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## Taming the FCPA Overreach Through an Adequate Procedures Defense

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# TAMING THE FCPA OVERREACH THROUGH AN ADEQUATE PROCEDURES DEFENSE

DIETER JUEDES\*

## ABSTRACT

*Currently many American corporations must pursue and develop international business relationships. For these American firms, the Foreign Corrupt Practices Act (FCPA) is the most important U.S. law governing international commerce. The FCPA prohibits firms from bribing foreign officials for the purpose of obtaining or retaining business in a foreign country. Despite its infrequent use during the last quarter of the twentieth century, Department of Justice (DOJ) and Securities and Exchange Commission (SEC) enforcement actions under the statute have exploded in the last few years. Due to this increase in enforcement and the difficulties in complying with the FCPA, the anti-bribery statute has caused American firms to avoid foreign markets and prospective growth areas, creating a competitive imbalance for U.S. companies.*

*This Article proposes an adequate procedures defense as the best way to fix this imbalance and allow American corporations to operate efficiently overseas without the cloud of FCPA liability hanging over them. The defense would allow American firms to escape FCPA liability upon showing that they had adequate procedures in place designed to detect and prevent international bribery. To be sure, Congress has recently considered amending the FCPA to add a similar defense, and others have suggested that Congress take such action. However, this piece goes further in so much as it proposes specific statutory language that Congress could use in adopting such a defense and it establishes precise factors to be promulgated by the DOJ and SEC for determining whether a firm's procedure would be deemed "adequate." Lastly, the Article details projected outcomes associated with American firms being able to use the adequate procedures defense.*

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\* J.D., 2012, Marquette University Law School; B.S.E., 2009, University of Wisconsin Oshkosh. Many thanks are owed to Professor Ed Fallon for his guidance on the Article, to the *William & Mary Business Law Review* staff for its hard-work and excellent editing, and to Andrew Faltin and Kerry Doyle for providing feedback and insights. Additionally, thanks are owed to Professors Mike Koehler and Joseph Yockey, whose previous articles on the FCPA helped spark my interest on this topic and were used to gather background information for this Article. Most importantly, I would like to thank my wonderful fiancé, Holly, and my family for their incredible support and patience.

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## INTRODUCTION

To survive in today's complex commercial world, many American corporations must develop international business relationships and pursue transactional opportunities abroad.<sup>1</sup> For these American firms, the Foreign Corrupt Practices Act (FCPA)<sup>2</sup> is the most important United States (U.S.) law governing international commerce.<sup>3</sup> Passed in 1977, the FCPA prohibits American corporations (both public and private)<sup>4</sup> from paying bribes to foreign officials for the purpose of obtaining or retaining business in a foreign country.<sup>5</sup> To promote the anti-bribery ban further, the FCPA also requires that corporations with securities listed in the U.S. keep financial books and records that accurately reflect payment to foreign officials and maintain a system of internal accounting controls.<sup>6</sup> The books and records provision works in tandem with the bribery provision, as one (the bribery

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<sup>1</sup> Indeed, American firms are looking outside the United States in part because of the "increase in globalization and the saturation of domestic markets." Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 997 (2010) [hereinafter Koehler, *Façade*]; see also Ashby Jones, *Legal Maze's Murkiest Corners*, WALL ST. J., Dec. 24, 2012, at B1, B5 (explaining that American "companies are rely[ing] on markets outside the U.S. for an increasing percentage of revenue").

<sup>2</sup> Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd (2006).

<sup>3</sup> See Koehler, *Façade*, *supra* note 1, at 997.

<sup>4</sup> The FCPA's bribery prohibition is also applicable against U.S. citizens, foreign companies listed on a U.S. stock exchange, or any person who, while physically present in the U.S. pays, offers to pay, or promises to pay a foreign official anything of value to obtain or retain business. See 15 U.S.C. §§ 78dd-1(a)(1), 78dd-2(a)(1), 78dd-3(a)(1) (2006). However, this paper only focuses on the impact of the FCPA on American corporations and their subsidiaries. Notably, the Act is applicable to U.S. parent corporations for the actions of their foreign subsidiaries. See *The Lay Person's Guide to the Foreign Corrupt Practices Act Antibribery Provisions*, U.S. DEP'T OF JUSTICE, at 3, available at <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> [hereinafter DOJ, *Lay Person's Guide*]. FCPA enforcement actions have predominantly targeted American firms. See *Recent Trends and Patterns in FCPA Enforcement*, SHEARMAN & STERLING LLP, Feb. 13, 2008, at 2–4, available at [http://www.shearman.com/files/upload/FCPA\\_Trends.pdf](http://www.shearman.com/files/upload/FCPA_Trends.pdf).

<sup>5</sup> See 15 U.S.C. § 78dd-1 (2006). It is notable that with respect to U.S. companies, the FCPA has extraterritorial application—a violation can occur even if the prohibited conduct takes place entirely outside the U.S. *Id.* Congress passed the Act in 1977, in the wake of Watergate investigations, which revealed corporate bribery practices. STUART H. DEMING, *THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS* 1 (2005). According to the Department of Justice, "Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system." DOJ, *Lay Person's Guide*, *supra* note 4.

<sup>6</sup> See 15 U.S.C. § 78m(b)(2)(A)–(B) (2006).

provision) punishes an occurrence of bribery, while the other (the books and records provision) helps detect bribery.<sup>7</sup>

Generally, the Department of Justice (DOJ) enforces the criminal anti-bribery provision and willful violations of the books and records provision,<sup>8</sup> while the Securities and Exchange Commission (SEC) enforces the civil anti-bribery provision with respect to issuers.<sup>9</sup> The DOJ and SEC seek (and often times garner) monetary penalties or settlements for violations of the FCPA.<sup>10</sup> When sanctioning firms, as opposed to individuals, organizations charged with criminal violations of the anti-bribery provisions may face fines of up to \$2 million per violation.<sup>11</sup>

Despite the statute's infrequent use in its first twenty-five years,<sup>12</sup> the number of FCPA enforcement actions has greatly increased in the past six years.<sup>13</sup> The DOJ recently said that enforcing the FCPA is now one of its

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<sup>7</sup> See ANDREW WEISSMANN & ALIXANDRA SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 2 (2010) [hereinafter WEISSMANN & SMITH], [http://www.instituteforlegalreform.com/sites/default/files/restoringbalance\\_fcpa.pdf](http://www.instituteforlegalreform.com/sites/default/files/restoringbalance_fcpa.pdf).

<sup>8</sup> DOJ, *Lay Person's Guide*, *supra* note 4, at 2 ("The Department of Justice is responsible for all criminal enforcement.").

<sup>9</sup> See *id.* Because all criminal violations of the Act are conducted by the DOJ, the SEC may send a case to the DOJ for criminal prosecution. See Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 495 n.14 (2011).

<sup>10</sup> See Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 FORDHAM L. REV. 775, 793–94 (2011). Besides monetary fines, another potent sanction remains available to the DOJ for violations of the FCPA—debarment of the firm from future contracts with the U.S. government. This sanction is available under the Federal Acquisition Regulation (FAR). See FAR 9.406-5 (2010).

<sup>11</sup> See 15 U.S.C. §§ 78dd-2(g)(1)(A), 78dd-3(e)(1)(A), 78ff(c)(1)(A)–(2)(A) (2006). The SEC has a wide amount of discretion in determining the nature of its civil enforcement actions; the agency can seek fines, injunctions, or both of these remedies. See David C. Weiss, Note, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471, 478 (2009).

<sup>12</sup> See Daniel Chow, *China Under the Foreign Corrupt Practices Act*, 2012 WIS. L. REV. 573, 574 n.2 (noting that in 2003 the U.S. government initiated nine FCPA investigations).

<sup>13</sup> See, e.g., Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 389 (2010) [hereinafter Koehler, *Resurgence*] ("[D]uring the past decade, enforcement agencies resurrected the FCPA from near legal extinction."); Westbrook, *supra* note 9, at 494 (noting the "recent radicalization" of the FCPA's enforcement); see also Joseph Palazzolo, *U.S. Probes Motorola Solutions*, WALL ST. J., Sept. 27, 2011, at B8 ("In recent years, the SEC and Justice Department have enforced the FCPA aggressively and have added staff in their anti-bribery units."). In November 2010, Assistant Attorney General Lanny Breuer stated that "FCPA enforcement is stronger than it's ever been—and getting stronger." See Lanny Breuer, Assistant Attorney Gen., Dep't of Justice, Address at the 24th National Conference on the Foreign

top priorities—second only to fighting terrorism.<sup>14</sup> Indeed, in 2010, seventy-four enforcement actions were brought by the DOJ and SEC, and eight of the ten costliest FCPA-related settlements were reached.<sup>15</sup> There are a multitude of reasons for the increase in enforcement actions, including the increase in global business transactions,<sup>16</sup> the recent global financial crisis<sup>17</sup> and related U.S. corporate scandals,<sup>18</sup> and aggressive prosecution and regulation.<sup>19</sup>

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Corrupt Practices Act (Nov. 16, 2010) (transcript available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>).

<sup>14</sup> See Laurence A. Urgenson et al., *New Bumps and Tolls Along the Road to FCPA Settlements*, BUS. CRIMES BULLETIN, Nov. 1, 2009, at 1.

<sup>15</sup> *2010 Year-End FCPA Update*, GIBSON, DUNN, & CRUTCHER LLP (Jan. 3, 2011), <http://www.gibsondunn.com/publications/Documents/2010YearEndFCPAUpdate.pdf>. In 2011, the DOJ initiated twenty-three enforcement actions and the SEC initiated twenty-five, for a total of forty-eight. *United States: 2011 FCPA Enforcement Actions Reach Second-Highest Level*, DE BRAUW BLACKSTONE WESTBROEK (Feb. 1, 2012), <http://www.mondaq.com/unitedstates/x/162240/White+Collar+Crime+Fraud/2011+FCPA+Enforcement+Actions+Reach+SecondHighest+Level>. In 2012, the DOJ initiated eleven enforcement actions and the SEC initiated twelve enforcement actions, for a total of twenty-three. *2012 Year-End FCPA Update*, GIBSON, DUNN, & CRUTCHER LLP (Jan. 2, 2013), <http://www.gibsondunn.com/publications/Documents/2012YearEndFCPAUpdate.pdf>. Despite enforcement actions decreasing in two consecutive years, all indications are that FCPA enforcement will continue to be robust. *Id.* (quoting Lanny A. Breuer, Assistant Attorney General for the DOJ's Criminal Division, as stating that "there is no turning back" from the "robust FCPA enforcement" of previous years.). Indeed, a recent survey completed by the Wall Street Journal reflected that the FCPA remains one of the top concerns for companies and their in-house legal counsel. Jones, *supra* note 1, at B1.

<sup>16</sup> See MARTIN T. BIEGELMAN & DANIEL R. BIEGELMAN, FOREIGN CORRUPT PRACTICES ACT COMPLIANCE GUIDEBOOK: PROTECTING YOUR ORGANIZATION FROM BRIBERY AND CORRUPTION xxi (2010) (noting the current importance of the FCPA due to the globalization of business); Westbrook, *supra* note 9, at 518 (explaining the "growth in global business opportunities during the economic boom of the mid-2000s"); see also Lawrence J. Trautman & Kara Altenbaumer-Price, *The Foreign Corrupt Practices Act: Minefield for Directors*, 6 VA. L. & BUS. REV. 145, 146 (2011) (noting the "[i]ncreased international commerce between the United States and faster growing economies such as the People's Republic of China").

<sup>17</sup> See Catherine Rampell, *Lax Oversight Caused Crisis, Bernanke Says*, N.Y. TIMES, Jan. 4, 2010, at A1.

<sup>18</sup> See Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 794 (2011) [hereinafter Yockey, *Solicitation*].

<sup>19</sup> See *id.* at 793 (noting that prosecutors may be "turning up the heat" so that they can transition to lucrative private sector employment where they then represent companies facing FCPA scrutiny); see also Nathan Vardi, *How Federal Crackdown on Bribery Hurts Business and Enriches Insiders*, FORBES (May 24, 2010), <http://www.forbes.com/forbes/2010/0524/business-weatherford-kbr-corruption-bribery-racket.html>. As an example, Vardi notes William Jacobson, who transitioned from a justice official to partner at a large law firm and eventually general counsel at a corporation that previously had bribery problems. *Id.*

Because of the increase in FCPA enforcement<sup>20</sup> and the strong remedial powers available to the DOJ and SEC,<sup>21</sup> the FCPA is currently one of the most feared statutes for American firms operating overseas.<sup>22</sup> This fear stems from the fact that perfect compliance with the FCPA is oftentimes extremely difficult due to the statute's expansive language, its lack of affirmative defenses, the absence of judicial and administrative guidance, and the practical realities involved in generating international business.<sup>23</sup>

With the increased enforcement of the FCPA and the difficulties in complying with the statute, American firms are at a disadvantage when it comes to competing internationally.<sup>24</sup> Indeed, both large and small firms have spent millions of dollars on FCPA compliance, have poured money and energy into internal investigations aimed at determining whether a FCPA violation occurred, and have, in certain instances, avoided foreign markets altogether because of the FCPA.<sup>25</sup> These implications reveal just how helpless American firms are against the FCPA. American firms need some type of tool that will incentivize compliance with the Act and curtail liability when the DOJ or SEC brings an action, and this tool is an "adequate procedures" defense. This defense will allow any American firm charged with violating the FCPA to show that it had adequate procedures in place to prevent a violation, and if the procedures are deemed sufficient, the firm avoids liability.<sup>26</sup>

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<sup>20</sup> See Koehler, *Resurgence*, *supra* note 13, at 389; see also Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 657 (2012) [hereinafter Koehler, *Revisiting*] (noting that approximately eighty companies are currently under investigation for FCPA violations).

<sup>21</sup> 2008 and 2009 saw record-setting settlements—for example, Siemens AG (\$800 million) and Halliburton (\$579 million). This trend continued in 2010: Technip (\$338 million) and Snamprogetti/ENI (\$365 million). Westbrook, *supra* note 9, at 492–93.

<sup>22</sup> See Yockey, *Solicitation*, *supra* note 18, at 781.

<sup>23</sup> See *infra* Part I.

<sup>24</sup> See *infra* Part II.

<sup>25</sup> See *infra* Part II.

<sup>26</sup> See *infra* Part III for a detailed discussion, including the predicted outcomes, of the adequate procedures defense. Additionally, it should be noted that similar proposed defenses have been dubbed the FCPA "due diligence defense" and the compliance defense. See Koehler, *Revisiting*, *supra* note 20, at 609, 618; James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233, 1234 (2007). This Article uses the phrase "adequate procedures defense" because it best embodies the fact that (1) procedures must be in place designed to prevent bribery and (2) those procedures have to be "adequate." This proposal differs from the others inasmuch as it (1) establishes specific factors to be promulgated by the DOJ and SEC for determining whether or not a procedure will be "adequate," and (2) details specific projected outcomes associated with American firms being able to use the defense.

To be sure, this Article does not posit that the FCPA should be outlawed or that foreign bribery is appropriate.<sup>27</sup> Bribery impacts the allocation of scarce public resources,<sup>28</sup> distorts markets, and reduces investment.<sup>29</sup> This Article argues that to strike the proper balance between the necessity to prevent bribery and allow American corporations to operate efficiently overseas without the threat of FCPA liability, Congress should amend the FCPA to add an affirmative adequate procedures defense. Further, the DOJ and SEC should promulgate a rule detailing factors that will be reviewed in determining whether a corporation had adequate procedures in place. In leading up to these proposals, Part I of this Article details the current difficulties American firms face in complying with the FCPA and avoiding liability exposure. Part II then analyzes the implications arising out of the difficulties in compliance. Part III details and projects the outcomes of the adequate procedures defense. The Conclusion offers a brief summation.

## I. COMPLIANCE DIFFICULTIES

Complying with the FCPA and limiting exposure to DOJ or SEC enforcement actions is a difficult, if not overwhelming, task for many American corporations.<sup>30</sup> These difficulties stem from numerous considerations including expansive FCPA statutory language and interpretation, a lack of (and narrowly interpreted) affirmative defenses to liability, missing judicial or administrative clarification, and the practical realities associated with pursuing international business transactions. Each consideration receives explanation below, in turn.

### *A. Expansive Statutory Language and Interpretation*

The FCPA's bribery provision generally prohibits American companies (or their agents) from corruptly paying or offering to pay money or

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<sup>27</sup> Cf. Doty, *supra* note 26, at 1239 (explaining that U.S. companies have no desire to compete on the basis of bribery).

<sup>28</sup> See Mark B. Bader & Bill Shaw, *Amendment of the Foreign Corrupt Practices Act*, 15 N.Y.U. J. INT'L L. & POL. 627, 627 (1983).

<sup>29</sup> Cortney C. Thomas, Note, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 441 (2010) ("Bribery inhibits economic growth by two primary mechanisms: economic inefficiency and reduced investment.").

<sup>30</sup> See Editorial, *Justice's Bribery Racket*, WALL ST. J., Feb. 16, 2012, at A12 ("Over the last five years, however, Justice has begun to stretch the law into a far more blunt instrument. Instead of going after clear violations, the vague statute has become a tool to prosecute or threaten legions of companies.").

anything of value to a foreign official to obtain or retain business.<sup>31</sup> Both the DOJ and SEC have taken an expansive interpretation of the statute, specifically with respect to what constitutes a foreign official.<sup>32</sup> The statute defines “foreign official” in part as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof ....”<sup>33</sup> The most confusing part of this definition is the term “instrumentality,” which itself is not defined in the statute.<sup>34</sup> The DOJ and SEC have not clarified or established a list of factors for determining whether someone is an instrumentality of a foreign government.<sup>35</sup> In direct contrast, the DOJ has admitted that “it is entirely possible, under certain circumstances and in certain countries, that nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a drug product in a foreign country will involve a ‘foreign official’ within the meaning of the FCPA.”<sup>36</sup>

As evidenced by the DOJ’s statement above, in many instances the term “instrumentality” “sweeps in payments to companies that are state-owned or state-controlled.”<sup>37</sup> Once that company is “defined as an instrumentality” under the FCPA, all employees or agents of the company “are considered ‘foreign officials.’”<sup>38</sup> The courts have not tested this expansive definition of foreign official,<sup>39</sup> and recently members of Congress have encouraged the DOJ to clarify “under what circumstances an employee of an instrumentality who is not exercising the sovereign authority of the state may be considered a ‘foreign official.’”<sup>40</sup>

<sup>31</sup> See 15 U.S.C. § 78dd-1(a) (2006).

<sup>32</sup> See *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 27 (2011) [hereinafter *FCPA Hearing*] (statement of the Hon. Michael B. Mukasey, Partner, Debevoise & Plimpton LLP) (“The DOJ’s and SEC’s enforcement ... make clear that they interpret the terms ‘foreign official’ and ‘instrumentality’ extremely broadly.”); Westbrook, *supra* note 9, at 531 (noting that the “most contentious point of [the] FCPA interpretation” is what constitutes a “foreign official”).

<sup>33</sup> 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A) (2006).

<sup>34</sup> Stacy Williams, *Grey Areas of FCPA Compliance*, CURRENTS: INT’L TRADE L.J. Winter 2008 at 14, 16 (“The meaning of the term ‘instrumentality’ is one of the most challenging aspects of FCPA compliance.”).

<sup>35</sup> See Westbrook, *supra* note 9, at 532.

<sup>36</sup> *DOJ’s FCPA Team Pressing Forward With Pharma Probes*, MCGUIRE WOODS LLP (July 20, 2010), <http://www.mcguirewoods.com/news-resources/item.asp?item=4976>.

<sup>37</sup> WEISSMANN & SMITH, *supra* note 7, at 25.

<sup>38</sup> *Id.*

<sup>39</sup> See *id.*

<sup>40</sup> Letter from Amy Klobuchar, U.S. Senator (Democrat, Minnesota), & Chris Coons, U.S. Senator (Democrat, Delaware), to Eric Holder, Attorney General (Feb. 15, 2012), available at [http://www.mainjustice.com/justanticorruption/wp-admin/documents-databases/265-2-judiciary\\_FCPA\\_02\\_16\\_12\[1\].pdf](http://www.mainjustice.com/justanticorruption/wp-admin/documents-databases/265-2-judiciary_FCPA_02_16_12[1].pdf). This letter demonstrates that the current overreach

A few examples demonstrate just how expansively the DOJ and SEC interpret the term “instrumentality” within the definition of “foreign official.” In an action against American construction company KBR, the DOJ and SEC alleged that KBR made improper payments to employees of Nigeria LNG Limited (LNG Limited).<sup>41</sup> The government claimed that these employees were foreign officials under the FCPA despite the fact that the Nigerian government had a minority ownership stake in LNG Limited.<sup>42</sup> LNG Limited settled with the government, and thus, the government never clarified its interpretation of “foreign official.”<sup>43</sup> Additionally, in 2007, the DOJ and SEC brought FCPA “actions against Baker Hughes and its subsidiaries for ... payments made to a company called Kazakhoil.”<sup>44</sup> The agencies claimed that these payments violated the FCPA because Kazakhoil was “controlled by officials of the Government of Kazakhstan.”<sup>45</sup> Baker Hughes settled with the agencies for \$44.1 million.<sup>46</sup>

The difficulty with the loose interpretations of instrumentality is that the FCPA now applies to payments made to “non-core” individuals who are employed by state-owned entities, including a minority ownership interest by the state (e.g., KBR case), or state-controlled (e.g., Baker Hughes case) entities.<sup>47</sup> Thus, it is difficult for firms and their agents “to determine *ex ante* what companies are sufficiently state-owned or state-controlled to qualify as an instrumentality of a foreign official,” that is, whether the FCPA applies to a particular foreign transaction or business relationship.<sup>48</sup> This difficulty is especially prevalent in countries like China, where state ownership of companies is particularly high.<sup>49</sup>

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of the FCPA is an issue for both Democratic and Republican legislators, and presumably amending the FCPA would be favored by members from both political parties. *See Justice's Bribery Racket, supra* note 30 (noting the concern in Congress amongst liberals and conservatives).

<sup>41</sup> WEISSMANN & SMITH, *supra* note 7, at 26.

<sup>42</sup> *Id.* Indeed, in that case, 51 percent of Nigeria LNG Limited was “owned by a consortium of private multinational oil companies.” *Id.*

<sup>43</sup> *See* SEC Charges KBR, Inc. with Foreign Bribery, Litigation Release No. 20897A, 95 SEC Docket 570 (Feb. 11, 2009), <http://www.sec.gov/litigation/litreleases/2009/lr20897a.htm>.

<sup>44</sup> WEISSMANN & SMITH, *supra* note 7, at 25.

<sup>45</sup> *Id.*

<sup>46</sup> *See* SEC Charges Baker Hughes With Foreign Bribery and With Violating 2001 Commission Cease-and-Desist Order, Litigation Release No. 20094, 90 SEC Docket 1369 (Apr. 26, 2007), <http://www.sec.gov/litigation/litreleases/2007/lr20094.htm>.

<sup>47</sup> *See* Koehler, *Façade, supra* note 1, at 965.

<sup>48</sup> Yockey, *Solicitation, supra* note 18, at 821.

<sup>49</sup> WEISSMANN & SMITH, *supra* note 7, at 6 (noting that “in countries where many companies are state-owned,” like China, it is not “immediately apparent whether an individual” would be a foreign official under the FCPA). In a related vein, pharmaceutical companies operating internationally are particularly exposed to the FCPA because “the

### B. Narrow Exceptions and Affirmative Defenses

Although the FCPA bribery liability provision has received broad interpretation, the exceptions and defenses to liability are narrow.<sup>50</sup> The FCPA contains one exception and two affirmative defenses, all three of which provide limited safe harbors for firms looking to avoid FCPA scrutiny.<sup>51</sup>

#### 1. The Facilitation Payment Exception

The statute provides an exception for payments made to secure “routine governmental action[s].”<sup>52</sup> The phrase is defined in the statute as “an action which is ordinarily and commonly performed by a foreign official,”<sup>53</sup> and it includes several examples, such as payments made in connection with granting permits, scheduling inspections, and providing police protection.<sup>54</sup> However, any decision by a foreign official to award new or continued business does not fall within the exception.<sup>55</sup> Accordingly, the payments that cause a foreign official to act with little or no discretion fall in the exception and payments that motivate a foreign official to use his or her discretion in awarding business do not.<sup>56</sup> As Professor Joseph Yockey notes, however, the distinction between non-discretionary acts and discretionary acts “is easily stated, but applying it in practice can be difficult.”<sup>57</sup>

This real world difficulty in applying the exception makes it almost impossible to rely upon.<sup>58</sup> For example, in 2008, the DOJ and SEC charged Westinghouse Air Brake Technologies Corporation with FCPA violations

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doctors and hospitals they do business with are government employees in many countries.” Johnathan D. Rockoff & Christopher M. Matthews, *Pfizer Settles Federal Bribery Investigation*, WALL ST. J., Aug. 8, 2012, at B7. At least eight drug makers have acknowledged FCPA investigations in recent SEC filings. *Id.* Also, “[t]he [SEC] has written to several Hollywood studios” regarding “their dealings with ... officials in China.” John Jannarone & Michelle Kung, *SEC Probes U.S. Studios on China*, WALL ST. J., Apr. 26, 2012, at B2. The inquiries are believed to be related to the FCPA, and in the coming months more details will surely emerge. *See id.* For background regarding the FCPA’s application in China, see generally Chow, *supra* note 12.

<sup>50</sup> Westbrook, *supra* note 9, at 541.

<sup>51</sup> *Id.* at 505–07.

<sup>52</sup> 15 U.S.C. § 78dd-2(b) (2006).

<sup>53</sup> 15 U.S.C. § 78dd-2(h)(4)(A) (2006).

<sup>54</sup> *Id.*

<sup>55</sup> Yockey, *Solicitation*, *supra* note 18, at 818.

<sup>56</sup> *See id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 819 (noting that in many circumstances, the exception can “rarely be relied upon”); Westbrook, *supra* note 9, at 542 (“[T]he ambiguity surrounding this exception combined with its increased enforcement makes compliance difficult.”).

when its India subsidiary made payments to officials employed by the Indian Railway Board.<sup>59</sup> Some payments were made for “scheduling pre-shipping produce inspections and having certificates of product delivery issued.”<sup>60</sup> “Because the matter ultimately settled through a non-prosecution agreement,” it remains unclear why these “payments did not fall within the facilitation payment exception.”<sup>61</sup> Nevertheless, this example shows the difficulties many firms face in determining whether payments made to officials fall outside of the exception.<sup>62</sup>

## 2. *Affirmative Defenses: Rarely Applicable, Rarely Used*

The first defense applies if the payment, offer, or promise to pay anything of value to a foreign official is “lawful under the written laws and regulations” of the foreign country.<sup>63</sup> To comply with this defense, the law “must be affirmatively stated and written; neither negative implication, custom, nor tacit approval” is sufficient.<sup>64</sup> Simply put, because no country has written laws that expressly permit bribery, this defense is an illusory safe harbor.<sup>65</sup>

The second defense applies if the payment, offer, or promise to pay anything of value is a “reasonable and bona fide expenditure, such as travel and lodging expenses... directly related to—(A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance

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<sup>59</sup> See Westbrook, *supra* note 9, at 542; Yockey, *Solicitation*, *supra* note 18, at 818.

<sup>60</sup> Westbrook, *supra* note 9, at 542.

<sup>61</sup> Yockey, *Solicitation*, *supra* note 18, at 819.

<sup>62</sup> *Id.*

<sup>63</sup> 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1) (2006). For background and a thorough analysis of the FCPA defenses, see generally Kyle P. Sheahan, Note, *I’m Not Going to Disneyland: Illusory Affirmative Defenses Under the Foreign Corrupt Practices Act*, 28 WIS. INT’L L.J. 464 (2010).

<sup>64</sup> Westbrook, *supra* note 9, at 506 (quoting David Krakoff et al., *FCPA: Handling Increased Global Anti-Corruption Enforcement*, IN FOCUS: CORPORATE LITIGATION WHITE PAPER (Mayer Brown), Feb. 25, 2008, at 3, <http://www.mayerbrown.com/Publications/article.asp?id=6386>).

<sup>65</sup> ROBERT W. TARUN, THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK 16 (2010); see also Trautman & Altenbaumer-Price, *supra* note 16, at 157 (explaining that experts have never found a law that expressly permits bribery). Although the focus of this Article is on FCPA firm liability and not individual liability, it bears noting that the FCPA “local law defense” was recently invoked by Frederic Bourke. See *United States v. Kozeny*, 582 F. Supp. 2d 535, 537 (S.D.N.Y. 2008). Bourke argued that the payments were legal under the laws of Azerbaijan because he self-reported the payments, and thus, under Azeri law, no prosecution would occur in that county. *Id.* The U.S. court rejected this argument, stating that just because prosecution would not occur in Azerbaijan, it does not necessarily mean that the bribes were legal under that country’s law. *Id.* at 540.

of a contract with a foreign government or agency thereof.”<sup>66</sup> In essence, this defense allows American firms to offer “small gifts as tokens of goodwill or to show hospitality to foreign officials.”<sup>67</sup> This defense has been deemed “amorphous” because the courts and the DOJ have offered little guidance as to when the expenditure is related to goodwill or hospitality, or when the expenditure rises to the level of a bribe.<sup>68</sup> To date, no court has analyzed this defense.<sup>69</sup>

### C. Lack of Judicial and Administrative Guidance

When faced with DOJ or SEC FCPA enforcement proceedings, American firms understand “[t]he potential monetary and reputational consequences that would follow from an ... indictment or guilty verdict.”<sup>70</sup> Because of these consequences, the only realistic option available to businesses is to settle their lawsuits.<sup>71</sup> In fact, only one business entity has challenged a DOJ and SEC enforcement case through trial in the last twenty years.<sup>72</sup>

Instead, corporations often enter into settlements in the form of Deferred Prosecution Agreements (DPAs) or Non-Prosecution Agreements (NPAs).<sup>73</sup> Under DPAs, the DOJ formally charges the corporation, but the agency defers actual prosecution so long as certain governance changes

<sup>66</sup> 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2) (2006).

<sup>67</sup> Westbrook, *supra* note 9, at 542.

<sup>68</sup> *Cf. id.*

<sup>69</sup> *Id.*

<sup>70</sup> Yockey, *Solicitation*, *supra* note 18, at 825; see also *Justice’s Bribery Racket*, *supra* note 30, at A12 (noting the “reputational risk of an indictment”).

<sup>71</sup> Yockey, *Solicitation*, *supra* note 18, at 825 (noting that “firms feel they must accept” settlements); see Joan McPhee, *Deferred Prosecution Agreements: Ray of Hope or Guilty Plea by Another Name?*, *INSIDE LITIG.*, Winter 2006, at 4, available at [http://www.ropesgray.com/files/Publication/a6d348fd-f6fd-4f4a-b38b-bd6de98836b7/Presentation/PublicationAttachment/4d1fdc14-3bcf-463a-b2b0-76204fc7f316/Article\\_Winter\\_2006\\_Deferred\\_Prosecution\\_Agreements\\_McPhee.pdf](http://www.ropesgray.com/files/Publication/a6d348fd-f6fd-4f4a-b38b-bd6de98836b7/Presentation/PublicationAttachment/4d1fdc14-3bcf-463a-b2b0-76204fc7f316/Article_Winter_2006_Deferred_Prosecution_Agreements_McPhee.pdf) (“Given the breadth of the corporate criminal liability doctrine and the potentially devastating consequences of a criminal conviction or even indictment, it is the rare corporation today that has a meaningful right to a jury trial in the resolution of its corporate criminal disputes with the government.”); see also Doty, *supra* note 26, at 1236 n.9 (explaining that the government uses the “threat of indictment” to force firms to settle and not litigate). Doty also notes the “associated practice” of requiring firms to waive the attorney-client privilege. *Id.*

<sup>72</sup> Koehler, *Revisiting*, *supra* note 20, at 627 n.73 (noting that the only time a corporate FCPA charge was presented to a jury was in the 2011 Lindsey Manufacturing case); see also Koehler, *Resurgence*, *supra* note 13, at 406.

<sup>73</sup> Koehler, *Facade*, *supra* note 1, at 933 (“The DOJ’s use of NPAs and DPAs has exploded in recent years.”).

are implemented and a fine is paid.<sup>74</sup> Under NPAs, no formal charges are filed, but similar terms and fines are accepted.<sup>75</sup> “Because an NPA is not filed with a court, there is absolutely no judicial scrutiny” of the facts and legal conclusions leading to the settlement.<sup>76</sup> Additionally, although a DPA is filed with a court and could be subject to judicial scrutiny, the agreements are regularly “rubber-stamped” by judges without modification.<sup>77</sup>

This lack of judicial oversight<sup>78</sup> yields two important, related outcomes. First, the DOJ and SEC’s vast interpretative policies are never limited through the judicial process.<sup>79</sup> This means that the DOJ and SEC’s interpretations control.<sup>80</sup> Second, no precedent is set, and thus, firms have no baseline measure for determining which actions are clearly legal under the statute.<sup>81</sup> Instead, firms have little guidance on how to comply with the FCPA.<sup>82</sup> This lack of guidance makes it difficult for American firms to enter emerging foreign markets and partake in aggressive business transactions without knowing affirmatively whether their actions violate the FCPA.<sup>83</sup>

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<sup>74</sup> Doty, *supra* note 26, at 1236 n.9 (noting that DPAs “have become virtually commonplace” in FCPA actions).

<sup>75</sup> Yockey, *Solicitation*, *supra* note 18, at 825.

<sup>76</sup> Koehler, *Façade*, *supra* note 1, at 935.

<sup>77</sup> Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 893 (2007). Several commentators and practitioners who have experience with DPAs and NPAs agree that the forms of settlements never face judicial scrutiny. See Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1, 14 (2007) (“Deferred and non-prosecution agreements often occur without judicial oversight or participation .... Even in the rare case that has court participation, it is usually a mere formality of the document being filed in the court.”).

<sup>78</sup> James C. Morgan, *Deferred Prosecution Agreements: Recent Justice Department Guidance*, Manufactures Alliance/MAPI e-Alert E-466 (Apr. 2, 2008), available at <http://www.mapi.net/Issues%20in%20Brief/e-Alert466.pdf>.

<sup>79</sup> *FCPA Hearing*, *supra* note 32, at 2 (statement of Rep. Sensenbrenner, Member, House Comm. on the Judiciary).

<sup>80</sup> *Id.* (noting “the absence of case law interpreting the breadth and scope of the FCPA,” which consequently “inflates ... prosecutorial discretion”); see also Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. TOL. L. REV. 99, 131–32 (2011) [hereinafter Koehler, *Big, Bold, and Bizarre*] (explaining that lack of “appropriate checks and balances or judicial scrutiny” with respect to FCPA enforcement leads to inconsistencies).

<sup>81</sup> *FCPA Hearing*, *supra* note 32, at 2 (statement of Rep. Sensenbrenner) (explaining that industries do not know how to conform to the law); Koehler, *Big, Bold, and Bizarre*, *supra* note 80, at 131–32 (noting the “lack of consistency and transparency” associated with FCPA compliance).

<sup>82</sup> *FCPA Hearing*, *supra* note 32, at 2 (statement of Rep. Sensenbrenner) (noting that “companies lack guidance”).

<sup>83</sup> See *id.*

Not only does the FCPA suffer from a lack of judicial oversight, but also the DOJ and SEC have not sufficiently filled this void through administrative guidance.<sup>84</sup> To be sure, “[p]rocedures [do] exist through which the DOJ and SEC can provide ... FCPA interpretation.”<sup>85</sup> The SEC procedure—an Opinion Release—is largely unused, as the last time the SEC used this vehicle to clarify the FCPA was 1981, when it explained that action would not be taken for minor or unintentional errors in books and recordkeeping.<sup>86</sup>

The DOJ vehicle—a DOJ FCPA Opinion Release Procedure—which is required by the FCPA statute,<sup>87</sup> allows an issuer to “obtain an opinion of the Attorney General as to whether certain specified, prospective—not hypothetical—conduct conforms with the [agency’s] present enforcement policy regarding the antibribery provisions” of the Act.<sup>88</sup> To obtain an opinion, a company must make a formal inquiry describing the proposed conduct.<sup>89</sup> Within thirty days, the DOJ must respond and state whether it would take action on the proposed conduct.<sup>90</sup> If the DOJ signs off on the proposed conduct and the firm does not deviate from the action that was approved, then any DOJ legal proceeding arising out of the approved conduct is subject to a rebuttable presumption that the conduct complies with the FCPA.<sup>91</sup>

Although on paper the DOJ opinion process appears to be a viable option for a firm contemplating business in a foreign country, the process has

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<sup>84</sup> Westbrook, *supra* note 9, at 496–97. Recently, in November 2012, the DOJ and SEC published a guide to help corporations better understand which practices might violate the FCPA. *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, U.S. DEP’T OF JUSTICE & U.S. SECURITIES AND EXCHANGE COMMISSION (Nov. 14, 2012), <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>. FCPA practitioners and scholars criticized the guide as doing “little to fill in the gray areas” and being “more of a scrapbook of past DOJ and SEC successes than a guide book for companies who care about playing with the rules.” Joe Palazzolo & Christopher Matthews, *Bribery Law Dos and Don’ts*, WALL. ST. J., Nov. 15, 2012, at B1, B2 (quoting Steven Tyrell, partner at Weil, Gotshal & Manges LLP and former chief of the DOJ’s criminal-fraud section); *see also* Mike Koehler, *Grading the Foreign Corrupt Practices Act Guidance*, White Collar Crime Rep. (BNA) 1, 7 (Dec. 14, 2012) (stating that even after the resource guide, “much about FCPA enforcement remains opaque”); Jones, *supra* note 1, at B5 (explaining that the guidance “wasn’t as specific as many companies had hoped”).

<sup>85</sup> Westbrook, *supra* note 9, at 563.

<sup>86</sup> Statement of Policy, Foreign Corrupt Practices Act of 1977, Exchange Act Release No. 17,500, 21 SEC Docket 1466, 1469 (Jan. 29, 1981).

<sup>87</sup> 15 U.S.C. §§ 78dd-1(e), 78dd-2(f) (2006).

<sup>88</sup> Foreign Corrupt Practices Act Opinion Procedure, 28 C.F.R. §§ 80.1 (2009).

<sup>89</sup> 28 C.F.R. §§ 80.2, 80.6, 80.7.

<sup>90</sup> 28 C.F.R. § 80.8.

<sup>91</sup> *See* 28 C.F.R. § 80.10.

been disused.<sup>92</sup> A number of reasons have been suggested for the underutilization of this process. First, the process may be seen as mere “window dressing” by firms and actually alert law enforcement to potential illegal bribery.<sup>93</sup> Additionally, the DOJ may be projecting its own discomfort with the concept of advising on potentially criminal behavior—a concept unique to the FCPA.<sup>94</sup>

It should also be noted that the opinion notices are limited to the specific facts presented and not legally binding on any other company (even if the other company’s conduct was directly analogous to conduct opined upon in a prior release).<sup>95</sup> This consideration, in conjunction with the DOJ opinion procedure’s underutilization, illustrates that firms cannot depend on the Department for guidance in determining what conduct leads to FCPA exposure.

To recap, the lack of judicial and administrative guidance on the FCPA in combination with agencies interpreting the statute broadly while interpreting the defenses narrowly creates an environment where businesses struggle to comply with the Act. These struggles are only exacerbated by the practical realities associated with pursuing foreign business—an area detailed next.

#### *D. Practical Realities in Generating Foreign Business*

As explained in the introduction of this Article, to survive in today’s corporate world, American corporations (both big and small) must search for and develop business connections and operations outside of the U.S.<sup>96</sup> Foreign markets provide access to resources that are not available domestically.<sup>97</sup> In order to facilitate foreign business, many firms have no choice but to use agents.<sup>98</sup> Additionally many firms must deal with hostile environments in

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<sup>92</sup> See *Opinion Procedure Releases*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/opinion/> (last visited Feb. 2, 2013) (documenting two releases in 2012, one in 2011, three in 2010, and one in 2009); see also Doty, *supra* note 26, at 1238.

<sup>93</sup> Doty, *supra* note 26, at 1238 (“[W]hile heightened awareness has led to procedural due diligence by U.S. businesses abroad, too often that diligence is dismissed by law enforcement as pretense, mere ‘window dressing’ to conceal ‘behind the scenes’ circumvention of the law that businesses and host governments alike are deemed to understand and countenance.”).

<sup>94</sup> Doty, *supra* note 26, at 1238 & n.17.

<sup>95</sup> Foreign Corrupt Practices Act Opinion Procedure, 28 C.F.R. §§ 80.11, 80.13 (2012) (narrowing the scope and limiting the effect of an opinion release).

<sup>96</sup> Doty, *supra* note 26, at 1252.

<sup>97</sup> See *supra* note 1.

<sup>98</sup> See Yockey, *Solicitation*, *supra* note 18, at 784.

which bribery is not suggested by the firm's agent, but instead is demanded by the foreign official.<sup>99</sup>

### *1. Necessity to Use Agents*

In foreign markets, "business traditions and customs are far different [from] those in the United States."<sup>100</sup> These differences cause transnational firms to use "specialized local agents and intermediaries."<sup>101</sup> Using agents also allows firms to enter new markets without having to set up an actual office or subsidiary in that foreign state.<sup>102</sup> However, as detailed further in Subsection II below, employees or agents in these countries are often subject to widespread corruption and they often discover that bribery is necessary to gain access into a market and to continue business in that market.<sup>103</sup>

Under the FCPA, bribery committed by an agent or employee is particularly significant because it can lead to a firm being held liable under principles of vicarious liability.<sup>104</sup> This common law doctrine allows a corporation to be held liable for the acts of its employees where the act was within the scope of employment and benefited, at least partially, the organization.<sup>105</sup> Almost all FCPA corporate enforcement actions are based on principles of vicarious liability because firms can only act through their agents or employees.<sup>106</sup>

Corporations can implement strategies to deter agent bribery and thus reduce exposure under vicarious liability.<sup>107</sup> The strategies may include offering monetary incentives to the agent to deter bribery, having policies and procedures in place to prevent and detect bribery, and conducting due diligence before deciding to place an agent in a certain country.<sup>108</sup> However,

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<sup>99</sup> Joseph W. Yockey, *FCPA Settlement, Internal Strife, and the "Culture of Compliance,"* 2012 WIS. L. REV. 689, 710 [hereinafter Yockey, *FCPA Settlement*] (noting that many foreign markets are rife with corruption).

<sup>100</sup> Westbrook, *supra* note 9, at 518 (quoting Phyllis Diamond, *Attorney Sees More Individuals Named in Ramped Up FCPA Enforcement Effort*, 41 SEC. REG. & L. REP. (BNA), no. 32, 2009 at 1495).

<sup>101</sup> Yockey, *Solicitation*, *supra* note 18, at 808.

<sup>102</sup> ALEXANDRA ADDISON WRAGE, *BRIBERY AND EXTORTION* 12□13 (2007).

<sup>103</sup> Yockey, *Solicitation*, *supra* note 18, at 810.

<sup>104</sup> *Id.* at 809; Frank C. Razzano & Travis P. Nelson, *The Expanding Criminalization of Transnational Bribery: Global Prosecution Necessitates Global Compliance*, 42 INT'L LAW. 1259, 1275–76 (2008).

<sup>105</sup> U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL, 9-28.800 (2012), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/28mcrm.htm#9-28.800](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.800) (elaborating the principals of federal prosecution of business organizations).

<sup>106</sup> Yockey, *Solicitation*, *supra* note 18, at 810.

<sup>107</sup> *Id.* at 811.

<sup>108</sup> *Id.*

there is currently no statutory-based acknowledgement (i.e., statutory-based defense) for having adequate procedures in place designed to prevent bribery.<sup>109</sup> Consequentially, as Professor Yockey explains, “firms have been prosecuted where the employees responsible for the alleged violations acted contrary to well-documented FCPA compliance policies.”<sup>110</sup>

## 2. Bribe Demands

When tapping into foreign resources and entering foreign markets, “American businesses ... operate in some of the most corrupt and ‘failed’ states on the globe.”<sup>111</sup> As a result, these businesses receive demands for bribes quite frequently.<sup>112</sup> These demands can take a variety of forms, including being asked to sponsor activities in exchange for a government contract and paying various fees for routine government-related transactions.<sup>113</sup> Additionally, outright extortion of American companies operating overseas is not uncommon.<sup>114</sup> Extortion takes the form of requests for payment (or goods) under a threat to terminate the corporation’s current investment.<sup>115</sup>

Although it is often difficult to track the amount of demand-side bribery and extortion, a recent survey of more than 2,700 business executives in twenty-six countries found that about 40 percent of respondents had

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<sup>109</sup> Doty, *supra* note 26, at 1235–36 (explaining that “the current law enforcement regime ... impute[s] vicarious liability to the corporate enterprise without regard” to the firm’s “codes of conduct [that] prohibit FCPA violations”).

<sup>110</sup> Yockey, *Solicitation*, *supra* note 18, at 811.

<sup>111</sup> Doty notes that the reason companies operate in these areas is perhaps best captured by Willie Sutton’s statement that “he robbed banks ‘because that’s where the money is.’” Doty, *supra* note 26, at 1252 (citing *Famous Cases & Criminals: Willie Sutton*, FBI, <http://www.fbi.gov/about-us/history/famous-cases/willie-sutton> (last visited Feb. 2, 2013)).

<sup>112</sup> INT’L CHAMBER OF COMMERCE ET AL., RESIST: RESISTING EXTORTION AND SOLICITATION IN INTERNATIONAL TRANSACTIONS 6 (2011), available at <http://www.iccwbo.org/Data/Documents/Corporate-Responsibility-and-Anti-corruption/RESIST-English/>; *Former DOJ FCPA Chief Supports FCPA Compliance Defense*, FCPA PROFESSOR (Oct. 4, 2011) (quoting Joseph Covington, former DOJ FCPA Unit Chief), <http://www.fcpaprofessor.com/former-doj-fcpa-chief-supports-fcpa-compliance-defense> (“[i]n my almost 40 years of experience, I have rarely seen American companies affirmatively offering bribes in the first instance; rather they are typically reacting to a world not of their making.”); see also Koehler, *Revisiting*, *supra* note 20, at 620 (explaining that American firms operating in foreign countries “are often funneled into an arbitrary world of low-paying civil servants who frequently supplement their meager salaries through payments condoned in the host country”).

<sup>113</sup> Yockey, *Solicitation*, *supra* note 18, at 795.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 795–96.

been sought out to pay a bribe.<sup>116</sup> In certain countries, including Egypt, India, Indonesia, Morocco, Nigeria, and Pakistan, this number rose to almost 60 percent.<sup>117</sup> To be sure, this survey only reflects one side of the story. Often times it is hard to determine whether a foreign official first demanded bribery or whether the foreign official's demand followed previous bribery suggestions or actual bribery on the part of the firm.<sup>118</sup> Nevertheless, regardless of what came first, a bribe demand or a bribe solicitation, bribery in some way, shape, or form is seen as a normal course of business in order to transact internationally.<sup>119</sup>

To be clear, the prevalence of demand-side bribery noted in this section is not meant to suggest that bribery should be tolerated or that the FCPA should not apply in foreign countries.<sup>120</sup> It is noted to show that in some countries the prevalence and frequency of bribery may cause a rogue employee or agent to go against a firm's anti-bribery policy and bribe a foreign official.<sup>121</sup> These firms are then subjected to potential liability despite their good-faith efforts to curtail bribery.<sup>122</sup> Of course, these firms could have simply opted not to transact in a specific country, especially when aware that their agents may subject them to FCPA liability.<sup>123</sup> However, given the vast resources available in foreign markets and the necessity to tap into these resources,<sup>124</sup> it is unrealistic and imprudent to force

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<sup>116</sup> TRANSPARENCY INT'L, GLOBAL CORRUPTION REPORT 2009 4 (2009), available at [http://archive.transparency.org/news\\_room/latest\\_news/press\\_releases/2009/2009\\_09\\_23\\_gcr\\_2009](http://archive.transparency.org/news_room/latest_news/press_releases/2009/2009_09_23_gcr_2009).

<sup>117</sup> *Id.* at 4.

<sup>118</sup> See Yockey, *FCPA Settlement*, *supra* note 99, at 711 (noting there are "situations where the lines between bribery and extortion are blurry"); see also James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695, 1695–98 (1993) (explaining that it is difficult to distinguish bribery from extortion).

<sup>119</sup> Yockey, *Solicitation*, *supra* note 18, at 795 ("[F]irms doing business abroad continue to report receiving demands for bribes—including some demands that rise to the level of extortion—on a daily basis.").

<sup>120</sup> See Doty, *supra* note 26, at 1239 ("U.S. businessmen want the statutory policies of the FCPA to prevail. Repeal of the statute would enable states tolerant of corrupt behavior by their national industries to up the ante without restraint."). *But see* Gideon Parchomovsky & Peter Siegelman, *Bribes vs. Bombs: A Study in Coasean Warfare*, 29 INT'L REV. L. & ECON. 179, 179–81 (2009) (noting that bribery may help resolve disputes); Donald Bates, *Payola's Payoff: Legalize Bribery? Yes, It's a Fact of Life*, HOUS. CHRON. Jan. 15, 2006, <http://www.chron.com/default/article/Legalize-bribery-Yes-it-s-a-fact-of-life-1476410.php>.

<sup>121</sup> See *supra* note 103 and accompanying text.

<sup>122</sup> See *supra* notes 109–10 and accompanying text.

<sup>123</sup> Yockey, *Solicitation*, *supra* note 18, at 809–10.

<sup>124</sup> Trautman & Altenbaumer-Price, *supra* note 16, at 147 (explaining that "[f]oreign operations constitute a major source of revenues and earnings" for American companies).

American firms to choose between either staying out of these markets or being subjected to FCPA scrutiny. As former SEC General Counsel James Doty notes, “[t]o serve the national interest, American businesses *must* operate” internationally.<sup>125</sup> Because American firms must operate internationally, their only choice then is to face the current overreach of the FCPA.

Part I of this Article documented the current difficulties American firms have in complying with the FCPA. These difficulties stem from a number of interrelated considerations. The DOJ and SEC interpret the statutory text to cover a wide variety of circumstances that subject firms to liability in which they have limited legitimate defenses.<sup>126</sup> More specifically, the realities of operating internationally are not considered in establishing liability or as an affirmative defense.<sup>127</sup> Because firms know that FCPA liability is easily established, they are unwilling to try FCPA enforcement actions. Thus, no limiting principles are established through the judiciary, and this is compounded by the unwillingness of the DOJ and SEC to limit their interpretations or provide meaningful guidance.<sup>128</sup>

There are numerous implications that result from the difficulties American firms have in complying with the FCPA, an area detailed next.

## II. IMPLICATIONS OF THE FCPA IN LIGHT OF THE DIFFICULTY WITH COMPLIANCE

The recent enforcement expansion of the FCPA and the difficulties firms have in complying with the Act yield two principal outcomes. First, firms must deal with the monetary and reputational consequences of facing DOJ and SEC FCPA actions.<sup>129</sup> Second, these monetary and reputational considerations influence future foreign business decisions, causing American firms to be overly risk adverse.<sup>130</sup>

### *A. Monetary and Reputational Consequences*

Firms immersed in full-blown FCPA investigations spend enormous sums on legal fees, forensic accounting fees, and other investigative

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<sup>125</sup> Doty, *supra* note 26, at 1252 (emphasis added); *see also* Trautman & Altenbaumer-Price, *supra* note 16, at 148 (noting the inevitable “co-dependence” between the United States and Chinese economies). Trautman and Altenbaumer-Price also explain that even if an American firm is not currently doing business overseas, “the overwhelming odds are that it will in the future.” *Id.* at 149.

<sup>126</sup> *See supra* Part I.A–B.

<sup>127</sup> *See supra* Part I.D.

<sup>128</sup> *See supra* Part I.C.

<sup>129</sup> *See infra* Part II.A.

<sup>130</sup> *See infra* Part II.B.

costs.<sup>131</sup> For example, Baker Hughes conducted an internal investigation that cost \$50 million, in addition to paying \$44 million in penalties.<sup>132</sup> Avon Products reported in its February 2011 quarterly SEC filing that it spent \$59 million more in 2010 than 2009 on “professional and related fees associated with [its] FCPA investigation and compliance reviews.”<sup>133</sup>

Not only do firms spend a tremendous amount of money on legal and investigative costs, but settlements also are burdensome. Indeed, in recent years, the monetary amount of FCPA settlements has increased dramatically.<sup>134</sup> Examples include the high-profile settlements involving U.S. companies such as Halliburton Co. and Johnson & Johnson.<sup>135</sup> In 2010, eight of the top ten FCPA settlements were reached,<sup>136</sup> and in the past five years, corporations’ penalties under the FCPA have amounted to \$4 billion.<sup>137</sup>

Firms facing FCPA scrutiny also have to deal with the reputational consequences that come along with such scrutiny, something former SEC

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<sup>131</sup> Klobuchar and Coons Letter, *supra* note 40 (“[I]t has become apparent that too many companies are devoting a disproportionate amount of resources to FCPA compliance and internal investigations.”); WEISSMANN & SMITH, *supra* note 7, at 5 (“Businesses enmeshed in a full-blown FCPA investigation conducted by the U.S. government ... will continue to spend enormous sums on legal fees, forensic accounting, and other investigative costs before they are even confronted with a fine or penalty, which ... can range into the tens or hundreds of millions.”); *see also* Yockey, *FCPA Settlement*, *supra* note 99, at 702 (“Litigating an FCPA case is not cheap.”). Yockey notes the “unique complexities involved in FCPA cases” such as “obtaining evidence from foreign countries,” communicating with foreigners, and making travel arrangements. *Id.* To this end, recently, law firms have increased hiring in temporary attorneys who have foreign-language skills in part to help review documents associated with FCPA investigations. *See* Jennifer Smith, *Wanted: Temp Attorneys with Foreign-Language Skills*, WALL ST. J., July 24, 2012, at B1, B5.

<sup>132</sup> Peter Jeydel, Note, *Yoking the Bull: How to Make the FCPA Work for U.S. Business*, 43 GEO. J. INT’L L. 523, 527 n.21 (2012).

<sup>133</sup> Avon Products, Annual Report (Form 10-k) (Feb. 24, 2011) at 29, available at <http://www.sec.gov/Archives/edgar/data/8868/000119312511044531/d10k.htm>. Since 2009, Avon’s cumulative legal costs due to FCPA investigations total \$248 million. Joe Palazzolo, et al., *Prosecutors Ask to Meet Jung in Avon Bribe Probe*, WALL ST. J., July 30, 2012, at B1, B2.

<sup>134</sup> WEISSMANN & SMITH, *supra* note 7, at 2; *see also* Christopher Matthews and Joe Palazzolo, *Pfizer Near Settlement on Bribery*, WALL ST. J., Nov. 21, 2011, at B1–B2, available at <http://online.wsj.com/article/SB10001424052970203710704577050303870770014.html> (noting that Pfizer Inc. will pay more than \$60 million and Johnson and Johnson \$70 million to resolve U.S. government anti-bribery probes).

<sup>135</sup> Joe Palazzolo, *Business Slams Bribery Act—Lobby Urges Curbs in Wake of \$4 Billion in Corruption Fines*, WALL ST. J., Nov. 28, 2011, at B1; *see Corporate Watch*, WALL ST. J., Feb. 17, 2012, at B6 (reporting that Halliburton paid \$579 million to resolve violations).

<sup>136</sup> *See supra* note 15 and accompanying text.

<sup>137</sup> Palazzolo, *supra* note 135, at B1.

General Counsel James Doty deems “wear[ing] the scarlet letter” of FCPA actions.<sup>138</sup> These consequences include exclusion from future transactions and government contracts,<sup>139</sup> in addition to future difficulties securing financing from lending institutions.<sup>140</sup>

*B. Disincentives to Partake in International Business Transactions*

Because of the monetary and reputational consequences that stem from FCPA scrutiny, American businesses have become more adverse to undertaking business transactions abroad.<sup>141</sup> This adverseness also stems from the lack of predictability regarding whether a particular firm’s conduct is within the bounds of the FCPA.<sup>142</sup> Firms depend on a certain amount of litigation predictability so that they can take chances in untapped markets, develop complicit transactional plans, and inform employees on how to comply with these plans.<sup>143</sup> When the FCPA threatens predictability,

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<sup>138</sup> Doty, *supra* note 26, at 1253.

<sup>139</sup> Morgan, *supra* note 78, at 3 (noting that accepting a DPA may be identical to an indictment for a company seeking future government contracts).

<sup>140</sup> *FCPA Hearing*, *supra* note 32, at 40 (statement of George J. Terwilliger, III, Partner, White & Case, LLP) (explaining the “risk to reputation that can arise” from FCPA scrutiny); Doty, *supra* note 26, at 1253.

<sup>141</sup> *FCPA Hearing*, *supra* note 32, at 40 (statement of George J. Terwilliger, III) (“When faced with [FCPA] uncertainty, companies sometimes forgo deals they could otherwise do, take a pass on contemplated projects or withdraw from ongoing projects or ventures.”); Palazzolo, *supra* note 135, at B8 (noting evidence suggesting that U.S. “companies shun [oversea] deals for fear of triggering FCPA probes”); *see also* Nicholas M. McLean, Note, *Cross-National Patterns in FCPA Enforcement*, 121 YALE L.J. 1970, 1980 (2012) (explaining that the possibility of an FCPA enforcement action “may dissuade U.S. firms from investing in [certain] countries”). Other scholars, however, have expressed doubt that the FCPA stifles foreign investment. *See* Macleans A. Geo-JaJa & Garth L. Mangum, *The Foreign Corrupt Practices Act’s Consequences for U.S. Trade: The Nigerian Example*, 24 J. BUS. ETHICS 245, 251–52 (2000) (concluding that the FCPA has not disadvantaged American firms).

<sup>142</sup> *See* Doty, *supra* note 26, at 1234 (“Criminal and civil prosecution, which presently constitute the principal source of guidance on an important sector of economic activity, should recede as the basis on which registrants plan their transactions.”); *id.* at 1239 (noting the lack of predictability associated with the Act); *see also* Weiss, *supra* note 11, at 505 (“Regulatory uncertainty has been quantitatively shown to be particularly harmful to investment in other contexts—for example, antitrust—and, while no quantitative study is available for foreign bribery, the likely result is similarly undesirable.”).

<sup>143</sup> WORLD BANK, WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD 4 (1997), (“[P]redictability of ... rules and policies and the consistency with which they are applied ... can be as important for attracting private investment as the content of those rules and policies.”).

American firms—both large and small<sup>144</sup>—become risk adverse and stop investing in certain oversea markets.<sup>145</sup>

A recent Dow Jones risk and compliance survey demonstrated the chilling effect that the FCPA has on American firm investment overseas. The survey found that fifty-one percent of companies had delayed a business initiative and fourteen percent had abandoned an initiative altogether because of unpredictable anti-corruption laws.<sup>146</sup> As an example of a company abandoning an initiative, in 2009, oil services firm Ensco International elected to abandon its Nigerian operations directly because of its concerns regarding FCPA scrutiny with regard to payments made to officials for permission to import oil-drilling rigs.<sup>147</sup> Additionally, oil firms that previously had operations in Kazakhstan have withdrawn because of the fear of FCPA exposure.<sup>148</sup> More recently, there is a fear that makers of medical devices will begin scaling back operations in countries that provide state-owned health care, including Argentina, Brazil, and China.<sup>149</sup> The FCPA is implicated in these circumstances because of the expansive view that healthcare professionals are foreign officials in these countries.<sup>150</sup>

The problems with risk aversion are that American firms are not maximizing their capital and are at a competitive disadvantage in comparison

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<sup>144</sup> Jeydel, *supra* note 132, at 531 (noting the small businesses are “often paralyzed by the FCPA”).

<sup>145</sup> Klobuchar & Coons Letter, *supra* note 40 (explaining that “[o]ver-compliance ... can have a negative effect on product development, export promotion, and workforce expansion”); Doty, *supra* note 26, at 1239 (explaining that the FCPA threatens “U.S. foreign competitiveness with a growing risk of exclusion of U.S. companies from foreign markets”); Andrew Brady Spalding, *Four Uncharted Corners of Anti-Corruption Law: In Search of Remedies to the Sanctioning Effect*, 2012 WIS. L. REV. 661, 662 (“[N]umerous data sources today confirm that FCPA enforcement leads to a reduction in investment by US companies ... in countries perceived to be relatively corrupt.”); Vardi, *supra* note 19 (“FCPA enforcement will cause U.S. companies to reduce investments in places where corruption is common or make them uncompetitive there.”).

<sup>146</sup> *Dow Jones Survey: Confusion About Anti-Corruption Laws Leads Companies to Abandon Expansion Initiatives*, DOW JONES (Dec. 9, 2009), <http://fis.dowjones.com/risk/09survey.html>. Professor Spalding notes that these statistics make sense because “if we increase the costs of conducting business in specific ways, we will of course tend to do less of that business.” Spalding, *supra* note 145, at 665.

<sup>147</sup> Vardi, *supra* note 19.

<sup>148</sup> *Id.*

<sup>149</sup> See Christopher M. Matthews, *Corporate News: Biomet Settles Bribery Charge*, WALL ST. J., Mar. 27, 2012, at B3.

<sup>150</sup> See *id.*; see also *Justice’s Bribery Racket*, *supra* note 30 (quoting Senator Klobuchar as stating “in today’s China, a nurse could be construed as a foreign official because they work for the state”).

to “their foreign counterparts who do not have significant FCPA exposure.”<sup>151</sup> In a 1999 report to Congress, the Congressional Research Service, a nonpartisan group that provides analysis on legislative issues, estimated that the FCPA’s anti-bribery “provisions have cost up to [\$1 trillion] annually in lost [U.S.] export trade.”<sup>152</sup> In this vein, it may be useful to consider that the majority of countries with anti-bribery laws provide for an adequate procedures defense to liability.<sup>153</sup> Corporations in those countries are able to defend against anti-bribery enforcement actions by showing that they had procedures and policies guarding against bribery in place.<sup>154</sup> In the U.S., such a defense is not available,<sup>155</sup> and thus, a certain amount of incongruity exists between America’s approach to worldwide bribery and other countries’ approaches.<sup>156</sup>

American firms are in need of a tool that will put them on an even playing field with their foreign counterparts.<sup>157</sup> This tool will also strike the proper balance between incentivizing foreign investment while at the same time incentivizing compliance with the Act and not condoning bribery.<sup>158</sup> This tool is an adequate procedures defense, a proposal detailed next.

### III. ADEQUATE PROCEDURES DEFENSE: DETAILS AND PROJECTED OUTCOMES

The best solution for altering the current overreach of the FCPA is for Congress to amend the FCPA to add an adequate procedures defense.<sup>159</sup>

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<sup>151</sup> WEISSMANN & SMITH, *supra* note 7, at 6 (explaining that the FCPA has made American firms less competitive in foreign markets); Vardi, *supra* note 19 (noting that U.S. companies are disadvantaged in the worldwide bribery landscape).

<sup>152</sup> MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., RL 30079, FOREIGN CORRUPT PRACTICES ACT 2 (1999).

<sup>153</sup> Koehler, *Revisiting*, *supra* note 20, at 635–36.

<sup>154</sup> *Id.* at 635–44 (documenting a defense similar to an adequate procedures defense as part of anti-bribery statutes in the U.K., Australia, Chile, Germany, Hungary, Italy, Japan, Korea, Poland, Portugal, Sweden, and Switzerland).

<sup>155</sup> *Id.* at 627 (noting that currently a “company’s pre-existing compliance policies and procedures are *not* relevant as a matter of law to the organization’s criminal liability”).

<sup>156</sup> *Bribery Abroad: A Tale of Two Laws*, ECONOMIST (Sept. 17, 2011), <http://www.economist.com/node/21529103> (noting the difference between the FCPA and U.K.’s analog inasmuch as the U.K. anti-bribery regime contains a compliance defense). For the text of the U.K.’s compliance defense, see Bribery Act 2010, c. 23, § 7(2) (U.K.).

<sup>157</sup> *Cf.* Doty, *supra* note 26, at 1252 (explaining that enforcement of the FCPA does not have to come at the expense of competitiveness of U.S. firms).

<sup>158</sup> See WEISSMANN & SMITH, *supra* note 7, at 7 (arguing for improvements to the FCPA, “aimed at providing more certainty to the business community,” while keeping intact the “integrity of the free market system”).

<sup>159</sup> *Id.* (arguing that improvements to the FCPA “are best suited for Congressional action”); see also *Justice’s Bribery Racket*, *supra* note 30 (arguing for Congressional action

The SEC and DOJ should then promulgate a rule detailing the factors that will be considered in determining what constitutes an adequate procedure. This defense will increase compliance with the Act while allowing American corporations to invest aggressively in international operations.

#### *A. Legislative Amendment Followed by Administrative Guidance*

This section suggests specific statutory language that could be adopted by Congress to provide for an adequate procedures defense. It further suggests specific factors that could be promulgated by the DOJ and SEC for determining whether a corporation's procedures were adequate.

##### *1. Congressional Action*

Recently, Congress has scrutinized the FCPA in committee hearings.<sup>160</sup> Although no official amendments have been proposed, one idea under discussion is an adequate procedures defense.<sup>161</sup> The time has now come for Congress to pass this defense and give American firms a tool against the overreach of the FCPA.

In turning to the specific statutory language, this Article suggests the following:

Any corporation subject to the anti-bribery provisions of the FCPA that has established and implemented "adequate procedures" designed to

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with respect to the FCPA). *But see* Richard L. Cassin, *Jacobson to DOJ: Fix FCPA Enforcement Policy*, THE FCPA BLOG (Apr. 16, 2012), <http://www.fcpablog.com/blog/2012/4/16/jacobson-to-doj-fix-fcpa-enforcement-policy.html> (noting that former DOJ FCPA prosecutor William Jacobson stated that Congressional action and FCPA amendments were unnecessary).

<sup>160</sup> See generally *FCPA Hearing*, *supra* note 32; *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drug of the H. Comm. on the Judiciary*, 111th Cong. 1 (2010) [hereinafter *Examining Enforcement Hearing*], available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg66921/pdf/CHRG-111shrg66921.pdf>. Indeed, this defense is not a novel idea: in 1986, Representative Howard L. Berman proposed a "due diligence" affirmative defense. Trade and International Economic Policy Reform Act of 1986, H.R. 4800, 99th Cong. (1986). The House adopted the defense, but it was ultimately not included in the legislation signed into law. See H.R. Rep. No. 100-576 (1988), reprinted in 1988 U.S.C.C.A.N. 1547.

<sup>161</sup> *FCPA Hearing*, *supra* note 32, at 4–5 (statement of Rep. Conyers, Member, House Comm. on the Judiciary) ("I want to tell you a suggested amendment that I can support, and that is the addition of a compliance defense which would permit companies to fight the imposition of criminal liability for these FCPA violations if individual employees or agents had circumvented compliance measures that were otherwise reasonable in identifying such violations.").

detect and prevent bribery in foreign countries shall not be liable for the vicarious actions of its employees in DOJ and SEC FCPA enforcement proceedings. The DOJ and SEC are to promulgate a list of factors to be considered in determining whether a procedure constitutes an “adequate procedure.”

A number of considerations about this statutory language are significant. First, the statute makes clear that the defense will only apply to corporations (not individuals) subject to the anti-bribery provisions of the FCPA. Second, it establishes the defense when a corporation has both established and implemented adequate procedures, meaning that the corporation must show more than the mere establishment of procedures through “paper-based” policies; it must show that these policies were implemented. Third, the language incorporates both a detection component and prevention component to combat bribery,<sup>162</sup> meaning that corporations should show that they actively analyzed areas of potential weakness where bribery might occur (detection) and systems were implemented to deter the illegal conduct from happening (prevention). Lastly, the defense mandates that the DOJ and SEC further clarify the defense by promulgating a list of factors to be considered in determining whether procedures were adequate.

## 2. *Administrative Guidance*

The DOJ and SEC should follow Congress’s command and promulgate a list of factors to be considered in determining what constitutes an adequate procedure.<sup>163</sup> This clarity will give American firms guidance in developing and implementing anti-bribery policies and procedures, aimed at incentivizing compliance with the Act. Additionally, the factors establish a greater amount of predictability for firms operating overseas, taking away some of the current uncertainty associated with FCPA’s expansive reach.

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<sup>162</sup> See BIEGELMAN & BIEGELMAN, *supra* note 16, at 212 (“An effective [compliance] program is a program that works to prevent and detect violations of the law.”).

<sup>163</sup> The DOJ has this ability under the 1988 FCPA amendment. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003(e), 102 Stat. 1107, 1417–18 (1988). The 1998 amendments allow the DOJ to determine whether the business community’s compliance with the FCPA would be enhanced “by further clarification of the [anti-bribery] provisions.” 15 U.S.C. § 78dd-1(d). If the DOJ finds that such clarification is needed, it is authorized to issue these guidelines, detailing conduct that would conform to the Act’s anti-bribery provisions. *Id.* This prior legislation, in addition to the legislation this Article proposes, is more than enough legal authority for the DOJ to take the suggested course and promulgate a list of factors. With respect to the SEC, the agency has this ability under its Opinion Release Procedure. See *supra* note 86.

This Article suggests the following factors (which should not be considered as being mutually exclusive from one another) in determining whether a defense will be deemed adequate by a judicial body:

- Board and Management Commitment: a commitment by the board of directors and management to detect and prevent bribery.
- Policies and Procedures in Place Designed to Detect Bribery: mechanisms established with the goal of analyzing the people and places where bribery may be a weakness.
- Policies and Procedures in Place Designed to Prevent Bribery: mechanisms established with the goal of deterring bribery.
- Effective Implementation: ensuring that the policies and procedures are embedded and carried out throughout the firm.
- Consistent Bribery Compliance Review: reviewing the firm's bribery policies, procedures, mechanisms, and overall compliance on a consistent basis.

These factors address the main areas associated with a strong compliance program including top-level commitment, detection and prevention mechanisms, and consistent review.<sup>164</sup> Because they are generally prescribed, it ensures that corporations will have the freedom to implement programs that best fit their respective situations.<sup>165</sup> Additionally, the effective implementation factor helps ensure that firm bribery prevention actually exists and that policies and procedures are more than mere paper-based policies and procedures.

Specifically, with regard to the procedural mechanisms associated with the defense, the defense would be asserted by a firm as an affirmative defense to liability in a FCPA enforcement action. Then, assuming the firm can show that a number of the factors listed above were sufficiently present, the DOJ, SEC, or both may be more willing to drop the lawsuit or settle for a nominal amount. If the case proceeded to trial, the judiciary would then apply and weigh the factors above.

Of course, like any legal proposal, there are a number of critiques that could be made against the adequate procedures defense, which this Article addresses below. Before addressing these critiques, however, the next section explains the projected outcomes of the defense.

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<sup>164</sup> See BIEGELMAN & BIEGELMAN, *supra* note 16, at 212.

<sup>165</sup> Cf. William C. Athanas, *When Doing Business Internationally Becomes a Crime: Assisting Clients in Understanding and Complying with the Foreign Corrupt Practices Act*, 71 ALA. LAW. 382, 386 (noting that compliance programs should not be "one size fits all").

*B. Striking the Proper Balance: Predicted Outcomes of the Defense*

Currently, firms have no recognized legal incentive to implement procedures designed to prevent bribery.<sup>166</sup> There is no defense when an employee decides to go rogue and bribe a foreign official.<sup>167</sup> To be sure, the DOJ has stated that anti-bribery procedures are considered at sentencing.<sup>168</sup> However, this consideration only takes place after liability is determined—certainly little protection against aggressive prosecution.<sup>169</sup> With the legal recognition of an adequate procedures defense, companies will be motivated to implement compliance programs.<sup>170</sup> These programs will lead to less bribery and will allow the FCPA to accomplish its original goal.<sup>171</sup>

The defense will also give firms a counterweight to balance against the current overreach of the FCPA. Although this defense does not prevent the

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<sup>166</sup> Koehler, *Revisiting*, *supra* note 20, at 627.

<sup>167</sup> Doty, *supra* note 26, at 1235 (noting that “current law leaves largely unresolved the central issue of when a company’s compliance system and anti-bribery policy are [legally] sufficient” to guard against FCPA liability).

<sup>168</sup> U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (2012).

<sup>169</sup> *FCPA Hearing*, *supra* note 32, at 24 (statement of the Hon. Michael B. Mukasey) (“There is [currently] no guarantee that a strong compliance program will be given the weight it deserves.”); WEISSMANN & SMITH, *supra* note 7, at 13 (explaining that anti-bribery procedures should be considered during the liability phase of litigation, not just at sentencing).

<sup>170</sup> *Cf.* Andrew Weissmann with David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 432–33 (detailing the lack of incentives for corporations “to implement effective compliance programs” given that “[u]nder the current legal regime, a corporation is given no benefit at all under the law for even the best internal compliance program if such crime nevertheless occurs”); *see also* Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53 (2007). In terms of incentivizing adequate procedures designed at complying with the Act, it may be useful to consider the United States Supreme Court’s holding in *Kolstad v. American Dental Ass’n*, 527 U.S. 526 (1999). In *Kolstad*, the Court, in examining punitive damages under a Title VII claim, held that “an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer’s ‘good-faith efforts to comply with Title VII.’” *Id.* at 545. The court implied that its holding was due in part to concerns that the existing standard was “[d]issuading employers from implementing programs or policies to” comply with Title VII. *Id.* at 545. Similar logic can be applied to the FCPA context because the current standard does not affirmatively persuade employers to adopt adequate procedures designed to prevent against bribery. In fact, evidence suggests that “very few companies are actually implementing best-in-class FCPA policies and procedures.” *The Benefits of an FCPA ‘Compliance Defense,’* CORP. COUNS. (Jan. 18, 2012) (interview by Catherine Dunn of Mike Koehler).

<sup>171</sup> Klobuchar & Coons Letter, *supra* note 40 (noting “that effective guidance will allow [U.S.] companies to comply with the [Act] more efficiently”); Koehler, *Revisiting*, *supra* note 20, at 656 (explaining that incentives to compliance will reduce instances of bribery and advance the FCPA’s objectives).

DOJ or SEC from bringing actions, the defense could be influential at a number of junctures in the litigation process, thereby reducing the monetary and reputational impact that a firm suffers.<sup>172</sup> First, if a corporation demonstrates that it had adequate procedures in place, the DOJ or SEC may be less likely to start enforcement actions, saving the firm money in legal fees and potential penalties. Second, assuming lawsuits commence, firms will be less likely to settle for high sums when they know that a legitimate defense against liability exists. This will, in turn, either force the agencies to settle at nominal amounts or proceed to trial, where the adequate procedures defense can be used to absolve a firm from liability. Additionally, if more FCPA corporate bribery cases go to trial, this will have the added benefit of judicial clarification of the Act.<sup>173</sup>

Not only does the adequate procedures defense limit a firm's liability exposure, but it also adds predictability to a firm's overseas actions.<sup>174</sup> American corporations will be more likely to invest in resource-rich areas—even those areas that may be prone to bribery—if they know that their good-faith efforts to detect and prevent bribery will be given legal recognition.<sup>175</sup> This added dimension (i.e., the defense) incentivizes overseas investment, ingenuity, and growth. As part and parcel of a firm's transactional plan, a plan to prevent bribery can be implemented, and uncertainty over compliance with the FCPA disappears.<sup>176</sup>

An adequate procedures defense also aligns the FCPA with other foreign anti-bribery regimes that contain a similar defense.<sup>177</sup> Because the FCPA has been shown to affect American firms negatively in comparison

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<sup>172</sup> See *supra* Part II.A (documenting the monetary and reputational consequences that come along with FCPA scrutiny).

<sup>173</sup> Cf. *FCPA Hearing*, *supra* note 32, at 2 (statement of Rep. Sensenbrenner) (explaining that “the absence of case law ... confounds industries’ ability to conform to the law”); WEISSMANN & SMITH, *supra* note 7, at 4 (noting that current incentives to settle enforcement actions “ensure that judicial oversight of FCPA cases will continue to be limited”).

<sup>174</sup> Cf. Doty, *supra* note 26, at 1239 (implying that consistency and predictability in the FCPA context will allow corporations “to accomplish complex tasks in difficult foreign venues”); Koehler, *Revisiting*, *supra* note 20, at 658 (noting that a compliance defense would make the FCPA enforcement “more transparent, consistent, and predictable”).

<sup>175</sup> See Doty, *supra* note 26, at 1239 (noting that the managers and directors of corporations want to comply with the FCPA, but that they just need to know “the how-to-do-it”).

<sup>176</sup> Interestingly, one former DOJ official explained that firms that implement anti-bribery procedures find it improves business: “[T]hey are more profitable, not less profitable when they have appropriate controls in place.” Interview by PBS Frontline with Mark Mendelsohn, Deputy Chief, Fraud Section, Criminal Div., U.S. Dep’t of Justice (Apr. 7, 2009) (transcript available at <http://www.pbs.org/wgbh/pages/frontline/blackmoney/interviews/mendelsohn.html>).

<sup>177</sup> See *supra* notes 153–56 and accompanying text.

to their foreign counterparts,<sup>178</sup> an adequate procedures defense would place American firms on an equal playing field.<sup>179</sup>

### *C. Responses to Anticipated Critique*

This Article will now rebut a number of criticisms that will be made in response to this proposal. First, opponents of a statutorily created defense note that a de facto adequate procedures defense already exists because the DOJ takes into consideration the existence of these procedures in deciding whether to prosecute, and these procedures are also credited at sentencing.<sup>180</sup> Thus, these opponents claim that incentives already exist for a firm to implement adequate anti-bribery procedures.<sup>181</sup> However, with respect to prosecutorial discretion, this “opaque carrot” is not the proper way to incentivize behavior, as discretion still remains, and therefore, litigation can proceed.<sup>182</sup> Moreover, with regard to sentencing credit, this consideration takes place after liability is established<sup>183</sup> and after firms have invested monetary sums on investigative and legal fees. In contrast, the adequate procedures defense can be used to thwart liability,<sup>184</sup> which leads to less monetary investment on litigation-based expenses. Additionally, the defense provides a real “tangible carrot” that incentivizes firms to comply with the Act.

Second, critics of the proposal may suggest that an adequate procedures defense could become a “blueprint for fraud”<sup>185</sup> in that firms just

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<sup>178</sup> See *supra* note 152 and accompanying text.

<sup>179</sup> See *FCPA Hearing, supra* note 32, at 24 (statement of the Hon. Michael B. Mukasey) (noting that the addition of a compliance defense would “ensure consistent application of anti-corruption law across jurisdictions”).

<sup>180</sup> *Examining Enforcement Hearing, supra* note 160, at 26 (statement of Greg Andres, Deputy Assistant Attorney General) (“[T]he Department already considers a company’s compliance efforts in making appropriate prosecutorial decisions, and the United States Sentencing Guidelines also appropriately credits a company’s compliance efforts in any sentencing determination.”); see also David Kennedy & Dan Danielsen, *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act*, OPEN SOC’Y FOUNDS., Sept. 2011, at 29, available at [http://iris.lib.neu.edu/cgi/viewcontent.cgi?article=1102&context=slaw\\_fac\\_pubs](http://iris.lib.neu.edu/cgi/viewcontent.cgi?article=1102&context=slaw_fac_pubs) (noting that “the DOJ and SEC regularly take a company’s compliance efforts into account at every stage of the enforcement process”).

<sup>181</sup> *Examining Enforcement Hearing, supra* note 160, at 26 (statement of Greg Andres).

<sup>182</sup> See *FCPA Hearing, supra* note 32, at 23 n.2 (statement of the Hon. Michael B. Mukasey) (noting that “the government has complete discretion as to how much credit to give for such a program”).

<sup>183</sup> *Id.* at 24.

<sup>184</sup> See *Examining Enforcement Hearing, supra* note 160, at 15 (statement of Andrew Weisman, Partner, Jenner & Block, LLP) (“The statute should be modified ... to mandate consideration of compliance programs during the liability discussion of an FCPA prosecution.”).

<sup>185</sup> Doty, *supra* note 26, at 1249 (noting one potential critique to his Reg. FCPA proposal: that it is a “blueprint for fraud”).

have to give the impression of adequate procedures and policies and then the defense can be utilized. As part and parcel of this argument, critics may argue that companies just “need to implement ... purely paper compliance program[s].”<sup>186</sup> However, as noted above, both the Congressional text establishing the defense and the administrative factors related to it discern whether policies were actually implemented—that is, any defense solely based on paper policies will not be adequate. To be sure, there is always a judicial check on the defense; in cases that are litigated to the end, the judiciary will be able to assess and apply the various factors, preventing firms from using the defense as a license and blueprint for fraud.

Third, supporters of the current regime claim that the FCPA’s ambiguous nature is integral to its purposes of preventing bribery.<sup>187</sup> As explained throughout this Article, however, the adequate procedures defense aims to further this anti-bribery goal by incentivizing firms to implement procedures designed to prevent bribery. At the same time, the defense mitigates some of the negative business impacts associated with the Act’s current overreach.

#### CONCLUSION

Today many American corporations must look to develop business outside of the U.S. For these firms, complying with the FCPA is difficult, if not outright near impossible because of the Act’s overreach. Firms then become risk adverse, often times opting to not pursue potential foreign growth areas, resulting in market inefficiency and competitive disadvantage. These firms are in desperate need of a tool that will allow the FCPA’s anti-bribery policy goals to continue while at the same time providing clarity to spur overseas investment. This tool is an adequate procedures defense.

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<sup>186</sup> *Examining Enforcement Hearing*, *supra* note 160, at 26 (statement of Greg Andres); *see also* Kennedy & Danielsen, *supra* note 180, at 31 (arguing that a “fig leaf” compliance program would insulate firms from liability).

<sup>187</sup> Doty, *supra* note 26, at 1249.