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Is Strict Liability the Answer in the Battle Against Foreign Corporate Bribery?

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Is Strict Liability the Answer in the Battle against Foreign Corporate Bribery?

> "A corporate culture that permits its employees to corrupt public officials ends up corrupting itself."[1]

INTRODUCTION

In February of 1975, Eli M. Black, the CEO of United Brands Company, jumped from the 44th floor of his New York City office building.[2] Black's jump followed the government's discovery that he authorized a $1.25 million bribe to Honduran Chief of State General Oswaldo López Arellano to obtain reduced shipment taxes on the exportation of bananas.[3] Four months later, in response to a Honduran investigation, both the Honduran president and Arellano resigned from their positions.[4] Although the scandal brought some of the negative effects of foreign bribery to the general public's attention,[5] it did not deter modern day companies from mimicking United Brand's actions. For example, from 2000 to 2007, Delaware manufacturer Innospec paid over $6 million to foreign government officials to secure the sale of a gasoline lead additive in Iraq and Indonesia.[6]

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[1] William M. Hannay, *Designing an Effective FCPA and Anti-Bribery Compliance Program*, *in* 12 CORP. COMPLIANCE SERIES 5 (2013).

[2] *The Inductees: Eli Black*, CON ARTISTS HALL OF INFAMY, http://www.thehallofinfamy.org/inductees.php?action=detail&artist=eli_black (last visited Jan. 12, 2014).

[3] *Honduras: A Genuine Banana Coup*, TIME, May 5, 1975, http://content.time.com/time/magazine/article/0,9171,913028,00.html; *see also* Matthew J. Kovacich, Comment, *Backyard Business Going Global: The Consequences of Increased Enforcement of the Foreign Corrupt Practices Act ("FCPA") on Minnesota & Wisconsin*, 32 HAMLINE L. REV. 529, 531 (2009); *The Inductees: Eli Black*, *supra* note 2.

[4] Kovacich, *supra* note 3,*Honduras: A Genuine Banana Coup*, *supra* note 3.

[5] *Wrestling with Reform: Financial Scandals and the Legislation They Inspired: Three Approaches, One Law: Foreign Corrupt Practices Act of 1977*, SEC. & EXCH. COMM'N HISTORICAL SOC'Y, http://www.sechistorical.org/museum/galleries/wwr/wwr04a-three-illicit.php (last visited Apr. 5, 2014).

[6] Complaint at 1-2, SEC v. Innospec, Inc., No. 1:10-cv-00448 (D.D.C. Mar. 18, 2010), *available at* http://www.sec.gov/litigation/complaints/2010/comp21454.pdf; *see also* Elizabeth K. Spahn, *Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 VA. J. INT'L L. 1, 32 (2012).

Unable to sell the lead-based product in the U.S. and Europe after the enactment of the Clean Air Act, Innospec targeted new markets.[7] Innospec not only bribed foreign officials to secure contracts for sales of the additive, but also created a separate corporate fund in hopes of bribing legislators to delay the adoption of clean air regulations elsewhere.[8] Simultaneously, pharmaceutical giant Pfizer, Inc. made frequent improper payments to foreign officials in Bulgaria, China, Croatia, Italy, Kazakhstan, Russia, Serbia, and the Czech Republic to obtain regulatory approval of pharmaceuticals, avoid customs requirements, and influence purchasing decisions in various hospitals.[9] Pfizer earned over $16 million in aggregate profits as a result of these bribes.[10] Numerous other cases, analogous to Innospec and Pfizer, exemplify the reality that, despite well-known consequences, bribery of foreign officials remains "a $1 trillion industry."[11] Battling this corruption today is "one of the world's greatest challenges."[12]

Not only does a world full of unchecked bribery facilitate an environment conducive to other criminal activities,[13] but it slows economic growth worldwide. The battle against corruption diverts resources from health, education, and infrastructure[14] and adds "10% or more to the costs of doing business" globally.[15]

For individual corporations, such corruption not only distorts competition and accurate pricing, but also puts bribing companies at risk of legal action, monetary loss, and

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[7] Complaint at 1-2, SEC v. Innospec, Inc., No. 1:10-cv-00448; *see also* Spahn, *supra* note 6, at 32.

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

[9] Complaint at 1-2, SEC v. Pfizer, Inc., No. 1:12-cv-01303 (D.D.C. Aug. 7, 2012), *available at* http://www.sec.gov/litigation/complaints/2012/comp-pr2012-152-pfizer.pdf.

[10] *Id.* at 19.

[11] Daniel Kaufmann, *Corruption—Can it Ever be Controlled?*, WORLD BANK, http://live.worldbank.org/corruption-can-it-ever-be-controlled (last visited Mar. 15, 2014).

[12] Hannay, *supra* note 1, at 5 (quoting Transparency and Anti-Corruption, *Principle 10: "Business Should Work Against Corrpution in All Its Forms, Including Extortion and Bribery,"* UN GLOBAL COMPACT, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/anti-corruption.html (last visited Apr. 5, 2014)).

[13] CRIMINAL DIV. OF THE U.S. DEP'T OF JUSTICE & ENFORCEMENT DIV. OF THE U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 2-3 (2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf [hereinafter RESOURCE GUIDE].

[14] *Id.* at 2.

[15] Hannay, *supra* note 1, at 6 (quoting Transparency and Anti-Corruption, *Principle 10: "Business Should Work Against Corruption in All Its Forms, Including Extortion and Bribery,"* UN GLOBAL COMPACT, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/anti-corruption.html (last visited Apr. 5, 2014)).

reputational harm.[16] Moreover, corrupt actions by management engender a corporate culture where employees believe it is permissible to engage in other forms of misconduct, including "employee self-dealing, embezzlement, financial fraud, and anti-competitive behavior."[17] Consequently, a company contributing to foreign bribery simultaneously "undermines [its] own long-term interests."[18] It naturally follows that laws prohibiting paying bribes to public officials to secure or further corporate relationships are "an increasingly important part of the legal framework in which modern corporations operate."[19]

In the United States, the Foreign Corrupt Practices Act (FCPA) governs corrupt actions by individuals and companies. The FCPA creates both criminal and civil liability for those engaging in the bribery of foreign officials.[20] The law "represents an attempt to ensure that American businesses operate with integrity abroad and do not exploit business opportunities in foreign lands with their deep pockets."[21] Although unique at its inception, today, the FCPA is but a single statute in a world increasingly full of laws and conventions dedicated to battling bribery of foreign officials.[22]

A recent rise in FCPA enforcement, coupled with a growing web of international anti-bribery legislation, puts FCPA compliance at "the forefront of most boards' agendas."[23] This increased presence in the corporate boardroom leads "many influential members of the business community to push for [statutory] reform."[24] The current reform debate is between those arguing for maintenance of current enforcement trends and those arguing for reform of the law's ambiguous language and enforcement methods.[25] Common complaints by U.S. corporations pushing for reform focus on the ambiguity surrounding the meaning of "corrupt intent," the uncertainty

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16 *Id.*

17 RESOURCE GUIDE, *supra* note 13, at 3 (footnotes omitted).

18 *Id.*

19 Hannay, *supra* note 1, at 3.

20 *See* RESOURCE GUIDE, *supra* note 13, at 4-5.

21 Kovacich, *supra* note 3, at 531.

22 Gwendolyn L. Hassan, *The Increasing Risk of Multijurisdictional Bribery Prosecution: Why Having an FCPA Compliance Program is No Longer Enough*, 42 INT'L L. NEWS 1 (2013), *available at* http://www.americanbar.org/publications/international_law_news/2013/winter/the_increasing_risk_multijurisdictional_bribery_prosecution_why_having_fcpa_compliance_program_no_longer_enough.html.

23 Joseph W. Yockey, *Choosing Governance in the FCPA Reform Debate*, 38 J. CORP. L. 325, 332 (2013).

24 *Id.*

25 *Id.* at 332, 338.

surrounding corporate cooperation, and the overall impact of the FCPA on a company's ability to compete internationally.[26]

Moreover, as international anti-bribery legislation becomes increasingly prevalent, some advocate for greater consistency in global legislation.[27] As FCPA enforcement increases alongside international legislative efforts, the FCPA's provisions are becoming increasingly scrutinized by American companies, in large part led by the United States Chamber of Commerce (USCOC). These companies are demanding that the government clarify various FCPA terms or scale back on enforcement.[28] However, while the costs of corruption are no less severe, advocates for reform should not focus on scaling back FCPA enforcement, but rather on removing part of the FCPA's ambiguity, such as the requirement of "corrupt intent" for corporate violations. By removing the corrupt intent standard, the government would provide clarification assuaging legitimate complaints about ambiguity, while simultaneously maintaining heightened enforcement. This note argues that Congress should amend the FCPA to not only reflect the current anti-bribery environment around the globe, but to avoid future enforcement obstacles stemming from a newly heightened focus on the statute's ambiguous terms. Creating strict corporate liability under the FCPA not only allows for sustainable, increased enforcement, but such an amendment would provide an unambiguous standard for U.S. companies.

Part I of this note describes the history of the FCPA, the essential elements of its anti-bribery provisions, the recent pattern of increased enforcement, and the ambiguity surrounding "corrupt intent." Part II introduces the FCPA "reform debate" between groups calling for statutory clarification and reduced enforcement and those arguing that the costs of foreign bribery demand maintenance of the status quo. Part III explores recent trends in international anti-bribery legislation and specifically highlights elements of

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[26] *See, e.g.*, PUBLIC CITIZEN, LICENSE TO BRIBE: HOW THE U.S. CHAMBER OF COMMERCE'S FIGHT TO WEAKEN ANTI-CORRUPTION LAW THREATENS THE GLOBAL ECONOMY, SMALL BUSINESS, AND DEMOCRACY 12 (2013); Letter from U.S. Chamber of Commerce et al. to Lanny A. Breuer, Assistant Att'y Gen. & George S. Canellos, Acting Dir. of Enforcement, SEC 1, 2, 5 (Feb. 19, 2013), *available at* http://www.ethic-intelligence.com/images/documents/legislation_reference_texts/2013_Coalition_Letter_to_DOJ_and_SEC_re_Guidance.pdf [hereinafter USCOC Letter].

[27] Misty Robinson, *Global Approach to Anti-Bribery and Corruption, An Overview: Much Done, But a Lot More to Do . . .* , 37 T. MARSHALL L. REV. 303, 320 (2012) ("Scholars suggest that globalization has birth[ed] a new category of problems that can only be addressed on a global scale . . . .").

[28] Yockey, *supra* note 23, at 337-38; USCOC Letter, *supra* note 26.

Brazil's Clean Companies Act. Part IV proposes that Brazil's Clean Companies Act should serve as an appropriate model for FCPA reform and argues that strict corporate liability for FCPA offenses will adequately deter foreign bribery by U.S. companies and effectively promote the intent behind the FCPA.

I. INTRODUCTION TO THE FCPA

A. The History of the FCPA

The FCPA can thank its existence to the Watergate scandal. In the 1970s, the Watergate special prosecutor uncovered U.S. companies making illegal contributions to the 1972 Nixon reelection campaign and paying substantial bribes to secure business abroad.[29] The discovery prompted the U.S. Securities and Exchange Commission (SEC) to undertake an investigation and voluntary disclosure program, focusing on "possible management misuse of corporate funds and concealment of improper payments."[30] Following this investigation, on May 14, 1976, the SEC provided the U.S. Senate with a report containing an analysis of "illegal or questionable foreign payments" made by U.S. companies.[31]

The report provided that U.S. companies were spending millions of dollars to secure business contracts by bribing foreign officials.[32] Over 400 U.S. corporations, 117 of them Fortune 500 companies, "admitted making questionable or illegal payments."[33] Many of these payments were "well in excess of $300 million."[34] To "restore public confidence" in the business community, Congress passed the FCPA in 1977.[35] The FCPA created both criminal and civil liability for companies bribing foreign officials[36] to either obtain or retain business.[37]

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[29] Hannay, *supra* note 1, at 8; *see also* GEORGE C. GREANIAS & DUANE WINDSOR, THE FOREIGN CORRUPT PRACTICES ACT: ANATOMY OF A STATUTE 17 (1982).

[30] GREANIAS & WINDSOR, *supra* note 29, at 19.

[31] SEC, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 1 (1976), *available at* http://www.sec.gov/spotlight/fcpa/sec-report-questionable-illegal-corporate-payments-practices-1976.pdf [hereinafter SEC REPORT].

[32] SEC REPORT, *supra* note 31, at 5.

[33] H.R. REP. No. 95-640, at 4 (1977), *available at* http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf.

[34] *Id.*; *see also* S. REP. No 95-114, at 3 (1977), *available at* http://www.justice.gov/criminal/fraud/fcpa/history/1977/senaterpt-95-114.pdf.

[35] RESOURCE GUIDE, *supra* note 13, at 2.

[36] 15 U.S.C. § 78dd-1(a) (2012). The FCPA also contains accounting provisions, requiring issuers of securities listed on any U.S. stock exchange to "make and keep books, records, and accounts, which, in reasonable detail, accurately and

Congress amended the FCPA in 1988 to allow for affirmative defenses[38] and again in 1998 to expand the law's authority and territorial jurisdiction.[39]

B. An Overview of the FCPA

The anti-bribery provisions of the FCPA prohibit issuers,[40] domestic concerns,[41] and other persons operating within a U.S. territory[42] from *corruptly* "offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value" to certain individuals to influence actions or decisions made "in an official capacity"[43] or "to secure any other improper advantage in order to obtain or retain business."[44] The prohibited improper conduct applies to actions involving foreign officials, foreign political parties or officials, candidates for foreign political office, or "*any person*[] while knowing that all or a portion of" what is given will go to a foreign official.[45] Both the Department of Justice (DOJ) and the SEC enforce the provisions.[46]

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fairly reflect the transactions and dispositions of the assets of the issuer"; however, this note only addresses the anti-bribery provisions. *See* 15 U.S.C. § 78m(b)(2)(A).

[37] 15 U.S.C. § 78dd-1(a) (for issuers); 15 U.S.C. § 78dd-2(a) (for domestic concerns); 15 U.S.C. § 78dd-3(a) (for others while in U.S. territory); *see also* RESOURCE GUIDE, *supra* note 13, at 2.

[38] From its inception, FCPA critics claimed the act severely disadvantaged U.S. companies operating in international markets when forced to compete with foreign companies not subject to restrictions on bribery. To alleviate this concern, Congress added two affirmative defenses to FCPA liability. *See* James A. Barta & Julia Chapman, *Foreign Corrupt Practices Act*, 49 AM. CRIM. L. REV. 825, 826 (2012); *infra* Part 1.B.1.

[39] RESOURCE GUIDE, *supra* note 13, at 3-4 (noting that Congress hoped the expansion of the FCPA's territorial jurisdiction would spur similar anti-corruption movements internationally).

[40] An "issuer" is a company with securities traded on a U.S. stock exchanges. 15 U.S.C. § 78dd-1(a).

[41] Domestic concerns are individuals that are "citizen[s], national[s] or resident[s] of the U.S." or "any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the [U.S.], or which is organized under [U.S.] laws." *Id.* § 78dd-2(h)(1).

[42] This includes "any natural person other than a [U.S.] national . . . or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation" who is acting while in the territory of the U.S. *Id.* § 78dd-3(f)(1).

[43] Decisions made in an official capacity are made "for or on behalf of any [] government or department, agency, or instrumentality, or for or on behalf of any [] public international organization." *Id.* § (f)(2)(A).

[44] RESOURCE GUIDE, *supra* note 13, at 10.

[45] 15 U.S.C. § 78dd-1(a)(3) (for issuers); *id.* § 78dd-2(a)(3) (for domestic concerns); *id.* § 78dd-3(a)(3) (for others operating within U.S. territory) (emphasis added). Congress provides that "knowing" refers not only to actual knowledge but also includes willful blindness or "those who purposefully avoid actual knowledge." RESOURCE GUIDE, *supra* note 13, at 22. Although the FCPA defines "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof,

1. Exceptions and Affirmative Defenses to FCPA Liability

There is one statutory exception and two statutory affirmative defenses to FCPA liability.[47] Under the "routine governmental action" exception, payments to foreign officials to expedite routine governmental actions are exempt from FCPA liability.[48] Routine governmental actions include the procurement of permits or licenses, processing governmental papers, and other actions that are "ordinarily and commonly performed by a foreign official."[49] Such payments are not protected, however, if they encourage a foreign official "to award new business or to continue business with a particular party."[50]

The first affirmative defense applies if an individual or entity is acting lawfully "under the written laws and regulations of the foreign official's . . . country."[51] The second affirmative defense provides for no liability for payments that are "reasonable and bona fide expenditure[s]," directly related to the "promotion, demonstration, or explanation of products or services," or "the execution or performance of a contract with a foreign government or agency thereof."[52] Acceptable expenditures include, but are not limited to, "travel and expenses to visit company facilities or operations," as well as

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or of a public international organization, or any person acting in an official capacity for or on behalf of any such government department, agency, or instrumentality, or for or on behalf of any such public international organization," the term is criticized as ambiguous. *See* USCOC Letter, *supra* note 26, at 3 (discussing 15 U.S.C. §§ 78dd-1(f)(1)(A) (for issuers), 78dd-2(h)(2)(A) (for domestic concerns), 78dd-3(f)(2)(A) (for others operating within U.S. territory).

[46] RESOURCE GUIDE, *supra* note 13, at 4-5.

[47] 15 U.S.C. § 78dd-1(b), (c) (for issuers); *id.* § 78dd-2(b), (c) (for domestic concerns); *id.* § 78dd-3(b), (c) (for others operating within U.S. territory).

[48] *Id.* § 78dd-1(b) (for issuers); *id.* § 78dd-2(b) (for domestic concerns); *id.* § 78dd-3(b) (for others operating within U.S. territory).

[49] *Id.* § 78dd-1(f)(3)(a) (for issuers); *id.* § 78dd-2(h)(4)(a) (for domestic concerns); *id.* § 78dd-3(f)(4)(b) (for others operating within U.S. territory).

[50] *Id.* §§ 78dd-1(f)(3)(B), 78dd-2(h)(4)(B), 78dd-3(f)(4)(B). Congress intended this exception to be very narrow. *See* United States v. Kay, 359 F.3d 738, 751 (5th Cir. 2004) (discussing the broad scope of activities prohibited by the FCPA and highlighting a limited exception for "lobbying or other normal representations to government officials"); United States v. Kozeny, 493 F. Supp. 2d 693, 697-98, 713 (S.D.N.Y. 2007) (finding that payments to secure the privatization of state owned enterprises were not the kind of legitimate payments Congress intended to fit within the exception).

[51] 15 U.S.C. §§ 78dd-1(c) (for issuers); 78dd-2(c) (for domestic concerns); 78dd-3(c) (for others operating within U.S. territory).

[52] 15 U.S.C. §§ 78dd-1(c) (for issuers); 78dd-2(c) (for domestic concerns); 78dd-3(c) (for others operating within U.S. territory).

expenses related to "product demonstration[s] or promotional activities" such as promotional meetings.[53]

2. The Benefit of Compliance Programs and Self-Reporting

Both the SEC and DOJ claim that, although not a formal defense, they will "consider the adequacy of a company's compliance program when deciding what, if any, [FCPA-related] action to take."[54] The extent of this consideration is unclear, however, as neither agency provides a model compliance program template or a clear explanation as to what benefit, if any, a company actually receives for implementing a compliance system.[55] The DOJ and SEC additionally claim to place a "high premium" on companies who self-report FCPA violations, cooperate with FCPA investigations, or bolster FCPA compliance as a remedial measure during investigations.[56] Like the use of extensive compliance programs, however, many companies argue that the benefits of self-reporting are "illusory" at best.[57]

3. Penalties for Anti-Bribery Violations

The FCPA provides for civil and criminal penalties for both individuals and business entities,[58] though this note focuses solely on business entity liability. For anti-bribery violations, businesses face criminal fines up to $2 million and civil penalties up to $10,000.[59] In certain circumstances, a company may incur an aggravated fine up to twice the benefit that the company sought to obtain by making a corrupt payment. [60]

"General principles of corporate liability [also] apply to FCPA liability."[61] This means that "a company is liable when its directors, officers, employees, or agents, acting within the scope of their employment, commit FCPA violations intended, at least

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[53] RESOURCE GUIDE, *supra* note 13, at 24.

[54] *Id.* at 56.

[55] USCOC Letter, *supra* note 26, at 2.

[56] RESOURCE GUIDE, *supra* note 13, at 54.

[57] Yockey, *supra* note 23, at 336 (noting that several firms cooperating during FCPA investigations still "paid jaw-dropping sums to settle" the charges); *see also* USCOC Letter, *supra* note 26, at 2.

[58] 15 U.S.C. § 78dd-2(g) (2012).

[59] *Id.*

[60] *See* RESOURCE GUIDE, *supra* note 13, at 69.

[61] *Id.* at 27; *see, e.g.*, 15 U.S.C. § 78dd-2(g).

in part, to benefit the company."[62] Under the current version of the FCPA, the DOJ or SEC must prove an employee's or agent's "corrupt intent" before imposing liability on the company.[63] If "corrupt intent" is established, a company is vicariously liable regardless of whether "the employee violate[d] express instructions or existing compliance requirements."[64]

C. *Increased Enforcement Trends*

During the 30 years following the FCPA's enactment, enforcement was virtually non-existent. This vacuum encouraged companies to conduct business as usual, indifferent to the FCPA and its prohibitions.[65] In fact, "[b]etween 1978 and 2000, the SEC and the [DOJ] together averaged only three prosecutions per year."[66] Any restraint shown by regulators, however, is now a thing of the past. For example, in 2011, 2012, and 2013, partially as a result of the implementation of Sarbanes-Oxley and an increasingly global marketplace, the SEC and DOJ together brought 48, 23, and 27 enforcement actions, respectively.[67] Of those actions, 37 were against corporate entities as opposed to individuals.[68]

The penalties companies received have also significantly increased.[69] In 2013 alone, the DOJ and SEC collected over $720 million in penalties against corporations, averaging $80 million per corporation charged.[70] From 2010 through 2012, the

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[62] RESOURCE GUIDE, *supra* note 13, at 27; *see also* Yockey, *supra* note 23, at 335 (noting that corporations are vicariously liable for the actions of employees within the scope of their employment who are motivated to serve the interests of the corporation).

[63] RESOURCE GUIDE, *supra* note 13, at 27.

[64] Yockey, *supra* note 23, at 335. In addition to corporate liability, the "principles of parent-subsidiary and successor liability" also apply to FCPA violations. RESOURCE GUIDE, *supra* note 13, at 27. Parent companies can be held liable under parent-subsidiary liability for a subsidiary's actions if the parent "participate[s] sufficiently [enough] in the activity" to warrant direct liability or "under traditional agency principles." *Id.* at 27. Liability may also incur under principles of successor liability to a corporation acquiring a company that engaged in acts violating the FCPA prior to the acquisition. *Id.* at 28.

[65] *See* Barta & Chapman, *supra* note 38, at 827-28.

[66] *Id.*

[67] Sharie A. Brown & Brian S. Chilton, *Foreign Corrupt Practices Act*, 11 BRIEFLY . . . PERSP. ON LEGIS. REG., & LITIG. 1, 3 (2007); GIBSON DUNN, 2013 YEAR-END FCPA UPDATE 2 (2014), *available at* http://www.gibsondunn.com/publications/Documents/2013-Year-End-FCPA-Update.pdf.

[68] SHEARMAN & STERLING LLP, FCPA DIGEST, at iv (2014), *available at* http://www.shearman.com/~/media/Files/Services/FCPA/2014/January_2014_FCPA_DigestFCPA010614.pdf.

[69] HUGHES HUBBARD & REED LLP, FCPA/ANTI-BRIBERY ALERT WINTER 2013 4 (2013), *available at* http://www.hugheshubbard.com/PublicationDocuments/FCPA_Anti-Bribery_Alert_Summer_2012.pdf.

[70] SHEARMAN & STERLING LLP, *supra* note 68, at vi.

government collected over $2.5 billion in corporate penalties.[71] Moreover, although historical FCPA actions largely targeted manufacturing companies, modern enforcement efforts target a wider range of industries, including pharmaceuticals, oil and gas, retail, and banking and finance.[72] Recent enforcement trends also show an increase in actions against both foreign companies and foreign nationals as a proportion of all actions brought under the FCPA.[73] DOJ Fraud Section Chief Jeffrey H. Knox has said that "continued aggressive enforcement of [the FCPA] . . . is exactly where we should be and where we are."[74]

An important aspect of FCPA enforcement is that almost every corporate FCPA action stems from voluntary disclosures.[75] Moreover, almost all corporate actions are settled before trial, making litigation regarding corporate liability relatively non-existent.[76] In fact, many critics suggest that the prevalence of settlements effectively relieves the government from proving an actual FCPA case. This timidity allows the SEC and DOJ to interpret the FCPA's provisions however they wish.[77] The typical settlement with the government includes either a deferred prosecution agreement (DPA) or a non-prosecution agreement (NPA) between the corporation and the government.[78] The government usually agrees to a DPA or NPA, without demanding an admission of guilt, in exchange for a company's agreement to fulfill certain requirements such as paying a large fine or implementing various corporate governance measures, including the use of independent compliance monitors.[79] In 2012, every FCPA enforcement action was resolved with an NPA or DPA.[80]

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[71] *Id.*

[72] Jonathan M. Karpoff et al., The Economics of Foreign Bribery: Evidence from FCPA Enforcement Actions 44 (Jan. 23, 2014) (working paper), *available at* http://ssrn.com/abstract=1573222.

[73] Mike Koehler, *The Foreign Corrupt Practices Act Under the Microscope*, 15 U. PA. J. BUS. L. 1, 9 (2012).

[74] GIBSON DUNN, 2013 MID-YEAR FCPA UPDATE 19 (2013), *available at* http://www.gibsondunn.com/publications/Documents/2013-Mid-Year-FCPA-Update.pdf.

[75] *Id.* at 15.

[76] *See id.* at 18, 27; Irina Sivachenko, Note, *Corporate Victims of "Victimless Crime": How the FCPA's Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance*, 54 B.C. L. REV. 393, 405-06 (2013).

[77] Sivachenko, *supra* note 76, at 405-06.

[78] Yockey, *supra* note 23, at 334.

[79] Internal compliance monitors are instated for limited time periods, typically three or four years, and oversee the implementation of new internal compliance programs within a company at the company's expense. *See id.* at 334-35.

[80] *Id.* at 334.

D. What Is "Corrupt Intent" and Why Is It a Problem for FCPA Enforcement?

To impose liability under the FCPA, the government must prove "corrupt intent."[81] Although the text of the statute does not define "corrupt," the accompanying Senate Report provides that corrupt actions are those "intended to induce the recipient to *misuse* his official position in order to wrongfully direct business . . . or to obtain preferential legislation or a favorable regulation."[82] The report further provides that "[t]he word 'corruptly' connotes an evil motive or purpose [or] an intent to wrongfully influence the recipient."[83] The FCPA's accompanying House Report additionally indicates that corrupt actions involve a "quid-pro-quo element," but the receipt of a desired benefit is not required to impose liability.[84]

Notwithstanding the House and Senate interpretations, the true meaning of "corrupt intent" in the FCPA remains ambiguous to those governed by the statute and its continued inclusion presents an opportunity for reform.[85] Judicial decisions provide little additional guidance to companies involved in foreign business operations, as cases discussing the "corrupt intent" element are rare and of limited assistance.[86] The most helpful decision to date is *Stichting Ter Behartiging v. Schreiber*, where the Second Circuit Court of Appeals noted in dicta that the government must prove that an individual or agent of a company entered into "a bribe-like transaction" in order to impose corporate liability under the FCPA.[87] The court described such a transaction as one where an individual actor "knew" they were engaging in prohibited conduct and not simply making a mistake.[88]

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[81] RESOURCE GUIDE, *supra* note 13, at 14 (referencing 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a)).

[82] S. REP. No. 95-114, at 10 (1977), *available at* http://www.justice.gov/criminal/fraud/fcpa/history/1977/senaterpt-95-114.pdf (emphasis added); *see also* Allen R. Brooks, Comment, *A Corporate Catch-22: How Deferred and Non-Prosecution Agreements Impede the Full Development of the Foreign Corrupt Practices Act*, 7 J.L. ECON. & POL'Y 137, 144 (2010).

[83] S. REP. No. 95-114, *supra* note 82, at 10.

[84] Barta & Chapman, *supra* note 38, at 839 (discussing H.R. REP. No. 95-640, at 8 (1977) *available at* http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf).

[85] *See* Yockey, *supra* note 23, at 338. (noting that "several parts of the FCPA appear vague or open to multiple interpretations[,] . . . includ[ing] the statute's required mental state, 'corruptly,' which remains undefined").

[86] *See* Stichting Ter Behartiging v. Schreiber, 327 F.3d 173, 181-83 (2d Cir. 2003).

[87] *Id.* at 177.

[88] *Id.*

Following the decision in *Stichting*, industry groups and business entities continued to seek clarification on the intent required for corporate liability under the FCPA. None, however, have gone so far as to suggest removal of the intent requirement altogether.[89] In 2012, the SEC and DOJ responded to such requests for guidance.[90] They released *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Resource Guide), providing the limited explanation that "[t]he corrupt intent requirement protects companies that engage in the ordinary and legitimate promotion of their businesses while targeting conduct that seeks to improperly induce officials into misusing their positions."[91]

Beyond this unsatisfactory comment, the document's "guidance" is limited to only a few brief hypothetical situations showing "corrupt" conduct.[92] For example, an executive explicitly authorizing other employees "to pay 'whoever [they] need to' in a foreign government to obtain a contract . . . violate[s] the FCPA."[93] Additional examples include offering to pay for foreign officials to travel first-class on "an all-expenses-paid, week-long trip to Las Vegas" or "for a vacation to Paris for [an official] and his girlfriend."[94] Examples of non-corrupt actions include giving away free pens and t-shirts at a tradeshow booth or giving a moderately priced wedding gift to a long-term business associate.[95] Although the SEC and DOJ attempt to provide clarification with the above illustrations, these "examples are so clearly on one side of the line or the other that they" do not offer any real guidance for companies engaging in international business transactions.[96] Whether a more ambiguous action is "corrupt," such as conduct an individual believes is allowed under the written laws of another country when it is in actuality prohibited, remains unpredictable.[97]

In reality, determining whether someone acts corruptly "requires a value judgment."[98] That is why, despite the

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[89] *E.g.*, USCOC Letter, *supra* note 26, at 5.

[90] *See generally* RESOURCE GUIDE, *supra* note 13.

[91] *Id.* at 15.

[92] *Id.* at 18.

[93] *Id.* at 14.

[94] *Id.* at 18.

[95] *Id.* at 17.

[96] Nora Whitehead, *Corrupt Intent Under the New Guide to the FCPA: Designing Best Practices in the Face of Continued Uncertainty*, BLOOMBERG LAW (July 10, 2013), http://about.bloomberglaw.com/practitioner-contributions/corrupt-intent-under-the-new-guide-to-the-fcpa-designing-best-practices-in-the-face-of-continued-uncertainty/.

[97] *Id.*

[98] Yockey, *supra* note 23, at 341.

supposed guidance from the SEC and DOJ, the true meaning of "corrupt intent" under the FCPA remains ambiguous.[99] Such ambiguities represent weak areas in the FCPA's provisions,[100] areas vulnerable to attack by those choosing to dispute the charges made against them.[101]

The following example illustrates the ambiguity surrounding the element of "corrupt intent." The Resource Guide provides that "proof of corrupt intent is" required to establish corporate criminal or civil liability.[102] Although this may appear straightforward, in the two years since the Resource Guide's release, the sentence has received conflicting interpretations.[103] In a recent letter, the USCOC and over 30 other local, state, and international business organizations stated their belief that this sentence meant "that[] in order for a corporation to be held liable for an anti-bribery violation, the *corporation* must act with 'corrupt intent.'"[104] A more common interpretation of this sentence is that "corrupt intent" of the employee, and not the corporation, is required to establish liability.[105] The USCOC interpretation would require the DOJ and SEC to prove that the corporate entity itself, rather than an individual working for the corporation, acted with "corrupt intent." Without certainty as to the meaning of the FCPA's elements, it seems as though "the FCPA's provisions frequently mean simply what enforcement agencies want them to mean."[106] Because the statute is exercised with such flexibility, with decisions based on "a variety of factors" rather than certain standards, enforcement could suffer dramatically if agencies are actually held to their burden of proof.[107]

In fact, as enforcement increases, so do calls to companies operating at the international level to hold the

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[99] Whitehead, *supra* note 96.

[100] *See* ANDREW WEISSMAN & ALIXANDRA SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 6 (2010) (noting that the FCPA should be reformed to "make clear what is and what is not a violation").

[101] *See* Kimberly A. Dunne & Alexis Miller Buese, *Holding the Government to its Burden of Proof in FCPA Cases: Litigating Jury Instructions*, 2013 A.B.A.: WHITE COLLAR CRIME 243 (2013), *available at* http://www.sidley.com/Holding-the-Government-to-its-Burden-of-Proof-in-FCPA-Cases-Litigating-Jury-Instructions-03-01-2013/ (click "View Article" hyperlink) (highlighting cases where defendants were not "willing to accept the government's aggressive pre-indictment demands" as "meaningful challenges" to the scope of the FCPA).

[102] RESOURCE GUIDE, *supra* note 13, at 14.

[103] *Compare* USCOC Letter, *supra* note 26, at 5, *with* Whitehead, *supra* note 96.

[104] USCOC Letter, *supra* note 26, at 5.

[105] *See* Koehler, *supra* note 73, at 60.

[106] Sivachenko, *supra* note 76, at 405-06.

[107] Dunne & Miller, *supra* note 101, at 6; Yockey, *supra* note 23, at 342.

government to its burden of proof on the ambiguous issue of intent.[108] Corporate lawyers are now beginning to highlight that "it is critical that the government be required to prove that a defendant [acted corruptly] . . . to avoid punishing someone who unwittingly . . . violates the FCPA."[109] These recommendations encourage business entities to look at the few litigated FCPA cases as "meaningful challenges to the scope and intent of the FCPA."[110] If the results of increased litigation in corporate FCPA actions mirror the results of these prior "meaningful challenges," however, the impact on the U.S. battle against foreign bribery could be devastating.

In the few FCPA cases to go to trial, courts have not only found that the FCPA was indeed "amenable to more than one reasonable interpretation and . . . ambiguous as a matter of law," but they have also taken issue with the DOJ's and SEC's aggressive enforcement efforts.[111] It seems that the government's historical reliance on settling claims undermines its ability to overcome challenges when actually put to its burden of proof at trial. In fact, Judge Howard Matz of the Federal District Court for the Central District of California famously threw out the only ever corporate conviction under the FCPA.[112] In dismissing the action, Judge "Matz cit[ed] 'flagrant' misconduct" on the part of the prosecution in its attempt to secure a conviction that the evidence did not substantiate.[113] In a similar display of prosecutorial catastrophe, the government was forced to dismiss a case against 12 business executives accused of bribing Nigerian foreign officials after it failed to secure convictions for the first 10 out of 22 defendants charged with FCPA violations.[114] In that case, Judge Richard J. Leon of the Federal District Court for the District of Columbia admonished the government, noting that its "very very aggressive conspiracy theory . . . was push[ed] . . . to its limits."[115] But with so few FCPA cases going to trial, the

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[108] Dunne & Miller, *supra* note 101, at 6.

[109] *Id.*

[110] *Id.* at 1.

[111] United States v. Kay, 513 F.3d 432, 443 (5th Cir. 2007) (quoting United States v. Kay, 359 F.3d 738, 746 (5th Cir. 2004)).

[112] *See* Samuel Rubenfeld, *U.S. Drops Appeal in Lindsey Manufacturing FCPA Case*, WALL ST. J. (May 29, 2012), http://blogs.wsj.com/corruption-currents/2012/05/29/u-s-drops-appeal-in-lindsey-manufacturing-fcpa-case/.

[113] *Id.*

[114] Leslie Wayne, *Bribery Case Falls Apart, and Tactics are Doubted,* N.Y. TIMES (Feb. 23, 2012), http://www.nytimes.com/2012/02/24/business/fbi-bribery-case-falls-apart-and-raises-questions.html?pagewanted=all.

[115] *Id.*

scrutiny exercised in these prior cases is often lacking. As seen from the above examples, there are significant issues in establishing liability when cases are actually litigated.[116] If more and more U.S. companies begin to litigate FCPA charges and challenge the government to prove the elusive element of "corrupt intent," the war against foreign bribery is likely to falter.[117]

II. THE FCPA REFORM DEBATE

A. *What Is the Debate?*

Critiques of the FCPA come from an assortment of entities including Congress, academics, businesses, public interest groups, the judiciary, and the press.[118] As explained above, as enforcement of the FCPA increases, discussions of potential reform correspondingly increase.[119] Typically, participants in the reform debate come from two conflicting sides, those arguing for the maintenance of current enforcement trends versus those arguing that the FCPA "is vague, over-broad, and [] leads to confusion about what is legal and what is illegal."[120] FCPA critics additionally claim that "enforcement actions impose large and unwarranted costs of firms" and simultaneously decrease the ability of U.S. companies to compete internationally.[121] Proponents of increased FCPA enforcement argue "that bribery is pervasive and that anti-bribery enforcement efforts are required to decrease corruption" undermining societal values.[122] Where one stands in the reform debate—for either reducing or maintaining the FCPA's potency—depends largely on whether one believes that the benefits of battling foreign bribery outweigh the costs of enforcement actions.[123]

The USCOC is an influential party and consistently advocates for FCPA reform.[124] The USCOC's main argument is

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116 *See id.*

117 *See, e.g.*, Dunne & Miller, *supra* note 101, at 6; USCOC Letter, *supra* note 26, at 5.

118 Koehler, *supra* note 73, at 56.

119 Yockey, *supra* note 23, at 332.

120 *Id.* at 332, 338.

121 Karpoff et al., *supra* note 72, at 1; *see also* WEISSMAN & SMITH, *supra* note 100, at 5-6.

122 Karpoff et al., *supra* note 72, at 1.

123 Yockey, *supra* note 23, at 340.

124 *See generally* USCOC Letter, *supra* note 26 (requesting clarification on various FCPA sections); Letter from U.S. Chamber of Commerce et al. to Lanny A. Breuer, Assistant Att'y Gen. & Robert Khuzami, Dir. of Enforcement, SEC (Feb. 21,

that the FCPA is "an old law that is aggressively enforced."[125] Further, the USCOC highlights that, due to the prevalence of settlements, the FCPA "lacks a history of case law" to clarify its numerous ambiguous terms.[126] Most recently, in a February 19, 2013 letter to the DOJ and SEC, the USCOC criticized the law's ambiguity and argued that FCPA over-enforcement damages the competitiveness of U.S. businesses abroad.[127] According to the USCOC, U.S. companies face competition from businesses in countries not subject to the FCPA.[128] Fearing a competitive disadvantage, U.S. companies may feel compelled to bribe foreign public officials to maintain or obtain contracts.[129]

Those advocating for maintaining current enforcement trends, such as Amnesty International and Human Rights Watch, along with the DOJ and SEC, urge "that at this crucial moment in history . . . [we] have no greater mission than to work toward eradicating corruption across the globe." [130] These FCPA supporters believe "that the social benefits of combating corruption outweigh any economic disadvantages that might follow from . . . anti-bribery laws."[131] Numerous human rights groups and other organizations argue that bribery destroys the opportunity to create a fair and rational marketplace that promotes legitimate competition. These advocates argue that condoning corruption allows bribe-givers to circumvent traditional market factors, like quality and service, that should determine market prices.[132] This increases the potential for poor quality goods to infiltrate the marketplace "solely because [their] proponent was able to pay off a government official."[133] Moreover, some argue that bribery-induced transactions create

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2012), *available at* http://www.scribd.com/doc/82585638/Chamber-Letter-to-DOJ-SEC-Regarding-FCPA-Guidance (same).

[125] Samuel Rubenfeld, *Chamber Picks Apart Guidance in Letter, Demands Statutory FCPA Reform*, WALL ST. J. (Feb. 19, 2013), http://blogs.wsj.com/corruption-currents/2013/02/19/chamber-picks-apart-guidance-in-letter-demands-statutory-fcpa-reform/.

[126] *Id.*

[127] USCOC Letter, *supra* note 26, at 5; *see also* PUBLIC CITIZEN, *supra* note 26, at 12.

[128] WEISSMAN & SMITH, *supra* note 100, at 6.

[129] Yockey, *supra* note 23, at 328-29.

[130] *Id.* at 327, 338 (quoting Lanny Breuer, Assistant Att'y Gen., Address at the American Bar Association 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011), *available at* http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html).

[131] *Id.* at 340.

[132] *See* Elizabeth Spahn, *Nobody Gets Hurt?*, 41 GEO. J. INT'L L. 861, 869 (2010); Cyavash Nasir Ahmadi, Note, *Regulating the Regulators: A Solution to Foreign Corrupt Practices Act Woes*, 11 J. INT'L BUS. & L. 351, 364 (2012).

[133] Ahmadi, *supra* note 132, at 364.

a cyclical effect.[134] For example, aside from the benefit conferred to the bribe-giver, consider what happens after a bribe is paid. "Economists ask, '[W]hat does a rational, self-interest maximizing (and now corrupt) government official do after he has just been bribed? He looks for more opportunities to maximize his economic self-interest . . . .'"[135] According to the groups arguing for strong FCPA enforcement, this interest-maximization strategy alters the decision-making process from one that weighs traditional market factors to one grounded in optimizing personal gain.[136] Bribe-takers, searching for a greater payout, will seek out those entities willing to give such payouts and, in exchange, will guarantee future contracts, delay or promote certain legislation, or let additional inferior goods into the market.[137] Further, such groups argue that "the cost of doing business in a corrupt environment weighs heavily on [a company's] finances and business development."[138] Not only is a corrupt environment detrimental to companies with legitimate business practices already involved in a particular market, but it also disincentivizes new businesses to enter into such a market, as any entrant may become the instant target of bribe-seekers.[139] Overall, these groups emphasize that the impact of bribery falls both on legitimate businesses attempting to compete globally and on individuals forced to consume sub-standard products around the globe.[140]

B. Choosing Sides: To Reform or Not to Reform?

Hindering both sides of the reform debate is a shortage of information about the actual costs of foreign bribery.[141] A new model developed by Jonathan M. Karpoff, D. Scott Lee, and Gerald S. Martin provides estimates of the true costs of international bribery using data from FCPA enforcement actions from 1978 through May 2013 (the Karpoff model).[142] The model clearly demonstrates that bribing foreign officials is still profitable for U.S. companies. The costs of FCPA enforcement

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134 *See id.* at 363-64.

135 *Id.*at 363.

136 *Id.* at 364.

137 *Id.* at 363-64.

138 Robinson, *supra* note 27, at 321; *see also* Hannay, *supra* note 1, at 5.

139 Ahmadi, *supra* note 132, at 364-65.

140 Hannay, *supra* note 1, at 5-6.

141 Karpoff et al., *supra* note 72, at 1.

142 *Id.* at 2. Karpoff works for the Foster School of Business, University of Washington, Lee for the Lee Business School, University of Nevada Las Vegas, and Martin for the Kogod School of Business, American University. *Id.* at 1, nn.a-c.

actions is outweighed by the gain companies can attribute to their corrupt practices. Taking this model into consideration, the reform discussion, therefore, should not be limited to either minimizing FCPA liability or maintaining the status quo. Rather, a group advocating for an increase in FCPA liability through the removal of the law's "corrupt intent" standard, could be a new voice that the current debate desperately needs.

Participants in the reform debate tend to focus on the immediate costs of foreign bribery: settlement costs and the costs attributed to the loss of business to entities not bound by the FCPA.[143] However, limiting the discussion to these costs, without considering the potential benefits of foreign bribery, ignores the reality that engaging in bribery remains profitable for companies.[144] While considering the costs associated with FCPA enforcement actions, it is important to remember that detection of bribery is largely based on self-reporting by firms, and without such reporting, it is exceedingly difficult to uncover.[145] Even the use of industry wide "sweeps" by the DOJ and SEC, a more reliable method for discovering bribery, requires spending a large portion of the government's limited resources and would inevitably require cutbacks elsewhere.[146] In fact, the Karpoff model estimates that the probability of catching a company engaging in bribery is only 6.4%.[147] Taking into consideration the costs paid by companies facing FCPA liability, such as direct costs like fines, penalties, and internal investigations, as well as indirect costs associated with reputational harm after a firm is exposed, the estimated loss to a company facing only an FCPA-based charge is 2.6% of their market capitalization.[148] Coupling the costs associated with enforcement actions along with the likelihood of getting caught reveals "that firms engage in bribery because it pays to bribe."[149] Therefore, although there is a strong emphasis on the high costs of FCPA actions, a more accurate reflection of those costs highlights that the costs are not high enough to make bribery unprofitable.[150]

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143 WEISSMAN & SMITH, *supra* note 100, at 5-6.
144 Karpoff et al., *supra* note 72, at 1-2.
145 Koehler, *supra* note 73, at 15-16. Yockey, *supra* note 23, at 347.
146 Yockey, *supra* note 23, at 347.
147 Karpoff et al., *supra* note 72, at 3.
148 *Id.*
149 *Id.*
150 *Id.* at 3-4.

III. INTERNATIONAL ANTI-CORRUPTION EFFORTS

A. The Historic and Current Global Atmosphere

In addition to those advocating for reform at home, such as the USCOC, global trends bolster the argument that the FCPA is in need of reform. The FCPA was the only significant piece of legislation targeting international corruption for nearly 20 years after its passage.[151] In fact, for years Congress was "interested in what might someday happen [if] our allies begin to join [the U.S.]" in combating foreign bribery.[152] Recent international initiatives to prevent corruption in global business transactions indicate that point in time has arrived.[153]

In today's global marketplace, a company engaged in international business is mistaken to focus solely on FCPA compliance.[154] In keeping with a growing international consensus "that bribe givers and bribe takers are real criminals doing real harm to real people," both international conventions and state legislation dealing with foreign bribery have increased dramatically.[155] As of 2012, 39 "major economic powers" participated in the Organization for Economic Cooperation and Development (OECD) Anti-Bribery Convention and 170 nations are currently parties to the United Nations Convention against Corruption.[156] Both conventions obligate their ratifying member nations to outlaw the "bribery of foreign public officials in international business transactions."[157] To meet these

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[151] Robinson, *supra* note 27, at 305.

[152] Koehler, *supra* note 73, at 14-15 (quoting Senator Christopher Coons).

[153] Barta & Chapman, *supra* note 38, at 850.

[154] Hassan, *supra* note 22, at 1.

[155] Elizabeth K. Spahn, *Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption*, 23 IND. INT'L & COMP. L. REV. 1, 33 (2013); *see also* Hassan, *supra* note 22, at 3-4.

[156] *United Nations Convention Against Corruption Signature and Ratification Status as of 29 November 2013*, UN OFFICE ON DRUGS & CRIME (Nov. 29, 2013), https://www.unodc.org/unodc/en/treaties/CAC/signatories.html; Spahn, *supra* note 155, at 1.

[157] *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD, http://www.oecd.org/corruption/oecdantibriberyconvention.htm (last visited Mar. 22, 2014); *United Nations Convention Against Corruption*, UN OFFICE ON DRUGS & CRIME, http://www.unodc.org/unodc/en/treaties/CAC/ (last visited Mar. 22, 2014). The European Union Convention Against Corruption Involving Officials, the Inter-American Convention Against Corruption, and the African Union Convention Preventing and Combating Corruption are a few of the more regionalized international frameworks with motives similar to the OECD and UN Conventions. *See* African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5, *available at* http://www.au.int/en/content/african-union-convention-preventing-and-combating-corruption (click hyperlink for PDF); European Union Convention on the Fight Against Corruption Involving Officials of the European

obligations, numerous parties to the conventions recently adopted legislation to prohibit bribing foreign officials.[158] Other nations are targeting foreign bribery without a specific convention obligation to fulfill. For example, India, not a party to either convention, has a bill prohibiting bribery of foreign officials and officials of public international organizations pending in its Parliament.[159] Even countries with previously enacted legislation prohibiting bribery of foreign officials, including Ireland, China, and Spain, recently amended such legislation to extend liability to business entities.[160]

Among the recent legislation battling foreign bribery, two laws seemingly surpass the stringent nature of the FCPA: the United Kingdom's 2010 Bribery Act and Brazil's 2013 Law 12.846, popularly known as the "Clean Companies Act" (CCA).[161] With the ratification of both acts, the "FCPA is no longer the [international] benchmark for anti-bribery law enforcement."[162] A recent joint-prosecution involving the U.S. and the U.K. exemplified the FCPA's diminished status when the U.K.'s Lord Justice Thomas publicly characterized "the [U.S.] as too soft in [its] anti-bribery enforcement efforts."[163] Unlike the FCPA, the U.K.'s Bribery Act provides for potentially unlimited financial penalties, contains no exception for facilitation payments, and creates strict corporate liability for "fail[ure] to prevent bribery."[164] Similarly, Brazil's CCA

Communities or Officials of Member States of the European Union, 26 May 1997, 1997, 1997 O.J.E.C. (C 195) 1, *available at* http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_corruption/l33027_en.htm; Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 727, *available at* http://www.oas.org/juridico/english/treaties/b-58.html.

158 Hassan, *supra* note 22, at 2. For example, Mexico, Ukraine, and Russia all recently enacted or strengthened legislation dealing with foreign bribery of public officials. *Id.* at 3-5; *see also* OECD WORKING GROUP, PHASE 2 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE RUSSIAN FEDERATION 5 (2013), *available at* http://www.oecd.org/daf/anti-bribery/RussianFederationPhase2ReportEN.pdf.

159 Hassan, *supra* note 22, at 3.

160 *Id.* at 4-5.

161 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, 846 (2011); *New Brazilian Anti-Bribery Statute*, COVINGTON 1 (Aug. 9, 2013), http://www.cov.com/files/Publication/83260639-b097-4908-843c-1434efafca9e/Presentation/PublicationAttachment/8c7a9c35-5f0c-4e2f-9e12-168b79085722/New_Brazilian_Anti-Bribery_Statute.pdf.

162 Spahn, *supra* note 155, at 20-21.

163 *Id.* at 16-17. In a case against a Delaware manufacturer, the financial penalties agreed to by the U.S. government were fairly low and Justice Thomas viewed the terms of the settlement as "wholly inadequate in light of the" company's actions. *Id.* at 17.

164 Michael L. Volkov, *The Bribery Act: Raising the Enforcement Bar*, WORLD COMPLIANCE, *available at* http://fcpa-worldcompliance.com/pdf/raising-the-enforcement-

provides for harsh penalties, strict liability, and contains no exceptions or affirmative defenses.[165]

It is clear that the 1977 world, where the U.S. was the sole combatant against foreign bribery, no longer exists. Rather, anti-corruption and anti-bribery regulations are becoming more standardized and stringent worldwide,[166] evidencing a need for both "broader, multijurisdictional compliance approaches" by companies operating in more than one country and symmetry among international anti-bribery efforts.[167] Gaps in international anti-corruption legislation create distinct challenges to domestic efforts to combat corruption.[168] The strict liability components of the U.K. Bribery Act and Brazilian CCA are only two examples of potential "gaps" in the FCPA that distance it from its more rigid international counterparts.

B. Brazil's Fight against Foreign Bribery

1. A History of Corruption in Brazil

> "In the past it was only individuals that could be prosecuted for corruption, which saved companies from the kind of punishment that could threaten their operations."[169]

Brazil's reputation for battling corruption is historically uninspiring. In a ranking of the world's countries where bribes are most likely to take place, Brazil ranks eighth, behind only China, Nigeria, Iraq, Indonesia, Saudi Arabia, India, and Mexico.[170] As recently as 2012, Brazil's federal auditor's office terminated almost 4,000 employees for demanding bribes from various individuals and business entities.[171] Additionally, the Brazilian government dismissed a former presidential aide in 2012 over allegations that he used his official influence to

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bar.pdf (last visited Mar. 22, 2014). This is applicable to all business organizations for the acts of their employees conducting any part of their business in the U.K. *Id.*

[165] *See infra* Part III.B.

[166] *See generally* Hassan, *supra* note 22 (discussing new international anti-bribery legislation and how compliance with the FCPA is no longer enough for companies hoping to mitigate liability for foreign corruption).

[167] *Id.* at 1-2; *see also* Robinson, *supra* note 27, at 320.

[168] Yockey, *supra* note 23, at 325.

[169] Leo Torresan, *Finally, Companies in Brazil Can Be Prosecuted for Corruption*, TRANSPARENCY INT'L (July 8, 2013), http://blog.transparency.org/2013/07/08/finally-companies-in-brazil-can-be-prosecuted-for-corruption/.

[170] Karpoff et al., *supra* note 72, at 14, 57.

[171] *Corruption by Country/Territory: Brazil*, TRANSPARENCY INT'L, http://www.transparency.org/country#BRA (last visited Mar. 22, 2014).

obtain favors and preferential treatment.[172] Public distrust in government aligns with the country's reputation. A 2013 survey shows that 81% of respondents felt that Brazilian political parties were either "corrupt" or "extremely corrupt."[173] Widespread political protests in 2012 demanded that the Brazilian government take charge in the area of corruption.[174] Further, the OECD, to which Brazil became a party in 2002, observed that Brazil's efforts to combat corruption contained "serious gap[s]."[175] As a result of public protests, reprimand from the OECD, and in preparation for notable upcoming events,[176] Brazil finally took actions toward eradicating corporate corruption in August 2013.

2. The Clean Companies Act

With the official signature of Brazilian President Dilma Vana Rousseff on August 1, 2013, Brazil officially joined the growing global trend of combating bribery of foreign officials by international companies.[177] Its CCA imposes strict liability on domestic and foreign corporate entities that engage in bribery or other forms of corruption.[178] The law only applies to those entities with a registered office in Brazil.[179] Prior to this legislation, only individuals were liable for acts of foreign bribery.[180] The CCA came into effect on January 29, 2014.[181]

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[172] *Id.*

[173] *Global Corruption Barometer 2013*, TRANSPARENCY INT'L, http://www.transparency.org/gcb2013/country/?country=brazil, (last visited Mar. 22, 2014). Similarly, a 2009 survey conducted by the International Finance Corporation of the World Bank revealed that almost 70% of business owners and managers in Brazil identified corruption as a major constraint to the operation of legitimate business. *See Enterprise Surveys*, WORLD BANK INT'L FIN. CORP. (2009), http://www.enterprisesurveys.org/Data/ExploreEconomies/2009/brazil.

[174] *New Brazilian Anti-Bribery Statute*, *supra* note 161, at 1.

[175] OECD, REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 4 (2007).

[176] Brazil will host the 2014 FIFA World Cup and the 2016 Summer Olympics. *See* Marcelo dos Santos Barradas Correia et al., *A Comparison of the New Brazilian Anticorruption Law, the FCPA, and the UK Bribery Act*, ASS'N OF CORP. COUNS., http://www.acc.com/legalresources/quickcounsel/cnbalfuba.cfm?makepdf=1 (last visited Mar. 22, 2014).

[177] *New Brazilian Anti-Bribery Statute*, *supra* note 161, at 1.

[178] Kelly B. Kramer et al., *Brazil's New Anti-Corruption Legislation*, MAYER BROWN JSM (Aug. 7, 2013), http://www.mayerbrown.com/Brazils-New-Anti-Corruption-Legislation-08-07-2013/.

[179] *New Brazilian Anti-Bribery Statute*, *supra* note 161, at 1.

[180] *Id.*

[181] *Id.*

Although many of the CCA's prohibitions mirror the FCPA, Brazil's law takes an extreme position with both penalties and enforcement.[182] The CCA imposes strict civil and administrative liability for companies based on the conduct of directors, officers, employees, and other agents acting on the company's behalf.[183] Moreover, business entities are liable under the Act "irrespective of the individual liability of the natural persons" committing the corrupt act.[184]

The CCA prohibits a business entity, or its employees and agents, from "promis[ing], offer[ing] or giv[ing], directly or indirectly, an undue advantage [or improper benefit] to a public official, or third person related to him [or her]."[185] The Act additionally prohibits "financing, funding, sponsoring or in any way subsidizing" the conduct prohibited by the act, "using an intermediary legal entity or individuals to conceal or disguise its real interests or the identity of the beneficiaries of the wrongdoings," or "hindering or interfering with the investigations or audits of public agencies, entities or agents."[186] The act also prohibits companies defrauding the competitive nature of the public bidding process or illegally benefitting from changes or extensions of government contracts.[187]

The CCA "is a wake-up call for the management and shareholders of Brazilian companies and will help ensure that businesses do not bribe their way to contracts either here or overseas."[188] Unlike the FCPA, the CCA does not require the government to prove an individual acted with "corrupt intent."[189] Instead, liability is established "by showing that a director, officer, employee or other agent committed a prohibited act to benefit the corporation," regardless of the agent's intent.[190]

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[182] *Id.* at 2.

[183] *Id.*; *see also* LAW. NO. 12,846 OF AUGUST 1, 2013, TRENCH, ROSSI E. WATANABE ADVOGADOS 1, *available at*, http://www.corporatecomplianceforum.com/files/Uploads/Documents/Spain/Compliance/Ley%20Brasil.pdf [hereinafter LAW 12,846] (unofficial translation).

[184] LAW 12,846, *supra* note 183, at 1. Like the FCPA, "[t]he responsibility of the legal entity remains in the event of corporate changes, transformation, merger, acquisition, or spin-off." *Id.*

[185] *Id.* at 2.

[186] Jonathan Barr et al., *The FCPA on Steroids: Brazil Ups the Ante in Fighting Corporate Corruption*, BAKERHOSTETLER (Aug. 12, 2013), http://www.bakerlaw.com/alerts/the-fcpa-on-steroids-brazil-ups-the-ante-in-fighting-corporate-corruption-8-12-2013/.

[187] LAW 12,846, *supra* note 183, at 2.

[188] Torresan, *supra* note 169.

[189] *New Brazilian Anti-Bribery Statute*, *supra* note 161, at 2; *see also* Santos Barradas Correia, *supra* note 176.

[190] Santos Barradas Correia, *supra* note 176.

3. Penalties and Exceptions under the CCA

The CCA provides for "draconian" administrative and civil penalties, but it does not impose criminal sanctions.[191] Potential administrative penalties, imposed after administrative proceedings, include: (1) fines between 0.1 and 20% of the violator's gross revenues from the year preceding initiation of enforcement; and (2) publication of the decision.[192] Potential civil penalties, imposed through civil suits brought by the government, include: (1) full disgorgement of illegally obtained benefits; (2) forfeiture of assets, rights, or other values obtained as a result of the wrongdoing; (3) partial or full suspension of corporate activities; (4) compulsory dissolution; and (5) debarment for one to five years, including prohibition from receiving incentives, subsidies, grants, donations, or loans from public financial institutions during the debarment period.[193] When imposing penalties, Brazilian authorities may take into consideration a number of factors including: "[(1) t]he seriousness of the offense; [(2) t]he advantage gained or intended by the offender; . . . [(3)] the existence of internal mechanisms and procedures; . . . [(4)] incentive[s] for reporting irregularities . . . [; and (5)] effective enforcement of codes of ethics."[194]

The existence of a strict liability component is not the only difference between the CCA and FCPA. Unlike the FCPA, Brazil's law does not have an exception for facilitation payments and does not include any affirmative defenses.[195] Moreover, under the CCA, companies may take advantage of formal leniency agreements, provided they self-disclose CCA violations and fully cooperate with government investigations and proceedings.[196] To obtain such an agreement, the offending

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[191] Barr, *supra* note 186.

[192] LAW 12,846, *supra* note 183, at 3. The fine "shall never be lower than the advantage obtained." *Id.* If a company is unable to calculate their gross earnings, the penalty will range from 6 thousand reais to 60 million reais (or approximately 2700 to 26.3 million U.S. dollars). *Id.*; Barr, *supra* note 186.

[193] LAW 12,846, *supra* note 183, at 3-4; Barr et al., *supra* note 186, at 2.

[194] LAW 12,846, *supra* note 183, at 3-4. Other factors include: (1) "[w]hether the offense was fully completed or not"; (2) "[t]he degree of damage, or risk of damage"; (3) "[t]he negative effect produced by the offense"; (4) "[t]he offender's economic situation"; (5) "[t]he cooperation of the legal entity in the investigation of the wrongdoing"; and (6) "[t]he value of the contracts held by the legal person with the public agency or entity damaged." *Id.*

[195] Juan Carlos Varela et al., *Brazil's New Anti-Corruption Law: What Every Multinational Employer Should Know*, ASAP: A TIMELY ANALYSIS OF LEGAL DEVELOPMENTS (Littler Mendelson, P.C.), Aug. 22, 2013, at 2, *available at* http://www.littler.com/publication-press/publication/brazils-new-anti-corruption-law-what-every-multinational-employer-shou.

[196] Barr et al., *supra* note 186, at 2.

entity must be "the first one to come forward" with information, "demonstrate its interest in cooperating with the investigation," "completely cease its involvement in the [] wrongdoing," "admit[] its participation in the wrongdoing," "and fully and permanently cooperate[] with the investigation and the administrative proceeding . . . at its [own] expense."[197] Unlike under the FCPA where cooperation results in an unknown and potentially nonexistent benefit, a formal leniency agreement under the CCA may provide "(i) up to a two-thirds reduction in fines; (ii) a waiver of debarment [from participating in public contracts]; and (iii) avoidance of government publication of its decision with regard to the [alleged] conduct."[198]

IV. BRAZIL: A MODEL FOR FCPA REFORM?

A. Time for Change

The competing camps in the FCPA reform debate fundamentally disagree on the cost-benefit analysis of outlawing bribery.[199] The commonly cited costs to companies include enforcement and internal investigation expenses, along with the expense of losing business to foreign entities not subject to the FCPA.[200] As noted in Section II.B., such complaints against increased enforcement purposefully overlook the important fact that bribing foreign officials is often profitable.[201] The benefits to individual corporations stemming from foreign bribery, especially when combined with the low possibility of being caught, outweigh the potential costs associated with an FCPA enforcement action.[202] This demonstrates that the FCPA may not be doing enough to eradicate such corruption. The Karpoff model estimates that either imposed penalties must increase 9.2 times or the probability of being sanctioned must increase by 58.5% in order to make bribery unprofitable for companies in the aggregate.[203] Attempts to increase sanctions alone, without any

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[197] LAW 12,846, *supra* note 183, at 5.

[198] Barr et al., *supra* note 186, at 2.

[199] Yockey, *supra* note 23, at 340; *see also supra* Part II.A.

[200] Karpoff et al., *supra* note 72, at 10.

[201] *Id.* at 3.

[202] *See* Karpoff et al., *supra* note 72, at 5.

[203] Karpoff et al., *supra* note 72, at 5. ("This implies that bribery will continue to be profitable . . . unless there is a substantial increase in the penalties for bribery or the probability of getting caught, or both.").

increase in the probability of being sanctioned, may be inadequate to successfully deter foreign bribery.[204]

Additionally, competition-based arguments against stronger FCPA enforcement ignore the fact that anti-corruption and anti-bribery regulations are becoming more standardized worldwide.[205] A narrow focus on the effects of the FCPA for businesses' international competitive ability is inadequate because it does not consider the "marked increase" in other nation's anti-bribery laws, some of which are more stringent than the FCPA.[206] One cannot forget, however, that there are still countries with either no legislation dealing with foreign bribery or "little enforcement" of existing legislation.[207] A company in the Czech Republic,[208] for example, with international operations limited to the U.S. and countries without adequate anti-bribery legislation, would realistically be subject exclusively to the FCPA. Thus, despite the seeming ubiquity of international legislation, for those companies affected only by the FCPA, it is necessary to expand the scope of the statute. Without strengthening its own laws to mirror international trends increasing efforts to combat foreign bribery, the U.S. risks becoming a safe haven for corrupt business enterprises to blossom and enabling the erosion of "public confidence" the FCPA was enacted to restore.[209] This "could send the wrong signal to other countries about the importance of curbing bribery" and make the U.S. appear "soft on bribery."[210] A solution that ensures an increase in successful enforcement actions, while simultaneously strengthening the FCPA to mirror international trends, such as removing the requirement of "corrupt intent," may be the best method to reach the "optimal level of deterrence" required to fight foreign bribery.[211]

Those arguing for FCPA reform may argue that imposing strict corporate liability for FCPA violations prevents companies from engaging in activities that are "desirable" and

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[204] *See* Yockey, *supra* note 23, at 354.

[205] *See* Hassan, *supra* note 22, at 2-4.

[206] *Id.* at 1.

[207] TRANSPARENCY INT'L, EXPORTING CORRUPTION?: COUNTRY ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION PROGRESS REPORT 2012 15, 17 (2012), *available at* http://www.transparency.org/whatwedo/pub/exporting_corruption_country_enforcement_of_the_oecd_anti_bribery_conventio (click "Download the Report").

[208] *Id.* at 18.

[209] RESOURCE GUIDE, *supra* note 13, at. 3.

[210] Peter J. Henning, *Taking Aim at the Foreign Corrupt Practice Act*, N.Y. TIMES, DEALB%K (Apr. 30, 2012, 1:55 PM), http://dealbook.nytimes.com/2012/04/30/taking-aim-at-the-foreign-corrupt-practices-act/?_php=true&_type=blogs&_r=0.

[211] Karpoff et al., *supra* note 72, at 5.

"socially necessary" to engage in international commerce.[212] A similar argument is that a strict liability standard would further hinder the competitiveness of U.S. companies with international operations.[213] Although such arguments are expected, foreign bribery itself, and not its prohibition, destroys incentives for new companies to enter into a corrupt market place.[214] Moreover, as the world becomes increasingly focused on battling foreign bribery and continues to enact legislation prohibiting it, arguments based on U.S. competiveness become increasingly irrelevant.[215]

Additional questions may arise as to whether a country like Brazil, notoriously corrupt, should really serve as a role model for FCPA reform. This argument, however, overlooks that the U.K., a country that often battles corruption side-by-side with the U.S., also has an anti-bribery law imposeing strict corporate liability.[216] Although there are still considerable uncertainties as to the effectiveness of strict liability in Brazil, where the CCA only recently came into effect,[217] or in the U.K., where the Bribery Act's first prosecution started in September of 2013,[218] there is also no evidence suggesting its ineffectiveness.

B. What Is Strict Liability?

A strict liability offense is an act that, if committed, results in the imposition of liability without regard to an actor's intent in relation to one or more elements of the offense.[219] In the U.S., the strict liability penalty scheme is typically found in certain criminal offenses, civil public welfare offenses, products liability, and tortious conduct involving ultrahazardous

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[212] Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 426 (1993).

[213] WEISSMAN & SMITH, *supra* note 100, at 6.

[214] Ahmadi, *supra* note 132, at 364-65.

[215] Hassan, *supra* note 22, at 1.

[216] Sharifa G. Hunter, *A Comparative Analysis of the Foreign Corrupt Practices Act and the U.K. Bribery Act, and the Practical Implications of Both on International Business*, 18 ILSA J. INT'L & COMP. L. 89, 98 (2011); *see also* Mythili Raman, Acting Assistant Att'y Gen., U.S. Dept. of Justice, Keynote Address at the Global Anti-Corruption Congress (June 17, 2013), *available at* http://www.justice.gov/criminal/pr/speeches/2013/crm-speech-130617.html.

[217] Kramer, *supra* note 178.

[218] Sarah Downey, *Trial Begins in the SFO's First Prosecution Under the UK Bribery Act*, LEGAL BUS. (Sept. 24, 2013, 9:38 AM), http://www.legalbusiness.co.uk/index.php/lb-blog-view/1217-trial-begins-in-the-sfo-s-first-prosecution-under-the-uk-bribery-act.

[219] Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 830 (1999).

activities.[220] A strict liability regime for FCPA corporate offenses would fit neatly within the category of public welfare offenses.[221] Strict liability classifications are common in the areas of public health and safety regulations, where the need for strict compliance with a law that protects the general public is important enough to eliminate the need to prove intent.[222] An underlying assumption in strict liability statutes is that the one facing liability is typically in the best position to prevent or mitigate the violation.[223]

With strict liability offenses, "[s]ociety has made a determination that it is better to hold persons responsible for certain actions even without a showing of negligence because the benefits derived . . . outweigh the burden placed upon a defendant in a strict liability lawsuit."[224] Such benefits include improved products, accountability, and safety.[225] In terms of corporate liability, the imposition of strict liability would highlight "the failure of the organization to react, respond, prevent, report, or engage in due diligence" or the failure of "corporate policies and organizational decision-making."[226]

There are several justifications to remove "corrupt intent" as an element of FCPA liability for corporate offenses. First, as noted above, making a party strictly liable "shifts the risks" imposed by certain conduct "to those best able to prevent a mishap."[227] A company whose employee or agent bribes a foreign official is typically not without fault.[228] In fact, as long as the benefits of bribery are more than the cost of sanctions, it is worth it for corporations to allow their employees to continue to bribe foreign offices, as there is little incentive to try and stop it at the managerial level.[229] Further, among other factors such as industry, firm size, and geographical operations, the Karpoff model overwhelmingly shows that an aggressive corporate culture is a common characteristic of bribe-paying

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[220] James R. MacAyeal, *The Comprehensive Environmental Response, Compensation, and Liability Act: The Correct Paradigm of Strict Liability and the Problem of Individual Causation*, 18 UCLA J. ENVTL. L. & POL'Y 217, 218 (2001).

[221] *Id.* at 222.

[222] *Id.* at 223.

[223] *Id.*

[224] Curt Ward, *What is Strict Liability?*, BUTERA, BEAUSANG, COHEN, BRENNAN, http://www.buteralaw.com/newsletters.asp?c=47&id=366 (last visited Mar. 22, 2014).

[225] *Id.*

[226] William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 648, 692 (1994).

[227] Levenson, *supra* note 212, at 419.

[228] Yockey, *supra* note 23, at 355-56.

[229] *Id.* at 355.

firms.[230] While there are, of course, cases of “rogue” employees involved in bribery despite the presence of compliance programs within a company, FCPA violations do not always occur in that manner.[231] It is more common that bribery issues stem from the environment and practices of the organization itself.[232] Empirical studies have shown that organizational factors, including the typical downplaying of internal corporate codes and intense corporate pressure to meet performance goals, are more to blame for potential firm misconduct than employee self-interest.[233] “In reality, corrupt business practices are often [a part of] very complex schemes . . . .”[234] Taking this into consideration, placing the blame on the entity rather than exclusively on individuals may be an optimal method to send a deterrence message and influence organizational culture.[235]

Second, corporate FCPA violations are analogous to other areas applying strict liability in that such violations generally involve conduct where the risk of injustice is outweighed by the need for public protection. Further, the violations typically come with a relatively minor punishment.[236] Here, it is important to focus on the Karpoff model’s estimation that companies charged with violating the FCPA typically only lose 2.6% of their market capitalization as a result of enforcement actions.[237] Although this sounds severe, the average value of a contract for which a bribe is paid is 3.55% of a company’s market capitalization.[238] Considering the relatively low rate of detection, it is difficult to argue that the penalties are excessive. There is a potential argument that companies risk significant non-monetary backlash from violations of the FCPA.[239] Recent data shows, however, that firms suffer negligible reputational harm based on bribery charges alone.[240] Further, any effect on a company’s reputation can likely be mitigated by the imposition of a sufficient compliance program

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[230] Karpoff et al., *supra* note 72, at 24.
[231] Yockey, *supra* note 23, at 355-56.
[232] *Id.* at 356.
[233] *Id.*
[234] Kovacich, *supra* note 3, at 530.
[235] Yockey, *supra* note 23, at 356.
[236] Levenson, *supra* note 212, at 422.
[237] Karpoff et al., *supra* note 72, at 29.
[238] *Id.* at 5.
[239] *Id.* at 2 n.3.
[240] *Id.* at 31 (noting that firms with co-mingled fraud charges experience large reputational losses compared to negligible reputational losses for bribe-paying firms without fraud charges).

and appropriate public relations addressing the program.[241] Although convictions under the FCPA could lead to disqualification from government contracts, the applicability of such a draconian sentence is a firm-dependent determination.[242] Therefore, when the comparatively small loss and low probability of being caught are analyzed in conjunction with the benefits of preventing bribery to both the general public and global businesses, the FCPA serves as an appropriate statute for applying strict liability.[243]

Third, imposing strict corporate liability for FCPA violations provides "a powerful public statement of legislative intolerance for certain behavior."[244] At this point, it should be clear that there are many costs associated with corruption and foreign bribery.[245] It is worth highlighting again, however, that the impact of corruption and bribery falls on honest businesses trying to compete globally as if there was a rational competitive market as well as on consumers of sub-standard products of every class worldwide.[246] By applying strict corporate liability and simultaneously increasing FCPA enforcement, the message to U.S. companies and businesses operating in the U.S. will be clear: bribery is simply not tolerated.

Fourth, imposing strict corporate liability on FCPA violations will ensure that instances of comparable corruption are handled similarly. As the ultimate effect of corruption's malfeasance on public welfare is likely the same, comparable conduct should not yield varying sanctions.[247] Currently, because the SEC and DOJ Resource Guide's examples of "corrupt" conduct "are so clearly on one side of the line or the other," ambiguous conduct that is closer to the "line" could easily inspire legal challenges to the meaning of "corrupt intent."[248] With a lack of case law and limited guidance for judges or juries to definitively label an action as "corrupt," a new string of challenges to the meaning of the term could result in varying liability for conduct of comparable character and effect.[249] By removing the requirement for "corrupt intent,"

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[241] Yockey, *supra* note 23, at 346.
[242] *Id.* at 349.
[243] *See supra* Part II.A.
[244] Levenson, *supra* note 212, at 422.
[245] *See supra* Part II.B.
[246] Spahn, *supra* note 155, at 10.
[247] Levenson, *supra* note 212, at 421.
[248] Whitehead, *supra* note 96, at 1; *see also supra* Part I.D.
[249] *See supra* Part I.D; *see also* Stichting Ter Behartiging v. Schreiber, 327 F.3d 173, 181-83 (2d Cir. 2003).

regulators could ensure that similar conduct would result in similar FCPA liability.

Finally, the idea of imposing strict corporate liability for violations of anti-bribery laws is not unique. Not only is this evidenced by the passage of the CCA, but strict liability is also imposed by the U.K. Bribery Act's corporate offense for "[f]ailing . . . to prevent bribery."[250] Much like the provisions of Brazil's law, the U.K. offense holds companies strictly liable if a person associated with the organization "intends to obtain or retain business for the organization or obtain or retain an advantage in the conduct of business for the organization."[251]

Applying a strict corporate liability regime would mean that penalties could be imposed upon companies for inducing improper acts with foreign officials, regardless of the intent of the actor. The reformed version of the FCPA, exclusively in the corporate context, would forbid:

> Offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value, to certain individuals in order to influence such individuals to act or make a decision in his or her official capacity or to secure any other improper advantage in order to obtain or retain business when acting for the benefit of the corporation.

Although, currently, corporate liability hinges on the corrupt motive or purpose of an employee or agent, the revised version would focus on the action of paying, offering to pay, promising to pay, or authorizing a prohibited payment, regardless of the intent behind the action.[252]

CONCLUSION

Combating foreign corporate bribery is a worldwide concern and an increasing number of nations agree on the disastrous effects that corruption wreaks on the global marketplace and the world's general population. An examination of the U.S.'s legislation dealing with foreign bribery, however, reveals that "basic legal and policy questions remain as to the [true] purpose, scope, and effectiveness of the

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[250] Hunter, *supra* note 216, at 95.

[251] Volkov, *supra* note 164.

[252] As the Brazil Act only addresses entity and not individual liability, for purposes of this note it is not considered whether "corrupt intent" should remain as a requirement to impose civil sanctions on an individual. In order to impose criminal liability on individuals, a finding of "willful intent" is required. *See* 15 U.S.C. § 78dd-2(g)(2)(A) (2012). It is worth noting, however, that currently, in order to impose criminal or civil liability on companies, only a finding of "corrupt intent" is required, there is no additional finding that the individual acted "willfully." *See id.* § 78dd-2(g)(1)(A).

FCPA and [current] enforcement."[253] Under the FCPA's current ambiguous construction and its regulators' uncertain enforcement practices, foreign bribery remains profitable for companies.[254] One solution proposed for FCPA reform is legislative action to clarify the meaning of certain ambiguous terms and to decrease enforcement efforts by the SEC and DOJ.[255] Others propose a continuation of heightened enforcement practices that apply an unchanged FCPA.[256] If and when Congress considers reforming the FCPA, however, it should instead remove the requirement of "corrupt intent" and impose strict corporate liability. This change would not only eliminate the ambiguity of "corrupt intent," but also increase the government's ability to enforce the statute and adequately fight foreign bribery.

"If the fruits of corruption are denied to the corrupt, the tendency to engage in corruption will be drastically reduced."[257] Congress enacted the FCPA with the intent to prohibit companies conducting business within the U.S. from bribing foreign officials. Though there have been significant efforts to accomplish this purpose since the FCPA's enactment, the time has come to revamp the law to ensure that its purpose is achieved in the most efficient way possible.

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[253] Koehler, *supra* note 73, at 23.

[254] Karpoff et al., *supra* note 72, at 2.

[255] Brooks, *supra* note 82, at 137-38; Yockey, *supra* note 23, at 335.

[256] Yockey, *supra* note 23, at 338.

[257] S.D. Sharma, *Indian NGO's Initiatives for Mobilisation & Empowerment of Civil Society for Ensuring Good Governance with Transparency, Moral Integrity and Accountability*, INT'L ANTI-CORRUPTION CONFERENCE, http://iacconference.org/en/archive/document/indian_ngos_initiatives_for_mobilisation_empowerment_of_civil_society_for_e/ (last visited Mar. 22, 2014).

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