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THE FOREIGN CORRUPT PRACTICES ACT: A NEW APPROACH TO THE REASONABLE AND BONA FIDE EXPENDITURE DEFENSE

INTRODUCTION

Since *United States v. Kay*¹ was decided in 2004, enforcement of the Foreign Corrupt Practices Act² (FCPA or the Act) has significantly increased, putting companies on notice that the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) intend to aggressively pursue violators.³ The agencies brought more indictments against individuals in 2009 alone than in the previous seven years combined.⁴ As of 2010, there were an estimated 140 open FCPA investigations, with fines reaching record levels.⁵ Increasing enforcement actions, together with the FCPA's vague wording, a broad interpretation of the statutory language,⁶ and a dearth of court decisions,⁷ have resulted in an overly cautious international business community.⁸ In attempting to ensure that their companies do not land on the DOJ's or SEC's radars, businesses are rejecting legitimate opportunities.⁹

The FCPA's increasingly high-profile status has led to examinations of its various elements. Most frequently examined are the definitions of several key terms such as "foreign official," "obtaining or retaining business," "corruptly," and "thing of value."¹⁰ However, there has been very little exploration of the FCPA's two affirmative defenses, in particular, the "reasonable and bona fide expenditure" defense.¹¹ Arguably, this is because the defense is ephemeral and the majority of enforcement actions end in deferred or non-prosecutorial agreements.¹² In theory, the defense allows companies to pay costs associated with promoting their products, such as travel and hotel fees that foreign officials incur while attending promotional events.¹³ However, no clear guidelines defining a reasonable

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

2. Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§ 78m(b), (d)(1), (g)–(h), 78dd-1 to 78dd-3, 78ff (2006).

3. Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT'L L. & COM. REG. 83, 95 (2007).

4. Jon Jordan, *Recent Developments in the Foreign Corrupt Practices Act and the New UK Bribery Act: A Global Trend Towards Greater Accountability in the Prevention of Foreign Bribery*, 7 N.Y.U. J. L. & BUS. 845, 853–54 (2011).

5. See Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 496 (2011).

6. Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 965 (2010).

7. *Id.*

8. *Id.* at 925.

9. Westbrook, *supra* note 5, at 498.

10. 15 U.S.C. § 78dd-1(a), (f)(1)(A) (2006).

11. § 78dd-1(c)(2).

12. Koehler, *supra* note 6, at 933–34.

13. § 78dd-1(c)(2).

expenditure currently exist. Without specific guidance, companies rely on the DOJ's and SEC's recently published *Resource Guide to the U.S. Foreign Corrupt Practices Act (Resource Guide)*,¹⁴ DOJ Opinion Procedure Releases, and practitioners' deductions about acceptable expenditures.¹⁵ In sum, businesses are forced to make educated guesses as to whether their promotional expenditures comply with the FCPA.

The greater problem, as this note argues, results when the lack of a clear standard leads to disparate results in factually similar cases, as illustrated by the divergent fines imposed on UTStarcom Inc. (UTSI) and Lucent Technologies, Inc. (Lucent). Although both companies engaged in similar violations, UTSI paid a higher fine than Lucent, notwithstanding the fact that Lucent spent more money on foreign official travel.¹⁶ If the DOJ articulated and codified a clear rule for determining what expenditures are "reasonable and bona fide," which the *Resource Guide* explicitly fails to do,¹⁷ the defense's limitations would be better understood. A rule would prevent future attempts to mask questionable expenditures¹⁸ behind the defense, while protecting companies making legitimate expenditures from DOJ or SEC action. Importantly, this clarity would allow decisions to be made at the speed of business, instead of waiting for DOJ Opinion Procedures. The resulting flexibility would achieve the defense's ultimate goals of promoting legitimate business opportunities while simultaneously ensuring equitable punishment for violators.

In Part I, this note provides background on the FCPA and the roles of the DOJ and SEC, as well as on the Act's most important elements. Part II reviews the "greasing provision" and the two affirmative defenses. Part III addresses the dramatic increase in FCPA enforcement and the reasons diversion agreements increase the FCPA's ambiguity.¹⁹ Part IV discusses the implications of the absence of DOJ guidance and case law on the affirmative defenses, particularly the "reasonable and bona fide expenditure" defense. Part V discusses the advantages of a rule-based system instead of the current standards-based FCPA construction. This note's proposed system envisages a rule modeled on the existing per diem structure currently in place for government employee travel.²⁰ As the

14. DEP'T OF JUSTICE, SEC. AND EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012) [hereinafter RESOURCE GUIDE].

15. See Shari A. Brown & Brian S. Chilton, *Foreign Corrupt Practices Act*, 11 BRIEFLY... PERSPECTIVES ON LEGIS., REG. & LITIG., May 2007, at 1, 35–39.

16. Koehler, *supra* note 6, at 989.

17. RESOURCE GUIDE, *supra* note 14, at 24.

18. Koehler, *supra* note 6, at 984–90.

19. Koehler, *supra* note 6, at 933–39; see also Lauren Giudice, Comment, *Regulating Corruption: Analyzing Uncertainty in Current Foreign Corrupt Practices Act Enforcement*, 91 B.U. L. REV. 348, 362–68 (2011) (providing background and exploration of the various critiques and rationales for the use of prosecution agreements).

20. *Per Diem Rates*, U.S. GEN. SERVICES ADMIN., <http://www.gsa.gov/portal/content/104877> (last visited Mar. 4, 2013).

section discusses, a rule-based system would facilitate the legitimate use of the defense and encourage pursuit of business opportunities abroad without fear of running afoul of the FCPA.

I. THE FOREIGN CORRUPT PRACTICES ACT

A. ELEMENTS OF THE FCPA

The FCPA was enacted as an amendment to the 1934 Securities Exchange Act after reports emerged that U.S. companies were making improper payments to foreign officials domestically and abroad.²¹ The Act prohibits bribery of foreign officials done to “obtain or retain” business and encompasses “U.S. persons and corporations, companies with publicly traded securities in the United States, and anyone who happens to be in U.S. territory.”²² Individuals and corporations covered by the Act may not “offer—either directly or indirectly—with a corrupt intent, anything of value to any foreign official for the purpose of ‘obtaining or retaining business for or with, or directing business to, any person.’”²³

The FCPA has been amended twice, in 1988 and again in 1998.²⁴ The first amendment added the affirmative defenses and expanded the Act’s scope to capture prohibited conduct occurring outside of the United States. The modifications made it possible to reach foreign corporations and persons who violate the FCPA while in the United States and clarified what it means to secure the type of “improper advantages” prohibited by the Act.²⁵ The 1998 amendment implemented the Organization for Economic Cooperation and Development’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.²⁶

The FCPA has two separate provisions: the accounting provisions and the anti-bribery provisions.²⁷ The FCPA amended the Securities Exchange Act to add record-keeping and disclosure requirements for companies subject to the Securities Exchange Act.²⁸ Corporations that either offer a class of securities requiring registration or are required to file reports under the Securities Exchange Act must comply with the FCPA’s accounting provisions, which are enforced by the SEC.²⁹ The accounting provisions

21. Jennifer D. Taylor, Comment, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 LA. L. REV. 861, 861–62 (2001); Westbrook, *supra* note 5, at 500.

22. Westbrook, *supra* note 5, at 500–01.

23. Giudice, *supra* note 19, at 355 (quoting 15 U.S.C. § 78dd-1(a)).

24. Westbrook, *supra* note 5, at 502.

25. *Id.*

26. *Id.*

27. Brown & Chilton, *supra* note 15, at 5.

28. Pamela J. Jadwin & Monica Shilling, *Foreign Corrupt Practices Act*, 31 AM. CRIM. L. REV. 677, 679 (1994).

29. Taylor, *supra* note 21, at 863.

state, “No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account”³⁰ The regulations further require that issuers “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer” and that companies also “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances” of properly authorized transactions.³¹ The provision aims to deter illegal business practices such as creating “off-the-books ‘slush funds’” or misrepresenting the nature of a commercial transaction.³² The record-keeping provisions ensure that transactions are properly recorded and that businesses are accountable for any differences in recorded and actual assets.³³ The Act’s requirements of “reasonable assurances” and “reasonable detail” are interpreted as a “level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.”³⁴

The DOJ administers the anti-bribery provisions, which are intended to deter bribery that occurs in an attempt to gain a competitive edge when conducting business with foreign government officials.³⁵ The Act’s carefully worded but sweeping language applies to “issuers,”³⁶ “domestic concerns,”³⁷ and “any person”³⁸ who violates the FCPA regardless of whether that person is a U.S. resident or doing business in the United States. It further prohibits use of the mail or other means of commerce to: (1) corruptly; (2) offer, pay, promise to pay, or authorize payment of money or anything of value; (3) to a foreign official; (4) to influence the foreign official’s actions or decisions in his official capacity, or to secure an improper advantage; and (5) to obtain or retain business.³⁹

The Act also prohibits willful blindness and imposes vicarious liability. An FCPA charge may be based on an intermediary’s or subsidiary’s act, and the government need not demonstrate either that the company was aware of or ordered the action.⁴⁰ Instead, liability under the FCPA requires only that the company’s executives were willfully blind to red flags indicating that the subsidiary was either engaging in, or would probably

30. 15 U.S.C. § 78m(b)(5) (2006).

31. § 78m(b)(2)(A)–(B).

32. Taylor, *supra* note 21, at 863.

33. *Id.*

34. § 78m(b)(7).

35. Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT’L L.J. 89, 94 (2010).

36. § 78dd-1(a).

37. § 78dd-2(a).

38. § 78dd-3(a).

39. See Brown & Chilton, *supra* note 15, at 5; see also § 78dd-1.

40. See Brown & Chilton, *supra* note 15, at 19.

engage in, illegal behavior.⁴¹ If a corporate executive ignores a third party's action, the official could still be liable if the executive's behavior implies knowledge of the actions.⁴² Further, the executive will also be responsible if he tacitly condoned the payment despite not possessing actual knowledge that it occurred.⁴³ This approach produces a problematic result when senior executives without knowledge of discreetly made payments, particularly by a third parties, are still held liable under the FCPA despite a lack of red flags or implied knowledge. The majority of enforcement actions against U.S. issuers or domestic concerns result from a third party's illegal actions.⁴⁴ Often, the third party is aware it is violating the company's anti-bribery provisions but believes its actions are the only way to obtain business in that country and does not inform the issuer of the payment.⁴⁵

B. THE AMBIGUOUS ELEMENTS

Most of the FCPA's language is quite broad and certain elements are particularly controversial. The majority of discussion has centered around who qualifies as a "foreign official," what it means to "obtain or retain" business, and determining when a gift is a "thing of value."⁴⁶ This section of the note briefly explores the debate and accepted interpretations of these phrases.

1. Who Is a "Foreign Official"?

The FCPA defines a "foreign official" as

any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.⁴⁷

41.

[T]he government can establish a company's "corrupt" intent to act through the intermediary through a "willful blindness" standard rather than requiring proof of "actual knowledge," such that the government need prove only that a company knew of facts (often referred to as "red flags") indicating a likelihood that the intermediary would engage in prohibited behavior, and then consciously or deliberately took steps to avoid learning whether the intermediary was engaging, or had engaged in, prohibited conduct.

Id. at 18.

42. Jadwin & Shilling, *supra* note 28, at 682–83.

43. *Id.*

44. Brown & Chilton, *supra* note 15, at 18–19.

45. *Id.*

46. See Koehler, *supra* note 6, at 914–17.

47. 15 U.S.C. § 78dd-1 (f)(1)(A) (2006).

Although the term “foreign official” is crucial to enforcing the FCPA, a court has never evaluated the current interpretation.⁴⁸ As a result, the DOJ and SEC have the freedom to define it to best suit their goals. Similarly, the *Resource Guide* fails to offer a conclusive definition but notes that the application is broad.⁴⁹ The Act clearly applies to foreign officials who serve in governmental ministries but has also been extended to include employees of foreign state-owned enterprises (SOE) because they are “instrumentalities” of the foreign government.⁵⁰ This poses a particular problem in certain fields such as “defense contracting, telecommunications, or airline manufacturing, where a company has all the attributes of a private enterprise, but on closer scrutiny demonstrates governmental ownership or control.”⁵¹ An employee may be considered a foreign official when he either holds a parallel position with the government in addition to having private sector responsibilities or where the employer is considered an “instrumentality” of a foreign government.⁵² Although not an exhaustive list, the DOJ and SEC will consider (1) the government’s extent of control over the organization and its characterization of the entity and the employees, (2) circumstances surrounding its creation and its obligations or privileges, (3) any financial support it receives, and (4) the perception that the entity is engaging in official business.⁵³ The DOJ and SEC additionally note that although an organization is unlikely to be considered an instrumentality if the government does not own or control a majority of the shares in the company, it might still be an SOE if the government has a close relationship with the company.⁵⁴ If a company is considered an “instrumentality,” then all of its employees are considered “foreign officials” for FCPA purposes regardless of their positions in the company.⁵⁵ As a result, a company subject to the FCPA must make a careful inquiry into the target industry’s affiliations as well as the particular background of the employee with whom it is conducting business.

2. What Does It Mean To “Obtain or Retain” Business?

To individuals unfamiliar with the FCPA, its prohibition on bribing officials in order to “obtain or retain” business would appear to relate only to those actions directly intended to procure contracts.⁵⁶ The Fifth Circuit’s decision

48. See Koehler, *supra* note 6, at 916.

49. RESOURCE GUIDE, *supra* note 14, at 20.

50. See Koehler, *supra* note 6, at 916.

51. Brown & Chilton, *supra* note 15, at 11.

52. *Id.*

53. RESOURCE GUIDE, *supra* note 14, at 20.

54. *Id.* at 20–21.

55. Brown & Chilton, *supra* note 15, at 11–12.

56. Jonathan N. Rosen, *FCPA Enforcement Actions: Managing Risks in the Global Marketplace*, DRI FOR THE DEF., Oct. 2010, at 58, 61 n.10.

in *United States v. Kay*,⁵⁷ demonstrated that this interpretation of the FCPA's clause is incorrect.⁵⁸ In *Kay*, the president and vice president of a Houston-based company were indicted for anti-bribery violations.⁵⁹ The indictment alleged that the defendants made improper payments to Haitian foreign officials in order to reduce customs duties and sales taxes.⁶⁰ The indictment did not present facts demonstrating how the company either obtained or retained business based on the reduced duties, but the DOJ argued that favorable tax treatment was within the FCPA's anti-bribery scope.⁶¹ In deciding the case, the court's analysis relied heavily on legislative intent because of the provision's ambiguity.⁶² The court found that Congress intended to prevent payments broader than those simply influencing the acquisition or retention of government contracts.⁶³ It held that payments to a foreign official to lower taxes can sometimes provide an unfair advantage to the payor over competitors and result in obtaining or retaining business.⁶⁴ However, the court limited its holding by recognizing that there would be circumstances in which making a payment to reduce taxes would not fall within the FCPA's scope.⁶⁵ Nonetheless, *Kay* prompted enforcement agencies to aggressively target companies that made payments involving customs duties and taxes.⁶⁶ Based on *Kay*, companies must consider whether they may incur liability under the FCPA through indirect benefits their companies obtain and not simply direct benefits.

3. What Is a "Thing of Value"?

One of the FCPA's crucial provisions is its prohibition on providing money or a "thing of value" to foreign officials.⁶⁷ Though the FCPA does not define the phrase "thing of value" nor provide a de minimis exception,⁶⁸ courts have looked to the subjective value the defendant places on the item rather than its monetary worth in applying the standard.⁶⁹ For example, in *United States v. Liebo*,⁷⁰ the Eighth Circuit found that an airline ticket was a

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

58. Rosen, *supra* note 56.

59. Koehler, *supra* note 6, at 918.

60. *Id.*

61. *Id.*

62. *Kay*, 359 F.3d at 755–57; *see also* Koehler, *supra* note 6, at 919.

63. *Kay*, 359 F.3d at 756.

64. *Id.* at 759–60; *see also* Koehler, *supra* note 6, at 920.

65. *Kay*, 359 F.3d at 760; *see* Koehler, *supra* note 6, at 920.

66. Koehler, *supra* note 6, at 920; Rosen, *supra* note 56, at 61 (discussing the DOJ's prosecution of Helerich & Payne, Inc. for improper payments to customs officials in Argentina and Venezuela to expedite importation and exportation of materials).

67. 15 U.S.C. § 78dd-1(a)(1)(A) (2006).

68. RESOURCE GUIDE, *supra* note 14, at 14–15.

69. Brown & Chilton, *supra* note 15, at 9.

70. RESOURCE GUIDE, *supra* note 14 (discussing *United States v. Liebo*, 923 F.2d 1308 (8th Cir. 1991), as an example of an airline ticket being a "thing of value" within the meaning of the statute).

thing of value. Additionally, the *Resource Guide* indicates that spending \$10,000 when entertaining government officials is improper because the “larger or more extravagant the gift . . . the more likely it was given with an improper purpose.”⁷¹ Further, a properly recorded donation to a legitimate charity may be a thing of value if a government official is actively involved with the charity and subjectively valued the donations.⁷² As a result, when making expenditures, corporate executives must consider not only the objective value of the expenditure but also whether it will induce the government official to assist the company, thereby evincing a corrupt intent.

II. EXCEPTION AND AFFIRMATIVE DEFENSES

The Act’s exception and affirmative defenses give businesses some latitude when operating overseas or negotiating with foreign governments. However, these exceptions and defenses are of limited use because of their narrow interpretations or vague language.

A. EXCEPTION: FACILITATION PAYMENTS

The Act includes one exception to allow “grease” payments to foreign government officials to facilitate the performance of routine duties, which are enumerated as

obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or actions of a similar nature.⁷³

This exception enables U.S. businesses operating overseas to obtain services necessary for conducting daily operations that might not occur without small facilitation payments. There is no official maximum amount for grease payments, but \$1,000 appears to be the acceptable limit⁷⁴ and the *Resource Guide* indicates that a large payment “is more suggestive of corrupt intent to influence a non-routine governmental action.”⁷⁵ When the exception is invoked, the government’s analysis focuses on whether the money was used to achieve the performance of a routine governmental

71. RESOURCE GUIDE, *supra* note 14, at 15–16.

72. See SEC v. Schering-Plough Corp., SEC Litigation Release No. 18740, 82 SEC Docket 3732 (June 9, 2004), available at <http://www.sec.gov/litigation/litreleases/lr18740.htm>; Koehler, *supra* note 6, at 915.

73. 15 U.S.C. § 78dd-2(h)(4)(A)(i)–(v) (2006).

74. Bixby, *supra* note 35, at 110.

75. RESOURCE GUIDE, *supra* note 14, at 25.

action. This exception will not apply where the official was required to use his discretion or perform a nonroutine task.⁷⁶ As such, courts focus on the purpose of the payment, not its value.⁷⁷ When the exception is invoked, the burden is on the government to show that it does not apply.⁷⁸ However, when the facilitation payment was intended as a bribe, then the payment may violate the FCPA even if it would have otherwise qualified as a grease payment.⁷⁹ In effect, the facilitation payment does not act as a *de minimis* exception to the anti-bribery provisions.⁸⁰

B. AFFIRMATIVE DEFENSES

The FCPA incorporates two affirmative defenses. The first, known as the “local law defense,”⁸¹ allows for “the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country.”⁸² To employ this defense, the law regarding payments or gifts must be codified and not simply culturally expected.⁸³ This defense has limited application, however, because if such payments are acceptable in the host country, their permissibility is unlikely to be codified.⁸⁴

The second affirmative defense allows “reasonable and bona fide expenditures” to enable corporations to pay a foreign official’s legitimate travel expenses, such as hotel stays, when the expenses are associated with promoting a product or service.⁸⁵ The language provides that expenses may be paid if the expense

was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—

(A) the promotion, demonstration, or explanation of products or services;
or

(B) the execution or performance of a contract with a foreign government or agency thereof.⁸⁶

76. *Id.*

77. *Id.*

78. See Brown & Chilton, *supra* note 15, at 26.

79. See *id.*

80. See *id.*

81. Margaret Ryznar & Samer Korkor, *Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing*, 76 MO. L. REV. 415, 433 (2011).

82. 15 U.S.C. § 78dd-1(c)(1) (2006).

83. Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT’L L. 419, 425 (1999).

84. *Id.*

85. 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. 466, 478 (2011).

86. § 78dd-1(c)(2)(A)–(B).

To be “reasonable and bona fide,” a payment may not be made corruptly.⁸⁷ Although not specifically defined, legislative history indicates that a payment is corrupt if

the offer, payment, promise, or gift, [is] intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or a favorable regulation. The word “corruptly” connotes an evil motive or purpose, an intent to wrongfully influence the recipient. It does not require that the act be fully consummated, or succeed in producing the desired outcome.⁸⁸

This provision is not a true affirmative defense, but rather a “safe harbor” that permits the company to prove that it did not have a corrupt intent when it paid the promotional expenses.⁸⁹ However, the “bona fide expense” defense will not shield a company from liability, even if its expenses were legitimate, if the government can prove that the company’s intentions were corrupt, and, hence, not “bona fide.”⁹⁰ The *Resource Guide* states that paying travel and other related expenses to visit company facilities, training, product demonstration/promotional activities, and meetings are not actionable.⁹¹ Further, it provides a list of safeguards addressing whether an expenditure might violate the FCPA and notes that each payment is individually evaluated.⁹²

III. THE DRAMATIC INCREASE IN FCPA PROSECUTIONS

A. FCPA ENFORCEMENT TRENDS

In 2004, the same year as *United States v. Kay* was decided, the SEC and DOJ began aggressively enforcing the FCPA.⁹³ In the years following, civil and criminal prosecutions based on novel legal theories used to prosecute corporations steadily increased.⁹⁴ The enthusiasm for FCPA prosecutions became more pronounced under the Obama administration, which linked corruption with national security issues such as terrorism and human, weapons, and drug trafficking.⁹⁵

In 2010, the SEC and DOJ brought a record seventy-four enforcement actions,⁹⁶ a sharp increase from the forty brought in 2009,⁹⁷ with little

87. Sheahan, *supra* note 85, at 478–79.

88. S. REP. NO. 95-114, at 10–11 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4108.

89. *See* Brown & Chilton, *supra* note 15, at 29.

90. *See id.*

91. RESOURCE GUIDE, *supra* note 14, at 24.

92. *Id.*

93. Bixby, *supra* note 35, at 104.

94. *Id.*

95. Mark Brzezinski, *Obama Administration Gets Tough on Business Corruption Overseas*, WASH. POST, May 28, 2010, at A23.

96. 2010 Year-end FCPA Update, GIBSON DUNN (Jan. 3, 2011) <http://www.gibsondunn.com/publications/Documents/2010YearEndFCPAUpdate.pdf> [hereinafter GIBSON DUNN 2010].

indication that prosecution will abate. Echoing the Obama administration's policy position, former Assistant Attorney General Lanny Breuer said, "One can say without exaggeration that this past year was probably the most dynamic single year in the more than thirty years since the FCPA was enacted."⁹⁸

FCPA enforcement actions expanded during 2009 based on several developments. These developments included the SEC's use of new enforcement theories, the DOJ's prosecution of third parties and foreign government officials, the DOJ's and SEC's encouragement of self monitoring, increased prosecution of individuals, and organizational changes at the DOJ and SEC.⁹⁹ Both the DOJ and SEC created task forces to uncover FCPA violations.¹⁰⁰ Additionally, the DOJ created a squad of FBI agents dedicated to pursuing allegations of corruption and developed investigative partnerships with agencies such as the Internal Revenue Service's Criminal Investigations Division.¹⁰¹ The DOJ and SEC also aggressively targeted individual defendants, particularly senior corporate executives.¹⁰² Interestingly, although corporations typically choose to avoid trial, individual defendants appear to prefer litigation.¹⁰³ If enforcement actions against individuals continue, then one long-term benefit may be an increased amount of case law, which will assist companies with interpreting the FCPA.

B. INCREASED PENALTIES FOR NONCOMPLIANCE WITH THE FCPA

Along with more aggressive FCPA enforcement, the penalties and fines for such violations have dramatically increased.¹⁰⁴ The FCPA's criminal penalties allow the DOJ and SEC to fine corporations and business entities up to \$2,000,000, while individuals may receive a fine of up to \$100,000 and five years in prison.¹⁰⁵ Additionally, under the Alternative Fines Act, the actual fine may be twice the benefit that the defendant received from making the illicit payment.¹⁰⁶ The Attorney General or the SEC may also bring a civil action for a fine of up to \$10,000 against a company or an individual acting on behalf of the company, and the court may impose a

97. *2009 Year-End FCPA Update*, GIBSON DUNN (Jan. 4, 2010), <http://gibsondunn.com/publications/pages/2009Year-EndFCPAUpdate.aspx> [hereinafter GIBSON DUNN 2009]. GIBSON DUNN 2010, *supra* note 96.

98. GIBSON DUNN 2009, *supra* note 97.

99. *Id.*

100. Brzezinski, *supra* note 95.

101. GIBSON DUNN 2009, *supra* note 97; RESOURCE GUIDE, *supra* note 14, at 5.

102. GIBSON DUNN 2009, *supra* note 97.

103. *Id.*

104. Bixby, *supra* note 35, at 109.

105. 15 U.S.C. § 78dd-2(g) to -3(e) (2006); *see* Brown & Chilton, *supra* note 15, at 47.

106. 18 U.S.C. § 3571(d) (2012); *see* Brown & Chilton, *supra* note 15, at 47.

fine based on the egregiousness of the violation.¹⁰⁷ Finally, the penalties for violating the books and records provisions may be a fine of up to \$25,000,000 for corporations, with \$5,000,000 and up to twenty years imprisonment for an individual.¹⁰⁸ Furthermore, the Alternative Fines Act applies to prosecutions conducted under the books and records provisions, which may also significantly increase the fines.¹⁰⁹ The most serious potential consequence for an FCPA violation is that a person or firm may be prohibited from receiving federal government contracts and export licenses.¹¹⁰

Although the stipulated monetary consequences of an FCPA violation are significant, they pale in comparison to the actual fines. Fines have steadily increased in large part because the penalties now include disgorgement of profits.¹¹¹ The prosecutorial trend of seeking fines in the alternative reflects an effort to both deter future violations and to eliminate any profits obtained through that specific violation.¹¹² The 2008 Siemens AG settlement demonstrates the enormity of potential FCPA-related fines: the company settled alleged FCPA violations with the SEC for disgorgement of \$350 million in profits and with the DOJ for \$450 million to settle criminal charges—in addition to a \$569 million fine levied by the German government.¹¹³ This \$800 million settlement was the largest penalty paid in an FCPA case.¹¹⁴ The enormous Siemens AG settlement demonstrates that the SEC and DOJ will seek substantial punitive measures in this new era of FCPA enforcement.

C. THE OVERUSE OF DEFERRED AND NON-PROSECUTORIAL AGREEMENTS

Although the SEC and DOJ are imposing increasingly large fines, the theories under which they bring actions are rarely tested because the vast majority of cases settle.¹¹⁵ The DOJ's and SEC's goal when enforcing the FCPA is to reform the company instead of simply punishing it.¹¹⁶ The DOJ

107. Brown & Chilton, *supra* note 15, at 47.

108. 15 U.S.C. § 78ff(a) (2006).

109. Brown & Chilton, *supra* note 15, at 48.

110. *Id.*

111. Bixby, *supra* note 35, at 109.

112. John Gibeaut, *Battling Bribery Abroad*, A.B.A. J. (Mar. 18, 2007, 5:05 AM), http://www.abajournal.com/magazine/article/battling_bribery_abroad/.

113. Press Release, Sec. & Exch. Comm'n, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), *available at* <http://www.sec.gov/news/press/2008/2008-294.htm>.

114. *FCPA Watch: Siemens Agrees to Pay Record-Breaking US \$800 Million for FCPA Violations*, MAYER BROWN (Dec. 16, 2008), <http://www.mayerbrown.com/publications/article.asp?id=5951&nid=6>.

115. Koehler, *supra* note 6, at 925.

116. Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 161 (2008).

relies on the Principles of Federal Prosecution, which sets forth factors prosecutors should consider when determining whether to bring charges against a business or to negotiate a deferred or non-prosecutorial agreement.¹¹⁷ The Principles provide several mitigating factors, such as the corporation's disclosure of the violation and willingness to cooperate with an investigation.¹¹⁸ The *U.S. Sentencing Guidelines* places a heavy premium on cooperation and disclosure, and cooperation may result in significantly lower fines.¹¹⁹ Given that voluntary disclosure carries much lighter penalties, corporations typically choose to disclose conduct and agree to the DOJ's terms, even when it is unclear whether the corporation's actions violated the FCPA.¹²⁰ In fact, although individuals typically proceed to litigation, in the last twenty years, no company has challenged an FCPA enforcement action.¹²¹

The SEC uses similar cooperation-based incentives to encourage companies to disclose conduct that might violate the FCPA.¹²² The result, as with the DOJ's approach, is that a company may potentially disclose conduct that does not violate the FCPA. However, some companies may prefer this calculated risk as it avoids the potentially greater cost of litigation and its uncertain result.¹²³

Deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) constitute the two most commonly used tools for settling FCPA charges.¹²⁴ One of the main differences between the two is that courts are empowered to review DPAs but not NPAs.¹²⁵ When the DOJ is involved, a DPA requires a defendant to pay a penalty, waive the statute of limitations, cooperate, admit certain facts, and implement compliance measures. If the company successfully completes the agreement, then the charges are dismissed.¹²⁶ Under an SEC DPA, the SEC agrees to forego an enforcement action provided the company meets certain requirements, including cooperation with the SEC's investigation. If the agreement is violated, the SEC may recommend an enforcement action and, if authorized, may use any admissions the company or individual made in a motion for summary judgment.¹²⁷ However, under an NPA, the DOJ and SEC retain the right to bring charges but refrain from filing documents with the court in order to allow the company or individual an opportunity to take

117. Koehler, *supra* note 6, at 925.

118. *Id.*

119. *Id.*

120. *Id.* at 926.

121. *Id.* at 927.

122. *Id.* at 929.

123. *Id.* at 926–27.

124. *Id.* at 928.

125. Giudice, *supra* note 19, at 366.

126. RESOURCE GUIDE, *supra* note 14, at 73–74.

127. *Id.* at 76.

remedial measures.¹²⁸ Although diversion agreements avoid the expense of litigation, one consequence is that prosecutors have an extensive amount of power when drafting the agreements.¹²⁹

Although diversion agreements allow the SEC and DOJ to quickly settle allegations, the result of their use has been wide-reaching FCPA enforcement with little judicial oversight of either the allegations or the settlements.¹³⁰ First, different judicial districts have different policies about the acceptable use of diversion agreements, increasing a corporation's uncertainty about whether to challenge the charge.¹³¹ Second, it appears that individuals and corporations may enter into diversion agreements before sufficient facts are established against an individual or entity.¹³² As a result of the DOJ's and SEC's use of diversion agreements, businesses are eager to quickly resolve any allegations of wrongdoing. Consequently, and perhaps due to companies' increased docility with respect to current diversion agreement practice, the DOJ has expanded the definition of "foreign officials," increased prosecution of companies over licensing issues, implemented strict liability for the record-keeping provisions, and used disgorgement for violations of the accounting provisions.¹³³

Although diversion agreements present businesses with the opportunity to quickly settle a charge, in the long run this might hurt them as the parameters for penalties remain unclear. Not only is the statute's language ambiguous, but, should a company determine that it violated the law, it cannot anticipate how harshly it will be punished. Further, given the premium the agencies place on cooperation, should a company attempt to defend its actions, the company will probably be considered uncooperative and possibly face stiffer penalties.¹³⁴ The opaqueness regarding the contours of FCPA liability created by current diversion agreement practice hurts businesses and undermines the DOJ's and SEC's ultimate goal of deterring such violations. Accordingly, U.S. companies are less willing to invest abroad and many avoid business opportunities in developing countries because the cost of a potential FCPA prosecution likely outweighs the anticipated profit.¹³⁵

128. *Id.* at 75–77.

129. Giudice, *supra* note 19, at 366.

130. Koehler, *supra* note 6, at 935.

131. Giudice, *supra* note 19, at 367.

132. Spivack & Raman, *supra* note 116, at 118.

133. *See* Koehler, *supra* note 6, at 964.

134. *Id.* at 925.

135. Marie M. Dalton, Note, *Efficiency v. Morality: The Codification of Cultural Norms in the Foreign Corrupt Practices Act*, 2 N.Y.U. J. L. & BUS. 583, 620 (2006).

IV. THE DILUTION OF THE “REASONABLE AND BONA FIDE” EXPENDITURE DEFENSE

As discussed above, the FCPA provides two affirmative defenses.¹³⁶ The first defense provides that the FCPA does not capture a payment that is codified as lawful behavior in the payee country.¹³⁷ The second defense permits expenditures that were made while promoting the company’s product, such as hotels or airfare.¹³⁸ These defenses pose several problems. First, to establish a working relationship in certain countries, an FCPA-prohibited expenditure may be culturally expected; however, it is unlikely that the payment’s legality is formalized and so the defense is inoperable.¹³⁹ Second, the promotional expenditure defense raises nuanced questions about when building rapport and establishing goodwill becomes a bribe. Further, there is very little case law to consult. *The Resource Guide*, however, provides general factors that the DOJ will consider when bringing enforcement actions.¹⁴⁰ On the other hand, the same ambiguity offers a potential loophole through which to make illicit payments. The DOJ has attempted to address the ambiguity of the promotional expenditure defense through its Opinion Procedure Releases, but its strict instructions limit this tool’s utility.

A. DOJ OPINION PROCEDURES

The DOJ offers one mechanism, an Opinion Procedure, through which a company can receive guidance about whether a specific situation would violate the FCPA. These opinions, however, offer little precedential value. If a company believes it may run afoul of the FCPA, it may request an Opinion Procedure Release.¹⁴¹ The regulations provide that DOJ review must be specific to the company and not hypothetical.¹⁴² The opinion, generally issued within thirty days of submission, applies only to the parties who joined in the request and “shall have no application to any party which does not join in the request for the opinion.”¹⁴³ Additionally, the opinion only addresses prospective conduct and does not apply to previous actions.¹⁴⁴ Therefore, requests are only submitted prior to the transaction.¹⁴⁵

Perhaps more significantly, Opinion Procedures pose a problem because so few are released. In 2010, the DOJ issued three opinions and

136. 15 U.S.C. § 78dd-1(c)(1)–(2) (2006).

137. § 78dd-1(c)(1).

138. § 78dd-1(c)(2).

139. Salbu, *supra* note 8383, at 425; *see also* Dalton, *supra* note 135, at 608–13 (discussing gift giving in China, South Korea, and Japan).

140. RESOURCE GUIDE, *supra* note 14, at 75.

141. 28 C.F.R. § 80.1 (2012).

142. *Id.*

143. *Id.* § 80.5, 80.8.

144. *Id.* § 80.3.

145. *Id.* § 80.3; *see* RESOURCE GUIDE, *supra* note 14, at 86.

after it only issued one in 2009.¹⁴⁶ None of the three 2010 Opinion Procedures provided the name of the company requesting the Opinion, although there were limited descriptions of the companies and the transactions.¹⁴⁷ The second release contained the most informative description; the requestor was a “U.S.-based microfinance institution (MFI) whose mission is to provide loans and other basic financial services to the world’s lowest-income entrepreneurs.”¹⁴⁸ However, most companies choose not to disclose their identities,¹⁴⁹ possibly in order to protect their activities. As a result, companies must hypothesize whether their situations are analogous to the requesting company’s. Compounding the inflexibility is the required thirty-day lead time in which a competitor may woo a prospective client. Additionally, if there is a fast breaking opportunity, then the company must decide whether to risk a potential violation or abandon a lucrative deal.

Further, some companies are reluctant to request an Opinion Procedure Release as they fear it will put them on the agency’s radar.¹⁵⁰ Although a company may always withdraw its request, it is possible that doing so will pique the DOJ’s interest in the company.¹⁵¹ These complications reduce the appeal of Opinion Procedure Releases and indicate that, in its current form, the tool’s disadvantages outweigh its advantages.

B. LUCENT TECHNOLOGIES

The prosecutions of Lucent Technologies (Lucent) in 2007 and UTStarcom (UTSI) in 2009 illustrate the necessity of standardized, clear guidance regarding promotional expenditures to ensure that the DOJ and SEC equally distribute punishment. The DOJ alleged that from 2000 to 2003, Lucent Technologies spent over \$10 million on 315 trips for approximately 1,000 Chinese government officials of state-owned enterprises to which Lucent wanted to sell its equipment.¹⁵² Lucent

146. *Opinion Procedure Releases*, DEP’T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/opinion/> (last visited Oct. 30, 2010).

147. Dep’t of Justice, FCPA Opinion Procedure Release No. 10-01 (Apr. 19, 2010) [hereinafter Opinion Procedure Release No. 10-01], *available at* <http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1001.pdf>; Dep’t of Justice, FCPA Opinion Procedure Release No. 10-02 (July 16, 2010), [hereinafter Opinion Procedure Release No. 10-02], *available at* <http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1002.pdf>; Dep’t of Justice, FCPA Opinion Procedure Release No. 10-03 (Sept. 1, 2010), [hereinafter Opinion Procedure Release No. 10-03], *available at* <http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1003.pdf>.

148. Opinion Procedure Release No. 10-02, *supra* note 147, at 1.

149. Alexandra Wrage, *Approaching the Sphinx: The DOJ’s Opinion Release Procedure*, TRACEBLOG (Mar. 2, 2009), <http://traceblog.org/2009/03/02/approaching-the-sphinx-the-doj-s-opinion-release-procedure/>.

150. *Id.*

151. *Id.*

152. Complaint at 1–2, *SEC v. Lucent Techs. Inc.*, No. 1:07-cv-02301 (D.D.C. Dec. 21, 2007), *available at* <http://www.sec.gov/litigation/complaints/2007/comp20414.pdf>; Lucent Techs. Inc., SEC Litigation Release No. 20414, 92 SEC Docket 867 (Dec. 21, 2007); Press Release 07-1028,

classified these trips in its records as “factory inspections” or “training” despite no longer owning any factories for its customers to tour.¹⁵³ These trips were primarily sightseeing excursions and included visits to Disneyland, Universal Studios, Washington, D.C., and New York City, and each trip cost between \$25,000 and \$55,000.¹⁵⁴ These trips were requested and approved by senior Lucent Chinese officials and coordinated with Lucent’s Murray Hill, New Jersey office.¹⁵⁵

Furthermore, the non-prosecution agreement alleged that Lucent “paid or offered to pay for educational opportunities” for relatives of Chinese government officials.¹⁵⁶ This included a payment of \$71,000 to cover enrollment and living expenses in Thunderbird’s School of Management Training in Beijing, China for an employee of the Chinese government ministry. This employee was part of a committee that wielded some influence in selecting China’s mobile telecommunications platform.¹⁵⁷ Lucent recorded the payment as a marketing expense.¹⁵⁸ In 2003, Lucent provided a paid internship for a Chinese government official’s daughter because Lucent viewed the official as its “key contact in China.”¹⁵⁹ As a result, “Lucent spent over \$5,000 to fund the internship and paid for the official’s daughter’s travel expenses, lodging expenses and a \$3,600 stipend,” which it also improperly recorded as marketing expenses.¹⁶⁰

Despite its blatant disregard of the FCPA’s anti-bribery provisions as well as the improperly recorded expenses, Lucent paid only a \$1 million penalty and its non-prosecution agreement stipulated that the company would develop an internal compliance program.¹⁶¹ The DOJ agreed not to prosecute Lucent if it complied with the NPA’s requirements for a two-year term.¹⁶² Without admitting to the allegations, Lucent settled the SEC’s complaint with the entry of a permanent injunction and paid \$1.5 million in civil penalties.¹⁶³ Interestingly, although the facts indicate that the various

Dep’t of Justice, Lucent Technologies Inc. Agrees to Pay \$1 Million fine to Resolve FCPA Allegations (Dec. 21, 2007) [hereinafter DOJ Press Release], *available at* http://www.justice.gov/opa/pr/2007/December/07_crm_1028.html.

153. DOJ Press Release, *supra* note 152.

154. *Id.*

155. *Id.*

156. Letter from Mark F. Mendelsohn, Deputy Chief, Fraud Section Criminal Division, Dep’t of Justice, to Martin J. Weinstein, Willkie Farr & Gallagher, Appendix A ¶¶ 19–23 (Nov. 14, 2007) [hereinafter Mendelsohn Letter], *available at* <http://www.law.virginia.edu/pdf/faculty/garrett/lucent.pdf>.

157. *Id.* Appendix A ¶ 20.

158. *Id.*

159. *Id.*

160. *Id.* Appendix A ¶ 22.

161. DOJ Press Release, *supra* note 152.

162. Mendelsohn Letter, *supra* note 156, at 2.

163. Lucent Tech. Inc., SEC Litigation Release No. 20414, 92 SEC Docket 867 (Dec. 21, 2007).

payments and trips were bribes, the DOJ did not charge it with anti-bribery violations.¹⁶⁴

C. UTSTARCOM

UTSI is a Delaware corporation headquartered in California that designs, manufactures, and sells network equipment and handsets primarily for a Chinese market.¹⁶⁵ The majority of UTSI's employees and operations are located in China, and the company operates through UTS-China, its wholly-owned subsidiary.¹⁶⁶ The SEC's complaint alleged that between 2002 and 2007, UTSI spent approximately \$7 million on 225 trips for its customer's employees to travel for training trips.¹⁶⁷ The trips were typically two weeks and cost \$5,000 per each of the customer's employees and were primarily used for sightseeing rather than training.¹⁶⁸ Further, in an attempt to garner business, UTSI paid more than \$4 million in "marketing expenses" on seven different occasions between 2002 and 2004 for executive training programs in the United States that included a stipend between \$800 to \$3,000 per person.¹⁶⁹ While trying to expand to Mongolia, UTSI authorized a \$1.5 million payment to a Mongolian company to obtain a license from the Mongolian government; however, the records do not reflect what services were obtained from the license.¹⁷⁰ Although UTSI recorded this payment as a license fee, the actual fee was only \$50,000 and the consulting company used the balance to pay Mongolian government officials.¹⁷¹ Finally, on at least ten occasions between 2001 and 2005, UTSI provided or offered UTSI employment to government customers or their family members.¹⁷² By claiming that UTSI employed these individuals, UTSI could sponsor their permanent U.S. residency applications. In these applications, UTSI falsely stated that the individuals were full-time UTSI employees in New Jersey and enabled them to receive green cards.¹⁷³

As a result of these activities, UTSI was accused of violating the anti-bribery and record-keeping statutes.¹⁷⁴ In its NPA, UTSI agreed to pay \$1.5 million to settle the criminal charges against it and had to implement

164. Claudius O. Sokenu, *To Host or Not to Host: Approving Expenses for Travel and Entertainment Under the Foreign Corrupt Practices Act*, 40 SEC. REG. & L. RPT. 367, 372 (Mar. 10, 2008).

165. Complaint at 2, SEC v. UTStarcom, Inc., No. CV-09-6094 (N.D. Cal. Dec. 31, 2009), available at <http://www.sec.gov/litigation/complaints/2009/comp21357.pdf>.

166. *Id.*

167. *Id.* at 3.

168. *Id.* at 3, 4.

169. *Id.* at 4.

170. *Id.* at 5–6.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 6–7.

compliance measures and refrain from illegal activity for three years.¹⁷⁵ It also paid a \$1.5 million fine for its violations of the record-keeping provision.¹⁷⁶

Despite the similarity in FCPA violations for travel and entertainment expenses, the resulting penalties were dissimilar. Although Lucent sponsored 315 trips to UTSI's 225, while spending more total money than UTSI, Lucent avoided an anti-bribery violation.¹⁷⁷ This is particularly curious because, according to the DOJ's press release, UTSI self-reported the violations, but no similar mention is made about Lucent.¹⁷⁸ Finally, although UTSI self-reported and its violations were less severe than Lucent's, its fine was \$500,000 more than Lucent's. This disparity in penalties highlights both the unpredictability of fines and the need for rule-based guidance regarding expenditures instead of the vague standard currently in force.

V. THE NECESSITY OF ESTABLISHING A RULE

A. THE BENEFITS OF A RULE INSTEAD OF A STANDARD

The FCPA's reasonable and bona fide affirmative defense promulgates a standard by which companies seeking to pay promotional expenses may determine whether their conduct violates the anti-bribery provisions. Standard-based approaches, however, offer no concrete parameters, making it difficult for companies to be assured they are correctly applying the law. Further, the DOJ Opinion Procedure Releases are of limited utility because the opinion applies only to the specific conduct described therein and may not be used for precedent. Finally, without clear guidelines, penalties for violations lack consistency as demonstrated in the UTSI and Lucent cases. In fact, the *Resource Guide* does not provide novel insight into the Act. Instead, it appears to be a compilation of various enforcement actions and a summary of advice the legal community already deduced. These problems all illustrate the need for a rule-based FCPA, particularly regarding the reasonable and bona fide affirmative defense.

The essential difference between a rule and a standard is that a rule specifies the law and penalties "in advance of the conduct to which it is

175. Letter from Steven A. Tyrrell, Chief, Fraud Section, Dep't of Justice, to Leo Cunningham, Wilson Sonsini Goodrich & Rosati 1, 2 (Dec. 31, 2009), available at <http://www.justice.gov/criminal/pr/documents/12-31-09UTSI-%20NPA-Agreement.pdf>.

176. SEC v. UTStarcom, Inc., SEC Litigation Release No. 21357, 97 SEC Docket 1905 (Dec. 31, 2009).

177. See Sokenu, *supra* note 164, at 7.

178. Press Release, Dep't of Justice, UTStarcom Inc. Agrees to Pay \$1.5 Million Penalty for Acts of Foreign Bribery in China (Dec. 31, 2009), available at <http://www.justice.gov/opa/pr/2009/December/09-crm-1390.html>; see Mike Koehler, *FCPA Goes Main Street*, FCPA PROFESSOR BLOG (Apr. 23, 2010), <http://www.fcpaprofessor.com/category/utstarcom-inc>.

applied.”¹⁷⁹ This differs from a standard because a standard “establishes general guidance to both the person governed and the person charged with applying the law but does not, in advance, specify in precise detail the conduct required or proscribed.”¹⁸⁰

The difficulty of interpreting and consistently applying the FCPA’s provisions illustrates the problem of expecting a standard to regulate frequently occurring conduct. As more businesses compete in the international arena, they will need to persuade potential customers of their products’ superiority over the competition’s. As a result, promotional expenses will likely increase. The current formulation of the affirmative defense as a standard is ineffective because there are few avenues through which a company may assess its behavior. A standard is effective when the regulated behavior does not occur frequently; however, FCPA prosecutions are increasing.¹⁸¹

Second, when adjudication is used to regulate frequently occurring conduct, standards are useful because the precedent forms a basis for future enforcement proceedings.¹⁸² However, most FCPA enforcement actions against companies are settled either through deferred or non-prosecution agreements, which eliminates the opportunities of establishing precedent and creating judge-made parameters for the defense. Instead, practitioners have formulated what they believe are the rules for evaluating promotional expenditures, which may not reflect the DOJ’s and SEC’s analysis.¹⁸³

Although establishing a rule will create some problems, the advantages outweigh the disadvantages. A rule determining permissible conduct is preferable when many individuals engage in the conduct because individuals “may be better guided by a rule since the law’s content can be more readily ascertained.”¹⁸⁴ In this case, a rule would allow businesses considering promotional expenditures to have a frame of reference for determining whether the expenditure was acceptable. If the FCPA’s affirmative defense provided better guidance about acceptable promotional expenditures, then legal compliance would probably increase because individuals could tailor their behavior to avoid noncompliance.¹⁸⁵ In fact, clarifying FCPA expenditure rules might reduce the cost of obtaining legal advice as it would require less individualized analysis.¹⁸⁶ This cost

179. Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 49 HARV. INT’L L.J. 333, 334 (1999).

180. *Id.*

181. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 563 (1992).

182. See *id.* at 578.

183. See Brown & Chilton, *supra* note 15, at 35–39 (providing guidance about when promotional expenditures are acceptable).

184. See Kaplow, *supra* note 181, at 563.

185. See *id.* at 564, 571.

186. See *id.* at 564, 604.

reduction could potentially be important to small businesses that currently do not fully investigate their FCPA obligations or reject legitimate business activities for fear of running afoul of the FCPA.

Rule based legislation may also be less expensive than a standards-based approach. Of course, the legislature incurs an initial cost in developing and promulgating rules that is not encountered with standards.¹⁸⁷ Government officials must determine how best to formulate the content of the law to maximize its utility and deter the targeted behavior.¹⁸⁸ Yet, this initial outlay should ultimately result in increased savings as compared to standards-based regulation because, unlike with standards, the law's content is more readily determinable.¹⁸⁹ As a result of this increased certainty, individuals and adjudicators spend less time and money struggling to identify appropriate behavior.¹⁹⁰ Further, it enables businesses to plan their conduct in advance as well as to understand the consequences of noncompliance.¹⁹¹

Detractors may argue that rules are under-or-over inclusive.¹⁹² If the rule-based FCPA formulation is over-inclusive, it will deter legitimate promotional expenditures, while an under-inclusive formulation will fail to deter illegitimate payments.¹⁹³ Yet, a closer examination reveals that these same complaints have led to the failure of the FCPA's current standards-based formulation—some businesses reject legitimate opportunities and some companies mask illicit payments as promotional expenditures.

Although standards allow for analyzing a broad range of factors and leave more discretion to the court, it is not clear which factors are considered when analyzing a violation.¹⁹⁴ A rule may only capture a limited number of circumstances or elements of a violation, but it is possible that the DOJ or SEC focuses on a few factors when determining whether a violation occurred.¹⁹⁵ As a result, rule-based regulation has the advantage of providing businesses with notice of what constitutes violative conduct and the resulting penalties. In contrast, the current standards-based formulation creates business-detering ambiguity.

Given the extent of enforcement activity and the frequency with which companies conduct business in markets with high potential for FCPA violations, a rule would provide greater guidance than a standard.

187. *See id.* at 620.

188. *See id.* at 569.

189. *See id.* at 621.

190. *See id.*

191. *See* Trachtman, *supra* note 179, at 352.

192. *See* Kaplow, *supra* note 181, 590–91.

193. *See id.* at 590–91.

194. *See id.* at 594.

195. *Id.*

B. A POSSIBLE RULE FOR FCPA PROMOTIONAL EXPENDITURES

Considering the increasing enforcement activity, it is likely that many different people are involved in determining whether a violation occurred and the appropriate enforcement action. Under a standards-based approach, these individuals impose their own analysis, which could result in a disparity in enforcement outcomes. Thus, a rule, albeit a complex one, would impose greater uniformity when determining whether a violation occurred. Additionally, a rule-based approach would clarify the range of potential fines, putting companies on notice of the repercussions for FCPA violations. A model for the FCPA rule might be found in the per diem schedule used for determining a federal employee's allowances for hotel, food, and incidental expenses when traveling.¹⁹⁶ This searchable schedule determines the allowance based on the city in which the person is traveling and the time of year.¹⁹⁷ Further, if a city or county is not listed, then it receives the standard Government Services Administration rate for continental U.S. travel of \$77 for lodging and \$46 for meals and incidental expenses.¹⁹⁸ These standard rates typically apply in areas where the federal employee community infrequently travels.¹⁹⁹ The rates for the non-standard areas are areas of frequent travel and are reviewed on an annual basis.²⁰⁰ Per diem rates are established by a contractor-provided average daily rate of lodging located in the target area.²⁰¹

This system is certainly not perfect and in some high-cost areas it might not reflect the actual market value during a period when prices spike for only a week or two. However, the per diem system provides advantages through its flexibility both regionally and seasonally, and its specification of the acceptable amounts for travel. Additionally, it alleviates the need for every hotel or meal expense to be reviewed and adjudicated.

A similar system might be adopted for determining appropriate promotional expenditures. The DOJ and SEC could develop a matrix that provides a maximum promotional expenditure value based on the rank of the official involved, the official's country of origin or regional location, and perhaps the value of the contract at issue. The accounting procedures would remain the same, preventing a blanket payment of the maximum amount to the official. If the company felt that the rates were not acceptable to its particular situation, then it could request an Opinion Procedure as it

196. See *FY 12 Per Diem Files*, GSA.GOV, <http://www.gsa.gov/portal/content/103168> (last visited Jan. 24, 2013) (follow "FY 12 Per Diem Files" hyperlink; then follow "FY 12 Per Diem Rates (Downloadable)" hyperlink).

197. *Per Diem Rates*, *supra* note 20.

198. *Frequently Asked Questions, Per Diem*, U.S. GEN. SERVICES ADMIN., <http://www.gsa.gov/portal/content/104208> (follow "What is the difference between non-standard areas and standard CONUS locations?" hyperlink) (last visited Jan. 24, 2013).

199. *Id.*

200. *Id.*

201. *Id.* (follow "How are the CONUS per diem rates set for NSAs?" hyperlink).

may under the current system. Finally, officials would review the permitted payment figures at regular intervals to ensure they are consistent with private industry expectations. This new system would also include a schedule of maximum and minimum fines for a violation. The fines would be based on a percentage of the entire contract's worth with increasing percentages linked to the number of violations and the period over which they occurred. Additionally, the expenditures would still have to be made for bona fide promotional activities without a corrupt intent. Thus, violators would be penalized for both the number of infractions and their duration.

The initial costs of establishing this matrix would admittedly be considerable. To ensure the system's effectiveness, a working committee would have to be formed that included officials from the DOJ and SEC, executives from a variety of industries, and country experts to create a realistic matrix. Undoubtedly, private industry and U.S. government officials would disagree about what constitutes reasonable expectations during business trips. This issue would be further compounded as culture greatly shapes expectations. The DOJ and SEC would have to develop a timetable for rolling out the new system in stages as there would be a lengthy developmental and implementation process. Finally, there would be costs associated with promulgating and educating companies about the changes.

Over the long term, however, the advantages of a rule-based system would outweigh the costs. As more companies engage in promotional expenditures, leading to more FCPA violations, a rule would reduce the business community's uncertainty. A rule would enable businesses to plan promotional expenditures with certainty that they were not violating the FCPA, thereby increasing their flexibility. The two-tiered approach of determining expenditures under the government-provided rates or requesting an Opinion Procedure would give businesses an option of complying with the rates to enable it to move quickly or to wait an additional thirty days under the Opinion Procedure process in exceptional situations. Under this system, a company can evaluate how best to protect its interests while still complying with the law.

The proposed system would ultimately reduce the costs of obtaining information as less interpretation and analysis would be involved to determine a promotional expenditure's legitimacy. This point would be especially important for small businesses. Under this system, a small company could independently educate itself and obtain legal advice on only the most important questions.

Finally, as DOJ and SEC resolve the FCPA's ambiguity on promotional expenditures, it would no longer be a forum for making illicit payments. A company would know the penalties in advance, creating a more balanced system preventing disparate fines as in Lucent and UTSI. Although problems would still arise under this new system, the parameters a rule

imposes would offer some confidence to businesses. As a result, they will be able to better compete in the global market and have some security that they are not violating the FCPA.

CONCLUSION

It does not appear that prosecutions under the FCPA will abate, and as U.S. companies enter more markets, the potential for violations increases. Although compliance measures can deter illicit payments, it is not always possible to impose U.S. government expectations on employees operating under different cultural norms. Under the current standards-based system, little guidance exists about what the DOJ considers acceptable promotional expenditures, although these expenses play an important role in developing business relationships. Further, the penalties for violations are unclear and vary widely, with little explanation for these discrepancies. A rule-based system would alleviate many of these problems and encourage businesses to proactively arrange promotional activities within defined boundaries. Additionally, the FCPA's ultimate goal of deterring illicit payments would be preserved while simultaneously imposing new restrictions on prosecutorial discretion.

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