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NOTE

Toward Greater Guidance: Reforming the Definitions of the Foreign Corrupt Practices Act

*Matthew W. Muma**

The Foreign Corrupt Practices Act of 1977 is the cornerstone of the United States' efforts to combat the involvement of U.S. companies and individuals in corruption abroad. Enforced by both the Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ"), the Act targets companies and individuals that pay bribes to "foreign officials," a nebulous category of persons that includes everyone from foreign cabinet members to janitors at companies only partially owned by a foreign state. After only sporadic enforcement in the early years of the Act's existence, the SEC and DOJ now bring many cases annually. This increased enforcement has raised the ire of the business community, and many commentators have criticized the government for haphazard enforcement and unclear guidance. The definition of "foreign official," which has always been deliberately broad and vague, has particularly vexed many companies. This Note proposes a creative amendment to the Act to solve this problem, not by changing the definition of "foreign official" but by requiring in-country State Department employees to provide country-specific guidance on who is—and who is not—a bona fide "foreign official" in a given place.

Table of Contents

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Introduction

Between 2001 and 2004, Joel Esquenazi and Carlos Rodriguez paid kickbacks to two employees of the Haitian Telecommunications Company, Telecommunications d'Haiti S.A.M. ("Haiti Teleco").[1] Esquenazi and Rodriguez's Miami-based telecommunications company, Terra Telecommunications Corp., had just consummated a joint-venture agreement with Haiti Teleco.[2] The duo apparently paid kickbacks to the Haiti Teleco employees to maintain the relationship and ensure favorable rates.[3] The Department of Justice ("DOJ") later brought suit against both individuals, alleging that they violated the Foreign Corrupt Practices Act of 1977 ("FCPA"), the chief U.S. law that prohibits U.S. companies, and companies that do business in the U.S., from bribing foreign governmental officials.[4] The DOJ alleged that Haiti Teleco—while perhaps not a traditional component of a national government, like a ministry of foreign affairs or a telecommunications regulatory body—counted as an instrumentality under the "control[ ]" of the Haitian government for the purposes of the FCPA.[5] The defendants did not deny committing the underlying acts but instead argued that the FCPA was inapplicable because employees of Haiti Teleco are not "foreign officials" and the company itself is not a "foreign instrumentality" for purposes of the law.[6]

The *Esquenazi* case is a good example of both the FCPA's reach and the ambiguities and uncertainties underlying that reach. While it is clear from the facts of the case that the defendants engaged in unethical business practices, it is not clear whether they knew or should have known they were bribing a foreign official. Haiti Teleco was an important company in Haiti, but its ownership structure was ambiguous; at the time, it was not obviously

1. Corrected Brief of Appellant at 13–16, United States v. Esquenazi, No. 11-15331 (11th Cir. argued Oct. 11, 2013), 2012 WL 2087313, at *13–16.

2. *Id.* at 13–14, 2012 WL 2087313, at *13–14.

3. *See id.* at 14–16, 2012 WL 2087313, at *14–16. In his brief, Esquenazi argues that in essence, Haiti Teleco shook down Terra after Terra made substantial investments in Haiti. *See id.* at 13–16, 2012 WL 2087313, at *13–16.

4. *Id.* at 6–7, 26–27, 2012 WL 2087313, at *6–7, *26–27.

5. Brief for the United States at 6, 19–20, *Esquenazi*, No. 11-15331, 2012 WL 3638390, at *6, *19–20.

6. Corrected Brief of Appellant, *supra* note 1, at 25–27, 2012 WL 2087313, at *25–27.

or wholly owned by or under the control of the government.[7] In their briefs, both defendants claimed, in fact, that the company was not so owned and that even if it was majority owned by the Haitian government, the company was never really in the control of the government or directly used to further its goals.[8] The *Esquenazi* case is therefore emblematic of several problems that have haunted FCPA enforcement in the last decade.

Congress passed the FCPA in 1977, after Watergate and revelations of corrupt payouts to foreign officials by employees of several American companies, including Northrop Grumman and Exxon Mobil.[9] The FCPA criminalizes two distinct practices: first, it makes it illegal for a U.S. company or its agent to bribe a "foreign official" who works for an "agency[ ] or instrumentality" of a foreign state for the purpose of "securing any improper advantage";[10] second, it requires companies that are publicly traded in the United States, and thus registered with the Securities and Exchange Commission ("SEC"), to keep accurate accounting records.[11]

In passing the FCPA, Congress was attempting to ensure that U.S. companies did not engage in bribery overseas because it found bribery both "unethical" and "bad business."[12] From the start, the FCPA's goal was to have both foreign and domestic importance. It encouraged American companies to behave well abroad at least partly under the assumption that they would then be less likely to behave badly at home.[13] After 1977, however, the FCPA languished for nearly twenty years, with only "sporadic" enforcement.[14] The DOJ considered prosecution to be a foreign policy risk.[15] Enforcement actions began to rise only with the end of the Cold War[16] and then soared to even greater numbers after the turn of the millennium.[17]

In many ways, this development has been salutary. Many more companies now have compliance programs, and U.S. firms that operate abroad

7. *See* Reply Brief of Appellant Carlos Rodriguez at 1, *Esquenazi*, No. 11-15331, 2012 WL 4901338, at *1.

8. *Id.*; Corrected Brief of Appellant, *supra* note 1.

9. Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. Int'l L. & Com. Reg. 83, 87 (2007).

10. FCPA § 104, 15 U.S.C. § 78dd-2 (2012).

11. FCPA § 102, 15 U.S.C. § 78m(b)(2). This Note will primarily focus on the antibribery provisions, to which there is one key exception: facilitation or "grease" payments to a public official are not crimes as long as these payments were made only to expedite "a routine governmental action." 15 U.S.C. § 78dd-2(b).

12. H.R. Rep. No. 95-640, at 4 (1977).

13. *See* S. Rep. No. 95-114, at 4 (1977) ("A strong anti-bribery law is urgently needed . . . to restore public confidence in the integrity of the American business system.").

14. Krever, *supra* note 9, at 93.

15. *Id.*

16. Padideh Ala'i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption*, 33 Vand. J. Transnat'l L. 877, 903 & n.126 (2000).

17. Cortney C. Thomas, Note, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 Rev. Litig. 439, 449 (2010).

today face pressure to avoid local extortion.[18] The extent of international bribery is extremely hard to quantify[19]: it is possible, for example, that the rising number of cases in recent years is simply evidence that the authorities are discovering more instances of bribery. Overall, however, criminalizing bribe giving by U.S. companies and those companies doing business in the United States has probably benefited U.S. foreign policy while furthering Congress's aims in passing the Act.[20] Bribery is almost universally acknowledged as a net negative for the world economy: laws that uncover and deter it are advantageous in the long run.[21] Outside of more extreme conservative think tanks, the FCPA—or at least the law's motivating idea—enjoys wide support.[22]

Yet the language of the statute has fallen behind its use. The last FCPA amendment was in 1998, and that amendment brought the FCPA in more complete accordance with the Organization for Economic Co-operation and Development ("OECD")'s 1997 antibribery convention, an international agreement seeking to curtail bribery worldwide.[23] But the amendment, at the time essentially an academic exercise because the FCPA had basically lain dormant since its enactment, did very little to address the underlying vagueness in the definitions.[24] Given this vagueness, the DOJ has adopted an expansive interpretation of both "foreign official" and "instrumentality."[25]

18. *See* Dan Harris, *Bribery in China as a Waste of Money*, China Law Blog (July 12, 2012), http://www.chinalawblog.com/2012/07/bribery-in-china-as-a-waste-of-money.html (urging compliance as sound business strategy).

19. Carl Pacini, *The Foreign Corrupt Practices Act: Taking a Bite Out of Bribery in International Business Transactions*, 17 Fordham J. Corp. & Fin. L. 545, 551 (2012).

20. David Kennedy & Dan Danielson, Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act 19–20 (2011), *available at* http://www.harvardiglp.org/wp-content/uploads/The-Foreign-Corrupt-Practices-FINAL.pdf. The FCPA can affect any company that does business in the United States and has indeed affected foreign companies and even bribery of foreign officials by foreigners. In practice, then, the FCPA can have extreme extraterritorial reach.

21. *See, e.g.*, Elizabeth Spahn, *Nobody Gets Hurt?*, 41 Geo. J. Int'l L. 861, 862–64 (2010). *But see* Seth Kaplan, *Is Corruption Always Bad?*, Global Dashboard (Mar. 9, 2012), http://www.globaldashboard.org/2012/03/09/is-corruption-one-word-or-many/.

22. *Compare* Walter Olson, *The Foreign Corrupt Practices Act: Clarification Is Not Enough*, CATO Inst. (Nov. 11, 2011, 7:49 AM), http://www.cato.org/blog/foreign-corrupt-practices-act-clarification-not-enough, *with* Mike Koehler, *Friday Roundup*, FCPA Professor (Nov. 18, 2011), http://www.fcpaprofessor.com/friday-roundup-19 (in which an overall critic of the current FCPA enforcement regime argues against Olson's position).

23. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (amending the FCPA); Krever, *supra* note 9, at 88. It is worth noting, however, that the FCPA was itself one of the inspirations for the OECD pact.

24. Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 Ga. L. Rev. 489, 497–98 (2011) (arguing that the FCPA's definitions remain too vague, frustrate the Act's purpose, and foster uncertainty about both legitimate and illegitimate business relations).

25. *Id.* at 533–34.

Despite vocal opposition from businesses and lobbying groups,[26] the DOJ has interpreted both terms broadly enough to potentially include foreign officials of all stripes, from the lowest janitor to a governmental minister. According to the DOJ, an employee who works for a state-owned or state-controlled enterprise, and not for the government itself, may be a "foreign official."[27] Indeed, the SEC at one point defined state-owned enterprises to include institutions less than half-owned by the relevant government.[28] The current enforcement regime may cost U.S. companies millions annually.[29] Because the FCPA affects a vast number of companies and has a large effect on the global economy, its definitions and workability remain points of controversy.

Various reforms have been proposed. The U.S. Chamber of Commerce has taken the lead in proposing revisions that would substantially weaken the law—for example, by introducing a de jure compliance defense, by allowing companies to escape prosecution if they show that employees circumvented reasonable in-house compliance programs, or by eliminating successor liability when companies merge or purchase new subsidiaries.[30] While few commentators have yet called for the law's repeal, the idea has occasionally been floated.[31]

This Note argues that Congress should amend the FCPA to authorize Foreign Service officers to specify the identities of both "foreign officials" and "instrumentalities" of foreign governments. Such an amendment would ensure that the FCPA reflects U.S. foreign policy goals, make FCPA enforcement more attentive to cultural differences, and increase all-around compliance and buy-in. Part I argues that the Act's definitions of "foreign official" and "instrumentality" are too vague, and it focuses on both the DOJ and

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26. *E.g.*, U.S. Chamber Inst. for Legal Reform, Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act 24 (2010) [hereinafter Restoring Balance], *available at* http://openairblog.files.wordpress.com/2011/10/us-chamber-of-comm-amending-the-fcpa.pdf. The chamber argues that it is often unclear whether a given individual or entity is actually under the control of or part of a foreign government.

27. *See AGA Medical Corporation Agrees to Pay $2 Million Penalty and Enter Deferred Prosecution Agreement for FCPA Violations*, U.S. Dep't of Justice (June 3, 2008), http://www.justice.gov/opa/pr/2008/June/08-crm-491.html.

28. *See* Mike Koehler, *Deep Within Its Section 1504 Final Rules, the SEC Adopts an FCPA Reform Proposal Advanced by the Chamber and Contradicts an Enforcement Theory at Issue in Several of Its Prior FCPA Actions*, FCPA Professor (Sept. 6, 2012), http://www.fcpaprofessor.com/deep-within-its-section-1504-final-rules-the-sec-adopts-an-fcpa-reform-proposal-advanced-by-the-chamber-and-contradicts-an-enforcement-theory-at-issue-in-several-of-its-prior-fcpa-actions (noting that the SEC instituted a majority ownership requirement only after the passage of the Dodd–Frank Act).

29. Ashby Jones, *FCPA Inc.: The Costs of Compliance Grow*, Wall St. J., Oct. 2, 2012, at B4.

30. Restoring Balance, *supra* note 26, at 11–14.

31. *See, e.g.*, James Surowiecki, *Invisible Hand, Greased Palm*, New Yorker (May 14, 2012), http://www.newyorker.com/talk/financial/2012/05/14/120514ta_talk_surowiecki. *But see* Richard L. Cassin, *Would the Tea Party Repeal the FCPA?*, FCPA Blog (Sept. 20, 2010, 8:08 AM), http://www.fcpablog.com/blog/2010/9/20/would-the-tea-party-repeal-the-fcpa.html.

SEC's lack of real guidance and the federal courts' inability to adequately address the problem. Part II urges that this current trajectory has negative implications for commerce and for U.S. foreign policy: the current regime disproportionately harms smaller enterprises; encourages expensive sham compliance by larger companies; and even fosters a "Black Knight Problem" in which less scrupulous countries and companies fill the vacuum left when U.S. companies avoid developing countries for fear of FCPA liability. Section II.D then addresses three other proposed solutions and explains why they are inadequate. Finally, Part III proposes that Congress amend the FCPA to require the State Department to craft evolving country-specific guidance to more precisely designate both foreign officials and instrumentalities, a solution inspired by the Tate Letter regime that preceded the passage of the Foreign Sovereign Immunities Act ("FSIA") of 1976.

I. Definitional Problems Bundled into the Current FCPA Regime

The definitions in the FCPA are vague and problematic, and contemporary judicial interpretation is not helping matters. Section I.A argues that the terms "foreign official" and "instrumentality" are too vague to be useful for companies going forward and that recent DOJ efforts to provide guidance fall short. Section I.B argues that a judicial, common law approach to the problem is unlikely to produce optimal results.

A. *The FCPA's Definitions: Vagueness and a Lack of Guidance*

In any given country, it is exceedingly difficult to determine exactly which institutions are "instrumentalities" and exactly who is a "foreign official." Given the FCPA's vague language, it is unsurprising that this point has generated some of the greatest opposition to the current FCPA regime.[32] As many critics have pointed out, applying the FCPA's definitions domestically would turn companies partly owned by the U.S. government into instrumentalities and their officers into officials. For example, the American Big Three automobile manufacturers would have become instrumentalities after their bailout in 2009.[33] Indeed, depending on how one bends the definitions, there is no clear limit to what can be deemed an instrumentality of the state, and the DOJ and SEC have kept the definitions as broad as possible.[34]

This problem is only exacerbated in many developing countries, where lines between private enterprise and the state are blurry. In China, for example, the Communist Party is inextricably intertwined with all levels of the

32. *See* Restoring Balance, *supra* note 26, at 24.

33. *See* Defendants' Notice of Motion and Motion to Dismiss Counts One Through Ten of the Indictment at 21, United States v. Carson, No. 8:09-cr-00077-JVS (C.D. Cal. filed Apr. 8, 2009).

34. *See* Lanny A. Breuer, Ass't Att'y Gen., U.S. Dep't of Justice, Keynote Address to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum (Nov. 12, 2009), *available at* http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-12-09breuer-pharmaspeech.pdf.

economy, and, since 1989, the party has made it a matter of policy that no one can succeed in China without first going through the party.[35] Even Chinese lawyers must swear oaths to the party as opposed to the country itself.[36] Above and beyond the problem posed by state-owned enterprises themselves, of which China has many, finding the line where the state ends and the private economy begins is almost impossible in China.[37] Doing business in the country often entails contacting locals to demand bribes or other forms of quid pro quo, and the boundaries between the state and the private sector are hazy.[38] Thus, companies doing business in China face a high risk of violating the FCPA from the moment they enter the country. China is not the only country with corruption problems, of course; other developing countries like India, Brazil, and Cambodia also suffer from extreme public corruption.[39] Bribery is a legitimate target, but if the DOJ employed the current FCPA to anything close to its maximum extent, small companies would be extremely cautious about entering these developing markets.[40]

The DOJ stepped in recently to provide some guidance but has in practice done little to clarify the situation—quite possibly because it does not wish to.[41] In November 2012, the DOJ and SEC teamed up to provide a one-stop guide to the FCPA. The document lists eleven factors, culled from courts' jury instructions, that the DOJ may consider in deciding whether to prosecute a given case.[42] For example, on the question of what constitutes an "instrumentality," the DOJ considers the extent to which the foreign state owns a given foreign entity, how the foreign entity was created, and the

35. Richard McGregor, The Party 36–41 (2010).

36. Edward Wong, *Chinese Officials' Loyalty Oath Requirement Raises Anger Among Lawyers*, N.Y. Times, Mar. 23, 2012, at A8, *available at* http://www.nytimes.com/2012/03/23/world/asia/chinese-lawyers-chafe-at-new-oath-to-communist-party.html.

37. *See* Bruce J. Dickson, Red Capitalists in China 106–07 (2003); *see also* Lance L.P. Gore, The Chinese Communist Party and China's Capitalist Revolution 2 (2011) ("[T]he Party has insisted on its organizational presence in all spaces of the Chinese society deemed politically significant, including business firms and nongovernmental organizations . . . .").

38. Dickson, *supra* note 37.

39. All four countries receive scores under fifty out of a hundred on Transparency International's annual listing of corruption perception. *Corruption Perceptions Index 2013*, Transparency Int'l, http://www.transparency.org/cpi2013/results (last visited Jan. 18, 2014).

40. *See infra* Section II.A.

41. *See* Breuer, *supra* note 34; *see also* Jones Day, DOJ/SEC's Resource Guide to the U.S. Foreign Corrupt Practices Act 7 (2012), *available at* http://www.jonesday.com/files/Publication/aea05ebf-c8d9-4c05-82c0-772fe3f0ca78/Presentation/PublicationAttachment/a6ec97c5-11f0-4e95-adde-6c7e83ce93d3/DOJ%20SEC%20Resource%20Guide.pdf ("Perhaps most important . . . [is] what the document does not say. Certain questions are . . . left unanswered. Many of these are matters of judgment while others are areas that the DOJ and SEC simply chose to leave vague, giving the government the most discretion possible in later enforcement actions.").

42. Crim. Div., U.S. Dep't of Justice & Enforcement Div., U.S. Sec. & Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act 20 (2012) [hereinafter FCPA Resource Guide], *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

entity's provision of services to the state's residents.[43] This guidance does not expand greatly on what practitioners in the field already know, however, and it does not substantially clarify the underlying uncertainty in the FCPA's definitions. In a memorandum to clients, the law firm Paul Hastings noted that the new guidance "may create more confusion" and "do[es] not provide the much-sought clarification for partially state-owned or controlled entities."[44] In sum, the DOJ's expansive definitions remain vague and unhelpful for companies doing business abroad.

The FCPA's punishments are so heavy—the monetary fines, even in settlements, are often in the range of $20–30 million and have reached up to $800 million—that most companies and individuals faced with prosecution refuse to risk them.[45] Not only are the fines enormous but individual defendants, most of whom have not previously been incarcerated, face jail time.[46] And the 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.[47] The result, similar to that in the area of U.S. securities regulation, is a dearth of case law.[48] Faced with vague definitions, expansive agency interpretations, and clear reasons to avoid risking open trial, most companies and individuals investigated for or charged with FCPA violations settle out of court.

The DOJ itself has begun to release limited specific guidance in the form of FCPA opinion releases.[49] It issues these short documents, upon request, to entities that have asked for specific but anonymous guidance on who might be a "foreign official" in a given country. Once it issues the statements, the DOJ posts them on its website. Unfortunately, these guidance papers are scarce, slow in coming, and highly general (since they do not name the

43. *See id.*

44. Paul Hastings LLP, Global Compliance & Disputes Practice Grp., Guidance on the U.S. Foreign Corrupt Practices Act from the Dep't of Justice and the Securities & Exchange Commission 2 (2012), *available at* http://www.paulhastings.com/Resources/Upload/Publications/2290.pdf.

45. 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); *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines*, U.S. Dep't of Justice (Dec. 15, 2008), http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html.

46. Koehler, *supra* note 45, at 940.

47. *See id.* at 926–29.

48. *See* Pete J. Georgis, Comment, *Settling with Your Hands Tied: Why Judicial Intervention Is Needed to Curb an Expanding Interpretation of the Foreign Corrupt Practices Act*, 42 Golden Gate U. L. Rev. 243, 278–80 (2012).

49. *E.g.*, Foreign Corrupt Practices Act Review, No. 12-01 (U.S. Dep't of Justice Sept. 18, 2012) [hereinafter Release No. 12-01] (opinion proc. release), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2012/1201.pdf.

countries to which they refer).[50] Furthermore, the DOJ's opinion releases lack the benefit of local expertise. For example, one opinion release refers to an unspecified "member of the royal family" in an unspecified country.[51] The letter details that individual's responsibilities to the country's government and concludes—based entirely on information provided by the requesting party (itself not named)—that this particular individual is not a "foreign official" for FCPA purposes.[52] In short, the guidance is inapplicable to any other situation, which critically reduces its utility. And if anyone tried to use it as a guide in another situation, it would pose more questions than it would answer: for example, what about countries where members of the royal family are not so cleanly dissociated from the state? (And indeed, is there any such country where the royal family is so cleanly dissociated from the state?[53]) These opinion releases create a rebuttable presumption in court,[54] which makes the DOJ unlikely to produce many of them. It is hard to picture the department successfully prosecuting an entity for its relationship with an individual covered in an opinion release, unless it could show that the company gave it false information—which would also be difficult, given the DOJ's limited manpower and expertise.

B. *Judge-Made Common Law Is Unlikely to Bring Clarity*

In *United States v. Carson*, the most recent district court opinion to reach the "foreign official" question, the District Court for the Central District of California held that the questions of whether an individual qualifies as a "foreign official" or whether a foreign institution qualifies as an "instrumentality" are questions of fact implicating several distinct inquiries.[55] Logical as this approach might seem, however, it only increases uncertainty for

50. Release No. 12-01, *supra* note 49, at 1. Note the date of the initial request—February 15, 2012—as well as the key phrase "based on the facts as represented by the Requestor." *Id.* The DOJ has only released a total of ten opinions in the last five years. *See Opinion Procedure Releases*, U.S. Dep't of Justice, http://www.justice.gov/criminal/fraud/fcpa/opinion/ (last visited Jan. 18, 2014).

51. Release No. 12-01, *supra* note 49, at 1.

52. *Id.* at 2.

53. For example, in Cambodia, royalty is not easy to sever from the state itself. *See* Richard S. Ehrlich, *Hun Sen Without Royal Check Good News for China*, Bangkok Post (Oct. 21, 2012, 12:00 AM), http://www.bangkokpost.com/print/317813. In fact, the same problem is sometimes even alleged in Britain. *See, e.g.*, Gregory Katz, *Breach of Confidence: Don't Quote the Queen*, Associated Press (Sept. 25, 2012, 1:43 PM), http://bigstory.ap.org/article/breach-confidence-dont-quote-queen.

54. 28 C.F.R. § 80.10 (2013).

55. United States v. Carson, No. SACR 09-00077-JVS, 2011 WL 5101701 (C.D. Cal. May 18, 2011). The *Carson* court analyzed the following:

> The foreign state's characterization of the entity and its employees;
> The foreign state's degree of control over the entity;
> The purpose of the entity's activities;
> The entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designated functions;
> The circumstances surrounding the entity's creation; and

possible defendants. Under the *Carson* rule, companies and individuals working abroad would have to assess both the individuals and institutions they deal with—or the individuals their employees deal with—in real time, without a clear sense of whom a court might later find to be a "foreign official."[56] For example, one of the *Carson* court's criteria was "[t]he foreign state's degree of control over the entity."[57] Given how entwined the state is with private enterprise in many countries, it may prove virtually impossible for a foreign company to ascertain exactly how much control the local government has over any given entity. In fact, this may be the precise problem in *Esquenazi*, the Haiti Teleco case.[58] The *Carson* approach, while at least superficially logical, is no substitute for agency or congressional action clarifying the law.

There is a further risk that under this standard, first the DOJ and then judges will defer to witness testimony without inquiring whether that testimony is credible on the exact nature of the bribed individual or institution. The risk is especially serious when the allegations involve wrongdoing overseas. Prosecutors may not have the expertise to judge effectively the structure of a foreign state or company or determine whether an individual who took bribes is actually an official under the plain language of the statute. As a result, prosecutors may pass these factual misunderstandings on to judges and juries. Circuit courts have yet to reach these particular issues of competence, although the criminal bar is alert to the possibility that fact-heavy jury instructions may confuse juries.[59]

In any case, other courts are under no obligation to follow the *Carson* approach. For example, *Esquenazi* is currently pending before the Eleventh Circuit in Florida,[60] and the case may give American companies a new standard to worry about. In any event, a binding judicial solution that creates settled law in U.S. courts may be some time off, and more confusion looms as courts continue to take these cases.

The current situation is problematic. On the one hand, the FCPA does appear to have furthered the U.S. foreign policy goal of reducing American companies' involvement in bribery abroad. The FCPA has also served as a model for foreign codes, like the United Kingdom's recently passed Bribery Act.[61] On the other hand, it is unclear how effective any of these laws have

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> The foreign state's extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans).

Id. at *3–4. The court noted that "[s]uch factors are not exclusive, and no single factor is dispositive." *Id.* at *4.

56. It is worth noting that this is only relevant if the company is engaged in some form of bribery. Under the FCPA, favors to private businesses remain legal while similar favors to governmental officials do not. *Id.* at *2.

57. *Id.* at *3.

58. *See supra* notes 7–8 and accompanying text.

59. Timothy P. O'Toole & Andrew T. Wise, *You Mean You're Really Going to Try an FCPA Case?*, Champion, Sept. 2011, at 26, 26–27.

60. United States v. Esquenazi, No. 11-15331 (11th Cir. argued Oct. 11, 2013).

61. *See* Bribery Act, 2010, c. 23 (U.K.).

actually been at curbing bribery abroad or whether any of the codes written outside of Western Europe are actually enforced.[62] The business community in the United States has complained about the FCPA, and the U.S. Chamber of Commerce is lobbying hard for wide-ranging reforms that might gut it.[63] Meanwhile, the definitions in the Act remain unchanged: they are unhelpfully vague and subject to varying interpretations in the courtroom.

II. The Current FCPA Regime Has Negative Foreign Policy Implications

This Part argues that the current state of FCPA enforcement negatively impacts U.S. foreign policy. In particular, Section II.A maintains that the law may lead the DOJ to unfairly target smaller and less sophisticated companies, and Section II.B then argues that a real risk of sham compliance exists among larger companies, which results in FCPA enforcement that merely enriches compliance officers and lawyers without actually curbing bribery. Section II.C argues that the current regime may in fact damage U.S. interests abroad by creating de facto sanctions on emerging markets that leave the field open to less scrupulous actors—a result that produces a "Black Knight Problem." Finally, Section II.D outlines several other proposed solutions and explains why they are inadequate.

A. *The Law Risks Unfairly Punishing Smaller Entities*

Since FCPA enforcement increased drastically in the mid-2000s, the DOJ and SEC have regularly reiterated that individuals and smaller companies are at risk of investigation and prosecution.[64] Going forward, individuals and smaller companies will almost certainly face increasing pressure under the FCPA.[65] While major law firms advocate expensive compliance programs to alleviate risk, smaller, less sophisticated companies can rarely afford the full panoply of these protections.[66] For example, in 2010, the company Team Inc. "disclosed $3.2 million in professional costs associated with an FCPA investigation focused on . . . a branch office that represents one-

62. *See, e.g.*, OECD, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Japan (2011), *available at* http://www.oecd.org/daf/anti-bribery/anti-bribery convention/Japanphase3reportEN.pdf (finding that Japan has not been aggressive about putting antibribery laws into practice).

63. Restoring Balance, *supra* note 26.

64. Lanny A. Breuer, Ass't Att'y Gen., U.S. Dep't of Justice, Address to IBC Legal's World Bribery & Corruption Compliance Forum (Oct. 23, 2012), *available at* http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-121023.html.

65. The DOJ has declared that there is no minimum amount to trigger an FCPA violation, although its November 2012 Guidance targets companies of all sizes. *See* FCPA Resource Guide, *supra* note 42, at 8, 57.

66. The international law firm Jones Day lists "ten questions" every director should ask herself about FCPA compliance; answering the questions with an effective compliance program would not be cheap. *See* Jones Day, Ten Questions Every Director Should Ask About FCPA Compliance (2010), *available at* http://www.jonesday.com/files/Publication/

half of one percent of the company's overall revenue."[67] As a policy matter, it is both deeply unfair and unnecessary to lock companies out of foreign markets simply because they cannot afford to pay—and it might work to the detriment of those foreign markets as well. Without the protection of such compliance programs, the potential fines and jail time create insurmountable risks for smaller companies.

The DOJ and SEC's November 2012 guidance urges smaller businesses to turn to Department of Commerce guidance papers to learn about conditions in individual countries.[68] As of today, however, the guidance for most countries consists of little more than boilerplate language concerning the FCPA and references to the text of the law;[69] the guidance is of no real help in determining whether any given individual or entity is a "foreign official" or an "instrumentality" of a foreign government. Although the guidance blithely anticipates that "small and medium-sized" entities will use Department of Commerce resources,[70] the program is not well publicized and appears to be mostly ignored by law firms in the business of FCPA compliance. While a more robust effort by the Department of Commerce to aid smaller companies doing business abroad would be welcome, it cannot substitute for more precise, written guidance about foreign states—especially since Congress has not specifically focused on this problem. Faced with the high costs of compliance programs and consultation, smaller companies that wish to operate overseas have access to surprisingly few publicly available resources. An increasingly robust FCPA regime will almost certainly result in fewer smaller companies doing business abroad.

B. *Perverse Incentives Create a Real Risk of "Sham Compliance"*

In the face of the difficulties posed by the FCPA, larger companies have embraced expensive compliance practices for before and after DOJ or SEC investigations. These compliance practices, provocatively called "FCPA Inc." by some commentators, have been very good for law firms and compliance officers—and the fines generated by FCPA settlements have been very good for the DOJ—but all this has come at a heavy cost to companies doing business overseas.[71] And many of these expensive FCPA compliance programs are nothing more than a sham whereby companies spend a great deal

b8f035e6-084c-40ad-a62d-1446eee89829/Presentation/PublicationAttachment/28a5983b-457b-429d-99b5-bb07be223927/Ten%20Questions.pdf.

67. Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. Tol. L. Rev. 99, 106 (2011).

68. FCPA Resource Guide, *supra* note 42, at 6.

69. *See, e.g.*, U.S. Commercial Serv., U.S. Dep't of Commerce, Doing Business in Cambodia: 2013 Country Commercial Guide for U.S. Companies 39–42 (2013), *available at* http://export.gov/thailand/static/2013%20Cambodia%20CCG_Latest_eg_th_063040.pdf.

70. FCPA Resource Guide, *supra* note 42, at 6. I have found no references to the Country Commercial Reports outside of the *Resource Guide*.

71. Joe Palazzolo, *FCPA Inc.: The Business of Bribery*, Wall St. J., Oct. 2, 2012, at B1, *available at* http://online.wsj.com/news/articles/SB1000087239639044386260457802846229461

of money on "see-no-evil" compliance programs.[72] Indeed, thanks to contemporary diversion instruments such as deferred prosecution agreements ("DPAs"), many companies may be inching toward treating FCPA compliance measures as something of a tax on doing business abroad as opposed to a genuine bribery-reducing regulatory regime.[73] This expensive, inefficient system risks locking smaller companies out of developing markets.

Today, the DOJ Fraud Section, which prosecutes criminal FCPA violations, prefers using DPAs and non-prosecution agreements ("NPAs") to settle a vast majority of cases.[74] The DOJ and SEC have extolled the wide-ranging use of these two devices because they allow prosecutorial discretion and prevent FCPA charges from becoming death knells for companies.[75] Commentators, regulators, and judges have criticized these devices in equal measure for circumventing judicial review and for introducing an extrastatutory compliance defense.[76] In essence, companies do "on-paper-only" compliance, wait until a problem percolates, and quickly settle.

The extensive use of DPAs and NPAs, as well as the terms commonly found in these agreements, favors larger companies. These companies can afford sophisticated legal counsel that can negotiate with DOJ lawyers on more or less equal terms. Large companies also have the resources to pay for the broad compliance programs that the DOJ usually demands in exchange—although these programs also may exist more on paper than in

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1352; *see also* Lisa Prager, *FCPA Compliance: Don't Blow Your Budget Just Yet*, Forbes (Mar. 27, 2012, 4:18 PM), http://www.forbes.com/sites/insider/2012/03/27/fcpa-compliance-dont-blow-your-budget-just-yet/.

72. *See, e.g.*, Koehler, *supra* note 45, at 954. In an interview, a former compliance investigator in China said that U.S. companies in China are most comfortable with compliance officers and investigators who provide "enough information that [the company] is not shocked, but not too much [information]," and that "if [a company] had to actually comply with the FCPA, the company would not be able to do business in China at all." Interview with Former Compliance Investigator (Feb. 12, 2013) (speaking on condition of anonymity).

73. *See* Koehler, *supra* note 45, at 933.

74. > [E]very corporate FCPA enforcement action over the last two decades has been resolved through a DOJ NPA, DPA, plea (or combination thereof) or SEC settlement, and nearly every individual FCPA enforcement action has been resolved through a plea or SEC settlement.

Id. at 932.

75. > One need only look at the example of Arthur Anderson, Enron's accounting firm, to see the potential repercussions of corporate indictment. When prosecutors approached the firm with a diversion agreement, it balked, refusing the deal and choosing instead to risk the litigation route. The damage of the DOJ's subsequent indictment was "irreversible"—twenty-eight thousand people lost their jobs when the firm crumbled. Even though Arthur Anderson's subsequent conviction was later reversed by the Supreme Court, the harm had already been done—the eighty-nine-year-old firm was out of business and the accounting industry had been transformed from the "Big 5" into the "Big 4."

Thomas, *supra* note 17, at 453–54 (footnotes omitted).

76. *See, e.g.*, Koehler, *supra* note 45, at 935–38.

reality.[77] Smaller players and individuals have fewer resources and are thus at a disadvantage in this process—and, going forward, prosecutions of smaller players are likely to increase.[78] DPAs and NPAs originally developed in the field of white-collar crime, directed at large or heavily capitalized companies.[79] In this arena, it is relatively unlikely that the targeted institutions will lack the resources to defend themselves. But in the FCPA universe, where there is theoretically no limit on how small an operation can be before it triggers charges, the basic problem of fairness looms much larger.

The result is sham compliance, which occurs when large companies institute costly compliance programs as a necessary component of doing business abroad.[80] Although these programs no doubt have some positive effects, the drawbacks are significant. Not only do they introduce huge fixed costs into foreign business ventures but they create a real risk of locking smaller companies out of foreign markets while larger ones enact expensive, "on-paper-only" compliance programs to escape the consequences of violating a vague and difficult-to-enforce law.

C. *The Black Knight Problem*

These fixed costs, along with the risk of FCPA prosecution, probably discourage investment in foreign states with a history of endemic corruption. Professor Spalding argues that this state of affairs harms U.S. foreign policy goals in two ways: first, it acts as an "unofficial sanction" on developing countries, reducing the engagement of the international business community in these states;[81] and second, it creates what Spalding calls a "Black Knight Problem," in which states that do not have qualms about operating in countries with endemic corruption move to fill the gap, exerting their own influence in the process.[82] Recently, China has been the biggest black

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77. *See* Interview with Former Compliance Investigator, *supra* note 72. The interviewee detailed how companies generally expected compliance officers to be "judicious" in handling instances of possible bribery. He described companies seeking enough information to prevent them from being "shocked" but no more than that. He also noted that more information than companies wanted to see was often readily available. *Id.*

78. *See* Lanny A. Breuer, Ass't Att'y Gen., U.S. Dep't of Justice, Address to the 22d National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009), *available at* http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf.

79. *See* Rachel Delaney, Comment, *Congressional Legislation: The Next Step for Corporate Deferred Prosecution Agreements*, 93 Marq. L. Rev. 875, 881–82 (2009). For more commentary on DPAs, NPAs, and the nature of the targeted companies, see Jed S. Rakoff, U.S. Dist. Judge, Speech at the N.Y.C. Bar Ass'n: Why Have No High Level Executives Been Prosecuted in Connection with the Financial Crisis? (Nov. 12, 2013), *available at* http://im.ft-static.com/content/images/cb1e43f2-4be6-11e3-8203-00144feabdc0.pdf.

80. *See* Koehler, *supra* note 45, at 1001–05. For some commentary on the nature of sham compliance, see Jeffrey M. Kaplan, *Compliance 'Half Measures' and the Ghost of Christmas Yet to Come*, FCPA Blog (Dec. 20, 2010, 6:28 AM), http://www.fcpablog.com/blog/2010/12/20/compliance-half-measures-and-the-ghost-of-christmas-yet-to-c.html.

81. Andrew Brady Spalding, *Four Unchartered Corners of Anti-Corruption Law: In Search of Remedies to the Sanctioning Effect*, 2012 Wis. L. Rev. 661, 663–64, 667.

82. *Id.* at 667.

knight.[83] This should not surprise anyone, for China's own endemic internal corruption poses massive FCPA problems.[84]

This imbalance may be eroding U.S. influence abroad.[85] In Southeast Asia, for example, the United States significantly lags behind China in foreign direct investment; in Cambodia alone, China's foreign direct investment of more than $1.19 billion in 2011 was ten times that of the United States.[86] The uncertainty created by the FCPA's vague definitions only exacerbates the challenges for the United States in the global economy.

D. *Other Proposed Solutions Are Ineffective*

Many scholars have suggested altering the FCPA regime to address the problems outlined above. This Section describes three proposed reforms: establishing a de jure compliance defense; repurposing the FCPA to focus on the solicitation of bribes by foreign officials; and creating a new U.S. governmental entity dedicated to foreign corruption. The Section ultimately concludes, however, that these reforms are incomplete solutions that may even exacerbate the uncertainty surrounding the FCPA.

First, many commentators have argued for a formal compliance defense to the FCPA.[87] Professor Koehler, in particular, argues that adding a compliance defense "as a matter of law" would incentivize companies to adopt better compliance practices and help the DOJ preserve prosecutorial resources for truly egregious cases.[88] Under a compliance-defense regime, companies would see reduced liability if they could demonstrate to the DOJ

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83. *Id.*

84. *See* Ernst & Young, Growing Beyond: A Place for Integrity 22–23 (2012), *available at* http://www.ey.com/Publication/vwLUAssets/Global-Fraud-Survey-a-place-for-integrity-12th-Global-Fraud-Survey/$FILE/EY-12th-GLOBAL-FRAUD-SURVEY.pdf (surveying corruption compliance issues in China).

85. It should be noted, however, that the question of whether the FCPA primarily harms U.S. companies has provoked cycles of intellectual skirmishing. The U.S. Chamber of Commerce has repeatedly claimed that the FCPA unfairly harms the foreign actions of *American* companies. Restoring Balance, *supra* note 26, at 24. Government critics have answered that nine of the largest FCPA penalties have been levied against companies not headquartered in the United States. *E.g.*, J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks Before the Forum for EU–US Legal-Economic Affairs 6–7 (Sept. 13, 2012), http://www.ftc.gov/speeches/rosch/120913FCPAenforcement.pdf.

86. *See* Andrew R.C. Marshall & Prak Chan Thui, *Insight: China Gambles on Cambodia's Shrinking Forests*, Reuters (Mar. 7, 2012, 8:31 AM), http://www.reuters.com/article/2012/03/07/us-cambodia-forests-idUSTRE82607N20120307 ("China has . . . been generous with aid, pledging more than $2 billion since 1992 . . . ."); *see also* Jonathan Weston et al., U.S.–China Econ. & Sec. Review Comm'n, China's Foreign Assistance in Review (2011), *available at* http://origin.www.uscc.gov/sites/default/files/Research/9_1_%202011_ChinasForeignAssistanceinReview.pdf.

87. *See, e.g.*, Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 Wis. L. Rev. 609.

88. *Id.* at 611–12 (emphasis omitted).

that they had instituted a "good faith" compliance program before discovering corruption.[89]

But Koehler's own work raises problems with this approach. First, many compliance programs, as they currently operate, create "on-paper-only" compliance.[90] The creation of a formal compliance defense may simply encourage expensive sham compliance as a form of good faith compliance efforts. Second, as Koehler and others have demonstrated, the DOJ's preference for DPAs and NPAs creates a de facto compliance defense in any case.[91] Perhaps most importantly, instituting a compliance defense would only perpetuate the problem this Note's proposed solution seeks to ameliorate: instead of incentivizing the DOJ to be more precise in its enforcement, a compliance defense would simply motivate companies to create large local compliance programs designed less to root out corruption than to deceive the DOJ, which lacks the cultural competence to assess adequately these programs' efficacy.[92]

Professor Klaw argues for decriminalizing the *giving* of bribes but criminalizing the *solicitation* or *extortion* of bribes by governmental officials.[93] According to Klaw, the current FCPA regime creates "perverse incentives," encouraging companies to hide incidents of bribery and extortion and thus preventing the market from taking into account the true costs of bribery.[94] To have the proper deterrent effect, he argues, companies should have to disclose extortion abroad, and the U.S. government should prosecute foreign officials who demand bribes if their home governments are unwilling or unable to hold them accountable.[95] The jurisdictional extension this would entail is not without constitutional merit.[96]

But there is simply no practical way that the government could actually bring enough foreign officials before U.S. courts for the law to have any deterrent effect.[97] Furthermore, such an aggressive stance would almost certainly damage U.S. relations with regimes around the world. The switch in

89. *See id.* at 618.

90. *See supra* Section II.B.

91. *See supra* text accompanying notes 74–76.

92. *See* Interview with Former Compliance Investigator, *supra* note 72; *supra* note 77.

93. Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 Harv. J. on Legis. 303 (2012) (arguing for a reversal of the FCPA regime whereby laws criminalizing the paying of bribes give way to laws targeting those who extort them).

94. *See id.* at 305, 319–20, 337.

95. *Id.* at 361–62.

96. Article 1, Section 8 of the U.S. Constitution authorizes Congress to "regulate Commerce with foreign Nations" and "define and punish . . . Offences against the Law of Nations." U.S. Const. art. 1, § 8, cls. 3, 10; *see also* Klaw, *supra* note 93, at 363 (citing United States v. Castle, 925 F.2d 831, 835 (5th Cir. 1991) (per curiam)).

97. The behavior of Argentina's governmental officials in the face of U.S. court rulings is instructive: the officials of sovereign states are generally disinclined to kowtow before foreign courts. *See infra* note 116.

criminalization would be exceedingly difficult to implement—it would involve reversing decades of national and international lawmaking—and would have a definite negative impact on enforcement.

All of these changes to the FCPA would solve problems only by making it harder for the DOJ to bring cases in the first instance, even if the department felt that the facts in a given case might warrant prosecution. Almost all of the solutions would severely limit the DOJ's discretion but would provide no countervailing aid to the global antibribery regime. By and large, the one-size-fits-all approach would simply weaken the law, not improve it.

Adopting a similar approach to the one advocated by this Note, some scholars have proposed reforms that address the lack of coordination between different governmental entities charged with conducting U.S. foreign policy. For example, Spalding suggests creating a new governmental entity empowered with "formal legal authority to participate in the design and implementation of anti-corruption policy."[98] As a longer-term solution, sketched at a very high level, this is a reasonable proposal. But it runs into practical problems that would make it hard to implement. It would be difficult to force meaningful cooperation between governmental units with different, and potentially conflicting, mandates.[99] By contrast, a modified form of country-specific guidance, as described below, would produce greater rapprochement between the DOJ and the State Department. Indeed, such guidance would not rely on de jure coordination between departments with conflicting goals, prerogatives, and competencies, which would increase the likelihood of positive results in the near term.

III. Amending the FCPA: State Department Country-Specific Guidance

The current FCPA enforcement regime is unwieldy and unpredictable and may result in both underenforcement and overenforcement. In light of these concerns, this Note proposes a unique solution: amending the FCPA to require the State Department to define "foreign official" and "instrumentality" for each country, with these definitions creating a rebuttable presumption in court. This proposal would render FCPA enforcement more predictable; enable the State Department to tailor the FCPA's application in specific countries to U.S. foreign policy goals; take advantage of the expertise

98. Spalding, *supra* note 81, at 687.

99. DOJ's Fraud Section is known for its highly prosecutorial culture. *Id.* at 681. The State Department asserts that its mission is to "fight terrorism, protect U.S. interests abroad, and implement foreign policy initiatives while building a freer, prosperous and secure world." *Mission*, U.S. Dep't of State: Careers Representing America, http://careers.state.gov/learn/what-we-do/mission (last visited Jan. 18, 2014). In addition, the State Department's official mission statement is to "[c]reate a more secure, democratic, and prosperous world for the benefit of the American people and the international community." *Mission*, U.S. Dep't of State, http://www.state.gov/s/d/rm/rls/dosstrat/2004/23503.htm (last visited Jan. 18, 2014). None of these missions involves enforcing U.S. laws—or indeed taking U.S. laws into account at all—except in the most indirect fashion. *Id.*

of in-country Foreign Service officers; and aid companies in making compliance decisions. In short, State Department guidance memoranda would be a first step to a more transparent and efficient FCPA regime. Section III.A outlines this proposal in more detail, in part by comparing it to its inspiration: the State Department's guidance under the Tate Letter regime prior to the passage of the FSIA. Section III.B then anticipates the proposal's potential weaknesses and limitations and responds to them.

A. *State Department Country-Specific Guidance Inspired by the Tate Letter*

In the near term, the United States can avoid some of the negative effects of the FCPA's unclear definitions without actually amending the definitions in the underlying statute or otherwise dramatically altering its purpose and scope. The State Department is already in a position to provide concrete support that will aid companies.[100] Specifically, Congress should amend the FCPA to require in-country State Department officials to author country-specific guidance that, if followed by U.S. companies, would serve as a rebuttable presumption of FCPA compliance in the event of prosecution.

While this situation might seem somewhat unusual, the State Department has previously issued guidance that substantially determined a party's liability in court. Prior to the passage of the FSIA, the State Department authored recommendations regarding sovereign immunity under the Tate Letter regime.[101] Although this earlier regime was largely ineffective, important differences in the sovereign immunity context make success much more likely under the FCPA. Section III.A.1 explains the structure of the Tate Letter regime, its perceived failings, and the reasons that the FSIA replaced it. In light of these findings, Section III.A.2 describes the details of the proposed country-specific FCPA guidance and explains how this guidance solves the FCPA's current problems while avoiding the pitfalls of the Tate Letter regime.

1. Sovereign Immunity and the Tate Letter

In 1938, the Supreme Court decided *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, which recognized that courts were bound by State Department suggestions regarding the sovereign immunity status of foreign states because the judiciary should defer to the executive on issues of

100. In the November 2012 guidance, the DOJ and SEC already urge "U.S. businesses to seek the assistance of U.S. embassies when they are confronted with bribe solicitations or other corruption-related issues overseas." FCPA Resource Guide, *supra* note 42, at 6.

101. Joseph W. Dellapenna, *Interpreting the Foreign Sovereign Immunities Act: Reading or Construing the Text?*, 15 Lewis & Clark L. Rev. 555, 560 (2011).

foreign policy.[102] But the State Department did not release any written guidance until 1952, when Jack B. Tate, legal adviser to the department, authored a letter to the acting attorney general. The letter set out the restrictive theory of sovereign immunity that the State Department felt the courts should adopt.[103] This theory of sovereign immunity holds that a sovereign enjoys immunity when acting as a state but not when engaged in everyday commercial activity. The State Department then occasionally intervened in specific instances when questions of sovereign immunity came before the courts.[104] Although *The Navemar* and the Court's subsequent decisions had decided only that such guidance should be binding as to specific cases, "Courts accepted the Tate Letter as a general suggestion, binding them to decide cases according to the restrictive immunity theory set forth in the Tate Letter even when the Department refused to make a specific suggestion."[105]

While theoretically sound, this regime, in which courts relied on the theory articulated in the Tate Letter and on the rare specific recommendations from the State Department, suffered from two practical problems unique to the sovereign context. First, while the Tate Letter identified different legal effects for the public and private acts of sovereigns, it did not articulate an easily applicable method to distinguish one from the other.[106] Thus, the Tate Letter did not provide sufficient guidance in situations where a "State Department determination did not control the outcome," or, in other words, where the State Department had not made a specific suggestion.[107] Second, when the State Department did make specific recommendations regarding sovereign immunity, they were heavily politicized, usually requesting favorable treatment for Cold War allies that had been haled into court.[108] Ultimately, the State Department was incapable or unwilling to give frequent guidance, and the guidance it did give was patently politicized and offered in reaction to pending cases.

102. 303 U.S. 68, 74 (1938). *The Navemar* and the cases that followed made clear that courts assumed the State Department would make a recommendation that it would then communicate to the attorney general, who would then communicate the opinion to the courts—hence the Tate Letter. *E.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945); *Ex parte* Republic of Peru, 318 U.S. 578, 586–89 (1943).

103. Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Philip B. Perlman, Acting Att'y Gen., Dep't of Justice (May 19, 1952), *reprinted in Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 Dep't. St. Bull. 984 (1952).

104. Ruth Donner, *The Tate Letter Revisited*, 9 Willamette J. Int'l L. & Disp. Resol. 27, 28, 36–39 (2001).

105. Dellapenna, *supra* note 101, at 559–60.

106. Donner, *supra* note 104, at 28.

107. Ved P. Nanda & David K. Pansius, 1 Litigation of International Disputes in U.S. Courts § 3:3 (2d ed. 2012).

108. *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983) ("On occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory."); *see also* Dellapenna, *supra* note 101, at 560–61.

These failings spurred Congress to replace the original Tate Letter with the FSIA in 1976.[109] The FSIA codified the Tate Letter's general restrictive approach to sovereign immunity, provided a coherent method to differentiate between sovereign and private acts, and removed the State Department from sovereign immunity determinations.[110] The Act eliminated much of the risk of politicization, particularly the concern that the State Department would intervene in cases that had already developed. Courts and commentators generally agree that the FSIA brought greater clarity and fairness to sovereign immunity cases.[111] And while the Act has presented many difficulties in application and interpretation, there has been no movement to return to the old regime.

2. A Proposal for State Department Guidance in the FCPA Context

The FCPA, passed a year after the FSIA, was undoubtedly created under a similar impulse. Congress would not have acted almost simultaneously to remove questions of sovereign immunity from State Department control while placing the fate of its new antibribery law in the hands of the same executive branch department. While the FSIA has brought coherence and predictability to the restrictive theory of sovereign immunity, the FCPA's inherently ambiguous statutory definitions have failed to provide such clarity.[112] The immense complexity and variety in economic systems between countries and the DOJ's enforcement practices have only exacerbated the situation.[113] To address these issues, this Note proposes replacing the DOJ's infrequent and limited opinion-release process with statutorily mandated country-specific guidance issued by the State Department.

Specifically, in-country Foreign Service officers would prepare guidance memos identifying what types of individuals and organizations within that country should be considered "foreign officials" and foreign "instrumentalities" under the FCPA. Updated regularly and available publicly on the internet, this guidance would provide compliant companies with a rebuttable defense—similar to the compliance defense afforded by the DOJ's opinion releases—in the event of DOJ prosecution. A guidance-memo regime would

109. 1 Nanda & Pansius, *supra* note 107, § 3:3; *see also* Foreign Sovereign Immunities Act of 1976 § 4(a), 28 U.S.C. §§ 1602–1611 (2012).

110. 1 Nanda & Pansius, *supra* note 107, § 3:3. While commentators generally view the FSIA as an improvement over the previous regime, it is beset by its own problems and might benefit from similar amendments. *See, e.g.*, Donner, *supra* note 104, at 36–39; Jonathan C. Lippert, *Vulture Funds: The Reason Why Congolese Debt May Force a Revision of the Foreign Sovereign Immunities Act*, N.Y. Int'l L. Rev., Summer 2008, at 1; J.F. Hulston, Note, *Chinese Assault Rifles, Giant Pandas, and Perpetual Litigation: The "Rights Without Remedies" Dead-End of the FSIA*, 77 Mo. L. Rev. 511, 520–521 (2012). Arguments about the reform of the FSIA are, however, beyond the scope of this Note.

111. *See, e.g.*, *Verlinden*, 461 U.S. at 487–89.

112. *See supra* Part I.

113. *See supra* Part I.

ameliorate many of the FCPA's policy problems by introducing local expertise, discouraging expensive sham compliance, and checking the DOJ's ability to strong-arm companies into settling cases without hobbling its ability to bring worthwhile investigations. The guidance-memo regime would also avoid many of the Tate Letter's pitfalls: it is better suited to the world's diverse political and legal regimes, less susceptible to rank politicization, and not vulnerable to retroactive politicization.

First, in-country Foreign Service officers are more cognizant than lawyers in Washington, D.C., of local economic and cultural issues, institutional prerogatives, and overarching U.S. foreign policy goals as applied to their specific country. As the U.S. officials closest to the action in any given country,[114] Foreign Service officers have the training and expertise necessary to produce these guidance memos. Because the DOJ does not produce the memos, it would be under no obligation to completely respect them—on the contrary, the DOJ could still bring any case it thought viable. A defendant, however, could use the memo as detailed guidance at trial, fashioning something akin to a compliance defense—but one based on an above-board attempt to act appropriately in a particular country as opposed to the implementation of a (quite possibly sham) compliance program.[115] These new, country-specific guidance memos would require frequent updates, perhaps once every two years. Furthermore, they would have to be quite specific: the State Department officers tasked with writing the memos would need to define who they felt was a "foreign official" and which organizations were "instrumentalities."

But why should Congress return, in the FCPA context, to a solution that did not work in the sovereign immunity context? First of all, in the FCPA arena the situation is less amenable to a one-size-fits-all solution; indeed, the FSIA's central problem is reversed. On questions of sovereign immunity, other states perhaps dislike that they may be sued in U.S. court for purely commercial activities, but they can read the law and make competent predictions. On the contrary, because of the worldwide diversity of cultures and legal systems, the FCPA context does not lend itself to any clear mode of judicial analysis. The sheer number of countries and unique situations means that distinctions between private and public are simply too diverse. Companies therefore incur enormous compliance costs to produce the effect of paper compliance and guard against risks that are hard to predict. While the sovereign immunity context was amenable to a one-size-fits-all approach with a common mode of analysis, the FCPA context is not.

114. With the exception, perhaps, of intelligence officers, who are unsuited to this task because of the necessary confidentiality of their activities and their use of bribes as a strategic tool. *See, e.g.*, Matthew Rosenberg, *Karzai's Office Gets Bags Full of C.I.A. Cash*, N.Y. Times, Apr. 29, 2013, at A1, *available at* http://www.nytimes.com/2013/04/29/world/asia/cia-delivers-cash-to-afghan-leaders-office.html?pagewanted=all.

115. *See supra* Section II.B. The key differences between the two approaches are good faith and local precision: the compliance defense incentivizes a "see-no-evil" approach to local issues and the mere appearance of compliance, while the Tate Letter regime incentivizes an open-eyed approach to local entities and relationships.

Furthermore, removing politics and the State Department from liability determinations is less beneficial in the FCPA context than in the sovereign immunity context.[116] Sovereign immunity involves foreign states directly, while the FCPA merely involves them tangentially—as the alleged bribe takers. As such, the risk of political quid pro quos is reduced in the FCPA context. The FSIA's fundamental question concerns the jurisdiction of U.S. courts, while the FCPA's fundamental question concerns the application of a U.S. law. Again, state issues are less directly implicated, which mitigates the concern of undue politicization[117] and increases the complexity, since the number of potential actors is larger and more fluid than the number of the world's states. Finally, in the sovereign immunity context, the State Department usually reacted to ongoing cases instead of providing a shield against potential prosecutions, whereas the State Department guidance proposed here would furnish ex-ante determination of liability, diminishing the impact of politicization in the FCPA context. Finally, the end of the Cold War has removed one of the major problems of politicization: the State Department's tendency to request solicitous treatment for allies regardless of the underlying merits of the case.[118] To the contrary, the contemporary State Department has a more nuanced set of considerations, including the strength of the global economy.[119]

Even so, the guidance-memo regime might appear to merely shift the lobbying from foreign countries to companies doing business in foreign countries. But there should be less cause for concern about the increased power of the State Department and the lobbying risks that such increased power might initially seem to promote. Foreign Service officers, even senior ones, serve fairly short terms in each country, before which they undergo

116. Even in the FSIA context this practice is problematic. In the line of cases spawned by Argentina's sovereign default, the State Department routinely weighed in on behalf of the Argentine government—and the Argentine government's repeated statements of disrespect for the American court and its rulings have precisely demonstrated the problems inherent in allowing one state to be sued in another state's courts. In the ongoing *Elliot v. Argentina* litigation, the Argentine government has come very close to admitting, in open court, that it does not intend to comply with court orders. *See generally* Felix Salmon, *Elliot vs Argentina: The Second Circuit's Dangerous Game*, Reuters (Mar. 4, 2013), http://blogs.reuters.com/felix-salmon/2013/03/04/elliott-vs-argentina-the-second-circuits-dangerous-game/. For an example of the State Department's supporting a foreign government in U.S. courts, see Brief for the United States of America as *Amicus Curiae* in Support of the Republic of Argentina's Petition for Panel Rehearing and Rehearing *En Banc*, NML Capital v. Republic of Argentina, 699 F.3d 246 (2d Cir. 2012) (No. 12-105-cv(L)), 2012 WL 6777132, *cert. denied*, 134 S. Ct. 201 (2013).

117. Since this process implicates large corporations, it could be susceptible to regulatory capture. This Note sets out below why capture may be less likely than some might fear. *See infra* text accompanying notes 120–121.

118. David P. Vandenberg, Comment, *In the Wake of* Republic of Austria v. Altmann*: The Current Status of Foreign Sovereign Immunity in United States Courts*, 77 U. Colo. L. Rev. 739, 745 (2006).

119. *See* Michael A. Almond & Scott D. Syfert, *Beyond Compliance: Corruption, Corporate Responsibility and Ethical Standards in the New Global Economy*, 22 N.C. J. Int'l L. & Com. Reg. 389 (1997).

intense in-house training.[120] To influence the content of the guidance memos, companies would have to cajole repeatedly new Foreign Service officers. But these officers' careers depend on in-house evaluations, not third-party approval: they are unlikely to be any more susceptible to direct lobbying than any U.S. civil servant at a domestic regulatory agency. Congress could further shield decisionmakers from interference by insulating them from the political appointment of ambassadors.[121] It is worth noting, however, that questions involving larger companies might invite lobbying at higher levels, probably directed at ambassadors or at U.S. governmental entities in Washington. In these cases, we may accept a certain degree of politicization; questions that could cause real lobbying of high officials in the United States are big enough to qualify as political and foreign policy questions, and it may be best to have them handled as such, with political appointees authorized to weigh in on "foreign official" determinations. The exact mechanics of the regime would take some time to work out, but that should hardly doom the proposal.

Implemented properly, these guidance memos would help a smaller company move into a foreign market: the memos would clarify, at least in general, how the company must behave toward local entities, and they would do so without entailing massive legal or compliance costs. The guidance approach would greatly clarify the FCPA's definitions and, finally, would put the somewhat conflicting mandates of the DOJ and the State Department to good use.[122] By providing defendants with stronger evidence of their compliance, these guidance notes would give defendants better weapons in court and would dissuade the DOJ from bringing marginal cases.[123] At the same time, this approach would allow the DOJ continued flexibility in prosecutions,[124] and the existence of these letters may encourage more defendants to challenge the DOJ in court, leading to long overdue judicial oversight for FCPA investigations.

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120. Entry-level Foreign Service officers generally serve two-year tours, and more senior officers usually serve three-year tours. Longer tours are rare, even for very senior officers. *See* Eilene Zimmerman, *Hiring Window Is Open at the Foreign Service*, N.Y. Times, Dec. 21, 2008, at BU9, *available at* http://www.nytimes.com/2008/12/21/jobs/21officers.html?pagewanted=all; *Is the Foreign Service Right for You?*, U.S. Dep't of State: Careers Representing America, http://careers.state.gov/officer/is-the-foreign-service-right-for-you (last visited Feb. 23, 2014) (noting that it is an "absolute requirement" that Foreign Service officers be willing to "[c]hange jobs and locations every 2–4 years").

121. Since the guidance memos would provide rebuttable presumptions, courts would uphold foreign official determinations only if they were actually persuasive. *See infra* note 124 and accompanying text.

122. *See supra* note 99.

123. After all, this Note argues that the DOJ's limited resources and lack of local expertise mean it is prone to both miss viable cases *and* to prosecute marginal ones.

124. Faced with a conflict between the two agencies, courts should side with the one they find more persuasive; this Note assumes that would usually be the State Department, but it also presumes that courts could choose not to credit a State Department decision if it were unduly politicized or otherwise unpersuasive.

B. *Potential Problems with Country-Specific Guidance Rebutted*

While one might raise several objections to statutorily mandated State Department guidance for the FCPA, these objections do not defeat the proposal's viability or efficacy. First, although this solution might appear to pose a constitutional problem by enabling State Department officials to "make law," the guidance falls well within established constitutional principles. Second, guidance memos might seem to create multiple standards whereas the FCPA only outlines a single, universal standard for foreign business practice; as described above, however, this is in fact a benefit of the proposal. Lastly, since it is a novel approach, the guidance-memo proposal might raise feasibility concerns, but Congress and the State Department could easily address these concerns if they act in good faith. It is worth noting, however, that the Tate Letter regime is, like the FSIA (and the FCPA itself), only a partial solution to a problem that may be at least somewhat intractable. If Congress implements the guidance-memo regime, it must still modify and monitor it to ensure that it has the intended effect.

The argument that the guidance-memo approach would allow the State Department to make law is unconvincing. Under contemporary nondelegation doctrine, governmental agencies may generally promulgate regulations within their area of expertise if Congress delegates to them the authority to do so, and this Note's proposal would see Congress delegate that authority to the State Department.[125] The State Department and its Foreign Service officers already make a good portion of U.S. visa policy, advise other organs of the U.S. government on foreign affairs, and direct the use of American resources abroad. The current FCPA is a vague statute—it does not define who or what is a "foreign official" or "instrumentality" in a given place—and the State Department is the governmental entity most capable of providing greater insight and direction within the statute's bounds. The department certainly has greater insight than the DOJ, which is attempting to act somewhat like the State Department by implementing an Opinion Release program that creates rebuttable presumptions in court. In short, if Congress amends the FCPA to include State Department guidance, the memos should enjoy a status at least equal to the DOJ's opinion releases—and this status would easily satisfy the nondelegation doctrine's need for an intelligible principle.

Some may also question the feasibility of the guidance-memo regime; in particular, they may doubt the State Department's expertise and manpower. But these concerns are unfounded: Foreign Service officers are already trained to become experts, within reason, on issues involving the government and the society of the country where they are posted. Giving them the task of assessing the relations between local entities and the government

125. The Supreme Court recently addressed delegation in *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001), and it concluded that the language "requisite to protect the public health" provided enough of an intelligible principle to pass nondelegation muster. *Id.* at 465 (internal quotation marks omitted).

would add relatively little to their workload.[126] Even if the State Department lacked the resources to implement comprehensive country-specific guidance, the law could still require guidance for specific regions or situations—for example, for the role of royalty in the Middle East or that of certain Chinese companies. This approach would be narrower than the one outlined above, but its implementation would be cheaper, and it would still achieve the same effect in those regions most likely to pose tough FCPA questions. And despite the worldwide antibribery trend, the guidance-memo regime would be politically feasible. Although the contemporary Congress is probably incapable of passing legislative changes, the Republican Party and the Chamber of Commerce have advocated for far more sweeping changes to the FCPA.[127] Given the difficulties outlined in this Note, the changes envisioned by the proposal should prove no less feasible than the wholesale changes to the FCPA championed by the U.S. business community.

That said, there are no magic bullets. When foreign states and companies are involved—when transactions cross and re-cross borders—political and diplomatic pressures will always impinge on the prerogatives of the U.S. judicial system. Through the FCPA, Congress charted a middle course. The Act does not ban all forms of foreign bribery: facilitation (or grease) payments and bribes to purely private entities remain legal, but bribery involving a foreign government is verboten.[128] A law clearly drafted to criminalize an activity in certain contexts and not in others deserves nuanced application and expert clarification. Currently, nonexperts apply the law in a shotgun approach and claim, at least theoretically, the legal right to prosecute nearly every U.S.-based company that does business in certain countries (although in practice the DOJ has stopped well short of doing so). This situation has enriched compliance investigators and lawyers and encouraged corporate record building without, it seems, greatly influencing behavior on the ground. A guidance-memo approach would not entirely rid the world of bribery or resolve the quandaries outlined above, but it at least marks a start to a clearer, more comprehensible enforcement regime.

Conclusion

The current FCPA regime is deeply problematic, and the unclear statutory definitions of "foreign official" and "instrumentality" have produced uncertainty and encouraged prosecutorial overreach in applying the law. But a solution exists: country-specific guidance memos. These memos would serve as a kind of modern day Tate Letter, tailored to each country and designed to help companies comply with the FCPA and bring U.S. foreign policy goals into line with the Act's enforcement in a transparent manner. A

126. Notably, the State Department must already maintain several foreign policy–related lists, including the annual Country Reports on Human Rights Practices, the Annual Report on International Religious Freedom, and a Trafficking in Persons Report. *See, e.g.*, 22 U.S.C. §§ 2151n(d), 2304(b), 6412(b), 7107(b) 8221, 8222 (2012).

127. *See supra* note 26 and accompanying text.

128. *See supra* note 56.

strengthened regime that focuses more specifically on individual countries would address many of the FCPA's current shortcomings without gutting the law altogether. It would benefit the United States, companies of all sizes, and the antibribery regime around the world.