⁸

Despite the FCPA’s text, history and the ruling in *Kay*, many federal enforcement officials still claim any corrupt payment to secure an improper advantage is enough.¹⁶⁹ The DOJ Guidelines say that.¹⁷⁰ Incredibly, the

156. See 15 U.S.C. § 78dd-1 (2012); *supra* Section II.C.1.iii.

157. See *supra* Section II.C.1.iii.

158. See *supra* notes 71–72 and accompanying text.

159. See 15 U.S.C. § 78dd-1.

160. See O’SULLIVAN, *supra* note 45, at 532.

161. See *id.*

162. See *infra* notes 165–66 and accompanying text.

163. Koehler, *supra* note 67, at 5.

164. *United States v. Kay*, 359 F.3d 738, 743 (5th Cir. 2004).

165. *Id.*

166. *Id.*

167. *Id.* at 756.

168. *Id.*

169. Koehler, *supra* note 67, at 5.

170. *Id.*; U.S. DEP’T OF JUSTICE, *supra* note 20, at 4.

Guidelines actually cite *Kay* as supporting this assertion.¹⁷¹ Even more worrisome, the DOJ Guidelines slightly misrepresent the language of the FCPA.¹⁷² Here is the mens rea section of the FCPA as quoted in the Guidelines:

anything of value to

any foreign official for purposes of

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such [covered defendant] in obtaining or retaining business for or with, or directing business to, any person.¹⁷³

In the real text of the FCPA, “in order to assist such [covered defendant] in obtaining or retaining business” is on its own line—making it clear that it applies to both sections (A) and (B).¹⁷⁴ By lumping “obtaining or retaining business” in with section (B), the DOJ supports its assertion that section (A) stands alone, and any payment to obtain “any improper advantage” violates the FCPA, whether or not it attempts to “obtain [] or retain [] business.”¹⁷⁵ But the statute requires the payment do both.¹⁷⁶

A number of recent DOJ and SEC enforcement actions conform to this expansive view.¹⁷⁷ In *United States v. Panalpina World Transport Ltd.*, many counts of the indictment concerned payments to foreign tax and customs officials, and the DOJ made little effort to even explain how they met the business purpose requirement.¹⁷⁸ In several of these cases, the indictment

171. Koehler, *supra* note 67, at 5; U.S. DEP’T OF JUSTICE, *supra* note 20, at 4.

172. Mike Koehler, *FCPA Guidance Rewrites the FCPA*, FCPA PROFESSOR (July 16, 2013), <http://fcpaprofessor.com/fcpa-guidance-rewrites-the-fcpa>.

173. *Id.* (quoting U.S. DEP’T OF JUSTICE, *supra* note 20, at 92).

174. *See* 15 U.S.C. § 78dd-1 (2012); Koehler, *supra* note 172; *supra* Section II.C.2.ii.

175. Koehler, *supra* note 172.

176. *See supra* notes 160–62 and accompanying text.

177. PHILIP UROFSKY & DANFORTH NEWCOMB, RECENT TRENDS AND PATTERNS IN FCPA ENFORCEMENT 1 (2011), <http://fcpa.shearman.com/utills/view.php?id=5e13bd87afdb6375d24106e9be4c1954&a=b11eedc840b3164050e7efa3efd6bcod> (“In several cases . . . such as *Pride International* and *Tidewater*, the connection of the alleged conduct to ‘obtaining or retaining business,’ a critical element of the statute was not pleaded or, worse, was pled in a way that suggests that virtually any bribe that improves a company’s profitability is sufficient—a result that is not consistent with established precedent and the language of the statute.”).

178. *Id.* at 13 (citing Indictment, *United States v. Panalpina World Transp. Ltd.*, No. 4:10-cr-00769 (S.D. Tex. Nov. 4, 2010), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/11-04-10panalpina-world-info.pdf>).

actually quoted the broader OECD language instead of the FCPA language. For example, the conspiracy charge in *United States v. Pride Int'l* accused the defendant of payments “to obtain other favorable treatment,” language which appears in the OECD Convention but not the FCPA.¹⁷⁹ The *In Re Noble Corp.* NPA pleading seemingly accused the defendant of satisfying either the business purpose or the improper advantage requirement, but not both.¹⁸⁰ The SEC has been guilty of similar conduct in cases such as *SEC v. Tidewater*.¹⁸¹ Other enforcement actions have very much complied with the holding in *Kay*, but that only further confuses observers about what the DOJ and SEC think the FCPA’s mens rea elements mean.¹⁸² As usual, these cases were resolved out of court, so the government was not forced to defend its shifting interpretations.¹⁸³

United States v. Kay is the best available authority on the FCPA’s two major mens rea requirements.¹⁸⁴ If the DOJ and SEC followed it consistently, we would at least know they agreed that the “business purpose test” and “improper advantage” were separate requirements. But we would still be confused about exactly what these requirements mean because *Kay* is a confusing opinion.¹⁸⁵ Its holding states that payments like the defendants’ payments “could (but do not necessarily) come within the ambit of the statute[,]”¹⁸⁶ since the payments “can provide an unfair advantage over competitors and thereby be of assistance to the payor in obtaining or retaining

179. *Id.* at 14 (quoting Indictment at 19, *United States v. Pride Int'l, Inc.*, No. 4:10-cr-766 (S.D. Tex. 2010), <https://www.justice.gov/archive/opa/documents/pride-intl-info.pdf>).

180. *Id.* (citing Noble Non-Prosecution Agreement, DOJ and Noble Corp. (Nov. 4, 2010), at *A-1, <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/11-04-10noble-corp-mpa.pdf>).

181. *Id.* at 14 n.4.

182. *Id.* at 15 (“[I]n *Alliance One*, the DOJ explicitly tied bribes of tax inspectors who had ‘threatened to shut down’ one of the company’s subsidiaries, stating that the purpose of the bribes was ‘to influence the acts and decisions of the Kyrgyz Tax Inspection Police and to secure DIK’s continued ability to conduct its business in Kyrgyzstan.’ It is thus not clear whether the government views all payments to reduce taxes as being ‘to assist in obtaining or retaining business,’ an interpretation contrary to *Kay*, or whether these particular reductions in taxes have some clear connection, not set out in the pleadings, to obtaining or retaining business under a more common understanding, e.g., a contract, a project, or a sale.”).

183. See Press Release, U.S. Dep’t of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than \$156 Million in Criminal Penalties; SEC and Companies Agree to Civil Disgorgement and Penalties of Approximately \$80 Million (Nov. 4, 2010), <https://www.justice.gov/opa/pr/oil-services-companies-and-freight-forwarding-company-agree-resolve-foreign-bribery>.

184. See *supra* notes 163–69 and accompanying text.

185. See Irvin Nathan, *Is Bribing Foreign Tax Collectors a Federal Crime? The Fifth Circuit Says Maybe Yes, Maybe No*, 11 BUS. CRIMES BULL. 1, 4 (2004) (“The decision leaves American companies and their counsel at sea as to whether or not certain types of payments to foreign officials violate the statute.”).

186. *United States v. Kay*, 359 F.3d 738, 740 (5th Cir. 2004).

business.”¹⁸⁷ The Court did little to explain what this holding meant.¹⁸⁸ Thus, the business purpose and improper advantage requirements are emblematic of many of the problems with the FCPA in general: The statute is vague. Because cases are resolved out of court, we get few opinions interpreting it. An unhelpful opinion may therefore remain the only authority. And if enforcement officials choose to ignore it, there will be little judicial oversight to stop them.

3. What is a Thing of Value?

To violate the FCPA, the recipient must receive a “thing of value.”¹⁸⁹ The FCPA does not define “thing of value,” and the legislative history does little to clarify its meaning.¹⁹⁰ This leaves open a number of questions such as how valuable an item must be to be a “thing of value.”¹⁹¹ Per usual, the DOJ has taken this ambiguity in the statute to mean Congress must have intended the broadest possible application.¹⁹² The DOJ has declined to set a *de minimus* rule (such as a gift worth \$5 or less is not a thing of value as a matter of law).¹⁹³ That is already a broad application because it means that theoretically buying someone a latte at Starbucks could violate the FCPA. But the DOJ has gone even further, and interpreted “thing of value” to apply to an item of no value, if the recipient could subjectively value it.¹⁹⁴ It also claims the item need not be tangible.¹⁹⁵

A broad and subjective standard like this causes much uncertainty. Whether a recipient would subjectively value something depends both on the eccentricities of the recipient and the prosecutor making charging decisions.¹⁹⁶ In 2004, the SEC accused Schering-Plough Poland of failing to properly document a charitable contribution to a local organization.¹⁹⁷ The founder of the organization was the director of a public health fund, which subsidized Polish hospitals’ pharmaceutical purchases.¹⁹⁸ As FCPA expert Mike Koehler explained, no “tangible monetary benefit accrued to the Director [but] . . . the donation was a thing of value because [it] . . . provided him with an intangible benefit of enhanced self-worth or prestige.”¹⁹⁹

187. *Id.* at 749.

188. *See id.*

189. 15 U.S.C. § 78dd-1 (2012).

190. Koehler, *supra* note 113, at 914–15.

191. *See id.* at 914.

192. *See id.* at 914–15.

193. *Id.* at 914.

194. *Id.* at 914–15.

195. *Id.*

196. *See id.*

197. *Id.* at 915.

198. *Id.*

199. *Id.* at 915–16.

Although DOJ officials claim the FCPA empowers them to prosecute for items worth \$1 or \$2,²⁰⁰ they have sometimes said they would not do so as a matter of discretion. For example, Deputy Assistant Attorney General Greg Andres told Congress the DOJ would never “prosecute[] somebody for giving a cup of coffee to a foreign official, a martini, two martinis, a lunch, a taxi ride, or anything like that.”²⁰¹ That kind of assurance is of little help, in part because it is not binding. At the same hearing, former U.S. Attorney General Michael Mukasey responded with his own testimony:

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.²⁰²

This anecdote illustrates the uncertainty vague criminal statutes like the FCPA create for companies as they operate in countries without our legal tradition, and especially the impact that uncertainty has on company profit.²⁰³

4. What Is the Difference Between a Bribe and a Grease Payment?

How to apply the FCPA's grease payments exception is particularly unclear.²⁰⁴ Grease payments are only allowed if they are made to “expedite or to secure the performance of a routine governmental action.”²⁰⁵ The DOJ Guidelines require and the FCPA legislative history indicates the government action must be nondiscretionary.²⁰⁶ Even if the defendant is operating under perfect information, it is very hard to guess at what a court or prosecutor would view as routine or discretionary. What percentage of the time must an act occur for it to be routine? If a defendant is making a payment to an official

200. See U.S. DEP'T OF JUSTICE, *supra* note 20, at 14–15.

201. 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, 112th Cong. 56–57 (2011).

202. *Id.*; see also Koehler, *supra* note 1, at 93 (“FCPA enforcement in 2016 was . . . notable given the wide spectrum of enforcement actions. For instance, there were FCPA enforcement actions . . . that alleged egregious instances of corporate bribery executed at the highest levels of a company, as well as enforcement actions finding bribery based on allegations of ‘golf in the morning and beer-drinking in the evening’ and internship and hiring practices.”).

203. Earle & Cava, *supra* note 137, at 148–49.

204. See *supra* notes 77–81 and accompanying text.

205. 15 U.S.C. § 78dd-2 (2012).

206. H.R. REP. NO. 95-640, at 8 (1977), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/housepr-95-640.pdf>; U.S. DEP'T OF JUSTICE, *supra* note 20, at 25.

to get him to do something, the official presumably has the power not to do it, or there would be no need for payment. So how much power must the official have before the act becomes discretionary? Georgia Tech Business Professor Steven Salbu gives this example:

In some countries, officials sporadically demand payment for the release of a foreign guest's luggage at the border. [T]his type of payment[']s . . . status under the FCPA . . . is uncertain [O]ne could reasonably characterize customs practices as routine On the other hand, the discretion exercised in any sporadic behavior is arguably inconsistent with the concept of a routine action. Because the exacting of payment occurs inconsistently, it has elements of harassment and potential discrimination that ordinarily are missing in truly "routine" payments. This ambiguity creates a quandary for the international business traveler: should she pay a bribe for the release of her personal belongings? In so doing, is she committing a crime under U.S. law . . . ? [H]ow many basically law-abiding American citizens would refuse to pay in this setting . . . ? Moreover, will Americans who are risk averse be dissuaded by such quandaries from transacting business abroad?²⁰⁷

Even if we had clear standards for what qualifies as routine and discretionary, corporations often operate under uncertain situations, particularly in unfamiliar cultures and/or developing countries.²⁰⁸ A corporate officer may be asked by a government official for a payment to expedite a decision.²⁰⁹ In many developing countries, government officials can otherwise be very slow, and the business world moves fast. Thus, in some developing countries it may be normal to pay officials to decide quickly.²¹⁰ However, the American businessperson may have a hard time telling whether payment would be routine in this particular circumstance.²¹¹ It may also be unclear whether the official is only asking for a bribe in return for a quick response

207. Salbu, *supra* note 149, at 265–66.

208. *See id.* at 266–67.

209. *See id.*

210. *See* Nandita Bose, *Insight: 'Speed Money' Puts the Brakes on India's Retail Growth*, REUTERS (May 4, 2013, 11:20 PM), <http://www.reuters.com/article/us-india-retail-insight/insight-speed-money-puts-the-brakes-on-indias-retail-growth-idUSBRE94400T20130505> (“In India, [p]ermits needed to open a store range from the mundane, such as a trade license, to the petty: lighted shelves require a separate permit, and even a shop window needs a license. Want to play music in the store? That requires a license. So does selling cosmetics or providing valet parking. A convenience store that sells basics such as milk, vegetables, cereal, bread, eggs, meat and baby food will require a minimum of 29 licenses from nearly 20 different authorities, according to a list of licenses compiled by the Retailers Association of India and obtained by Reuters Middlemen sell speed. They provide access to government officers who can sign off on permits as soon as they are paid.”).

211. *See* Salbu, *supra* note 149, at 266–67.

(nondiscretionary) or a favorable response (discretionary).²¹² Frustrated by these uncertainties, most American companies have now banned grease payments altogether for fear that a grease payment may be later construed as a bribe by the DOJ.²¹³

Once again, there are very few cases, so enforcement agencies get to decide what the statute means. The DOJ Guidelines do not even explain how the DOJ understands the difference between a discretionary and nondiscretionary act.²¹⁴ They tell us little about what a grease payment is other than that the DOJ interprets the exception “narrow[ly].”²¹⁵ Beyond interpreting it narrowly, several scholars have observed that enforcement agencies seem “to be reading the [grease] exception out of the statute.”²¹⁶ The DOJ’s 2008 charges against Westinghouse Air Brake Technologies Corporation (“Wabtec”) are a strident example:

The non-prosecution agreement entered into with the DOJ states that Wabtec’s Indian subsidiary had made payments, some as low as \$67.00, to ensure that the product inspections would be scheduled and performed. Nothing in the non-prosecution agreement indicates that the payments were made to ensure a positive outcome for Wabtec; rather, it appears that the payments were made so that the inspections would be scheduled and performed. It is unclear why these payments would not qualify as facilitating or expediting payments to secure the performance of routine governmental action. Similarly, Wabtec’s Indian subsidiary made payments in order to obtain certificates usually issued upon delivery of conforming products.²¹⁷

B. THE FCPA IS IMPERIALIST.

The United States established the FCPA because rampant bribery hurt the developing world.²¹⁸ The United States had an altruistic and vested interest in helping the developing world root out this problem; at the very

212. *See id.*

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

214. F. Joseph Warin et al., *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VA. L. & BUS. REV. 33, 63 (2010).

215. U.S. DEP’T OF JUSTICE, *supra* note 20, at 25.

216. *Id.*

217. *Id.* at 63–64; *see also* Yockey, *supra* note 35, at 819 (“Some . . . challenged payments were made to schedule pre-shipping product inspections and to have certificates of delivery issued for certain products. Because the matter ultimately settled through a non-prosecution agreement and no formal charging document was ever filed, the DOJ’s theory as to why the latter payments did not fall within the facilitation payment exception remains unclear. If the payments were made simply to have certificates of delivery issued or to schedule inspections, those acts would seemingly qualify as ‘routine governmental actions.’”).

218. *See supra* Section II.A.

least, the United States did not want to make it worse.²¹⁹ FCPA enforcement has exploded in recent years, partly because it yields huge settlements and is relatively easy.²²⁰ If foreign bribery mostly harms foreign countries, it makes no sense for the United States to collect the penalty, but that is what happens.²²¹ The bribery is generally illegal in the country where it occurs,²²² and that is the country that should get the money from the fine, if any country should.

Not only does the United States get the money from the fines and settlements, it makes foreign companies pay much more than American defendants.²²³ Nine out of ten of the largest FCPA settlements ever were against foreign companies.²²⁴ In data collected by Duke Law Professor Brandon Garrett concerning corporate criminal prosecutions (not limited to the FCPA though it is one of the top crimes), courts fined foreign companies \$35 million, and foreign companies paid in total close to \$66 million.²²⁵ Meanwhile, courts fined domestic companies \$4.7 million, and they paid \$12 million.²²⁶ After controlling for types of crimes and companies, foreign companies still faced fines more than seven times higher and paid nine times as much in total than domestic firms.²²⁷ Foreign corporations are also substantially less likely to receive DPAs and NPAs (deferred and non-prosecution agreements).²²⁸

219. See *supra* Section II.A.

220. See Mike Koehler, “*Totally* Milking the FCPA Cash Cow?”, FCPA PROFESSOR (June 3, 2013), <http://fcpaproffessor.com/totally-milking-the-fcpa-cash-cow/>; see also Lisa Lacy, *The Rise and Rise of FCPA*, BUS. INSIDER (Mar. 24, 2011, 8:45 AM), <http://www.businessinsider.com/the-rise-and-rise-of-fcpa-2011-3> (“[FCPA enforcement has spiked because it is] . . . quite simply, lucrative for the government . . . ‘You have to think of the SEC and the DoJ as businesses,’ [Attorney David] Krakoff asserts. ‘They are looking for growth areas, too.’”); 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> (“Many of these are ‘cash cow’ cases for Justice . . . It’s a government program that is profitable to the U.S. Treasury.” (quoting Mike Koehler)); *supra* Part I; *supra* Sections II.B & III.A.

221. See Wayne, *supra* note 220.

222. See, e.g., Chris MacDonald, *Bribery is Still a Challenge for International Business*, CANADIAN BUS. (Mar. 26, 2014), <http://www.canadianbusiness.com/blogs-and-comment/bribery-is-still-a-challenge-for-international-business> (“[B]ribery is illegal just about everywhere.”); Alexandra Wrage, *Bribery is Bad . . . For Business*, FORBES (Jan. 25 2017, 10:09 AM), <https://www.forbes.com/sites/alexandrawrage/2017/01/25/bribery-is-bad-for-business> (“[B]ribery is illegal everywhere.”).

223. BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* 219 (2014).

224. Wayne, *supra* note 220.

225. GARRETT, *supra* note 223, at 220.

226. *Id.*

227. *Id.*

228. *Id.* at 219–20 (“Only about one-fifth of the deferred prosecution and non-prosecution agreements involved foreign companies . . . And of the foreign companies prosecuted between 2001 and 2012, [not only for FPCA violations though that is one of the top crimes they are prosecuted for] less than one-fifth received deferred prosecution or non-prosecution agreements . . .”).

The DOJ has even gone after corporations after they have been fined for the same conduct by the country where the bribery occurred. In *United States v. Statoil*, U.S. attorneys prosecuted a Norwegian company that had already been fined for the same acts in the country where the bribe was paid.²²⁹ The defendant had already been punished, and the money had gone to the country hurt by the bribery.²³⁰ If the conduct had been punished, and the harm to the victim repaired, it is hard to see what motive the DOJ might have had aside from revenue.

The FCPA's application to foreign persons is shockingly broad in scope. Foreign companies may be prosecuted for undertaking any action inside the United States in furtherance of a bribe overseas.²³¹ They may also be prosecuted if they "make use of the mails or any means or instrumentality of interstate commerce" "in furtherance of" a bribe, even having never set foot in the United States.²³² Therefore, a Nigerian company with no offices, clients, or operations outside of Nigeria could use an American bank account electronically to pay off a Nigerian official and find itself within the bounds of the FCPA. The company could even implicate the FCPA by sending an email or making a phone call in furtherance of the bribe if the email or call routed through the United States.²³³ Data Center Frontier and DatacenterHawk estimate that as much as 70% of global internet traffic passes through a single county in West Virginia alone.²³⁴

These are not purely hypotheticals. In the 2014 prosecution of BNP Paribas, federal prosecutors claimed jurisdiction solely because bribes were paid in U.S. currency.²³⁵ The defendant wound up paying almost \$9 billion in fines.²³⁶ What business is it of the United States if a solely Nigerian company wishes to bribe a Nigerian official regarding purely Nigerian business? Apparently dissatisfied with its reach, the DOJ has officially stated that, while it has no case law to support the assertion, it proceeds under the theory that it would also have "jurisdiction whenever a foreign company or national causes an act to be done within the territory of the United States by any person acting as that company's or national's agent."²³⁷

229. *Id.*

230. *Id.*

231. 15 U.S.C. § 78dd-3(a), (f)(1) (2012).

232. *Id.*; see Thomas J. Bussen, *Midnight in the Garden of Ne Bis In Idem: The New Urgency for an International Enforcement Mechanism*, 23 CARDOZO J. INT'L & COMP. LAW 485, 488-89 (2015).

233. See Bussen, *supra* note 232, at 488-89.

234. Elizabeth Chang & Chris Alcantara, *Northern Virginia, Center of the (Data) World*, WASH. POST (July 5, 2017), <https://www.washingtonpost.com/apps/g/page/lifestyle/northern-virginia-center-of-the-data-world/2226>.

235. Bussen, *supra* note 232, at 497-98.

236. *Id.*

237. Richard L. Cassin, *The Long, Strong Arm of the FCPA*, FCPA BLOG (Aug. 27, 2007, 1:45 AM), <http://www.fcpablog.com/blog/2007/8/27/the-long-strong-arm-of-the-fcpa.html> (quoting U.S.A.M., 9 CRIMINAL RESOURCE MANUAL § 1018 (2000)).

Almost every country bans bribery, but not every country views bribery as exactly the same thing. For example, in Confucian countries, gift giving is an essential part of how strangers gradually develop *guanxi*, which is necessary for the parties to work together and trust each other.²³⁸ Not every benefit Americans would consider a bribe is a bribe in China, though some certainly are.²³⁹ The written laws affirmative defense²⁴⁰ may be a clumsy attempt to account for this, but it does not work. In few countries (particularly developing ones) is the exact word for word text of the law given quite the same respect it is in America.²⁴¹ Many developing nations focus much more on common practice and relationships, and the FCPA explicitly says that common behavior in the country is not a defense.²⁴² As is the case in most Confucian societies—even developed ones—“[t]he Chinese legal tradition,

238. Murphy, *supra* note 85, at 236. *Guanxi* is a Chinese word roughly translating to “personal relationship.” It refers to the way in which Chinese people intersperse gifts, favors and formal work collaboration over time to develop trust. Chinese people usually strongly prefer to do business with people they have developed *guanxi* with, both for cultural reasons and because of the lack of a robust legal system. Without the certainty that a court will enforce a contract, Chinese people rely on mutual trust to ensure that the other side will perform her end of the bargain. *See, e.g.*, John Grossmann, *What Does It Take To Do Business in China?*, N.Y. TIMES (Sept. 4, 2013, 11:08 AM), <https://boss.blogs.nytimes.com/2013/09/04/what-does-it-take-to-do-business-in-china>; Dan Levin, *East Meets West, But It Takes Some Practice*, N.Y. TIMES (Dec. 21, 2010), www.nytimes.com/2010/12/22/business/global/22chinatrain.html; *see also* Warin et al., *supra* note 214, at 37 (“The Chinese approach toward business transactions greatly values personal relationships and requires a certain level of gift exchange that may strike many Westerners as inappropriate.”). Similar phenomena are found in other Confucian countries. *See, e.g.*, Choe Sang-Hun, *Rethinking Weddings that Come with Cashiers*, N.Y. TIMES (Nov. 17, 2009), <http://www.nytimes.com/2009/11/18/world/asia/18iht-gifts.html>.

239. *See* Warin et al., *supra* note 214, at 37–38.

240. *See supra* Section II.C.1.iv.

241. *See e.g.*, RICHARD D. LEWIS, WHEN CULTURES COLLIDE: LEADING ACROSS CULTURES 5 (2006) (“As the globalization of business brings executives more frequently together, there is a growing realization that if we examine concepts and values, we can take almost nothing for granted. The word contract translates easily from language to language, but like truth, it has many interpretations. To a Swiss, Scandinavian, American or Brit, a contract is a formal document that has been signed and should be adhered to. Signatures give it a sense of finality. But a Japanese businessperson regards a contract as a starting document to be rewritten and modified as circumstances require. A South American sees it as an ideal that is unlikely to be achieved but that is signed to avoid argument.” (emphasis omitted)); *id.* at 173 (“Italian flexibility in business often leads Anglo-Saxons to think they are dishonest. They frequently bend rules, break or get around some laws and put a very flexible interpretation on certain agreements, controls and regulations. There are many gray areas where shortcuts are, in Italian eyes, a matter of common sense.”); ROB GIFFORD, CHINA ROAD: A JOURNEY INTO THE FUTURE OF A RISING POWER 34 (2008) (“Tintin laughs, as if to say ‘who cares?’ and we talk about how practical and unideological the Chinese are. I tell them of the time I visited a racetrack outside Beijing where people were clearly placing bets on horses . . . I thought I would give it a try too, so I approached what looked like the betting window and said that I would like to place a bet. The woman told me that I couldn’t place a bet (betting is illegal in China, she confirmed), but if I wanted to, I could place a guess on one of the horses . . . So I put down twenty yuan . . . and stood cheering the horse on, hoping that my guess would win me some money.”).

242. *See* Murphy, *supra* note 85, at 228–29.

under the influence of Confucianism, has emphasized the necessity of integrating legal principles with evolving standards of virtue and morality.”²⁴³ An affirmative defense that considers only whether conduct is explicitly allowed by Chinese law (without regard for the culture’s views on “virtue and morality”) does not separate acts that would and would not be considered criminal in China. This cuts both ways: Chinese anti-bribery laws do not contain an exception for grease payments, so it is possible for an act inside China to violate Chinese law without violating the FCPA.²⁴⁴ Whether China chooses to go after bribery within its borders more strictly or more leniently should be a choice for the Chinese government. The FCPA is especially disturbing because it can even apply to a Chinese national bribing a Chinese official in China if the email or phone call routed through America.

IV. CONGRESS SHOULD REPEAL THE FCPA’S ANTI-BRIBERY PROVISIONS AND REPLACE THEM WITH A MODIFIED ACCOUNTING REQUIREMENT

It is much easier to make accounting requirements clear than anti-bribery requirements. Legislators have a hard time dreaming up every possible grey area hypothetical for foreign bribery and defining exactly when someone should go to jail in each case. But it is easy to simply require corporations to report all such cases, and corporations should be unafraid to report what they know is not a crime. Thus, Congress should repeal the anti-bribery provisions and apply a modified accounting requirement to all groups currently touched by the anti-bribery provisions. The FCPA’s current accounting provisions apply only to issuers and require them to document a host of transactions having nothing to do with the FCPA.²⁴⁵ Many aspects of this Note’s proposed accounting requirement are inspired by the FCPA’s accounting provisions. Some of the language is verbatim, and the proposal cites where it takes language or ideas from the FCPA’s current accounting provisions. However, this proposed accounting requirement is separate from and does not affect the FCPA’s current accounting provisions, which serve a different purpose and would remain in force. This proposal does however largely repeal the anti-bribery provisions.

A. PROPOSAL

The proposed modified accounting requirement will state as follows:

- (a) This accounting requirement applies to “any issuer which has a class of securities registered pursuant to section 781 of this title or which is required to file reports under section 780(d) of this

243. See *id.* at 240.

244. Warin et al., *supra* note 214, at 64.

245. See *supra* Section II.C.2.

title”²⁴⁶ and any domestic concern as defined in section 78dd-2(h)(1) of this title.

- (b) “Every issuer”²⁴⁷ and domestic concern “shall file with the Commission,²⁴⁸

in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate”²⁴⁹ to provide for transparency in payments to foreign officials—

1. “such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants”²⁵⁰ “as the Commission may prescribe”²⁵¹ if and only if their foreign payments satisfy requirements in Section 2.
2. Issuers and domestic concerns must report all payments within a single foreign country to that country’s national, state-level or equivalent, or local government; an entity 80% or more owned by these governments; or any employee of the country’s national, state-level or equivalent, or local government or an entity 80% owned by these governments, if the payments together total more than \$1,000 in a single year.
 - i. Payment in items also count toward the \$1,000, but according to the items’ market value (in the country where the payment was received and at the time it was received), not any subjective value the recipient might place on it.
 - ii. The burden of proof will be on the prosecution to prove the item’s market value at the time and in the country the payment was received, and prosecutors must also prove the defendant intended, knew, should have known or consciously disregarded a risk of the item’s value.
 - iii. Payments through intermediaries still count toward the \$1,000.

246. 15 U.S.C. § 78dd-1 (2012).

247. *Id.* § 78m.

248. “The term ‘Commission’ means the Securities and Exchange Commission” *Id.* § 78c(a)(15).

249. *Id.* § 78m.

250. *Id.* § 78m(a).

251. *Id.*

(c) Penalties

1. “Any issuer” or domestic concern that is an entity “that violates” the foregoing requirements “shall be fined not more than \$2,000,000.”²⁵²
2. “Any issuer” or domestic concern that is an entity “that violates” the foregoing requirements “shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Commission.”²⁵³
3. “Any officer, director, employee, or agent of an issuer,” or “[a]ny [domestic concern that is an individual or] officer, director, employee, or agent of” a domestic concern, “or stockholder acting on behalf of such issuer” or domestic concern, “who willfully violates” the foregoing requirements “shall be fined not more than \$100,000, or imprisoned not more than 5 years, or both.”²⁵⁴
4. “Any officer, director, employee, or agent of an issuer,” or “[a]ny [domestic concern that is an individual or] officer, director, employee, or agent of” a domestic concern, “or stockholder acting on behalf of such issuer,” or domestic concern “who violates” the foregoing requirements “shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Commission.”²⁵⁵

(d) The foregoing accounting requirements also bind “other persons,” (as defined in 15 U.S.C. § 78dd-3); however, only certain payments by “other persons” count towards the \$1,000.

1. For a payment to count toward the \$1,000, the payer must
 - i. make the payment while in the United States;
 - ii. order someone to make it while the person making the order is inside the United States; or
 - iii. order an agent to make the payment while inside the United States.

(e) After receiving and processing the information, the Commission shall publish—the payer; the amount of money; the reason for the payment; and the recipient’s information—for all payments that were required to be reported.

²⁵². *Id.* § 78ff(c)(1)(A).

²⁵³. *Id.* § 78ff(c)(1)(B).

²⁵⁴. *Id.* § 78ff(c)(2)(A).

²⁵⁵. *Id.* § 78ff(c)(2)(B).

1. The Commission may publish this information on its website or another print or electronic forum of its choice.
- (f) At the time of reporting, payers and/or payees may petition the Commission to redact or not publish a payment, subject to the following standard. The Commission should only redact or restrict publication as narrowly as possible to come within the ambit of the standard. The payer or payee must show:
1. Publication will harm the petitioner by disclosing or facilitating the discovery of its intellectual property, business strategy or tactics or other sensitive business information; and
 2. The payment would not have fallen within the original FCPA's anti-bribery provisions (as listed in 15 U.S.C. § 78-dd-1-3) because the actus reus or mens rea requirements were not met.
 3. If denied, the petitioner may appeal to an administrative law judge. The standard of review is abuse of discretion.
 4. Publication may not occur until this process is complete.
- (g) The Commission may also opt not to publish information if it views the publication as detrimental to the national security of any country or diplomatic relations between two or more countries, or if it believes publication will endanger anyone's physical safety.
- (h) Repeal—
1. The FCPA anti-bribery provisions as listed in 15 U.S.C. § 78-dd-1-3 are hereby repealed, except for the purposes of assessing petitions for redaction or nonpublication and for definitional purposes as listed in the foregoing paragraphs.
 2. The FCPA's original accounting provisions (which apply only to issuers) as listed in 15 U.S.C. § 78(m) are separate from and unaffected by this proposed statute. We hereby reaffirm that those accounting provisions serve a wide range of goals such as "the proper protection of investors and to insure fair dealing in the security"²⁵⁶ whereas this proposed statute serves a narrower purpose of providing for transparency in foreign payments to government officials. This proposed statute applies to a broader swath of defendants than 15 U.S.C. § 78(m), but also imposes much narrower reporting requirements.

256. *Id.* § 78(m).

B. EXPLANATION

This proposal addresses many of this Note's criticisms of the FCPA. It eliminates the need to determine what a "thing of value" is by substituting a bright-line test of \$1,000 per year. It requires reporting of payments over \$1,000, regardless of whether they meet the "corruptly," business purpose or improper advantage requirements, fall within the grease payment exception or either affirmative defense—eliminating the need to interpret those vague provisions. This proposal also addresses the need for a *de minimus* exception with the \$1,000 requirement. Aggregating the payments keeps defendants from making an end-run around the accounting requirement through a series of small payments.

The proposal eliminates the need to diagnose whether someone is a foreign official. It makes who qualifies as a covered recipient clearer by specifying that the recipient must either be the government or an entity 80% or more owned by the government. It eliminates the need to debate whether a nongovernment entity can qualify—now federal enforcement officials will have clear legal authority to go after SoEs with 80% or more ownership—and no basis to claim they can go after any other SoE. The proposal may still seem overbroad—particularly because a low-level government employee could still qualify as a covered recipient if the payment was large enough. But narrowing which types of employees qualify would introduce too much ambiguity and case-by-case analysis, which is exactly what this proposal seeks to eliminate. The good news is that a payment to a janitor at an 80% government owned entity will at most require disclosure. It will not be criminal so long as it is disclosed.

The caveats in section (d) of this proposal are designed to cabin the scope of the new FCPA's application to "other persons." It seems unlikely that Congress ever foresaw transactions occurring completely outside the United States and involving only foreigners to fall within the purview of the FCPA, just because an email or wire transfer routed through the United States.²⁵⁷ The proposed requirement that the payer either make the payment while in the United States, order the payment while in the United States, or order someone inside the United States to make the payment limits application to payments that involve the United States.

This proposal addresses the issue of imperialism because it favors transparency over intervention. Provided corporations disclose, the United States will not be able to prosecute or sue companies for engaging in foreign bribery. However, it will have handed the evidence to the country where the bribe occurred on a silver platter. Since the FCPA was based on the idea of protecting the American image abroad and helping the developing world rid itself of bribery, this tremendous favor to those countries will be more helpful

257. See *supra* Section III.B.

and reflect better on America than the status quo, where the United States takes the money. Rather than imposing American views about bribery on the other country, the country will now get to decide for itself whether to prosecute. The information will be publicly available, however, so if the people of the country view a certain act as a bribe, the government will be under pressure to prosecute. Rather than elite U.S. lawyers parsing the difference between a grease payment and a bribe, the people of the countries where the bribes occur will now decide whether the payment was a bribe according to their values. And the money from any judgment will go to the country that was hurt by the bribe rather than to the United States.

V. CONCLUSION

The FCPA started with laudable goals. Foreign bribery hinders development and reflects badly on the United States when our companies engage in it. The problem is that it is hard to prevent enforcement of such a statute from becoming arbitrary, and arbitrary it has become. Enforcement agencies are exploiting the FCPA in a way that is unfair to corporations and to foreign countries and individuals. Such an anti-bribery statute is no longer necessary. In today's globalized world where publicly available information travels so fast from one corner of the world to another, the United States no longer needs to be the investigator, jury and judge as to what kinds of payments abroad should be allowed. From here on out, it will be enough to just be the investigator, provide the information, and let the foreign governments decide what to do inside their own borders.