SOLICITATION, EXTORTION, AND THE FCPA

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The U.S. Foreign Corrupt Practices Act (FCPA) prohibits firms from paying bribes to foreign officials to obtain or retain business. It is one of the most significant and feared statutes for companies operating abroad. FCPA enforcement has never been higher and nine-figure monetary penalties are not uncommon. This makes the implementation of robust FCPA compliance programs of paramount importance. Unfortunately, regardless of whether they have compliance measures in place, many firms report that they face bribe requests and extortionate threats from foreign public officials on a daily basis. The implications of these demand-side pressures have gone largely unexplored in the FCPA context. This Article helps fill that gap. First, I describe the nature and frequency of bribe solicitation and extortion to illustrate the scope of the problem and the costs it imposes on firms and other market participants. I then argue that current FCPA enforcement policy in cases of solicitation and extortion raises several unique corporate governance and compliance challenges and ultimately poses a risk of overdeterrence. Though these concerns can be partially addressed through enhanced statutory guidance, I conclude by urging regulators to shift some of their focus from bribe-paying firms in order to directly target bribe-seeking public officials. Confronting the market for bribe demands in this way will help reduce corruption in general while also allowing employees and agents to spend less time worrying about how to respond to bribe requests and more time on legitimate, value-enhancing transactions.

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INTRODUCTION

Maintaining compliance with the Foreign Corrupt Practices Act (FCPA)[1] represents one of the most significant issues facing American firms today. The U.S. Department of Justice (DOJ) recently said that enforcing the FCPA, which prohibits firms from bribing foreign officials to obtain business, is now its top priority—"second only to fighting terrorism."[2] This has translated into a sharp rise in FCPA case

1 Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. § 78dd (2006)).

2 *See* Laurence A. Urgenson et al., *New Bumps and Tolls Along the Road to FCPA Settlements*, BUS. CRIMES BULL., Nov. 2009, at 1.

volume during the past decade.[3] Last year alone saw more FCPA actions than ever before in the statute's thirty-three-year history, with resulting fines routinely reaching into the hundreds of millions of dollars.[4] Estimates further suggest that federal regulators currently have over 200 open FCPA investigations,[5] leading to the observation that FCPA enforcement is "at an all time high and likely to remain there."[6]

In many respects the increasing rate of enforcement is a positive development. Bribery blights lives, undermines democracy, and distorts markets. The FCPA's resurgence is a key part of the global anti-corruption response and encourages firms to adopt compliance programs designed to counter corrupt practices. The problem is that, no matter how elaborate a firm's compliance efforts might be, they can do little to curb the market for bribe demands. Firms report that they continue to receive demands for bribes from foreign officials on a daily basis.[7] In some cases this means being solicited for bribes from customs officials in exchange for moving goods in or out of the country. In other situations it means falling victim to extortion, where paying a ransom to a foreign official becomes the only way to avoid harm to one's person, property, or existing economic interests.

Bribe solicitation and extortion thus pose constant challenges for transnational firms but have received only minimal attention in the newly developing literature on the FCPA. This Article seeks to fill that gap by exploring the problem of solicitation and extortion from the

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3 The DOJ and United States Securities and Exchange Commission (SEC) brought almost twice as many FCPA cases between 2007 and 2009 than in the statute's previous twenty-eight-year history. *See* Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 522 (2011).

4 *See id.* at 492–93.

5 *See* Nathan Vardi, *How Federal Crackdown on Bribery Hurts Business and Enriches Insiders*, FORBES, May 24, 2010, at 72, *available at* http://www.forbes.com/forbes/2010/0524/business-weatherford-kbr-corruption-bribery-racket.html (reporting 150 open criminal FCPA investigations); *see also* ORG. FOR ECON. COOPERATION & DEV., UNITED STATES: PHASE 3 REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 2009 REVISED RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 11 (2010) [hereinafter OECD Phase 3 Report], *available at* http://www.oecd.org/dataoecd/10/49/46213841.pdf (reporting over 150 criminal FCPA investigations and over eighty civil FCPA investigations ongoing).

6 Westbrook, *supra* note 3, at 523 (quoting Oliver J. Armas, *The U.S. Foreign Corrupt Practices Act—An Overview*, 22 INT'L C. PRACTICUM 31, 37 (2009)).

7 *See* INT'L CHAMBER OF COMMERCE ET. AL., RESIST: RESISTING EXTORTION AND SOLICITATION IN INTERNATIONAL TRANSACTIONS 6 (2011) [hereinafter RESIST]; Philip Urofsky, *Extortionate Demands Under the Foreign Corrupt Practices Act*, 26 WHITE COLLAR CRIME REP. 848, 884 (2008).

perspective of corporate governance. Firms know that giving into bribe demands—regardless of the circumstances in which they were made—is generally no excuse to liability. What this Article shows, however, is that a variety of obstacles exist which make designing efficient internal controls to resist solicitation and extortion increasingly difficult.

Part I sets up the analytical framework by discussing the FCPA's key provisions and the recent upsurge in FCPA enforcement. Part II then introduces data on the nature and frequency of bribe solicitation and extortion to illustrate the scope of the problem and the costs these practices impose on firms and other market participants.

Part III turns to the governance challenges that result from solicitation and extortion. This requires looking at two overlapping issues. The first stems from the fact that firms investing in foreign markets typically need to retain local agents to navigate unfamiliar laws and customs. These agents are notoriously difficult to monitor and often go to great lengths to hide bribe and ransom payments from the firms that hired them. Firms are then exposed to vicarious liability (civilly and criminally) for the wrongs committed by their agents, even when the firms made every effort to prevent the wrongdoing.

The risk of vicarious liability feeds directly into the second issue. Instead of helping to protect firms from solicitation or extortion, federal regulators have actually made compliance *more* difficult due to their aggressive interpretation of several key aspects of the FCPA. Not all bribes under the FCPA are created equal. The statute affirmatively allows payments made to prompt an official to take "routine" action,[8] payments that were not made for the purpose of getting business,[9] and payments that were not made to "foreign" officials.[10] Many payments made in response to bribe demands arguably fall within these protected areas and yet have resulted in FCPA actions based on increasingly expansive enforcement theories. As regulators continue to push the boundaries of statutory interpretation, firms will find it difficult to predict *ex ante* whether conduct that appears permissible under the FCPA's terms will later expose them to sanction. This in turn hinders efforts to design monitoring programs that will prevent illegal payments without also deterring employees from pursuing legitimate transactions or engaging in socially desirable risk-taking.

As Part IV shows, some of the foregoing issues can be addressed through enhanced statutory guidance intended to provide firms with

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8 *See* 15 U.S.C. § 78dd-1(b) (2006).

9 *See id.* at § 78dd-1(a).

10 *See id.*

better understanding of enforcement standards. This should lead to greater predictability and consistency in the administration of the FCPA. Still another way to ease the pressures generated by solicitation and extortion would involve expanding the scope of anti-corruption efforts in order to directly confront the demand-side origins of corruption. This would require regulators to shift some of their focus from bribe-paying firms in order to target bribe-seeking public officials. To be sure, my argument is not that bribery should be tolerated or that bribe-paying firms should avoid sanction. Rather, the goal of confronting bribe-seeking officials would simply be to add balance to existing regulatory efforts by addressing both supply *and* demand in corrupt transactions.

The DOJ has made some initial strides on the demand side by seeking to disgorge profits from corrupt foreign officials who receive bribes. But much more needs to be done. This includes improving levels of cooperation with other countries to reduce the frequency of bribe demands and working with non-governmental organizations (NGOs) and other groups dedicated to fighting corruption. Through these and other initiatives, demand-side intervention has the potential to reduce corruption in general while also allowing firms and their agents to spend less time worrying about how to respond to bribe requests and more time on value-enhancing transactions.

I. FCPA Enforcement

A. *Background*

Enacted in 1977, the FCPA was the first statute in history to prohibit firms in one country from bribing government officials in another for the purpose of getting business. Its origins can be traced to two scandals from the 1970s. The first involved Lockheed Corporation, which disclosed to regulators in 1971 that it paid multi-million dollar bribes to officials in several countries in order to secure government contracts.[11] This might not have made the splash that it did if it were not for the fact that Lockheed paid these bribes shortly after receiving a $250 million federal loan guarantee to keep it out of bankruptcy.[12] The discovery of Lockheed's bribery embarrassed the

11 *See* Andrew Brady Spalding, *The Irony of International Business Law: U.S. Progressivism, China's New Laissez Faire, and Their Impact in the Developing World*, 59 UCLA L. Rev. (forthcoming 2011) (manuscript at 19), *available at* http://papers.ssrn.com/vol3/papers/cfm?abstract_id.=1795563.

12 *See* Mike Koehler, *The Façade of FCPA Enforcement*, 41 Geo. J. Int'l L. 907, 912 n.6 (2010).

United States, as well as the countries whose officials received bribes, including Japan, Italy, and the Netherlands.[13]

The second scandal was Watergate. In the course of investigating then-President Nixon's re-election campaign, the SEC uncovered evidence that over 400 American companies made questionable payments to foreign officials during the 1970s in amounts totaling approximately $300 million.[14] These payments were often made through the use of "slush funds" that originated in offshore bank accounts or shell companies created for the sole purpose of facilitating bribery transactions or illegal campaign contributions aimed at securing business opportunities abroad. Congress passed the FCPA on the basis of these discoveries as an amendment to the Securities Exchange Act of 1934 (Exchange Act)[15] in an effort to "restore public confidence in the integrity of the American business system."[16]

The FCPA's approach to fighting corruption relies on two components. First, at its core, the statute's anti-bribery provisions prohibit the payment of bribes to foreign officials for the purpose of obtaining or retaining business. Second, the statute requires issuers of publicly traded securities to maintain accurate books and records and to institute various internal accounting controls. The latter provisions supplement the statute's anti-bribery rules by enhancing financial transparency and assisting firm management in preventing or detecting questionable payments.

1. Anti-Bribery Provisions

The FCPA's anti-bribery provisions prohibit covered persons from corruptly providing money or anything of value to foreign officials for the purpose of obtaining or retaining business.[17] Covered persons under the statute include (1) issuers, (2) domestic concerns, (3) individual officers, directors, employees, agents, or shareholders of issuers or domestic concerns acting on their behalf, and (4) any other persons or entities (or their officers, directors, employees, agents, or shareholders), while in U.S. territory, who use the mails or

13 *See* S. REP. NO. 95-114, at 3 (1977) ("Foreign governments friendly to the United States in Japan, Italy, and the Netherlands have come under intense pressure from their own people. The image of American democracy abroad has been tarnished.").

14 *See* 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).

15 Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified at 15 U.S.C. §§ 78a–78pp).

16 S. REP. NO. 95-114, at 4.

17 *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

interstate commerce to commit acts in furtherance of bribery.[18] The statute defines "issuers" as firms that have a class of securities registered under section 12 of the Exchange Act or that are required to file periodic reports with the SEC (i.e., public companies).[19] "Domestic concerns" include United States citizens, nationals, or residents, as well as business entities organized under United States law or those with their principal place of business in the United States.[20]

The bribes prohibited by the FCPA are not limited to monetary payments. They include the provision of "anything of value," with no exception for payments of *de minimis* value.[21] The statute does, however, require that any alleged bribes be paid to a "foreign official."[22] This term is broadly defined.[23] It includes any officer or employee of a foreign government, or of any department, agency or instrumentality of that government, as well as any foreign political party, party official, or candidate for foreign office.[24] Also included is any third party, such as an agent, distributor, or joint venture partner, who is given money with the knowledge that at least part of that money will be "offered, given, or promised, directly or indirectly" to any of the aforementioned persons.[25]

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18 *See id.* §§ 78dd-1, 78dd-2, 78dd-3. This last category of covered persons was added pursuant to amendments in 1998 that were necessary to bring the FCPA into compliance with the Organization for Economic Cooperation and Development's Convention Against Corruption (OECD Convention). *See* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 4, 112 Stat. 3302, 3306–09. The FCPA has been amended twice. *See id.*; Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 102 Stat. 1415 (1988). The 1998 amendments, prompted by the OECD Convention, extended the FCPA's jurisdiction to reach more conduct that takes place outside of U.S. territory. *See* § 2(c), 112 Stat. at 3303 (prohibiting bribery committed outside U.S. territory by U.S. persons and by issuers and anyone acting on behalf of issuers). They also expanded liability to include anyone who commits violations of the FCPA while in U.S. territory (including foreign companies and foreign individuals, as well as foreign nationals who are agents or employees of U.S. issuers), and clarified the FCPA's prohibition against payments made to secure "improper advantages." *See id.* § 4, 112 Stat. at 3306–09. Prior to 1998, the other amendment occurred in 1988, when Congress added affirmative defenses to FCPA liability and narrowed the requirement for "knowing" violations. *See id.* § 5003, 102 Stat. at 1416–18.

19 *See* 15 U.S.C. § 78dd-1(a).

20 *See id.* § 78dd-2(h).

21 *See id.* § 78dd-1(a).

22 *See id.*

23 *See infra* notes 74–86 and accompanying text.

24 *See* 15 U.S.C. §§ 78dd-1(a)(2), 78dd-1(f)(1)(A), 78dd-2(a)(2), 78dd-2(h)(2)(A), 78dd-3(a)(2), 78dd-3(f)(2)(A).

25 *See id.* § 78dd-1(a)(3).

If a bribe is paid to a foreign official, the FCPA requires proof that the defendant acted with "corrupt[ ]" intent.[26] This involves looking into the purpose of the payment. Though undefined in the statute, the FCPA's legislative history says that a corrupt payment is one intended to induce the recipient to misuse her official position to direct business wrongfully to the payer or to any other person.[27] Unless the defendant confesses, intent must be inferred from the facts and circumstances in each case. Relevant facts include the size of the alleged bribe, as well as the total number of bribes paid to a foreign official over time.[28]

Not all payments that resemble bribes are unlawful under the FCPA. The statute's anti-bribery provisions contain one express exception and two affirmative defenses to liability. Payments that simply "expedite or . . . secure the performance of routine governmental action by a foreign official" are permissible under the statute's facilitation (or "grease") payment exception (presumably because they are not made with a corrupt intent).[29] This exception is discussed extensively in Part III. The FCPA's two affirmative defenses are available for payments that (1) constitute reasonable "promotion" expenses or (2) are lawful under the written laws of another country.[30] The former has generally been applied to modest payments that cover things like airfare and hotel accommodations for foreign officials when used in connection with promoting or demonstrating a company's products or services.[31] The latter requires that the law in question "be affirmatively stated and written; neither negative implication, custom, nor

26 *See id.* §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

27 *See Lay-Person's Guide to the FCPA*, U.S. DEP'T JUSTICE, LAY-PERSON'S GUIDE TO THE FCPA, http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf (last visited Oct. 13, 2011); *see also* H.R. REP. NO. 95-640, at 7–8 (1977) ("The word 'corruptly' is used to in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position.").

28 *See* F. Joseph Warin et al., *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VA. L. & BUS. REV. 33, 62 (2010).

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

30 *See id.* §§ 78dd-1(c)(1)–(2), 78dd-2(c)(1)–(2), 78dd-3(c)(1)–(2).

31 *See* Thomas Fox, *Best Practices Regarding FCPA Policy on Gifts, Business Entertainment, and Travel for Governmental Officials*, CORP. COMPLIANCE INSIGHTS (July 23, 2009), http://www.corporatecomplianceinsights.com/2009/best-practices-fcpa-doj-policy-on-gifts-business-entertainment-travel-foreign-governmental-officials/ ("[R]easonable and bona fide business expenses related to the promotion, demonstration, or explanation of products or services . . . are within the affirmative defenses [of the FCPA].").

tacit approval" is sufficient.[32] This defense is of limited practical value since no country currently has laws expressly permitting bribery.[33]

2. Accounting and Internal Control Provisions

The FCPA's accounting and internal control provisions are narrower than the anti-bribery provisions in that they only apply to issuers of securities traded on United States exchanges.[34] The accounting provisions require issuers to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[35]

The internal control provisions require issuers to "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances" that (1) transactions are authorized by management, (2) financial statements are prepared in accordance with proper accounting principles, and (3) recorded assets are periodically checked against existing assets to ensure that there are no discrepancies.[36] The SEC evaluates the adequacy of internal accounting controls by considering factors such as the role of the board of directors, the quality of the communication of corporate policies, the assignment of authority and responsibility, integrity of personnel, accountability for performance and compliance with firm policies and

32 Westbrook, *supra* note 3, at 506 (quoting David Kraroff et al., FCPA: Handling Increased Global Anti-Corruption Enforcement 3 (2008), *available at* http://www.mayerbrown.com/publications/article.asp?id=6386).

33 *See id.* at 506–07 (citing United States v. Kozeny, 582 F. Supp. 2d 535, 537–40 (S.D.N.Y. 2008); *see also infra* notes 226–28 (discussing *Kozeny*'s holding that lack of domestic prosecution for bribery offenses or the availability of affirmative defenses under domestic law does not mean that bribery will be considered "legal" for the purposes of the FCPA's affirmative defense). This defense does not apply if a foreign country simply lacks domestic bribery laws or when a payer is able to invoke an affirmative defense to bribery charges under local law.

34 *Compare supra* note 18, *with* 15 U.S.C. § 78m(b)(2) (illustrating that only issuers of registered securities are covered by the accounting and internal control provisions).

35 15 U.S.C. § 78m(b)(2)(A). The SEC promulgated two rules to implement the accounting provisions. Exchange Act Rule 13b2-1 prohibits any person from falsifying any book, record, or account subject to the FCPA. *See* 17 C.F.R. § 240.13b2-1 (2010). Exchange Act Rule 13b2-2 prohibits issuers from making misleading statements to auditors and outside accountants who prepare an issuer's reports. *See* 17 C.F.R. § 240.13b2-2 (2010). The term "reasonable detail" in this context means "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." 15 U.S.C. § 78m(b)(7).

36 *Id.* § 78m(b)(2)(B). The term "reasonable assurances" in this context means "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." *Id.* § 78m(b)(7).

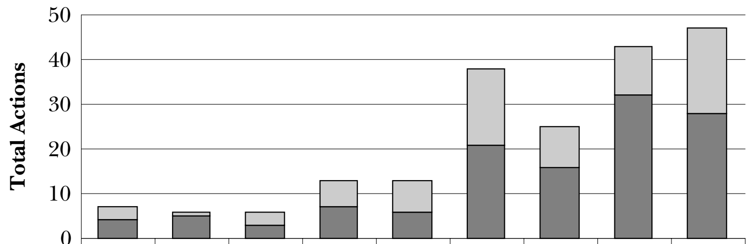
procedures, and the objectivity and effectiveness of internal auditing.[37]

B. Recent Enforcement Trends

For most of its thirty-three-year history, the FCPA was enforced only sporadically and penalties imposed on firms rarely exceeded one million dollars.[38] This is no longer true today. Speaking in November 2010, Assistant Attorney General Lanny A. Breuer said that "FCPA enforcement activity is stronger than it's ever been—and getting stronger."[39]

The surge in enforcement has largely occurred in the past decade. The following chart[40] lists the number of FCPA enforcement actions brought by the DOJ and SEC from 2002 to 2010:

FCPA ENFORCEMENT ACTIONS BY YEAR



	2002	2003	2004	2005	2006	2007	2008	2009	2010
SEC	3	1	3	6	7	17	9	11	19
DOJ	4	5	3	7	6	21	16	32	28

37 *See* SEC Notice of Withdrawal of Proposed Rules Regarding Statement of Management on Internal Accounting Controls, 45 Fed. Reg. 40,134, 40,139–40, 40,142 (June 13, 1980); Statement of Management on Internal Accounting Controls, Exchange Act Release No. 34-16877, 20 SEC Docket 310 (June 6, 1980).

38 *See* Westbrook, *supra* note 3, at 495. The FCPA provides for both criminal and civil penalties, and is enforced by both the DOJ and the SEC. The SEC has civil enforcement authority only and is further limited to regulating only issuers and their directors, officers, employees, and agents. This means that the DOJ is responsible for all criminal enforcement of the FCPA, as well as for civil enforcement actions brought against non-issuers.

39 GIBSON, DUNN & CRUTCHER LLP, 2010 YEAR-END FCPA UPDATE 1 (2011), *available at* http://www.gibsondunn.com/publications/documents/2010yearendFCPAupdate.pdf.

40 SHEARMAN & STERLING LLP, FCPA DIGEST OF CASES AND REVIEW RELEASES RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977, at i (2011), *available at* http://www.shearman.com/files/upload/FCPA-Digest-Jan-2011.pdf.

As this data reveals, the biggest spike in enforcement occurred within the past four years. This same period also produced cases with record-setting monetary sanctions.[41] In 2008, Siemens AG agreed to settle FCPA-related charges with United States and German authorities for a total of $1.6 billion—still the largest FCPA settlement ever recorded.[42] The previous high for an FCPA monetary sanction came in 2007 when Baker Hughes settled charges for $44 million.[43]

One year after the Siemens AG settlement, Halliburton and its former engineering and construction subsidiary Kellogg, Brown & Root settled FCPA charges with the DOJ and SEC for $579 million.[44] The year after that, 2010, then saw eight of the ten costliest FCPA-related settlements in history.[45] The DOJ and SEC settled with the Dutch construction firm Snamprogetti Netherlands B.V. for $365 million, the Swiss shipping company Panalpina World Transport (Holding) Ltd. for $156 million, the French construction firm Technip S.A. for $338 million, the British defense contractor BAE Systems PLC for $400 million, and German automaker Daimler AG for $185 million.[46]

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41 Firms face criminal fines up to $2 million per violation of the FCPA's anti-bribery provisions, which applies to each illegal payment, or twice the gross pecuniary gain or loss resulting from the offense, whichever is greater. *See* 15 U.S.C. §§ 78dd-2(g), 78dd-3(e), 78ff(a); 18 U.S.C. § 3571(d) (2006). Individual violators face up to five years in prison, fines up to $100,000 or twice the gross pecuniary gain or loss, whichever is greater, or both a fine and imprisonment. *See* 15 U.S.C. §§ 78dd-2(g), 78dd-3(e), 78ff(c); 18 U.S.C. § 3571(d). Violations of the accounting or internal control provisions carry the possibility of criminal fines up to $25 million for firms and up to $5 million for individuals. *See* 15 U.S.C. § 78ff(a). Individual violators further face the possibility of imprisonment for a maximum of twenty years. *See id.* As with the anti-bribery provisions, the maximum fine for either firms or individuals may be raised to twice the gross gains or losses from the offense. *See* 18 U.S.C. § 3571(d). Firms that are formally prosecuted face the risk of debarment from government contracts and the imposition of injunctive remedies. Short of an actual prosecution, word that a firm is being investigated for possible FCPA violations often leads to parallel private shareholder litigation and substantial reputation loss.

42 Approximately $800 million of the settlement was paid to the United States, with the other $800 million going to Germany. *See* Vardi, *supra* note 5, at 74.

43 *See* Westbrook, *supra* note 3, at 496 n.22.

44 Zachary A. Goldfarb, *Halliburton, KBR Settle Bribery Allegations*, WASH. POST, Feb. 12, 2009, at D1.

45 Overall, the top ten FCPA settlements in terms of actual dollar amounts have come since 2007 and total $2.8 billion. *See* ANDREW WEISSMAN & ALIXANDRA SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE 2 (2010).

46 *See* Press Release, U.S. Dep't of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More than $156 Million in Criminal Penalties (Nov. 4, 2010); Press Release, U.S. Dep't of Justice, Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty (July 7, 2010) (dis-

The enforcement trend has continued into 2011, with federal authorities recently resolving FCPA matters with Maxwell Technologies for $14.3 million, IBM Corporation for $10 million, Tyson Foods for $5.2 million, Rockwell Automation for $2.7 million, and Armor Holdings for $17 million.[47] The FCPA was also at the heart of the much-discussed News Corporation phone-hacking scandal that dominated headlines during the summer of 2011.[48]

Several factors explain the recent resurgence in FCPA enforcement. For one, globalization is leading more firms of all sizes to pursue corporate opportunities abroad. Unfortunately, many countries that look the most attractive from a business standpoint also happen to be the ones most plagued by corruption. Bribery is often seen as the price for market entry in developing economies or as the only realistic way to overcome bureaucratic inefficiencies. DOJ representatives say that the agency's focus on the FCPA is driven by a desire to "root out global corruption and preserve the integrity of the world's

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cussing a $240 million criminal penalty and a disgorgement of profits of $125 million); Press Release, U.S. Dep't of Justice, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty (June 28, 2010) (discussing a $240 million criminal penalty and disgorgement of profits of $98 million); Press Release, U.S. Dep't of Justice, Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay $93.6 Million in Criminal Penalties (Apr. 1, 2010); *see also* Daniel Michaels & Cassell Bryan-Low, *BAE to Settle Bribery Cases for More than $400 Million*, WALL ST. J., Feb. 6–7, 2010, at B1; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Daimler AG with Global Bribery (Apr. 1, 2010).

47 *See* Complaint at 1–9, SEC v. Armor Holdings, Inc., No. 1:11-cv-01271 (D.D.C. July 13, 2011); Litig. Release No. 22037, U.S. Sec. & Exch. Comm'n, SEC Files Settled Anti-Bribery, Books and Records, and Internal Controls Charges Against Armor Holdings, Inc. (July 13, 2011), *available at* http://www.sec.gov/litigation/litreleases/2011/lr22037.htm; Press Release, John Bernaden, Media Relations, Rockwell Automation, Rockwell Automation Settles with SEC (May 3, 2011), *available at* http://www.reuters.com/article/2011/05/03/idUS174137+03-May-2011+BW20110503; Litig. Release No. 21889, U.S. Sec. & Exch. Comm'n, IBM to Pay $10 Million in Settled FCPA Enforcement Action (Mar. 18, 2011), *available at* skaddenpractices.skadden.com/fcpa//attach.php?uploadFileID=274; Press Release, Maxwell Techs., Inc., Maxwell Technologies Settles FCPA Charges (Jan. 31, 2011), *available at* http://www.reuters.com/article/2011/01/31/idUS225889+31-Jan-2011+PRN20110131; Samuel Rubenfeld, *Tyson Foods Settles FCPA Probe, Agrees to Pay $5.2 Million*, WALL ST. J. (Feb. 10, 2011), http://blogs.wsj.com/corruption-currents/2011/02/10/tyson-foods-settles-fcpa-probe-agrees-to-pay-52-million/.

48 *See* Jamie Doward et al., *Phone-Hacking Scandal: Is This the Tipping Point for Murdoch's Empire?*, GUARDIAN (July 9, 2011), http://www.guardian.co.uk/media/2011/jul/09/phone-hacking-scandal-rupert-murdoch.

markets."[49] Officials from the U.S. Department of Homeland Security add that "corrupt actions hamper U.S. national security interests, foreign assistance goals, and the security of the United States against transnational crime and terrorism."[50] This echoes statements made by Mark Mendelsohn, the former head of the DOJ's FCPA enforcement unit, who recently said that the upsurge in FCPA-related investigations and prosecutions reflects how "corruption is a national security issue and an impediment to security in combat areas, like Iraq and Afghanistan."[51]

A more cynical explanation for the government's focus on the FCPA is based on the "revolving door" between government and private sector employment. The rise in FCPA enforcement has produced a cottage industry of FCPA experts, including lawyers, accountants, and consultants at prestigious firms, which DOJ and SEC personnel often join after leaving their federal jobs for considerably higher compensation.[52]

Another part of the story concerns the enactment of the Sarbanes-Oxley Act (SOX)[53] in 2002 in the wake of accounting scandals at Enron and other companies.[54] SOX did many things to alter

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49 Alice S. Fisher, Assistant Att'y Gen., U.S. Dep't of Justice, Remarks at the American Bar Association National Institute on the Foreign Corrupt Practices Act (Oct. 16, 2006), *available at* http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06 AAGFCPASpeech.pdf.

50 *Keeping Foreign Corruption Out of the United States: Hearing Before the S. Subcomm. on Investigations of the S. Comm. on Homeland Sec. and Governmental Affairs*, 111th Cong. 3 (2010) (statement of Janice Ayala, Assistant Director, Office of Investigations, U.S. Immigration and Customs Enforcement Department of Homeland Security), *available at* http://www.ice.gov/doclib/news/library/speeches/ayala_02-04-10.pdf.

51 Bruce Carton, *FCPA Enforcement in 2010: Prepare for Blastoff*, SEC. DOCKET (Mar. 10, 2010), http://www.securitiesdocket.com/2010/03/10/fcpa-enforcement-in-2010-prepare-for-blastoff/.

52 *See* Vardi, *supra* note 5, at 72 ("[A]s the feds cranked up enforcement of the 33-year-old Foreign Corrupt Practices Act, a thriving and lucrative anti-bribing complex has emerged."). Similar issues have been raised in the context of the securities industry. *See* HOMER KRIPKE, THE SEC AND CORPORATE DISCLOSURE 4, 18–20 (1979); Donald C. Langevoort, *The SEC as a Lawmaker: Choices About Investor Protection in the Face of Uncertainty*, 84 WASH. U. L. REV. 1591, 1598 (2006) (discussing a high turnover rate at the SEC and the propensity for insiders to leave for the private sector after holding leadership positions for a few years); Larry E. Ribstein, *Agents Prosecuting Agents* 13 (Univ. Ill. Program in L., Behav. and Soc. Sci., Research Paper No. LBSS11-01, 2011) ("[P]rosecutors turn up the fire so they can sell extinguishers.").

53 Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C. (2006)).

54 *See* Westbrook, *supra* note 3, at 515; Timothy W. Schmidt, Note, *Sweetening the Deal: Strengthening Transnational Bribery Laws Through Standard International Corporate Auditing Guidelines*, 93 MINN. L. REV. 1120, 1133 (2009).

the behavior of public companies, including imposing additional certification and reporting requirements. For example, SOX requires corporate officers to certify that they have read their company's quarterly and annual reports, and that to the best of their knowledge, the reports are complete and accurate and do not contain any untrue statements.[55] SOX also holds management and auditors responsible for a company's financial reporting systems.[56] These developments prompted an increasing number of firms to voluntarily disclose potential FCPA violations, which are considered "material" events under SOX.[57]

The enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank)[58] is expected to generate even more evidence of potential FCPA violations. Under Dodd-Frank, qualified whistleblowers who provide original information about potential violations of the securities laws—which include the FCPA—will be awarded between 10% and 30% of any monetary sanction imposed on a firm in excess of $1 million by either the DOJ or SEC.[59] In the Siemens AG case, where U.S. regulators received $800 million, this formula would have authorized a payment of up to $240 million to a qualified whistleblower.[60]

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55 *See* 15 U.S.C. §§ 7241(c), 7262 (2006); 18 U.S.C. § 1350(a) (2006).

56 *See* 15 U.S.C. § 7262.

57 *See* Bruce Hinchey, *Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements*, 40 PUB. CONT. L.J. (forthcoming 2011) (draft at 6) (citing Laura E. Kress, Note, *How the Sarbanes-Oxley Act Has Knocked the "SOX" Off DOJ and SEC and Kept the FCPA on Its Feet*, 10 U. PITT. J. TECH. L. & POL'Y 2, 3–5 (2009)), *available at* http://papers.ssrn.com/so13/papers.cfm?abstract-id=1650925 (discussing the reasons why companies are more likely to voluntarily disclose violations under SOX); Westbrook, *supra* note 3, at 516 ("SOX likely contributed to increased information for FCPA investigations, and to companies reporting borderline transactions rather than risk SEC discovery and investigation later.").

58 Pub. L. No. 111-203, 124 Stat. 1376 (2010).

59 *See id.* § 922(a) (codified at 15 U.S.C. § 78u-6). The exact amount of the reward is left to the SEC's discretion based on factors such as the significance of the information, the degree of assistance provided, and the programmatic interest of the government. *See id.* The following individuals are not eligible for a monetary reward: (1) persons who are criminally convicted in a related action; (2) those who acquire the information they provided through financial statement audits; and (3) persons who fail to submit their information in a form required by the SEC, or who knowingly provide false, fictitious, or fraudulent information. *See id.* The statute attempts to protect whistleblowers by prohibiting employers from retaliating against them.

60 *See* Kara Scannell & Thomas Catan, *U.S. Nears Deals in Bribery Case*, WALL ST. J., Oct. 15, 2010, at B1.

II. Demand-Side Pressures: The Problem of Bribe Solicitation and Extortion

The increasing pace of FCPA enforcement, as well as new regulations that make discovery of potential FCPA violations more likely, incentivizes firms to enhance their internal compliance programs to prevent illegal payments from occurring. These programs should help counter corruption and will hopefully lead to fewer instances of corporate malfeasance in general.

However, despite the implementation of compliance programs, firms doing business abroad continue to report receiving demands for bribes—including some demands that rise to the level of extortion—on a daily basis.[61] These pressures make compliance a constant challenge (or "nightmare") for firms operating in markets where corruption is endemic.[62]

A. *Nature and Frequency of Bribe Demands*

Bribe demands come in a variety of forms. Some firms report being asked to pay extra money to customs officials every time they attempt to move goods in or out of a country.[63] Others report being asked to sponsor activities or events in a country in order to receive a government contract,[64] or to purchase special "stamps" for employee passports to allow them to move freely through the country's borders.[65] Low-level officials in several African countries have even gone so far as to post "fee charts" that describe how much extra companies must pay in bribes for various routine transactions.[66]

Companies also report that they frequently receive demands that constitute extortion. Bribery and extortion are closely related. Bribery refers to a corrupt payment that provides the payer with "*better* than fair treatment."[67] By contrast, extortion describes the request or receipt of a corrupt benefit under a "threat to give the payer *worse*

61 *See supra* note 7 and accompanying text.

62 *See* Letter from Francois Vincke, Chairman, Int'l Chamber of Commerce Comm'n on Anti-Corruption, to Paul Wolfowitz, President, World Bank (Aug. 9, 2006), *available at* www.iccwbo.org/uploadedfiles/icc/policy/anticorruption/pages/letter%20from%20Francois%20vincke%20to%20Paul%20wolfowitz%20on%20bribe%20solicitation.pdf.

63 *See, e.g.*, Urofsky, *supra* note 7, at 880–81 (referencing United States v. Kay, 359 F.3d 738 (5th Cir. 2004)).

64 *See* RESIST, *supra* note 7, at 33.

65 *See id.* at 22.

66 *See* Alexandra Addison Wrage, Bribery and Extortion 24 (2009).

67 James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. Pa. L. Rev. 1695, 1699 (1993) (emphasis added).

than fair treatment."[68] In the latter case the payee is guilty of extortion and the payer is a victim of extortion.

Extortion in the context of international business transactions usually comes in the form of economic extortion. This refers to a request for payment made under a threat to the payer's existing investment.[69] It includes being asked to pay extra compensation in order to secure a deal on previously agreed terms or to pay funds in order to receive money that the firm is already entitled to—often with private security guards retained by foreign officials hovering nearby to add their own brand of motivation to the negotiations.[70]

Extortion can also mean being asked to pay fictional fines or "surcharges" necessary to keep one's employees out of prison and able to continue working.[71] This scenario was at the center of a recent FCPA action against NATCO Group, a Texas-based oil and gas services company.[72] According to the complaint, NATCO's wholly owned subsidiary, TEST Automation & Controls, Inc., won a contract to provide electrical services to Kazakhstan.[73] As work on the contract was underway, Kazakh immigration prosecutors conducted periodic audits of the immigration documentation of TEST's expatriate workers and claimed the TEST employees lacked proper documentation.[74] The prosecutors threatened to fine, jail, or deport the workers if TEST refused to pay cash fines.[75] The TEST employees believed the threats to be genuine and sought advice from senior management in Louisiana. Senior management authorized the payments and the employees used personal funds to pay $45,000 to the Kazakh prosecutors.[76]

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68 *Id.* (emphasis added). Extortion can refer to any illegal use of threats to obtain money, property, or an advantage from someone else. However, the more commonly evoked usage of extortion is extortion under the color of office. In this context, extortion refers to "the seeking or receipt of a corrupt payment by a public official (or a pretended public official) because of his office or his ability to influence official action." *Id.* at 1696.

69 *See* Urofsky, *supra* note 7, at 683.

70 *See* WRAGE, *supra* note 66, at 6; *see also* RESIST, *supra* note 7, at 38; Urofsky, *supra* note 7.

71 *See* RESIST, *supra* note 7, at 22–23.

72 *See* GIBSON DUNN & CRUTCHER LLP, *supra* note 39, at 15–16; Client Memorandum from Wilkie Farr & Gallagher LLP on SEC Brings FCPA Charges Based on Extorted Payments (Jan. 20, 2010) [hereinafter Wilkie Farr on SEC], *available at* http://www.willkie.com/files/tbl_s29Publications%5CFileUpload5686%5C3209%5CSEC%20Brings%20FCPA%20Charges%20Based%20On%20Extorted%20Payments.pdf.

73 *See* Wilkie Farr on SEC, *supra* note 72 and accompanying text.

74 *See id.*

75 *See id.*

76 *See id.*

The SEC acknowledged that the TEST employees were the victims of extortion but charged NATCO with FCPA accounting violations because the company falsely recorded the employees' reimbursement for the ransom payments as a salary advance.[77]

The examples above aside, data on the frequency of bribe solicitation and extortion can be difficult to gather since corruption typically occurs behind closed doors. Yet NGOs and other groups dedicated to fighting corruption have made considerable headway in this area. A recent survey by Transparency International of more than 2,700 business executives in twenty-six countries found that approximately 40% of the respondents had been directly solicited to pay a bribe from tax, customs, permitting, or other governmental authorities.[78] This figure rose to over 60% when the survey was confined to particular countries, such as Egypt, India, Indonesia, Morocco, Nigeria, and Pakistan, as well as when focused on particular industries, such as the energy, mineral resources, and telecommunications sectors.[79] A narrower survey conducted in partnership with the United Nations Office on Drugs and Crime found that businesses operating in Nigeria were requested to pay bribes in approximately 35% of transactions involving Nigerian customs officials.[80] Between 25% and 40% of respondents did not remember or refused to say whether they had been solicited for a bribe.[81] This suggests that the actual frequency of bribe requests may be considerably higher than documented in the report.

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77 *See id.* As a final example, the DOJ entered into a non-prosecution agreement (NPA) with Alliance One International following allegations that the company violated the FCPA by making payments to tax inspectors in Kyrgyzstan who threatened to shut down one of the company's subsidiaries. *See* GIBSON, DUNN & CRUTCHER LLP., *supra* note 39, at 10. The complaint and NPA are short on details, but they note that several of the challenged payments were made "to secure [the subsidiary's] *continued* ability to conduct its business in Kyrgyzstan." Letter from Denis J. McInerny, Chief, Fraud Section, Criminal Div., to Edward J. Foth, Hunton & Williams LLP app. A at 6 (Aug. 6, 2010). This language suggests the company acted under threat of negative economic consequences.

78 TRANSPARENCY INT'L, GLOBAL CORRUPTION REPORT 2009, at 4 (2009) [hereinafter 2009 REPORT], *available at* http://www.transparency.org/publications/publications/global_corruption_report/gcr2009. Executives surveyed were from the following countries: Egypt, Ghana, Morocco, Nigeria, Senegal, South Africa, India, Indonesia, Japan, Malaysia, Pakistan, Philippines, Singapore, South Korea, Czech Republic, Hungary, Poland, Russia, Argentina, Brazil, Chile, Mexico, France, Germany, United States, and United Kingdom. *Id.* at 403 n.3. At least one hundred senior executives were interviewed in each country. *Id.* at 403.

79 *See id.* at 4–5.

80 *See* NAT'L BUREAU OF STATISTICS ET AL. NBS/EFCC BUSINESS SURVEY ON CRIME & CORRUPTION AND AWARENESS OF EFCC IN NIGERIA, 2007: SUMMARY REPORT 3 (2009).

81 *Id.*

Anecdotally, much of the evidence on solicitation comes from firms doing greater amounts of business in Asia, Eastern Europe, the Middle East, and Africa. These regions account for the majority of countries that rank lowest on Transparency International's annual *Corruption Perceptions Index*—a survey indicating a perception by the public that they are "highly corrupt."[82]

To help organize and expand on anecdotal accounts of bribe demands, TRACE International, a non-profit organization that provides advice on anti-bribery compliance, has launched a project called "BRIBEline."[83] BRIBEline is an online service that allows companies to anonymously report instances of bribe solicitation or extortion wherever they might occur.[84] After about a year TRACE publishes data on the hundreds of calls it receives and organizes it by country. Individual country reports then break down the information obtained into a variety of categories: the frequency of bribe demands, the source of the demands, and the nature of the demands. With respect to the nature of the demands, respondents are asked whether the bribe demand was "extortionate"—meaning that it was sought in exchange for something the offeree was already entitled to or in exchange for the avoidance of harm—or whether it was requested in exchange for providing the offeree with a specific business advantage, such as winning a government contract.[85]

82 *See* TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2010, at 4 (2010), *available at* http://www.transparency.org/policy_research/surveys_indices/cpi. Transparency International (TI) defines corruption as the "abuse of entrusted power for private gain." *Id.* This definition encompasses corrupt practices in both the public and private sectors. *Id.* The Corruption Perceptions Index (CPI) ranks countries according to perception of corruption in the public sector. *Id.* The CPI is an aggregate indicator that combines different sources of information about corruption, making it possible to compare countries. *Id.*

83 *See* BRIBELINE, https://www.bribeline.org (last visited Sept. 27, 2011). "BRIBEline" stands for Business Registry for International Bribery and Extortion. *See id.*

84 *See* TRACE INT'L, THE METHODOLOGICAL AND ANALYTICAL INTEGRITY OF THE TRACE APPROACH TO COLLECTING & REPORTING INFORMATION ABOUT INTERNATIONAL BRIBERY 1 (2007), *available at* https://secure.traceinternational.org/data/public/documents/Methodology-64654-1.pdf.

85 *See, e.g.*, TRACE INT'L, BUSINESS REGISTRY FOR INTERNATIONAL BRIBERY AND EXTORTION (BRIBELINE) 2010 BRAZIL REPORT 1 (2010) [hereinafter BRAZIL REPORT], *available at* https://secure.traceinternational.org/data/public/documents/Brazil BRIBELINEReportFINAL_000-64647-1.pdf ("Over 40% of all reported bribe demands in Brazil were extortionate demands; that is, demands for some form of payment in order to avoid damage to either personal or commercial interests (21%), receive delivery of a product or service already paid for (15%) or be paid for services already rendered (5%).").

Though caution should be exercised when generalizing from the BRIBEline data, the resulting reports contain a number of notable findings. For example, between 47% and 75% of respondents report receiving multiple bribe requests per year, with 7% to 19% saying they received over one hundred requests.[86] Moreover, respondents from each country surveyed report receiving a much higher percentage of extortionate demands than bribe requests tied to the attainment of a specific business advantage. In China, for example, 54% of the reported demands were deemed extortionate in nature, compared to only 32% of which were sought in exchange for granting the firm new business or similar favorable treatment.[87] The spread in the data collected from Russia and Ukraine is even greater, with 60% to 63% of respondents reporting extortionate bribe requests and only 16% reporting requests involving the provision of a business advantage.[88] Overall, India had the most divergent split between extortionate and non-extortionate demands, 77% to 12%, where as Brazil had the narrowest, 41% to 32%.[89]

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86 *See* Brazil Report, *supra* note 85, at 3. These reports are limited to Brazil (7/2007 to 6/2010, 121 respondents), *see id.*; China (7/2007 to 6/2008, 148 respondents), *see* TRACE Int'l, Business Registry for International Bribery and Extortion (BRIBEline) China Report, 2008, at 1 (2008) [hereinafter China Report], *available at* https://secure.traceinternational.org/data/public/documents/China_PR_and_Report-64652-1.pdf; India (7/2007 to 10/2008, ninety-six respondents), *see* TRACE Int'l, Business Registry for International Bribery and Extortion (BRIBEline) India Report, 2009, at 1 (2009) [hereinafter India Report], *available at* https://secure.traceinternational.org/data/public/documents/IndiaReportPressKit011009-64642-1.pdf; Mexico (7/2007 to 1/2010, 151 respondents), *see* TRACE Int'l, Business Registry for International Bribery and Extortion (BRIBEline) 2010 Mexico Report 3 (2010) [hereinafter Mexico Report], *available at* https://secure.traceinternational.org/data/public/documents/2010MexicoBRIBElineReport-64590-1.pdf; Russia (7/2007 to 12/2008, 286 respondents), *see* TRACE Int'l, Business Registry for International Bribery and Extortion (BRIBEline) 2009 Russia Report 1 (2009) [hereinafter Russia Report], *available at* https://secure.traceinternational.org/data/public/documents/BRIBElineRussiaReport_2009-64650-1.pdf; Ukraine (7/2007 to 11/2009, 169 respondents), *see* TRACE Int'l, Business Registry for International Bribery and Extortion (BRIBEline) 2009 Ukraine Report 2 (2009) [hereinafter Ukraine Report], *available at* https://secure.traceinternational.org/data/public/documents/BRIBElineUkraine-64618-1.pdf. This data further reveals that the percentage of bribe demands from government officials ranges from 81% to 92%. *See* Brazil Report, *supra* note 85; China Report, *supra*; India Report, *supra*; Mexico Report, *supra*; Russia Report, *supra*; Ukraine Report, *supra*.

87 China Report, *supra* note 86, at 3 Chart 4. The remaining percentage of reported bribe demands fell in an undefined category. *Id.*

88 Ukraine Report, *supra* note 86, at 2.

89 Brazil Report, *supra* note 85, at 2.

Of course, a limitation of this data is that it depends on voluntary responses and only reflects one side of the story. The data does not reveal any information about the frequency with which *firms* may first solicit potential bribe-takers in an effort to secure a business advantage. It is certainly conceivable that firms would be quicker to report extortionate demands than they would be to report their own attempts to use bribery to win contracts. Nevertheless, the data provides a useful glimpse into the dynamic that firms face with respect to solicitation/extortion.

B. Costs

Frequent bribe demands of all types impose a variety of costs on firms and other market participants. At a minimum, the need to respond to demands raises transaction costs.[90] These costs include spending additional time to address requests for payments that come outside of normal, legal channels—which may involve repeated meetings with the foreign official requesting payment—as well as additional expenditures on lawyers or other advisors brought in to assist in such situations. The latter expenditures will be particularly important so that firms can adequately evaluate the nature of the foreign official's demand or implement procedures to avoid or negate threats. Ordinarily, and setting aside possible sanctions under the FCPA, a rational firm will acquiesce to economic extortion as long as the amount of the payment does not exceed the harm that it would suffer if the threat is executed.[91] However, if the firm acts on imperfect or misunderstood information regarding the credibility of the threat, it may reject a demand only to see the threat carried out and a loss suffered.

Solicitation and extortion also reduce the incentives for firms to do business in particular countries where bribe demands are common. One way to avoid losses is to minimize one's vulnerability to those who do the threatening.[92] In the case of economic extortion

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90 *See* FRED S. MCCHESNEY, MONEY FOR NOTHING 33–34 (1997) (discussing increased transaction costs relating to extortion including disincentives for future investment, diminished value of existing investment, social costs, and the dead weight of hidden resources); WRAGE, *supra* note 66, at 70 (illustrating prolonged negotiations and damage to corporate culture as examples of the transaction costs of extortion).

91 *See* Steven Shavell, *An Economic Analysis of Threats and Their Illegality*, 141 U. PA. L. REV. 1877, 1882–83 (1993).

92 *See* MCCHESNEY, *supra* note 90, at 33 ("One way of minimizing loss by theft is to have little or nothing to steal. In a world in which theft was legal we could expect this fact to lead to a reduction in productive activities." (quoting Gordon Tullock, *The*

abroad, this means reducing commercial activity in areas where threats are viewed as routine or as simply a cost of doing business. This could be good or bad, depending on the social value created by commercial activity taking place within a particular country or region.[93]

If a firm remains in an area with widespread passive corruption, and if the expected cost of the action threatened by a foreign official exceeds the value of what the firm must pay to avoid the consequences of the threat, the firm will be acting rationally if it makes the requested payment in order to avoid future losses.[94] However, this too will have negative repercussions. For consumers and end-users of a firm's goods or services, the cost of the corrupt payment will now be reflected in higher selling prices. Consumers are then left to "purchase alternative goods that they do not really prefer and which are not really cheaper but only appear so because of the high extortion-related price of goods sold by extorted merchants."[95]

The willingness of a firm to acquiesce to one demand for payment can further spawn additional demands, which will then lead to continued costs and complications as the firm becomes "the goose that lays the golden eggs" for a particular foreign official or group of officials.[96] Moreover, persistent threats can create fear and anxiety for a firm's agents and employees.[97]

If alternative markets exist where solicitation or extortion is less of a problem, firms facing bribe demands may elect to move to those areas. Yet, it will often be unclear whether such a move would be more socially valuable for the countries involved—as opposed to simply being more practical for the firm—and the costs involved with relocation will be borne by shareholders and end-users of the firm's goods or services.[98]

Welfare Costs of Tariffs, Monopolies, and Theft, 5 W. ECON. J. 224, 229 n.11 (1967))); Shavell, *supra* note 91, at 1879–80.

93 *See* Shavell, *supra* note 91, at 1894.

94 *See* MCCHESNEY, *supra* note 90, at 22. This calculation could change depending on how a firm assesses the probability of future demands and the expected losses from those future demands.

95 Shavell, *supra* note 91, at 1897.

96 *See id.* at 1886, 1888–89; *see also* WRAGE, *supra* note 66, at 31 ("Each time a businessman responds to a demand with payment, he paves the way for the creation of new and higher hurdles which he will have to buy his way past.").

97 *See* Shavell, *supra* note 91, at 1894, 1897.

98 *See* MCCHESNEY, *supra* note 90, at 33. Of course one final negative consequence associated with economic and other forms of extortion would result if a threat is carried out following non-payment of a demanded sum. *See* Shavell, *supra* note 91, at 1895.

C. Incongruity of the FCPA and Other International Anti-Bribery Instruments

The FCPA suffers from an inherent incongruity that prevents it from fully addressing the foregoing costs associated with solicitation and extortion. To explain, it is first useful to recognize that the corruption literature breaks down bribery transactions into two parts: active bribery and passive bribery. Active bribery refers to the "supply" side of the deal and is defined as the payment of a bribe.[99] On the demand side, passive bribery occurs when a government official solicits or accepts a bribe.[100] As shown above, the FCPA's extraterritorial reach extends only to active bribery—it prohibits the payment of bribes but does not cover the request for or receipt of a bribe by a foreign official.[101]

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99 *See* Patrick X. Delaney, *Transnational Corruption*, 47 VA. J. INT'L L. 413, 422–23 (2007); Susan Rose-Ackerman, *The Law and Economics of Bribery and Extortion*, 6 ANN. REV. L. & SOC. SCI. 217, 222 (2010); *see also Corruption Glossary*, U4 ANTI-CORRUPTION RESOURCE CENTRE, http://www.04.no/document/glossary.cfm (last visited Oct. 14, 2011). The Criminal Law Convention on Corruption of the Council of Europe defines "active bribery" as "the promising, offering or giving by any person, directly or indirectly, of any undue advantage [to any public official], for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions." Criminal Law Convention on Corruption, art.2, *opened for signature* Jan. 27, 1999, E.T.S. No. 173.

100 The Criminal Law Convention on Corruption of the Council of Europe defines "passive bribery" as the "request or receipt [by any public official], directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions." Criminal Law Convention on Corruption, *supra* note 99, at art. 3. Despite using the term "passive" to refer to the conduct of the bribee, neither side is truly passive since both the briber and bribee must agree before a bribe can occur. When a foreign official pressures the briber, she is arguably the more active of the two parties. *See* Rose-Ackerman, *supra* note 99, at 222. The commentary to the OECD Convention Against Corruption provides as follows:

> The Convention does not utilise the term "active bribery" simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.

Org. for Econ. Co-operation & Dev., Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ¶ 1, Nov. 21, 1997, 37 I.L.M. 14 [hereinafter OECD Commentaries].

101 *See supra* Part I.A. Most domestic anti-bribery laws recognize the two-sided nature of corruption and criminalize both active and passive bribery. For example, in the United States, 18 U.S.C. § 201 penalizes both active and passive bribery. *See* 18 U.S.C. § 201 (2006).

Most other international anti-bribery instruments follow a similar approach. For example, the 1997 Organization for Economic Cooperation and Development's Convention Against Corruption encourages signatories to enact domestic laws that will criminalize the payment of bribes to foreign officials when done in connection with international business transactions.[102] Like the FCPA, it focuses solely on the supply side of transnational bribery: it does not require signatories to criminalize the bribery of their own public officials, nor does it apply to purely domestic bribery or bribery involving non-public officials.[103]

Another prominent piece of legislation modeled after the FCPA is the recently enacted United Kingdom Bribery Act of 2010 (Bribery Act). The Bribery Act received Royal Assent on April 8, 2010 and went into effect on July 1, 2011.[104] It is intended to consolidate the United Kingdom's law on the subject of bribery, which had been previously described by Transparency International as "ineffective and out-of-date."[105] Structurally, the Bribery Act closely tracks the FCPA and the OECD and its extraterritorial provisions prohibit the payment of bribes to foreign officials in order to obtain a commercial advan-

102 *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1 [hereinafter OECD Anti-Bribery Convention]. The OECD Convention has been adopted and ratified by thirty-eight countries. The OECD consists of thirty-four of world trade and investment member states that collectively represent over 80% of the world trade and investment. *See id.*

103 The OECD Convention requires signatories to adopt agreements to prosecute or extradite nationals who are accused by another signatory of bribery, as well as to force companies to implement accounting and internal control provisions incidental to the bribery restrictions. *See id.* In 2009 the OECD Council adopted two additional measures. *See* Org. for Econ. Co-operation & Dev., Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 26, 2009, 37 I.L.M. 20 [hereinafter OECD Reporting Recommendation]; Org. for Econ. Co-operation & Dev., Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Officials in International Business Transactions, May 25, 2009, 37 I.L.M. 33 [hereinafter OECD Tax Recommendation]. One urges signatories to affirmatively disallow tax deductions for bribes. *See* OECD Tax Recommendation, *supra*. The other recommends measures related to the reporting of foreign bribery. *See* OECD Reporting Recommendation, *supra*.

104 *See U.K. Anti-Bribery Act to Be Effective in July; Business Guidance Published*, Sec. L. Daily (BNA) (March 31, 2011).

105 Client Memorandum Wilkie Farr & Gallagher LLP on Recent Enforcement Actions by U.K. Serious Fraud Office and Introduction of New U.K. Bribery Bill in Parliament Demonstrate Increased Focus on Corruption 2 (Jan. 5, 2010), *available at* http://www.willkie.com/files/tbl_s29Publications%5CFileUpload5686%5C3197%5CRecent%20Enforcement%20Actions%20By%20UK%20Serious%20Fraud%20Office.pdf.

tage. A person violates this provision if she offers, promises, or gives, directly or indirectly, a financial or other advantage to a foreign public official, with the intent to influence that foreign public official in her official capacity and to obtain or retain business. The Bribery Act also holds companies strictly liable if they fail to prevent a bribe. The only way firms can avoid liability for the failure to prevent bribes is if they successfully demonstrate that they had "adequate procedures" in place designed to prevent misconduct at the time that the alleged violation occurred.[106]

The one major player in the international community to take a different approach is the United Nations, which, in 2005, authored the United Nations Convention Against Corruption (UNCAC). The UNCAC has been ratified by 122 of its 140 signatories.[107] Like the FCPA and OEDC, it prohibits bribes to foreign government officials. However, the UNCAC also includes an optional provision that encourages signatories to adopt legislation prohibiting passive bribery and extortion in the public and private sectors.[108]

So far no signatories have implemented the UNCAC's optional provision on passive bribery. This is likely explained by the same reasons that led Congress to forgo any attempt at regulating passive bribery under the FCPA. For one, the FCPA's exclusive focus on active bribery allows regulators to avoid the diplomatic and jurisdictional complications that would undoubtedly accompany any attempt to directly prosecute foreign officials who solicit or receive bribes. State actor defendants may seek sovereign immunity under the U.S. Foreign Sovereign Immunities Act, or they may invoke the act of state

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106 *See id.* at 3.

107 *See United Nations Convention Against Corruption Participants*, UNITED NATIONS TREATY COLLECTION (Oct. 14, 2011, 7:25 AM), http://treaties.un.org/pages/viewdetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XVIII-14&chapter=18&lang=en#Participants.

108 *See* Philippa Webb, *The United Nations Convention Against Corruption*, 8 J. INT'L ECON. L. 191, 210 (2005). Other international anti-corruption instruments include conventions adopted by the Organization of American States (OAS), the European Union, and the African Union. *See id.* at 198–203. The OAS Convention has been signed by twenty-two countries, including the United States, and covers a greater range of conduct than the OECD Convention or FCPA. *See id.* at 193–94; *List of Signatories to the Inter-American Convention Against Corruption*, ORG. AM. STS. http://www.oas.org/juridico/english/sigs/b-58.html (last visited Oct. 14, 2011). For example, it recommends that both transnational and domestic bribery be criminalized. *See* Webb, *supra*, at 194. On the domestic front this includes the criminalization of active and passive bribery, but its provisions on transnational bribery are limited to active bribery only. *See id.* The anti-corruption conventions by the European Union and African Union both only extend to active bribery.

doctrine or the political question doctrine. Congress was also aware when it passed the FCPA that nearly every country has domestic laws in place that prohibit public officials from taking bribes, perhaps making the consideration of passive bribery by U.S. authorities seem superfluous.[109]

These reasons might explain why the FCPA and other instruments fail to address bribe solicitation and extortion, but they do not provide much comfort to firms doing business abroad. Regulators' inability to impose criminal sanctions on corrupt foreign officials means that little is done to curb the market for bribery on the demand side. Domestic authorities in the developing world are rarely able to pick up the slack in this regard because in many countries the prosecution of government officials who solicit or receive bribes is lax due to overburdened prosecutors, lack of resources, weak legislation, or the failure or inability to devise appropriate strategies for interdiction.[110] In others, the problem of under-enforcement is more troubling because it stems from corrupt influences on or within the relevant governmental authorities.[111] Foreign officials who contemplate asking firms for bribes in connection with a business transaction will naturally weigh their self-interests against the probability of being penalized. If the demand-side regulation of bribery is reserved to host countries, and if that regulation is ineffective, then the payoff calculus performed by corrupt officials will often come out in favor of solicitation or extortion.[112]

D. *FCPA Enforcement in Cases of Solicitation and Extortion*

Even though the DOJ and SEC cannot use the FCPA to target the demand side of corruption, they have clearly indicated through their enforcement patterns that solicitation or extortion is no excuse for

109 *See* United States v. Castle, 925 F.2d 831, 835 (5th Cir. 1991) ("Further minimizing the deterrent value of a U.S. prosecution was the fact that many foreign nations already prohibited the receipt of a bribe by an official.").

110 *See* John Brademas & Fritz Heimann, *Tackling International Corruption*, 77 FOREIGN AFF. 17, 19 (1998); Robert Klitgaard, *International Cooperation Against Corruption*, 35 FIN. & DEV. 3, 3 (1998).

111 Brademas & Heimann, *supra* note 110, at 21; Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257, 283 (1999). Nichols writes that "[c]orrupt environments tend to drive out honest bureaucrats, leaving only those who engage in bribe-taking. Indeed, in some corrupt systems positions within the bureaucracy are illicitly sold by superiors, thus effectively screening out those whose integrity would disallow the payment of bribes." *Id.*

112 Klitgaard, *supra* note 110, at 4 ("[W]hen bribes are large, the chances of being caught small, and the penalties if caught meager, many officials will succumb.").

paying bribes. One example can be found in the DOJ's "Catch-22" operation from January 2010. In that case, federal authorities indicted and arrested twenty-two executives in the arms industry following the first undercover sting operation ever aimed at violations of the FCPA.[113] All but one of the arrests took place in Las Vegas, where most of the defendants were attending the SHOT Show—billed as the world's premier weapons and firearms trade show.[114] None of the defendants lived in Las Vegas, however, and all of the criminal charges related to conduct that purportedly occurred several months earlier at two luxury hotels in Miami and Washington, D.C.[115] Over several days at these hotels, two people claiming to represent the defense minister of Gabon solicited the defendants for bribes.[116] In fact, the two "representatives" were FBI special agents working undercover.[117] The agents told the defendants that they would need to pay a twenty percent commission to a fictional sales agent—half of which would then go directly into the defense minister's own personal account as a bribe—in order to receive lucrative contracts to supply the Gabonese presidential guard with munitions.[118] The indictments further allege that the defendants agreed to this arrangement, with some going so far as to perform a test transaction to reassure the defense minister that the transfer of funds could go through as planned.[119]

Assuming that the allegations in the SHOT Show indictments are true, this case clearly falls within the FCPA's prohibition on active bribery regardless of the fact that the defendants did not initiate the bribe payments directly. Congress was fully aware that bribes may be demanded as price for gaining market entry or as a price for obtaining government contracts. It noted, however, that "at some point the U.S. company would make a conscious decision whether or not to pay a bribe."[120] The limited exceptions and affirmative

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113 *See* GIBSON, DUNN & CRUTCHER LLP, 2010 MID-YEAR FCPA UPDATE (2010), *available at* http://www.gibsondunn.com/Publications/Pages/2010Mid-YearFCPAUpdate.aspx.

114 Diana B. Henriques, *F.B.I. Snares Weapons Executives in Bribery Sting*, N.Y. TIMES, Jan. 21, 2010, at A3.

115 *See id.*

116 *See id.*

117 *See id.*

118 *See* Press Release, U.S. Dep't of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), *available at* http://www.justice.gov/opa/pr/2010/January/10-crm-048.html.

119 *See id.*

120 S. REP. NO. 95-114, at 10 (1977).

defenses to the FCPA's anti-bribery provisions thus do not excuse bribes on the grounds that they were paid only after first being demanded by foreign officials.

In one sense this approach reflects a logical enforcement strategy. Not all bribery cases feature the straightforward quid pro quo arrangement found in the SHOT Show case. Many corrupt officials drop hints that bribes would move things along without ever explicitly asking for payment.[121] In other cases, it will be known in the local business community that no business can happen without a bribe.[122] In these situations it is not always clear which parties committed active versus passive bribery. If bribery is seen as a "cost of doing business" in Country X, is providing an envelope of cash to a foreign official an offer to bribe or a response to a bribe request? Though it takes two to tango, bribery rarely consists of formal offers, counteroffers, and negotiations. It is often subtle, and solicitations and offers can start to look quite similar from both a normative and economic perspective.[123] Practically speaking it would be difficult, if not impossible, to use the FCPA to combat corporate corruption abroad if the statute's drafters tried to make clear distinctions between active and passive bribery in order to penalize only those firms that expressly initiate bribe offers.

However, one lingering issue with the FCPA's approach is that it can often appear to put firms in untenable or unfair positions precisely because of the hazy lines between active bribery and passive bribery. For example, should firms also be held liable under the FCPA if they fall victim to extortionate threats? Or should they be liable in cases where the subtleties and vagaries of bribe solicitation make it unclear whether an agent who paid money to a foreign official actually *intended* for the payment to serve as a "bribe" (as opposed to serving as a gift or some other less obviously corrupt purpose)? So far federal regulators have answered both questions in the affirmative.[124] Firms are therefore encouraged to develop strategies for resisting bribe demands regardless of the form they take or how unfair firms think the imposition of liability would be. Yet, as discussed in the next

121 WRAGE, *supra* note 66, at 10 ("Officials . . . do not ask for money outright. Instead, they stage a scene in which the company representatives, attuned to the signals being sent after years of doing business in the region, will know what is expected of them.").

122 *See id.* at 6.

123 *See id.* at 10–11. My thanks to Professor Urska Velikonja for sharing similar observations based on her time practicing law in Eastern Europe.

124 *See infra* text accompanying notes 157–164.

section, developing efficient compliance programs to deal with bribe demands has proven increasingly problematic.

III. Governance and Compliance Challenges

Several suggestions have been offered to help firms resist bribe demands. For instance, firms have been encouraged to ask foreign officials if they would be willing to allow an independent consultant (such as a law firm or representative from the World Bank) to serve as a supervisor during all negotiations,[125] or if they would agree to insert anti-bribery clauses in all potential contracts.[126] Other ideas include asking foreign officials to reduce any unusual payment requests to writing, as well as bringing such requests to the attention of the officials' superiors, the firms' own compliance officers, or local business associations.[127]

These strategies might very well help firms reduce their exposure to solicitation and extortion. However, two issues remain that make compliance a persistent challenge: (1) the unique practical complexities that firms face when doing business abroad; and (2) the expansive approach to statutory interpretation that the DOJ and SEC often take when enforcing the FCPA.

A. *Practical Issues*

Doing business abroad is quite different from doing business domestically because overseas markets often feature unfamiliar laws and customs. This leads transnational firms to depend heavily on the use of specialized local agents and intermediaries. In fact, frequently the first step taken by a firm considering a project in another country is to engage a foreign third party as its agent to help navigate the particular nuances of the market.[128] Hiring an agent/specialist may even be a legal requirement for doing business in certain countries, particularly in the Middle East.[129] In other countries, it is a de facto requirement in the sense that local agents provide firms with their only hope of complying with a complex set of location-specific rules,

125 Wrage, *supra* note 66, at 17.

126 *See* RESIST, *supra* note 7, at 8.

127 *See id.* at 39, 48.

128 *See* Mike Koehler, *The FCPA, Foreign Agents, and Lessons from the Halliburton Enforcement Action*, 36 Ohio N.U. L. Rev. 457, 459 (2010). These agents and intermediaries work in a variety of fields. Some simply fill the roles of consultant or go-between; others play important roles in the supply chain as distributors or resellers. *Id.* at 457, n.3.

129 *See id.* at 459.

regulations, and cultural norms.[130] The use of foreign agents also allows firms to enter new markets without needing to go to the expense of actually establishing a local office with local employees.[131]

In the FCPA context, the use of specialized agents or intermediaries takes on particular significance due to principles of vicarious liability. Vicarious liability can arise under the FCPA in two situations. The first involves the statute's third-party liability provisions. Pursuant to these provisions, any covered person under the statute is prohibited from providing anything of value to a person while knowing that all or at least a part of it will be given directly or indirectly to a foreign official for the purpose of obtaining or retaining business. The required mens rea for this provision is broad. A firm will be liable for violations caused by its agent if it is aware that the agent is "engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur"; or if it has "a firm belief that such circumstance exists or that such result is substantially certain to occur."[132] In addition, knowledge is established when a firm is aware "of a high probability of the existence of such circumstance, unless [it] actually believes that such circumstance does not exist," as well as when a firm consciously disregards facts that an agent may act in such a way.[133]

The second principle of vicarious liability often implicated in FCPA actions is the common law doctrine of respondeat superior. This doctrine provides that firms may be held liable for the actions of their agents where the agents' actions were committed with the scope of employment and done at least in part to serve the firm's interests.[134] The consequences of respondeat superior can be severe: "If a single employee, however low down in the corporate hierarchy, commits a crime in the course of his or her employment, even in part to benefit the corporation, the corporate employer is criminally liable

130 *See id.* ("Use of foreign agents is particularly strong in high-growth markets, such as China and India, where understanding and navigating through complex bureaucracies is often a key ingredient to business success.").

131 *See* WRAGE, *supra* note 66, at 12–13.

132 15 U.S.C. § 78dd-1(f) (2006).

133 *Id.* Unlike the U.K. Bribery Act, the third-party liability provisions of the FCPA do not allow firms to cite the existence of an internal compliance program as a defense. Compliance programs typically become relevant, if at all, only in the settlement or sentencing phases.

134 *See* Frank C. Razzano & Travis P. Nelson, *The Expanding Criminalization of Transnational Bribery: Global Prosecution Necessitates Global Compliance*, 42 INT'L LAW. 1259, 1275–76 (2008).

for that employee's crime."[135] This is true regardless of whether the agent acted contrary to express instructions, even when the instructions were part of a larger firm compliance program.[136]

Enforcement actions against all corporations are based on principles of vicarious liability since firms can only act by and through their agents. In the FCPA setting, however, the risk of vicarious liability is amplified in markets where bribe demands or extortionate threats are common. It is usually a firm's agents on the front lines who will first face these demands.[137] Due to competitive pressures, and in order to serve the interests of their clients who are seeking to operate in these and other countries, foreign agents and intermediaries are often put in the position where acquiescence to bribe demands seems like the only option.

Similar issues arise with respect to a firm's own employees. Employees doing business in countries with widespread corruption frequently discover that bribery is seen as necessary to gain market entry or to overcome problems presented by stalled bureaucracies. These issues raise an additional layer of complexity due to the responsibility of firms to serve the financial interests of their shareholders. Firms are not monoliths. They have multiple moving parts, each with different perspectives and goals.[138] On the one hand, firms are encouraged by extraterritorial anti-bribery laws like the FCPA to do whatever they can to prevent their employees from engaging in corrupt transactions with foreign officials. On the other, these same employees are routinely incentivized to act in the best financial interests of the corporation.[139] If employees believe that bribery is a neces-

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135 Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, 1517 PLI/Corp. 815, 817 (2005). Ms. White is a former U.S. Attorney.

136 *See id.*

137 This is especially true in the extractive industries, where the need to work with available resources leads firms to countries that rank among the most corrupt according to Transparency International's World Index of Corruption Perceptions. According to the chief compliance officer at Weatherford International Ltd., "[T]he biggest challenge or risk for many, if not all oil and gas companies, will always be with respect to third parties and intermediaries acting on a company's behalf in dealing with covered persons. We all do business in the 'high risk' countries with reputations for corruption and we're all somewhat reliant on sales agents, consultants and brokers in many of these countries. Many of the DOJ and SEC FCPA settlements we hear about started because of some bad act or acts by an agent of that company." Interview with Adrian Mebane, Dir. of the Ethics and Compliance Group, Weatherford Int'l Ltd. (on file with author).

138 *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION 80 (1992).

139 *See id.* at 19 (noting that "[b]usiness executives have profit-maximizing selves and law-abiding selves, at different moments, in different contexts, the different selves prevail").

sary part of doing business and serving shareholder interests, the temptation to give into bribe demands will be considerable.

To be sure, firms can implement a variety of governance strategies to reduce their exposure to vicarious liability in cases of solicitation or extortion. They can provide agents with monetary incentives designed to ensure compliance, expand existing monitoring efforts, and restrict agents' ability to make decisions on behalf of the firm.[140] However, these measures will rarely provide firms with complete protection from liability. Agency costs within firms are never zero because agents' incentives are never perfectly aligned with the interests of their principals.[141] This often causes agents to disregard internal firm policies and instructions if doing so will serve their own financial interests. In several FCPA cases, firms have been prosecuted where the employees responsible for the alleged violations acted contrary to well-documented FCPA compliance policies and had previously participated in extensive FCPA compliance training.

Agents in the FCPA context—and especially foreign agents—also frequently employ a variety of tools to conceal bribes to public officials. For example, agents routinely attempt to hide bribes by disguising them in underlying documentation as "service fees," "facilitation fees," or "commissions."[142] Bribe-seeking officials in some countries, including China, have actually helped agents conceal bribes from their firms by creating subsidiary agencies that then charge fees for the agent's ability to interact with primary agencies.[143] In other situations, firms may be unable to discover that government officials have ownership interests in the agent enterprises they hired or that individual agents have family ties to particular government officials.[144] Firms subject to the FCPA devote considerable resources to vetting potential agents, but even the best firms can miss red flags when agents go to great lengths to hide their tracks.[145]

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140 *See generally* Ribstein, *supra* note 52 (evaluating incentives involved with the prosecution of corporate crimes).

141 *See id.* at 8.

142 *See* Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 400, 403 (2010); *see also* 2009 REPORT, *supra* note 78, at 60.

143 *See* Steven R. Salbu, *A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery*, 33 CORNELL INT'L L.J. 657, 686 (2000).

144 *See* WRAGE, *supra* note 66, at 13.

145 *See id.* These issues are not limited to agents retained by large, transnational corporations. Increased globalization and domestic market saturation has caused firms of all sizes to consider entering foreign markets. Exposure to liability under statutes like the FCPA can be especially problematic for small and medium-sized enterprises (SMEs). SMEs doing business in foreign countries often lack the

B. Expansive and Aggressive Statutory Interpretation

Another factor contributing to FCPA compliance challenges is the way that regulators now interpret and apply several of the FCPA's key provisions. The DOJ and SEC have become more expansive in their interpretation of the FCPA anti-bribery provisions and considerably narrower in their assessment of the statute's exceptions and defenses.

Much of the trouble in this regard comes because the government's authority under the FCPA is not as broad as the recent resurgence in enforcement activity might suggest. The FCPA expressly *permits* at least four types of payments: (1) payments that are not "corrupt"; (2) payments that are not made for the purpose of obtaining or retaining business; (3) payments that facilitate routine government action; and (4) payments that go to someone other than a foreign official.[146] Many payments made in response to bribe demands or extortionate threats arguably fall within one or more of these "protected" categories. However, regulators have taken an increasingly aggressive and uneven approach to interpreting them.

1. The Meaning of "Corrupt" and the FCPA's Business Nexus Requirement

To be liable under the FCPA's anti-bribery provisions a defendant must act with the requisite intent. This means a defendant's challenged payment must have been both (1) corrupt and (2) made for the purpose of "obtaining or retaining business for or with, or directing business to, any person."[147] Neither prong is defined in the

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resources and expertise to effectively resist solicitation for bribes. Like their larger counterparts, SMEs are under considerable financial pressure and may feel that bribery is their only path to economic survival. *See* 2009 REPORT, *supra* note 78, at 24–25 ("What can an SME do to avoid bribery when a customs official demands a bribe in order to allow the import of a perishable product? Where can a supplier get help when the buyer for a major retailer expects 'encouragement' when awarding contracts?"). SMEs also frequently operate in developing or transitional economies, and often serve as links in the chain of supply with larger firms. This makes SMEs especially vulnerable to bribe solicitation and extortion. *See id.* (noting that at least one study cited by TI suggests that corruption is a greater impediment to the business of SMEs than large corporations in light of SMEs position in supply chains).

146 The FCPA also permits payments for bona fide promotion expenses. *See* 15 U.S.C. § 78dd-1(c)(2) (2006).

147 *Id.* §§ 78dd-1(a), 78dd-2(a), 78dd-3(a). The U.K. Bribery Act similarly prohibits bribes to foreign officials that are made in order "to obtain or retain business or an advantage in the conduct of business." MINISTRY OF JUSTICE, CONSULTATION ON GUIDANCE ABOUT COMMERCIAL ORGANISATIONS PREVENTING BRIBERY 19 (2010).

statute. The FCPA's legislative history says that a "corrupt" payment is one that was intended to induce the recipient to misuse her official position to wrongfully direct business to the payer.[148] This definition has received judicial support and is used by the DOJ in its Criminal Resource Manual (which guides prosecutorial discretion).[149] It is also consistent with how other international anti-bribery instruments define the term corrupt.[150]

The second prong—"obtain or retain business"—is typically described as the FCPA's business nexus requirement.[151] Though long considered vague, the Fifth Circuit appeared to clarify this requirement in its 2004 decision in *United States v. Kay*.[152] In that case, the court considered whether payments to foreign officials for the purpose of avoiding customs duties or receiving lower sales taxes satisfied the necessary business nexus. The court held that these payments *could* assist in obtaining business, and therefore allowed the case to proceed.[153] However, the court added that not all such payments are unlawful: "We hasten to add . . . [that] [i]t still must be shown that the bribery was intended to produce an effect—here, through tax savings—that would 'assist in obtaining or retaining business.' "[154]

In a lengthy but important passage the court continued:

> Although we recognize that lowering tax and customs payments presumptively increases a company's profit margin by reducing its cost of doing business, it does not follow, *ipso facto* . . . that such a result satisfies the statutory business nexus element. Even a modest imagination can hypothesize myriad ways that an unwarranted reduction in duties and taxes . . . could *assist* in obtaining or retaining business. . . . [B]ut that is not to say that such a diminution *always* assists in obtaining or retaining business. There are bound to be circumstances in which a cost reduction does nothing other than increase the profitability of an already-profitable venture. . . . Indeed, if the government is correct that anytime operating costs are reduced the

148 *See* United States v. Kay, 359 F.3d 738, 749 n.40 (5th Cir. 2004). The Eighth Circuit has applied a different definition of "corrupt" in the FCPA setting, saying that the term means conduct that is "voluntarily [a]nd intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means." *See* United States v. Liebo, 923 F.2d 1308, 1312 (8th Cir. 1991) (alteration in original) (quoting trial court's jury instructions).

149 U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 1018 (2000), *available at* http:www.justice.gov/usao/eousa/Foia_reading_room/usam/title9/crim00000.htm.

150 *See, e.g.*, OECD Commentaries, *supra* note 100, ¶ 1.

151 *See Kay*, 359 F.3d at 740.

152 *See id.*

153 *Id.* at 740.

154 *Id.* at 756.

> beneficiary of such advantage is assisted in getting or keeping business, the FCPA's language that expresses the necessary element of assisting is [sic] obtaining or retaining business would be unnecessary, and thus surplusage—a conclusion that we are forbidden to reach.[155]

Taken together, the requirement that a payment be made corruptly and with a business nexus raises several issues in FCPA cases involving demand-side corruption. On one hand, cases that involve straightforward bribe solicitation, like the SHOT Show operation mentioned earlier, should not pose much difficulty under either the corrupt intent or business nexus requirements. In the SHOT Show case, the defendants were allegedly told in no uncertain terms that disguised side payments to an agent for the Gabonese defense minister were necessary to win government contracts.[156] Assuming the facts at trial support these allegations, it will be hard for the defendants to argue that they did not appreciate the corrupt nature of the transaction nor the business advantage that the bribes would provide.

However, matters become murkier in cases involving extortion. In situations that involve "true extortion"—defined as payments made under threat of serious bodily harm—the FCPA's legislative history suggests that firms are entitled to a defense. Congress noted that these cases do not implicate the FCPA's anti-bribery provisions because payments "to an official to keep an oil rig from being dynamited [are not] made with the requisite corrupt purpose."[157] This reasoning clearly follows from the FCPA's plain language. A payment to an official designed to prevent the bombing of one's property would hardly be intended to induce that official to misuse her position to "wrongfully" direct business to that payer. The payment in this hypothetical would be made simply to keep everything in one piece.

The law is considerably less clear in cases involving economic extortion. As the BRIBEline data shows, firms report receiving extortionate threats of an economic nature much more often than threats of physical injury.[158] This is an important issue for firms because U.S. authorities have demonstrated a willingness to bring FCPA charges based on payments made to protect existing investments. For example, in 2010, the SEC charged Joe Summers, a former employee of Pride International, with violating the FCPA after he paid $30,000 to

155 *Id.* at 759–60.

156 *See* Henriques, *supra* note 114.

157 S. Rep. No. 95-114, at 11 (1977).

158 *See* BRIBEline, *supra* note 83.

Venezuela's state-owned oil company (PDVSA).[159] The payment came after one of PDVSA's mid-level employees demanded it in exchange for releasing funds that Pride was entitled to for services already rendered.[160] Once the payment went through, Pride quickly received the money it was due. Summers later settled the charges against him by paying a fine of $25,000.[161]

This case is problematic for two reasons. First, when Summers paid $30,000 to secure money that his firm was already entitled to, nothing suggests that his purpose was to induce a government worker to "misuse" her official position. If anything, Summers intended for the payment to prompt the official to actually fulfill her lawful duty and pay the amount owed. Similarly, it is difficult to see how Summers's payment constituted a bribe "intended to produce an effect . . . that would 'assist in obtaining or retaining business.'" The "business" that Summers engaged in was completed prior to the demand for the bribe. Just as in the hypothetical of the exploding oil rig, the money that Summers paid was to protect Pride from being placed in a worse position than it would have been absent the payment. The SEC did not argue that Summers paid the ransom in order to compete for new or existing business, or otherwise try to distinguish this case from the example in *Kay* of an already profitable venture simply increasing its profits. It thus remains unclear what the government considered the necessary business nexus to be under these facts.

Related issues arise in cases where the lines between solicitation and extortion are harder to differentiate. As Lindgren notes, "[T]he same envelope filled with cash can be both a payment extorted under a threat of unfairly negative treatment and a bribe obtained under a

159 *See* Complaint at 5, SEC v. Summers, No. 4:10-cv-02786 (S.D. Tex. Aug. 5, 2010), *available at* http://www.sec.gov/litigation/litreleases/2010/lr21617.htm. The complaint indicates that "[f]ollowing widespread strikes and civil unrest in Venezuela in late 2002, [Pride's Venezuelan subsidiary] and other companies performing work for PDVSA [the state-owned oil company] had difficulty collecting outstanding receivables from PDVSA." *Id.* Pride's subsidiary later received information that a "mid-level PDVSA accounts payable employee was holding up the payment of funds owed to [Pride] and wanted a payment of approximately $30,000 in order to release the funds due." *Id.* The complaint further alleged that Summers authorized or allowed payments totaling approximately $384,000 to be made to third parties with the belief that those funds would be given to Venezuelan officials in order to secure several drilling contract extensions. *Id.* at 1.

160 *See* Litig. Release No. 21617, U.S. Sec. & Exch. Comm'n, SEC Charges Former Employee of Pride International with Violating the Foreign Corrupt Practices Act (Aug. 5, 2010), *available at* http://www.sec.gov/litigation/litreleases/2010/lr21617.htm.

161 *See id.*

promise of unfairly positive treatment."[162] Depending on the context of a particular bribe request, the circumstantial evidence surrounding a defendant's mental state can be open to multiple interpretations.[163] An employee working in places like Africa or Eastern Europe may feel like a victim of extortion when threats are made against her employer's existing investment only to later find the DOJ arguing that she simply acquiesced to a request for a bribe. Similarly, the government may view a payment outside of normal channels as a bribe when that thought never crossed the mind of the employee paying it. In many countries, payments made in response to subtle hints by foreign officials do not breach obvious social norms in the same way that behaviors like theft or assault do.[164]

A few courts have tried to address these issues through jury instructions. The trial court in *Kay* gave an instruction saying that threats of "serious economic loss" could negate the FCPA's corrupt intent requirement.[165] The court defined "extortion" as "obtaining money or something of value from another person by intimidation,

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162 James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695, 1700 (1993).

163 *See* Ribstein, *supra* note 52, at 10.

164 *Id.* at 7–8 ("In the business context it may be particularly unclear when behavior crosses the line from hard-nosed competition that is at most subject to a civil action to what society considers criminal. For example, it may not be clear how to distinguish aggressive but legitimate competitive behavior from criminal violations of the antitrust laws. . . . By contrast, most non-corporate criminal behavior is criminal because it breaches clear social norms.").

165 *See* United States v. Kay, 359 F.3d 738 (5th Cir. 2004). The Second Circuit reached a similar result in a non-FCPA case involving allegations that a defendant paid a bribe to an IRS agent. *See* United States v. Barash, 365 F.2d 395, 401–02 (2d Cir. 1966) (allowing instruction on intent where a defendant accused of bribing an IRS agent lays a foundation indicating that an alleged bribe was made after a government officer "threatens serious economic loss"). The U.S. domestic bribery statute largely tracks the language of the FCPA with respect to unlawful bribery; the statute, 18 U.S.C. § 201, provides that:

> Whoever . . . directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . with intent (A) to influence any official act; or (B) to influence such public official . . . to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (C) to induce such public official . . . to do or omit to do any act in violation of the lawful duty [shall be fined and/or imprisoned].

18 U.S.C. § 201 (2006).

threats of serious economic loss to a person or a business, or withholding official action until the official's demands are met."[166]

By contrast, in *United States v. Kozeny*[167] the court held that only "true extortion" could negate the corrupt intent required by the FCPA.[168] The court distinguished economic extortion by saying that a defendant can simply walk away from economic threats—something that is impossible when facing threats of physical harm.[169] The difficulty with this reasoning, however, is that it confuses the relationship between the type of threat at issue and the intent required for FCPA liability. If a defendant did not intend for a payment to induce an official to misuse her position, then it is irrelevant whether the reason for the defendant's lack of intent was based on a threat of physical harm or economic loss.[170] Put differently, it is impossible to define from the outset the universe of threats that will negate corrupt intent. The question is more nuanced and requires assessing all circumstances surrounding a challenged payment.

Practically speaking, though, even the *Kay* instruction will likely provide little comfort to firms or employees trying to ensure FCPA compliance. For one thing, *Kay* did not articulate how "serious" an economic loss must be before it will constitute economic extortion. Even if courts provide guidance on this question, firms and employees are still left in the untenable position of trying to determine which payments are actually "corrupt" and which ones will later be considered as such by regulators. As *Summers* indicates, firms cannot presume that payments to protect existing investments will escape scrutiny even when they were not intended to induce an official to misuse her position or to provide the payer with a competitive advantage. Individual employees and agents will find it increasingly difficult to discern when compliance ends and exposure to liability begins if prosecutors continue to expand their definition of the FCPA's required mental state.

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166 *See* Urofsky, *supra* note 7, at 883 (citing Jury Instructions at 23–24, United States v. Kay, 200 F. Supp. 2d 681 (S.D. Tex. 2002) (No. 4:01-cr-00914), *rev'd* 359 F.3d 738 (5th Cir. 2004)).

167 582 F. Supp. 2d 535 (S.D.N.Y. 2008).

168 *See id.* at 540.

169 *See Barash*, 365 F.2d at 402.

170 *See* Theodore C. Sorensen, *Improper Payments Abroad: Perspectives and Proposals*, 54 Foreign Aff. 719, 722 (1975–76) ("A company which can demonstrate that it was truly confronted with an unmistakable choice between paying a corrupt foreign official, or seeing its entire investment in that country expropriated, is not paying a 'bribe.'").

2. The Facilitation Payment Exception

While regulators continue to take an increasingly expansive view of the FCPA mens rea requirements, they have significantly narrowed the scope of the statute's facilitation payment exception. This exception provides that payments made "to expedite or to secure the performance of a routine governmental action" are exempted from the FCPA's anti-bribery provisions.[171] The statute defines "routine governmental action" as "an action which is ordinarily and commonly performed by a foreign official."[172] It further lists several examples of permissible facilitation payments, which include payments made in connection with granting permits, processing government papers, scheduling inspections, providing power or water service, mail pick-up and delivery, providing police protection, and "actions of a similar nature."[173]

Though U.S. domestic anti-bribery laws do not contain a facilitation payment exception, Congress found it necessary in the context of the FCPA because some payments that look like bribery in the United States are not viewed the same way under the cultural norms of other countries.[174] Yet this cultural sensitivity is not limitless. The FCPA provides that any decision by a foreign official to award new or continued business, or any action taken by a foreign official to encourage a decision to award new or continued business, would not constitute "routine governmental action." In addition, Congress has emphasized that the exception should only apply to actions by foreign officials that are non-discretionary. The FCPA's legislative history notes that payments that "merely move a particular matter toward an eventual act or decision" should be permitted, whereas those that "cause an official to exercise other than his free will" should not.[175]

This distinction is easily stated, but applying it in practice can be difficult. Many firms report that bribe demands frequently come from lower-level foreign officials in the areas of tax and customs who make it explicitly or implicitly known that bribery will be a necessary cost of doing business with them. For example, customs officials often tell firms that no goods will move in or out of the country unless a side

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171 15 U.S.C. § 78dd-2(b) (2006).

172 *Id.* § 78dd-2(h)(4)(A).

173 *Id.*

174 *See* H.R. REP. NO. 95-640, at 8 (1977) ("While payments made to assure or to speed the proper performance of a foreign official's duties may be reprehensible in the United States, the committee recognizes that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments.").

175 *Id.*

payment is forthcoming.[176] Payments made in response to these types of demands would seem to constitute permissible facilitation payments under the definitions above, but in the current enforcement environment this conclusion can rarely be relied upon.

This became most evident in the case of Westinghouse Air Brake Technologies Corp. ("Wabtec"). In 2008, the DOJ charged Wabtec with FCPA violations based on payments that its subsidiary in India made to officials employed by the Indian Railway Board. Some of the payments were made to assist the subsidiary in receiving new contracts and to limit excise tax audits, and thus represented clear violations of the FCPA's anti-bribery provisions.[177] However, other challenged payments were made to schedule pre-shipping product inspections and to have certificates of delivery issued for certain products.[178] Because the matter ultimately settled through a non-prosecution agreement and no formal charging document was ever filed, the DOJ's theory as to why the latter payments did not fall within the facilitation payment exception remains unclear. If the payments were made simply to have certificates of delivery issued or to schedule inspections, those acts would seemingly qualify as "routine governmental actions."

The FCPA's accounting provisions add an additional layer of complexity. In an enforcement action against Triton Energy Corporation, the company was alleged to have violated the FCPA's accounting and internal control provisions—but not the anti-bribery provisions—by misreporting ostensibly permissible facilitation payments of approximately $1,000 each that were made to expedite the receipt of monthly invoices.[179] The specter of an FCPA enforcement action under these facts puts firms in a difficult position. Even if they think they can comply with the statutory exception, firms will likely remain reluctant to accurately record facilitation payments out of fear that they may create an appearance of impropriety or provide evidence of a violation of local law.[180]

The uncertainty in this area has prompted many firms to adopt strict "zero tolerance" policies that prohibit facilitation payments of any type—including those that, if documented, would appear to fall

176 *See* Urofsky, *supra* note 7, at 880.

177 *See* Warin et al., *supra* note 28, at 63.

178 *See id.*

179 *See* Litig. Release No. 15266, U.S. Sec. & Exch. Comm'n, Securities and Exchange Commission v. Triton Energy Corporation, et al. (Feb. 27, 1997).

180 Thomas R. Fox, *The End of the FCPA Facilitation Payment Exception?*, FCPA COMPLIANCE & ETHICS BLOG (Nov. 11, 2010, 9:26 PM), http://tfoxlaw.wordpress.com/2010/11/11.

within the statutory exception.[181] But this too is fraught with difficulties. Companies that take a zero-tolerance attitude with respect to facilitation payments "run the risk that officials will not concede the ground so easily and will retaliate by delaying or even denying their applications for permits and licenses for real or imaginary technical noncompliance."[182] This will only add to the pressures already faced by agents, employees, and intermediaries attempting to meet deadlines and performance targets.[183]

3. Who Is a "Foreign Official"?

A final area where the aggressive posture assumed by U.S. regulators creates uncertainty for firms facing bribe demands concerns the FCPA's definition of "foreign official." The statute defines "foreign official" as

> any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.[184]

Most of the confusion surrounding this language centers on the ambiguous term "instrumentality." The FCPA does not define "instrumentality," nor does it provide any factors that will be used to determine what types of entities are instrumentalities of foreign governments such that their officers and employees would be deemed "foreign officials" within the meaning of the statute. The DOJ itself has admitted that the term "foreign official" as used in the FCPA poses difficult interpretation issues for firms.[185] Rather than attempt to narrow the term's scope, or at least describe the characteristics that the DOJ uses to evaluate whether a person or entity qualifies as a foreign official, the agency admits that "it is entirely possible, under certain circumstances and in certain countries, that nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of

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181 "An October 2009 TRACE International survey about facilitating payments revealed that approximately 35% of the companies surveyed had policies prohibiting facilitating payments." Warin et al., *supra* note 28, at 64–65 (noting also that firms have also been pressured by international organizations to ban facilitation payments on the grounds that they are "corrosive" on the rule of law and overall economic development).

182 Urofsky, *supra* note 7, at 882.

183 *See id.*

184 15 U.S.C. § 78dd-1(f) (2006).

185 *See* Koehler, *supra* note 12, at 964–65.

a . . . product in a foreign country will involve a 'foreign official' within the meaning of the FCPA."[186]

Despite a lack of formal regulatory guidance, the DOJ and SEC have clearly demonstrated that they believe the definition of "foreign official" extends at least to state-owned entities and their employees.[187] In fact, the majority of recent FCPA enforcement actions have been premised on payments made to "non-core" individuals who are employed by state-owned or state-controlled entities, rather than payments made to persons directly employed by a foreign state.[188]

The issue for firms and employees facing bribe demands thus becomes trying to determine *ex ante* what companies are sufficiently state-owned or state-controlled to qualify as an instrumentality of a foreign official in the eyes of federal regulators. This is not always an easy task. For example, several recent FCPA enforcement actions have demonstrated the unique challenges presented by doing business in China, where state ownership is particularly high. The DOJ and SEC have alleged that actors such as physicians working in state-owned hospitals[189] and journalists working for state-run media companies[190] constitute "foreign officials" under the FCPA even though this conclusion would not be obvious to many outsiders. Estimates further suggest that the government is a majority shareholder in at least 31% of all publicly listed companies in China, while also maintaining authority over the country's major banks and five largest electricity conglomerates.[191] Many practitioners admit that they often cannot determine with confidence whether bribe requests in countries like China are coming from a government official or a private citizen.[192]

DOJ and SEC enforcement patterns further indicate that even *minority* state ownership creates a risk that an entity or organization will be treated as a "foreign official" for the purposes of the FCPA. In

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186 *Id.* at 965. Koehler adds that this statement was made before an audience composed of representatives from the pharmaceutical industry, an industry that has become subject to a high degree of FCPA scrutiny. *Id.*

187 *See* Weissman & Smith, *supra* note 45, at 25; Koehler, *supra* note 12, at 965.

188 *See* Weissman & Smith, *supra* note 45, at 26–27; Koehler, *supra* note 12, at 965.

189 *See* Thomas R. Fox, *What's in a Name: Agents, Resellers, and Distributors Under the FCPA*, FCPA Compliance & Ethics Blog (Nov. 15, 2010, 1:57 PM), http://tfoxlaw.wordpress.com/2010/11/15 (discussing FCPA enforcement action against AGA Medical Corp., where a distributor hired by AGA paid bribes totaling $460,000 to doctors in state-owned hospitals).

190 Warin et al., *supra* note 28, at 44 ("In a 2008 opinion procedure release, the U.S. Department of Justice ('DOJ') assumed that journalists working for state-run media outlets in China fall under the FCPA's definition of 'foreign official.'").

191 *See id.* at 45.

192 Wrage, *supra* note 66, at 11–12.

an action against KBR, the SEC and DOJ claimed that payments made to employees of the oil firm Nigeria LNG Limited constituted bribes paid to "foreign officials."[193] However, Nigeria only owns 49% of Nigeria LNG, with the remaining shares held by private oil companies.[194] In a similar case, FCPA-related charges were brought against Alcatel-Lucent, S.A., based on payments made to Telekom Malaysia Berhad ("TMB"), a telecommunications company where the Malaysian government holds only a 43% stake.[195] Despite having a sub-majority holding percentage, federal authorities alleged that TMB was an instrumentality of a foreign official because the Malaysian government had the ability to appoint officers, "had veto power over . . . major expenditures, and made [certain key] operational decisions."[196]

These cases raise the question of just how far the government will extend the term "instrumentality."[197] At the very least it appears firms and their employees must do more than simply analyze the ownership structure of entities with foreign government ties. Firms must go one step further and discern the level of control that the government has

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193 Litig. Release No. 20897A, U.S. Sec. & Exch. Comm'n, SEC Charges KBR, Inc. with Foreign Bribery; Charges Halliburton Co. and KBR, Inc. with Related Accounting Violations—Companies to Pay Disgorgement of $177 Million; KBR Subsidiary to Pay Criminal Fines of $402 Million; Total Payments to Be $579 Million (Feb. 11, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr20897a.htm.

194 *See Business Structure in Nigeria: Liquefied Natural Gas*, SHELL, http://www.shell.com.ng/home/content/nga/aboutshell/shell_businesses/lng/ (last visited Oct. 14, 2011). The private oil companies at issue were Shell, Total, and Eni.

195 As Professor Koehler notes, TMB describes itself as "privatized." *See* Mike Koehler, *"Foreign Official" Limbo . . . How Low Can It Go?*, FCPA PROFESSOR (Jan. 10, 2011, 5:30 AM), http://fcpaprofessor.blogspot.com/2011/01/foreign-official-limbo-how-low-can-it.html.

196 Information at 10–11, United States v. Alcatel-Lucent, S.A., No. 10-20907-CR-Moore/Simonton (S.D. Fla. Dec. 27, 2010).

197 A recent FCPA enforcement action against Comverse premised on alleged accounting violations involved payments made to Hellenic Telecommunications Organization, S.A. ("OTE"), a telecommunications provider partially owned by the Greek government. The action indicates that the United States government is continuing to lower its understanding of the ownership threshold necessary for state ownership. Although the FCPA's accounting prohibitions do not contain a "foreign official" element, the Comverse case is notable in that historically the Greek government has only owned between a 33 and 38% interest in OTE. *See* Mike Koehler, *Converse Technology . . . Is it Really That Simple?*, FCPA PROFESSOR (Apr. 12, 2011, 5:26 AM), http://fcpaprofessor.blogspot.com/2011/04/comverse-technology-is-it-really-that.html. Furthermore, OTE's annual reports provide that Greece "may—only as a shareholder—monitor the operation and administration of the corporate affairs." Mike Koehler, *"Foreign Official" Limbo—The Bar Has Been Lowered*, FCPA PROFESSOR (Apr. 15, 2011), http://www.fcpaprofessor.com/foreign-official-limbo-the-bar-has-been-lowered.

over a particular entity or organization—including those entities that would not immediately bring to mind government involvement.

4. Implications: Increased Monitoring Costs and the Risk of Overdeterrence

The aggressive interpretation of the FCPA's core provisions raises several issues for firms that must deal with bribe demands. Of most immediate concern is the need to implement compliance programs that match the increasingly expansive gloss that regulators have applied to the statute. Companies depend on predictability in the law so that they can clearly articulate for firm employees and agents how compliance is to be accomplished and engage in efficient business planning. If we think back to the FCPA actions against NATCO and Joe Summers, one lesson from the NATCO case is to accurately record payments made in response to extortionate threats that put one's employees in danger. This is necessary to avoid liability under the FCPA's accounting provisions. Yet, *Summers*[198] teaches that payments made under similar circumstances can lead to charges under the FCPA's anti-bribery provisions, despite apparent tension with the FCPA's mens rea requirements and the inability to rely on all courts to give an economic extortion jury instruction. This dynamic can confuse firms that are legitimately trying to comply with the law and limit their ability to provide instructions that will give agents and employees clear direction.

Firms could respond to these concerns by taking a more active role every time an employee or agent receives a demand for payment from a foreign official that in any way touches upon the firm's business activities. The problem with this approach is that at some point close monitoring negates the benefits that come from delegating authority to agents in the first place. Close monitoring is also expensive. For large firms with agents and employees spread across multiple markets, the practical challenge of intervening in every case of bribe solicitation will be highly prohibitive.

The breadth of current FCPA enforcement policy can also prompt firms to launch costly and time-intensive internal investigations for "ambiguous, internal allegations of conduct that could potentially implicate the FCPA" in the eyes of regulators.[199] In one recent example a firm disclosed that it spent $3.2 million to investigate $50,000 of "potentially" improper payments made by a foreign branch that accounts for approximately one-half of 1% of the com-

198 *See supra* notes 159–61 and accompanying text.
199 Koehler, *supra* note 12, at 1005.

pany's total annual revenue.[200] These costs will ultimately be passed along to a firm's shareholders and may mean diversions from other, more profitable activities.[201] More immediately, internal investigations will cause disruptions to current business operations and employee morale as documents and computers are seized and employees are deposed.[202]

Another danger posed by legal uncertainty under the FCPA is that agents and employees will become overly risk-averse and thus deterred from taking actions that would otherwise benefit their firms. For example, they may reject making payments in response to demands that appear permissible under the facilitation payment exception due to concerns that the DOJ or SEC will later consider them suspect. A recent Dow Jones survey found that 51% of companies have delayed, and 14% have cancelled, business ventures abroad due to uncertainty over FCPA enforcement.[203] If United States firms leave markets under these circumstances, they may also be put at a competitive disadvantage as firms from countries without FCPA-like legislation step in to fill their vacancies. This has already been observed in practice. In 2009, the oil services firm Ensco International elected to abandon operations in Nigeria due to concerns that it may be subjected to FCPA scrutiny after making payments to customs officials to obtain permission to import oil-drilling rigs.[204] Similar events have transpired in Kazakhstan as increased FCPA scrutiny has seen United States oil firms withdraw only to be replaced by their Chinese competitors.[205] Not only does market exit of this type negatively impact United States firms hoping to do business abroad, the citizens of the countries left behind face the risk of poor quality substi-

200 Interview with Richard Alderman, Dir., U.K. Serious Fraud Office (on file with author). The costs of internal investigations escalate as the scope of potential liability expands. For example, the record-setting FCPA settlement in 2008 by Siemens AG was preceded by the company's own internal audit. This audit involved the services of over 1,500 lawyers, accountants, and support staff personnel, who billed approximately 1.5 million hours reviewing 167 million financial and accounting documents. The total bill to Siemens reached $1 billion—nearly the cost of its eventual settlement of $1.6 billion with United States and German authorities. *See* Vardi, *supra* note 5, at 74.

201 *See* Koehler, *supra* note 12, at 954.

202 *See* Wrage, *supra* note 66, at 116.

203 Westbrook, *supra* note 3, at 498.

204 Vardi, *supra* note 5, at 77.

205 *Id.*

tutes. Some scholars have compared this result to the effects felt after the imposition of economic sanctions.[206]

Of course, one way for firms to gain clarity on the legal status of payments made in response to bribe demands and extortionate threats would be to test the DOJ and SEC's enforcement theories in court. But FCPA litigation continues to be rare and there are few reported FCPA judicial opinions. The potential monetary and reputational consequences that would follow from an FCPA indictment or guilty verdict at trial generally leave firms with no realistic option other than to seek settlement on the most favorable terms possible. For individual defendants, this typically means entering a guilty plea. For firms, it means agreeing to a deferred prosecution agreement (DPA) or a non-prosecution agreement (NPA).

Under a DPA, the prosecution files a formal charging document with the court but defers actual prosecution if the defendant firm agrees to implement and maintain various governance requirements, pay a fine, and disgorge profits.[207] If the firm fulfills its obligations under the DPA the prosecution later withdraws the charge. NPAs usually require firms to accept similar terms, but the difference is formal charges are never filed.

Commentators suggest that a climate where firms feel they must accept DPAs and NPAs emboldens the DOJ and SEC to advance broad and vague theories of FCPA liability that rarely, if ever, receive judicial scrutiny.[208] Even though these agreements are often negotiated vigorously, their final terms are not subject to any judicial oversight. Whether this situation truly provides regulators with too much leverage is outside this Article's scope. What appears undeniable, however, is that an absence of judicial review on key aspects of the FCPA makes it considerably more difficult for firms to design compliance programs that efficiently separate lawful but aggressive competitive activity from conduct that clearly violates the statute.

IV. Suggestions and Alternatives

Several options are available to alleviate some of the governance challenges and compliance headaches that result from widespread

206 *See* Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 Fla. L. Rev. 351, 356 (2010).

207 One of the most burdensome compliance requirements typically included as part of a deferred or non-prosecution agreement is the commitment on behalf of the corporation to retain an outside monitor for an extended period of time. The compliance monitor hired by Siemens AG following its settlement with the DOJ was projected to cost $52 million over four years. *See* Vardi, *supra* note 5, at 76.

208 *See* Koehler, *supra* note 12, at 909.

bribe demands. One option would involve making changes to the FCPA itself. For example, to add clarity to the law, the FCPA could be altered to either *permit* all bribes or to clearly *prohibit* all payments made in response to solicitation or extortion (including facilitation payments). A less drastic way to help firms fulfill their compliance obligations would be to provide them with more guidance on the grayer areas of the FCPA. Still another option would be to leave the FCPA's basic structure intact and instead devote more regulatory attention and resources to dealing with the demand-side origins of corruption. The advantages and disadvantages of these approaches are discussed below.[209]

A. *Changes to the FCPA*

1. Permit All Bribes

The most direct way to "help" firms design clear, workable anti-bribery compliance programs would be to simply get rid of the FCPA and permit them to pay bribes. Under this approach, the sometimes-blurry lines between active bribery, passive bribery, and extortion would simply melt away. Firms would no longer need to monitor agents that receive bribe demands and could expand unfettered into markets where corruption is common.

But as attractive as this option might seem from a clarity and predictability standpoint, morally and politically it is a non-starter. Corruption has been universally condemned by governments, international organizations, non-governmental organizations (NGOs), and religious groups. Former United Nations Secretary-General Kofi Annan describes transnational bribery as "an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts

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209 As Professor Westbrook notes:

> Some legislation has been recently introduced that would alter the FCPA. The Foreign Business Bribery Prohibition Act of 2009, H.R. 2152, 111th Cong. (2009) (sponsored by Rep. Ed Perlmutter (D-CO)), would authorize certain private rights of action under the FCPA for violations by foreign concerns that damage domestic businesses. The Energy Security Through Transparency Act of 2009, S. 1700, 111th Cong. (2009) (sponsored by Sen. Richard Lugar (R-IN)), would require certain issuers to disclose payments to foreign governments for the commercial development of energy resources. Neither bill has made it out of committee.

Westbrook, *supra* note 3, at 503 n.56.

markets, erodes the quality of life, and allows organized crime, terrorism, and other threats to human security to flourish."[210]

The FCPA is part of the global response to these harms. Any pull-back in the fight against corruption by federal regulators would represent a significant departure from current policy and likely harm the United States' reputation in the international community. The United States became a pioneer in the area of extraterritorial anti-corruption legislation when it passed the FCPA. This subsequently led American officials to urge other countries to adopt similar measures. Though the motivation was largely selfish—United States firms believed the FCPA put them at a competitive disadvantage compared to firms that weren't subject to similar restraints on bribery—this pressure eventually culminated in the OECD Convention and the passage of several FCPA-like laws in other countries. This was not an easy process. Many countries initially resisted efforts to curb corruption because they believed that bribery (and available tax deductions for bribery) provided their companies with the only advantage they could obtain over their American competitors—an advantage they were reluctant to give up. Existing international anti-corruption accomplishments could thus be put in jeopardy if the United States altered its solid anti-corruption stance.

2. Clearly Prohibit All "Bribes"

Another way to provide greater certainty under the FCPA would be to clearly *prohibit* all "bribe" payments—including facilitation payments, as well as payments that were first solicited by foreign officials or made in response to extortionate threats. Under this approach, firms would be able to provide explicit instructions to all agents and employees and obviate the need for them to spend time analyzing whether a payment satisfies the business nexus requirement, is corrupt, or qualifies as a permissible facilitation payment. This approach would also be consistent with the DOJ's and SEC's existing attitudes toward FCPA enforcement, where the message often appears to be "do not bribe, and do not do anything that remotely resembles bribery."

But before heading down this path, several issues must first be addressed. For one, expanding the scope of the FCPA's prohibited conduct will do nothing to address the agency costs that firms already

210 Julie R. O'Sullivan, Federal White Collar Crime 552 (4th ed. 2009) (quoting Kofi Annan, Secretary-General, United Nations, Statement on the Adoption by the General Assembly of the United Nations Convention Against Corruption (Oct. 31, 2003), *available at* http://www.un.org/apps/sg/sgstats.asp?nid=602).

face when retaining specialized foreign agents in distant markets. Even if firms can get these costs under control through incentives or other means, this approach arguably conflicts with the FCPA's original purpose, raises normative fairness concerns, and could lead to market withdrawal.

a. Clarifying the Purpose of Anti-Bribery Legislation

In one sense, expanding the scope of the FCPA to prohibit all payments in response to solicitation or extortion might seem inconsistent with the statute's legislative history. When the FCPA was passed in 1977, Congress cited the effect of bribery on competition as the main justification for the legislation. The Senate Report accompanying the final version of the bill provided that:

> Corporate bribery is bad business. In our free market system it is basic that the sale of products should take place on the basis of price, quality, and service. Corporate bribery is fundamentally destructive of this basic tenet. Corporate bribery of foreign officials takes place primarily to assist corporations in gaining business. Thus foreign corporate bribery affects the very stability of overseas business. Foreign corporate bribes also affect our domestic competitive climate when domestic firms engage in such practices as a substitute for healthy competition for foreign business.[211]

If preserving free and fair competition is the goal of the FCPA, then banning payments in response to extortionate threats will not always square with that goal. Payments to obtain money that one is already owed or to prevent other types of economic harm do not provide firms with a competitive advantage in the sense of gaining business that they would not otherwise be entitled to.

On the other hand, prohibiting even these types of payments would bring the FCPA in line with the driving forces behind international anti-bribery instruments like the OECD Convention and the UNCAC. These instruments aim to combat the harms of corruption in general—harms that go beyond adverse effects on competition. The preamble to the OECD Convention says that bribery in international business transactions "raises serious moral and political concerns, undermines good governance and economic development, and

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211 S. REP. NO. 95-114, at 4 (1977). The House Report accompanying an earlier version of the FCPA emphasized the fact that many of the corrupt payments uncovered during the SEC's Watergate investigation were made not to compete with foreign companies, but rather to gain an advantage over a competing American firm. *See* H.R. REP. NO. 95-640, at 4, 5 (1977).

distorts international competitive conditions."[212] Similarly, the UNCAC's preamble proclaims that corruption undermines "the institutions and values of democracy, ethical values and justice," and jeopardizes "sustainable development and the rule of law."[213] The OECD Guidelines for Multinational Enterprises further say that bribe solicitation and extortion discourage "attempts by citizens to achieve higher levels of economic, social and environmental welfare" and hinder "efforts to reduce poverty."[214]

Reframing the FCPA's intent to fit within this framework would cause the distinction between bribery and extortion to collapse. Even if they do not provide payers with a competitive advantage, payments made in response to extortion still produce injurious effects on domestic markets. They allow for the perpetuation of corrupt practices and lend support to other forms of crime such as organized crime and money laundering.[215] As a result, a person who fails to resist a demand for payment effectively aids and abets the harms generated by corruption. This is one reason why the OECD Convention prohibits bribes to obtain or retain "business or *other improper advantage*."[216] The "other improper advantage" language was included by the OECD to make it clear that anti-bribery legislation should do more than just prohibit bribes to obtain business per se.

Though they have not issued formal commentary on this issue, federal regulators already appear to agree with the OECD's stance. In the SEC's complaint against Joe Summers, the agency alleged that Summers's payment to secure unpaid receivables was for the purpose of "securing an *improper advantage*."[217] In a related case the DOJ charged Pride International with conspiracy to make payments "in order to obtain or retain business *and to obtain other favorable treatment*."[218] And finally, in a non-prosecution agreement reached with

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212 OECD Anti-Bribery Convention, *supra* note 102, at pmbl.

213 United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/4, at pmbl. (Oct. 31, 2003) [hereinafter UNCAC].

214 ORG. FOR ECON. DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 48 (2008), *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf. This sentiment was not completely foreign at the time the FCPA was enacted. President Carter noted when signing the bill that "[c]orrupt practices between corporations and public officials overseas undermine the integrity and stability of governments." Statement on Signing the Foreign Corrupt Practices and Investment Disclosure Bill, 13 WEEKLY COMP. PRES. DOC. 1909, 1909 (Dec. 20, 1977).

215 *See* UNCAC, *supra* note 213, at pmbl.

216 OECD Anti-Bribery Convention, *supra* note 102, at art. 1, ¶ 4 (emphasis added).

217 Complaint, *supra* note 159, at 6 (emphasis added).

218 SHEARMAN & STERLING LLP, *supra* note 40, at xv.

Noble, the DOJ stated that the FCPA is intended to prohibit payments "for the purpose of obtaining or retaining business *or securing any improper advantage*."[219] None of the highlighted language appears in the FCPA's anti-bribery provisions and is instead a reference to the OECD Convention.

Still, despite the SEC's and DOJ's apparent acceptance of the OECD language, more regulatory guidance would be necessary to clear up a lingering problem. The OECD defines an improper advantage as "something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements."[220] As indicated before, payments in response to economic extortion do not always provide firms with this type of advantage.[221] United States authorities would thus need to clarify their interpretation of "improper advantage" to the extent it differs from the OECD if this language were to be added to the FCPA formally through an amendment or informally through implementing regulations.

b. Normative Fairness Concerns

Another issue that would be raised by prohibiting all payments in response to solicitation and extortion concerns basic fairness. This comes up primarily in cases of extortion, where the payer is described as a victim rather than perpetrator.

Most people agree that it would be unfair to force firms to choose between exposure to legal liability and the safety of their personnel, and thus happily accept the FCPA's unwritten defense in cases of "true extortion" (i.e., threats of harm to person or property).[222] However, fairness becomes hazier when addressing economic extortion. A strong argument can be made that fairness concerns do *not* warrant a defense when threats are made only to existing investments. If we look again at the NATCO enforcement action, the fine imposed in that case was relatively small ($65,000), and the company must have been aware of the risks of doing business in Kazakhstan.[223] If paying bribes or responding to economic extortion is a cost of doing business in a market and companies are still willing to enter, then FCPA enforcement only adds to the costs of doing so. NATCO surely would have adjusted its expected return by taking these costs into account

219 *Id.*
220 OECD Anti-Bribery Convention, *supra* note 102, at art. 1, ¶ 5.
221 *See supra* notes 158–59 and accompanying text.
222 *See supra* note 157 and accompanying text.
223 *See supra* text accompanying notes 72–77.

when making the decision to invest. Allowing the company to escape FCPA enforcement as a "victim" of economic extortion would provide it with an unjustified windfall (to say nothing of bolstering corrupt practices in Eastern Europe).

Though this analysis works for firms, its application to individual defendants is more difficult. Agents and employees who receive threats often generate more sympathy than economically rational firms, and arguably they should not be punished as a result of pressure imposed on them by corrupt foreign officials.[224] On the other hand, the harms caused by bribery and extortion do not depend on how blame is apportioned between payer and payee.

One way to resolve this debate harkens back to the term "corrupt." Does a person act corruptly—or abet corruption—when she fails to resist demand-side pressure? If so, a ban on payments made in response to economic extortion appears fair regardless of whether the payer is an individual or a firm. The trouble with this reasoning is that the meaning of "corruptly" is usually defined in a different way. The FCPA, OECD Convention, and UNCAC all define corruption in terms of paying a foreign official to do something that the official should not do because it would violate her duty.[225] A person would not be acting corruptly under these definitions if she paid a foreign official to do something that would not be an affirmative violation of duty, such as fulfilling a predetermined obligation to provide the payer with something she was already entitled to receive. Penalizing the payer in that situation would appear unfair since she did not act with the required intent.

Still another fairness concern arises because courts in different jurisdictions often apply inconsistent approaches to extortion. In the *Kozeny* case from 2008, defendant Frederick Bourke was charged under the FCPA for paying bribes to Azeri officials to encourage the privatization of the State Oil Company of the Azerbaijan Republic.[226] Bourke claimed that the payments were lawful under Azeri law because bribe payers in that country are relieved of liability if they were the victims of extortion.[227] He therefore sought to invoke the

224 *See* David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371, 1375 (2008).

225 According to the UNCAC, bribery is defined as "[t]he promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official *act or refrain from acting in the exercise of his or her official duties.*" UNCAC, *supra* note 213, at ch. III, art. 15(a) (emphasis added).

226 *See* United States v. Kozeny, 582 F. Supp. 2d 535, 537 (S.D.N.Y. 2008).

227 *See id.*

FCPA's affirmative defense for payments that are lawful under the law of the country where they were made. Judge Scheindlin of Southern District of New York rejected this attempt, however, holding that the FCPA's defense only applies where a foreign law expressly allows a payment, not when it simply provides a defense or exception to liability.[228] Though this case dealt with the FCPA's affirmative defenses, similar issues would arise if the FCPA's scope were to be expanded to clearly prohibit payments in response to economic extortion. Assuming they are subject to multiple jurisdictions, agents in countries like Azerbaijan could find themselves excused under their own laws only to later become exposed to liability under the FCPA.

c. Market Exit

It has already been observed that widespread demand-side corruption discourages firms from doing business in particular markets.[229] If the FCPA is altered to prohibit all bribe payments—including facilitation payments and payments in response to economic extortion—this concern would be amplified to the extent that firms might effectively be prevented from doing any business in some countries.

For example, China is quickly establishing itself as one of the most significant markets for U.S. firms. But because corruption is rampant in China, it is difficult to do business there on lawful terms.[230] China's cultural and social norms of gift giving introduce additional complications. Representatives of Western companies are typically told that they should give gifts to Chinese officials when meeting to discuss business transactions in order to show that a relationship of friendship is intended. This practice, and the relationships that are established through it, are collectively referred to as "*guanxi*."[231] *Guanxi* can result in large amounts of money being spent on gifts and hospitality on an almost daily basis during the life of a particular deal.

However, the relationship between *guanxi* and the FCPA's facilitation payment is ambiguous, which already makes it difficult to

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228 *See id.* at 539.

229 *See supra* text accompanying notes 96–98.

230 China recently ranked in the bottom half on Transparency International's Corruption Perceptions Index, indicating that it is perceived by the public sector to be highly corrupt. *See* TRANSPARENCY INT'L, *supra* note 82, at 3.

231 *See* Warin et al., *supra* note 28, at 37 (citing a story where two entrepreneurs attempting to open a fireworks business in China spent nearly $44,000 on gifts and hospitality for government officials in order to secure necessary permits and licenses).

design compliance measures.[232] If the facilitation payment exception is removed entirely, firms may move from implementing monitoring programs to questioning whether it still makes sense to seek opportunities in China at all. Regulators might ultimately conclude that the social and economic harms of corruption justify the risk of market exit presented by bans on all bribe payments. But if that is the case, it will require a detailed analysis of foreign and domestic economic policy that goes beyond the scope of this Article.

B. Enhanced Regulatory Guidance

As the foregoing discussion suggests, changing the FCPA to either allow all bribes or to clearly prohibit all bribes would not be without controversy. In addition to the potential objections already mentioned, both options would also require fairly drastic changes to the current version of the law.

Other reforms exist that are more measured and would involve working within the FCPA's existing framework. For example, firms would certainly benefit from enhanced regulatory guidance on the enforcement standards that regulators apply in cases of solicitation or extortion. This would mean clarifying the definition of "foreign official," the meaning of "instrumentality" of a foreign government, and the way regulators interpret the FCPA's corrupt intent and business nexus requirements.[233] Common law principles hold that "everything

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232 *See id.* at 63.

233 So far there has been minimal formal regulatory guidance on the FCPA. The SEC issued two short rules in 1979 to prohibit issuers from falsifying books and records or making material misrepresentations regarding books and records. *See* Falsification of Accounting Records, 17 C.F.R. § 240.13b2-1 to -2 (2010). Other regulations were promulgated shortly after the FCPA's enactment to establish a procedure whereby firms can obtain opinion releases from the DOJ in response to particularized inquiries. *See* Westbrook, *supra* note 3, at 563. This system is similar to the SEC no-action letter procedure. *See id.* at 564. It allows firms to request an opinion from the DOJ on proposed transactions before they occur to see if they would lead to a violation of the FCPA's anti-bribery provisions. *See id.* The DOJ Opinion Procedure does not affect a firm's obligations under the FCPA's accounting or internal control provisions. Firms are granted a presumption of compliance with the FCPA if they go forward with a transaction in conformity with the DOJ's opinion. *Id.* at 564 n.429. The DOJ opinion procedure is rarely used, however. *See id.* at 563. Firms are often reluctant to communicate the nature of a particular transaction with the DOJ out of fear that it will expose them to greater levels of FCPA scrutiny and potential investigations down the road. The opinion procedure is also of limited use given how particularized it is. An opinion may help a firm in one transaction but does little to set standards for future activities. This procedure is also of little use to firms that face unexpected bribe demands or extortionate threats. Time is of the essence in those situations, and firms will not have time to wait for a response from the DOJ. Instead, firms need

that is not prohibited is permitted (*nulum crimen sine lege*)."[234] Since the FCPA allows certain types of payments that arise in cases of extortion or solicitation, at a minimum regulators should clarify the dividing lines between lawful and unlawful conduct. Regulatory guidance that accomplishes this goal will lead to greater predictability and, hopefully, more consistency in the application of the statute.

Regulatory guidance also does not necessarily need to be limited to formal rule-making. Regulators should work to promote greater levels of informal dialogue with firms and assist them in developing appropriate responses to bribe demands and extortionate threats. As matters stand, firms have little incentive to approach the DOJ or SEC on these issues because doing so can lead to subsequent enforcement proceedings. If regulators can step back from an adversarial stance and work on fostering dialogue and mutual trust with firms it can transform the nature of a regulatory encounter from one of confrontation to one of cooperation.[235]

This will aid both parties. For firms, hopefully they will begin to gain a better sense of what conduct will bring the most scrutiny, as well as what they can do to lawfully respond to bribe demands. Regulators will gain by getting a thorough view of the challenges that firms face when doing business in certain parts of the world. Because bribery typically takes place in secret, firms on the receiving end of bribe demands are uniquely positioned to provide regulators with an inside look at how corruption occurs. In addition, prosecutors often do not have much experience working in business, much less experience in the particular industries where corruption is most common.[236] Establishing lines of communication with firms will help regulators understand the costs and difficulties associated with the frequent demand-side origins of bribery and extortion.

C. *Demand-Side Intervention*

Improved regulatory guidance should be one part of FCPA reform, but it cannot be a complete solution. The FCPA's supply-sided orientation, while logical in light of jurisdictional concerns, ultimately means that firms will continue to face pressures from bribe-

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guidance that is both standard-setting and forward-looking if they are to be able to design effective and efficient compliance systems. *See id.* at 563–65.

234 SHEARMAN & STERLING LLP, *supra* note 40, at xiv.

235 *See* AYRES & BRAITHWAITE, *supra* note 138, at 34.

236 *See* Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, *in* PROSECUTORS IN THE BOARDROOM 62–63 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

seeking officials unless additional steps are taken. Even if focusing on the supply side provides some levels of deterrence, accepted principles of law enforcement strategy suggest that optimal deterrence can only be accomplished through regulatory initiatives directed to both supply and demand.[237] Put simply, foreign officials who approach a corrupt transaction knowing that they face little chance of being prosecuted will be more inclined to put pressure on firms to pay bribes. And if firms find that limited regulatory interdiction on the demand side increases the frequency of bribe solicitation or extortion, at some point they may feel that they have no choice but to acquiesce to requests for corrupt payments. This is especially true when firms can expect other companies to step into their place and make payments when they refuse to do so, or when they are under such financial pressures that bribery is viewed as the only chance for survival.[238]

A more balanced enforcement policy that confronts both supply *and* demand will help address these concerns by discouraging foreign officials from asking for bribes or from being willing to accept them, thereby reducing the available market for corruption. To its credit, the DOJ appears willing to take steps in this direction. Since the FCPA does not address passive bribery, in some cases the DOJ has turned to alternative methods to target corrupt foreign officials for their role in bribery transactions.

One strategy involves the use of disgorgement proceedings. Following its 2008 FCPA enforcement action against Siemens AG, the DOJ initiated forfeiture proceedings against bank accounts located in Singapore.[239] These accounts were selected because they contained money that had been transmitted through U.S. banks to facilitate the payment of bribes to foreign public officials in Bangladesh.[240] In another example, the DOJ recovered $1.58 million in bribes that were received by a foreign official in Haiti and laundered in the United

237 *See* Rose-Ackerman, *supra* note 99, at 223.

238 These considerations pose the risk of creating a slippery slope. Fundamentally, all criminal laws create an incentive for actors who commit violations to seek to cover their tracks. But in the context of passive bribery, this means that firms which decide to give in to bribe requests for economic reasons will be prone to resorting to financial innovations and "creative" accounting devices to hide their corrupt transactions. *See* Brademas & Heimann, *supra* note 110, at 21 ("Because bribes must be paid in secret, normal systems of checks and balances do not function . . . . A company that decides to bribe must engage in a pattern of deception involving off-the-books transactions and secret bank accounts. The normal control system, including auditors, lawyers, and boards of directors, must be kept in the dark.").

239 *See* Complaint at 1–3, United States v. All Assets Held in the Name of Zasz Trading and Consulting, No. 1:09-cv-00021-JDB (D.D.C. Jan. 8, 2009).

240 *See id.*

States.[241] DOJ officials have pointed to these cases as examples of their willingness to prosecute not only companies and executives who pay bribes, but also those individuals who stand on the other side of the transaction.[242]

The DOJ has also used other criminal laws to target foreign officials involved in bribery schemes. For example, in December 2009 the DOJ indicted Robert Antoine and Jean Rene Duperval, two former employees of the Republic of Haiti's state-owned national telecommunications company (Haiti Teleco).[243] Both Antoine and Duperval allegedly accepted bribes from U.S. telecommunications companies that sought to do business with Haiti Teleco. Since these officials could not be prosecuted under the FCPA for receiving bribes, the DOJ instead charged them with violations of the federal money laundering statute.[244]

It remains to be seen whether these efforts will substantially deter foreign officials from demanding bribes. The examples above aside, disgorgement proceedings and money laundering actions against corrupt foreign officials continue to be rare. Part of the problem is that they suffer from the same diplomatic and jurisdictional concerns that initially led Congress to limit the FCPA's scope to cover active bribery only.

This is where international cooperation has to come into play. Little progress will be made in deterring demand-side corruption if states do not work together to root out and prosecute corrupt foreign officials wherever they happen to be found. The good news is that the past two years have seen an increasing number of countries adopt anti-bribery legislation and more frequent cross-border collaboration between authorities in the United States and other countries. In July 2010, Transparency International noted that the number of countries with active anti-bribery enforcement measures increased from four to

241 *See generally* Indictment, United States v. Esquenazi, No. 09-21010-CR-COOKE (S.D. Fla. Dec. 4 2009) (using all the various consulting fees that were allegedly paid as bribes and subsequently laundered).

242 *See* Mike Koehler, *Holder to Corrupt Foreign Officials—We Are Coming After Your Money*, FCPA PROFESSOR (Nov. 9, 2009, 12:52 PM), http://fcpaprofessor.blogspot.com/2009/11/holder-to-corrupt-foreign-officials-we.html (noting that U.S. Attorney General Eric Holder recently announced a "redoubled commitment on behalf of the [DOJ] to recover" funds obtained by foreign officials through bribery).

243 *See* Indictment, *supra* note 241, at 3, 5, 22.

244 *See* SHEARMAN & STERLING LLP, *supra* note 40, at 42, 95 (noting that other foreign officials in recent FCPA cases have been charged with money laundering offenses based on their role in transporting bribes across state lines).

seven within the past year.[245] The United States has also been one of the most proactive nations in terms of facilitating international cooperation in law enforcement and is well positioned to provide assistance if foreign regulators are open to cooperation. For example, the DOJ's Criminal Division currently has resident advisors in thirty-seven countries, and the FBI has agents in seventy-five foreign cities.[246]

Moreover, both the OECD Convention and the UNCAC include provisions on cooperation, and the United States is a party to eighty bilateral treaties on mutual legal assistance in criminal matters and 133 on extradition.[247] Mutual legal assistance provisions in these instruments typically require countries to provide assistance "to the fullest extent possible under relevant laws, treaties, agreements and arrangements" in connection with investigations and prosecutions that arise under them.[248] This assistance may include conducting searches and seizures, serving court documents, and tracing, freezing, and recovering assets. Mutual legal assistance provisions also help facilitate cooperation and communication between law enforcement agencies in different states, with the goal being that the state best positioned to prosecute a given offender will have all the necessary resources to do so.

The bad news is that is that the success rate of international cooperation remains mixed. Some efforts at cooperation have been received positively, while others have been met with limited or no response. Success in this area will likely depend on the willingness of U.S. officials to open direct lines of communication with foreign governments at the highest level. This in turn will require firms to be open to reporting instances of solicitation or extortion to their own government officials, such as members of the trade department of their local embassy, so that this information can be passed along to the relevant foreign regulators.

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245 *See* Press Release, Org. for Econ. Co-operation & Dev., Efforts to Curb Foreign Bribery Remain Inadequate (July 28, 2010), *available at* http://www.transparency.org/news_room/latest_news/press_releases/2010/2010_07_28_oecd_progress_report.

246 *See* Lanny A. Breuer, Assistant Att'y Gen., Crim. Div., Dep't of Justice, Remarks at Council on Foreign Relations (May 4, 2010), *available at* http://www.cfr.org/international-law/international-criminal-law-enforcement-rule-law-anti-corruption-beyond/p22048. The SEC has agreed to bilateral enforcement memoranda of understanding with twenty foreign securities commissions and is a signatory of the International Organization of Securities Commissions' multilateral memorandum of understanding (IOSCO MMOU). *See* CHARLES DOYLE, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 22–23 (2010).

247 *See* OECD Phase 3 Report, *supra* note 5, at 54.

248 *See* UNCAC, *supra* note 213, at ch. IV, art. 46.

A final component of international cooperation that is especially significant in the fight against solicitation and extortion is the role played by NGOs, trade associations, and other groups. These organizations perform two key functions: monitoring and education. As with treaty regimes that depend on monitoring for success, the primary consequence of a state's failure to prosecute its own corrupt officials will be reputational harm.[249] NGOs are well-positioned to track and publicize information like prosecution rates and enforcement of domestic anti-bribery laws. For their part, trade associations can engage all firms within a given industry on the subject of solicitation and extortion and share that information with the relevant law enforcement authorities.

Depending on the relationships they are able to establish with firms, NGOs may further be able to publicly share the identities of known extortionists or perpetrators of corrupt schemes. Companies will be reluctant to provide this information if their identities will be revealed. However, if they are provided with anonymity, this information will prove extremely useful. Other firms can use it as they consider entering various markets. It will also put public pressure on governments to address demand-side corruption within their borders. Something similar occurred when Transparency International and others harshly criticized the way United Kingdom's regulators handled their investigation into potential acts of bribery by BAE Systems PLC.[250] This criticism eventually prompted the passage of the Bribery Act of 2010 and brought the United Kingdom closer to compliance with the OECD Convention.[251] At the very least, risk-averse bribe-seekers will be less prone to request bribes or make extortionate threats if they feel their names could become exposed.[252]

249 *See* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1246 (2008).

250 The BAE matter generated controversy after the company successfully lobbied the U.K.'s Serious Fraud Office (SFO) to terminate its investigation into potential bribes paid in connection with a trade deal between Great Britain and Saudi Arabia. *See* Karl West, *Campaigners Fury at £ 286M Deal to End Corruption Probe After BAE Systems Admits Using Cash to Win Contracts*, DAILY MAIL ONLINE (Feb. 6, 2010, 9:30 AM), http://www.dailymail.co.uk/news/article-1248832/BAE-Systems-pay-280m-criminal-fines-settling-corruption-charges.html. The U.K.'s High Court found associates of BAE applied illegal political pressure to end the inquiry, but this ruling was subsequently overturned by the House of Lords. *See id.*

251 *See* Adrienne Margolis, *Bribery Bill Brings UK Closer to OECD Rules*, INT'L BAR ASS'N, http://www.ibanet.org/Article/Detail.aspx?ArticleUid=dbfdf0e9-074c-4b79-a7f8-1aed7e44b3b8 (last visited Oct. 14, 2011).

252 *See* WRAGE, *supra* note 66, at 127.

Conclusion

Theodore Sorensen, former Special Counsel to President John F. Kennedy, once remarked that "corporate bribery abroad is not the simple, safe issue it seems at first blush."[253] This is particularly true in light of the challenges that transnational firms face when confronted with solicitations for bribes and extortionate threats. Current FCPA enforcement activities clearly alert firms that these types of demands are no excuse for paying bribes. At the same time, unique practical complexities associated with international commerce and the aggressive approach that federal regulators have taken when interpreting the FCPA make designing programs to resist solicitation and extortion increasingly difficult.

To address these concerns, this Article urges federal regulators to provide enhanced regulatory guidance so that firms will have a better understanding of the FCPA's application in cases of solicitation and extortion. It further proposes that regulators in the United States and other countries commit to fighting corruption on the demand side by directly targeting foreign officials who solicit and receive bribes. This will require meaningful and consistent international cooperation, as well as a commitment on the part of NGOs and other groups to monitor progress and educate firms and governments on the issues surrounding solicitation and extortion.

Deterring foreign officials from demanding or accepting bribes is important because it will reduce the incidence of corruption. It should also help firms implement efficient compliance programs that will enable their agents and employees to spend less time worrying about how to respond to bribe requests and more time on legitimate, value-enhancing transactions.

253 Sorensen, *supra* note 170, at 719.