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The Corruption Crackdown: Providing Private Plaintiffs a Direct Role in FCPA Enforcement

Kristen Polanski

Michigan State University College of Law

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**The Corruption Crackdown: Providing Private
Plaintiffs a Direct Role in FCPA Enforcement**

by

Kristen Polanski

Submitted in partial fulfillment of the requirements of the King Scholar Program

Michigan State University College of Law

under the direction of Professor Bruce W. Bean

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Introduction—The Corruption Crackdown

Corruption is a world-wide issue¹, and recently it has been receiving world-wide attention.² Realistically, the issue of corruption may be best described as a “you know it when you see it” phenomenon.³ Although a universal definition of corruption most certainly does not exist,⁴ one suggested definition of the term provides that at the very least, “corruption includes the misuse of public office for personal gain, bribery, extortion, and other misappropriations of public and private assets.”⁵ Recognizing the difficulty in defining corruption, the World Bank developed interpretive guidelines to assist the analysis.⁶ The guidelines highlight the expansive scope and the inherent vagueness that encompasses the issue by distinguishing between “corrupt practices,” “fraudulent practices,” “coercive practices,” “collusive practices,” and “obstructive practices.”⁷

¹ Transparency International, Corruption Perception Index 2009, *available at* http://www.transparency.org/policy_research/surveys_indices/cpi/2009 (last visited Apr. 25, 2010) [hereinafter Corruption Perception Index 2009]; MARK PIETH ET AL., THE OECD CONVENTION ON BRIBERY: A COMMENTARY (2007).

² TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT (2009), *available at* http://www.transparency.org/publications/publications/global_corruption_report/gcr2009 (“The Global Corruption Report 2009 discusses the most promising tools to tackle corruption in business, identifies pressing areas for reform and outlines how companies, governments, investors, consumers and other stakeholders can contribute to raising corporate integrity and meeting the challenges that corruption poses to sustainable economic growth and development.”) [hereinafter GLOBAL CORRUPTION REPORT 2009]; The World Bank, Public Sector Governance, Anticorruption, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPUBLICSECTORANDGOVERNANCE/EXTANTICORRUPTION/0,,menuPK:384461~pagePK:149018~piPK:149093~theSitePK:384455,00.html> (last visited Apr. 22, 2010).

³ COUNCIL OF EUROPE, EXPLANATORY REPORT ON THE CRIMINAL LAW CONVENTION ON CORRUPTION, GMC (98) 40 (Dec. 1, 1998), *available at* <http://www.justice.gov/criminal/fraud/fcpa/docs/explainrpt.pdf> (explaining that “[e]ven if no common definition has yet been found by the international community to describe corruption as such, everyone seems at least to agree that certain political, social or commercial practices are corrupt”) [hereinafter COE EXPLANATORY REPORT].

⁴ This is partially a result of the significant cultural differences that exist among the world’s citizens and nations. COE EXPLANATORY REPORT, *supra* note 3.

⁵ Ethan S. Burger & Mary S. Holland, *Why the Private Sector is Likely to Lead the Next Stage in the Global Fight Against Corruption*, 30 FORDHAM INT’L L.J. 45, 45-46 (2006).

⁶ World Bank, Definitions and Interpretive Guidelines, Sept. 21, 2009, [http://www.ifc.org/ifcext/anticorruption.nsf/AttachmentsByTitle/Definitions_Interpretive_Guidelines_Jan_2007/\\$FILE/Definitions_Interpretive_Guidelines.pdf](http://www.ifc.org/ifcext/anticorruption.nsf/AttachmentsByTitle/Definitions_Interpretive_Guidelines_Jan_2007/$FILE/Definitions_Interpretive_Guidelines.pdf).

⁷ *Id.*

Under the guidelines, “a ‘corrupt practice’ is the offering, giving, receiving or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party.”⁸

In the United States of America (USA), the corruption crackdown appears to be much more than a mere trend, and the Foreign Corrupt Practices Act (FCPA)⁹ is the American statute that is fueling the development.¹⁰ From 1978 to 2000, the Securities Exchange Commission (SEC) and the Department of Justice (DOJ) averaged only three prosecutions a year under the Act.¹¹ 2007 was described as a “watershed year for FCPA enforcement;”¹² however, since then, the frequency of federal prosecutions under the Act has only grown.¹³ As explained in Gibson Dunn’s 2009 Year-End FCPA Update, “[i]n what is becoming nearly an annual event, 2009 once again saw record levels of FCPA enforcement actions brought by [the] DOJ and the SEC.”¹⁴ The report called it “clichéd to continuously hype... the enduring explosion of FCPA prosecutions.”¹⁵ Clichéd or not, the increases in the number of enforcement actions brought by the SEC and DOJ, the increasing magnitude of the penalties imposed, the prosecution of individuals, CEO’s and board members in addition to their corporations, the prosecution of domestic and foreign intermediaries,

⁸ *Id.*

⁹ The Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78dd-3, 78ff (1998).

¹⁰ Christopher M. Matthews, *Mendelsohn and Scarboro Spread the FCPA Gospel*, MAIN JUSTICE, Mar. 23, 2010, [http://www.mainjustice.com/2010/03/23/mendelsohn-and-scarboro-spread-the-fcpa-gospel/\(summarizing and compiling statements made by DOJ and SEC officials regarding the recent FCPA enforcement trend\)](http://www.mainjustice.com/2010/03/23/mendelsohn-and-scarboro-spread-the-fcpa-gospel/(summarizing%20and%20compiling%20statements%20made%20by%20DOJ%20and%20SEC%20officials%20regarding%20the%20recent%20FCPA%20enforcement%20trend)).

¹¹ Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1450 (2008); Eugene R. Erbstoesser et al., *The FCPA and Analogous Foreign Anti-Bribery Laws—Overview, Recent Developments, and Acquisition Due Diligence*, 2 CAP. MARKETS L.J. 381, 386 (2007).

¹² Fenwick & West, *The Foreign Corrupt Practices Act: The Next Corporate Scandal?*, Jan. 28, 2008 http://www.fenwick.com/docstore/Publications/Litigation/sec/Sec_Litigation_Alert_01-28-08.pdf.

¹³ Gibson Dunn, 2009 Year-End FCPA Update, Jan. 4, 2010, <http://www.gibsondunn.com/Publications/Pages/2009Year-EndFCPAUpdate.aspx> [hereinafter 2009 FCPA Update]. The report does not contain page numbers; therefore, subsequent footnotes will reference the subheading of the specific section referenced in the report.

¹⁴ *Id.* at 2009 Year-End Figures.

¹⁵ *Id.*

and the overall “aggressive new enforcement theories,”¹⁶ are significant.¹⁷ The FCPA’s new attention is undoubtedly creating a multitude of questions for corporations and directors on how to avoid FCPA liability.¹⁸

In addition to the domestic crackdown, “the world’s international organizations ha[ve] moved dramatically to established strong policies in favor of transparency in government and against corruption and bribery.”¹⁹ Anti-corruption efforts are increasingly becoming global.²⁰ For example, member states to the Organization of American States (OAS)²¹ signed the Inter-American Convention Against Corruption treaty (OAS Convention), which entered into force on March 6, 1997.²² Member countries of the Organization for Economic Cooperation and Development (OECD)²³ signed the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), which entered into force on February 15, 1999²⁴. The Council of Europe (COE)²⁵

¹⁶ Allan Verman Yap Ong, *The Rise of the Prosecutorial Efforts in Foreign Corruption: Lessons Learned from Recent FCPA Cases* (Mar. 24, 2010) (Colum. J. Asian L. working paper series, available at <http://ssrn.com/abstract=1577444>) [hereinafter Yap Ong].

¹⁷ 2009 FCPA Update, *supra* note 13, at 2009’s Top Six Developments in FCPA Enforcement; Yap Ong, *supra*, note 16; Jeffrey Cramer, *Commentary: The FCPA Game Has Changed: Trends in Enforcement*, MAIN JUSTICE, Apr. 23, 2010, <http://www.mainjustice.com/2010/04/23/commentary-the-fcpa-game-has-changed-trends-in-enforcement/>.

¹⁸ See generally 2009 FCPA Update, *supra* note 13.

¹⁹ UHY Advisors, *International Drive to Eliminate Corruption*, <http://www.uhyadvisors-us.com/uhy/Default.aspx?tabid=391> (last visited Mar. 31, 2010).

²⁰ David E. Dworsky, *Foreign Corrupt Practices Act*, 46 AM. CRIM. L. REV. 671, 690-694 (2009).

²¹ The OAS includes 33 member nations all located in the Western Hemisphere, excluding Cuba. Organization of American States, <http://www.oas.org> (last visited Apr. 12, 2010).

²² Organization of American States, *Inter-American Convention Against Corruption*, Mar. 29, 1996, 35 I.L.M. 724, available at <http://www.oas.org/juridico/english/treaties/b-58.html> [hereinafter OAS Convention].

²³ The OECD has 30 members and 8 non-member observers. Organisation for Economic Co-operation and Development, <http://www.oecd.org> (last visited Apr. 12, 2010).

²⁴ Organization for Economic Cooperation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Dec. 18, 1997, 37 I.L.M. 1, available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf> [hereinafter OECD Convention].

²⁵ The Council of Europe includes 47 member states and 5 observer nations. The Council of Europe, <http://www.coe.int/> (last visited Apr. 12, 2010).

enacted the Criminal Law Convention on Corruption (COE Convention) on July 1, 2002.²⁶ Additionally, in 2005, the United Nations General Assembly signed the United Nations Convention Against Corruption (U.N. Convention).²⁷ Similarly, the Member States of the African Union²⁸ enacted the African Union Convention on Preventing and Combating Corruption in August, 2006.²⁹ Finally, the World Bank, through its Department of Institutional Integrity and as part of its Worldwide Governance Indicators (WGI) project, released governance indicators, beginning in 1996, for two hundred and twelve countries and territories in six categories, including: voice and accountability, political stability and absence of violence, government effectiveness, regulatory quality, rule of law, and control of corruption.³⁰ Although the effectiveness of these specific policies and treaties are debatable,³¹ they are nonetheless developing greater significance in the international business marketplace.³² Additionally, since these conventions are not self-executing, meaning that they call for member states to enact domestic laws in accordance with the guidelines established under the conventions, the benefits flowing from such international agreements will take time to accrue. Also, even once member countries enact such laws, in light of the thirty year time period that passed between the FCPA being enacted

²⁶ Council of Europe, Criminal Law Convention on Corruption, Jan. 27, 1997, 38 I.L.M. 505, *available at* <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=173&CM=8&DF=10/11/2007&CL=ENG> [hereinafter COE Convention].

²⁷ United Nations Convention Against Corruption, Dec. 11, 2003, 43 I.L.M. 37, *available at* http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf [hereinafter U.N. Convention].

²⁸ The African Union has fifty three members. African Union, <http://www.africa-union.org/> (last visited Apr. 12, 2010).

²⁹ African Union Convention on Preventing and Combating Corruption, Adopted by the 2nd Ordinary Session of the Assembly of the Union, July 11, 2003, *available at* <http://www.africa-union.org/root/au/Documents/Treaties/Text/Convention%20on%20Combating%20Corruption.pdf>.

³⁰ The Worldwide Governance Indicators (WGI) project, <http://info.worldbank.org/governance/wgi/index.asp> (last visited Mar. 12, 2010).

³¹ *See generally* Burger, *supra* note 5, at 52 (suggesting that perhaps as governments realize that other governments are taking their treaty commitments seriously, they will be more willing to investigate and prosecute bribery); Dworsky, *supra* note 20, at 699.

³² *International Drive to Eliminate Corruption*, *supra* note 19.

in the USA and it being enforced with any real frequency,³³ it will likely take time for the developing foreign laws to be seriously enforced as well.³⁴

In 2008, Ernst and Young sought to better understand “how companies are managing the risks associated with bribery of government officials outside their home countries” by questioning almost 1200 major companies from thirty three countries.³⁵ According to Ernst and Young’s 2008 Corruption or Compliance—Weighing the Costs, 10th Global Fraud Survey, only one third of the survey’s respondents claimed some awareness of the FCPA and fifty eight percent of senior in-house counsel answered that they were not familiar with the Act.³⁶ Considering the recent corruption crackdown and the international media attention it is receiving, more respondents would arguably be familiar with the Act today. However, for any number of reasons, despite the recent crackdown, the prevalence of corruption does not appear to be diminishing.³⁷ Historically, corruption is not a new phenomenon,³⁸ and unfortunately, “[a]berrational behavior is inevitable in organizations, large and small.”³⁹ As provided in the Ernst and Young survey, one fourth of respondents stated that their company “had experienced an incident of bribery and corruption in the past two years,” twenty three percent “knew that someone in their company had been solicited to pay a bribe to win or retain business,” eighteen percent “knew that their company had lost

³³ See generally, Bruce Carton, *FCPA Enforcement in 2010: Prepare for Blastoff*, SECURITIES DOCKET, Mar. 10, 2010, <http://www.securitiesdocket.com/2010/03/10/fcpa-enforcement-in-2010-prepare-for-blastoff/>.

³⁴ Dworsky, *supra* note 20, at 699.

³⁵ 2008 Ernst and Young, Corruption or Compliance—Weighing the Costs, 10th Global Fraud Survey, available at [http://www.ey.com/Publication/vwLUAssets/FIDS_10th_Global_Fraud_Survey/\\$FILE/Corruption_or_compliance_weighing_the_costs.pdf](http://www.ey.com/Publication/vwLUAssets/FIDS_10th_Global_Fraud_Survey/$FILE/Corruption_or_compliance_weighing_the_costs.pdf). (last visited Apr. 12, 2010) [hereinafter Global Fraud Survey]. Survey respondents included CFO’s, senior internal audit directors, CEO’s, COO’s, heads of legal, compliance and strategy, audit committee directors and other board members. *Id.*

³⁶ *Id.*

³⁷ *Id.*; see also, Burger, *supra* note 5, at 46 (suggesting that “despite anticorruption norms and global attention... corruption thrives; and globalization has created vast new opportunities for it”).

³⁸ Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 J. OF ECON. LIT. 1320, 1320 (1997) (describing corruption as an ancient problem); J.T. NOONAN, BRIBES (1984).

³⁹ Global Fraud Survey, *supra* note 35, at 1.

business to a competitor who had paid a bribe,” and most notably, more than one third “felt that corrupt business practices were getting worse.”⁴⁰

In conjunction with the FCPA’s new attention, the Act is receiving increased, though not necessarily new,⁴¹ criticism. One realm of criticism focuses on the generally ineffective enforcement of corruption, specifically international bribery, through the Act.⁴² Many academics have made suggestions on how to remedy the reality of this ineffective enforcement.⁴³ This note will analyze some of these suggestions before concluding that the FCPA should be amended to include a broad private right of action. Part I highlights the ongoing battle against corruption. Part II introduces the FCPA. Part III discusses challenges currently hindering effective enforcement under the FCPA. Part IV establishes the need for a private right of action under the Act. Finally, Part V provides a remedy for improving enforcement. This note does not in any way attempt to argue that by amending the Act, either corruption or bribery will be completely eradicated. Furthermore, this note recognizes the serious implications private plaintiffs might suffer from bringing FCPA claims. As a result, this note acknowledges that merely providing a private right by no means guarantees that private plaintiffs will bring FCPA claims with any predictable frequency. Corruption and international bribery is an unsolvable problem; realistically, the goal must be to suppress and control corruption by creating greater deterrents and access to the judicial system, not eliminate it completely.

⁴⁰ *Id.* at 2.

⁴¹ *See infra* Part V.B.

⁴² *See infra* Parts III and IV.

⁴³ *See infra* Part V.B..

I. The Battle Against Corruption

Corruption is not an issue that only affects select nations, industries, or peoples,⁴⁴ and although extremely difficult to establish with any sort of mathematical certainty, in today's society, the prevalence of corruption seems only to be expanding.⁴⁵ In fact, it is a popular assertion that "[d]espite anticorruption norms and global attention... corruption thrives; and globalization has created vast new opportunities for it." Bribery is but one facet of corruption; however, it appears to be a costly one. The World Bank estimates that over one trillion dollars are paid world-wide in bribes each year. Bribery has been described as a "widespread phenomenon in international business transactions... which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions."⁴⁶

A. Two Sides of Every Bribe

To begin with, it must be recognized that there are two parties and two sides to any bribe. These two sides are referred to as the supply side and the demand side.⁴⁷ "The demand side of bribery refers to demands or requests for bribes by public officials; the supply side of bribery refers to offers of bribes to public officials. A corrupt transaction can be initiated in either way."⁴⁸ Taking into account issues of extraterritorialism, domestic laws and international agreements frequently only support prosecution of the supply side of a bribe, despite the possibility that "most bribes are initiated by demand."⁴⁹ If it is in fact true that most bribes are initiated by public officials, then it provides some support for the conclusion that the current anti-bribery statutes,

⁴⁴ OAS Convention, *supra* note 22, pmb1.

⁴⁵ COE EXPLANATORY REPORT, *supra* note 3, intro.

⁴⁶ OECD Convention, *supra* note 24, pmb1.

⁴⁷ Steven R. Salbu, *Information Technology in the War Against International Bribery and Corruption: The Next Frontier of Institutional Reform*, 38 HARV. J. ON LEGIS. 67, 69 n. 13 (2001).

⁴⁸ *Id.*

⁴⁹ *Id.*; see e.g., *United States v. Castle*, 925 F.2d 831 (5th Cir. Tex. 1991) (holding that foreign officials, who were the recipients of bribes, could not be prosecuted for conspiring to commit bribery under the FCPA).

including the FCPA, are an inefficient means of prohibiting corrupt business practices because they are “poorly matched to the underlying realities of corrupt transactions.”⁵⁰

B. The Need for Multi-layered Policies

Because corruption is a multi-faceted dilemma,⁵¹ it has been suggested that the only way to effectively limit corruption is by utilizing “multi-layered policies”⁵² or measures.⁵³ These include: “prevention,” “enforcement,” “State building,” and “instilling cultural values that will reinforce prevention, enforcement, and State building.”⁵⁴ Prevention incorporates “the enactment and implementation of legislation and administrative regulations that choke off corrupt practices.”⁵⁵ Enforcement is needed in order to “deter future misconduct by investigating and prosecuting existing corruption.”⁵⁶ State building “consists of institutional reforms designed to create a society of laws” and the building of “a transparent, accountable, and durable legal, economic, and political foundation.”⁵⁷ Last, the cultural dimension “involves transmitting positive values and norms” into the business marketplace and serves to strengthen and support the other three policies.⁵⁸

C. The USA’s Fight Against Corruption

Internationally, the USA is a member state to the OAS and signed the OAS Convention on March 19, 1996.⁵⁹ The Senate’s advice and consent was given July 27, 2000 and formal

⁵⁰ Salbu, *supra* note 47, at 102.

⁵¹ Ben W. Heineman, Jr. & Fritz Heimann, *The Long War Against Corruption*, 85 FOREIGN AFF., May/June 2006, at 75, 76, available at http://www.viet-studies.info/kinhte/War_against_Corruption_FA.pdf [hereinafter *The Long War*].

⁵² Burger, *supra* note 5, at 50.

⁵³ *The Long War*, *supra* note 51, at 2.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ OAS convention, *supra* note 22.

ratification is pending.⁶⁰ In addition, the USA is a member state to the OECD.⁶¹ The USA signed the OECD's Convention December 17, 1997, the Senate's advice and consent was given July 31, 1998, and formal ratification occurred December 8, 1998.⁶² Last, the USA, as a non-member state of the COE,⁶³ signed the COE Convention on October 10, 2000.⁶⁴

Moreover, thirty-seven American states⁶⁵ have enacted laws prohibiting bribery in the commercial context.⁶⁶ Although the laws' specifics vary from state to state,⁶⁷ to the extent that these laws "encompass the bribery of any agent of a principal or an employee of an employer," foreign bribery may be prosecuted under such laws so long as "the foreign official is viewed as an agent or employee of his government."⁶⁸ These state laws may also form the basis of prosecution under federal laws dealing with corruption.⁶⁹

⁶⁰ Senate Resolution Advising and Consenting to the Treaty on Inter-American Convention Against Corruption, S. TREATY DOC. NO 105-39 (2000), *as reprinted in* 146 CONG. REC. S 7809, D 840, *available at* <http://www.justice.gov/criminal/fraud/fcpa/docs/senate-resolute.pdf>.

⁶¹ OECD Convention, *supra* note 24.

⁶² See Department of Justice, FCPA, International Agreements Relating to Bribery of Foreign Officials, OECD, *available at* <http://www.justice.gov/criminal/fraud/fcpa/intlagree/> (last visited Apr. 25, 2010); Response of the United States Questions Concerning Phase 2, at A.F.1, A.F.2., <http://www.justice.gov/criminal/fraud/fcpa/docs/response1.pdf> (last visited May 5, 2010) [hereinafter USA OECD Phase 2 Response].

⁶³ Council of Europe, Criminal Law Convention on Corruption, Chart of renewal of declarations or reservations, *available at* <http://conventions.coe.int/Treaty/EN/treaties/html/173-1.htm#ART38> (last visited May 5, 2010).

⁶⁴ See Department of Justice, FCPA, International Agreements Relating to Bribery of Foreign Officials, COE, *available at* <http://www.justice.gov/criminal/fraud/fcpa/intlagree/> (last visited Apr. 25, 2010).

⁶⁵ See Ala. Code §§ 13A-11-120, -121; Alaska Stat. §§ 11.46.660 - .670; Ariz. Rev. Stat. Ann. §13-2605; Cal. Penal Code §641.3; Colo. Rev. Stat. § 18-5-401; Conn. Gen. Stat. Ann. §§53a-160, -161; Del. Code Ann. tit. 11, §§ 881-882; Fla. Stat. Ann. §§ 838.15-.16; Haw. Rev. Stat. Ann. § 709-880; Ill. Com. Stat. Ann., ch. 720, §§ 5/29A-1, A-2; Iowa Code Ann. § 722.10; Kan. Stat. Ann. §21-4405; Ky. Rev. Stat. Ann. §§ 518.020 -.030; La. Rev. Stat. Ann. §14:73; Me. Rev. Stat. Ann. tit. 17-A, § 904; Mass. Ann. Laws ch. 271, § 39; Mich. Comp. Laws Ann. § 750.125; Minn. Stat. Ann. §609.86; Miss. Code Ann. § 97-9-10; Mo. Ann. Stat. §570.150; Neb. Rev. Stat. § 28-613; Nev. Rev. Stat. Ann. § 207.295; N.H. Rev. Stat. Ann. § 638:7; N.J. Stat. Ann. § 2C:21-10; N.Y. Penal Law §§180.00 - .08; N.C. Gen. Stat. § 14-353; N.D. Cent. Code § 12.1-12-08; 18 Pa. Cons. Stat. Ann. §4108; R.I. Gen. Laws §§ 11-7-3, -4; S.C. Code Ann. § 16-17-540; S.D. Codified Laws Ann. §§ 22-43-1, -2; Tex. Penal Code Ann. § 32.43; Utah Code Ann. § 76-6-508; Va. Code Ann. § 18.2-444; Wash.Rev. Code Ann. §9A.68.060; Wis. Stat. Ann. § 134.05.

⁶⁶ USA OECD Phase 2 Response, *supra* note 62, at B.1.2.

⁶⁷ *Id.*; Norton Rose Group, Business ethics and anti-corruption, *An introduction to the law of bribery and corruption*, <http://www.nortonrose.com/expertise/businessethicsandanticorruption/default18514.aspx?lang=en-gb> (last visited May 4, 2010).

⁶⁸ Norton Rose Group, *supra* note 67.

⁶⁹ See United States v. Mead, Cr. 98-240-01 (D.N.J. 1998)(NJ state law served as basis for a federal Travel Act prosecution).

Additionally, international bribery may serve as the predicate act for a civil Racketeer Influenced and Corrupt Organizations Act⁷⁰ (RICO) action⁷¹ and to the Money Laundering Control Act.⁷² Moreover, the Travel Act⁷³ and the federal mail⁷⁴ and wire fraud statutes⁷⁵ may be implicated by criminal corruption investigations.⁷⁶ The primary federal anti-bribery statute is the FCPA, which the remainder of this note will focus on.

II. The FCPA

A. History

As already explained, the FCPA is the federal statute that is fueling the current corruption crackdown. In the early 1970's, SEC investigations, assisted by private disclosures, shed public light on the magnitude of corrupt business practices American companies engaged in both domestically and internationally.⁷⁷ Congress determined that international bribery was a serious detriment to both domestic markets and foreign relations.⁷⁸ Beginning in 1976, bills were introduced to make bribery of foreign public officials illegal.⁷⁹ The original FCPA was introduced by Senators William Proxmire and Harrison A. Williamson on January 18, 1977, and passed by both the House and Senate in December, 1977.⁸⁰ The Act's stated purpose was to end "the bribery

⁷⁰ 18 U.S.C. §§ 1961- 68 (2000).

⁷¹ *Dooley v. United Technologies Corp.*, 803 F. Supp. 428, 440 (D.D.C. 1992) (allowing a plaintiff's FCPA violation claim to serve as a predicate for his civil RICO action).

⁷² 18 U.S.C. §§ 1956, 1961-1964 (1988); USA OECD Phase 2 Response, *supra* note 62, at B.1.2.

⁷³ 18 U.S.C. § 1952 (1988).

⁷⁴ 18 U.S.C. § 1341(2002).

⁷⁵ 18 U.S.C. § 1343(2002).

⁷⁶ *Norton Rose Group*, *supra* note 67.

⁷⁷ Securities Exchange Act Release No. 13185 (Jan. 19, 1977); S. REP. NO. 95-114 (1977), *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 4098 [hereinafter 1976 FCPA Senate Report]; Veronica Ann Deberardine, *Foreign Corrupt Practices: Creating an Exception to the Act of State Doctrine*, 34 AM. U.L. REV. 203, 220-22 (1984).

⁷⁸ 1976 FCPA Senate Report, *supra* note 77.

⁷⁹ *Id.*

⁸⁰ *Id.*

of foreign officials and to restore public confidences in the integrity of the American business system.”⁸¹

The FCPA was first amended in 1988.⁸² The amendments raised the penalties for violating the Act, attempted to clarify the knowledge requirement, and added affirmative defenses and an exception for grease or facilitating payments.⁸³ The 1998 amendments were necessary after the member states to the OECD, including the USA, signed the OECD Convention.⁸⁴ Pursuant to the OECD Convention, the 1998 amendments expanded the FCPA’s jurisdictional reach to include non-American entities and persons acting within the USA, and to American entities and persons acting outside the USA.⁸⁵ Prior to the 1998 amendments, a primary complaint of the FCPA was that it placed American companies at a competitive disadvantage because it held them to a higher ethical standard and hindered their ability to effectively compete for international business due to the threat of federal prosecution.⁸⁶ The 1998 amendments were a response to this criticism, and arguably helped “level the playing field” for American companies who were competing in the globalized economy.⁸⁷

⁸¹ United States Department of Justice, *Lay Person’s Guide to the FCPA Statute*, June 2001, <http://www.justice.gov/criminal/fraud/docs/dojdocb.html> [*hereinafter* Lay-Person’s Guide].

⁸² *Id.*; Trade and Competitiveness Act, Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 1988 H.R. 4848 (1988) [*hereinafter* 1988 FCPA Amendment].

⁸³ 1988 FCPA Amendment, *supra* note 82; Matt A Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J ON LEGIS. 425 (2009). Grease or facilitating payments are payments made “to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.” 15 U.S.C. § 78dd-1.

⁸⁴ OECD Convention, *supra* note 21; H.R. REP. NO. 105-802 (1998) (House Commerce Committee to accompany H.R. 4353) [*hereinafter* H.R. REP. NO. 802].

⁸⁵ H.R. REP. NO. 802, *supra* note 84, at 18-20; Lay-Person’s Guide, *supra* note 81; 15 U.S.C. §78dd-1 – dd-3.

⁸⁶ H.R. REP. NO. 802, *supra* note 84; Paul V. Gerlach, Associate Director, Division of Enforcement, U.S. Securities and Exchange Commission, Testimony concerning H.R. 4353, The International Anti-Bribery and Fair Competition Act of 1998 before the Subcommittee on Finance and Hazardous Materials, United States House of Representatives (Sept. 10, 1998), 1998 WL 778822 (F.D.C.H.) [*hereinafter* Gerlach Testimony].

⁸⁷ H.R. REP. NO. 802, *supra* note 84; Gerlach Testimony, *supra* note 86.

B. Provisions

There are two main provisions of the act: the anti-bribery and accounting provisions.⁸⁸ In general, the anti-bribery provisions “prohibit companies and individuals from paying or promising to pay foreign officials anything of value with the corrupt intent of obtaining or retaining business.”⁸⁹ According to the DOJ, “there are five elements which must be met to constitute a violation of the Act.”⁹⁰ First is the “who” element; the FCPA applies to “issuers,” “domestic concerns,” and “any person other than issuers or domestic concerns” who corruptly uses USA mails or instrumentalities of interstate commerce to bribe foreign officials.⁹¹ Second is the “corrupt intent” element; it must be intended that the payment “induce the recipient to misuse his official position.”⁹² The third element is the “payment” requirement, which has been interpreted to mean “money or anything of value,” with “anything of value” being very broadly interpreted.⁹³ Fourth is the “recipient” element; under the Act either the direct or indirect recipient of the bribe must a foreign official, which is also broadly defined.⁹⁴ The final element is the “business purpose test.”⁹⁵ “Payments made in order to assist the firm in obtaining or retaining business for or with, or directing business to, any person” are prohibited.⁹⁶ Like other terms, the DOJ interprets “obtaining or retaining business” broadly.⁹⁷

⁸⁸ 15 U.S.C. §§ 78m, 78dd-1 – 78dd-3, 78ff; Lay-Person’s Guide, *supra* note 81.

⁸⁹ Lay-Person’s Guide, *supra* note 81. See also the anti-bribery provisions at 15 U.S.C. §§78dd-1 – dd-3 (1998).

⁹⁰ Lay-Person’s Guide, *supra* note 81.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*; see e.g., *Kay v. United States*, 129 S.Ct. 42 (2008), *reh’g denied*, 2008 WL 5046518 (2008).

⁹⁴ Lay-Person’s Guide, *supra* note 81.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*; Kenneth Winer & Gregory Husisian, *Recent Opinion Sheds Light on the Relevance Of Due Diligence to the FCPA’s ‘Knowledge’ Requirement*, 4 CORP. ACCOUNTABILITY REP., Nov. 13, 2009, http://www.foley.com/files/tbl_s31Publications/FileUpload137/6597/CorporateAccount2009.pdf.

The accounting provisions were enacted as an amendment to section 13(b) of the Securities Exchange Act of 1934.⁹⁸ The provisions impose duties on “issuers,” defined as “a corporation that has issued securities that have been registered in the United States or who is required to file periodic reports with the SEC,”⁹⁹ to keep books and records that accurately reflect transactions and dispositions of assets and to develop and maintain a reliable internal system of accounting.¹⁰⁰

C. Enforcement

Congress designated enforcement of the FCPA to both the SEC and the DOJ.¹⁰¹ The joint enforcement responsibility reflected Congress’s recognition that granting sole enforcement to the DOJ would cause unnecessary duplication since the SEC already possessed investigative authority under the federal securities laws, had particular expertise and success in investigating violations of the securities laws, and maintained a politically independent position from the DOJ.¹⁰² The DOJ is responsible for all criminal enforcement, under both the accounting and anti-bribery provisions, and for civil enforcement of the anti-bribery provisions.¹⁰³ The SEC is responsible for civil enforcement of the accounting provisions.¹⁰⁴

There is no express private right of action included in the Act,¹⁰⁵ and it has been judicially determined that there is also no implied private right of action;¹⁰⁶ however, there was considerable

⁹⁸ Securities Exchange Act of 1934 § 13(b), 15 U.S.C. § 78m(b) (1998).

⁹⁹ Lay-Person’s Guide, *supra* note 81.

¹⁰⁰ 15 U.S.C. § 78q (1982).

¹⁰¹ 1976 FCPA Senate Report, *supra* note 77.

¹⁰² *Id.*

¹⁰³ Lay-person’s Guide, *supra* note 81.

¹⁰⁴ *Id.*

¹⁰⁵ 15 U.S.C. §§ 78m, 78dd-1 – dd-3, 78ff.

¹⁰⁶ *See, e.g.,* Lamb v. Phillip Morris, Inc., 915 F.2d 1024 (6th Cir. 1990), *cert. denied*, 498 U.S. 1086 (1991); Citicorp Int’l Trading Co. v. Western Oil & Refining Co., 771 F. Supp. 600 (S.D.N.Y. 1991).

congressional debate over whether there should be such a right in the Act's legislative history.¹⁰⁷ As originally drafted, the House's version of the FCPA included a private right of action.¹⁰⁸ Additionally, after the Act was enacted, the SEC General Counsel stated that the Act did in fact imply a private right of action.¹⁰⁹ Despite this interesting legislative history, private litigants currently are not afforded a private right of action. Therefore, sole enforcement authority rests with the DOJ and SEC. In light of this, private parties harmed by FCPA prohibited conduct have had to resort to alternative means in order to receive a remedy for the alleged FCPA violations.¹¹⁰

III. FCPA Enforcement Challenges

A logical thought after reading of the recent corruption crackdown would be that bribery is being eradicated and that the fight to develop or return integrity to the business world is being won. However, this is not the case.¹¹¹ The argument has been made that although the number of FCPA prosecutions is on the increase, when this value is compared with the underlying sum of bribes being effectuated world-wide, companies and individuals are actually only being held responsible for a very small percentage of bribes.¹¹² To some, for example those that believe that paying bribes or making other "gentlemen-type" agreements is standard business practice,¹¹³ this assertion that corruption is in fact more prevalent than ever comes as no surprise. To others, such

¹⁰⁷ S.R. 1031, 94th Cong. (2d Sess. 1976); H.R. 640, 95th Cong. (1st Sess. 1977) (providing that Congress indicated that it intended courts to imply a private cause of action under the Act).

¹⁰⁸ Lamb, 915 F.2d. at 1025.

¹⁰⁹ Opinion of the General Counsel on the Existence of a Private Right of Action Under the Foreign Corrupt Practices Act of 1977, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) P 81,071, at 80,806 (Sept. 6, 1976).

¹¹⁰ See *infra* Part IV.A.

¹¹¹ Transparency International, Global Corruption Barometer 2009, <http://www.transparency.org/publications/publications/gcb2009> (explaining that the Barometer "presents the main findings of a public opinion survey that explores the general public's views of corruption, as well as experiences of bribery around the world. It assesses the extent to which key institutions and public services are perceived to be corrupt, measures citizens' views on government efforts to fight corruption, and this year, for the first time, includes questions about the level of state capture and people's willingness to pay a premium for clean corporate behaviour.") [hereinafter Corruption Barometer].

¹¹² Burger, *supra* note 5, at 47.

¹¹³ Corruption Barometer, *supra* note 111, at 15.

as those who believe that corrupt business practices directly and negatively seriously affect many other important issues, such as the global financial crises, poverty, or human rights violations,¹¹⁴ this is a concerning and disheartening reality. Still others, perhaps falling somewhere between the two groups just mentioned, appreciate the modern reality of business transactions and the prevalent culture of paying bribes, but recognize that if the bribery of public officials is not controlled the future global business marketplace will be too significantly harmed and positive growth and development will be too extensively stunted. This group believes that merely prosecuting companies or individuals who engage in such bribery after the fact is an ineffective deterrent because both the immediate and long-run harm is still suffered and the proceeds of the bribe are nearly impossible to recover.¹¹⁵ Additionally, this group respects the current corruption crackdown in theory, but believes there are numerous inefficiencies standing in the way of an actual, long-run solution to global bribery.¹¹⁶

Although the enactment,¹¹⁷ and arguably even the recent increased enforcement¹¹⁸ of the FCPA, was “reactionary rather than preventive,” and even though one purpose of the Act is to punish those that engage in illegal business practices, another important purpose is to “deter [the] same type of conduct in the future.”¹¹⁹ There are many possible reasons why the “preventive” goal of the FCPA is not always accomplished.

¹¹⁴ The World Bank, Governance and Anti-Corruption, <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20040922~menuPK:34480~pagePK:34370~theSitePK:4607,00.html> (last visited Apr. 7, 2010); Transparency International, <http://www.transparency.org/> (last visited Apr. 7, 2010).

¹¹⁵ See generally Vega, *supra* note 83; Burger, *supra* note 5.

¹¹⁶ See generally Vega, *supra* note 83; Burger, *supra* note 5.

¹¹⁷ The FCPA was enacted after the Watergate scandal received national attention. 1976 FCPA Senate Report, *supra* note 77.

¹¹⁸ David Hess & Cristie L. Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT’L L.J. 307, 308 (2008).

¹¹⁹ William Allen Nelson II, *Attorney Liability Under the Foreign Corrupt Practices Act: Legal and Ethical Challenges and Solutions*, 39 U. MEM. L. REV. 255, 258 (2009).

A. Resources

First, both the SEC and DOJ have suffered from a lack of necessary resources,¹²⁰ thus explaining why traditionally only the easy and most obvious FCPA cases were prosecuted.¹²¹ The SEC and DOJ both heavily rely on and encourage companies to make voluntary disclosures of possible FCPA violations.¹²² Also, government law enforcement inherently has “competing priorities” and government agencies “sometimes have inconsistent priorities.”¹²³ This is relevant because under the FCPA, in some circumstances, the DOJ and SEC must work together in their prosecution attempts.¹²⁴

B. Evidence

Moreover, while engaging in suspicious activities, companies do not flaunt their potentially prohibited conduct; instead, they work hard to keep their conduct secret.¹²⁵ This reality was recognized as early as the fourth century B.C. by Kautiliya, who wrote, “Just as fish moving under water cannot possibly be found out either as drinking or not drinking water, so government

¹²⁰ Burger, *supra* note 5, at 53-54.

¹²¹ Hess, *supra* note 118, at 314.

¹²² Jacqueline C. Wolff and Pamela Sawhney, *FCPA Voluntary Disclosures: A Risk-Benefit Analysis*, 2008, <http://www.cov.com/files/Publication/97ca6c31-614b-4ace-a441-6dab61135c65/Presentation/PublicationAttachment/3980bda8-c3b1-4f62-9df9-7845d53e1764/FCPA%20Voluntary%20Disclosures%20-%20A%20Risk-Benefit%20Analysis.pdf>; Lanny A. Breuer, Assistant Attorney General for the Criminal Division, Speech at the American Bar Association National Institute on White Collar Crime (Feb. 25, 2010), *available at* <http://www.justice.gov/criminal/pr/speeches-testimony/documents/02-25-10aag-AmericanBarAssosiation.pdf> (providing that “I also want to assure you that the Department’s commitment to meaningfully reward voluntary disclosures and full and complete corporate cooperation will continue to be honored in both letter and spirit.”).

¹²³ Burger, *supra* note 5, at 47; Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CALIF. L. REV. 185, 229 n. 57 (1994) (“There have been numerous occasions on which the State Department attempted to convince the SEC or DOJ to restrict its investigations, especially when the SEC or DOJ was considering whether to reveal the names of countries or officials under investigation.”).

¹²⁴ If it believes there is enough evidence for a criminal action, the SEC must refer the matter to the DOJ. According to the U.S. Attorneys’ Manual, the DOJ is responsible for the criminal investigation and prosecution of all willful violations of either section of the Act and has civil enforcement powers with respect to those companies not subject to SEC jurisdiction. U.S. Dep’t of Justice, United States Attorneys’ Manual 9-47.110, -47.130 (2000), *available at* [http://www.justice.gov/usao/eousa/foia reading room/usam/title9/47mcr.htm](http://www.justice.gov/usao/eousa/foia%20reading%20room/usam/title9/47mcr.htm).

¹²⁵ See generally NOONAN, *supra* note 38.

servants employed in the government work cannot be found out (while) taking money (for themselves).”¹²⁶ Many times there is no written evidence or paper trail of illegal payments or corrupt business deals;¹²⁷ therefore, it is difficult or nearly impossible to obtain the necessary evidence.¹²⁸ Instead, only those intimately involved in the deal have knowledge of it. However, it is possible that other employees or competitors might become aware of the illegal conduct. Nevertheless, despite potentially having such information, before these groups can be expected to report the activity, they must feel that they are adequately protected by anti-retaliation or un-fair competition laws¹²⁹ and they must believe that they will be able to recover their damages suffered. Currently these groups have little incentive to alert the DOJ or SEC even if they believe they will be protected, because fines imposed are paid to the SEC and DOJ, and not the individuals. As a result of the inherent difficulties in obtaining the evidence necessary to prosecute under the FCPA, the DOJ and SEC have recently expanded their investigation tools to include massive FBI sting operations.¹³⁰ However, aggressive undercover action may raise the controversial issue of entrapment.¹³¹ The fact that such aggressive undercover investigation is necessary illustrates part of the challenge inherent in effectively enforcing the FCPA.

¹²⁶ Bardhan, *supra* note 38, at 1320.

¹²⁷ S.J. Lochner, *The Criminalization of American Extraterritorial Bribery: The Effect of the Foreign Corrupt Practices Act of 1977*, 13 N.Y.U. J. INT’L L. & POLY. 645, 661-62 (1981).

¹²⁸ Nelson, *supra* note 119, at 299-302.

¹²⁹ See generally Vega, *supra* note 83; see *infra* footnote 240 and accompanying text for a discussion on Whistleblower statutes.

¹³⁰ *Mega-Bust Is Only The Beginning*, THE FCPA BLOG, Feb. 11, 2010, <http://www.fcpablog.com/blog/2010/2/11/mega-bust-is-only-the-beginning.html>; *Massive FCPA Indictment Unsealed*, THE FCPA BLOG, Jan. 19, 2010, <http://www.fcpablog.com/blog/2010/1/19/massive-fcpa-indictment-unsealed.html>.

¹³¹ See e.g., *Africa Sting - The Big Question*, FCPA PROFESSOR, Jan. 21, 2010, <http://fcpaprofessor.blogspot.com/2010/01/africa-sting-big-question.html>.

C. Vague Provisions

Furthermore, there is little predictability with prosecution under the FCPA because the provisions are inherently vague¹³² and there is almost no binding authority interpreting them.¹³³ No regulations have been promulgated, very few cases have gone to trial because such a high number of the cases settle, and the DOJ opinion procedure¹³⁴ is rarely used, and even when it is used, it cannot be relied upon with much certainty.¹³⁵ An additional source of unpredictability stems from the fact that related state law claims and remedies, like the international anti-corruption laws, are not uniform, but instead vary significantly from jurisdiction to jurisdiction.¹³⁶ Finally, cultural differences around the world lead to varying definitions of corruption and acceptable business conduct,¹³⁷ thus providing an additional reason for the Act's unpredictable nature.¹³⁸

D. Inadequate Penalties

Last, the penalties imposed for violating the Act may not be severe enough to adequately deter future misconduct.¹³⁹ There are numerous ways that the penalties may be inadequate. First, the fines themselves may not be large enough to actually serve as a punishment for the bribe paid because the financial benefits flowing from the corrupt conduct may be greater than the fine

¹³² This may raise constitutional concerns for the FCPA because “the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007); *see also* *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513, 525 (1994).

¹³³ *Pines*, *supra* note 123, at 185, 200, 216. However, *see infra* footnote 235 and accompanying text for a discussion of the possible benefits stemming from the FCPA's vague provisions.

¹³⁴ Foreign Corrupt Practices Act Opinion Procedure, 28 C.F.R. § 80.1-80.16.

¹³⁵ *Nelson*, *supra* note 119; *Vega*, *supra* note 83, at 443-44.

¹³⁶ For a summary of International anti-bribery laws see UHY Advisors, International Anti-Bribery Laws & Enforcement, <http://www.uhyadvisors-us.com/uhy/Default.aspx?tabid=392> (last visited Apr. 19, 2010).

¹³⁷ *Salbu*, *supra* note 47, at 75.

¹³⁸ *Id.*

¹³⁹ *Burger*, *supra* note 5, at 47.

imposed.¹⁴⁰ However, this risk appears to be diminishing, because at least recently, the magnitude of the fines imposed by the DOJ and SEC is increasing.¹⁴¹ A second reason a penalty may be an inadequate deterrent is because multiple enforcement agencies may realistically be involved in a single prosecution. Together, the various agencies or countries may attempt to “craft[] global settlements.”¹⁴² The imposed penalty therefore will serve as a joint remedy that will be shared by the multiple agencies or countries. The total overall penalty will run the risk of not providing full remedy for some of the affected agencies or countries because these interested parties will be required to give credit for fines paid to other agencies or countries.¹⁴³ A recent example of this is the global settlement of just over \$40 million between the British division of Innospec, Inc., the SEC, DOJ, and Britain’s Serious Fraud Office.¹⁴⁴ The British judge who approved the \$12.7 million British portion of the fine said he did so “reluctantly, as it was wholly inadequate and should have been in the tens of millions for a very serious offence.”¹⁴⁵ A final reason why the fines imposed may fail to be an adequate penalty is because in many instances the fines are paid with company money and do not come directly out of the pocket of the responsible individuals. The DOJ and SEC likely recognize this shortcoming because they are beginning to directly prosecute the responsible individuals, in addition to their companies, with more frequency.¹⁴⁶ The individuals then not only become personally responsible for the fines imposed, but also risk

¹⁴⁰ Corruption Barometer, *supra* note 111. This phenomenon may be analogized to an efficient breach of contract. *See generally* Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982).

¹⁴¹ 2009 FCPA Update, *supra* note 13, at DOJ Follows the Money.

¹⁴² *Headwinds In London*, THE FCPA BLOG, Mar. 29, 2010, <http://www.fcpcbog.com/blog/2010/3/29/headwinds-in-london.html>.

¹⁴³ *Id.* Alternatively, the 2008 Siemens case is an example of a successful coordinated prosecution effort. Press Release, Dept. of Justice, *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines*, (Dec. 15, 2008), available at <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html> [hereinafter Siemens Press Release].

¹⁴⁴ Siemens Press Release *supra* note 143.

¹⁴⁵ *Id.* (internal citations omitted).

¹⁴⁶ FCPA Update 2009, *supra* note 13.

incarceration, which is a serious deterrent. “As of March 1, [2010] the DOJ has 38 individuals awaiting trial.”¹⁴⁷

IV. The Need for a Private Right of Action

A. Uncompensated Victims

If FCPA prohibited conduct only caused harm to American’s “domestic markets and foreign relations,”¹⁴⁸ than the DOJ and SEC’s sole enforcement authority may be justified. However, there are many other possible victims of FCPA violations, including employees, competitors, business partners, and shareholders. These private victims might suffer a variety of injuries. For example, they might lose the financial benefit that they would have earned had they received the contract they lost to the party who was willing to engage in the requested corrupt business activities; they might suffer harm to their reputation if they alert the SEC or DOJ of others’ corrupt acts; or they might tarnish their relationship with the foreign country to the point that obtaining future business is unlikely. These are only some of the reasons it is detrimental that the parties most directly harmed by the corrupt business practices and the parties who are in the best position to stop the corrupt business practices before they can be completed are not currently granted a direct private right of action under the FCPA. Although parties may attempt to recover indirectly for FCPA violations, the success of such claims is unpredictable; frequently, as will be discussed below, such claims are lost.¹⁴⁹

¹⁴⁷ Sherman & Sterling, *FCPA Digest of Cases and Review Releases Relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1977*, at 6, Mar. 4, 2010, <http://shearman.symlicity.com/files/03f/03f164bc0bd3d772e53eff9d9cbba048.pdf>.

¹⁴⁸ 1976 FCPA Senate Report, *supra* note 77.

¹⁴⁹ *More Hurdles For Private Litigants*, THE FCPA BLOG, Dec. 2, 2008, <http://www.fcablog.com/blog/2008/12/2/more-hurdles-for-private-litigants.html>; *High Velocity FCPA*, THE FCPA BLOG, Jan. 24, 2010, <http://www.fcablog.com/blog/2010/1/25/high-velocity-fcpa.html>; *Another FCPA Derivative*

B. Engaging Multi-layered Policies

Moreover, as already explained, corruption can be more effectively controlled by implementing “multi-layered policies.”¹⁵⁰ By allowing a private right of action under the FCPA, the advancement of these various policies will be enhanced. First, with regard to the prevention policy, the private sector is in a better position to prevent corrupt business activities from being effectuated in the first instance. The FCPA can effectively be used as a defensive shield. As it has been said in many different arenas, the best offense is a good defense.¹⁵¹ When a company is approached regarding the payment of a bribe, it can refuse the opportunity by using a potential FCPA prosecution as a defense. Second, with regard to the State building and cultural dimension policies, the private sector is needed in order to implement and foster the necessary non-corrupt codes of conduct and culture within companies and industries. Third, with regard to the enforcement policy, “[t]here is little doubt that there would be greater enforcement, and concomitant deterrent effect, if Congress amended the FCPA to include a direct private right of action.”¹⁵² Moreover, “[t]he right of civil action provides a useful complement to criminal proceedings as a deterrent.”¹⁵³

Specifically providing a private right of action when harm is suffered as a result of bribery and/or corruption is not a completely novel policy. The COE Convention and the U.N

Suit is Tossed, THE FCPA BLOG, June 2, 2009, <http://www.fcpcbog.com/blog/2009/6/3/another-fcpa-derivative-suit-is-tossed.html>.

¹⁵⁰ Burger, *supra* note 5, at 50.

¹⁵¹ It is unknown who first coined this saying.

¹⁵² Burger, *supra* note 5, at 54.

¹⁵³ *Id.* at 63.

Convention¹⁵⁴ each specifically reference a private right.¹⁵⁵ The COE Convention states in Article 5 that:

Each Party shall provide in its internal law for *appropriate procedures for persons* who have suffered damage as a result of an act of corruption by its public officials in the exercise of their functions to claim for compensation from the State or, in the case of a non-state Party, from that Party's appropriate authorities (emphasis added).¹⁵⁶

Additionally, the Convention seeks additional protection for private individuals who are whistleblowers in Article 9 by suggesting that Parties “provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.”¹⁵⁷

Article 35 of the U.N. Convention provides:

Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that *entities or persons who have suffered damage* as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation (emphasis added).¹⁵⁸

International anti-bribery laws are being enacted and enforced with more frequency and bite.¹⁵⁹

The USA already set the tone regarding the enactment of such laws,¹⁶⁰ and it is now in a position to set the tone regarding the enforcement of them. When private parties are denied a right of action under American law, then the private parties might understandably seek remedies under foreign laws in foreign courts. When this occurs, the USA's leadership role is eroded. An example of this

¹⁵⁴ The U.N. Convention mandates that countries enact laws permitting private civil suits to help enforce its anti-bribery laws. U.N. Convention, *supra* note 27, art 35.

¹⁵⁵ Burger, *supra* note 5, at 50-51, 69.

¹⁵⁶ COE Convention, *supra* note 26, art. 5.

¹⁵⁷ *Id.* at art. 9.

¹⁵⁸ U.N. Convention, *supra* note 27, art. 35.

¹⁵⁹ See generally *supra* footnotes 21-30 and accompanying text.

¹⁶⁰ A. Timothy Martin, *The Development of International Bribery Law*, 14 NATURAL RES. & ENVIRON. 11, 11-12 (Fall 1999); see also Transparency International USA, Who We Are, <http://www.transparency-usa.org/who/mission.html> (last visited May 5, 2010).

is the recent complaint Jack Grynberg, an independent oilman, filed with the European Commission after his American remedies were exhausted when his civil fraud and RICO suits were dismissed in the District of Columbia.¹⁶¹ Although the fact that private parties might pursue foreign resolution over domestic resolution does not necessarily have a direct negative impact on American enforcement of the FCPA, it is an issue worth noting, and may be additional evidence for the conclusion that a direct private right is necessary under the FCPA.

C. Current Attempted Uses of Indirect Private Rights of Action

Because there is no direct private right, private parties have been forced to resort to alternative means of seeking remedy for harm caused by corrupt business practices. Although some such parties have had success, more frequently the parties are finding themselves exhausting their legal options without being provided a remedy. The wide variety in the groups of private parties bringing collateral civil litigation is both staggering and insightful. The variety demonstrates the extensive and far-reaching aspects the harm from corruption causes. In fact, “two-thirds of published court decisions mentioning the FCPA involve cases brought by private parties.”¹⁶² Discharged employees, competitors, business partners, foreign governments/entities, shareholders, and investment funds have all recently attempted to recover damages in collateral civil litigation.¹⁶³ The diversity of civil claims brought is also informative.

First, shareholders have brought shareholder derivative suits alleging violations of section 10(b), section 11, and section 20 of the securities act, common law fraud, negligent representation based on artificially inflated stock price, breach of fiduciary duties, waste of corporate assets,

¹⁶¹ The FCPA Blog, *Jack Grynberg Battles On*, Feb. 2, 2010, <http://www.fcpablog.com/blog/2010/2/3/jack-grynberg-battles-on.html>; see *Grynberg v. BP P.L.C.*, 596 F. Supp. 2d 74 (D.D.C. 2009); *Grynberg v. BP P.L.C.*, 585 F. Supp. 2d 50 (D.D.C. 2008).

¹⁶² Vega, *supra* note 83, at 464.

¹⁶³ 2009 FCPA Update, *supra* note 13, at Collateral Civil Litigation.

abuse of control, gross mismanagement, and unjust enrichment.¹⁶⁴ Second, foreign governments/entities have brought claims for violations of RICO and the Robinson-Putnam Act, mail and wire fraud, common law fraud, civil conspiracy, unjust enrichment due to misappropriation of funds, and breach of fiduciary duty.¹⁶⁵ Next, competitors have alleged violations of RICO and the Sherman Act, intentional interference with contractual/business relations, and unjust competition.¹⁶⁶ Also, business partners have brought claims for contract breach, including breached distributorship agreements, common law fraud, theft/conversion, false light, and constructive trust claims.¹⁶⁷ Last, employees have sought damages for wrongful or retaliatory discharge.¹⁶⁸

Some of the above claims have been successful, and at the very least, collateral parallel civil litigation is becoming more popular.¹⁶⁹ Nonetheless, the plaintiffs have continued to encounter many obstacles to successful recovery as a result of only being able to bring indirect causes of action. Some of examples of these obstacles include: high standards of proof, for example, having

¹⁶⁴ *Glazer Capital Mgmt. LP v. Magistri*, 549 F.3d 736 (9th Cir. 2008) (alleging misrepresentation); *In re Immucor Inc. Sec. Litig.*, 2006 U.S. Dist. LEXIS 72335 (N.D. Ga. Oct. 4, 2006) (alleging false statements); *In re Nature's Sunshine Products Securities Litigation*, 486 F. Supp. 2d 1301 (D. Utah 2007) (alleging securities fraud and other violations of the securities act); *Complaint, Hawaii Structural Ironworkers' Pension Trust Fund v. Belda*, No. 08-cv-00614 (W.D. Pa. May 6, 2008).

¹⁶⁵ *Integral Res. (PVT) Limited v. ISTIL Group, Inc.*, 155 Fed. Appx. 69, 70-71 (3d Cir. Del. 2005)(alleging tortious interference with contract and tortious interference with prospective contractual relations); *Adler v. Federal Republic of Nig.*, 219 F.3d 869, 871 (9th Cir. Cal. 2000)(alleging breached contract claims); *Castellanos v. Pfizer, Inc.*, 2008 U.S. Dist. LEXIS 42586 (S.D. Fla. May 29, 2008)(alleging defamation, tortious interference, RICO violation, and wrongful revocation of visas); *Complaint, Aluminum Bahrain B.S.C. v. Alcoa, Inc.*, No. 08-cv-299 (W.D. Pa. Feb. 27, 2008); *Complaint, Iraq v. ABB AG*, No. 08 CV 5951 (S.D.N.Y. June 27, 2008).

¹⁶⁶ *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1054-1055 (3d Cir. N.J. 1988); *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. Cal. 1983); *In re Refined Petroleum Prods. Antitrust Litig.*, 649 F. Supp. 2d 572 (S.D. Tex. 2009)(alleging Sherman Act violations); *Complaint, Supreme Fuels Trading FZE v. Sargeant*, No. 9:08-cv-81215-DTKH (S.D. Fla. Oct. 21, 2008).

¹⁶⁷ *Compagnia Importazioni Esportazioni Rappresentanze v. L-3 Communs. Corp.*, 2010 U.S. Dist. LEXIS 25500 (S.D.N.Y. Mar. 9, 2010)(alleging breach of contract, fraudulent concealment, breach of the duty of good faith and fair dealing, and quantum meruit); *Forum Publications, Inc. v. P.T. Publishers, Inc.*, 700 F. Supp. 236, 237 (E.D. Pa. 1988); *Verified Complaint and Jury Demand, Grynberg v. B.P. P.L.C.*, No. 1:08-cv-00301-JDB (D.C. Feb. 21, 2008); *Complaint, Agro-Tech Corp. v. Yamada Corp.*, No. 1:08CV0721 (N.D. Ohio Mar. 24, 2008).

¹⁶⁸ *Day v. Staples, Inc.*, 555 F.3d 42 (1st Cir. 2009); *Haddad v. ITT Industries, Inc.*, 2007 WL 141949 (N.D. Ind. Jan. 12, 2007).

¹⁶⁹ 2009 FCPA Update, *supra* note 13, at Collateral Civil Litigation.

to establish a pattern of corrupt behavior under RICO or knowledge of the corrupt activities under a claim for breach of fiduciary duties,¹⁷⁰ the Foreign Sovereign Immunities Act,¹⁷¹ lack of subpoena power, and application of foreign law as a result of choice of law rules.¹⁷²

Before the FCPA was enacted, American corporations could only be prosecuted domestically for corrupt payments or bribes through indirect means,¹⁷³ such as through the securities laws¹⁷⁴, the Bank Secrecy Act¹⁷⁵, the Travel Act,¹⁷⁶ or the Mail¹⁷⁷ or Wire Fraud Acts.¹⁷⁸ However, because it was realized that “such indirect means of preventing foreign bribery were ineffective,” the FCPA was enacted to serve as a “more direct and effective means of enforcement.”¹⁷⁹ The overall ineffectiveness of indirect enforcement of bribery and corruption has already been recognized once by this country in the past; therefore, the need to provide a direct right of action for private plaintiffs presumptively should only be an extension of this already understood and acknowledged principle.

V. Possible Solutions

A. An Implied Right?

Private rights of action may be established in two ways. Either the private right is expressly provided for in the statute, which as already explained is not the case with the FCPA, or the private

¹⁷⁰ *Id.*

¹⁷¹ 28 U.S.C. § 1602-1611(2000).

¹⁷² This has resulted in holding directors of foreign companies that do business in the USA to a lower standard than USA company directors are held to while acting in the USA. The FCPA Blog, *BAE Bribe Suit Tossed On Appeal*, Jan. 2, 2010, <http://www.fcpablog.com/blog/2010/1/4/bae-bribe-suit-tossed-on-appeal.html>.

¹⁷³ Pines, *supra* note 143, at 187-88.

¹⁷⁴ Securities Act of 1933, 15 U.S.C §§ 77a--77aa (2000); Securities Exchange Act of 1934, 15 U.S.C. §§ 77b—77e, 77j, 77k, 77m, 77o, 77s, 78a—78o, 78o-3, 78p—78hh (2000).

¹⁷⁵ 31 U.S.C. §§ 321, 5311—5314, 5316—5322(2006).

¹⁷⁶ 18 U.S.C. § 1952.

¹⁷⁷ 18 U.S.C. § 1341.

¹⁷⁸ 18 U.S.C. § 1343.

¹⁷⁹ Pines, *supra* note 143, at 187-88.

right is determined by the judicial system to be implied.¹⁸⁰ The courts that have addressed whether the FCPA impliedly authorizes a private right of action have answered the question in the negative.¹⁸¹ The Supreme Court has held that the existence of an implied private right of action depends on the determination of congressional intent.¹⁸² Given the legislative history of the FCPA, it is not entirely clear that there should not be an implied right of action based on the determination of congressional intent.

On one side of the argument, the Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce of the 95th Congress, the Congress that enacted the FCPA, stated in its report “the Committee intends that the courts shall recognize a private cause of action based on this legislation, as they have in cases involving other provisions of the Securities Exchange Act, on behalf of persons who suffer injury as a result of prohibited corporate bribery.”¹⁸³ The SEC Chairman, Harold M. Williams, testified at that time that “this legislation would furnish the Commission and private plaintiffs ... with potent new tools to employ against those who commit corporate bribery.”¹⁸⁴ On the other hand, there were also statements from both Senators and House Representatives that the drafting Committee did not intend for the courts to imply a private right for plaintiffs.¹⁸⁵ Also, although the original draft of the Senate’s version of the FCPA expressly included a private right, this provision was subsequently deleted

¹⁸⁰ Vega, *supra* note 83, at 459.

¹⁸¹ See *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990) (affirming dismissal of private FCPA action for failure to state a claim), cert. denied, 498 U.S. 1086 (1991); see also *Lewis v. Sporck*, 612 F. Supp. 1316, 1333 (D.C. Cal. 1985) (FCPA accounting provisions do not imply private right of action).

¹⁸² See *Touche Ross & Co. v. Remington*, 442 U.S. 560, 575 (1979) (holding “the central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action”); *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 15 (1979) (holding “what must ultimately be determined is whether Congress intended to create the private remedy asserted”); see also *Thompson v. Thompson*, 484 U.S. 174, 189-90 (1988) (Scalia, J., concurring) (stating “it could not be plainer that we effectively overruled the *Cort v. Ash* analysis”).

¹⁸³ *Lamb*, 915 F.2d at 1029.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

before the bill was passed.¹⁸⁶ The specific meaning behind this subsequent deletion is the subject of an academic debate.¹⁸⁷ It may be argued that “[t]he provision’s removal would seem to suggest that Congress did not intend to make private suits possible.”¹⁸⁸ Alternatively, it is possible that “the likely reason Congress deleted the language was to avoid undermining the implied rights of action that had already been inferred by courts under the Securities Exchange Act.”¹⁸⁹ Despite the fact that the true congressional intent regarding the existence or non-existence of a private right is by no means obvious, at least with regard to the FCPA’s anti-bribery provisions¹⁹⁰, and in light of the fact that courts have found an implied private right of action in numerous other federal statutes,¹⁹¹ “the few commentators arguing in favor of a private FCPA right have uniformly concluded the statute should be amended to expressly include a limited private right of action.”¹⁹²

B. Existing Academic and Legislative Remedies

Before addressing the issue of amending the FCPA, it is important to recognize that commentators have suggested other means of enhancing the effectiveness of the Act. One possibility is to encourage the private sector, including competing companies, international organizations, multilateral development banks, such as the World Bank, non-governmental organizations, such as Transparency International, and a not-yet-developed specialized plaintiff’s

¹⁸⁶ *Id.*

¹⁸⁷ See Brett Witter, *Lamb v. Phillip Morris Inc.*, 915 F.2d 1024 (6th Cir. 1990): *The Sixth Circuit Gets Sheepish on Foreign Corrupt Practices Act Enforcement*, 5 TRANSNAT’L LAW 533, 556 (1992) (arguing for an implied private right of action under the FCPA); but see Raymond J. Dowd, Note, *Civil RICO Misread: The Judicial Repeal of the 1988 Amendments to the Foreign Corrupt Practices Act*, 14 FORDHAM INT’L L.J. 946, 947-57 (1990-91) (arguing no implied private right of action exists under the FCPA).

¹⁸⁸ Witter, *supra* note 187.

¹⁸⁹ *Id.*; Vega, *supra* note 83, at 462.

¹⁹⁰ Vega, *supra* note 83, at 461 (explaining that although the SEC, early in the process, “advocated an implied private right of action...that position was quickly abandoned.”).

¹⁹¹ *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) (*citing* *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

¹⁹² Vega, *supra* note 83, at 463.

bar, to “lead the next stage in the global fight against corruption.”¹⁹³ Additionally, existing causes of action, other than the FCPA, could be expanded to provide assistance to private parties seeking remedy. One example is employee whistleblower protection under the Securities Exchange Act.¹⁹⁴ In fact, “on March 15, [2010] Senate Banking Committee Chairman Christopher Dodd (D-CT) released his much-anticipated financial reform bill... [that] establishes a new program to reward whistleblowers who assist the SEC in an investigation of securities violations such as violations of the FCPA.”¹⁹⁵ Whistleblowers who provide “original information” that leads to a successful FCPA action or other “related actions” and that results in the payment of fines exceeding one million dollars will receive between ten and thirty percent of the fine that the government collects.¹⁹⁶ Although the future of this bill is unknown, it is relevant to this notes theme, and if nothing more, its development or lack of development will be interesting to follow.

1. A Limited Private Right for American Competitors

As early as 1994, at least one commentator already recognized that amending the FCPA to include a private right of action could remedy two fundamental problems with the FCPA that prevented the Act from fulfilling its purpose.¹⁹⁷ The two identified problems were the DOJ’s and SEC’s ineffective enforcement and the vagueness of the FCPA’s provisions.¹⁹⁸ To remedy these problems, and to “allow American businesses to realize the FCPA’s dormant benefits,” the commentator suggested that the Act should be amended “to allow a private right of action that is

¹⁹³ Burger, *supra* note 5.

¹⁹⁴ Vega, *supra* note 83.

¹⁹⁵ Miller Chevalier, *Whistleblower Rewards Could Drastically Change FCPA Practice*, Apr. 1, 2010, CORP. COMPLIANCE INSIGHTS, <http://www.corporatecomplianceinsights.com/2010/whistleblower-rewards-could-drastically-change-fcpa-practice>.

¹⁹⁶ *Id.*

¹⁹⁷ Pines, *supra* note 143.

¹⁹⁸ *Id.* at 185.

restricted to competing American businesses.”¹⁹⁹ By granting a private right, the commentator concluded that enforcement would indirectly become more effective because the courts would be forced to clarify the vague provisions of the Act and because companies would have an added incentive to use the DOJ review procedure.²⁰⁰ The suggested amendment limited prospective plaintiffs to American businesses in order “to allow fair competition.”²⁰¹ At the time the commentator suggested the amendment, many foreign governments did not have statutes similar to the FCPA and international conventions were less active;²⁰² therefore, the commentator did not think that American businesses should fear being sued by foreign businesses for conduct that the foreign businesses could not be conversely sued for in their home countries.²⁰³ The proposal did not grant a private right of action to shareholders or employees, because although recognizing their potential vulnerability to FCPA violations, the commentator believed that these groups did not have “the same long-term interests as the company,” that it would be hard for these groups to acquire sufficient evidence to prove their distinct harm, and that publicly held companies should not bear a greater FCPA enforcement burden than privately held companies.²⁰⁴

While respecting the commentator’s early recognition of FCPA ineffectiveness, limiting a private right of action to competitors, and denying a private right to shareholders and employees, would not significantly resolve any of the Act’s current inefficiencies. Employees may be in the best position to have actual knowledge of corrupt practices and they likely are in the best position to help institute changes in the company’s culture. Also, by acknowledging the difficulties of

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 220-21; *see also* Foreign Corrupt Practices Act Opinion Procedure, *supra* note 134. The DOJ’s Lay-person’s guide explains that American companying may seek guidance from the government by requesting “a statement of the Justice Department’s present enforcement intentions under the ant bribery provisions of the FCPA regarding any proposed business conduct.” Lay-persons Guide, *supra* note 81.

²⁰¹ Pines, *supra* note 143, at 217.

²⁰² *See generally supra* footnotes 21-30 and accompanying text.

²⁰³ Pines, *supra* note 143, at 217.

²⁰⁴ *Id.* at 218-19.

proving a distinct harm and gathering the evidence needed to support indirect causes of action, without providing a direct cause of action, this commentator highlighted the fact that these groups have little incentive to attempt to stop or remedy the corrupt activities because of the reality that they are not allowed to recover for their efforts.

2. *H.R. 2152—A Limited Private Right Against Foreign Concerns*

On June 4, 2008, H.R. 6188, the Foreign Business Bribery Prohibition Act of 2008 was introduced to the House by Rep. Ed Perlmutter, a Democrat from Colorado.²⁰⁵ The bill was referred to the House Committee on Energy and Commerce and the House Committee on the Judiciary; however, the committees never reported on the bill, the bill was never voted on, the session expired, and the bill was removed from the books.²⁰⁶ On April 28, 2009, Rep. Ed Perlmutter introduced H.R. 2152, the Foreign Business Bribery Prohibition Act of 2009, which is identical to the expired H.R. 6188.²⁰⁷ On June 12, 2009, H.R. 2152 was again referred to the House Committee on Energy and Commerce and the House Committee on the Judiciary, which further referred the bill to the Subcommittee on Crime, Terrorism, and Homeland Security.²⁰⁸ As of the writing of this note, there is no additional reported activity regarding the bill.²⁰⁹

Generally, the bill authorizes “issuers”, “domestic concerns”, and “United States persons” to sue “foreign concerns” when damage is caused to domestic business.²¹⁰ Under the proposed amendment to the FCPA, a plaintiff must first prove that the defendant foreign concern made a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with,

²⁰⁵ H.R. 6188, 110th Cong. (2008), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=h110-6188>.

²⁰⁶ Govtrack.us, H.R. 6188, <http://www.govtrack.us/congress/bill.xpd?bill=h110-6188> (last visited Mar. 28, 2010).

²⁰⁷ H.R. 2152, 111th Cong. (2009), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=h111-2152>.

²⁰⁸ Govtrack.us, H.R. 2152, <http://www.govtrack.us/congress/bill.xpd?bill=h111-2152> (last visited Mar. 28, 2010).

²⁰⁹ *Id.*

²¹⁰ H.R. 2152, *supra* note 207.

or directing business to, any person.²¹¹ Second, the plaintiff must prove that the defendant foreign concern's illegal, corrupt payment "prevented the plaintiff from obtaining or retaining business for or with any person" and "assisted the foreign concern in obtaining or retaining such business."²¹² In reality, the burden of proof a plaintiff must bear is almost impossibly high. However, a plaintiff who is able to satisfy these statutory requirements would be able to recover the higher of either "the total amount of the contract or agreement that the defendant gained in obtaining or retaining business by means of" the illegally made payment or "the total amount of the contract or agreement that the plaintiff failed to gain because of the defendant's obtaining or retaining business by means of" the illegally made payment."²¹³ Additionally, the proposed amendment requires treble damages.²¹⁴

Although the USA has been described as having a "historic resistance...to private actions combating foreign bribery,"²¹⁵ the introduction of H.R. 6188 and H.R. 2152 possibly offers insight as to whether or not the USA will "follow[] the international community's lead"²¹⁶ by opening its courts to such litigation.²¹⁷ Also, despite this "historic resistance," at least one commentator has suggested "that more viable reforms may be effected through broader public policy changes."²¹⁸ Additionally, H.R. 2152 has been referred to as a "game-changer in terms of FCPA enforcement."²¹⁹ Since a private plaintiff will not be able to craft settlements with a defendant that include a non-prosecution/ deferred prosecution agreement or consent decree, options currently

²¹¹ *Id.*; Lay-Person's Guide, *supra* note 81.

²¹² H.R. 2152, *supra* note 207.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Aryeh S. Protnoy & John L. Murino, *Private Actions Under the US Foreign Corrupt Practice Act: An Imminent Front?*, INT'L LITIG. NEWS 31 (April 2009).

²¹⁶ *See supra* footnotes 154-158 and accompanying text.

²¹⁷ Protnoy, *supra* note 215.

²¹⁸ Salbu, *supra* note 47, at 68; *see generally supra* footnotes 51-58 and accompanying text.

²¹⁹ Mike Koehler, *If HR 2152 Were to Be Enacted ... Part II*, FCPA PROFESSOR, Nov. 19, 2009, <http://fcpaprofessor.blogspot.com/search/label/HR%202152>.

used by the DOJ and SEC with frequency,²²⁰ more FCPA claims will go to trial, “[w]hich means that a court will actually be called upon to construe FCPA elements and legal theories of liability.”²²¹

At first glance, this bill may reasonably attempt to solve some of the previously discussed shortfalls of the current FCPA, including the inherent vagueness of the Act’s provisions; however, ultimately this bill is an ineffective solution for multiple reasons. First, under the amendment, a plaintiff would only be able to sue foreign companies, and not American companies or individuals. This means that many of the collateral civil causes of action discussed above would not be transformed into legitimate FCPA actions. Second, by its terms the Act would “exclude as prospective plaintiffs companies that are the foreign subsidiaries of US firms while permitting foreign companies which are issuers to bring actions against non-US companies, including foreign subsidiaries of US firms.”²²² The practical effect of the bill’s language therefore makes little sense. It has been suggested that the bills appear to be:

geared toward addressing concerns that the FCPA places U.S.-based global companies at a disadvantage because (1) the FCPA’s application to “domestic concerns” makes their liability exposure broader than that of their foreign competitors, and (2) the authorities in their foreign competitors’ home countries do not enforce anti-bribery laws as aggressively as the DOJ and the SEC enforce the FCPA.²²³

²²⁰ Christopher M. Matthews, *SEC Appoints FCPA Unit Chief*, MAIN JUSTICE, Jan. 14, 2010, <http://www.mainjustice.com/2010/01/14/sec-appoints-fcpa-unit-chief/>.

²²¹ *Id.*

²²² Caldwell, *The Fair Foreign Business Bribery Prohibition Act*, FCPA ADVISOR, at 4-5, July 2009, available at [http://www.cadwalader.com/assets/newsletter/FCPA_July_09_revised.pdf#page=\\$newsletter_page](http://www.cadwalader.com/assets/newsletter/FCPA_July_09_revised.pdf#page=$newsletter_page).

²²³ Jason E. Prince, *A Rose by Any Other Name? Foreign Corrupt Practices Act-Inspired Civil Actions*, THE ADVOCATE 20, 24 (March/April 2009).

Whether or not the FCPA actually places American companies at a competitive disadvantage is a separate subject of academic debate.²²⁴ Regardless, realistically, the amendment would do little to seriously remedy the present inadequacies of the FCPA, especially in light of the high burden of proof plaintiffs would be required to satisfy.

C. A New Amendment to the FCPA—Granting A Broad Private Right

As Gandhi once said, “[c]orruption and hypocrisy ought not to be inevitable products of democracy, as they undoubtedly are today.”²²⁵ One of the worst reasons to continue to do something is because it is the way it has always been done in the past. By accepting bribes, big or small, as an unfortunate reality of the business world, all nations and all people are harmed. Despite domestic and international efforts to enact laws in order to combat corruption and bribery, the fight is a far cry from being won.²²⁶ Domestically, the FCPA is receiving unprecedented attention.²²⁷ The DOJ’s resources and ability to work effectively with the SEC and other foreign governments in order to prosecute violators under the Act are improving.²²⁸ Internationally, foreign governments and conventions are passing new laws and starting to enforce with more authority both new and old laws.²²⁹

²²⁴ Hess, *supra* note 118, at 314 (suggesting that when countries do not enforce their anti-corruption laws against their home corporations, USA companies “will continue to feel that paying bribes is a business necessity in some situations”).

²²⁵ <http://www.unaccountable.net/quotes.htm> (last visited Apr. 1, 2010).

²²⁶ Salbu, *supra* note 47, at 82-84.

²²⁷ See generally 2009 FCPA Update, *supra* note 13.

²²⁸ *Id.*; David Hechler, *Roided Up Enforcement: DOJ Unit That Prosecutes FCPA to Bulk Up ‘Substantially,’* Feb. 25, 2010, http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202444478279&Roided_Up_Enforcement_DOJ_Unit_That_Prosecutes_FCPA_to_Bulk_Up_Substantially. For example, the SEC recently created a new FCPA enforcement unit to focus on proactive enforcement of the Act through “targeted sweeps and sector-wide investigations, alone and with other regulatory counterparts both here and abroad.” Cheryl J. Scarboro, Speech by SEC Staff: Remarks at News Conference Announcing New SEC Leaders in Enforcement Division (Jan. 13, 2010), *available at* <http://www.sec.gov/news/speech/2010/spch011310newsconf.htm#scarboro>.

²²⁹ Corruption Barometer, *supra* note 111; Corruption Perception Index 2009, *supra* note 1; GLOBAL CORRUPTION REPORT 2009, *supra* note 2.

The USA could improve its own enforcement abilities by paying attention to some of these foreign enacted laws. For example, the OECD Convention is the “landmark” anti-bribery convention and the OECD continues to be both active and innovative in regards to the international battle against corruption and bribery.²³⁰ For this reason, in the remaining sections, this note will specifically reference the OECD Convention in discussing how the FCPA should be amended.

Evidencing their commitment to “stepping up their fight against bribery and corruptions,” thirty OECD member countries, including the USA, and eight others recently signed the Recommendation for Further Combating Bribery of Foreign Public Officials in International Business.²³¹ The Recommendations include:

Ensur[ing] companies cannot avoid sanctions by using agents and intermediaries to bribe for them; Periodically review[ing] policies and approach on small facilitation payments; Improv[ing] co-operation between countries on foreign bribery investigations and the seizure, confiscation and recovery of the proceeds of transnational bribery; Provid[ing] effective channels for reporting foreign bribery to law enforcement authorities and for protecting whistleblowers from retaliation; and Working more closely with the private sector to adopt more stringent internal controls, ethics and compliance programmes and measures to prevent and detect bribery.²³²

Secretary of State Hillary Rodham Clinton has stated that “[t]he United States fully supports the OECD’s anti-corruption agenda,”²³³ which is interesting considering some of the OECD’s commitments regarding facilitating payments, whistleblower protections, and the private sector.

Although difficult to establish with any certainty, the fact that senior DOJ and SEC officials of the

²³⁰ Transparency International, OECD Convention on Bribery, <http://www.transparency-usa.org/what/private.html#OECD> (last visited May 5, 2010); Organization for Economic Cooperation and Development, About OECD, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html (last visited May 5, 2010).

²³¹ Working Group on Bribery in International Business Transactions, *Recommendation for Further Combating Bribery of Foreign Public Officials in International Business*, Nov. 26, 2009, <http://www.oecd.org/dataoecd/11/40/44176910.pdf>.

²³² *Id.*

²³³ *Id.*

Obama Administration have continued to promise “a robust program of enforcement,”²³⁴ is evidence that corruption and bribery in the USA are as prevalent as ever. This prevalence is at least partially a result of the FCPA’s inadequacies that have already been discussed.

The first place to start in remedying this fact is the federal statute that makes such conduct illegal, the FCPA. As already explained, one of the primary criticisms of the FCPA is the Act’s vagueness.²³⁵ However, in amending the Act, the focus should not be on clarifying the vague provisions. The Act’s vagueness is arguably an asset to the battle against corruption. By not clearly defining prohibited conduct, the Act keeps companies guessing as to whether or not their desired business conduct will result in an FCPA prosecution. This can serve as a powerful deterrent. If prohibited conduct was clearly defined, then companies and individuals would always act in a way that would allow them to stay just out of reach of a FCPA prosecution. For example, if on a linear scale conduct A-J was legal and conduct K-Z were illegal, companies would continually act at point J. Clearly defining conduct K-Z as illegal would merely encourage companies to find innovative ways of engaging in activities or manipulating records in such a way as to just avoid committing a FCPA violation, despite the reality that the requisite corrupt intent may realistically be present. This would do nothing to further the ultimate goal of suppressing the prevalence of corruption and bribery or deterring its occurrence and acceptance.

²³⁴ Shearman & Sterling, *FCPA Digest of Cases and Review Releases Relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1977*, at 6, Mar. 4, 2010, <http://shearman.symplicity.com/files/03f/03f164bc0bd3d772e53eff9d9cbba048.pdf>.

²³⁵ See generally Pines, *supra* note 143.

I. Possible Private Party Plaintiffs

Instead, unlike some other commentators' suggestions, the FCPA should be amended to grant a broad, rather than limited, direct right of action.²³⁶ According to the Ernst & Young Survey, stakeholders who are negatively impacted by foreign bribery include: investors, customers, general public employees, financial regulators, suppliers, media, and NGO's.²³⁷ Although in the survey's responses there were significant regional variations in regards to which stakeholders were the most negatively affected, twenty nine percent of respondents cited "shareholder/competitor litigation as a negative impact of engaging in corrupt practices."²³⁸ The fact that collateral civil litigation is a recognized burden is a good thing; it provides evidence that expanding the FCPA to include a broad private right of action would help curb the frequency of foreign bribery by acting as a useful deterrent. Although the argument has been made that granting a private right of action for foreign bribery would "effectively place industry regulation in the hands of private litigants rather than the U.S. government,"²³⁹ because of the benefits stemming from providing a direct private right would have on increasing the effectiveness of current FCPA enforcement and the inherent safeguards against frivolous litigation, in order to effectively combat foreign corruption and bribery, the private sector ought be granted a direct right of action under the FCPA.

So long as jurisdiction is otherwise proper, this right should be granted to employees, both whistleblowers and non-whistleblowers, both domestic and foreign; competitors, both domestic and foreign; shareholders; and foreign governments, so long as the foreign government has either

²³⁶ Granting a broad right is consistent with the USA's approach to combating corruption. In its quest to make bribery of public officials prohibited on an international level, after pursuing its corruption agenda with the OECD, where only the supply side of bribery was focused on, the USA then pursued its agenda with the OAS, which focuses on both the supply and demand side. *See* Martin, *supra* note 160, at 8-9. The amendment of the FCPA to include a broad private right is therefore within this historical broad focus on combating corruption generally.

²³⁷ Global Fraud Survey, *supra* note 35.

²³⁸ *Id.*

²³⁹ Caldwell, *supra* note 222.

signed an international agreement or is a member of an international convention relating to corrupt business practices that the USA supports or has a domestic law similar to the FCPA. The reason a broad private right should be granted is because there is an inherent check against frivolous claims built into the nature of FCPA claims. Each private group that would be granted the right has an incentive to avoid bringing unnecessary or nuisance litigation. Employees run the risk of receiving a tarnished reputation or being fired and having to satisfy requirements under whistleblower statutes for protection.²⁴⁰ Competitors and foreign governments that directly control businesses, despite significant differences in the resources of the two groups, have similar interests at stake. They also run the risk of receiving a tarnished reputation, which could lead to additional lost business opportunities. Moreover, they risk having their own practices closely scrutinized by other industry participants, foreign countries, or the DOJ and SEC. Also, as earlier discussed, the FCPA only criminalizes the supply side of a corrupt business transaction; however, by granting a private right to foreign government controlled businesses, this might act as an indirect regulator of the demand side of bribery as well. If a foreign government owned business learns of another foreign government's officials making bribes, the government owned business could inform its own government officials of the bribe, and these officials could then use the FCPA as a defensive shield, which overtime may reduce the prevalence of bribes being initiated by the supply side.

²⁴⁰ Being fired is a very serious and legitimate risk, and obtaining protection by whistleblower statutes is often a difficult task. *See* Whistleblower Protection Act of 1989, 5 U.S.C.S. §1221 (1998) and The United States Department of Labor, Employment Law Guide, Whistleblower and Retaliation Protections, <http://www.dol.gov/compliance/guide/whistle.htm>, for summaries of the employee protection or “whistleblower” provisions of the seventeen statutes the Occupational Safety and Health Administration (OSHA) administers. *See generally* Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757 (2007) (discussing the inadequacies of whistleblower statutes and various models for whistleblowing legislation); Mary K. Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform*, 76 U. CIN. L. REV. 183, 183 (2007) (describing “the law’s protection of whistleblowers today is illusory at best”).

Finally, shareholders of domestic, foreign government owned, and foreign privately owned businesses risk tangible loss to stock prices or intangible loss to company good will.²⁴¹

2. *Burdens of Proof*

Employees bringing suit should be required to prove that they suffered a particularized and definite harm as a result of a defendant's FCPA violation. Likely situations are that an employee is discharged after alleging a FCPA violation, reporting a FCPA violation, or refusing to complete a job responsibility because the task would include a FCPA violation. In regards to alleging or reporting a FCPA violation, the Act should be amended to include an "up-the-ladder reporting system" similar to what is required under the Sarbanes-Oxley Act of 2002.²⁴² Employees should be required to report in-house before they report to the SEC or DOJ. A whistleblower hotline is one possibility to assist the up-the-ladder reporting requirement. According to the Ernst & Young Survey, although less than one third of respondents provided that a whistleblower hotline would be a measure "most successful" in lowering the risk of foreign bribery, "North American companies were much more enthusiastic about whistleblower hotlines than any other region."²⁴³ In fact, seventy seven percent of North American companies believed whistleblower hotlines would be successful.²⁴⁴ This requirement would therefore likely provide further incentive for companies to implement effective FCPA compliance programs. Also, by first requiring the in-house reporting, the likelihood that a corrupt payment or activity may be all together avoided is greater, which

²⁴¹ This statement does not mean to suggest that in all circumstances will an FCPA prosecution result in recoverable loss to good-will. Negative media attention may be received during a FCPA prosecution; however, it is possible that shareholders could bring suit, conduct discovery, and then settle in a confidential agreement never made public. It may be argued that this is legalized extortion, blackmail, or greenmail. However, if there is no merit to the shareholders claim, then the company will likely not settle in the first instance. It is acknowledged that in order to recovery for either tangible or intangible loss, the shareholders must prove that the company affirmatively did something that directly resulted in the loss.

²⁴² Nelson, *supra* note 119; Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

²⁴³ Global Fraud Survey, *supra* note 35.

²⁴⁴ *Id.*

would do more to further the goals of the FCPA than reporting directly to the SEC or DOJ would. In regards to refusing to complete a job responsibility because the task would include a FCPA violation, in all likelihood, by refusing to fulfill the task, the employee would be fired or demoted. In this instance, the employee might be protected as a whistleblower.²⁴⁵ However, when the company learns that the employee refused to complete the task, instead of allowing the task to go unaccomplished, the company will instead find another employee to complete it. For example, if one employee refuses to accompany a foreign government official on an all expense paid elaborate trip, the company will merely find a different employee to do so. In this instance, the purpose of the FCPA is not furthered, because in the end, the unlawful activity is still effectuated. For this reason, the employee who refuses to complete the task initially, after being required to satisfy in-house reporting requirements, should be able to seek an injunction prohibiting the task from being completed in appropriate situations.

Similar to H.R. 2152, domestic competitors and foreign government owned businesses bringing suit should be required to prove that a company, either domestic or foreign, violated the FCPA's anti-bribery provisions, and that the violation prevented the plaintiff from obtaining or retaining business while assisting the defendant company in obtaining or retaining the business. The plaintiff should be required to prove these elements with substantial certainty, but not absolute certainty. Although plaintiffs should carry a heavy burden, they should not carry an impossible one. A plaintiff who, as a result of a third-party's bribe, is unable to effectively compete for or negotiate a contract, must be able to prove with substantial certainty that it was prohibited from

²⁴⁵ See Whistleblower Protection Act of 1989, 5 U.S.C. §1221 and The United States Department of Labor, Employment Law Guide, Whistleblower and Retaliation Protections, <http://www.dol.gov/compliance/guide/whistle.htm> (last visited Apr. 22, 2010).

either obtaining or retaining business. Merely alleging the lost opportunity to fairly or fully participate in the bidding process in the first instance will not be sufficient to support a claim.

Last, shareholders bringing suit should, like employees, be required to prove that they suffered a particularized and definite harm as a result of a FCPA violation. It may be argued that allowing shareholders to bring a private action against a company only after the company has already been prosecuted by the DOJ or SEC would allow the shareholders to piggy-back off the DOJ and/or SEC's investigation without having to carry much of a burden on their own. However, because the DOJ and SEC penalties are paid to the agencies, if the shareholders were estopped from benefiting from the DOJ and/or SEC's investigations, those shareholders would not receive any compensation for the harm that the FCPA violation caused. For example, if the shareholders can prove with substantial certainty, not necessarily mathematical certainty, that the stock price of the company fell a certain amount or that the company reputation or good-will was diminished by a certain value, then these shareholders should be able to recover for this harm suffered.

3. *Available Remedies*

Under the amended Act, available the remedies must remain flexible. In different circumstances, either legal or equitable relief may be granted. If evidence is obtained regarding the substantial likelihood that a corrupt payment will be made, then injunctive relief prohibiting the payment from being effectuated is appropriate. In the more likely situation where the corrupt payment will not be discovered or stopped before being effectuated, compensatory damages are appropriate. Private parties may receive treble damages. The reason for this is that without treble damages, keeping in mind the significant risks to each group that have already been discussed, there arguably is not sufficient incentive for private parties to bring a claim. If damages in excess

of treble damages are granted, then the additional punitive damages should be disgorged to the DOJ and SEC. This could help provide the DOJ and SEC with adequate resources to improve effective prosecution under the Act. Although it may be very difficult for private parties to ultimately prove damages to the level of certainty required under the amendment, since treble damages could force defendant companies into bankruptcy or reorganization, and in light of the underlying goal of the FCPA to strengthen the global marketplace by limiting corruption, such strong burden of proof requirements are necessary.²⁴⁶

4. *Affirmative Defenses and Exceptions*

The affirmative defenses²⁴⁷ currently existing under the FCPA should also apply to private claims. These include that “the payment was lawful under the written laws of the foreign country” and “that the money was spent as part of demonstrating a product or performing a contractual obligation.”²⁴⁸ However, the fact that a company voluntarily disclosed its illegal or suspicious conduct to the DOJ or SEC should not bar private parties from having the ability to bring a subsequent private right of action. An initial voluntary disclosure should not be an available defense in regards to additional civil litigation brought against defendant companies. However, it may be the situation that a company voluntarily discloses a potential FCPA violation to the SEC or DOJ and then incurs significant costs relating to an internal investigation.²⁴⁹ Although in this instance shareholders will be able to prove affirmative action on the part of the company in spending corporate funds and may seek to be compensated for the cost, shareholders should not be able to recover for such internal investigation costs.

²⁴⁶ Nelson, *supra* note 119.

²⁴⁷ 15 U.S.C. § 78dd-1(c), -2(c), -3(c).

²⁴⁸ 15 U.S.C. § 78dd-1(c), -2(c), -3(c).

²⁴⁹ See e.g. *Avon: A Pound Of Cure*, THE FCPA BLOG, May 3, 2010, <http://fcpablog.squarespace.com/blog/2010/5/3/avon-a-pound-of-cure.html>.

On the other hand, the current grease or facilitating payment exception for routine governmental action²⁵⁰ should be removed. Although the DOJ has provided that “‘routine governmental action’ does not include any decision by a foreign official to award new business or to continue business with a particular party,”²⁵¹ there is too much room for manipulation and abuse for this exception to remain. Arguably, by definition, an exception is only needed if it can be established that the elements underlying the offense have been or may likely be satisfied. One of the elements for a FCPA bribery prosecution is corrupt intent. By including grease or facilitating payments as an exception, congress acknowledged that corrupt intent *may* exist with regards to these payments. Although the argument may be made that it would be impossible to prove corrupt intent with regards to facilitating payments, if nothing else, the existence of the exception concedes that there is at least the possibility of the existence of something distinctive or above and beyond fair business procedure occurring in the business transaction. The argument may also be made that facilitating payments are not made in order to obtain or retain business. A weakness of this argument is that in some instances the facilitating payment, for example the granting of a license, may be the first step in the ultimate acquisition or retention of business. In the circumstance that the facilitating payment is more removed from the business transaction, for example the granting of a visa or the provision of phone service, the argument may still be made that these actions constitute early steps in the ultimate acquisition of business. These facilitating actions therefore still set the ultimate acquisition or retention of business in motion. While not intending to suggest that every early step in the ultimate acquisition of a business deal should be the proper subject of a FCPA prosecution, it is important to acknowledge the possibility of manipulation and abuse regarding facilitating payments. Once a party begins making facilitating payment deals with a

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

²⁵¹ Lay-Person’s Guide, *supra* note 81.

foreign official, the foreign official likely has that party under his control, and the possibility of future corrupt conduct is only magnified. Thus, as the earlier argument regarding vagueness under the Act suggested, including the grease or facilitating payment exception only opens the door for additional future abuses.

The OECD convention recognizes “the corrosive effect of small facilitation payments.”²⁵² The convention encourages member states to “periodically review their policies and approach on small facilitation payments,” “encourage companies to prohibit or discourage the use of small facilitation payments,” and urges them to enact laws with an eye to “stopping the solicitation and acceptance of small facilitation payments.”²⁵³ True business expenses are and will continue to be tax deductible; however, in order to effectively begin to suppress corruption, the grease or facilitating payment exception must be removed. By removing the exception, it will not be the case that the granting of a license or the provision of a routine service will automatically be the subject of FCPA prosecutions; it must be remembered that each of the required elements under the Act will still need to be satisfied in order for the conduct to be an actionable FCPA offense.

5. *No Materiality Requirement*

With the facilitating payment exception removed, the Act should not be amended to include a new type of materiality requirement. This is because all corruption and bribery, regardless of its degree, harms the global market place, and by choosing to regulate large-scale as opposed to merely minor corrupt practices, the Act would no longer deter such activities, but instead would encourage companies to find innovative ways to guarantee their corrupt practices always remain

²⁵² OECD convention, *supra* note 24, at 21; *see also OECD Recommends That Facilitating Payments Be Prohibited or Discouraged*, INT’L TRADE LAW NEWS, Dec. 10, 2009, <http://www.djacobsonlaw.com/2009/12/oecd-recommend-that-facilitating.html>.

²⁵³ OECD convention, *supra* note 24, at 21.

below the minimum threshold. Specifically including a materiality requirement may be contrary to the original drafters' intent. For example, it was important to the original drafters that the tax deductibility of *all* bribes be eliminated.²⁵⁴ They were “concerned that other governments allowed their corporations to deduct such payments against their income tax and thus tacitly approved the practice.”²⁵⁵ By providing incentive to companies to find innovative ways to classify their corrupt practices, it may be argued that such deceitful practices would be supported²⁵⁶ and indirectly “tacitly approved.”²⁵⁷

Another reason for not having a materiality requirement is because, as already explained, it is only the supply side, and not the demand side, of bribery that can be prosecuted under the FCPA. There is no way to control what exactly, in type, quantity or value, the foreign official is offering to the prospective bribe-accepting party. The bribe-offering foreign official's culture likely dictates his behavior, and this culture is not subject to FCPA control. By requiring that the prospective bribe-accepting party deny participating in all bribes, the culture of the parties actually subjected to FCPA enforcement has the best opportunity of being controlled and shaped. Not having a materiality requirement will allow the FCPA to be used successfully as a defensive shield in more situations.

²⁵⁴ Martin, *supra* note 160, at 6.

²⁵⁵ *Id.*

²⁵⁶ It should be noted that grease or facilitating payments, which are payments related to routine governmental administrative actions ordinarily and commonly performed by a foreign official, including obtaining licenses and providing common governmental services, like telephone service, mail pickup, and processing official papers, are tax deductible business expenses because their coverage is excluded from the FCPA. *See* 15 U.S.C. § 78dd-2(h)(4) (defining “routine governmental action”).

²⁵⁷ Martin, *supra* note 160, at 6.

The OECD convention does not specifically have a materiality requirement, although comment 9 does provide that “small ‘facilitation’ payments do not constitute payments made ‘to obtain or retain business or other improper advantage’”.²⁵⁸

6. *DOJ and SEC Investigation Stays*

As a general rule, a DOJ or SEC investigation should stay a private parties right under the Act. This is because the goal of the amendment is to increase the effectiveness of the FCPA, and if an investigation into a company’s activities is already occurring, then one of the Act’s purposes is being fulfilled. The DOJ and SEC have greater subpoena powers than private parties.²⁵⁹ Additionally, Fifth Amendment rights may inhibit successful prosecution if private parties are concurrently investigating claims.²⁶⁰ Once the DOJ or SEC’s investigation is ended, the stay will be lifted, and the private parties will be able to seek recovery under a direct private right of action.

Conclusion

Corruption, including the bribing of foreign officials, is a serious concern that imposes costs both domestically and internationally.²⁶¹ In order to effectively enforce the prohibition against such activities, and to further the purpose underlying the FCPA of limiting and controlling such activities, the FCPA must be amended to include a private right of action. There is much inefficiency with the Act as it exists today, some that this note has attempted to address, and others, including the fact that “[w]hile the FCPA has an impressive reach with regard to bribery of public officials, it does not touch two related areas of corruption: business-to-business bribes and

²⁵⁸ OECD Convention, *supra* note 24.

²⁵⁹ Ernest E. Badway et al., *SEC Enforcement Staff Gains Subpoena Power (and Other Evolutions in the Division’s Authority and Responsiveness)*, Aug. 2009, <http://www.foxrothschild.com/newspubs/newspubsArticle.aspx?id=11120>.

²⁶⁰ For example, if evidence illegally obtained is ultimately excluded.

²⁶¹ Salbu, *supra* note 47, at 67-68.

business-to-quasi-public official bribes,”²⁶² that are beyond the scope of this note. However, as the saying goes, before you can run you must walk, and before all forms of corruption can be *attempted* to be remedied, the bribery of public officials must be more successfully controlled. Responsible business relationships between companies and foreign public officials and governments must be the initial goal. If change is able to be effectuated with regards to these powerful and influential groups, then the more general battle against all corruption has a much greater chance of success.

²⁶² Salbu, *supra* note 47, at 78.