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Toward a Reconceived Legislative Intent behind the Foreign Corrupt Practices Act

THE PUBLIC-SAFETY RATIONALE FOR PROHIBITING BRIBERY ABROAD

INTRODUCTION

The Foreign Corrupt Practices Act (FCPA) became law in 1977 as an amendment to the 1934 Securities Exchange Act (Exchange Act).¹ This legislation was in part a response to Watergate and to investigations by the Securities and Exchange Commission (SEC),² which revealed that hundreds of U.S. companies had been bribing foreign officials on a regular basis.³ In light of this discovery, the FCPA made it a crime for U.S. companies and individuals to bribe foreign government officials.⁴ In addition, it imposed requirements on the accounting procedures and internal control systems of publicly traded companies.⁵

Congress addressed foreign bribery by attempting, first, to deter the bribery of foreign officials by criminalizing it, and second, to detect such illicit activity by mandating accurate and detailed records of transactions. This approach reflects the legislative determination that bribery of foreign government officials, by certain parties, at least, should not be permitted. Alongside this admirable objective, however, was a belief that the law could not entirely ignore business realities. On this view, it was necessary to permit some bribery, lest the

¹ Foreign Corrupt Practices Act, Pub. L. No. 95-231, 91 Stat. 1495 (1977) (codified as amended at 15 U.S.C. §§ 78m, 78dd-1 to -3, 78ff (2012)).

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

³ Patrick J. Keenan, *The Future of the Guiding Principles*, in PROCEEDINGS OF THE ONE HUNDRED FIFTH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 301 (2012) (citing H.R. REP. No. 95-640, pt. 4 (1977)).

⁴ 15 U.S.C. §§ 78dd-1 to -3.

⁵ *Id.* § 78m(b).

competitiveness of American businesses be substantially hampered.⁶

Recognizing that an outright ban on bribery was inappropriate, Congress drafted an exception to the FCPA's anti-bribery provisions. This carve-out permits "facilitating payments," small bribes paid to low-level officials to expedite approvals or permits that would be granted regardless.⁷ The so-called facilitating payments exception has proved problematic. Conceptually, the line-drawing required to distinguish facilitating payments from impermissible bribes often is not straightforward.⁸ Practically, the U.S. Department of Justice (DOJ) and the SEC have, over the past few years of enforcement, effectively read the facilitating payments exception out of the statute.⁹ As various commentators have noted, it is highly questionable for enforcing agencies to proscribe conduct that Congress has explicitly permitted.¹⁰

Recent DOJ and SEC interpretations of the facilitating payments exception illustrate a larger trend—the renewed, vigorous enforcement of the FCPA.¹¹ After the FCPA was enacted in 1977, enforcement was all but dormant for decades.¹² Beginning in 2006, however, there has been a marked year-on-year increase in the number of enforcement

⁶ "Neither I nor my colleagues on this subcommittee have any desire to unfairly penalize U.S. companies in the competition for foreign markets. Therefore, some form of international agreement is a necessary corollary to any national legislation." Decl. of Prof. Michael J. Koehler in Supp. of Defs.' Mot. to Dismiss, *United States v. Carson*, No. SA CR 09-00077-JVS, at 23 (C.D. Cal. Mar. 21, 2011) [hereinafter *Koehler Declaration*] (quoting *Hearing Before the Subcomm. on Int'l Trade of the Comm. on Fin.*, 94th Cong. 10 (1975) (testimony of Sen. Frank Church)).

⁷ 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

⁸ Michael S. Diamant & Jesenka Mrdjenovic, *Don't You Forget About Me: The Continuing Viability of the FCPA's Facilitating Payments Exception*, OHIO STATE L.J. FURTHERMORE 19, 23 (2012), available at <http://moritzlaw.osu.edu/students/groups/oslj/files/2012/06/Furthermore.Diamant.pdf> ("But some of the examples of qualifying payments provided for by the statute are not necessarily 'non-discretionary' . . . Nor is the line between discretionary and non-discretionary functions always clear as a practical matter . . .").

⁹ *Id.* at 24 (citing TRACE ANTI-BRIBERY COMPLIANCE SOLUTIONS, TRACE FACILITATION PAYMENTS BENCHMARKING SURVEY 2 (2009), available at <http://traceinternational.org/data/public/documents/FacilitationPaymentsSurveyResults-64622-1.pdf>). The study reported that "more than 70% of surveyed corporations 'either never, or only rarely, make facilitation payments, even if their corporate policy permits facilitation payments.'"

¹⁰ *Id.* at 21.

¹¹ Steve Frinsko, *Recent Trends in Foreign Corrupt Practices Act Enforcement*, 55 ADVOCATE 30, 30-31 (2012), available at <http://isb.idaho.gov/pdf/advocate/issues/adv12MarApr.pdf>.

¹² Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 913 (2010).

actions.¹³ This increase has been accompanied by a chorus of criticisms that has grown steadily louder, with a particular focus on the lack of transparency and predictability with respect to key terms in the law that trigger liability.¹⁴ For instance, what kind of organization, precisely, is an “instrumentality” of a foreign government whose employees or officials cannot receive bribes?¹⁵ What additional guidance is there to flesh out the meaning of “anything of value” that cannot be given or promised?¹⁶ What concepts or rules hem in who may appropriately be considered a “foreign official”?¹⁷

Part I provides a brief history of the FCPA. It then sets out the key provisions, namely, the anti-bribery provisions, the books and records provision, the internal controls provision, and the facilitating payments exception.

Part II argues that a sense of moral ambiguity and compromise surrounded the passage of the FCPA in 1977. Drawing on the legislative history, this part notes that foreign bribery initially was cast mainly as a foreign policy issue. It then contends that Congress was aware of, but ultimately left unresolved, certain normative questions as to why, exactly, bribery is wrong.

Part III turns to China and considers how two important facets of Chinese culture, *guanxi* (relationships) and *mianzi* (social standing), can affect business dealings and discusses several important implications for FCPA compliance.

Part IV analyzes three recent examples of FCPA enforcement actions involving Chinese subsidiaries of U.S. companies. This part describes violations of the anti-bribery, books and records, and internal controls provisions of the FCPA, and of Section 13(a) of the Exchange Act. These case studies illustrate the types of conduct that the DOJ and SEC interpret as impermissible under the FCPA.

Part V argues that we ought to recognize the undeniable and growing threat that corruption poses to public health and

¹³ See Lawrence J. Trautman & Kara Altenbaumer-Price, *The Foreign Corrupt Practices Act: Minefield for Directors*, 6 VA. L. & BUS. REV. 145, 157-58 (2011).

¹⁴ See, e.g., Daniel Chow, *China Under the Foreign Corrupt Practices Act*, 2012 WIS. L. REV. 573 (2012); Nicholas M. McLean, *Cross-National Patterns in FCPA Enforcement*, 121 YALE L.J. 1970 (2012); Eric M. Pedersen, *The Foreign Corrupt Practices Act and Its Application to U.S. Business Operations in China*, 7 J. INT'L BUS. & L. 13, 13-15 (2008); F. Joseph Warin et al., *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VA. L. & BUS. REV. 33 (2010).

¹⁵ Chow, *supra* note 14, at 606.

¹⁶ *Id.*

¹⁷ *Id.*

safety as a reason to prohibit foreign bribery. This notion would help to address the moral ambiguity that undergirds the FCPA as it stands today. Further, the danger to public health and safety suggests particular ways in which the FCPA ought to change. Such a danger also forms a plausible basis for a reconceived legislative intent for these reforms, which will likely require legislative action because they diverge from, and extend beyond, the status quo of FCPA enforcement that the DOJ and SEC support. Reasonable minds can differ as to what reforms the public-safety rationale calls for. One possible view, this note argues, is that these reforms ought to include both a prohibition against American firms bribing anyone, not just foreign government officials, and a compliance defense that operates as a matter of law.

I. THE FCPA

A. *History*

Congress enacted the FCPA in 1977 as an amendment to the Exchange Act.¹⁸ Commentators frequently have cast the FCPA as a direct result of Watergate.¹⁹ That scandal arguably contributed to a political atmosphere conducive to the FCPA's passage, but Congress had already been investigating overseas bribery and corruption.²⁰ In particular, the SEC conducted a series of investigations in the mid-1970s,²¹ in the course of which over 400 U.S. companies admitted to making "questionable or illegal payments."²² More than one-quarter of these companies belonged to the Fortune 500.²³ Investigators also unearthed slush funds that the companies used to pay bribes.²⁴ The questionable or illegal payments amounted to

¹⁸ Foreign Corrupt Practices Act, Pub. L. No. 95-231, 91 Stat. 1495 (1977) (codified as amended at 15 U.S.C. §§ 78m, 78dd-1 to -3, 78ff (2012)).

¹⁹ See Koehler, *supra* note 12, at 911 (quoting Carolyn Lindsey, *More Than You Bargained For: Successor Liability Under the U.S. Foreign Corrupt Practices Act*, 35 OHIO N.U. L. REV. 959, 961 (2009)) ("The FCPA arose out of the Watergate scandal in the 1970s. While investigating contributions to Richard Nixon's re-election campaign, Congress discovered that over 400 U.S. companies had paid bribes in excess of \$300 million through offshore slush funds in order to win contracts overseas.").

²⁰ *Id.*

²¹ RESOURCE GUIDE, *supra* note 2, at 3.

²² Keenan, *supra* note 3, at 301 (citing H.R. REP. NO. 95-640, pt. 4 (1977)).

²³ *Id.*

²⁴ Nicole Y. Hines, *Cultural Due Diligence: The Lost Diligence That Must Be Found by U.S. Corporations Conducting M&A Deals in China to Prevent Foreign Corrupt Practices Act Violations*, 9 DUQ. BUS. L.J. 19, 22 (2007).

more than \$300 million,²⁵ or approximately \$1.2 billion in today's dollars.²⁶

After the FCPA was enacted, American companies immediately found themselves at a disadvantage against foreign competitors that did not face similar restrictions.²⁷ This disadvantage persisted for much of the 1990s, when the United States was the only country to prohibit bribes to foreign government officials.²⁸ Between April 1994 and May 1995, for example, the government documented almost 100 instances where foreign bribes affected the ability of American firms to secure contracts together worth \$45 billion.²⁹ Moreover, foreign firms willing to engage in bribery won contracts over American firms 80% of the time.³⁰

Congress amended the FCPA in 1988³¹ and again in 1998.³² The summary below reflects the statute in its current form after the second set of amendments.

B. Provisions

1. Anti-Bribery Provisions

The anti-bribery provisions make it unlawful for certain people and corporations to corruptly offer, give, promise to give, or authorize the giving of money or anything of value to foreign officials and other prohibited recipients to obtain or retain business.³³

²⁵ H.R. REP. No. 95-640, at 4.

²⁶ *CPI Inflation Calculator*, BUREAU LAB. STAT., http://www.bls.gov/data/inflation_calculator.htm (last visited Mar. 1, 2014).

²⁷ Keenan, *supra* note 3, at 301.

²⁸ Blake Puckett, *The Foreign Corrupt Practices Act, OPIC, and the Retreat from Transparency*, 15 IND. J. GLOBAL LEGAL STUD. 149, 150 (citing JEFFREY P. BIALOS & GREGORY HUSISIAN, *THE FOREIGN CORRUPT PRACTICES ACT: COPING WITH CORRUPTION IN TRANSITIONAL ECONOMIES* 4 (1997)).

²⁹ Marlise Simons, *U.S. Enlists Rich Nations in Move to End Business Bribes*, N.Y. TIMES, Apr. 12, 1996, at A7, available at <http://www.nytimes.com/1996/04/12/world/us-enlists-rich-nations-in-move-to-end-business-bribes.html>.

³⁰ Sarah C. Kaczmarek & Abraham L. Newman, *The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation*, 65 INT'L ORG. 745, 751 (2011).

³¹ Title V of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified as amended in scattered sections of 15 U.S.C.).

³² International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified as amended in scattered sections of 15 U.S.C.) (implementing the Organization of Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Officials in International Business Transactions).

³³ *Id.* §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

As to givers of bribes, the FCPA prohibits the following classes of persons from giving, or promising to give, money or anything of value: (1) issuers³⁴; (2) domestic concerns³⁵; and (3) persons³⁶ other than issuers and domestic concerns.³⁷

As to recipients of bribes, the FCPA prohibits those subject to its provisions from giving, or offering to give, money or anything of value to the following classes of persons: (1) foreign officials³⁸; (2) any foreign political party or party official³⁹; (3) any candidate for political office⁴⁰; (4) any official of a public international organization⁴¹; and (5) any other person who knows that the payment or promise to pay will be passed on to one of the preceding types of prohibited recipients.⁴²

Influencing the recipient or gaining an improper advantage occurs when a person gives a gift or makes a payment for the purposes of (1) “influencing any act or decision . . . in [one’s] official capacity”⁴³; (2) “inducing . . . any act in violation of [one’s] lawful duty”⁴⁴; (3) “securing any improper advantage”⁴⁵; or (4) “inducing [the use of one’s] influence . . . to affect or influence

³⁴ *Id.* § 78dd-1. “Issuers” are defined as “any company whose securities are registered in the United States or which is required to file periodic reports with the SEC,” ROBERT W. TARUN, BASICS OF THE FOREIGN CORRUPT PRACTICES ACT 2 (2006), available at http://www.lw.com/upload/pubContent/_pdf/pub1287_1.pdf, or any “officer, director, employee, or agent” acting on behalf of such a company, 15 U.S.C. § 78dd-1(a).

³⁵ 15 U.S.C. § 78dd-2. “Domestic concerns” are defined as “any individual who is a citizen, national or resident of the United States,” *id.* § 78dd-2(h)(1)(A), and “any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States,” *id.* § 78dd-2(h)(1)(B).

³⁶ “Persons” are defined as “any natural person other than a national of the United States,” *id.* § 78dd-3(f)(1), as defined in the Immigration and Nationality Act, 8 U.S.C. 1101 (2012). Further, the 1998 amendment to the FCPA extended the anti-bribery provisions to apply to foreign firms and persons who engage in the proscribed conduct. RESOURCE GUIDE, *supra* note 2, at 4.

³⁷ 15 U.S.C. § 78dd-3.

³⁸ *Id.* §§ 78dd-1(a)(1), 78dd-2(a)(1), 78dd-3(a)(1). “Foreign official” is defined as:

[A]ny 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.

Id. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).

³⁹ *Id.* §§ 78dd-1(a)(2), 78dd-2(a)(2), 78dd-3(a)(2).

⁴⁰ *Id.*

⁴¹ *Id.* §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).

⁴² *Id.* §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3).

⁴³ *Id.* §§ 78dd-1(a)(1)-(2), 78dd-2(a)(1)-(2), 78dd-3(a)(1)-(2).

⁴⁴ *Id.*

⁴⁵ *Id.*

any act or decision of [a foreign] government or instrumentality.”⁴⁶ The DOJ enforces the anti-bribery provisions through civil and criminal penalties.⁴⁷

2. Books and Records and Internal Controls Provisions

The FCPA imposes two categories of accounting requirements. The first category is set forth in the books and records provision, which requires issuers to “make and keep books, records,⁴⁸ and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer”⁴⁹ “Reasonable detail” is defined as “such level of detail . . . as would satisfy prudent officials in the conduct of their own affairs.”⁵⁰ It is important to note that “accurately” does not require “exact precision,” but the records should “reflect transactions in conformity with generally accepted accounting principles or other applicable criteria.”⁵¹

The second category is set forth in the internal controls provision, which requires issuers to “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances” of compliance.⁵²

Together, the books and records and internal controls provisions give “the SEC authority over the entire financial management and reporting requirements of publicly held United States corporations.”⁵³ The SEC enforces the books and records and internal controls provisions through civil penalties.⁵⁴

3. The Facilitating Payments Exception

Since its passage in 1977, the FCPA has excluded certain foreign payments from the anti-bribery provisions. The current language was added as part of the 1988 amendments.

⁴⁶ *Id.*

⁴⁷ Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 395 (2010).

⁴⁸ The Exchange Act defines “records” to include “accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type, whether expressed in ordinary or machine language.” 15 U.S.C. § 78c(a)(37). Adding the words “books” and “accounts” broadens the scope of the recordkeeping required under the FCPA.

⁴⁹ 15 U.S.C. § 78m(b)(2)(A).

⁵⁰ *Id.* § 78m(b)(7).

⁵¹ S. REP. No. 95-114, at 8 (1977).

⁵² 15 U.S.C. § 78m(b)(2)(B).

⁵³ SEC. v. World-Wide Coin Investments, Ltd., 567 F. Supp. 724, 746 (N.D. Ga. 1983).

⁵⁴ Koehler, *supra* note 47, at 396.

When Congress enacted them, however, “[b]oth houses insisted that their proposed amendments only clarified ambiguities ‘without changing the basic intent or effectiveness of the law.’”⁵⁵ As such, these amendments simply made “the facilitating payments [exception] an express part of the statute.”⁵⁶

The statute now removes from the scope of the FCPA “any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.”⁵⁷ In addition, the statute defines the term “routine governmental action” with a non-exhaustive list of exempted payments.⁵⁸ But the statute provides this qualification:

[T]he term . . . does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decisionmaking process to encourage a decision to award new business to or continue business with a particular party.⁵⁹

II. MORAL AMBIGUITY AND THE FCPA

This part argues that a sense of moral ambiguity and compromise surrounded the passage of the FCPA in 1977. The legislative history reveals that, in the early stages, lawmakers viewed foreign bribery as an undesirable source of conflict between the United States and foreign governments. They feared, however,

⁵⁵ *United States v. Kay*, 359 F.3d 738, 750 (5th Cir. 2004) (citing S. REP. NO. 100-85, at 54 (1987); H.R. REP. NO. 100-40, pt. 2, at 77 (1987)).

⁵⁶ *Diamant & Mrdjenovic*, *supra* note 8, at 22.

⁵⁷ 15 U.S.C. §§ 78dd-1(f)(2), 78dd-2(h)(3), 78dd-3(f)(3).

⁵⁸ *Id.* §§ 78dd-1(f)(3)(A)(i)-(v), 78dd-2(h)(4)(A), 78dd-3(f)(4)(A). These sections of the United States Code elaborate as follows:

The term “routine governmental action” means only an action which is ordinarily and commonly performed by a foreign official in—

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

⁵⁹ *Id.* §§ 78dd-1(f)(3)(B), 78dd-2(h)(4)(B), 78dd-3(f)(4)(B).

that prohibiting bribery would put American firms at a disadvantage. Closer to the time the FCPA was enacted, normative rationales rejecting bribery as immoral gained prominence. Ultimately, Congress took a balanced approach that did not resolve the question of why bribery is wrong, and that recognized the necessity of limited amounts of foreign bribery.

A. *Arguments for and against Legislative Action*

Congress grappled over an interrelated set of considerations for and against taking legislative action. This is evident in the House report,⁶⁰ the Senate report,⁶¹ and the House conference report⁶² associated with S. 305 and H.R. 3815, the two bills that led to the FCPA as enacted. These documents focused on the perceived moral repugnancy of bribery and are discussed below. Although this consideration was a recurring thread throughout the legislative process, foreign bribery initially was cast mainly as a foreign policy issue.

With respect to foreign policy, Congress was concerned that misconduct by American firms would affect relationships between the United States and foreign governments. Moreover, there was the worry that paying off foreign officials would harm America's standing abroad, serving as a tacit admission that capitalism was flawed or unworkable, that fair competition based on price and quality, not on greased palms, was a story for the gullible. George Ball, a Democrat, described the setback that would result from the battle for hearts and minds: "This is a problem that, like so many others, has relevance in the struggle of antagonistic ideologies; for, when our enterprises stoop to bribery and kickbacks, they give substance to the communist myth . . . that capitalism is fundamentally corrupt."⁶³ In this way, the legislative history suggests that Congress was motivated, in part, by the goal of "promoting values and building alliances through the active, deliberate exportation of anticorruption norms."⁶⁴

Running counter to arguments in favor of legislative action was an obvious danger—cracking down on foreign

⁶⁰ H.R. REP. No. 95-640 (1977).

⁶¹ S. REP. No. 95-114 (1977).

⁶² H.R. CONF. REP. No. 94-831 (1977).

⁶³ *Foreign and Corporate Bribes: Hearings Before the Subcomm. on Banking, Hous., & Urb. Aff., 94th Cong. 41-42 (1976)* (statement of George Ball, Lehman Brothers) (quoted in Andrew Brady Spalding, *The Irony of International Business Law: U.S. Progressivism and China's New Laissez-Faire*, 59 UCLA L. REV. 354, 373-74 (2011)).

⁶⁴ Spalding, *supra* note 63, at 373.

bribery would handicap American firms. Other things being equal, American firms would lose out to foreign firms that had deep pockets and were willing to reach into them. This concern explains why, from the beginning, discussions concerning foreign bribery included the importance of convincing other countries to adopt similar rules. On October 6, 1975, at a hearing before the Senate Subcommittee on International Trade of the Committee on Finance, Senator Frank Church emphasized the need for an international agreement to accompany any U.S. legislation.⁶⁵ Several months later, before the Subcommittee on Banking, Housing, and Urban Affairs, the International Chamber of Commerce testified that without international cooperation, prohibitions on foreign bribery “could, and in some cases would, mitigate [sic] severely against U.S. business and prevent it from being able to compete effectively in quite substantial markets of the world.”⁶⁶

B. Justifications for the FCPA as Enacted in 1977

The legislative history most useful to understanding the FCPA as it was enacted in 1977 consists of the Senate report accompanying S. 305, the House report accompanying H.R. 3815, and President Carter’s signing statement. Both reports articulate the notion that bribery has no place in business predicated on fair competition.⁶⁷ Both also refer to the manner in which foreign bribery initially was framed—as a foreign policy issue.⁶⁸ Specifically, the worry focused on the harm that could—and indeed, did—result to relationships between the United States and foreign governments. An oft-cited example is the revelation that Lockheed Martin had bribed foreign officials in Japan, the Netherlands, and Italy for government business.⁶⁹ Understandably, the peoples of these countries reacted unfavorably to the news and placed “intense pressure” on the officials to explain themselves.⁷⁰ That the company

⁶⁵ Senator Church disassociated himself and the subcommittee from “any desire to unfairly penalize U.S. companies in the competition for foreign markets.” *Hearing Before the Subcomm. on Int’l Trade of the Comm. on Fin.*, 94th Cong. 10 (1975) (testimony of Sen. Frank Church) (quoted in *Koehler Declaration*, *supra* note 6, at 23).

⁶⁶ *Foreign and Corporate Bribes: Hearings Before the Subcomm. on Banking, Hous., & Urb. Aff.*, 94th Cong. 39, 49 (1976) (testimony of Sen. Frank Church).

⁶⁷ See S. REP. No. 95-114, at 4 (1977); H.R. REP. No. 95-640, at 4 (1977).

⁶⁸ See S. REP. No. 95-114, at 3; H.R. REP. No. 95-640, at 5.

⁶⁹ Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARV. J. ON LEGIS. 303, 307 (2012).

⁷⁰ S. REP. No. 95-114, at 3 (1977).

involved was American led to “concomitant diplomatic problems for the United States.”⁷¹

The legislative history also considers normative rationales that reject bribery as immoral. Senate report 95-114 quotes Secretary of State W. Michael Blumenthal, who testified that bribery was “morally repugnant and illegal in most countries”⁷² The report concludes its section on the need for legislation by stating, “[a] strong antibribery law is urgently needed to bring these corrupt practices to a halt and to restore public confidence in the integrity of the American business system.”⁷³ House report 95-640 describes the bribery of foreign officials as “unethical”⁷⁴ and “counter to the moral expectations and values of the American public.”⁷⁵ It continues, “[foreign bribery] rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business.”⁷⁶ In his signing statement, President Carter wrote, “I share Congress [sic] belief that bribery is ethically repugnant and competitively unnecessary.”⁷⁷

C. *Congress’s Balanced Approach and the Facilitating Payments Exception*

It is striking that the legislative history is replete with statements that bribery is wrong, but nearly devoid of explanations as to why. The quotations above are representative in that they advance a moral position that is seemingly self-evident and axiomatic. Some commentators have attributed the motivation behind passing the FCPA to the Puritan religious worldview of the settlers, which “fundamentally influenced the American sense of morality.”⁷⁸ Professors George and Lacey suggest that the Puritan notion equating success in business

⁷¹ *Hearing Before the H. Subcomm. on Int’l Econ. Pol’y & Trade*, 95th Cong. 8 (1975) (testimony of Rep. Robert C. Eckhardt) (quoted in *Koehler Declaration*, *supra* note 6, at 81).

⁷² S. REP. No. 95-114, at 4.

⁷³ *Id.*

⁷⁴ H.R. REP. No. 95-640, at 4 (1977).

⁷⁵ *Id.*

⁷⁶ *Id.* at 5.

⁷⁷ Jimmy Carter, *Foreign Corrupt Practices and Investment Disclosure Bill; Statement on Signing S. 305 into Law*, 2 PUB. PAPERS 2157 (Dec. 20, 1977), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=7036> (quoted in *Koehler*, *supra* note 12, at 913).

⁷⁸ Barbara Crutchfield George & Kathleen A. Lacey, *A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks, and Non-Governmental Organizations: A Pivotal Complement to Current Anti-Corruption Initiatives*, 33 CORNELL INT’L L.J. 547, 554-55 (2000).

with “proof of divine favor” was the underlying cause of a “righteous indignation” against those who appear not to play by the rules.⁷⁹ This is a plausible explanation, but it is difficult to prove and at least one commentator is not persuaded.⁸⁰

Alternatively, Congress may have believed that bribery was objectionable because of its adverse consequences. Foreign payments may be wrong because they run afoul of a certain conception of fair competition in business. Or they may be wrong because they turn friendly relationships between the United States and foreign governments into something decidedly less so. Unfortunately, there is no clear indication in the legislative history that ties the condemnations of bribery as “morally repugnant”⁸¹ to these rationales for addressing foreign bribery. Insofar as divining legislative intent, such a consequentialist view does not give a clear answer.

There are, however, reasons to believe that Congress was aware of some of the conceptual difficulties when thinking about bribery in moral terms. The first, noted above, is the lack of affirmative explanations for why bribery is wrong. The second is the recognition of how difficult it is to legislate against a phenomenon—i.e., bribery of the sort that we feel should not be permitted—whose contours are difficult to define.⁸²

There is a third reason to believe that Congress struggled with and left unresolved the moral ambiguity surrounding bribery—the FCPA’s facilitating payments exception, which permits small bribes for “routine governmental action.” This is not to say that the carve-out was purely the result of conceptual confusion. Rather, the exception may best be understood as

⁷⁹ *Id.*

⁸⁰ See Elizabeth Spahn, *International Bribery: The Moral Imperialism Critiques*, 18 MINN. J. INT’L L. 155, 170-71 (2009) (noting that Professors George and Lacey point to no supporting evidence in the legislative debates that American Puritan ethics were a motivating factor behind the FCPA).

⁸¹ S. REP. NO. 95-114, at 6 (1977).

⁸² Statements by William Simon, Secretary of the Treasury, before the Senate Committee on Banking, Housing, and Urban Affairs, are illustrative. Asked by Senator Proxmire for his thoughts on S. 3133, Secretary Simon responded: “[I]t’s very difficult to put it down on paper in statutory language that would not be damaging to some other legitimate things . . . It’s almost like the Justice who said that he can’t define pornography, but he knows what it is when he sees it.” *Koehler Declaration*, *supra* note 6, at 31 (quoting *Hearings Before the S. Comm. on Banking, Hous., & Urban Aff.*, 94th Cong. 1 (1976) (testimony of William Simon, Secretary of the Treasury)). The following month, Senator Proxmire expressed a related frustration at a hearing before the Committee on Banking, Housing, and Urban Affairs. He stated, “[S]omehow we can’t bring ourselves, at least the executive branch can’t seem to bring itself to a clear-cut definition of this action as illegal and then take effective action to prevent it.” *Id.* at 39 (quoting *Hearings Before the S. Comm. on Banking, Hous., & Urban Aff.*, 94th Cong. 2 (1976) (testimony of Sen. William Proxmire)).

stemming from three related causes—moral ambiguity surrounding bribery; a concern that the FCPA was an exercise of moral imperialism by the United States; but the belief that certain, arguably de minimis, forms of bribery were necessary for conducting business.

III. CHINA

This part turns to China and recognizes its importance to the United States as a trade partner and as an enormous growth market. It then describes the cultural notions of *guanxi* (relationships) and *mianzi* (social standing). Together, *guanxi* and *mianzi* emphasize the need to build personal relationships, to reciprocate in exchanging gifts and favors, and to cultivate and leverage one's reputation. Lastly, this part considers some of the ways in which Chinese culture complicates conducting business while complying with the FCPA.

A. *The Importance of China*

It is difficult to overstate China's importance to the United States, both as a trade partner and as an enormous growth market. China is the second-largest trade partner of the United States, surpassed only by Canada.⁸³ In 2009, China took Germany's place as both the world's third-largest economy⁸⁴ and the world's largest exporter.⁸⁵ The following year, China made headlines when it unseated Japan as the world's second-largest economy,⁸⁶ a title Japan had held for more than 40 years.⁸⁷ China is predicted to become the world's largest

⁸³ *Foreign Trade—Top Trading Partners*, U.S. CENSUS BUREAU (July 2013), <http://www.census.gov/foreign-trade/statistics/highlights/toppartners.html>.

⁸⁴ Ashley Seager, *China Becomes World's Third-Largest Economy*, GUARDIAN, Jan. 14, 2009, available at <http://www.guardian.co.uk/business/2009/jan/14/china-world-economic-growth>.

⁸⁵ *China 'Overtakes Germany as World's Largest Exporter'*, BBC NEWS (Jan. 10, 2010, 10:05 GMT), <http://news.bbc.co.uk/2/hi/8450434.stm>.

⁸⁶ David Barboza, *China Passes Japan as Second-Largest Economy*, N.Y. TIMES, Aug. 15, 2010, at B1, available at <http://www.nytimes.com/2010/08/16/business/global/16yuan.html>.

⁸⁷ Justin McCurry & Julia Kollewe, *China Overtakes Japan As World's Second-Largest Economy*, GUARDIAN, Feb. 14, 2011, available at <http://www.guardian.co.uk/business/2011/feb/14/china-second-largest-economy>. But it is worth noting that "the rapid overtaking of the Japanese economy also reflects years of disappointing growth there." *China: Second in Line*, ECONOMIST FREE EXCH. BLOG (Aug. 16, 2010, 1:36 PM), http://www.economist.com/blogs/freexchange/2010/08/china_0.

importer by 2014.⁸⁸ Given America's imports were six times those of China in 2000,⁸⁹ this is a remarkable turnaround.

Moreover, China's retail sales could exceed America's by 2014.⁹⁰ This estimate is no doubt because of the Chinese middle class, who earn between \$10,000 and \$60,000 per year.⁹¹ This demographic, estimated to include between 250 and 300 million people,⁹² is already roughly as large as the entire population of the United States.⁹³ The Chinese middle class may grow to between 700 and 800 million people, or more than half of the entire population of China.⁹⁴

Given the significant trade relationship between the United States and China, and the continued growth of the Chinese middle class, the Chinese market is of profound importance to American firms. Moreover, the conditions in China provide a useful stress test for the FCPA and its problematic provisions.

B. *How Chinese Culture Complicates FCPA Compliance*

1. Guanxi

Generally, guanxi refers to informal, long-term personal relationships⁹⁵ somewhat similar to the Western concepts of connections and networking.⁹⁶ Guanxi can refer both to specific relationships a person has with another individual or group of individuals, and to the bundle of relationships to which a

⁸⁸ *Economics Focus: How to Get a Date*, ECONOMIST, Dec. 31, 2011, available at <http://www.economist.com/node/21542155>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Tami Luhby, *China's Growing Middle Class*, CNN MONEY (Apr. 26, 2012, 6:00 PM), <http://money.cnn.com/2012/04/25/news/economy/china-middle-class/index.htm> (quoting one expert's view on the salary range of China's middle class).

⁹² MICHAEL ANDREW & PENG YALI, *THE RISE OF THE MIDDLE CLASS IN ASIAN EMERGING MARKETS 2* (Apr. 2012), available at <http://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Documents/Middle-Class-Asia-Emerging-Markets-201206-2.pdf>.

⁹³ The United States Census Bureau estimated the population of the United States to be approximately 316 million in 2013. *State and County QuickFacts—USA*, U.S. CENSUS BUREAU (June 27, 2013, 1:52 PM), <http://quickfacts.census.gov/qfd/states/00000.html>.

⁹⁴ Luhby, *supra* note 91.

⁹⁵ Yi Zhang & Zigang Zhang, *Guanxi and Organizational Dynamics in China: A Link Between Individual and Organizational Levels*, 67 J. BUS. ETHICS 375, 375 (2006).

⁹⁶ Patricia Pattison & Daniel Herron, *The Mountains Are High and the Emperor is Far Away: Sanctity of Contract in China*, 40 AM. BUS. L.J. 459, 484 (2003).

person is a party, i.e., his or her “network.”⁹⁷ But to appreciate the breadth of guanxi, it is important to understand how it differs from networking. At its core, guanxi is a social undertaking that arises from being part of a larger society.⁹⁸ The reason why guanxi pervades all aspects of Chinese society stems from its origins in Confucianism,⁹⁹ which emerged between the fourth and fifth centuries B.C.¹⁰⁰ Since that time, Confucianism as a social philosophy has espoused values of “duty, loyalty, honor, filial piety, kindness, sincerity, and respect for age and seniority.”¹⁰¹ To this day, Confucianism endures as a principal source of community values in China.¹⁰²

At a minimum, guanxi consists of “mutual obligations, assurances, and understanding.”¹⁰³ Often, but not always, guanxi relationships—especially those between family members, friends, and business associates—entail some measure of emotional attachment or sympathy.¹⁰⁴ For example, the extent to which two individuals get along and find common ground can determine the strength of their guanxi.¹⁰⁵ While emotional attachment may or may not play a role in a given guanxi relationship, the sense of mutual indebtedness that results from exchanging gifts and favors is crucial.¹⁰⁶ Both the need to reciprocate and the fact that repayment is often unequal serve to perpetuate the relationship.¹⁰⁷

It is common to conceive of guanxi as concentric circles that surround the individual. In the innermost circle are family members, by both marriage and birth.¹⁰⁸ This reflects the role in Chinese culture of the family as the primary collective to which one belongs.¹⁰⁹ Beyond the innermost circle are non-

⁹⁷ See *Comprehensive Chinese-English Dictionary*, NCIKU, <http://www.nciku.com/search/zh/detail/关系/1305381> (last visited Mar. 1, 2014) (defining guanxi as “relationship” and “relations”).

⁹⁸ See Jane Tung, *Guanxi and Ethics: A Study of Chinese Management Behaviour*, 9 AM. J. APPLIED SCIS. 223, 223 (2012) (“Guanxi in China is recognized as a major activity in its world of business as well as the [sic] society.”).

⁹⁹ Zhang & Zhang, *supra* note 95, at 378.

¹⁰⁰ Gary Kok Yew Chan, *The Relevance and Value of Confucianism in Contemporary Business Ethics*, 77 J. BUS. ETHICS 347, 347 (2008).

¹⁰¹ Pattison & Herron, *supra* note 96, at 478.

¹⁰² Chan, *supra* note 100, at 347-48.

¹⁰³ Seung Ho Park & Yadong Luo, *Guanxi and Organizational Dynamics: Organizational Networking in Chinese Firms*, 22 STRAT. MGMT. J. 455, 455 (2001).

¹⁰⁴ Chris Provis, “Guanxi” and Conflicts of Interest, 79 J. BUS. ETHICS 57, 58 (2008).

¹⁰⁵ Tung, *supra* note 98, at 224.

¹⁰⁶ Pattison & Herron, *supra* note 96, at 485.

¹⁰⁷ Hines, *supra* note 24, at 56.

¹⁰⁸ *Id.*

¹⁰⁹ Pattison & Herron, *supra* note 96, at 483.

family members, such as friends, acquaintances, coworkers, and business associates.¹¹⁰ The distance of a non-family member from the innermost circle depends on the nature of the affiliation and level of trust he or she shares with the individual.¹¹¹ In the outermost circle are strangers, with whom the individual shares no guanxi.¹¹² The Chinese generally feel no sense of obligation toward strangers.¹¹³

2. Mianzi

Mianzi, which translates into English as “face,”¹¹⁴ refers to an individual’s “public self-image.”¹¹⁵ It is a measure of social standing¹¹⁶ determined by various factors, such as one’s “post, credibility, reputation, power, income, or network.”¹¹⁷ The Chinese strive to maintain mianzi in the eyes of others to enhance their “reputation, recognition, and status.”¹¹⁸ One’s success in maintaining mianzi shapes his or her ability to cultivate and grow a guanxi network.¹¹⁹ More broadly, each individual’s relative position helps to maintain social order by indicating what is appropriate behavior for that individual.¹²⁰

The concept of social currency is helpful when thinking about how mianzi operates. To the Chinese, social status is something that can be measured, at least in relative terms.¹²¹ Thus, one may have “a lot of face (*mianzi da*), not much face

¹¹⁰ Hines, *supra* note 24, at 56.

¹¹¹ Zhang & Zhang, *supra* note 95, at 378 (citing MAYFAIR MEI-HUI YANG, GIFTS, FAVORS, AND BANQUETS: THE ART OF SOCIAL RELATIONSHIPS IN CHINA (1994)).

¹¹² See Zhang & Zhang, *supra* note 95, at 378-79 (rejecting the view that one can share guanxi with strangers because “common identity or an intermediary . . . is necessary in initiating Guanxi . . .”).

¹¹³ Hines, *supra* note 24, at 57.

¹¹⁴ *Id.*

¹¹⁵ Peter W. Cardon & James Calvert Scott, *Chinese Business Face: Communication Behaviors and Teaching Approaches*, 66 BUS. COMM. Q. 9, 9 (2003) (quoting PENELOPE BROWN & STEPHEN C. LEVINSON, *POLITENESS: SOME UNIVERSALS IN LANGUAGE USAGE* (2d ed. 1987)).

¹¹⁶ *Id.* at 12 (citing Hsien Chin Hu, *The Chinese Concepts of “Face”*, 46 AM. ANTHROPOLOGIST 45 (1944); WENSHAN JIA, *THE REMAKING OF THE CHINESE CHARACTER AND IDENTITY IN THE 21ST CENTURY* (2001)) (“To have a lot of face essentially means that one has high status compared to others, whereas not to have much face or to have no face means to have low status.”).

¹¹⁷ Park & Luo, *supra* note 103, at n.1.

¹¹⁸ Victor P. Lau et al., *Entrepreneurial Career Success from a Chinese Perspective: Conceptualization, Operationalization, and Validation*, 38 J. INT’L BUS. STUD. 126, 137 (2007).

¹¹⁹ Park & Luo, *supra* note 103, at n.1.

¹²⁰ Hines, *supra* note 24, at 57.

¹²¹ Cardon & Scott, *supra* note 115, at 12 (citing Hsien Chin Hu, *The Chinese Concepts of “Face”*, 46 AM. ANTHROPOLOGIST 45 (1944); WENSHAN JIA, *THE REMAKING OF THE CHINESE CHARACTER AND IDENTITY IN THE 21ST CENTURY* (2001)).

(*mianzi xiao*), no face (*mei mianzi*), or more face than others (*ta de mianzi bijiao da*).¹²² The currency metaphor goes further. One can gain face (*zengjia mianzi*) or lose it (*diu mianzi*).¹²³ For example, an individual may gain face by succeeding in business or by being associated with high-status individuals.¹²⁴ On the other hand, he or she may lose face by “not keeping promises, meeting expectations, or disregarding social norms.”¹²⁵ Examples of behavior that result in losing face include directly contradicting a superior in front of a third party, speaking out of turn, or failing to return a favor. One can also lend or borrow face (*jie mianzi*).¹²⁶ For example, an individual has borrowed face when he or she receives an introduction or a favor only because someone of higher status has intervened. The Chinese also think of face as something that can be protected (*baohu mianzi*), saved (*liu mianzi*), and given (*gei mianzi*) to enhance or acknowledge the face of others.¹²⁷

3. The Implications of Guanxi and Mianzi for FCPA Compliance

The concepts of guanxi and mianzi, as well as other facets of Chinese culture, encourage the Chinese to maintain and foster harmony.¹²⁸ The desire to avoid conflict has implications for business generally. Individuals may avoid “evaluation and constructive criticism.”¹²⁹ An aversion to confrontation may keep unproductive employees from being dismissed and unprofitable companies from failing.¹³⁰ As mentioned above, guanxi and mianzi require a mutually shared sense of obligation to sustain relationships. Professor Potter has described the dilemma as “not merely a matter of suspending moral or legal values,” but as reflecting “uncertainties and tensions as to the permissible parameters for guanxi behavior and the parameters for formal institutional behavior.”¹³¹ In other words, an

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Hines, *supra* note 24, at 58.

¹²⁶ *Id.* at 13.

¹²⁷ Cardon & Scott, *supra* note 115, at 14.

¹²⁸ Pattison & Herron, *supra* note 96, at 488.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Provis, *supra* note 104, at 63 (quoting P. B. Potter, *Guanxi and the PRC Legal System: From Contradiction to Complementarity*, in *SOCIAL CONNECTIONS IN CHINA: INSTITUTIONS, CULTURE, AND THE CHANGING NATURE OF GUANXI* (T. Gold et al., eds.) 179-95 (2002)).

important ethical question is how guanxi “obligations are related to other ethical and moral commitments people have.”¹³²

More specifically, American firms face a high risk of violating the FCPA when they try to adhere to the Chinese customs of guanxi and mianzi.¹³³ This is in large part because “bribery is related to the gift-giving ethos in China.”¹³⁴ Gifts, particularly in Chinese culture, show that a relationship is valued and are expressions of respect for the recipient.¹³⁵ The need for reciprocity that attaches to gift giving follows from the principle of *li*—Confucian ritual action.¹³⁶ Professor Tian has suggested, however, that bringing expensive gifts to superiors to show respect or to request special privileges reflects “a transition from the ritual action ‘Li’ to the secular Li,” i.e., a gift.¹³⁷

An everyday application of these Chinese customs may easily violate the FCPA. Professor Hines describes one of these possibilities:

Imagine a scenario where X, an employee in a Chinese subsidiary, borrows the face of Y, a family member of Z, in order to be introduced to Z, a foreign official, who then offers X a major contract or other business deal. However, in order to [sic] for the deal to go through, Z insists that X pay Y a large “service fee.” In China, such a payment is viewed as maintaining and building guanxi (network/connections). However, under the FCPA a violation has occurred because X, an employee in a Chinese subsidiary, has bribed a foreign official, Z. Even though Z did not receive the payment himself, he received a benefit from Y receiving the payment. Thus, Z has received a “thing of value” under the Act.¹³⁸

IV. RECENT ENFORCEMENT ACTIONS IN CHINA

To elaborate on the preceding discussion of guanxi and mianzi, this part provides concrete examples of behavior that is common when doing business in China, but that violates the FCPA. The case studies concern three U.S. companies with Chinese subsidiaries—Eli Lilly and Company, International Business Machines Corporation, and Maxwell Technologies, Inc. The DOJ, the SEC, or both have charged these companies

¹³² *Id.* at 58.

¹³³ Hines, *supra* note 24, at 21-22.

¹³⁴ Qing Tian, *Perception of Business Bribery in China: The Impact of Moral Philosophy*, 80 J. BUS. ETHICS 437, 438 (2008).

¹³⁵ *Id.* at 443.

¹³⁶ *Id.* (citing QING TIAN, A TRANSCULTURAL STUDY OF ETHICAL PERCEPTIONS AND JUDGMENTS BETWEEN CHINESE AND GERMAN BUSINESSMEN (2004)).

¹³⁷ *Id.*

¹³⁸ Hines, *supra* note 24, at n.190.

and/or their subsidiaries with violating the anti-bribery, books and records, and internal controls provisions of the FCPA, and Section 13(a) of the Exchange Act. These case studies form part of the trend, in recent years, of China being a “significant demand-side country” for FCPA violations.¹³⁹ Indeed, nearly one-third of FCPA enforcement actions in 2012 involved improprieties in China.¹⁴⁰

A. *Eli Lilly and Company*

Eli Lilly and Company (Lilly) operates in more than 143 countries¹⁴¹ and manufactures drugs for treating, among other things, diabetes,¹⁴² pancreatic cancer,¹⁴³ and osteoporosis.¹⁴⁴ From 2000 to 2009, Lilly foreign subsidiaries made improper payments not only in China, but also in Brazil, Poland, and Russia.¹⁴⁵ In China, Lilly has a wholly owned subsidiary (Lilly-China) whose sales representatives targeted government-employed health-care providers.¹⁴⁶

Between 2006 and 2009,¹⁴⁷ there were widespread and repeated instances of Lilly-China employees submitting false expense reports and then using the reimbursed amounts to pay for improper gifts and benefits.¹⁴⁸ The recipients were primarily government-employed physicians,¹⁴⁹ who received wine, specialty foods, jewelry, cosmetics, meals, and visits to bathhouses and karaoke bars.¹⁵⁰ In addition, government officials who could improve sales in China by placing Lilly products on “government reimbursement lists” received cigarettes, meals, and spa

¹³⁹ SHEARMAN & STERLING LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 7 (2012), available at <http://www.shearman.com/files/Publication/bb1a7bff-ad52-4cf9-88b9-9d99e001dd5f/Presentation/PublicationAttachment/6ec0766a-25aa-41ec-8731-041a672267a6/FCPA-Digest-Trends-and-Patterns-Jan2012.pdf>.

¹⁴⁰ GIBSON, DUNN & CRUTCHER LLP, 2012 YEAR-END FCPA UPDATE 25 (2013), available at <http://www.gibsondunn.com/publications/Documents/2012YearEndFCPAUpdate.pdf>.

¹⁴¹ Complaint ¶ 5, SEC v. Eli Lilly & Co., No. 1:12-cv-02045 (D.D.C. Dec. 20, 2012), available at <http://www.sec.gov/litigation/complaints/2012/comp-pr2012-273.pdf>.

¹⁴² See *Human*, Eli Lilly & Co., <http://www.lilly.com/products/human/Pages/human.aspx> (last visited Mar. 1, 2014).

¹⁴³ See *GEMZAR*, <http://pi.lilly.com/us/gemzar.pdf> (last visited Mar. 1, 2014).

¹⁴⁴ See *About Forteo*, FORTEO, <http://www.forteo.com/Pages/osteoporosis-medication.aspx> (last visited Mar. 1, 2014).

¹⁴⁵ Complaint ¶¶ 1-2, SEC v. Eli Lilly & Co., No. 1:12-cv-02045.

¹⁴⁶ *Id.* ¶ 16.

¹⁴⁷ *Id.* ¶ 2.

¹⁴⁸ *Id.* ¶¶ 17-20.

¹⁴⁹ *Id.* ¶¶ 17-19.

¹⁵⁰ *Id.* ¶¶ 18-19.

treatments.¹⁵¹ In response, Lilly has dismissed or disciplined employees who engaged in this prohibited conduct.¹⁵²

As a result of these improprieties, the SEC charged Lilly-China with violating the books and records provision by falsifying expense reports and then using the reimbursed amounts to pay for perquisites.¹⁵³ The SEC also charged Lilly with violating the internal controls provision, which requires the company to “devise and maintain an adequate system of internal accounting.”¹⁵⁴ First, the SEC alleged, Lilly relied on written assurances from Lilly-China employees that they were not giving improper gifts to obtain or retain business.¹⁵⁵ Second, Lilly’s audit department lacked procedures for ensuring that foreign transactions complied with the FCPA.¹⁵⁶

Without admitting to wrongdoing, Lilly “consented to the entry of a final judgment permanently enjoining the company from violating the . . . books and records[] and internal control[] provisions of the FCPA.”¹⁵⁷ Moreover, Lilly agreed to disgorge approximately \$13.9 million in ill-gotten gains, pay approximately \$6.7 million in prejudgment interest, and pay a penalty of \$8.7 million.¹⁵⁸

B. *International Business Machines Corporation*

International Business Machines Corporation (IBM) is a multinational technology and consulting company operating in more than 170 countries.¹⁵⁹ IBM manufactures, configures, and sells a variety of products, which include IT infrastructure services, enterprise-level software, point-of-sale retail systems, semiconductors, and data storage products.¹⁶⁰ IBM (China) Investment Company Limited and IBM Global Services (China) Co., Ltd. (collectively, IBM-China) are wholly owned subsidiaries of IBM.¹⁶¹ From 2004 to 2009,¹⁶² employees of IBM-China created

¹⁵¹ *Id.* ¶ 20.

¹⁵² *Id.* ¶ 21.

¹⁵³ *Id.* ¶ 44.

¹⁵⁴ *Id.* ¶¶ 45-46.

¹⁵⁵ *Id.* ¶ 45.

¹⁵⁶ *Id.* ¶ 46.

¹⁵⁷ Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Eli Lilly and Company with FCPA Violations (Dec. 20, 2012), *available at* <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171487116>.

¹⁵⁸ *Id.*

¹⁵⁹ IBM, 2012 ANNUAL REPORT 25 (2012), *available at* http://www.ibm.com/annualreport/2012/bin/assets/2012_ibm_annual.pdf.

¹⁶⁰ *Id.* at 21-24.

¹⁶¹ Complaint ¶ 3, SEC v. IBM Corp., No. 1:11-cv-00563 (D.D.C. Mar. 18, 2011), *available at* <http://www.sec.gov/litigation/complaints/2011/comp21889.pdf>.

slush funds, some at local travel agencies to pay for overseas trips, and others to provide improper gifts, such as cash payments and consumer electronics.¹⁶³ Chinese government officials received both overseas trips and improper gifts.¹⁶⁴ IBM-China entered into contracts with “government-owned or controlled customers in China” to provide training on how to use IBM hardware and software.¹⁶⁵ IBM held some of this training off-site.¹⁶⁶ Certain trips deviated from preapproved itineraries, which detailed a trip’s business purpose and “sightseeing and entertainment activities.”¹⁶⁷ Other trips did not have preapproved itineraries at all, and had little to no business content or provided per diem payments.¹⁶⁸

The SEC charged IBM “with violating the books and records and internal control provisions of the . . . FCPA.”¹⁶⁹ During the period in question, IBM had policies prohibiting bribery and addressing FCPA compliance.¹⁷⁰ But on more than 100 occasions, trips that did not follow preapproved itineraries or were otherwise objectionable somehow escaped detection.¹⁷¹ In this manner, “IBM failed to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances, among other things, that . . . transactions were executed in accordance with management’s general or specific authorization”¹⁷² IBM-China also designated certain travel agents as “authorized training providers” and paid them for “training services.”¹⁷³ These sums paid for trips that lacked preapproved itineraries.¹⁷⁴ The SEC alleged that IBM-China violated the books and records provision by recording improper payments as legitimate business expenses.¹⁷⁵

Like Lilly, IBM did not admit to wrongdoing and “consented to the entry of a final judgment that permanently enjoins the company from violating the books and records and

¹⁶² *Id.* ¶ 3.

¹⁶³ *Id.* ¶ 32.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* ¶ 33.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* ¶¶ 33-34

¹⁶⁸ *Id.* ¶ 34.

¹⁶⁹ Press Release, U.S. Sec. & Exch. Comm’n, IBM to Pay \$10 Million in Settled FCPA Enforcement Action (Mar. 18, 2011), *available at* <http://www.sec.gov/litigation/litreleases/2011/lr21889.htm>.

¹⁷⁰ Complaint ¶ 4, SEC v. IBM Corp., No. 1:11-cv-00563.

¹⁷¹ *Id.* ¶ 34.

¹⁷² *Id.* ¶ 40.

¹⁷³ *Id.* ¶ 34.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* ¶ 6.

internal control provisions of the FCPA”¹⁷⁶ Moreover, IBM agreed to disgorge approximately \$5.3 million in ill-gotten gains and pay \$2.7 million in prejudgment interest.¹⁷⁷

C. *Maxwell Technologies, Inc.*

Maxwell Technologies, Inc. (Maxwell), a Delaware corporation headquartered in California,¹⁷⁸ manufactures energy storage and power delivery products.¹⁷⁹ Maxwell Technologies S.A. (Maxwell SA) is a wholly owned Swiss subsidiary.¹⁸⁰ Maxwell SA employed a Chinese national as a third-party agent who marketed and sold Maxwell’s high-voltage capacitors to Chinese customers.¹⁸¹

“From 2002 through May 2009, Maxwell . . . paid over \$2.5 million in kickback payments to officials at several Chinese state-owned entities” through its Chinese agent.¹⁸² On behalf of Chinese customers, the Chinese agent requested price quotations from Maxwell SA and instructed Maxwell SA to inflate the prices by 20%.¹⁸³ Upon receiving the power equipment, the Chinese customers paid those inflated prices to Maxwell SA.¹⁸⁴ The Chinese agent then “invoiced [Maxwell SA] for the ‘extra’ 20 percent”¹⁸⁵ Once the Chinese agent received these amounts, he paid them as bribes to employees of the state-owned entities.¹⁸⁶

As a result of these improprieties, Maxwell was subject to enforcement actions by both the DOJ and the SEC.¹⁸⁷ The DOJ charged Maxwell with violating the anti-bribery provisions because it knowingly permitted the Chinese agent to continue transferring the extra amounts to employees of state-owned entities in return

¹⁷⁶ Press Release, U.S. Sec. & Exch. Comm’n, *supra* note 169.

¹⁷⁷ *Id.*

¹⁷⁸ MAXWELL TECHS., INC., 2012 ANNUAL REPORT 69 (2011), *available at* <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NTIzOTY4fENoaWxkSUQ9MjA5NjIxfr5cGU9MQ==&t=1>.

¹⁷⁹ *Company Overview*, MAXWELL TECHS., http://www.maxwell.com/about_us/company-overview (last visited Mar. 1, 2014).

¹⁸⁰ Complaint ¶ 2, SEC v. Maxwell Techs., Inc., No. 1:11-cr-00258 (D.D.C. Jan. 31, 2011), *available at* <http://www.sec.gov/litigation/complaints/2011/comp21832.pdf>.

¹⁸¹ Information ¶ 11, United States v. Maxwell Techs., Inc., No. 3:11-cr-00329 (S.D. Cal. 2011), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/maxwell/01-31-11maxwell-tech-info.pdf>.

¹⁸² Complaint ¶ 2, SEC v. Maxwell Techs., Inc., No. 1:11-cr-00258.

¹⁸³ Information ¶ 16 United States v. Maxwell Techs., Inc., No. 3:11-cr-00329.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Maxwell Technologies for Long-Running Bribery Scheme in China (Jan. 31, 2011), *available at* <http://www.sec.gov/news/press/2011/2011-31.htm>.

for business.¹⁸⁸ Further, the DOJ charged Maxwell with violating the books and records provision by recording these improper payments as commissions, and by labeling them “Extra Amount” or “Special Arrangement.”¹⁸⁹

The SEC charged Maxwell with violating the internal controls provision, because Maxwell failed to determine why the contract prices were artificially inflated, failed to mandate FCPA training for certain employees, and because senior officers and managers did not stop improprieties of which they were aware.¹⁹⁰ Finally, the SEC charged Maxwell with violating Section 13(a) of the Exchange Act by recording the bribes “as sales commission expenses in its financials.”¹⁹¹

Maxwell entered into a deferred prosecution agreement with the DOJ.¹⁹² Under the agreement, the DOJ agreed not to prosecute Maxwell for three years and seven calendar days.¹⁹³ Further, the DOJ agreed to release Maxwell from criminal liability after that time as long as Maxwell complies with the agreement.¹⁹⁴ In exchange, Maxwell must continue cooperating with the DOJ in any ongoing investigation “relating to corrupt payments, related false books and records, and inadequate internal controls.”¹⁹⁵ Maxwell must also continue implementing a compliance program “designed to prevent and detect violations of the FCPA and other applicable anti-corruption laws.”¹⁹⁶ Finally, Maxwell must review its internal controls, improving and supplementing them as necessary.¹⁹⁷

Maxwell also reached a settlement with the SEC, in which it “consented to the entry of a final judgment that permanently enjoins the company from future violations of” Section 13(a) of the Exchange Act, and the anti-bribery, books and records, and internal controls provisions of the FCPA.¹⁹⁸ Moreover, Maxwell

¹⁸⁸ Information, *supra* note 181, ¶¶ 20-21.

¹⁸⁹ *Id.* ¶¶ 22-23.

¹⁹⁰ Complaint ¶ 27, SEC v. Maxwell Techs., Inc., No. 1:11-cr-00258 (D.D.C. Jan. 31, 2011).

¹⁹¹ *Id.* ¶¶ 32-35.

¹⁹² Deferred Prosecution Agreement, United States v. Maxwell Techs., Inc., No. 3:11-cr-00329 (S.D. Cal. 2011), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/maxwell/01-31-11maxwell-tech-dpa.pdf>.

¹⁹³ *Id.* ¶ 3.

¹⁹⁴ *Id.* ¶ 9.

¹⁹⁵ *Id.* ¶ 5.

¹⁹⁶ *Id.* ¶ 10.

¹⁹⁷ *Id.* ¶ 11.

¹⁹⁸ Press Release, U.S. Sec. & Exch. Comm’n, *supra* note 187.

agreed to disgorge approximately \$5.6 million in ill-gotten gains and pay nearly \$700,000 in prejudgment interest.¹⁹⁹

V. TOWARD A RECONCEIVED LEGISLATIVE INTENT

The preceding parts of this note have described the development and present-day reality of FCPA enforcement. Part I provided a brief history of the FCPA, which became law after hundreds of U.S. companies admitted to paying more than \$300 million in overseas bribes. Part II concluded from examining the legislative history that a reflexive conviction that bribery is morally reprehensible sat uneasily alongside the facilitating payments exception. This exception reflects the moral ambiguity surrounding bribery, the concern that the United States was imposing its normative standards on other countries, and the belief that certain, arguably *de minimis*, forms of bribery ultimately were necessary.

Part III recognized that the cultural notions of *guanxi* and *mianzi* are deeply rooted in Chinese culture and invariably affect how individuals do business. Part IV elaborated on the abstract descriptions in Part III by providing examples of behavior that without question was informed by *guanxi* and *mianzi*, and that led to charges of violating the FCPA and the Exchange Act. In China, payments and gifts outside the boundaries of rules and regulations often are not seen as immoral, which further underscores the difficulty of relying on moral intuitions.

This part considers two examples of corruption in China that have threatened public health and safety. These incidents raise the possibility that overseas corruption could one day harm American consumers. Given the trade relationship between the United States and China, this risk will only increase with time. Next, this part argues in favor of recognizing a public-safety rationale for prohibiting foreign bribery. Recognizing a public-safety rationale suggests two reforms. First, the prohibition of foreign bribery should be expanded to include all recipients. Second, to mitigate increases in compliance costs and decrease uncertainty, the FCPA should include a compliance defense that operates as a matter of law. In addition to suggesting specific reforms, the public-safety rationale provides a reconceived legislative intent behind the FCPA, which will be necessary to amend it.

¹⁹⁹ *Id.*

A. *Threats to Public Health and Safety*

In recent years, China has attracted criticism for scandals that illustrate the dangers of an at-all-costs approach to business and economic growth. Not infrequently, this approach has had devastating consequences for public health and safety. Two examples are the bribery scandal that engulfed China's State Food and Drug Administration, which led to the execution of Zheng Xiaoyu, its director, and the high-speed train collision in Wenzhou in 2011.

For eight years, Zheng Xiaoyu led the State Food and Drug Administration, an agency that he lobbied to create.²⁰⁰ During that time, eight drug companies showered him with bribes and gifts including a house, a car, cash, and stock,²⁰¹ together worth more than \$850,000.²⁰² During his tenure, Zheng approved more than 150,000 new drugs—a rate of nearly 19,000 new drugs per year.²⁰³ By contrast, the Food and Drug Administration approved only 35 new drugs in 2012.²⁰⁴ As a result of Zheng's improprieties, 14 people died and hundreds possibly were injured after using Xinfu, an unsafe antibiotic.²⁰⁵

In July 2011, one high-speed train collided with a train ahead of it, killing 40 people and injuring 172.²⁰⁶ Both trains had departed Beijing for the eastern city of Fuzhou.²⁰⁷ After concluding its investigation, the Chinese government attributed the accident to problematic track-signal equipment, which stopped working after being struck by lightning.²⁰⁸ The government's report found several dozen additional instances of faulty equipment, which "called into question how the signal contracts were awarded in the first place."²⁰⁹ One journalist who

²⁰⁰ David Barboza, *A Chinese Reformer Betrays His Cause, and Pays*, N.Y. TIMES, July 13, 2007, available at <http://www.nytimes.com/2007/07/13/business/worldbusiness/13corrupt.html>.

²⁰¹ *Id.*

²⁰² Jonathan Watts, *China Executes Former Food Safety Chief Over Fake Medicines*, GUARDIAN, July 10, 2007, available at <http://www.guardian.co.uk/world/2007/jul/11/china.jonathanwatts>. The bribes and gifts were worth \$6.5 million Chinese yuan, then equivalent to \$858,000. See *Historical Exchange Rates*, OANDA, <http://www.oanda.com/currency/historical-rates> (last visited Mar. 1, 2014) (providing an average Chinese yuan to U.S. dollar exchange rate of 0.1321 in July 2007).

²⁰³ Barboza, *supra* note 200.

²⁰⁴ FDA, FY 2012 INNOVATIVE DRUG APPROVALS 4 (2012), available at <http://www.fda.gov/downloads/aboutfda/reportsmanualsforms/reports/ucm330859.pdf>.

²⁰⁵ Barboza, *supra* note 200 (see slides 2 and 6 in accompanying slideshow).

²⁰⁶ James T. Areddy, *China Blasts High-Speed Rail System*, WALL ST. J. (Dec. 29, 2011), <http://online.wsj.com/article/SB10001424052970204632204577126121683353312.html>.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

investigated China's Rail Ministry after the accident catalogued the widespread use of illegal subcontracting: "A single contract could be divvied up and sold for kickbacks, then sold again and again, until it reached the bottom of a food chain of labor, where the workers were cheap and unskilled."²¹⁰ For example, in November 2011, "a former cook with no engineering experience was found to be building a high-speed railway bridge using a crew of unskilled migrant laborers who substituted crushed stones for cement in the foundation."²¹¹

B. *The Public-Safety Rationale for Prohibiting Foreign Bribery*

Given the trade relationship between the United States and China, and despite safety and quality control laws in the United States, the risk that problems in the supply chain will harm American consumers will only increase with time. For this reason, it is useful to supplant the moral ambiguity surrounding the FCPA with a consequentialist rationale for prohibiting bribery. That is, we can view bribery as morally objectionable—or, at least, as something that ought to be prohibited—because it can lead to significant dangers to public health and safety.

1. How the FCPA Ought to Be Reformed

Recognizing a public-safety rationale for prohibiting bribery suggests that the FCPA ought to be reformed. Reasonable minds can differ as to what reforms are appropriate. One possibility, however, is that the FCPA should prohibit bribing not only foreign government officials, but anyone at all. Expanding the statute in this manner is not without precedent. For example, the United Kingdom's Bribery Act 2010—which applies to persons "ordinarily resident" in the United Kingdom and to companies that are based in, or that do business in, the United Kingdom—prohibits both giving bribes, no matter the recipient, as well as receiving them.²¹² Such a

²¹⁰ Evan Osnos, *Boss Rail: The Disaster That Exposed the Underside of the Boom*, NEW YORKER, Oct. 22, 2012, available at http://www.newyorker.com/reporting/2012/10/22/121022fa_fact_osnos.

²¹¹ *Id.*

²¹² See AKIN GUMP STRAUSS HAUER & FELD LLP, UK BRIBERY ACT RAISES THE BAR ON FCPA STANDARDS FOR ANTIBRIBERY COMPLIANCE 1-2 (2010), available at <http://cdn.akingump.com/images/content/6/7/v2/6732/100802-UK-Bribery-Act-Raises-the-Bar-on-FCPA-Standards-for-Antib.pdf>.

change to the FCPA is consistent with the public-safety rationale because it recognizes that any bribe is a potential source of devastating harm, and it is of no moment who the recipient is.

In addition to prohibiting foreign bribery no matter the recipient, the FCPA should also include a compliance defense. The argument, as Professor Koehler puts it, is that a “company’s *pre-existing* compliance policies and procedures, and its good faith efforts to comply with the FCPA, should be relevant *as a matter of law* when a non-executive employee or agent acts contrary to those policies and procedures and in violation of the FCPA.”²¹³ Unfortunately, the DOJ and SEC oppose such a compliance defense.²¹⁴ It remains that the two agencies have sole discretion on whether to prosecute, and the degree to which they will recognize efforts to comply with the FCPA.²¹⁵

A compliance defense that is not subject to the whims of prosecutorial discretion would be a welcome companion to the first reform, i.e., expanding the prohibition of bribery to all recipients. The DOJ and SEC have already given detailed guidance on what makes a compliance program robust and appropriate to a given company.²¹⁶ But they should go further to decrease uncertainty, and assure the business community that compliance programs will be taken into account when investigating potential FCPA violations. Expanding the prohibition of foreign bribery may increase compliance costs, but a compliance defense would mitigate this increase by enabling companies to better manage compliance risk elsewhere.

2. A Reconceived Legislative Intent for Reforms to the FCPA

The public-safety rationale for prohibiting bribery not only suggests certain reforms, but also serves as a reconceived legislative intent for them. This is necessary because reforms tied to public health and safety will likely require legislative action in the form of a third set of amendments to the FCPA. As for the two reforms mentioned above, both the DOJ’s and SEC’s

²¹³ Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2 WIS. L. REV. 609, 611 (2012) (emphases in original).

²¹⁴ *Id.* at 651.

²¹⁵ *Id.* (quoting *Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Security, H. Comm. on the Judiciary*, 112th Cong. 5 (2011) (written testimony of the Hon. Michael B. Mukasey)).

²¹⁶ RESOURCE GUIDE, *supra* note 2, at 56-65.

guidance²¹⁷ and the current enforcement environment make clear that such changes simply are not in the offing.

CONCLUSION

When it comes to the FCPA, China has proved to be a source of both problems and solutions. The cultural notions of *guanxi* and *mianzi* present significant obstacles for U.S. companies, which, given the risk of steep fines and negative publicity, want to ensure that their Chinese subsidiaries do not violate the FCPA. In the face of these obstacles, however, recent high-profile incidents in China that affect public health and safety raise the possibility that overseas corruption could one day harm American consumers. Recognizing a public-safety rationale for prohibiting bribery abroad addresses the moral ambiguity surrounding the original passage of the FCPA, and suggests that it ought to be reformed. This note has argued for one possible set of reforms—expanding the prohibition of foreign bribery to all recipients, while decreasing uncertainty and controlling compliance costs with a compliance defense that operates as a matter of law, and is not subject to prosecutorial discretion. Further, the public-safety rationale provides a reconceived legislative intent that will be necessary to implement these reforms through an amendment to the FCPA.

Upton Au[†]

²¹⁷ See generally *id.*

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