Journal of Criminal Law and Criminology

Volume 106 | Issue 2 Article 6

Spring 2016

The Foreign Corrupt Practices Act: Unbridled Enforcement and Flawed Culpability Standards Deter SMEs from Entering the Global Marketplace

Stephen S. Laudone

0091-4169/16/9106-0355
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 106, No. 2

Printed in U.S.A.

THE FOREIGN CORRUPT PRACTICES ACT: UNBRIDLED ENFORCEMENT AND FLAWED CULPABILITY STANDARDS DETER SMEs FROM ENTERING THE GLOBAL MARKETPLACE

Stephen S. Laudone*

In the wake of the Watergate Scandal, which exposed a variety of corporate as well as political abuses, the Securities and Exchange Commission (SEC) discovered that a staggering number of large corporations had made questionable or illegal payments exceeding $300 million to foreign government officials, politicians, and political parties. In 1977, Congress passed the Foreign Corrupt Practices Act (FCPA) to curb the negative impact of these corrupt payments on United States foreign policy objectives regarding the promotion of democracy and the free market system.

In the decades since the passage of the FCPA, the government has expanded the use of the statute beyond its original target (large corporations) to small- and medium-sized enterprises (SMEs), which often lack the resources and international business sophistication to guard against bribery and extortion in all its forms and thus avoid liability. Additionally, the government's enforcement regime exists largely outside the courts. As a result, the investigative tactics and settlement agreements are overly harsh on SMEs, exceed statutorily proscribed penalties, and discourage utilization and litigation of a variety of statutory provisions designed to protect businesses from liability.

This Comment argues that the FCPA should be amended to provide

* J.D., Northwestern University School of Law, 2017. B.A., The American University, 2011. Thanks to Professor Jide Nzelibe for sharing his insight on the subject matter of this Comment. Thanks to my family and the many past and present coworkers who have encouraged and supported me in the pursuit of my law degree. A special thanks to all the editors of the *Journal of Criminal Law and Criminology* for all of their efforts in revising this piece.

SMEs proper defenses against liability through the mental state provisions for domestic concerns and require more judicial oversight of the Department of Justice (DOJ) and the SEC enforcement policies. These changes will encourage SMEs to enter the international marketplace and protect SMEs from investigative costs and settlement penalties that do serious harm to their financial situation and are often disproportionate to the alleged wrongdoing.

TABLE OF CONTENTS

INTRODUCTION

The management of a hypothetical Alabama-based agriculture irrigation utility company (AIC) receives a request from a regional government entity in an African country (Country Z) looking to increase farming production through enhanced irrigation systems to address its food shortage and import-export imbalance.[1] AIC has never engaged in an international project but sees this as an incredible opportunity to grow its business, currently consisting of 140 employees and grossing $15 million a year in revenue.[2] AIC representatives work with a regional official from Country Z over the terms of the contract which include a provision for an initial down payment of 35% of the estimated project costs and the remaining 65% at the conclusion of the work. AIC agrees to employ local workers to the extent possible and will send American employees to evaluate the region's needs, manage the project, and provide the requisite expertise throughout. Towards the end of negotiations, the official introduces the AIC representatives to a local consultant who is "familiar with the agricultural production and irrigation needs of the region" and will "represent the government throughout the process and assist in dealing with local entities." AIC representatives agree to these terms and begin work on the project to assist with upland storage of rainfall runoff, develop well and surface/groundwater processes, and promote effective water management, all of which was to be completed in eight months.[3]

Six months into the project, Country Z's immigration officials inform AIC that several of their American employees in the country lack the requisite documentation and are facing fines, jail, or deportation unless AIC pays cash fines to rectify the situation. Too far into the project to back out and concerned for their safety, AIC encourages the targeted employees to

[1] This hypothetical is designed to present the reader with a simple picture of some of the difficult issues that confront small- and medium-sized enterprises conducting business overseas for the first time.

[2] Small- and medium-sized enterprises employ between 100 and 5,000 employees and revenue varies by industry. *See Summary of Size Standards by Industry Sector*, U.S. SMALL BUS. ASS'N, (current as of Feb. 26, 2016), https://www.sba.gov/content/summary-size-standards-industry-sector (last visited Nov. 22, 2015) (providing data regarding what constitutes a small business); *Small and Medium-Sized Enterprises: Overview of Participation in U.S. Exports, Inv. No. 332-508* (USITC PUB. 4125, January 2010), U.S. INT'L TRADE COMM'N, https://usitc.gov/publications/332/pub4125.pdf ("[N]o universally accepted definition of an SME [exists], even within the U.S. government" because "the relative nature of the 'small' and 'medium' size classifications . . . can apply differently to firms in the manufacturing, agricultural, and service sectors."). Part III.B.2 of this article contains a more thorough discussion of what constitutes an SME. The FCPA itself does not contain a definition for SME.

[3] The inspiration for this hypothetical was partially drawn from the following sources: *Irrigation, Alabama Agricultural Irrigation Information Network*, ALA. COOP. EXTENSION SYS., http://www.aces.edu/anr/irrigation/ (last visited Mar. 25, 2016) and Sandra Postel, *Small-scale Irrigation Boosts Incomes and Food Security in sub-Saharan Africa*, NAT'L GEOGRAPHIC (Aug. 8, 2013), http://voices.nationalgeographic.com/2013/08/08/small-scale-irrigation-boosts-incomes-and-food-security-in-sub-saharan-africa/.

pay the fines and reimburses them through their next paycheck.[4] At the conclusion of the eight-month project period, AIC requests payment from Country Z officials for the remaining balance under the contract. Months go by and finally AIC gets a response from a Country Z official requiring AIC to pay a "service fee" to a government official in order to obtain the remaining balance on the contract and close the account. Based on its financial position and the need for these proceeds for continued investment in future projects, AIC representatives agree to pay the fees to facilitate final payment for services rendered.[5]

After completion of the project, the U.S. government opens an investigation as either the result of a tip or regularly scheduled audit of companies doing business in regions of the world considered particularly prone to corruption. During this investigation, the government requests information regarding the work done by the local consultant and an itemization justifying the fees said consultant charged. When AIC is unable to sufficiently assuage the U.S. government's concerns based on Country Z's propensity for corruption, further investigation reveals the local consultant was the relative of a government official and sent a portion of the fees to said official as a kickback. Suddenly, AIC faces civil penalties for violating the accounting provisions of the FCPA and criminal charges for the alleged briberies made to the foreign government in the form of consultant fees and the "service fees." The company is at risk of fines and disgorgement potentially in the millions, and any directors, officers,

---

[4] This situation is based on the facts of the Securities and Exchange Commission's (hereinafter "SEC") investigation of Test Automation & Controls, Inc. *See* Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 796–97 (2011) (citing Client Memorandum from Wilkie Farr & Gallagher LLP on SEC Brings FCPA Charges Based on Extorted Payments (Jan. 20, 2010), http://www.willkie.com (search "NATCO FCPA")).

[5] This portion of the hypothetical is based on the facts of the Department of Justice's (hereinafter "DOJ") investigation of Vitusa Corporation and related individual defendants. *See* Beverley Earle & Anita Cava, *When Is A Bribe Not A Bribe? A Re-Examination of the FCPA in Light of Business Reality*, 23 IND. INT'L & COMP. L. REV. 111, 133 (2013) (referring to United States v. Vitusa Corporation, Case No. 94-CR-253, 3 FCPA Rep. 699.155 (D. N.J. 1994) and *Exhibit B: Stipulated Facts and Application of the United States Sentencing Guidelines*, U.S. DEP'T OF JUSTICE, (May 23, 1994), https://www.justice.gov/criminal-fraud/case/united-states-v-vitusa-corporation-court-docket-number-94-cr-253). Situations like this one enter the gray area of what constitutes a facilitating payment (to cause a foreign official to do a lawful action in the event of a delay or a need for expedited action) which is legal under the FCPA versus a bribe. To many SMEs, this fee might seem unjust, but without experienced counsel and a compliance program, company leadership may not realize it could be perceived as a bribe to a foreign official.

employees, or agents found to be culpable face prison time as well.[6]

This hypothetical situation encompasses several common pitfalls that small- and medium-sized enterprises (SMEs) face as they enter the global marketplace.[7] Companies that are unable to hire sophisticated legal representation for the purpose of developing a thorough compliance program due to insufficient financial means, or a lack of knowledge of the extraordinary risks associated with international business, are left at the mercy of a vigorous and strict governmental enforcement regime. When carrying out the FCPA enforcement regime, the government often ignores, or chooses not to view as mitigating, the fact that companies regularly face extortion from foreign governments, companies, and individuals.[8] The government also often ignores the size and sophistication of the company when investigating and making prosecutorial determinations even when it is clear the entity and its leadership lacked intent to violate the FCPA and engage in bribery or foreign corruption.[9]

After almost forty years and several congressional amendments, the existing case law on the FCPA, coupled with a sharp increase in DOJ and SEC enforcement measures, have resulted in two trends, both of which operate to the detriment of SMEs. The first trend is a narrowing of vital statutorily-created exceptions and affirmative defenses to FCPA liability, and the second trend is a broadening of the mental states required for conviction under the statute. Looking forward, Congress should amend the statute to require a mental state equivalent to specific intent, and account for differences between sophisticated, multi-national corporations and SMEs. The "willfulness" requirement should also apply to SMEs as it does to

---

6 *See infra* Part III.B.1, notes 146–147 for a brief discussion of individual penalties both monetary and imprisonment.

7 For the definition of SMEs, *see infra* Part III.B.2.

8 Yockey, *supra* note 4, at 797 (noting that in the TEST case, the SEC charged the company with FCPA accounting violations even after acknowledging that the company "falsely recorded the employees' reimbursement for the ransom payments as a salary advance" because they were the victims of extortion).

9 U.S. DEP'T OF JUST. & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 8 (2012) [hereinafter RESOURCE GUIDE] (admitting that there are areas where "the United States' anti-bribery efforts could be improved, including consolidating publicly available information on the application of the FCPA and enhancing awareness among small- and medium-sized companies about the prevention and detection of foreign bribery"). The government also formally acknowledges that "[i]n addition to the existence and scope of a company's training program, a company should develop appropriate measures, depending on the size and sophistication of the particular company, to provide guidance and advice on complying with the company's ethics and compliance program, including when such advice is needed urgently." *Id.* at 59.

individuals.[10] Additionally, Congress should act to reinvigorate the "greasing the wheels" (hereinafter "facilitating payments") and "local law or customs" exceptions while also establishing mandatory Article III jurisdiction over proposed settlements by requiring the filing of civil and criminal complaints.

Part I of this Comment provides a history of the FCPA and a discussion of the functional effect of the statute and a prima facie case under the anti-bribery provisions. Part II outlines some of the problems that have developed around what little FCPA case law exists and provides examples of how many small- and medium-sized enterprises find themselves in situations of potential liability under the current system without a clear understanding of the government's burden regarding mental states and the statutory exceptions that should be available to them. Part III describes these problems in more detail by discussing the enforcement regime that the DOJ and SEC have developed outside of the court system and the problems with insufficient litigation surrounding the FCPA. Finally, Part IV discusses both existing proposed solutions to some of the problems outlined in Parts II and III as well as some new solutions specifically designed to aid small- and medium-sized enterprises as they navigate the global marketplace while also trying to avoid crippling liability under the FCPA.

I. THE FOREIGN CORRUPT PRACTICES ACT

A. HISTORY: THE ORIGINAL PROBLEM AND CONGRESSIONAL ACTION

Bribery has been a crime for millennia and punishable under the common law for centuries. The first British statute criminalizing bribery was passed in the 1300s and the first references to bribery cases in Britain appear in the Star Chamber records around 1550.[11] The United States expanded the term "bribery" well beyond its common law meaning to include all government officials, as well as commercial bribery of

[10] In both the domestic concern and individual anti-bribery provisions of the FCPA, the "willfully" requirement only applies to natural persons acting on behalf of themselves or a company, not to the company itself. 15 U.S.C. § 78dd-2(g)(2) (2012) (subjecting "[a]ny natural person . . . acting on behalf of such domestic concern, who willfully violates" the statute to criminal and civil fines); *Id.* at § 78dd-3(e)(2) (subjecting "[a]ny natural person who willfully violates" the statute to criminal and civil fines).

[11] *See* James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695, 1696 n.6, 1705 (1992–1993) (citing JOHN T. NOONAN, JR., BRIBES (1984) ("providing a history of bribery-type offenses from 3000 B.C. to 1984")).

individuals acting in a private capacity.[12] The United States continued this expansion by becoming the first nation to criminalize international bribery through the passage of the Foreign Corrupt Practices Act in 1977.[13]

In the wake of the Watergate Scandal, which exposed a variety of corporate (foreign bribery) as well as political abuses (slush funds for domestic politicians), the SEC conducted its own investigation, which culminated in an extensive "Report on Questionable and Illegal Corporate Payments and Practices" (SEC report).[14] The SEC report detailed the widespread misuse of corporate funds and questionable or illegal corporate payments which "represented a serious breach in the operation of the Commission's system of corporate disclosure and, correspondingly, in public confidence in the integrity of the system of capital formation."[15] Specifically, over 400 corporations had admitted making questionable or illegal payments exceeding "$300 million in corporate funds to foreign government officials, politicians, and political parties."[16] According to the

---

[12] Perrin v. United States, 444 U.S. 37, 43–45 (1979).

[13] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd-1 to -3, 78ff (2006)), amended by 15 U.S.C. §§ 78dd-1 to -3, 78ff (1988) and 15 U.S.C. §§ 78dd-1 to -3, 78ff (1998).

[14] H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 2–4, nn.5–6 (1998) (discussing how the SEC acted after "disclosures by the Watergate Special Prosecutor of overseas 'slush' used by U.S. corporations to make illegal campaign contributions in the U.S. and corrupt payments to foreign officials"); *see also* S. REP. NO. 95-114 at 3–4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4101 (referring to SEC Report on Questionable and Illegal Corporate Practices). The Foreign Corrupt Practices Act was later passed to combat the first of these abuses, bribery of foreign officials to gain business advantages. *See also Disclosure of Payments to Foreign Government Officials Under the Securities Acts*, 89 Harv. L. Rev. 1848, 1849 n.11 (1976) (defining slush funds as "sums of money not reflected in the corporate accounts" which in some cases were found to have been "used for secret payments to foreign government officials").

[15] *See* S. REP. NO. 95-114, *supra* note 14, at 3–4 (referring to SEC Report on Questionable and Illegal Corporate Practices); *see also* Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 932–49 (2012) (detailing the investigations of the Church Committee and SEC report and the major examples of corrupt payments made to heads of state and U.S. politicians leading up to the passage of the FCPA).

[16] H.R. REP. NO. 95-640, at 4 (1977), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/houseprt-95-640.pdf [hereinafter HOUSE REPORT] (stating that over 117 of them rank in the top Fortune 500 industries).

While the House Report does not explicitly define what questionable or improper payments are, the phrase seems to be used to describe foreign bribes which are not expressly illegal compared to "domestic bribes [which] are clearly illegal" under U.S. law. *Id.* at 6. This understanding is supported by the fact that the proposed law sought to reach "foreign subsidiaries of any U.S. corporation" because of the extensive use of these foreign subsidiaries "as a conduit for questionable or improper foreign payments authorized by their

House Report created by Congressman Harley O. Staggers Sr., Chairman of the Committee on Interstate and Foreign Commerce, companies were engaging in everything from bribing high-ranking foreign officials for favorable action on behalf of the company, to making facilitating payments to encourage government agents to discharge certain ministerial or clerical functions.[17] The volume of these domestic and foreign corrupt payments posed a danger to the integrity of the United States' elections and foreign policy goals, including the goals of promoting democracy and a free market system where companies should be able to honestly and ethically compete in areas like price and quality of product.[18] Thus, the FCPA contained anti-bribery provisions, as well as accounting requirements to prevent companies from hiding bribes in financial records.[19] The law provides for joint enforcement responsibilities, shared between the DOJ and the SEC for the criminal and civil applications.[20]

Since its passage, the FCPA has been amended twice. The 1988 Amendments[21] were designed to address corporations' concerns regarding unclear and excessive accounting standards and the costs of competing in

---

domestic parent." *Id.* at 12.

Similarly, the SEC does not provide a clear definition of what constitutes questionable foreign payments, but notes in their report that virtually all questionable payments involved "the deliberate falsification of corporate books or records, or the maintenance of inaccurate or inadequate books and records which, among other things, prevented these practices from coming to the attention of the company's auditors, outside directors and shareholders." *Report on Questionable and Illegal Corporate Payments and Practices*, U.S. SEC. & EXCH. COMM'N 13 (May 1976), https://www.sec.gov/spotlight/fcpa/sec-report-questionable-illegal-corporate-payments-practices-1976.pdf.

[17] HOUSE REPORT, *supra* note 16, at 4.

[18] *Id.* at 4–5 (listing the negative ramifications flowing from this level of bribery). The report notes:

> For example, in 1976, the Lockheed scandal shook the Government of Japan to its political foundation and gave opponents of close ties between the United States and Japan an effective weapon with which to drive a wedge between the two nations. In another instance, Prince Bernhardt of the Netherlands was forced to resign from his official position as a result of an inquiry into allegations that he received $1 million in pay-offs from Lockheed.

Id. at 5.

[19] 15 U.S.C. §§ 78dd-1 to -3 (2012) (anti-bribery provisions). *See generally* Mary Jane Dundas & Barbara Crutchfield George, *Historical Analysis of the Accounting Standards of the Foreign Corrupt Practices Act*, 10 MEM. ST. U. L. REV. 499 (1980) (conducting an in-depth historical analysis of the FCPA accounting standards).

[20] Brown, *supra* note 14, at 16 (1998) (discussing the shared, yet distinct enforcement authority of the DOJ and SEC under the FCPA) (citing 15 U.S.C. § 78dd-1 (1994) for SEC's authority and 15 U.S.C. § 78dd-2(d) for DOJ's authority).

[21] Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415 (codified as 15 U.S.C. §§ 78dd-1 to -3, 78ff).

foreign markets.[22] In the decade following the 1988 Amendments, enforcement efforts focused on policing international agreements with little extraterritorial enforcement.[23] Then, in 1998, a new set of Amendments[24] was prompted by the Organization for Economic Cooperation & Development Convention on combating the bribery of foreign officials.[25] At the time, Congress agreed with the business community that the FCPA was negatively impacting U.S. business success abroad because there were no restraints on foreign firms that would pay bribes without fear of penalty, to the detriment of U.S. businesses.[26] The 1998 Amendments expanded the jurisdiction of the FCPA to foreign persons who commit an act furthering a foreign bribe while on U.S. soil, as well as U.S. businesses and nationals acting wholly outside the United States.[27] The Amendments also expanded the FCPA's scope to include payments made to secure "any improper advantage" and broadened the definition of "public official" to include officials of public international organizations.[28] The FCPA has remained unaltered since the 1998 Amendments, though the DOJ and SEC enforcement models have changed.[29] The following subsection addresses the core anti-bribery provisions applicable to companies and individuals.

---

22 H.R. REP. NO. 100-576, at 6 (1981), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/tradeact-100-418.pdf; *Impact of Foreign Corrupt Practice Act on U.S. Business: Comptroller's General Report to the Congress of the United States*, U.S. GEN. ACCOUNTING OFFICE 6 (1981), http://www.gao.gov/assets/140/132199.pdf.

23 Emily Willborn, *Extraterritorial Enforcement and Prosecutorial Discretion in the FCPA: A Call for International Prosecutorial Factors*, 22 MINN. J. INT'L L. 422, 426 (2013).

24 International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified at 15 U.S.C. §§ 78dd-1 to -3, 78ff (1998)).

25 *Convention on Combating Bribery of Foreign Officials in International Business Transactions and Related Documents*, ORG. FOR ECON. COOPERATION & DEV. (Nov. 21, 1997), http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf [hereinafter OECD Convention].

26 *See* S. REP. NO. 105-277, at 1–2 (1998) (explaining that bribery is estimated to affect overseas procurements valued in the billions of dollars each year and how the amendment reconciles the FCPA with the OECD Convention in order to "level the playing field") [hereinafter BANKING COMMITTEE SENATE REPORT 1998].

27 *Id.* at 4 ("The new offense . . . provid[es] for criminal jurisdiction in this country over bribery by foreign nationals of foreign officials when the foreign national takes some act in furtherance of the bribery within the territory of the United States.").

28 *See id.* at 2.

29 Matthew J. Kovacich, *Backyard Business Going Global: The Consequences of Increased Enforcement of the Foreign Corrupt Practices Act ("FCPA") on Minnesota and Wisconsin*, 32 HAMLINE L. REV. 529, 544–49 (2009) (discussing how the DOJ and SEC are "engaging in new, creative techniques to sanction individual company agents, disgorge companies of their profits, and settle investigations through deferred prosecution agreements" compared to the FCPA's first thirty years of existence).

B. THE PROHIBITIONS AND ELEMENTS OF A PRIMA FACIE CASE

In order to establish a prima facie criminal case against an entity or individual under the FCPA's anti-bribery provisions, the government must establish the existence of six elements. The defendant must be:

> 1. a domestic concern [or individual or issuer]
> 2. that made use of a means or instrumentality of interstate commerce
> 3. corruptly
> 4. in furtherance of an offer or payment of anything of value to any person
> 5. while knowing that the money would be offered or given directly or indirectly to any foreign official
> 6. for purposes of influencing any act or decision of such foreign official in his official capacity.[30]

The FCPA's anti-bribery provisions encompass three mental states that address acts done "corruptly," acts done while "knowing" bribery will result, and acts done "willfully" by individuals to violate the statute.[31] Additionally, Congress has carved out several exceptions to the anti-bribery provisions including the "facilitating payments" exception, which states that prohibitions do not apply to any "facilitating or expediting payment to a foreign official, political party, or party official, the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official."[32] The Senate Report of the Committee on Banking, Housing, and Urban Affairs, favorably reporting bill S. 305 and recommending it for passage, noted that the facilitating payments exception would cover "payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties."[33]

The statute's anti-bribery provisions provide for two affirmative defenses as well. The first is the "legality defense," which permits a payment, gift, offer, or promise that is lawful under the laws or regulations

---

[30] Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber, 327 F.3d 173, 179–80 (2d Cir. 2003) [hereinafter *Stichting*]; *see also* Thomas McSorley, *Foreign Corrupt Practices Act*, 48 AM. CRIM. L. REV. 749, 757–58 (2011) (setting forth the *seven* elements of an FCPA violation) (citing 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3).

[31] *See infra* Part II.A for a fuller discussion of the meaning of these mental state terms and how courts have interpreted them.

[32] 15 U.S.C. § 78dd-1(b) (2012) (for issuers); § 78dd-2(b) (for domestic concerns); § 78dd-3(b) (for "any person").

[33] S. REP. No. 95-114 at 10 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4108 [hereinafter BANKING COMMITTEE SENATE REPORT 1977].

of the foreign official's country.[34] While many nations permit behavior that would fall under the legality defense, companies can rarely take advantage of this defense because the written laws of foreign nations rarely allow for such conduct because it is implicit in the business and political culture.[35] The second is the "reasonable expenditure defense," which permits a payment, gift, offer, or promise if it was a "reasonable and bona fide expenditure, such as travel and lodging expenses" that the company incurred on behalf of a foreign official and was directly related to the "promotion, demonstration, or explanation of products or services" or "the execution or performance of a contract with a foreign government or agency thereof."[36]

When requested, the DOJ provides guidance to companies through opinion procedure releases on what is considered reasonable and bona fide expenditures. The trend throughout these opinion releases is that the expenditures tend to be modest, related to travel and hotel reimbursement, and paid to the providers, not to the officials themselves.[37] For example, one anonymous requestor received an opinion procedure release sanctioning the payment of domestic expenses for "approximately six junior to mid-level officials of a foreign government for an educational program at the [r]equestor's U.S. headquarters" after these officials attend "an annual six-week long internship program for foreign insurance regulators sponsored by the National Association of Insurance Commissioners."[38] The expenses to be paid were limited to "domestic economy class air travel . . . domestic lodging, local transport, meals and incidental expenses (up to a modest set amount per day upon presentation of a receipt), and a modest four-hour city sightseeing tour for the six officials."[39] While these exceptions and

---

34 15 U.S.C. § 78dd-1(c)(1) (2012) (for issuers); § 78dd-2(c)(1) (for domestic concerns); § 78dd-3(c)(1) (for "any person").

35 Kovacich, *supra* note 29, at 536 & n.38 (referencing DOJ, Lay-Person's Guide to FCPA, http://www.justice.gov/criminal-fraud/fcpa-guidance (last visited Nov. 13, 2015) [hereinafter Lay-Person's Guide to FCPA]); RESOURCE GUIDE, *supra* note 9, at 23 ("[T]he fact that bribes may not be prosecuted under local law is insufficient to establish the defense. In practice, the local law defense arises infrequently, as the written laws and regulations of countries rarely, if ever, permit corrupt payments.").

36 15 U.S.C. § 78dd-1(c)(2) (2012) (for issuers); § 78dd-2(c)(2) (for domestic concerns); § 78dd-3(c)(2) (for "any person").

37 F. JOSEPH WARIN ET AL., THE U.S. FOREIGN CORRUPT PRACTICES ACT: ENFORCEMENT AND COMPLIANCE 18 (Bloomberg BNA, 2014).

38 FCPA Opinion Procedure Release No. 07-02 (Dep't of Justice Sept. 11, 2007).

39 *Id.*; *see also* FCPA Opinion Procedure Release No. 04-04 (Dep't of Justice Sept. 3, 2004) (sanctioning a "Study Tour" for foreign officials to help "develop a practical understanding of how mutual insurance committees are managed and regulated" and

defenses to FCPA liability and enforcement are statutorily prescribed, their applicability has been severely narrowed by the DOJ and SEC. The following section discusses problems surrounding the various mental states required by the FCPA.

II. PROBLEMS CREATED BY THE FCPA STATUTE AND CURRENT ENFORCEMENT PRACTICES WITH REGARD TO THE MENTAL STATE REQUIREMENT

The FCPA anti-bribery provisions contain several layers of mental state requirements including acts done “corruptly,” acts done while “knowing” bribery will result, and acts done “willfully” by individuals to violate the statute, but these terms and how they interact are not clearly defined in the context of the statute. This has led to some confusion in the circuit courts,[40] a problem that is exacerbated by the lack of cases being tried under the FCPA.[41] Some guidance does come from the FCPA’s legislative history.

The FCPA prohibits domestic concerns and any individuals on their behalf from acting “corruptly” in furtherance of a payment, gift, or offer of anything of value to influence or induce a foreign official, political campaign, or candidate for office to violate the law, act in his official capacity, or aid in securing an improper advantage for the company.[42] The

---

differences (if any) in the organization, daily operation, capitalization, regulations, demutualization, and management of mutual insurance companies versus stock insurance companies (life and non-life)”); FCPA Opinion Procedure Release No. 07-01 (Dep’t of Justice July 24, 2007) (sanctioning payment of domestic expenses for a “six-person delegation of the government of an Asian country for an educational and promotional tour of one of the requestor’s U.S. operations sites”).

[40] *See generally* Gregory M. Lipper, *Foreign Corrupt Practices Act and the Elusive Question of Intent*, 47 AM. CRIM. L. REV. 1463, 1470 (2010) (providing an overview of the circuit court’s discussion of the FCPA mental state requirements and efforts by Congress to provide clarity).

[41] The lack of FCPA case law is driven by the high stakes companies face when confronted with a DOJ or SEC investigation. Companies are reluctant to risk the resources necessary to successfully litigate against the government and pay the penalties if found guilty. See *infra* Part III.A for a fuller discussion of the government’s enforcement regime and its impact on companies’ business and FCPA litigation.

[42] 15 U.S.C. § 78dd-2(a)(1)–(2) (2012).

> The term “domestic concern” means—(A) any individual who is a citizen, national, or resident of the United States; and (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

Id. § 78dd-2(h)(1).

statute also prohibits acts done "corruptly" in furtherance of a payment, gift, or offer of anything of value to a person, "while knowing that all or a portion of such money or thing of value" will be used to influence a foreign official.[43] The statute does provide a definition section which explains that a person's state of mind constitutes "knowing" when: "(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur."[44] Knowledge can be established if the individual is aware of a "high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist."[45] According to the 1977 Senate Report's definition:

> [t]he word "corruptly" is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or a favorable regulation. The word "corruptly" connotes an evil motive or purpose, an intent to wrongfully influence the recipient.[46]

The House Report defines the term similarly, stating:

> [t]he word "corruptly" is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position; for example, wrongfully to direct business to the payor or his client, to obtain preferential legislation or regulations, or to induce a foreign official to fail to perform an official function.[47]

The term "corruptly" is not defined anywhere in the statute. In the handful of FCPA cases that have reached the circuit courts, the legislative history has been influential in understanding the word "corruptly."[48]

When dealing with a person charged as an individual or an officer, director, agent, or some other type of company employee, the individual

---

[43] *Id.* § 78dd-2(a)(3) (2012).

[44] *Id.* § 78dd-2(h)(3)(A) (2012).

[45] *Id.* § 78dd-2(h)(3)(B) (2012).

[46] S. REP. NO. 95-114, at 10 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4108.

[47] H.R. REP. NO. 95-640, at 7–8 (1977) (comparing the term "corruptly" to its use to "connote[] an evil motive or purpose," as in 18 U.S.C. § 201 which criminalizes the bribing of a domestic official).

[48] *See, e.g.*, United States v. Kay, 513 F.3d 432, 443 (5th Cir. 2007) (The court discusses how "the [legislative] history serves as additional support for the court's resolution of the ambiguity of the business nexus test. This Court looked to numerous aspects of the Act—its text, its title, its 'grease payments' exception, the dictionary definition of 'business,' and the Act's legislative history."); *Stichting*, 327 F.3d 173, 182 (2d Cir. 2003); United States v. Liebo, 923 F.2d 1308, 1312 (8th Cir. 1991).

must "willfully" violate the FCPA by corruptly influencing a foreign official (directly or through an intermediary), in order to be subject to criminal fines or incarceration.[49] The Supreme Court has stated that "willfulness" generally requires at least "proof that the defendant knew that his conduct was unlawful. . . ."[50]

These three mental states present challenges to SMEs who lack the sophisticated legal counsel and compliance programs of larger entities, especially when SMEs are new to the global marketplace and unfamiliar with the risks, customs, and laws of the foreign countries in which they operate. Challenges faced by SMEs, like obtaining the knowledge required to understand the FCPA's mental state requirements, are exacerbated by the low volume of case law and the confusing nature of relevant circuit court opinions.[51]

A. THE COURTS INTERPRET THE MENTAL STATE REQUIREMENTS

Few courts have examined the FCPA, which is in part due to the lack of litigation reaching the trial stage.[52] This is a result of the enforcement tactics of the DOJ and SEC.[53] In *United States v. Liebo*,[54] the Eighth Circuit first considered the meaning of "corruptly" using interstate commerce to make a payment, promise, or gift to a foreign official for the purpose of influencing their actions. In *Liebo*, the first consular for the Niger Embassy in Washington, D.C. considered airline tickets to be personal gifts from defendant Liebo.[55] The court was satisfied that sufficient evidence existed to allow a reasonable jury to find that the airline tickets were given "corruptly" as a "commission payment" or to induce the consular to misuse his official position.[56] The Eighth Circuit also affirmed the district court's jury instructions, which defined "corruptly" as requiring that "the offer, promise to pay, payment or authorization of payment, must be intended to induce the recipient to misuse his official position or to

---

[49] 15 U.S.C. § 78dd-2(g)(2)(A) (2012); 15 U.S.C. § 78dd-3(e)(2)(A) (2012). Civil penalties are also available under 15 U.S.C. § 78dd-2(g)(2)(B) (2012) and 15 U.S.C. § 78dd-3(e)(2)(B) (2012).

[50] Lipper, *supra* note 40, at 1470 (quoting Bryan v. United States, 524 U.S. 184, 186 (1998)).

[51] *See infra* Part II.B.

[52] *See generally* Lipper, *supra* note 40.

[53] See Part III.A for a fuller discussion of the government's enforcement regime and its impact on companies' business and FCPA litigation.

[54] 923 F.2d 1308, 1308 (8th Cir. 1991).

[55] *Id.* at 1312.

[56] *Id.*

influence someone else to do so," and that "an act is 'corruptly' done if done voluntarily [a]nd intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means."[57]

This jury instruction contains dueling definitions of the term corruptly. The first portion reflects the FCPA's legislative history that a payment must be made with "the specific intent to cause a misuse of an official's position" in order to be done "corruptly."[58] The second portion seems to expand this definition by "suggesting that the 'corruptly' element is met when the 'private payment to the official [is] intended to simply get the fair treatment to which the payer was otherwise legally entitled.'"[59] Not only does this second portion of the jury instruction seem to broaden the applicability of the "corruptly" element, it potentially conflicts with both the "facilitating payment" exception and the interpretation of legislative history that "corporations are protected when foreign officials use economic extortion to receive payments."[60] The Eighth Circuit has not clarified the definition of the term "corruptly" since *Liebo*.

Over a decade passed before another circuit court addressed the mental states of the FCPA. In 2003, the Second Circuit held in *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber* ("*Stichting*")[61] that a defendant is not required to have knowledge that it is violating the FCPA in order to be convicted because the FCPA is a general intent statute and knowledge of the specific statute applies "mainly [to] tax and other technical statutes that use the term 'willfully.'"[62] The court was not clear that its analysis was only applicable to companies because the term "willfully" does appear in the statute as applied to individuals.[63] The court also looked to the guidance

---

57 *Id.*

58 Preston Tull Eldridge, *Without Bounds: Navigating Corporate Compliance Through Enforcement of the Foreign Corrupt Practices Act*, 66 ARK. L. REV. 733, 761 (2013).

59 *Id.* (quoting Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARV. J. ON LEGIS. 303, 328 (2012)).

60 *Id.* at 761–62.

61 327 F.3d 173 (2d Cir. 2003). Later that same year, the Eighth Circuit affirmed jury instructions that construed the FCPA knowledge requirement to include "deliberate ignorance," so long as the defendant(s) deny any knowledge of a criminal scheme despite being presented with facts that put the defendant(s) on notice of possible criminal activity that the defendant(s) then failed to investigate. United States v. King, 351 F.3d 859, 866–67 (8th Cir. 2003).

62 *Id.* at 181 n.3, 182–83.

63 *Id.* at 181–83.

of Senate and House Reports for an understanding that "corruptly" should be viewed as it is under the bribery statute, meaning, a "bad or wrongful purpose and an intent to influence a foreign official to misuse his official position."[64] The Second Circuit viewed the Eighth Circuit's affirmation of the jury instructions in *Liebo* as an approval of the trial court's reasoning that the defendant violated the FCPA only if he sought to induce a foreign official to act "unlawfully" by misusing his position.[65]

The following year, the individual defendants in *United States v. Kay* (*Kay III*)[66] argued on appeal that a jury must find beyond a reasonable doubt that they "corruptly" and "willfully" violated subsections of the FCPA in order to obtain a criminal conviction.[67] Because the statute does not define "willfully," the court discussed the three common law definitions of criminal "willfulness": (1) the basic definition (committing an act and having knowledge of that act); (2) the intermediate definition (committing an act with knowledge that the act is unlawful); and (3) the strict definition (knowing the terms of the statute and violating them).[68] The Fifth Circuit held that the district court did not abuse its discretion in denying the individual defendants' two proposed jury instructions because the first proposed instructions were not substantively correct and the second proposed instructions were substantially covered by the trial court's jury instructions which sufficiently captured both the basic and intermediate definitions of willfulness.[69] The court rejected the strict definition of willfulness as inapplicable to the FCPA, adopting the Second Circuit's reasoning that the FCPA is a general intent statute.[70] Finally, the Fifth Circuit stated that the indictment was "not required to contain the exact

---

64 *Id.* at 183.
65 *Id.* at 183 n.9.
66 513 F.3d 432 (5th Cir. 2007).
67 *Id.* at 446.
68 *Id.* at 447–48.
69 *Id.* at 447–49. The Fifth Circuit held that:

> [t]he district court, by instructing the jury that a guilty verdict required a finding that defendant acted "voluntarily and intentionally, and with a bad purpose or evil motive of accomplishing either an unlawful end or result," and by including a separate "knowing" instruction, correctly indicated that the jury must identify evidence amounting to "knowledge of facts that constitute the offense" required by the traditional criminal definition of willfulness (which we have described as the first category of willfulness). The court's instructions also substantially covered the requested instruction that Defendants acted "corruptly," meaning they acted "knowingly and dishonestly, with the specific intent to achieve an unlawful result by influencing a foreign public official's action in one's own favor."

Id.
70 *Id.* at 448.

term 'willfulness'" and that "an indictment alleging that [a] defendant 'corruptly did endeavor' sufficiently 'charges an intentional act,' which is 'interchangeable with the term willful.'"[71]

Scholar Gregory Lipper argues that there are two issues with the decision in *Kay III*. First, the Fifth Circuit upheld the district court's jury instructions, which stated the statute's use of "corruptly" meant "done voluntarily and intentionally, and with a bad purpose or evil motive of accomplishing either an unlawful end or result" and the statute's use of "knowingly" meant "done voluntarily and intentionally, not because of accident or mistake."[72] The district court failed to provide a separate instruction regarding the meaning of "willfully" and when the jury asked if a "lack of knowledge of the FCPA could be considered an accident or mistake," the court simply "referred the jury to its definition of the term knowingly."[73] Second, Lipper points out that the Fifth Circuit conflated "willfully" and "corruptly" and held that the "'[d]efendants' knowledge that they were committing the acts of *corrupt* bribery of foreign officials was sufficient' to convey the separate requirement of willfulness.'"[74] The danger in reading the statute to allow corruptly to "subsume[] the concept of willfulness [is that it] effectively reads the 'willfully' element out of the statute."[75] This removes a layer of protection for individuals, like the defendants in *Kay III*, where a statute "extends to a range of conduct that an ordinary person would not necessarily understand to be unlawful."[76] Lipper believes the Fifth Circuit made this error because of the confusing discussion of the willfulness requirement in *Stichting* as it applies to companies.[77]

The Second Circuit revisited the mental state issue under the FCPA in *United States v. Kozeny*.[78] The defendant argued that the district court

---

[71] *Id.* at 451 (quoting United States v. Haas, 583 F.2d 216, 220 (5th Cir. 1978)).

[72] Lipper, *supra* note 40, at 1475 (quoting *Kay III*, 513 F.3d at 446).

[73] *Id.* (quoting *Kay III*, 513 F.3d at 446, 449 n.62).

[74] *Id.* at 1476 (quoting *Kay III*, 513 F.3d at 449 n.62) (emphasis in original).

[75] Brief for National Association for Criminal Defense Lawyers as Amici Curiae Supporting Respondents, United States v. Kay, 513 F.3d 432 (5th Cir. 2007) (No. 05-20604), 2006 WL 5582334 at *5.

[76] *Id.* (comparing the FCPA to a variety of other statutes containing a willfulness requirement for individuals including Ratzlaf v. United States, 510 U.S. 135, 140–41 (1994) which addresses a tax statute and declares that judges should resist treating statutory terms in such a way as to render an element of an offense as surplusage). See Part IV.B for a discussion of *Ratzlaf* and a solution to the court's conflation of mental state requirements.

[77] Lipper, *supra* note 40, at 1475.

[78] 667 F.3d 122, 135–36 (2d Cir. 2011).

"erred by failing to instruct the jury that the government needed to prove [that he] acted 'corruptly' and 'willfully' to sustain a conviction on FCPA conspiracy."[79] The Second Circuit appeared to agree with the holding of the Fifth Circuit, that to violate the FCPA one must act "corruptly" and "willfully."[80] The court held that the district court properly instructed the jury that it must find the defendant knowingly entered a conspiracy that had the object of "corruptly" and "willfully" bribing foreign officials and that the defendant intended to aid in achieving this object.[81] Once again, willfulness was not held to require the government to show the defendant was aware of a specific law that prohibited his conduct and instead held it sufficient that the defendant "act[] deliberately and with the intent to do something that the law forbids, that is, with a bad purpose to disobey or disregard the law."[82] Like the courts before it, the Second Circuit's analysis conflates the definitions of corruptly and willfully under the FCPA, thereby rendering the willfulness requirement surplusage.[83] If federal judges struggle to understand and accurately interpret the FCPA's mental state requirements and how they work together, SMEs that are new to the global marketplace (and the individuals running them) and acting without the benefit of sophisticated legal counsel and compliance plans are unlikely to be able to effectively guard against liability under the statute.

B. A TRAP FOR UNSUSPECTING SMALLER BUSINESSES

The extremely small number of cases interpreting the mental state requirements under the FCPA combined with its declared general intent status renders compliance for small- and medium-sized enterprises extremely difficult.[84] Small, unsophisticated companies just entering the global marketplace for the first time are not able to seek refuge behind an argument of ignorance or a true lack of "willfulness" to commit bribery and there are very few cases upon which to rely on when evaluating culpability and obligations under the statute. A company embarking on its first project overseas or a company that only does work sporadically abroad will often

---

79 *Id.* at 130.

80 *Id.* at 136.

81 *Id.*

82 *Id.* at 135.

83 "[I]n November [2009] U.S. Judge Shira Scheindlin in Manhattan sentenced him to only a year and a day, saying 'after years of supervising this case, it's still not entirely clear to me whether Mr. Bourke is a victim or a crook.'" Nathan Vardi, *How Federal Crackdown on Bribery Hurts Business and Enriches Insiders*, FORBES (May 6, 2010), http://www.forbes.com/forbes/2010/0524/business-weatherford-kbr-corruption-bribery-racket.html.

84 *See* Part III.B.2 (defining an SME).

lack the institutional knowledge developed through experience with the various risks in the project's home country (including but not limited to the level of corruption that exists there). When international projects make up only a small percentage of a business or constitute a new venture entirely, it is not necessarily obvious that such ventures require investing millions of dollars in developing compliance programs and hiring lawyers for a problem that has not yet occurred. SMEs find themselves in a challenging business and legal environment when one combines the lack of experience with the price tag of trying to prophylactically prevent activity that falls within the broad definition of bribery. The government used provisions from a statute originally passed to target large sophisticated business entities, such as oil companies, to prosecute SMEs, which are unprepared and unable to defend themselves or institute effective anti-liability compliance programs.[85]

The FCPA only provides individuals with the protection of a "willfulness" requirement for conviction, not businesses.[86] This poses serious problems for small- and medium-sized businesses. Smaller companies have fewer employees, which makes it more likely that high-level executives are involved in the everyday, minute decision-making for the company.[87] In the event of a DOJ investigation and indictment, SMEs cannot argue that the mental state of criminal "willfulness" was not present, even though the corporate action is more directly attributable to the SME's officers and directors because of how closely held SMEs often are compared to large multi-national corporations with expansive subsidiaries.[88] Even if the "willfulness" requirement did apply to closely held businesses, the circuit courts have not been clear about which standard of "willfulness"

---

[85] Kovacich, *supra* note 2935, at 531, 533.

[86] 15 U.S.C. § 78dd-2(g)(2)(A) (2012).

[87] Rashna Bhojwani, *Deterring Global Bribery: Where Public and Private Enforcement Collide*, 112 COLUM. L. REV. 66, 73–74 (2012) (citing Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571, 614 & n.149 (2005) ("[M]any small organizations sentenced under the Guidelines are ineligible for sentence mitigation, due to top-management knowledge of or participation in the misconduct.")).

[88] There is also the problem of the maxim that ignorance of the law is no excuse and the individuals running this company will be bound by such a maxim. But Lipper notes that Congress can override this presumption in a statute. Lipper, *supra* note 40, at 1470–71 (noting that the Supreme Court has interpreted "willfully" provisions in criminal statutes, over the last several decades, to "require, at minimum, that the defendant know that his conduct is illegal and often that the defendant know about the specific legal provision which he is alleged to have violated").

applies.[89] This problem is compounded by confusion among courts regarding the differing mental state requirements.[90] Even if the "willfulness" requirement applied to SMEs as well as individuals, there is still confusion in the circuits as to how "willfulness" and "corruptly" differ and how to apply them.[91] SMEs cannot claim a lack of knowledge of the statute and its provisions and prohibitions as a defense, because many courts such as the Second Circuit have held that the FCPA is a general intent statute.[92] Compare this to tax statutes, which courts have repeatedly held are specific intent statutes that allow unsophisticated parties to argue that they did not fully understand the complex statute and thus were unable to comply fully, despite a desire to do so.[93] The confusion surrounding the FCPA's mental states and the poor application of those mental states to more closely held businesses adds multiple layers of difficulty for SMEs attempting to mount a mental state culpability defense against a DOJ investigation or indictment.

In addition, it is not clear that companies are always aware that their behavior satisfies the "corruptly" mental state requirement because foreign officials, foreign government agents, and foreign business people have become more adept at hiding how money is used and where it goes. An example is through the use of so-called local experts and consultants. The industries of developing nations are often state-owned or operated, and investors in those countries often require the services of "local agents."[94] These local agents are often well-connected to the foreign government and have a strong knowledge of local customs, and because they are difficult to supervise, bribes often happen unbeknownst to the foreign government or the American company engaging with the agent.[95] While it might seem logical for American businesses to avoid these types of agents, "[w]ell-

---

[89] *Kay III*, 513 F.3d 432, 447–49 (5th Cir. 2007) (holding that the jury instructions satisfied the basic definition of willfulness (committing an act and having knowledge of that act) and the intermediate definition of willfulness (committing an act with knowledge that the act is unlawful, without actually specifying which was correct under the statute)).

[90] See *supra* Part II.A for examples.

[91] *See supra* Part II.A, at notes 55–57.

[92] *See supra* Part II.A, at note 46.

[93] *See, e.g.*, Cheek v. United States, 498 U.S. 192, 199–200 (1991) (discussing how the Court's prior decisions had interpreted "willfully" in the federal criminal tax laws as an exception to the rule that ignorance of the law is no excuse because "[t]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws").

[94] Lipper, *supra* note 40, at 1464–65.

[95] *Id.*

connected local agents are essential to investing in most foreign countries, especially those with Byzantine bureaucracies."[96] But in some countries, the use of local agents is required.[97] The Senate recognized the legitimacy of using agents "with personal relationships with government officials" in the locality where a company wants to do business.[98] To quote businessman Gilbert Chagoury—who is "believed to have acted as a middleman" for former corrupt Nigerian dictator Sani Abacha—"You have lobbyists; we have agents."[99] This reality of doing business in foreign countries not only makes bribes more common, but it also increases the likelihood that the company and its agents did not act with the requisite mental states: corruptly and knowingly.

SMEs are also less likely to employ legal counsel with the resources and experience to effectively counsel on issues of FCPA liability risk. Large law and accounting firms are typically well-versed on FCPA liability and compliance because they represent large international clients that can afford to invest in the research, development, and implementation of compliance programs.[100] SMEs are less likely to employ these expensive firms.[101] For example, as Kovacich notes in his article on SMEs, Wisconsin and Minnesota businesses are more likely to employ local Midwestern law firms that "do not publish and update FCPA literature to educate their

[96] *Id.* at 1486 (citing J. Scott Ballenger et al., *Reigning in the Foreign Corrupt Practices Act: The Supreme Court Ignores a Perfect Opportunity*, 46 NO. 4 CRIM. L. BULL. ART 2 (2010)).

[97] *Id.* (citing Lisa Middlekauff, *To Capitalize on a Burgeoning Market? Issues to Consider Before Doing Business in the Middle East*, 7 RICH. J. GLOBAL L. & BUS. 159, 170 (2008)).

[98] S. REP. NO. 100–85, at 52 (1987).

[99] Lipper, *supra* note 40, at 1486 (quoting Robin Urevich, *Chasing the Ghosts of a Corrupt Regime*, FRONTLINE, (Jan. 8, 2010), http://www.pbs.org/frontlineworld/stories/bribe/2010/01/nigeria-chasing-the-ghosts-of-a-corrupt-regime.html).

[100] Kovacich, *supra* note 29, at 544 n. 101 (noting these large law and accounting firms "have generated most of the advertisements and educational literature regarding the FCPA because recent trends have put significant pressure on [these] firms' clients").

[101] "The global market is no longer a playing field just for the large corporation [and] . . . [t]he leveling of the playing field is not always prevalent when it comes to adequate resources that ensure compliance. The stakes are therefore chancier for privately held companies that enter into high-risk markets and expand their international sales than for large businesses with resources." Deitra Crawley, *How Company Size Influences FCPA Enforcement*, TAYLOR ENGLISH (Mar. 22, 2016), https://www.taylorenglish.com/newsroom-publications-How-Company-Size-Influences-FCPA-Enforcement-InsideCounsel.html ("Most startups begin with a single individual or a small team, and do not have the infrastructure to address the complicated risks associated with international business. Oftentimes, there is no in- house counsel or specialized staff to navigate the risks.").

clients."[102] Even if an SME wanted to engage a large, experienced law firm to aid them in developing a compliance program or investigating potential abuses, doing so can often come at too high a price. Companies often pay much more in pre-enforcement action professional fees and expenses than they do in penalties or settlement amounts to the government.[103] During a recent presentation on first-quarter fiscal year 2017 earnings, Wal-Mart disclosed $21 million in expenses for ongoing FCPA investigations and inquiries and another $4 million in expenses for their global FCPA compliance program.[104] Large companies such as Wal-Mart can often absorb these high costs, but not all SMEs have the same capacity.[105]

---

[102] Kovacich, *supra* note 29, at 553.

[103] Mike Koehler, *Foreign Corrupt Practices Act Ripples*, 3 AM. U. BUS. L. REV. 391, 396–97 (2014) ("For instance, in the NATCO enforcement action the company agreed to pay a $65,000 civil penalty to resolve an SEC enforcement action. The company's pre-enforcement action professional fees and expenses were reported to be $ 11 million and caused the company cash-flow problems."); *see also* Beverley Earle, *Because It's the Bottom Line: The Need for Corporate Compliance Programs for Small- and Medium-Size Businesses*, 25 BUS. F. J. SCH. BUS. & ECON. 3, 3–5 (2000) (discussing the costs associated with developing a compliance program through the hiring of expensive lawyers and how many SMEs do not understand the incredibly high costs of not having a compliance program); Earle & Cava, *supra* note 5, at 140 ("The smaller companies do not have the resources to mount serious compliance efforts and they do not necessarily even appreciate the risk they are facing. This study demonstrates the concerns executives have in trying to operate within this landscape and still comply with both domestic and foreign laws.

[104] Mike Koehler, *Friday Roundup*, FCPA PROFESSOR (May 27, 2016), http://fcpaprofessor.com/friday-roundup-194/print/ (calculating Wal-Mart's 1Q FCPA and compliance-related costs to be approximately $396,000 per working day); *see also The Anti-Bribery Business*, THE ECONOMIST (May 9, 2015), http://www.economist.com/node/21650557 (discussing how Wal-Mart will pay $800 million by the end of fiscal year 2015 on its internal probe into non-trivial allegations of bribery in Mexico and on related compliance improvement and by the time the government concludes this investigation which began in 2012, Wal-Mart's costs will likely be close to $2 billion).

Former DOJ criminal fraud section chief Steven Tyrrell "estimated that a multinational company spends, on average, about $2 million to investigate its operations in one country and that most investigations span several countries . . . . Smaller investigations for a 'specific, discrete issue,' can cost around $100,000 to $200,000, said Paul McNulty, a partner at Baker & McKenzie LLP. But companies have to be prepared to assure the government that a problem in one country doesn't exist in others." Joe Palazzolo, *FCPA Inc.: The Business of Bribery, Corruption Probes Become Profit Center for Big Law Firms*, WALL ST. J. (Oct. 12, 2012), http://www.wsj.com/articles/SB10000872396390443862604578028462294611352.

[105] "While major law firms advocate expensive compliance programs to alleviate risk, smaller, less sophisticated companies can rarely afford the full panoply of these protections." Matthew W. Muma, *Toward Greater Guidance: Reforming the Definitions of the Foreign Corrupt Practices Act*, 112 MICH. L. REV. 1337, 1347 (2014). "The international law firm Jones Day lists 'ten questions' every director should ask herself about FCPA compliance;

Because SMEs are less likely to have the resources to invest in compliance programs, and are often unaware of just how important they are, they are less likely to create a sufficient demand for local law firms to invest in the development of literature and compliance programs to help avoid FCPA liability. Compound this reality with the costs of pre-government enforcement action and many SMEs become defenseless targets against an unchecked and unchallenged government enforcement regime.

III. THE DEPARTMENT OF JUSTICE'S UNCHECKED AND UNCHALLENGED HISTORY OF ENFORCEMENT

The negative correlation between the frequency of investigations of companies by the DOJ and the frequency of actual prosecutions that go to trial is not a coincidence. In fact, throughout the entire course of the FCPA's existence, only two companies of any size have litigated charges to a final verdict.[106] In both cases, the DOJ lost. Yet despite these setbacks, the DOJ successfully "prosecutes" companies every year without ever setting foot in a courtroom.

The first case the DOJ brought under the FCPA against a company occurred when the United States criminally indicted Harris Corporation ("Harris") (a publicly traded company), John D. Iacobucci (Vice President and General Manager of the Digital Telephone Systems ("DTS") division), and Ronald L. Schultz (Director of Human Relations and Facilities at DTS, Director of Administration at DTS and responsible for Contracts Administration) in 1991.[107] The defendants were charged with engaging in a bribery scheme in violation of the FCPA which targeted a local Colombian company owned by a foreign party official, members of the national legislature of Colombia, and other local government officials.[108]

---

answering the questions with an effective compliance program would not be cheap." *Id.* at 1347 n.66 (citing Jones Day, *Ten Questions Every Director Should Ask About FCPA Compliance* (2010), http://www.jonesday.com/files/Publication/b8f035e6-084c-40ad-a62d-1446eee89829/Presentation/PublicationAttachment/28a5983b-457b-429d-99b5-bb07be223927/Ten Questions.pdf.

[106] See *infra* notes 107–117 for a discussion of these two cases.

[107] United States v. Harris Corporation, et al. (N.D. Cal. 1991) at *2 (unpublished case) (link to indictment found here: http://www.fcpaprofessor.com/one-win-one-loss and https://www.justice.gov/criminal-fraud/case/united-states-v-harris-corporation-et-al-court-docket-number-90-cr-456).

[108] Mike Koehler, *FCPA 101*, FCPA PROFESSOR (2012), http://www.fcpaprofessor.com/one-win-one-loss (citing United States v. Harris Corporation, et al. (N.D. Cal. 1991) at *2–3 (unpublished case) (link to indictment found here: http://www.fcpaprofessor.com/one-win-one-loss and https://www.justice.gov/criminal-fraud/case/united-states-v-harris-corporation-et-al-court-docket-number-90-cr-456)).

The criminal trial began on March 4, 1991.[109] After the prosecution presented its case, Judge Charles Legge granted a directed verdict of acquittal because "'no reasonable' jury could convict the company nor its executives on any of the five bribery-related counts for which they were indicted" due to insufficient evidence showing that the defendants intended to enter into a criminal conspiracy.[110]

The second case occurred two decades later when the government filed a first superseding indictment against Lindsey Manufacturing Company and two individuals with conspiracy to violate the FCPA and substantive violations of the FCPA.[111] Lindsey is a small, privately-owned company that manufactures equipment used by electrical utility companies.[112] The Lindsey defendants allegedly paid bribes to two high-level employees of an electric utility company wholly-owned by the Mexican Government.[113] Lindsey made payments to the employees through their company as commissions for services when in reality, the money was used for bribe payments.[114] After the jury convicted the defendants on all counts,[115] the court conducted a hearing in response to multiple motions filed by defendants alleging prosecutorial misconduct.[116] The court ultimately threw out the convictions of all defendants and dismissed the first superseding indictment after finding the government had

> allowed a key FBI agent to testify untruthfully before the grand jury, inserted material falsehoods into affidavits submitted to magistrate judges in support of applications for search warrants and seizure warrants, improperly reviewed e-mail communications between one Defendant and her lawyer, recklessly failed to comply with its discovery obligations, posed questions to certain witnesses in violation of the Court's rulings, engaged in questionable behavior during closing argument and even made misrepresentations to the Court.[117]

While not completely clear, it seems unlikely that the government would

---

109 *Id.*

110 Jim Doyle, *Judge Tosses Out Overseas Bribery Case*, S. F. CHRON., Mar. 20, 1991, at B6.

111 United States v. Aguilar, 831 F. Supp. 2d 1180, 1182 (C.D. Cal. 2011).

112 *Id.*

113 *Id.* at 1183.

114 *Id.* at 1183.

115 Press Release, Dep't of Just., California Company, Its Two Executives and Intermediary Convicted by Federal Jury in Los Angeles on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico (May 10, 2011), http://www.justice.gov/opa/pr/california-company-its-two-executives-and-intermediary-convicted-federal-jury-los-angeles-all.

116 *Aguilar*, 831 F. Supp. 2d at 1182.

117 *Id.*

have secured a conviction without engaging in the above-mentioned misconduct. While these two cases seem like milestones in the history of the FCPA that would impact the government's enforcement strategies, that has not been the case. This directed verdict of acquittal and vacated conviction tandem has not emboldened companies to challenge the government in court on interpretations of key provisions of the FCPA, and these setbacks have not deterred the DOJ and SEC from pursuing an aggressive enforcement strategy against companies suspected of violating the FCPA.[118] So far, no company has wanted to challenge the government in open court because the "bet the firm" stakes are so high given the DOJ and SEC possess unbridled authority with regard to the fines and penalties they assess.[119]

A. THE ENFORCEMENT ENVIRONMENT OUTSIDE THE COURT SYSTEM

The DOJ has created an enforcement environment in which many of its FCPA enforcement and liability theories do not undergo judicial scrutiny on a regular basis.[120] Beginning in 1997, the DOJ and SEC began adopting "a more aggressive approach to investigating and prosecuting FCPA violations."[121] The number of enforcement actions brought by both entities combined more than doubled to five in 2004, more than doubled again in 2005 with twelve actions, and substantially more than doubled in 2007 when thirty-eight actions were brought compared to the fifteen actions

---

[118] No companies have gone all the way through to a jury trial on any issues related to an allegation of FCPA violations since the conclusion of these two cases. See infra Part III.A for a discussion of how the government has continued to ramp up its enforcement actions under the FCPA in spite of these two company victories years ago.

[119] *See* Ashby Jones, *FCPA: Company Costs Mount for Fighting Corruption*, WALL ST. J., Oct. 2, 2012, http://www.wsj.com/articles/SB10000872396390444752504578024893988048764 (suggesting that few cases end up in court because most are settled which means "there are few judicial decisions to guide corporate legal departments" which then in turn discourages future litigation).

> Even those [companies] that do have a good case are scared to fight and risk a criminal indictment that would clobber their share price. It is commercially rational to roll over, all the more so given how severely any failure to co-operate is punished. Ask Marubeni of Japan, whose coyness towards the DOJ led to its being forced to plead guilty and pay an elevated fine. This hands prosecutors a lot of discretion.

The Anti-Bribery Business, *supra* note 104 ("'The FCPA often means what enforcement agencies say it means,' says [Mike] Koehler. 'We have only a façade of enforcement.'").

[120] Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters A New Era*, 43 U. TOL. L. REV. 99, 126 (2011).

[121] WARIN ET AL, *supra* note 37, at A-25.

brought in 2006.[122] This number continued to rise until 2010, when the government brought a record seventy-four actions.[123] This Comment focuses more on the DOJ Fraud Section, which is able to bring both civil and criminal enforcement actions while the SEC is limited to civil actions. As these enforcement actions increased, the DOJ developed several methods of resolution: declination, non-prosecution agreement (NPA), deferred prosecution agreement (DPA), plea agreement, or trial before a judge or jury.[124]

For some companies, admitting guilt through a plea bargain is the most advised route by counsel under the circumstances. But if possible, a company will make an effort to enter into a DPA or an NPA because they allow a company to avoid admitting guilt. Under a DPA, the DOJ or SEC will still "file a charging document with the court, while simultaneously requesting that the prosecution be deferred for a period of time (typically two or three years) during which the company may demonstrate its good conduct."[125] Alternatively, NPAs are maintained by the parties outside of the judicial system, though most are made available to the public on the DOJ and SEC websites, which preserves the government's right to file charges later on if the company or individual fails to comply.[126]

Under this regime, the primary statutory interpretive function is performed almost exclusively by the DOJ Fraud Section and the SEC. Over time, the ratio of complaints filed in federal court to in-house administrative proceedings has completely reversed. For example, in 2010, the SEC filed twenty-five civil complaints in federal courts and only two in-house administrative proceedings, while in 2012, the SEC filed eleven civil complaints and one in-house administrative proceeding.[127] But in 2014, the SEC filed just one civil complaint in federal court and eight in-house

---

[122] *Id.*

[123] *Id.* See infra notes 131–134 for a discussion of this trend and corresponding trends in average resolutions amounts.

[124] WARIN ET AL., *supra* note 37, at A-28 (citing RESOURCE GUIDE, *supra* note 9 at 74–75; U.S. ATTORNEY'S MANUAL 9-28.300, 9-28.1000, 9-28.1300).

[125] *Id.* at A-28 (explaining that a DPA will require a defendant to "(1) pay a monetary penalty, (2) waive the statute of limitations, (3) cooperate with the government, (4) admit relevant facts, and (5) commit to certain compliance and remediation terms"); *see* RESOURCE GUIDE, *supra* note 9, at 74.

[126] WARIN ET AL., *supra* note 37, at A-28 (requiring similar concessions as outlined in n.125 for DPAs).

[127] *2014 Year-End FCPA Update*, GIBSON DUNN 6–7 (Jan. 5, 2015), http://www.gibsondunn.com/publications/pages/2014-Year-End-FCPA-Update.aspx [hereinafter Gibson 2014 FCPA Update].

administrative proceedings.[128] The DOJ and SEC are removing more and more investigations and subsequent cases from the purview of Article III courts. There was also a meteoric rise in the DOJ and SEC combined enforcement actions from twelve (7 DOJ / 5 SEC split) in 2005 to seventy-four (48 DOJ / 26 SEC split) in 2010.[129] And while the statistics have leveled off somewhat in the last three years with twenty-three (11 DOJ / 12 SEC split) in 2012, twenty-seven (19 DOJ / 8 SEC split) in 2013, and twenty-six (17 DOJ/9 SEC split) in 2014, these numbers are still very high when compared to the roughly thirty years of government FCPA enforcement.[130]

This increase of enforcement actions outside of the formal judicial process translates to enormous monetary penalties, and damages assessed without a formal finding of guilt by a judge or jury. The DOJ and SEC assessed a combined $1.8 billion in corporate fines, penalties and disgorgement in 2010 compared to $300,000 in 2000 FCPA enforcement.[131] Prior to 2005, the single largest corporate monetary resolution between the government and a company occurred in 1995 when Lockheed Corporation paid $24.8 million.[132] But since the post-2005 enforcement boom, the *average* corporate monetary resolution has only dipped below $25 million four times.[133] At the peak of the DOJ and SEC enforcement boom in 2010 (quantity of actions brought), the *average* resolution was $81,860,000.[134] In 2015, the number of resolutions was one-third the number that occurred in 2010 (74 resolutions), and yet 2015 saw an average corporate resolution of $156,610,000.[135] This is partially attributable to use of disgorgement.[136]

---

[128] *Id.*

[129] *Id.* at 2.

[130] *Id.*

[131] Koehler, *supra* note 120, at 100–04.

[132] Gibson 2014 FCPA Update, *supra* note 127, at 3; "Early FCPA penalties imposed on corporations ranged from a few hundred thousand to a few million dollars." WARIN ET AL., *supra* note 37, at A-25–26 (citing examples of judgments and plea agreements from the 1980s and early 1990s).

[133] Gibson 2014 FCPA Update, *supra* note 127, at 3 (noting the average resolution dipped below $25 million in 2005, 2006, 2007, and 2012).

[134] *Id.* at 2–3.

[135] *Id.*

[136] "Disgorgement is a civil remedy with roots in the traditional equitable remedies of restitution and recoupment. Imposition of the disgorgement remedy requires corporations subject to FCPA liability to forfeit the amount of 'ill-gotten' arising from the bribery at issue. Use of the disgorgement remedy is a recent but growing practice on the part of the SEC." Matthew C. Turk, *A Political Economy Approach to Reforming the Foreign Corrupt Practices Act*, 33 NW. J. INT'L L. & BUS. 325, 336 (2013).

Disgorgement was not considered an available remedial action at the government's disposal from the passage of the FCPA.[137] It was never sought by the SEC in the first twenty-seven years of the FCPA's existence.[138] Since 2004, the SEC has sought disgorgement in almost every case and in 2010, "ninety-six percent of the proceeds from SEC FCPA settlements consisted of disgorgement and prejudgment interest, a total amounting to approximately $500 million."[139] Like many aspects of the FCPA, the SEC's authority to seek disgorgement has gone unchallenged in federal courts.[140] The government determines the possible maximum penalty it can assess under the Sentencing Guidelines and Alternative Minimum Fines Act, which is then used to increase fines above the FCPA-mandated limits to twice the amount the offender stood to gain through his or her illicit financial transaction.[141] If a company wishing to avoid bet-the-company litigation feels this is too high, either because they do not believe their conduct violated the FCPA or because they believe their conduct was not that egregious, the government often responds by pointing out that they could indict a company for as many violations as alleged bribes were made and seek the $2,000,000 statutory maximum fine for each such violation. This number is often much larger than that calculated under the Sentencing Guidelines, so companies agree to the increased fines. It is unclear if an indictment structured this way would hold up in court.

While there is a trend away from criminal or civil litigation, arguably by both the authorities and the companies involved, there is an increasing number of guilty pleas at the same time. From 1990 to 2007, the vast majority of FCPA cases "yielded settlements before the parties adjudicated any criminal issues in court" and the government "disposed of 77% of the investigations through non-prosecution agreements and pleas, while only 14

---

137 *Id.* at 337 ("While not explicitly disallowed by the FCPA, the 'lack of any statement that disgorgement should be part of the SEC's enforcement arsenal, and the rarity of the remedy at the time that Congress passed the FCPA and its amendments' have led some to question the propriety of the remedy. As with many aspects of the FCPA, the exact contours of the SEC's disgorgement authority have never been tested in court.'").

138 *Id.* at 336.

139 *Id.*

140 *Id.* at 336–37 (discussing the SEC's theory of statutory interpretation to justify disgorgement as an FCPA remedy and the legal and practical problems arising from this tenuous interpretation).

141 18 U.S.C. § 3571(d) (2012). Of course, the government is only supposed to assess this fine increase when supported by evidence and the offender pleads guilty or is proven guilty beyond a reasonable doubt. 18 U.S.C. § 3571(a) (2012) ("In General.—A defendant who has been found guilty of an offense may be sentenced to pay a fine.").

investigations resulted in convictions, dismissals, or acquittals."[142] More recently, the DOJ and SEC have moved away from settling cases through DPAs or NPAs and instead seek plea agreements from corporate defendants. For example, only two of DOJ's seven corporate enforcement actions in 2013 resulted in plea agreements, and in 2014, five of DOJ's seven corporate enforcement actions resulted in guilty pleas.[143] "While the distinction between plea agreements, deferred prosecution agreements, and non-prosecution agreements may be minor in substance and consequence, the government's decision to extract a guilty plea is generally understood to be a harsher form of corporate punishment."[144]

B. THE PROBLEMS ASSOCIATED WITH INSUFFICIENT LITIGATION

Too little litigation on a statute like the FCPA can sometimes lead to improper or undesirable interpretive results. Many terms and provisions of the FCPA remain unapplied by district courts and juries, leading to a dearth of appellate case law examining the ambiguities left by Congress. In the case of the FCPA, the statutory interpretation is left to the DOJ and SEC through rulemaking and administrative proceedings. One might initially miss the issue of concern. The problem is not that the DOJ and SEC are completely incapable of interpreting congressional directives from a statute and filling in any remaining holes. Rather, the problem is that the DOJ and SEC have skin in the game—the FCPA has become extremely lucrative for these governmental bodies.[145] And government attorneys who perpetuate this enforcement regime go into private practice to represent companies and build up very successful white-collar practices.[146]

---

[142] Kovacich, *supra* note 29, at 546 n.112 (citing *Recent Trends and Patterns in FCPA Enforcement*, SHEARMAN & STERLING, LLP 7 (2008), http://www.shearman.com/~/media/Files/Old-Site-Files/LIT_FCPA_Trends_121208.pdf (indicating a desire on behalf of companies and authorities alike for quick disposal methods that generate little public or industry attention respectively) [hereinafter *Shearman Recent Trends 2008*]).

[143] *Recent Trends and Patterns in FCPA Enforcement*, SHEARMAN & STERLING, LLP 4 (Jan. 5, 2015), http://www.shearman.com/~/media/Files/NewsInsights/Publications/2015/01/Recent-Trends-and-Patterns-only-LT-010515.pdf [hereinafter *Shearman Recent Trends 2015*].

[144] *Id.*

[145] See *supra* Part III.A for discussion of the massive criminal penalties the DOJ and SEC are assessing and collecting.

[146] "'This is good business for law firms,' says Joseph Covington, who headed the Justice Department's FCPA efforts in the 1980s and is now codirector of white-collar defense at Jenner & Block. 'This is good business for accounting firms, it's good business for consulting firms, the media–and Justice Department lawyers who create the marketplace and then get yourself a job.'" Nathan Vardi, *How Federal Crackdown on Bribery Hurts*

1. The Government's Enforcement Regime is not Interchangeable with Case Law and Perpetuates the Lack of Case Law

The lack of judicial oversight has bred an environment marked by over-enforcement and a lack of transparency. There are indications that the DOJ's activity would be reined in if challenged in court. For example, while the penalties assessed against corporate defendants outside the court system have sky-rocketed over the past five to ten years, the number of individuals penalized in court has actually decreased.[147] Of the forty-two individual defendants sentenced to prison terms for violations of the FCPA since 2010, only five of those defendants received sentences within the Sentencing Guidelines range—most received shorter sentences.[148] Individuals have incentives to contest the government's allegations of FCPA violations because of the loss of personal liberty they face. The number of individuals receiving prison sentences lower than the recommended guideline ranges suggests that either the government is cutting deals with individuals for more information or the courts are providing a bulwark against overzealous prosecution. The latter possibility begs the question of what corporate criminal fines (and civil fines imposed by the SEC) might look like if reviewed and imposed by courts rather than the DOJ through DPAs, NPAs, and settlements.

Deputy Attorney General Paul McNulty issued a revised memorandum (the "McNulty Memorandum") of guidelines for companies in 2006 which laid out factors the DOJ considers when deciding whether to prosecute and how a company can cooperate to avoid higher levels of liability.[149] These discretionary factors are supposed to help determine whether a company deserves cooperation credits and whether the DOJ should prosecute.[150] Some factors include "the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal

---

Business and Enriches Insiders, FORBES (May 6, 2010), http://www.forbes.com/forbes/2010/0524/business-weatherford-kbr-corruption-bribery-racket.html.

147 WARIN ET AL., *supra* note 37, at A-30; *Shearman Recent Trends 2015*, *supra* note 143, at 2 (depicting the number of individuals criminally penalized by the DOJ declining from 44 individuals in 2009 to 12 individuals in 2014 (most of whom received prison sentences)).

148 WARIN ET AL, *supra* note 37, at A-30.

149 Memorandum from Paul McNulty, Deputy Att'y Gen., U.S. Dep't of Just. to Head of Dep't Components & United States Att'ys. (Dec. 12, 2006), http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf [hereinafter McNulty Memorandum].

150 *Id.* at 4.

approaches."[151] Other corporation-specific factors considered are "the nature and seriousness of the offense, including the risk of harm to the public, . . . the existence and adequacy of the corporation's pre-existing compliance program, . . . [and the] collateral consequences, including disproportionate harm to shareholders . . . and [the] impact on the public."[152]

The problem with the McNulty Memorandum is that it fails to restrain prosecutors in any meaningful way—prosecutors are only instructed to "consider the sufficiency of the evidence and the likelihood of success at trial."[153] The government does not need to seriously consider whether the evidence would be sufficient to win at trial because both the government and many companies push for settlement under the current enforcement environment.[154] The pressure to settle is especially felt by smaller companies who cannot afford the expense and cost to their reputation that public litigation brings and who rarely have the ability to invest in developing a rigorous compliance program to help mitigate the DOJ's desire to prosecute.[155] Because the government knows companies are unlikely to pursue litigation in light of this "robust settlement history," there is even more of an incentive for the government to unfairly "consider the weight of the evidence and whether it supports success at trial."[156] In addition, the government's use of these agreements (DPAs, NPAs, and settlements) allows it to "receive facts from potential defendants in exchange for a diversion agreement [and then] weave the facts into convincing narratives."[157] The threat of this settlement regime is felt even more by SMEs than large corporations with significantly greater resources to devote to litigation and settlement.

This hostile enforcement environment for SMEs is only exacerbated by the fact that the DOJ and SEC have essentially read many of the safety valves and affirmative defenses out of the FCPA. For example, the

---

151 *Id.*

152 *Id.*

153 Kovacich, *supra* note 29, at 561.

154 *See The Anti-Bribery Business*, *supra* note 104 (discussing how even companies with good cases chose not to litigate in court against the government because of the financial cost and share price risks).

155 Kovacich, *supra* note 29, at 561–62.

156 *Id.*

157 Eldridge, *supra* note 58, at 750 (noting that this feature of the enforcement regime allows the government to "overcome evidentiary difficulties [and] enforce the FCPA when it may not have a strong chance of success under evidentiary burdens or the FCPA's provisions at trial").

statutory exception for facilitating payments exception allows for a facilitating or expediting payment to be made for the purpose of securing performance of a routine governmental action.[158] The DOJ has read this exception very narrowly, interpreting that it is difficult for companies to claim the exception in an enforcement context.[159] In 2008, Westinghouse Air Brake Technologies Corporation self-reported FCPA violations to the DOJ and SEC.[160] Some of the alleged payments certainly constituted a violation, but the NPA stated that Westinghouse made one payment of less than $100 to the standards and certification agency in India to "ensure that inspections would be scheduled and performed and to obtain certificates usually issued upon delivery of conforming products."[161] This agency was responsible for conducting inspections of finished products prior to shipping and despite this looking like the kind of facilitating payment the exemption was created to protect, the DOJ listed it as a violation in the NPA.[162] The DOJ and SEC have successfully eliminated the majority of judicial oversight and are now capable of circumventing congressional intent by selecting which provisions of the FCPA are to be interpreted narrowly and which are to be interpreted broadly. These determinations then govern companies interacting with the DOJ and SEC.[163]

---

[158] 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (2012).

[159] *See generally* Earle & Cava, *supra* note 5, at 139 (discussing the confusion surrounding the facilitating payments exception under the FCPA based on government enforcement trends and the DOJ's ineffective opinion procedure releases):

> Very obviously, the private sector is confused by the state of the law both in the United States and abroad; predictably, it is reacting in a rather rational manner. The Deloitte Anticorruption Practices Survey 2011 of 276 executives revealed that 47% of companies prohibited facilitating payments in all cases, 36% allowed them with preapproval and only 5% allowed them with no restrictions. Of the combined percentage of companies that permit some type of facilitating payment, 4% allowed between $250-$499; 7% allowed up to $500; 13% percent allowed $100-$249; 23% allowed under $100; and 53% had no restrictions.

Id. at 139–40 (italics omitted).

[160] Press Release, Dep't of Just., Westinghouse Air Brake Technologies Corporation Agrees to Pay $300,000 Penalty to Resolve Foreign Bribery Violations in India (Feb. 14, 2008), https://www.justice.gov/criminal-fraud/case/re-westinghouse-air-brake-technologies-corporation-2008.

[161] WARIN ET AL., *supra* note 37, at A-17–18.

[162] *Id.* at A-18; *see also* Non Prosecution Agreement, *In Re* Westinghouse Air Brake Technologies Corporation, at Appendix A 3–4 (Feb. 8, 2008), https://www.justice.gov/criminal-fraud/case/re-westinghouse-air-brake-technologies-corporation-2008 (showing that the DOJ merely asserted in its statement of facts the existence of the payments to insure the foreign agency "would schedule and perform inspections" followed by the claim that such payments were unlawful).

[163] "Due to the lack of FCPA case law, corporations and individuals necessarily relied

The nature of this extra-judicial enforcement regime means that the government has created a lucrative revenue stream with little connection to victims of overseas bribery by American companies and American citizens. In fact, none of the money goes to actual victims of the bribery in any given case through restitution.[164] And the U.S. Treasury has a weak case that it is actually harmed by the bribery. One could argue that bribery has the potential to interfere with the aims of foreign aid grants, economic competition, or particular policy goals of the political branches; however, there are causation challenges when trying to link one act of bribery to one of those potential harms.[165] Increasingly, the highest fines imposed by the DOJ are actually being assessed against international companies more so than domestic ones, which was not the original purpose of the FCPA.[166] The government is unlikely to voluntarily decrease or eliminate this revenue stream given its profitability. In the DOJ Civil Division's 2013 budget justification, the DOJ referred to itself as the "profit center of the U.S. Treasury."[167] Recently, the DOJ's former Assistant Chief for FCPA enforcement admitted: "the government sees a profitable program, [and] it's going to ride that horse until it can't ride it anymore."[168]

Settlements are the vehicle by which the DOJ generates a strong revenue stream. The punishments against companies are incredibly heavy, even in the case of settlements, with the typical range between $20-30 million and a high of $800 million.[169] With these ranges and possible jail

---

on agency guidance documents and published settlement agreements to inform their conduct and avoid liability. As a result, these materials became de facto agency jurisprudence." Barry J. Pollack & Annie Wartanian Reisinger, *Lone Wolf or the Start of A New Pack: Should the FCPA Guidance Represent A New Paradigm in Evaluating Corporate Criminal Liability Risks?*, 51 AM. CRIM. L. REV. 121, 131 (2014).

[164] *See generally* Turk, *supra* note 136.

[165] *Id.* at 338 (pointing out that even an argument that shareholders are "victimized" by corporate bribes falls flat considering most bribes are used to procure business overseas and increase corporate profits).

[166] *Id.* at 342. See supra Part I.A regarding the original purpose of the FCPA.

[167] Turk, *supra* note 136, at 353 & notes 154–155 (citing Civil Div., U.S. Dep't of Just., FY 2013 Budget and Performance Plans 23 (2012), http:// www.justice.gov/jmd/2013 justification/pdf/fy13-civ-justification.pdf; Criminal Div., U.S. Dep't of Justice, FY 2011 President's Budget 20-22 (2010), http://www.justice.gov/jmd/2011justification/pdf/fy11-crm-justification.pdf ("requesting more FCPA staff while noting that 'the [Criminal] Division's FCPA prosecutions have resulted in fines and penalties totaling more than $1 billion'")).

[168] *Id.* at 362–63 (citing Joseph Rosenbloom, *Here Come the Payoff Police*, AM. LAW. (May 17, 2011), http://www.americanlawyer.com/id=1202457704533/Here-Come-the-Payoff-Police (quoting William Jacobson, former Assistant Chief at the DOJ)).

[169] Matthew W. Muma, *Toward Greater Guidance: Reforming the Definitions of the*

time for individual defendants, corporate defendants do not want to take the risk of going to trial.[170] "[T]he DOJ and SEC both actively punish noncompliance; companies faced with possible DOJ investigation are generally quick to settle because the agencies treat fighting the charges as noncompliance."[171] And if large, multinational corporations are passing up the opportunity to challenge the DOJ's and SEC's allegations due to the heavy penalties being threatened, SMEs stand little chance of surviving when forced to choose between litigating and accepting a settlement. It becomes a lose-lose situation.

Defenders of the current enforcement regime might point to the DOJ's FCPA opinion releases as a viable replacement for case law. While these opinion releases are required by statute and are supposed to aid companies in complying with the FCPA, they fall far short, in benefits and quality, of case law.[172] In fact, the statute states the DOJ "shall establish a procedure to provide responses to specific inquiries by domestic concerns concerning conformance of their conduct with the Department of Justice's present enforcement policy . . . [and] within 30 days after receiving such a request, issue an opinion in response to that request."[173] The opinions are supposed to inform the company whether or not the specified prospective conduct would violate the FCPA.[174] But recently, DOJ opinions responding to these anonymous requests for guidance have become "scarce, slow in coming, and highly general (since they do not name the countries to which they refer)."[175] Were these opinion releases frequent and applicable beyond the

Foreign Corrupt Practices Act, 112 MICH. L. REV. 1337, 1344 (2014) (citing Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 924–25 (2010)); *see, e.g.*, Plea Agreement at 17, United States v. Bridgestone Corp., No. 4:11-CR-00651 (S.D. Tex. Oct. 5, 2011) (fine of $28 million); Deferred Prosecution Agreement at 9, United States v. Shell Nigeria Exploration & Prod. Co., No. 4:10-CR-00767 (S.D. Tex. Nov. 4, 2010) (fine of $30 million); Press Release, Dep't of Just., 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), http:// www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html.

170 Muma, *supra* note 169, at 1344 (citing Koehler, *supra* note 169, at 940).

171 *Id.* (citing Koehler, *supra* note 169, at 926–29).

172 15 U.S.C. §§ 78dd-1(e)(1), -2(f)(1) (2012).

173 *Id*. § 78dd-2(f)(1).

174 *Id.*

175 Muma, *supra* note 169, at 1344–45, 1345 n.50 ("The DOJ has only released a total of ten opinions in the last five years." *See Opinion Procedure Releases*, U.S. DEP'T OF JUST., http://www.justice.gov/criminal/fraud/fcpa/opinion/ (last visited Nov. 22, 2015)); *see, e.g.*, Foreign Corrupt Practices Act Review No. 12-01 (U.S. Dep't of Just. Sept. 18, 2012) (opinion proc. release), http:// www.justice.gov/criminal/fraud/fcpa/opinion/2012/1201.pdf (issued a full seven months after the initial request and "based on the facts as represented by

individual set of circumstances, then perhaps a stronger case could be made that they are fungible with case law. Opinion releases and settlements (including plea agreements, DPAs, and NPAs) have helped build an environment where precedent does not carry the guiding force typically associated with case law, and companies lack clarity on a host of interpretive questions as well.[176] Case law is needed for uniformity in the enforcement regime and to uphold the rule of law.

2. The Enforcement Regime's Negative Impact on SMEs

The current DOJ and SEC enforcement regime, with its host of flaws, has and can have a negative impact on SMEs. The average SME may be unaware of the existence of the FCPA, let alone its current reach, because of the lack of public visibility of the statute due to the high settlement rates. In addition, many local law firms representing SMEs do not have robust FCPA practices and experience detecting bribery risks or developing compliance plans. Further, there is a lack of case law for local law firms to rely on if a SME client sought to expand its knowledge on the subject.[177] Kovacich discusses how corrupt business practices are often "very complex schemes involving kickbacks, discounts, and other subtle methods of securing foreign business contracts that straddle the line of acceptability and corruption," which make detecting such corrupt business practices challenging and expensive.[178] All of these factors make for treacherous waters for an SME looking to enter the global marketplace.

As early as 2007, the DOJ and SEC began focusing on SMEs engaging in global trade.[179] International Business Machines Corporation (IBM)

---

the Requestor," thereby making it inapplicable to a wide variety of similar situations).

176 *See, e.g.*, Koehler, *supra* note 169, at 984–90 (discussing the similar facts but materially different outcomes between the December 2007 enforcement action against Lucent Technologies, Inc. ("agree[d] to pay $2.5 million in total fines and penalties for merely FCPA books and records and internal controls violations—that is, no *anti-bribery* violations") and the December 2009 enforcement action against UTStarcom, Inc. ("settled its matter by agreeing to pay $3 million in total fines and penalties for FCPA *anti-bribery*, books and records and internal control violations") (emphasis in original)).

177 Kovacich, *supra* note 29, at 553–54; *see also supra* Part II.B.

178 Kovacich, *supra* note 29, at 530 (noting that in addition to sophisticated schemes that involve charitable donations, payments to reduce tax, and custom duties and payments for government reports and certifications, many potential bribery situations are complicated by cultural differences in the foreign country).

179 Mike Koehler, *FCPA Compliance – It's Not Just For Big Companies*, FCPA PROFESSOR (May 7, 2015), http://fcpaprofessor.com/fcpa-compliance-its-not-just-for-big-companies/ (providing a list of SMEs the government has brought enforcement actions against since 2007).

defines an SME as a company that falls within one of two tiers: companies within the 100 to 1,000 employee range, and companies that range from 1,000 to 5,000 employees.[180] The U.S. Small Business Association defines a small business as having 500 employees or less for most manufacturing and mining industries and $7.5 million in average annual receipts for nonmanufacturing industries, with some industry-based exceptions.[181] The FCPA does not explicitly adopt any definition of an SME, nor does it explicitly indicate that the statute applies differently to companies of differing size and characteristics (i.e., private versus publicly traded).[182] And the U.S. government does not have a universally accepted definition of SMEs that is used across agencies and departments.[183]

In theory, the DOJ and SEC have had the authority to investigate and prosecute SMEs engaged in overseas bribery of foreign officials since the passage of the FCPA in 1977 because the FCPA does not expressly limit its application to the large corporations who were committing the bribery that spurred its passage.[184] In 1988, the FCPA amendments created the procedure for issuing general guidelines and advisory opinions for the purpose of providing enforcement policy guidance to potential "exporters and small businesses that are unable to obtain specialized counsel."[185] But as discussed earlier,[186] the use of these advisory opinions and the guidelines themselves only provide advice on a modicum of the myriad situations that can arise in global commerce where bribery might occur.

Complying with the statute, and more specifically the DOJ and SEC standards, is often cost prohibitive for SMEs.[187] It can be incredibly

---

[180] Kovacich, *supra* note 29, at 531 n.13.

[181] *Summary of Size Standards by Industry Sector*, U.S. SMALL BUS. ASS'N, (current as of July 14, 2014) https://www.sba.gov/content/summary-size-standards-industry-sector (last visited Nov. 22, 2015).

[182] *See, e.g.*, Kovacich, *supra* note 29, at 530.

[183] *See Small- and medium-Sized Enterprises: Overview of Participation in U.S. Exports*, *supra* note 2.

[184] *See supra* Part I.A at notes 14–17.

[185] H.R. REP. NO. 100-576, at 923 (1988); *see also Impact of Foreign Corrupt Practice Act on U.S. Business: Comptroller's General Report to the Congress of the United States*, U.S. GEN. ACCOUNTING OFFICE 116 (1981), http://www.gao.gov/assets/140/132199.pdf (last visited Sept. 17, 2016).

[186] *See supra* Part III.B.1 at notes 37–39, 172–176.

[187] Kovacich, *supra* note 29, at 544 n.101; *see, e.g.*, Koehler, *supra* note 120, at 106 (citing the example of Team Inc. described below).

Consider for example, when in October 2010, Team Inc. ($12.3 million net income in 2010) disclosed $3.2 million in professional costs associated with an FCPA investigation focused on payments over a five-year period totaling less than $50,000 in a branch office to challenging to determine if a foreign entity is controlled in any way by the government of that country and finding out such information without offending global business partners can be impossible.[188] And in situations where bribery does occur, it is often perpetrated solely by the foreign government unbeknownst to the company—for example, through the use of local agents—making the unsophisticated company arguably a victim as well.[189] When a company is investigated and prosecuted by the DOJ, the Federal Sentencing Guidelines are used to enact punishment on companies based on aggravating and mitigating factors.[190] The Sentencing Guidelines take into account the size of a company, and as a result, SMEs will receive a lower culpability score which helps lessen the punishment.[191] But "there are only two mitigating factors: (1) the existence of an effective compliance and ethics program and (2) self-reporting, cooperation, or acceptance of responsibility," and as discussed next, SMEs often do not have compliance programs and may be unaware when they are involved in an act of bribery.[192] Any benefit received based on size will often be offset in the context of an SME because "if high-level officials in the company were involved in the misconduct, the company cannot receive the benefit of [a] mitigation factor."[193] In small companies, the odds increase that senior officials will be involved in international deals and activity and are thus party to the alleged bribe, whether knowingly or not.[194] Many SMEs are unable to invest in sophisticated compliance plans like the ones created by international law firms for large companies.[195] However, it is difficult for smaller companies to pass up on international opportunities to grow their

---

employees of foreign government owned enterprises in Trinidad. These improper payments represent one-half of one percent of the Team Inc.'s overall revenue. TEAM INC., QUARTERLY REPORT (Form 10-Q), at 34 (Oct. 8, 2010), https://www.sec.gov/Archives/edgar/data/318833/000119312510226805/d10q.htm#tx100438_8; TEAM INC., REPORT FOR THE FISCAL YEAR ENDED MAY 31, 2010 (Form 10-K), at 34 (Oct. 8, 2010), https://www.sec.gov/Archives/edgar/data/318833/000119312510181451/d10k.htm.

188 Kovacich, *supra* note 29, at 566.

189 *See supra* Part II.B, notes 94–99.

190 *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(b)–(g) (2010) (instructing companies to "apply subsections (b) through (g) [(aggravating and mitigating factors)]" to determine final culpability score).

191 Bhojwani, *supra* note 87, at 73–74.

192 *Id.* at 73 (referencing U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f)–(g)); *see also supra* Part II.B at notes 62–68.

193 Bhojwani, *supra* note 87, at 73 (referencing U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f)).

194 *Id.* at 73–74.

195 Muma, *supra* note 169, at 1347–48.

business just because there may be risks.

3. Examples of the DOJ's Over-Enforcement Against SMEs

In his order granting Lindsey Manufacturing Company's motion to dismiss on charges of prosecutorial misconduct, Judge A. Howard Matz wrote "the very survival of that small, once highly-respected enterprise has been placed in jeopardy."[196] The cost to Lindsey of both the investigation and subsequent trial was crushing, but this is no isolated incident. Kovacich writes about how the DOJ and SEC have honed in on certain industries, like medical device manufacturing and agriculture, which are critical to the Minnesota and Wisconsin economies.[197] He sees this phenomenon impacting the "business and legal landscape for small- and medium-sized businesses across the country," not just in those two states.[198] For example, Twin Cities-based AGA Medical, a company with only 300 employees, was accused of making improper payments to doctors at state-owned hospitals in China for purchasing AGA products.[199] AGA Medical agreed to pay $2 million in criminal penalties based on the DOJ's unchallenged theory that when a business is state-owned, its employees are foreign officials because they are "instrumentalities" of the foreign nation.[200]

Consider the SEC's civil case against Immucor, Inc. (500 employees) and its CEO for allegedly paying €13,500 to a director of an Italian hospital that turned out to be publicly owned.[201] These payments were made to the hospital for favoring Immucor on medical supply contracts and the CEO ultimately paid a $30,000 penalty without having to admit or deny the accusations in the complaint.[202] In some circumstances, this is certainly a net positive for the company. In practice, the outside world may perceive that the company or individual did in fact do wrong and are just not being

[196] Order Granting Motion to Dismiss, United States v. Aguilar Noriega, 831 F. Supp. 2d 1180, 1209 (C.D. Cal. 2011); *see supra* notes 111–117.

[197] Kovacich, *supra* note 29, at 532.

[198] *Id.*

[199] *Id.* at 540, n.73 (citing Press Release, AGA Medical Corporation Agrees to Pay $2 Million Penalty and Enter Deferred Prosecution Agreement for FCPA Violations, Dep't of Just. (June 3, 2008), https://www.justice.gov/archive/opa/pr/2008/June/08-crm-491.html).

[200] *Id.*

[201] *Id.* at 546 n.111.

[202] *Id.*; Litigation Release No. 20316, SEC Files Action Naming Officer of Immucor, Inc., for Violating, and Aiding and Abetting Violations of, Books and Records and Internal Control Provisions of the Securities Exchange Act of 1934 (Exchange Act), U.S. SEC. & EXCH. COMM'N, (Sept. 28, 2007), https://www.sec.gov/litigation/litreleases/2007/lr20316.htm.

forced to admit it, even if that is not the case. In addition, the company or individual is then forbidden from ever publicly denying wrongdoing or defending against accusations that wrongdoing occurred.

Finally, consider the story of a Mississippi-based producer and marketer of cottonseed, Delta & Pine Land Company. Over a five-year period, Delta & Pine made payments amounting to $43,000 to Turkish officials in exchange for "reports and certifications necessary to maintain its business operations in Turkey."[203] While the purpose of these payments was merely to speed up the government's inspection and reporting process, because the SEC and DOJ have read the facilitating payments exception so narrowly (some argue it has been almost completely eliminated from the statute), Delta & Pine faced an uphill battle.[204] The SEC alleged that several of the payments did not coincide with inspections or reports and Delta & Pine ultimately agreed to pay a $300,000 penalty.[205] These are just some examples of the negative and unfair impact the DOJ's and SEC's enforcement regime has on SMEs operating in the global marketplace.

IV. PROPOSED SOLUTIONS

A. EXISTING PROPOSALS

Several proposals exist for amending the FCPA to account for the problems associated with the statute's implementation, some of which have been discussed in the preceding pages of this article. In thinking about how to address these issues, it seems logical to start with existing proposals and discuss why they will likely fall short of the goal of reforming the enforcement regime in a way that removes the proverbial government boot off of the back of the many SMEs that desire to expand into the global marketplace.

Some advocate that the most basic approach to fixing the FCPA is to decriminalize unwilling bribery.[206] Bruce Klaw argues that the DOJ's and SEC's prosecution over the last decade has included many individuals

---

[203] Kovacich, *supra* note 29, at 542.

[204] *Id.*

[205] *Id.* (citing Press Release, Delta & Pine and Turk Deltapine Agree to Pay a $300,000 Penalty to Settle FCPA Charges, SEC (July 26, 2007), https://www.sec.gov/litigation/litreleases/2007/lr20214.htm (explaining that Delta & Pine agreed to pay a $300,000 penalty); In the Matter of Delta & Pine Land Co., Exchange Act Release No. 56, 138, 91 SEC Docket 371 (July 26, 2007), http:// www.sec.gov/litigation/admin/2007/34-56138.pdf).

[206] Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 Harv. J. ON LEGIS. 303, 305 (2012).

whose payments were made unwillingly.[207] Klaw emphasizes that in accordance with United States' extortion law, an individual who makes an "unwilling" payment—a payment that "while made intentionally and knowingly, [is] not made voluntarily or corruptly because the payer is subject to express or implicit coercive extortion, placing them in reasonable fear that if they do not pay, they will be treated unfairly"—should not be penalized.[208] Numerous federal courts have recognized that an individual or a domestic concern can act out of fear because of extortion, including "fear of economic loss."[209]

Among his many suggestions, Klaw outlines two possible solutions relevant to the treatment of SMEs under the FCPA. First, Klaw makes the case for the decriminalization of unwilling bribery regardless of whether or not the extortion "involved threats of threatened jail, property destruction, injury, or death" because there is a lack of the requisite mental state.[210] Klaw also argues for the decriminalization of willing bribery under the theory that it will promote transparency, that companies should only be punished for failing to disclose, and that other companies and foreign nations could still sue the discloser under the host country's laws.[211] Second, Klaw argues that victims of extortion should be permitted to disclose the "bribe" and be able to recover non-speculative losses resulting from the extortion.[212]

Klaw's first solution should be rejected because companies should be held to a high standard when faced with non-violent, non-destructive consequences to bribery refusal. The line drawing between threats of extortion that include violence and those that do not is reasonable, and the use of economic coercive behavior by a foreign official does not justify allowing companies to contravene America's foreign policy interests.[213]

---

[207] *Id.* at 320.

[208] *Id.* at 320–21.

[209] *Id.* at 321 (citing United States v. Capo, 817 F.2d 947, 951 (2d Cir. 1987) (en banc) (quoting United States v. Brecht, 540 F.2d 45, 52 (2d Cir. 1976))).

[210] *Id.* at 344–47 (noting that in other non-FCPA contexts, federal courts have found that "extortion is committed when a public official makes wrongful use of his office to obtain money not due him or his office").

[211] *Id.* at 347–49.

[212] *Id.* at 368–70.

[213] To clarify, I am drawing a distinction between unwilling bribery due to some form of extortion (violent or non-violent) that a company is aware of and unwilling bribery in the form of clever gamesmanship by foreign officials (i.e., the use of consultants) where the company is unaware that the foreign official is seeking a bribe at all. Klaw's article does not address the latter version of unwilling bribery.

And willing bribery, where no extortion is involved, should certainly remain illegal under the FCPA. At the time the FCPA was enacted, the series of political and business scandals had undermined public confidence in the integrity of the market, jeopardized American foreign policy of promoting democracy and capitalism, and posed a danger to the free market system, where companies should be able to honestly and ethically compete in areas like price and quality of product.[214] Decriminalizing both willing and unwilling bribery in cases of non-violent extortion essentially repeals the core of the FCPA, which is an overreaction to the problems facing SMEs. Decriminalizing unwilling bribery based on a company's lack of knowledge, on the other hand, would protect companies, especially unsophisticated SMEs, from being victimized on the global stage through extortion and then victimized again by the DOJ and SEC in the form of hefty penalties and public embarrassment. This would not solve other issues that plague the statute, like vague and overly-expanded terms ("foreign official" and "instrumentality")[215] and erosion of the facilitating payments exception.[216] In addition, it would not protect SMEs and their executives who unknowingly engage in bribery but were not coerced. However, decriminalizing unwilling bribery would constitute a positive reform to the mental state requirements, either by clarifying their reach or serving as an affirmative defense.

Another existing proposal is for Congress to amend the FCPA to require the State Department to better define terms used in the enforcement of the statute. Specifically, Matthew Muma argues that if the State Department drew on the expertise of Foreign Service officers and defined "foreign official" and "instrumentality" for each country, companies would be better equipped to navigate situations in specific countries by relying on detailed documentation of how the business and political culture in the host country operates.[217] This would render FCPA enforcement more predictable than it is under the underutilized and insufficient opinion release

---

[214] *Id.* at 307.

[215] *See, e.g.*, Muma, *supra* note 169, at 1342 (identifying the problems associated with vague terms in the FCPA including "foreign official" and "instrumentality" and proposing solutions to remedy this issue). *See generally* Mike Koehler, *A Snapshot of the Foreign Corrupt Practices Act*, 14 SANTA CLARA J. INT'L L. 143 (2016) (discussing recent problematic developments in the interpretation of the term "foreign official" under the FCPA).

[216] See the discussions regarding, and examples of, the erosion of the facilitating payments exceptions at *supra* note 60, 158–162, 204–205.

[217] Muma, *supra* note 169, at 1353–54 (creating a rebuttable presumption of FCPA compliance that could be challenged in court).

regime currently in existence, and the FCPA's application tailored in "specific countries to U.S. foreign policy goals."[218]

This proposal would make a positive difference in the education and subsequent operation of companies of all sizes overseas and would take into account societies where gift-giving in business transactions is acceptable and not considered bribery.[219] For example, in the case of AGA Medical, the company would have benefited from a State Department analysis and report that identified doctors of government-owned hospitals as foreign officials under the statute.[220] Whether it is the State Department, the courts, or Congress, a disinterested party other than the DOJ and SEC should be taking greater care to define these critical terms.[221]

Unfortunately, this solution does not sufficiently address concerns regarding the culpability standard under the law as a whole. This solution alone would not protect the CEO of an SME who inadvertently pays for a "government consultant" or "government agent" on an environmental or agricultural project, not realizing that the consultant is a clandestine conduit for the government to extort bribes. The DOJ's and SEC's 2012 FCPA Resource Guide likewise fails to take into account the lack of sophistication of SMEs in international business deals and transactions, but rather, only considers the lack of sophistication of SMEs with regard to compliance programs.[222] But because SMEs often lack compliance plans and FCPA-experienced legal counsel, these sophistication considerations do not benefit them.

Others argue for the creation of a compliance defense because the lack of an adequate defense of this nature "reduces a company's incentive to

---

218 *Id.*

219 Judith A. Lee & James D. Slear, *Unique Problems with FCPA Compliance in the People's Republic of China*, 16 BUS. L. TODAY 15, 17 (May/June 2007) ("It is well known by companies doing business in the [People's Republic of China (PRC)] that PRC businessmen value the opportunity to gain exposure to similar businesses outside of the PRC." And while "PRC rules and regulations require any gift that might affect an official's impartial exercise of his public function be turned over to the state . . . anticorruption laws and regulations are reportedly ignored and compliance met with 'incredulity' by PRC businessmen.").

220 *See supra* notes 198–199.

221 The DOJ and SEC do not qualify as "disinterested" because while they are technically just the neutral enforcers of the FCPA, comments by department officials and the revenue from penalties statistics indicate the DOJ and SEC cannot be expected to hamstring themselves.

222 Lanny A. Breuer, et al. (panelists), *The Federalist Society for Law and Public Policy Studies 2012 National Lawyers Convention the Foreign Corrupt Practices Act*, 51 AM. CRIM. L. REV. 433, 458 (2014) (discussing RESOURCE GUIDE, *supra* note 9).

invest in internal anti-bribery policies and to monitor and report any identified violations."[223] Under this new defense, a company would still need to make a showing of reasonableness with regard to its implementation and maintenance of an anti-bribery program and "[m]eeting these conditions would only afford a rebuttable presumption that the company as an entity is not liable for the FCPA violations of its rogue employees."[224]

Of course, when considering SMEs, the alleged rogue employee could easily be a high-ranking executive because they are more closely held companies. Additionally, this solution is not adequate for SMEs because they often cannot afford to develop a robust compliance program of the sort that would be required to take advantage of this rebuttable compliance defense. Thus, even if a compliance program defense existed, it would be insufficient to protect SMEs from unbridled enforcement.[225]

Some have suggested that amending the statute to compensate victims of corruption and bribery would alter how the DOJ and SEC prosecute companies under the FCPA.[226] Currently, the DOJ uses the FCPA enforcement regime as a profit generator and makes little to no attempt to compensate victims of American corruption and bribery abroad, despite

---

[223] Irina Sivachenko, *Corporate Victims of "Victimless Crime": How the FCPA's Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance*, 54 B.C. L. REV. 393, 425 (2013).

[224] *Id.*

[225] The Conference Report for the 1988 FCPA Amendments indicates that a provision granting safe harbor to corporations with FCPA compliance program from prosecution was included but ultimately removed from the final bill. H.R. REP. NO. 100-576, at 922–23 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1955; *see also* Bhojwani, *supra* note 87, at 74 n.57 (referencing Foreign Corrupt Practices Act Assessment: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary, 112th Cong. 38 (2011) (statement of George Terwilliger, Partner, White & Case, LLP) (advocating for adoption of FCPA safe-harbor provision that "shield[s] from criminal liability companies that operate demonstrably robust compliance programs and that self-report any misconduct that arises")).

[226] *See, e.g.*, Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419 (2012) (advocating for a private right of action under the FCPA for a variety of reasons including compensating victims of FCPA violations); *see also* Shane Frick, *"ICE" Capades: Restitution Orders and the FCPA*, 12 RICH. J. GLOBAL L. & BUS. 433, 448–50 (2013) (discussing how DOJ would have to begin thinking of FCPA violations in terms of harm done to victims (economic, cultural, etc.) which would (A) potentially limit the amount of penalties/damages the government could seek from companies and (B) prosecutorial action taken against companies would be based on a need to make specific victims whole and not on the current reality that all penalties/damages go back to the U.S. government).

repeatedly claiming that bribery is not a victimless crime.[227] Victims have sought relief in U.S. courts for restitution in the wake of FCPA violations. For example, the Instituto Constarricense de Electricidad of Costa Rica (ICE) "petitioned for victim status of Alcatel-Lucent's wide-ranging bribery scheme" in 2011 due to alleged massive losses and catastrophic harm resulting from the bribery.[228] ICE claimed the harm done was to other employees and the company based on the actions of five employees out of 16,500 total employees.[229] The DOJ argued against giving ICE victim status and restitution because ICE employees were also involved in the bribery.[230]

While ICE's petition ultimately failed,[231] there is room for more sympathetic bribery victims to apply pressure to the DOJ enforcement regime by seeking restitution. If a future case brought by an entity like ICE or an individual is successful, this could open the door to amending the FCPA to specifically require the government to seek to disperse a portion of the fines and disgorgement levied against offending U.S. companies to victims of corruption abroad, which would hopefully cause the DOJ to more carefully consider when to prosecute, thereby benefiting SMEs and companies in general.

Matthew Kovacich argues specifically for Congress to "update the FCPA to provide a more usable opinion procedure and legality defense."[232] Kovacich argues that while Congress intended to protect a company if it

---

[227] *See, e.g.*, Press Release, U.S. Dep't of Just., California Company, Its Two Executives and Intermediary Convicted by Federal Jury in Los Angeles on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico (May 10, 2011), http://www.justice.gov/opa/pr/2011/May/11-crm-596.html ("Bribery is not a victimless crime . . . ."); *see* Alexandra Wrage, *Paying the Fox to Buy New Chickens*, HUFFINGTON POST (Jul. 15, 2011), http://www.huffingtonpost.com/alexandra-wrage/paying-the-fox-to-buy-new_b_647837.html. *Contra* Andy Spalding, "A DOJ Initiative that Helps Corruption's Victims" FCPA BLOG (Oct. 15, 2014), http://www.fcpablog.com/blog/2014/10/15/a-doj-initiative-that-helps-corruptions-victims.html; *see also* Press Release, U.S. Dep't of Just., Second Vice President of Equatorial Guinea Agrees to Relinquish More Than $30 Million of Assets Purchased with Corruption Proceeds (Oct. 10, 2014), https://www.justice.gov/opa/pr/second-vice-president-equatorial-guinea-agrees-relinquish-more-30-million-assets-purchased (providing money for the direct benefit of people harmed by the Equatorial Guinea Vice President's abuse of office through large-scale foreign official corruption).

[228] Mike Koehler, *The Foreign Corrupt Practices Act Under the Microscope*, 15 U. PA. J. BUS. L. 1, 51 (2012) (citing United States v. Alcatel-Lucent S.A., No. 1:10-cr-20907-MGC (S.D. Fla. dismissed May 31, 2011)).

[229] *Id.* at 51–52.

[230] *Id.* at 52.

[231] *Id.*

[232] Kovacich, *supra* note 29, at 563.

abides by the local law or custom in a foreign nation, this protection is weak because the statute requires the local law or custom to be expressly written down in the foreign nation's law.[233] Congress failed to realize that not all social norms are encapsulated in law, even if they have substantial force.[234] Kovacich calls for Congress to amend the statute to provide for an opinion release procedure where companies could address matters of custom and business norms with the DOJ and SEC in advance of taking action, especially when the custom or norm is not written in the foreign country's laws.[235] This solution would certainly make a significant difference for many companies of all sizes. But, once again, the unsophisticated SMEs are not protected from many unwilling "bribes" under this solution, and it is not geared towards solving the larger problem of the DOJ and SEC enforcement regime unchecked by case law.

B. NEW SOLUTIONS

This section builds off of some of the existing solutions proposed to solve the FCPA's many problems while also offering several additional alternative solutions that would benefit SMEs in particular and protect them from the current, unfair enforcement regime. Specifically, this section argues for legislative clarification regarding the mental state requirements for domestic concerns and for statutory provisions requiring more judicial oversight of the DOJ and SEC prosecution regime under the FCPA with regard to DPAs, NPAs, and settlements.

In a perfect world, change would happen organically by companies that are able to afford the risk of challenging the DOJ and SEC in court. In particular, companies should further litigate the FCPA's mental states to better define these terms, the narrowing of statutory exceptions, and the overall spirit of the statute regarding how damages are assessed.[236] Unfortunately, expecting companies to take the extremely high-risk path of a jury trial is not very realistic, especially in light of the enforcement regime the DOJ and SEC have developed over time, which forces companies to settle in the face of such extreme penalties. Although the government's record is zero for two in federal court against corporations,[237] most companies remain unconvinced that the monetary risks are worth the litigation fight that would await them in court.

---

[233] *Id.* at 562–63.
[234] *Id.*
[235] *Id.*
[236] *See supra* Part III.
[237] See the text accompanying *supra* notes 106–119.

The most important and necessary legislative change required is for Congress to amend the statute to alter the mental state requirement to account for businesses early on in their international economic participation and development. This can be accomplished in several ways. Perhaps the simplest way is to create a specific intent element applicable for the anti-bribery provision to make the FCPA akin to the tax statutes. In *Ratzlaf v. United States*,[238] the Supreme Court reviewed the defendant's conviction for illegally structuring a transaction, by "break[ing] up a single transaction above the reporting threshold into two or more separate transactions[] for the purpose of evading a financial institution's reporting requirement."[239] The Court held that the statute's "willfulness" element required something more than just a "purpose to circumvent a bank's reporting obligation" and that ignorance of the anti-structuring law was indeed an excuse.[240] The Court held that provisions of the Currency and Foreign Transactions Reporting Act (Bank Secrecy Act)[241] and other tax statutes are so difficult to understand that to say a lack of knowledge of the statute and its provisions was no excuse would be to read the willful element out of the statute or at least render it superfluous.[242] If a lack of knowledge of the tax statute was not a defense, there was a risk of innocent conduct being punished.[243]

Since there is little chance a case under the FCPA's anti-bribery provisions will reach the Supreme Court in the near future due to the settlement trends, Congress should act to amend the statute to more clearly function like the tax statutes. This would allow SMEs some measure of protection because, in the event they cannot afford an expensive compliance program or are completely ignorant of the FCPA due to a lack of sophistication and previous international business experience, they have a viable defense under the intent element. Then, the government would have to show that the company was aware of the FCPA and its prohibitions and that the company willfully violated the statute. It should be noted that in order to succeed in this endeavor, the "willfully" element must be made to

---

[238] 510 U.S. 135 (1994).

[239] *Id.* at 136 (citing 31 U.S.C. § 5324 (1988)).

[240] *Id.* at 136–37, 149.

[241] Pub. L. No. 91–508, 84 Stat. 1118 (1970) (codified at 31 U.S.C. §§ 5311–5325).

[242] *Ratzlaf*, 510 U.S. at 136.

[243] Lipper, *supra* note 40, at 1476 (pointing out that cases like *Ratzlaf* presented "the risk of catching individuals who engaged in innocent conduct" and that courts have said such a risk does not exist in the FCPA context).

apply to SMEs under the domestic concern section[244] because currently it only applies to individuals.[245] This would be especially helpful for small, closely held businesses where the lines between the corporation's actions and individuals' actions can be blurred because high-level executives make a wide range of decisions as to a company's beginning forays into the global marketplace.

Alternatively, Congress should put in place new boundaries on the use of settlements by the DOJ and SEC when prosecuting companies. The DOJ and SEC should be required by statute to abide by the following new settlement boundary steps: (1) all investigations lasting more than 365 days must be filed in an Article III court as preliminary indictments; (2) these preliminary indictments will be reviewed every 90 days for merit, and the Article III court will have the authority to dismiss the indictments and by extension, the investigations when they are not yielding fruit or for a failure to prosecute; and (3) settlements that exceed the statutorily prescribed fine amounts or cross certain statutorily provided benchmarks must be approved by the Article III court or meet certain thresholds for reasonableness. These measures will provide substantial protections to companies of all sizes, but particularly SMEs that struggle to pay for the investigation, litigation, and any settlement that comes with a DOJ or SEC decision to prosecute.

The first element is designed to force the DOJ and SEC into the court system where more judicial oversight will occur, even over settlements. This will also prevent government agents from dragging out investigations that force companies into DPAs and NPAs where the government then has substantial control to place extreme remedy demands on the company in exchange for the company avoiding trial and a public relations nightmare.[246] The second element is designed to reinforce the need for the DOJ and SEC to only pursue investigations and prosecutions for as long as they are grounded in fact and reasonably likely to be successful. In addition, the second element requires that a neutral party be present and able to step in and save a company (particularly an SME) from being bled of resources in its defense against unmeritorious prosecutions outside the scope of the FCPA. The final element provides for a neutral arbiter to assess the reasonableness of the penalty in light of the actions the defendant is

[244] 15 U.S.C.A. § 78dd-2(g)(2)(A) (West 1998) (for domestic concerns).

[245] Lipper, *supra* note 40, at 1474–75 (discussing how at least one court's imprecision in attributing the willfulness element leads to an improper inference that the willfulness element applies to both individual and domestic concerns under the FCPA when it does not).

[246] See *supra* Part III.A and III.B.1 for a discussion of DPAs and NPAs and the governments use of them.

pleading guilty to or admitting occurred. The statute could be amended to take into account and sanction the disgorgement policies of the DOJ and SEC and then require any settlement over $6 million or (treble the statutorily proscribed penalty for a violation) a certain percentage of the company's value (market capitalization) be approved by an Article III judge.[247] These elements will directly remedy situations like the one Team Inc. faced where the investigation costs and potential fines far outweighed the alleged prohibited conduct.[248] Of course, a company that determined this filing timeline was not in its best interest could stipulate with the government to an extension of these deadlines (but not waive them entirely).

One possible criticism of the settlement boundary steps solution is that courts will apply *Chevron* deference to decades of department and agency "jurisprudence," thereby neutralizing the desired benefits of these changes.[249] Specifically, courts first look to "whether Congress has directly spoken to the precise question at issue" and if the answer is yes, Congress's intent controls.[250] But where the statute is silent or ambiguous on a particular issue, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[251] One could argue that these settlement boundary provisions will not be enough to encourage courts to discuss the specific provisions and terms of the statute. Enforcing step number two, for example, requires courts to evaluate the merit of the preliminary indictment and related investigation. But if the courts punt in favor of DOJ enforcement precedent regarding how various statutory provisions, exceptions, and affirmative defenses work and what various terms mean, then the merits review may not have the teeth needed to pare back the DOJ and SEC enforcement regime. This is why Congress must simultaneously enact amendments to the mental state requirement,

[247] There are other means of controlling the prosecution regime of the DOJ and SEC and preventing SMEs from accruing crippling legal costs on top of excessive fines, disgorgement, and settlement amounts. For example, Congress could provide that SME attorney's fees count toward the percentage threshold that requires judicial review of the settlement.

[248] *See supra* note 187.

[249] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations . . . .").

[250] *Id.* at 842–43 (holding that "the agency[] must give effect to the unambiguously expressed intent of Congress").

[251] *Id.* at 843.

incorporate the suggested changes in Part IV.A regarding the definitions of "foreign officials" and "instrumentalities," and provide some clarity on the exceptions that exist in the statute for facilitating payments and abiding by local law or custom.[252] In conjunction with the settlement boundary steps, these changes will make a meaningful difference for SMEs just entering, or relatively new to, the global marketplace.

CONCLUSION

Congress enacted the Foreign Corrupt Practices Act to put a stop to massive international bribery by large, sophisticated U.S. corporations, but not to penalize unsophisticated small- and medium--size enterprises new to the international marketplace. In an era of unbridled, unsupervised DOJ and SEC prosecution, the FCPA is not being enforced as originally intended. Statutory exceptions have been effectively eliminated, the lack of case law has muddied the waters with regard to mental state requirements, and in an ironic twist, the very governmental bodies charged with rooting out corruption abroad are now engaged in a sort of legal extortion through a regime that over-enforces and over-penalizes companies regardless of their actual culpability and ability to afford the necessary programs and controls needed to stay abreast of and in compliance with the FCPA. The DOJ and SEC cannot be trusted to make the necessary fixes on their own because they have too much skin in the game—FCPA enforcement actions are viewed as a cash cow and the authorities have given every indication that the current prosecution and enforcement regime will only continue if not expand.

Some of the existing solutions proposed by academics and practitioners alike would certainly make a positive impact on the current situation. But most, if not all, fall short of addressing problems unique to SMEs under the FCPA. Muma makes a compelling case for the creation of country-specific guides by the State Department to address concerns over the definition of terms in the FCPA and also to distinguish differences in culture and local custom for the purposes of applying and giving teeth to the facilitating payments and local law or custom exceptions. But most of the existing solutions are not tailored to assisting SMEs that are new to or inexperienced in the global marketplace, cannot afford the expensive, big law compliance plans large companies pay for, and are too often wholly unaware of the FCPA and the forms corruption takes abroad.

[252] 15 U.S.C. § 78dd-2(a) (2012); 15 U.S.C. § 78dd-2(h)(2)(A) (2012) (defining "foreign official").

As a result, Congress needs to amend the FCPA in several ways. First, Congress should add language to render the FCPA a specific intent statute for the purposes of corporations rather than a general intent statute. And Congress should require a showing of "willfulness" for domestic concerns as well as individuals so that closely held companies that are tricked into committing bribery have a defense. Second, Congress should put in place new boundaries on the use of settlements by the DOJ and SEC when prosecuting companies. The three additional requirements proposed in Part IV.B will reign in meritless and unjust investigations and subsequent prosecutions while also putting in place protection for SMEs that cannot afford the high costs associated with said investigations and defending against litigation and penalties. Finally, these additional steps will create more judicial oversight of the current FCPA enforcement regime. The purpose of this oversight, in addition to the reasons previously mentioned above, is to create more opportunities for genuine statutory interpretation by a disinterested third party to occur on FCPA terms and provisions of serious importance. These include but are not limited to terms like "foreign official" and "instrumentality," as well as the various exceptions and affirmative defenses that have been essentially eliminated through a severe narrowing by the DOJ and SEC.

These changes, combined with some of the strong existing proposals, could make for a better FCPA statute. With these changes, the FCPA will better prevent foreign corruption by domestic companies and individuals for the protection of the nation's foreign policy goals and the promotion of a fair capitalist system while also ensuring companies lacking culpability are not swept in the broad net currently cast by the DOJ and the SEC.