Note

Extraterritorial Enforcement and Prosecutorial Discretion in the FCPA: A Call For International Prosecutorial Factors

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Corruption is a worldwide problem without a comprehensive international solution.[1] In 1977, the United States passed the Foreign Corrupt Practices Act[2] (FCPA or Act) to enforce anti-bribery laws against U.S. corporations, protecting its own reputation and foreign policy interests.[3] The FCPA prohibits companies that are listed on the U.S. indexes and regulated by the Securities and Exchange Commission (SEC) from bribing foreign officials[4] and contains provisions that require specific accountings to ensure companies cannot hide bribes in their financial records.[5] The Act specifically authorizes extraterritorial jurisdiction, which means that as a matter of law, it grants the United States far-reaching international enforcement power.[6]

Unchecked extraterritorial enforcement has become more

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1. Although there have been many treaties regarding corruption and bribery, they lack the enforcement teeth necessary to address the problems. *See* Sonja Starr, *Extraordinary Crimes at Ordinary Times,* 101 NW. U. L. REV. 1257, 1292–93 (2007).

2. 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).

3. See discussion *infra* Part I.A.

4. 15 U.S.C. § 78dd-1 (2006); s*ee* Thomas McSorley, *Foreign Corrupt Practices Act*, 48 AM. CRIM. L. REV. 749, 757–65 (2011).

5. 15 U.S.C. § 78m(a)-(b) (2006); s*ee* McSorley, *supra* note 4, at 752–57.

6. 15 U.S.C. §§ 78dd-2(i), dd-1(a), dd-3(a) (2006); s*ee* McSorley, *supra* note 4, at 759.

aggressive since 2007.[7] Each year, more foreign corporations are accused of bribery in foreign nations and named as defendants in U.S. suits, a fact which raises questions of comity and foreign policy.[8] Common prosecutorial tools like non-prosecution and deferred-prosecution agreements serve as a means to bypass judicial scrutiny.[9] This lack of judicial or legislative direction leads to unclear standards.[10] International cooperation has become increasingly important, highlighted in cases such as *Siemens*, an action against a German company for bribery in Argentina and other foreign countries, and *Halliburton*, an action against a French subsidiary of a U.S. company for bribery in Nigeria.[11] However, international will to enforce foreign bribery laws can lead to questions of conflict with foreign law[12] and diplomatic issues.[13] Therefore, extraterritorial application may overreach its bounds in cases such as News Corp, where the U.K. has brought its own charges and an FCPA action against the U.K. subsidiary of a U.S. company for bribery in the U.K.[14] This application of the

7. *See* discussion *infra* Part I.B.

8. *See* discussion *infra* Part I.B.

9. *See* discussion *infra* Part I.C.

10. *See* discussion *infra* Part I.C. Many commentators suggest legislative amendments to clarify these provisions. *See, e.g.*, ANDREW WEISSMANN & ALIXANDRA SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT (Oct., 2010); Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 609 (2012) [hereinafter *Compliance Defense*]; Charles Weinograd, *Clarifying Grease: Mitigating the Threat of Overdeterrence by Defining the Scope of the Routine Governmental Action Exception*, 50 VA. J. INT'L L. 509, 511–12 (2010) (suggesting a two-part test to determine a routine governmental action).

11. *FCPA and Related Enforcement Actions: United States v. Kellogg Brown & Root LLC*, DEP'T. OF JUST., http://www.justice.gov/criminal/fraud/fcpa/cases/kellogg-brown.html (last visited Oct. 31, 2012) (linking to documents related to Halliburton subsidiary Kellogg Brown's investigation and judgment); *FCPA and Related Enforcement Actions: United States v. Siemens Aktiengesellschaft,* DEP'T. OF JUST., http://www.justice.gov/criminal/fraud/fcpa/cases/siemens-aktiengesellschaft.html (last visited Oct. 29, 2012) (linking to documents related to Siemens investigation and judgment); *see* discussion *infra*, Part II.B.

12. *See infra,* notes 61–68, and accompanying text.

13. *See infra* notes 130–136, and accompanying text.

14. *See* NEWS CORP., 2011 ANNUAL REPORT, 15 (2011), *available at* http://www.newscorp.com/Report2011/2011AR.pdf ("As a result of these allegations [of phone hacking and payments to police], the company is subject to several ongoing investigations by U.K. and U.S. regulators and governmental authorities."); Joe Pompeo, *U.S. Litigation Against Rupert Murdoch's News Corp May Not Be Imminent; But It's Still All Bad News For*

FCPA leads to difficulties normally associated with extraterritorial application of U.S. law such as comity, conflict with foreign law, interference with foreign legal proceedings, and diplomatic issues. However, recently developed guidelines issued by the Department of Justice (DOJ) and SEC do not comprehensively address international factors.[15]

This Note examines the FCPA's extraterritorial jurisdiction and suggests a framework for taking international factors into account when prosecutors make enforcement decisions. Part I describes the history and legislative intent of the FCPA, recent trends in enforcement, prosecutorial discretion and possible prosecutorial decision-making factors, and current FCPA enforcement guidelines. Part II analyzes the possible enforcement factors from a perspective of legislative intent. This Note attempts to answer the question of what international factors should be included in future prosecutorial guidelines issued by the DOJ or SEC.

I. HISTORY, TRENDS, AND ENFORCEMENT OF THE FCPA

A. ORIGIN OF THE FCPA AND LEGISLATIVE HISTORY

In 1977, the Foreign Corrupt Practices Act was passed in the wake of Watergate, after SEC investigations uncovered corrupt payments to foreign officials in countries such as Japan and the Netherlands by over 400 American companies, amounting to hundreds of millions of dollars.[16] The scandal

Him, CAPITAL N.Y. (Feb. 15, 2012), http://www.capitalnewyork.com/article/media/2012/02/5267941/us-litigation-against-rupert-murdochs-news-corp-may-not-be-imminent-it; Ed Pilkington & Dominic Rushe, *News Corp Exposed to Growing Legal Threat Following Charges for Tabloid Duo*, THE GUARDIAN (Nov. 20, 2012), http://www.guardian.co.uk/media/2012/nov/20/news-corp-legal-threat-brooks-coulson-charges.

15. The SEC and DOJ issued guidelines on FCPA enforcement on Nov. 14, 2012. U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012) [hereinafter FCPA GUIDANCE], *available at* http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf; *see* discussion *infra* Part II.C.

16. *See* 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); H.R. REP. NO. 95-640, at 4 (1977), *available at* http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf (stating that 400 corporations have admitted to $300 million in corrupt payments); *see also* H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 2–3 (1998) (discussing the political climate); Mike Koehler, *The Story of the Foreign Corrupt Practices*

threatened foreign relations as well as the reputations of American businesses, as foreign entities attempted to distance themselves from the disgrace and Americans reacted with distrust.[17] Congress intended the passage of the FCPA to combat bribery and protect the reputation of American businesses and foreign policy positions.[18] President Carter's signing statement indicated that the United States had no intention of enforcing the Act against corporations headquartered abroad, despite the fact that the Act's language permitted this application.[19]

In 1988, Congress amended the FCPA.[20] The amendment clarified the anti-bribery provisions of the FCPA[21] and directed the Executive Branch to encourage foreign trading partners to enact legislation similar to the FCPA to level the playing field.[22] The amendment arose from pressure by corporations worried about the FCPA's costs to American corporations

Act, 73 OHIO L. REV. 929, 932–49 (2012) [hereinafter *Story of the FCPA*] (examining the SEC report and congressional record leading up to the passage of the FCPA).

17. Laura E. Longobardi, *Reviewing the Situation: What Is To Be Done With the Foreign Corrupt Practices Act?*, 20 VAND. J. TRANSNAT'L L. 431, 433 (1987) ("The discovery of payments by Lockheed to the Prime Minister of Japan, for example, forced his resignation and chilled relations between the two countries. Reports that Lockheed had paid Prince Bernhardt of the Netherlands $1 million compelled him to relinquish his official functions.").

18. Senate Report 114 at 3–4 (indicating that the Senate was primarily concerned with the "severe adverse effects" of the uncovered bribery on relations with "[f]oreign governments friendly to the United States" and "[t]he image of American democracy abroad."); *see* Longobardi, *supra* note 17, at 434 (citing HOUSE COMM. ON INTERSTATE & FOREIGN COMMERCE, UNLAWFUL CORPORATE PAYMENTS ACT OF 1977, H.R. REP. NO. 640, 95th Cong., 1st Sess. 5 (1977)). *But see Story of the FCPA*, *supra* note 16, at 972–80 (describing problems the legislation attempted to address regarding foreign business conditions and extortion of American companies, competitive disadvantage of American companies doing business abroad, and defining bribery in a reasonably predictable way).

19. *See* Foreign Corrupt Practices and Investment Disclosure Bill, Statement on Signing S. 305 Into Law, II PUB. PAPERS 1884, 2157 (Dec. 20, 1977) (indicating that the effort against bribery could only be successful "if other countries . . . take comparable action" and urging the United Nations to negotiate a treaty on the same subject).

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

21. These clarifications are beyond the scope of this Note. By way of example, Congress amended the well-known routine governmental action (or "grease") exception. *See* Weinograd, *supra* note 10, at 517–19.

22. *See* Proposed Legislative History, International Anti-Bribery Act of 1998, http://www.justice.gov/criminal/fraud/fcpa/docs/leghistory.pdf.

competing in foreign markets.[23] The amendment had findings that there was "unnecessary concern among exporters about the scope of the Act," but that the accounting standards were "unclear and excessive."[24] From 1988 to 1998, the United States focused its anti-corruption effort on international agreements[25] instead of aggressive extraterritorial enforcement.[26]

In 1998, Congress amended the FCPA again, prompted by the ratification of the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).[27] This time Congress agreed that the FCPA was negatively impacting American business success abroad, and suggested ratification of this international OECD convention on corruption as the solution to international bribery.[28] The amendment also extended jurisdiction extraterritorially in compliance with the OECD convention,[29] but Congress did not suggest aggressive enforcement abroad.[30] President Clinton's

23. *See, e.g.*, DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT ANTIBRIBERY PROVISIONS: LAY PERSON GUIDE 2, *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf (last visited Feb. 24, 2013); GEN. ACCOUNTING OFFICE, IMPACT OF FOREIGN CORRUPT PRACTICE ACT ON U.S. BUSINESS: COMPTROLLER'S GENERAL REPORT TO THE CONGRESS 6 (1981).

24. H.R. REP. NO. 100-576 (1988) (Conf. Rep.) *available at* http://www.justice.gov/criminal/fraud/fcpa/history/1988/tradeact-100-418.pdf. *See also* Weinograd, *supra* note 10, at 517–19 (explaining criticism that the FCPA placed US corporations at a disadvantage compared to foreign firms who were using bribes to secure contracts).

25. *See infra* notes 53–65, and accompanying text.

26. *See infra* notes 35–37, and accompanying text.

27. 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); Org. for Econ. Cooperation & Dev., Convention on Combating Bribery of Foreign Officials in International Business Transactions, Nov. 21, 1997, [hereinafter OECD Convention], *available at* http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/38028044.pdf.

28. *See* S. REP. No. 105-277, at 2–3 (1998) (explaining how the amendment puts the FCPA in line with the OECD Convention in order to implement the Convention and "level the playing field"); Proposed Legislative History, International Anti-Bribery Act of 1998.

29. The OECD Convention called on all parties to assert territorial jurisdiction broadly, in order to give the Convention international application. OECD Convention, *supra* note 27, art. 4 ("Each party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.").

30. 15 U.S.C. §§ 78dd-2(i), dd-1(a), dd-3(a). This is consistent with the

signing statement repeated this emphasis on equalizing business advantages between the U.S. and foreign companies, and focused on enforcement of the convention as the path to success.[31]

There have been many calls in academic and business circles for legislative changes to the FCPA.[32] The legislature has not passed further amendments on the FCPA since 1998, though several amendments have been proposed and a hearing about enforcement was held in 2010.[33] These critics prompted the DOJ and SEC to issue new written guidance in November of 2012, in an attempt to clarify prosecutorial treatment of the FCPA.[34]

OECD Convention goals of asserting jurisdiction "when the offense is committed in whole or in part in [a country's] territory" or "to prosecute its nationals for offences committed abroad." OECD Convention, *supra* note 27, art. 4.

31. Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, II PUB. PAPERS 1793, 2011 (Nov. 10, 1998).

32. *See, e.g.*, WEISSMANN & SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 10, at 2–8 (proposing a series of amendments to improve the FCPA, including adding a compliance defense, adding a "willfulness" requirement for corporate criminal liability, clarifying the definition of a foreign official, limiting successor and limiting parent company liability). *But see* Brady Dennis & Tom Hamburger, 5 proposed amendments to the Foreign Corrupt Practices Act, WASH. POST, April 25, 2012, http://www.washingtonpost.com/business/economy/5-proposed-amendments-to-the-foreign-corrupt-practices-act/2012/04/25/gIQAXbuVhT_story.html (explaining the five proposals by the US Chamber of Commerce and their rebuttals by the Open Society Foundation). .

33. *See Examining Enforcement of the Foreign Corrupt Practices Act Before Subcomm. On Crime & Drugs of the S. Comm. on the Judiciary*, 111th Cong. (2010) [hereinafter *2010 Hearing*], *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111shrg66921/pdf/CHRG-111shrg66921.pdf; Overseas Contractor Reform Act, H.R. 3588, 116th Cong. (2011); Foreign Business Bribery Prohibition Act of 2011, H.R. 3531, 116th Cong. (2011); GIBSON DUNN, 2011 YEAR END FCPA UPDATE, 21 (Jan. 3, 2012), *available at* http://www.gibsondunn.com/publications/Documents/2011YearEndFCPAUpdate.pdf.

34. *See* Lanny A. Breuer, Assistant Attorney Gen., Speech at the 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011) [hereinafter Speech], *available at* http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html ("[I]n 2012, in what I hope will be a useful and transparent aid, we expect to release detailed guidance on the Act's criminal and civil enforcement provisions."). The SEC and DOJ issued guidelines on FCPA enforcement on Nov. 14, 2012. FCPA GUIDANCE, *supra* note 15.

B. FCPA ENFORCEMENT TRENDS

1. Prosecutors' Increased Extraterritorial Focus

The DOJ and SEC have expanded their enforcement of the FCPA in the last decade. In the first few years after the FCPA was enacted in 1977, prosecutors brought almost no enforcement actions.[35] Between 1978 and 2004, the SEC tried cases under the FCPA an average of less than once per year and the DOJ tried an average of less than two cases per year.[36] In 2004, the two agencies brought five cases total.[37]

In recent years, the number of FCPA actions and related penalties has ballooned. In 2009, the DOJ brought twenty-six actions and the SEC brought fourteen civil prosecutions.[38] In 2010, combined corporate fines and penalties under the FCPA were approximately $1.8 billion.[39] Each agency now has between seventy and eighty FCPA investigations open at any one time.[40] Although the total number of enforcement actions is not high compared to likely corruption around the world, the number of actions is trending upwards and settlement costs are regularly in the tens or hundreds of millions of dollars.[41] The largest single action was against Siemens in 2008, resulting in $800 million in U.S. fines and $1.6 billion in fines worldwide.[42]

35. William L. Larson, Note, *Effective Enforcement of the Foreign Corrupt Practices Act,* 32 STAN. L. REV. 561, 568 (1980).

36. Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 522 n.171 (2010).

37. *Id.* at 522.

38. *Id.* at 522–23.

39. Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. TOL. L. REV. 99, 100 (2011) [hereinafter *Big, Bold, and Bizarre*].

40. *See* McSorley, *supra* note 4, at 779.

41. *See FCPA and Related Enforcement Actions*, DEP'T OF JUST., http://www.justice.gov/criminal/fraud/fcpa/cases/a.html (last visited Nov. 13, 2010); *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last updated Aug. 20, 2012).

42. *See* Press Release, Department of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008) ("Siemens AG will pay a combined total of more than $1.6 billion . . . including $800 million to U.S. authorities, making the combined U.S. penalties the largest monetary sanction ever imposed in a FCPA case since the act was passed by Congress in 1977."). Some believe fines as large as this are not enough to stop corporations from bribery. *See 2010 Hearing*, *supra* note 33, at 2 ("Siemens enjoyed revenue that year of $105 billion and income of approximately $8 billion.").

The numbers show no sign of slowing actions against companies, nor a reduction in fines, and DOJ officials have repeated that the priority of FCPA enforcement remains high.[43] The recent appointment of Mary Jo White, a prominent former federal prosecutor, to head the SEC may indicate that heavy handed prosecution is a priority for that agency as well.[44]

The surge in enforcement has increased corporations' costs in two ways.[45] First, enforcement imposes higher legal settlement costs on corporations under FCPA investigation.[46] Second, enforcement imposes costs on corporations through necessary internal investigations.[47] Corporations often self-report the results from these internal investigations to the enforcement agencies, which may use them to prosecute or to pursue non-prosecution or deferred-prosecution agreements.[48] Extraterritorial enforcement, by its nature, implicates foreign policy issues; the very definition of an FCPA violation requires that a foreign government official take a bribe, which suggests foreign government involvement in the corruption.[49] In

43. *See* Westbrook, *supra* note 36, at 523 n.178; Joe Palazzolo, *From Watergate to Today, How FCPA Became So Feared,* WALL ST. J., Oct. 1, 2012, http://online.wsj.com/article/SB10000872396390444752504578024791676151154.html (quoting Larry Urgenson, lawyer at Kirkland & Ellis, LLP) ("The FCPA has gone from a carriage trade into what the [Justice Department] has said at times is [its] No. 2 priority behind terrorism.").

44. *See* Ben Protess and Benjamin Weiser, *A Signal to Wall Street in Obama's Pick for Regulators*, N.Y. TIMES, Jan. 24, 2012, http://dealbook.nytimes.com/2013/01/24/mary-jo-white-to-be-named-new-s-e-c-boss/.

45. *See supra* notes 23–28, and accompanying text; Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act,* 33 N.C.J. INT'L L. & COM. REG. 83, 90 (2007) (summarizing empirical studies showing that the FCPA led to a loss of business or export opportunities). *But see id.* at 90–91 (summarizing empirical studies showing that the FCPA had no effect on US exports or demand for US products abroad).

46. *See* discussion *infra* notes 75–80, and accompanying text.

47. *See Big, Bold, and Bizarre*, *supra* note 39, at 106 (giving examples of professional costs that companies undertake to respond to FCPA investigations). For example, Pfizer overhauled its FCPA compliance systems after reporting instances of bribery to the SEC in 2004. *See* Ashby Jones, *FCPA: Company Costs Mount for Fighting Corruption,* WALL ST. J., Oct. 1, 2012, http://online.wsj.com/article/SB10000872396390444752504578024893988048764.html.

48. In a non-prosecution agreement, criminal charges are not filed against a company. In a deferred prosecution agreement, criminal charges are filed but are not actually prosecuted. *See* discussion *infra* Part I:C.

49. *See* Elizabeth Spahn, *Discovering Secrets: Act of State Defenses to Bribery Cases,* 38 HOFSTRA L. REV. 163, 180 (2010).

addition, there is an increasing trend towards enforcing the FCPA against foreign-based companies rather than domestic-based companies.[50] Although domestic companies still make up the majority of FCPA enforcement actions, the percentage of actions against foreign companies is a larger percentage of the total than ever before,[51] and foreign companies receive higher average fines.[52]

2. Increased Foreign Government and International Cooperation to Combat Bribery

International efforts to combat corruption in a coordinated way have increased dramatically in the last two decades.[53] The focus of the 1998 amendment to the FCPA was the international impulse to combat bribery, primarily through the OECD Convention.[54] The Convention has been ratified by 38 member states, which have varying but generally increasing commitments to the Convention's enforcement.[55] It includes mutual assistance programs for bribery convictions, which encourage cooperation and assistance between parties to the Convention.[56] In addition, countries such as Norway and the

50. *See Big, Bold, and Bizzare*, *supra* note 39, at 105 ("[A]pproximately 90% of 2010 FCPA fines and penalties were paid by foreign companies . . . [t]he trend of foreign companies comprising a large percentage of FCPA enforcement actions is likely to continue.").

51. *See* Brandon L. Garrett, *Globalized Corporate Prosecutions,* 97 VA. L. REV. 1775, 1833 (2011) ("[T]he DOJ has targeted more foreign firms than ever before . . . .").

52. *See id.* at 1812 ("[F]or otherwise comparable firms, a foreign firm will receive a fine that is on average 22 times larger (between 12 and 41 times larger) than the fine of a domestic firm."). *But see id.* at 1813 (giving four reasons for higher fines for foreign firms apart from different treatment).

53. Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283, 285 (2004) ("States can only govern effectively by actively cooperating with other states . . . .").

54. *See* discussion *supra* Part I:A. In addition to the OECD Convention, there have been at least six new international treaties addressing corruption, showing international momentum to combat the issue. Starr, *supra* note 1, at 1292–93 (assessing the impact of seven international treaties).

55. *See* TRANSPARENCY INTERNATIONAL, OECD ANTI-BRIBERY CONVENTION PROGRESS REPORT 2008 1, 7–8 (2008), *available at* www.transparency.org/content/download/33627/516718*;* GIBSON DUNN, 2010 YEAR-END UPDATE ON CORPORATE DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS 1, 29 (Jan. 4, 2011) [hereinafter GIBSON DUNN 2010], *available at* http://www.gibsondunn.com/publications/Documents/2010YearEndFCPAUpdate.pdf.

56. *See* OECD Convention, *supra* note 27, art. 9 ("Each Party shall, to the

Netherlands have been motivated by the Convention and the United States' urging to change their own laws which, before, had allowed bribes to be written off on tax reports as business expenses.[57] Mutual legal assistance requests between member states have supported prosecutions of bribery around the globe.[58] These legal assistance requests have been used to prosecute recent high-profile cases such as the Halliburton enforcement action.[59] This kind of international cooperation was the only international factor emphasized in the new FCPA Guidance.[60]

Since ratifying the OECD Convention, other countries have also enacted robust domestic anti-bribery laws.[61] For example, the United Kingdom's Bribery Act became effective in 2011.[62] It is slightly different from the FCPA, with the most notable differences being that the U.K.'s Bribery Act defines both bribing and being bribed as offenses,[63] contains a strict liability

fullest extent possible . . . provide prompt and effective legal assistance to another Party for the purpose of criminal investigations . . . within the scope of this Convention.").

57. *See, e.g.*, H. Lowell Brown, *The Extraterritorial Reach of the U.S. Government's Campaign Against International Bribery,* 22 HASTINGS INT'L & COMP. L. REV. 407, 494–95 (1999) (citing OECD Council Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, OECD Doc. C(96)27/Final, 35 I.L.M. 1311 (Apr. 11, 1996)) (explaining the success of the Convention in addressing the tax deductibility of bribes to foreign officials).

58. *See* GIBSON DUNN 2010, *supra* note 55, at 29–30; OECD, PHASE THREE REPORT ON THE U.S. APPLICATION OF THE OECD CONVENTION, (Oct. 15, 2010).

59. *See* Steven Pearlstein, *Cashing in on Corruption*, WASH. POST, Apr. 25, 2008, at D1 (acknowledging "valuable help from foreign governments since the signing of a global convention"); Barbra Crutchfield George & Kathleen A. Lacey, *Investigation of Halliburton Co./TSKJ's Nigerian Business Practices: Model for Analysis of the Current Anti-Corruption Environment on Foreign Corrupt Practices Act Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 503, 503 (2006) (analyzing concurrent investigations into Halliburton's alleged misconduct).

60. FCPA GUIDANCE, *supra* note 15, at 7–8, 63 (overviewing international anti-corruption efforts including the OECD Convention and the OECD Working Group, which monitors the implementation of the OECD Convention).

61. *See* Starr, *supra* note 1, at 1291 (finding that there are criminal bribery statutes in virtually every country).

62. Bribery Act, 2010, c. 23 (U.K.) [hereinafter U.K. Bribery Act], *available at* http://www.legislation.gov.uk/ukpga/2010/23/contents. This Act came after an enforcement scandal involving BAE, a British military corporation and the Saudi government. *See* Garrett, *supra* note 51, at 1840–43.

63. U.K. Bribery Act, *supra* note 62, at c. 23 §§ 1–2; *see* Lawrence W. Newman, *The New OECD Convention on Combating Bribery*, N.Y.L.J. , Mar.

provision for failure to prevent bribery,[64] and provides an affirmative compliance defense.[65] In addition, the UK's Ministry of Justice proposed using deferred-prosecution agreements. However, the agreements would differ from U.S. agreements–in the U.K. the judiciary would play a much larger role in the agreements, as required by the proposed law.[66] American law could come into conflict with a foreign anti-bribery law by virtue of a technical difference such as a compliance defense, even though the laws have the same policy goals.[67] Increased international cooperation and increased foreign enforcement against the same kind of bribery and corruption that the FCPA prohibits leads to questions about how U.S. prosecutors should change enforcement in the light of

29, 1999, at 3 (criticizing the OECD and FCPA for extending penalties only to suppliers of bribes, and not to foreign officials demanding them).

64. U.K. Bribery Act, *supra* note 62, at c. 23 §§ 7–9. There is no provision in the FCPA punishing failure to prevent bribery.

65. *Id.* at § 7*; see* GIBSON DUNN 2010, *supra* note 55, at 30–33; *Compliance Defense*, *supra* note 10, at 636–37. This compliance defense allows corporations with robust compliance programs a defense against claims by the government. *Compliance Defense*, *supra* note 10, at 636–37. Many other countries have compliance defenses in their FCPA laws as well. *Id.* at 638–44 (surveying such laws in Australia, Chile, Germany, Hungary, Italy, Japan, Korea, Poland, Portugal, Sweden, and Switzerland). The DOJ opposes an official compliance defense in the United States, but does use compliance as a mitigating factor in prosecution and sentencing. *See Examining Enforcement of the Foreign Corrupt Practices Act, supra* note 33, at 26 ("The Department opposes the adoption of a formal compliance defense . . . the Department already considers a company's compliance efforts in making appropriate prosecutorial decisions, and the United States Sentencing Guidelines also appropriately credits a company's compliance efforts in any sentencing determination.").

66. Kathleen Harris, *Will U.K. DPA's Make a Difference?,* FCPA PROFESSOR BLOG (Nov. 13, 2012), http://fcpaprofessor.com/will-uk-dpas-make-a-difference? (addressing a new proposal for the U.K. to use deferred-prosecution agreements but stating that the use of judicial control make prosecutors less powerful than they are in the U.S.). For more on prosecutorial power, see discussion *infra,* notes 74–78, and accompanying text.

67. *See* Lanny A. Breuer, Assistant Attorney Gen., Speech at the IBC Legal's World Bribery & Corruption Compliance Forum (Oct. 23, 2012) [hereinafter IBC Speech], *available at* http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-121023.html ("In short, the world is moving in one direction only with respect to anti-corruption efforts . . . I hope and believe that we will continue to make strides in this area together."); Richard L. Cassin, *James Murdoch And The FCPA,* FCPA BLOG (July 11, 2011), http://www.fcpablog.com/blog/2011/7/11/james-murdoch-and-the-fcpa.html ("[I]f the U.K. has sturdy enough laws, why are news outlets in London and the U.S. so busy speculating whether James Murdoch could face an American criminal prosecution under the Foreign Corrupt Practices Act?").

foreign policy and comity.[68]

C. EFFECTS OF PROSECUTORIAL DISCRETION

1. Powerful Prosecutors and Unilateral Decision-Making

The SEC enforces against civil violations of the FCPA, while the DOJ enforces against both civil and criminal violations.[69] In the early days of FCPA enforcement, the DOJ ordered its U.S. Attorneys to continue with investigations only with express approval from Washington, and the State Department took into account some of the foreign policy concerns that were indicated by legislative intent.[70] Now, although federal prosecutors do technically report to the executive branch, and therefore the President, U.S. attorneys are seldom subject to direct oversight.[71] The push for more FCPA enforcement began with Mark Mendelsohn, a young prosecutor at the DOJ who realized that the mostly-unenforced FCPA could be enforced aggressively by using its far-reaching, sweeping provisions.[72] However, his broad prosecutorial

68. *See* discussion *infra* Part III:B; Nicolas M. Mclean, *Cross-National Patterns in FCPA Enforcement,* 121 YALE L. J. 1970, 1982–86 (2012) (analyzing whether prosecutors take into account considerations such as foreign policy, international cooperation, foreign direct investment, and corruption indexes); Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act* (Pub. Law & Legal Theory Research Paper Series, Working Paper No. 12-35, 2012) (Law & Econ. Research Paper Series, Working Paper No. 12-15, 2012) (analyzing enforcement patterns related to foreign policy concerns), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116487; George & Lacey, *supra* note 59, at 507–09 (describing concurrent investigations by the DOJ and SEC as well as French and Nigerian officials).

69. *See* 15 U.S.C. § 78dd-1(c) (2006); Longobardi, *supra* note 17, at 441.

70. *See* Larson, *supra* note 35, at 569; Kate Gillespie, *Middle East Response to the U.S. Foreign Corrupt Practices Act,* CAL. MGMT. REV., Summer 1987, at 9–11. Now, enforcement by the DOJ is reserved for the main DOJ Criminal Fraud Section to ensure consistency. *See* U.S. Attorney's Manual § 9-47.110 (2011) ("No investigation or prosecution of cases involving alleged violations . . . shall be instituted without the express authorization of the Criminal Division.").

71. Ross E. Wiener, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 MINN. L. REV. 363, 380–85 (2001) (discussing the role and responsibilities of US Attorneys and the general day-to-day independence they have); Bruce A. Green & Fred C. Zacharias, *The US Attorneys Scandal and the Allocation of Prosecutorial Power*, 69 OHIO ST. L.J. 187 (2008) (discussing allocation of prosecutorial power between the President, US attorneys, and individual assistant US attorneys).

72. *See* Palazzolo, *supra* note 43 ("Mark Mendelsohn, a young federal prosecutor from the Southern District of New York, was the division's FCPA

discretion has the potential to lead to prosecutorial abuse.[73]

Prosecutors work without significant judicial checks and balances in part because many cases settle using non-prosecution and deferred-prosecution agreements.[74] Although the DOJ uses these agreements in other contexts, they are used most often to resolve FCPA investigations.[75] These agreements are a type of plea bargain that permits prosecutors to charge the corporations with the crimes, fine them, and induce them to cooperate with the government by taking specific steps to improve compliance without a formal enforcement action.[76] It makes sense to use the agreements when corporations are especially cooperative.[77] Deferred prosecution agreements may result in fines below sentencing guidelines, which encourages corporations to elect this alternative when possible.[78]

Because of the lower fines imposed when corporations cooperate, many of these investigations begin by a corporation's

point man at the time."); *Big, Bold, and Bizarre*, *supra* note 39, at 127 (criticizing Mendelsohn for starting the FCPA enforcement frenzy as a prosecutor, and then moving to a private defense firm).

73. *See* Courtney Thomas, *The FCPA: A Decade of Rapid Expansion* 29 REV. LITIG. 439, 462–66 (2010) (submitting arguments on both sides of the debate on if the current enforcement system encourages prosecutorial abuse).

74. This contrasts with early FCPA prosecutions, when judicial checks could be used to incorporate foreign policy concerns. *See* Margaret A. Niles, *Judicial Balancing of Foreign Policy Considerations: Comity and Errors Under the Act of State Doctrine,* 35 STAN. L. REV. 327, 359 (1983).

75. *See* GIBSON DUNN 2010, *supra* note 55; Mike Koehler, *What Is An FCPA Enforcement Action?*, FCPA PROFESSOR (Jan. 7, 2013), http://www.fcpaprofessor.com/what-is-an-fcpa-enforcement-action (examining the different actions that may be taken as a result of an FCPA investigation and attempting to define what constitutes a single enforcement action).

76. *See* IBC Speech, *supra* note 67.

77. Legislative intent does not support a compliance defense, but the DOJ takes corporate compliance efforts and cooperation into account. *See* H.R. REP. NO. 100-576, at 922–23 (1988) (Conf. Rep.) *reprinted in* 1988 U.S.C.C.A.N. 1955 (showing the 1988 amendment originally had a safe harbor for corporations with compliance procedures but that it was taken out); Arthur F. Matthews, *Defending the SEC and DOJ Foreign Corrupt Practices Investigations,* 18 NW. J. INT'L L. & BUS. 303, 340 (1998) (arguing compliance is a mitigating factor in criminal prosecutions) (citing U.S. SENTENCING GUIDELINES MANUAL § 8A1.2(k) (1995) (updated in 2011 at § 8C2.5)), *available at* http://www.ussc.gov/Guidelines/2011_guidelines/Manual_PDF/Chapter_8.pdf.

78. *See Big, Bold, and Bizarre*, *supra* note 39, at 128 (finding that in 10 of the 12 enforcement actions in 2010, the average fine was 25% below the minimum guidelines range). This decreases the value of the guidelines as an indicator of liability.

voluntary self-reporting.[79] Companies then conduct their own internal investigations, with the help of outside counsel, and provide the material to the DOJ themselves.[80] These investigations can cost millions of dollars, and often times uncover actions that the enforcement agencies would not find on their own, but for which companies may still be held liable.[81] The resulting agreements do not have the benefit of a judicial check, so even when case law rejects the government's interpretations of a particular provision, prosecutors may ignore the courts' interpretations for the purpose of a prosecutorial agreement.[82] This creates a prosecutorial "common law of settlement" that governs in lieu of judge-made or legislative law.[83]

2. Prosecutorial Enforcement Guidelines Lack Sufficient Assistance

The DOJ and SEC recently issued FCPA enforcement guidelines, which were met with criticisms of issuing them too late and a lack of clarity. [84] These criticisms are valid and, at

79. Ironically, this may explain a large portion of enforcement, since detection of bribery would otherwise be very difficult. *See* Larson, *supra* note 35, at 565–70 (stating that "agency enforcement is unlikely ever to be effective" because of the difficulty in detecting violations); Garrett, *supra* note 51, at 1833 (suggesting the increase in enforcement is partially due to voluntary self-reporting).

80. *See* Joe Palazzolo, *FCPA Inc.: The Business of Bribery,* WALL ST. J., Oct. 1, 2012, (quoting Assistant Attorney General Breuer as saying "We absolutely need companies through their firms to provide us with their investigations . . . prosecutors test information they receive from companies through parallel investigations."); Mike Koehler, *FCPA-Palooza,* FCPA PROFESSOR (Oct. 3, 2012), http://www.fcpaprofessor.com/fcpa-palooza (questioning Breuer's statements that during his time on the defense bar, he "never once got the sense that the enforcement agencies tested the information or conducted a parallel investigation").

81. *See* Garrett, *supra* note 51, at 1786 (reporting that Siemens' costs of investigating its FCPA case were over $500 million in legal fees and that the investigation uncovered over $1 billion in bribe payments that had not been found by regulators).

82. *See Big, Bold, and Bizarre*, *supra* note 39, at 119–22 (citing *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004)) (giving an example of a case interpreting the FCPA's "obtain or retain business" element and later prosecutions that seem to ignore that interpretation).

83. Michael Levy, *Prosecutorial Common Law,* FCPA PROFESSOR BLOG (March 16, 2011), http://fcpaprofessor.com/prosecutorial-common-law.

84. The 1988 amendment included a provision allowing the DOJ to issue further guidance on enforcement, but the DOJ declined to do so. *See* 15 U.S.C. § 78dd-1(d)-78dd-2(e) (2006); U.S. Dep't of Justice, Anti-Bribery Provisions, 55 Fed. Reg. 28,694 (July 12, 1990); Mike Koehler, *DOJ – Guidance Better Late*

the very least, the guidelines do not offer new information for best practices of the enforcement of the FCPA.[85] Others criticize the guidance as counter to judicially sanctioned FCPA enforcement policy.[86] Most legal propositions in the guidelines are supported by DOJ or SEC settlements, rather than legislative interpretation or case law.[87] Along with offering little information on domestic questions of prosecution, the guidelines fail to offer additional information regarding foreign prosecutions or international factors beyond superficial references to international cooperation.[88] Other statutes that are enforced extraterritorially have meaningful guidelines regarding extraterritorial enforcement.[89]

than Never, But Will it Matter?, FCPA PROFESSOR (Nov. 10, 2011), http://www.fcpaprofessor.com/doj-guidance-better-late-than-never-but-will-it-matter ("[T]he Attorney General has determined that no guidelines are necessary . . . [Compliance] would not be enhanced nor would the business community be assisted by further clarification of these provisions."); *See* Mike Koehler, *Grading the Foreign Corrupt Practices Act Guidance,* BLOOMBERG/BNA WHITE COLLAR CRIME REPORT (Dec. 14, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189072; Mike Koehler, *What If?,* CORP. COMPLIANCE INSIGHTS (Nov. 27, 2012), http://174.120.83.250/~killer1/cci/what-if (questioning what would happen if the enforcement agencies issued guidance after the 1988 or 1998 amendments or after a 2010 OECD report recommending guidance).

85. Mike Koehler, *Guidance Roundup,* FCPA PROFESSOR BLOG (Nov. 16, 2012), http://www.fcpaprofessor.com/guidance-roundup (collecting commentary from law firms, individuals, and civil society organizations relating to the new guidance, most of whom conclude that "the guidance offers little in terms of actual new substance").

86. *See* Mike Koehler, *Do Lanny Breuer and Robert Khuzami Actually Read FCPA Enforcement Actions?,* FCPA PROFESSOR BLOG (Dec. 13, 2012), http://www.fcpaprofessor.com/do-lanny-breuer-and-robert-khuzami-actually-read-fcpa-enforcement-actions (describing the discrepancy between the FPCA guidance which proposes prosecution against "payments of real and substantial value" and FCPA prosecutions which list minor violations "about a bottle of wine . . . a camera, kitchen appliances and business suits" as violations substantial enough to sustain an enforcement action); *Cf. Story of the FCPA*, *supra* note 16, at 1003–13 (describing the FCPA as a "limited statute" that captures a narrow range of possible bribery payments, based on the recipient and business purpose of the payment).

87. FCPA GUIDANCE, *supra* note 15 at 118–119 n.97–102 (referring to DOJ and SEC settlements to support legal claims).

88. FCPA GUIDANCE, *supra* note 15, at 7–8 (addressing the OECD Convention and its enforcement, but not expanding upon specific goals or procedures of the DOJ or SEC in promoting foreign enforcement).

89. The Sherman Act, an anti-trust statute, is enforced against foreign firms based on specific judicially created tests that have been incorporated into DOJ guidelines. U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement Guidelines for International Operations §3.1 (1995), http://www.justice.gov/atr/public/guidelines/internat.htm.

Through these new guidelines, DOJ and SEC show a willingness to respond to businesses' concerns, but the vague information included does not assist in predicting enforcement patterns. The guidance lists several examples of potential FCPA activity that the DOJ and SEC have declined to pursue, but the examples do not address questions American corporations are concerned with.[90]

FCPA guidance also includes a lay person's guide,[91] responses to requests for an opinion from the DOJ,[92] and a listing of previous enforcement actions.[93] Investigations might not be publicly disclosed, making it harder for companies to rely on other corporations' experiences for reference or deterrence purposes.[94] Policies regarding corporate criminal prosecution lay out factors that will be taken into account,[95] but the DOJ has not provided any specifics on what companies can expect with regard to FCPA enforcement. Criminal sentencing guidelines may help companies determine if their conduct will be eligible for lesser sanctions, but these guidelines do not

90. FCPA GUIDANCE, *supra* note 15. *But see* Mike Koehler, *The Guidance and Declinations,* FCPA PROFESSOR BLOG (Nov. 27, 2012), http://www.fcpaprofessor.com/the-guidance-and-declinations (noting that these are not the first declination decisions announced by the agencies, and that the declination decisions do not clarify the factors at play in a decision to prosecute).

91. *Foreign Corrupt Practices Act Antibribery Provisions: Lay Person Guide,* DEP'T. OF JUST., http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf (last visited Oct. 8, 2012).

92. These requests for an opinion are limited to factual situations, not hypotheticals, and may be used in future investigations by the DOJ. *See* FCPA OPINIONS, http://www.justice.gov/criminal/fraud/fcpa/opinion/ (last visited Oct. 8, 2012); Garrett, *supra* note 51, at 1835–36 (describing increased use of opinion process as enforcement has increased).

93. DOJ FCPA AND RELATED ENFORCEMENT ACTIONS, http://www.justice.gov/criminal/fraud/fcpa/cases/2012.html (last visited Oct. 27, 2012); SEC ENFORCEMENT ACTIONS, http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited Oct. 31, 2012).

94. *See* Matthews, *supra* note 77, at 410–12 (1998) (questioning when SEC investigations of privately held companies must be publicized if at all); Mike Koehler, *Secret FCPA Investigations,* FCPA PROFESSOR BLOG (Jan. 3, 2013), http://www.fcpaprofessor.com/secret-fcpa-enforcement (noting inconsistencies in the newly issued FCPA guidance about if individual FCPA non-prosecution agreements are made public).

95. Memorandum from Mark Filip, Depty Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components and U.S. Attorneys, regarding Principles of Federal Prosecution of Business Organizations, 3–4 (Aug. 28, 2008), http://www.justice.gov/dag/readingroom/dag-memo-08282008.pdf (setting out nine factors to be used in determining whether to charge a corporation in addition to individual prosecution factors).

apply to civil sanctions and are not specific to the FCPA.[96] Average DOJ criminal fines in enforcement actions have been 25-28% below the minimum guidelines, undermining the utility of the guidelines as predictors of liability.[97]

The combination of aggressive international and foreign enforcement, broad prosecutorial discretion, and unhelpful prosecutorial guidelines has led to significant confusion about the parameters of the FCPA and its enforcement.[98] Because FCPA cases are enforced extraterritorially, this uncertainty regarding compliance also extends to international companies in the United States and in foreign countries. Some corporations respond with very conservative compliance policies.[99] Others are advised against self-reporting, even when internal compliance issues arise.[100] There are no bright lines to the law, and therefore no one understands the limits or expectations.

In other corporate legal contexts, regulations and guidelines give corporations guidance in order to increase consistent compliance.[101] Guidance regarding extraterritorial jurisdiction has been helpful in antitrust enforcement to clarify

96. *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 77, at §8C2.5.

97. *See* discussion *infra,* note 78, and accompanying text; Mike Kohler, *DOJ Enforcement of the FCPA – Year In Review,* FCPA PROFESSOR BLOG (Jan. 9, 2013), http://www.fcpaprofessor.com/doj-enforcement-of-the-fcpa-year-in-review-3.

98. *See* Mike Koehler, *The Façade of FCPA Enforcement,* 41 GEO. J. INT'L L. 907, 910 (2010) (explaining the "opaque nature of FCPA enforcement"); *2010 Hearing*, *supra* note 33, at 6–7 ("[O]ne of the basic principles of due process is that people in companies have to be able to know what the law is in order to comply with it . . . they do not always know what behavior will trigger an enforcement action.").

99. For example, Apple's compliance policies are robust and closely tailored to OECD definitions, and Apple was not named in an FCPA enforcement action during Steve Jobs' life. *Compare* Apple Business Conduct Policy (July 2012), http://investor.apple.com/governance.cfm *with* OECD Convention, *supra* note 27, art. 1.4(a).

100. *See Former Federal Prosecutors Pen New Treatise on the Foreign Corrupt Practices Act,* METROPOLITIAN CORP. COUNS. (Dec. 19, 2012), http://www.metrocorpcounsel.com/articles/21790/former-federal-prosecutors-pen-new-treatise-foreign-corrupt-practices-act (quoting attorneys who advise some clients to "fix compliance problems . . . without the assistance of the U.S. government" through nondisclosure of those compliance problems).

101. *See* James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act,* 62 BUS. LAW. 1233, 1235 (2007) (arguing that effective deterrence results from regulatory certainty and shared knowledge of correct compliance, using the Sarbanes-Oxley Act of 2002 as an example).

the reach of prosecutors and avoid international relations issues.[102]

II. PROPOSED INTERNATIONAL FACTORS IN PROSECUTORIAL DISCRETION

A. LEGISLATIVE INTENT ON INTERNATIONAL APPLICATION OF THE FCPA AND PROSECUTORS' RESPONSIBILITY TO ACT WITHIN THAT INTENT.

Prosecutors should consider the drafters' legislative intent in the original act, as well as drafters' intent in the amendments touching on international issues with prosecution. The drafters' intent should influence the application of each international factor where policy arguments can be made for greater prosecution or greater discretion.

The FCPA has extraterritorial application and deals exclusively with behaviors that involve at least one foreign country. At its passage in 1977, and its subsequent amendments in 1988 and 1998, foreign policy and international considerations were important. Commentary focusing on increased costs to American businesses is shortsighted in the light of increased extraterritorial enforcement. Each amendment stemmed from calls for international cooperation to solve the global problem of corruption, and each amendment was a step closer to a solution at the international level.[103]

1. DOJ and SEC Guidelines and Their Potential Effects on Prosecutors' Treatment of Legislative Intent

Prosecutorial guidance is needed to ensure consistent application of the law. The use of non-prosecution and deferred prosecution agreements circumvents the courts in the vast majority of cases.[104] The worries about prosecutorial abuse are based on prosecutors' frequent use of these agreements, and the

102. *See* Sarah A. Solow, *Prosecuting Terrorists as Criminals and the Limits of Extraterritorial Jurisdiction,* 85 ST. JOHN'S L. REV. 1483, 1537–49 (2011) (comparing extraterritoriality due process tests in anti-trust and securities statutes to determine a jurisdictional test for terrorists); Harvard Law Review Association, *Comity and Extraterritoriality in Antitrust Enforcement*, 124 HARV. L. REV. 1269 (2011) (exploring the way comity has recently limited civil antitrust jurisdiction); Salil K. Mehra, *Extraterritorial Antitrust Enforcement and the Myth of International Consensus,* 10 DUKE J. COMP. & INT'L L. 191, 211–16 (1999) (giving an overview of the international antitrust controversy around the Boeing merger).

103. *See* discussion *supra* notes 16–33, and accompanying text.

104. *See* discussion *supra* notes 74–81, and accompanying text.

risk that innocent companies "who fear the potential aftershocks of the filing of criminal charges" will choose not to defend themselves and "risk[ ] the farm" in favor of reaching an agreement and being subjected to fines.[105] Although some say that "the DOJ has done a commendable job of policing itself,"[106] guidance about extraterritorial reach will avoid confusion on the part of foreign corporations regarding the reach of liability.[107]

Guidance through other means will not come quickly and may not be effective. In this political climate, legislative action is far from certain.[108] Even if there is legislative action, the culture of enforcement of the FCPA, which includes broad prosecutorial discretion with little judicial or executive check, will likely remain the same.

Judicial checks are infrequent, and so far have been relatively unsuccessful.[109] Current prosecution is inconsistent, and extraterritorial enforcement is especially unpredictable.[110] Prosecutorial guidelines that adhere to the legislative intent of the current law are needed to clarify prosecutorial priorities, ensure consistent application of the law, and assist corporations in determining what correct compliance looks like on an international scale.[111]

105. *See* Thomas, *supra* note 73, at 463–64 (giving an overview of the arguments that prosecutors are abusing the system in the context of FCPA enforcement actions).

106. *See id.* at 465.

107. Arguments about the DOJ abuse of discretion also rely on judicial checks, which have not yet materialized and are unlikely to become a larger player due to the structure and incentives around non and deferred prosecution agreements. *See id.* at 465–66 (relying on individual criminal prosecutions for the development of case law, but ignoring the lack of development of civil case law).

108. Proposed laws have not gotten a lot of traction in the current legislative climate. *See* Overseas Contractor Reform Act, H.R. 3588, 116th Cong. (2011); Foreign Business Bribery Prohibition Act of 2011, H.R. 3531, 116th Cong. (2011).

109. *See Big, Bold and Bizarre*, *supra* note 39, at 119–23 (giving the example of *U.S. v. Kay* to indicate a judicial limitation of the "obtain or retain business" element, and showing that recent FCPA enforcement actions ignore the limitation successfully, garnering settlements even though there are questions of if conduct even violated the FCPA are warranted).

110. *See* discussion *supra* notes 50–52, and accompanying text. Extraterritorial enforcement actions have increased in number and fines against foreign corporations are higher than fines against American corporations. This makes the uncertainty that stems from FCPA prosecutorial discretion and enforcement more important on the international playing field.

111. *See* Doty, *supra* note 101, at 1235.

Although the newly issued guidelines did not take these factors into account, any additions to the guidelines should carefully consider these issues. There are two main reasons why the DOJ and SEC can and should elucidate extraterritorial enforcement expectations. First, clarifying extraterritorial enforcement discretion will not overreach into the legislative arena. Even though the FCPA was drafted with extensive extraterritorial jurisdiction, clarifying the reach prosecutors should use does not infringe on the legislature's definitions within the act. Second, there are good policy reasons to clarify extraterritorial reach. These policy reasons, such as foreign policy, comity, promotion of international cooperation, and protection of American foreign investments, are reflected in the factors proposed below.

Generally, new guidelines should clarify prosecutorial factors while leaving the intent of the legislature alone to comply with balance of power concerns. New guidelines should not attempt to predict what future congressional intent will be by redefining terms or adding defenses to the FCPA, as many legislative proposals suggest.[112] Instead, guidelines should focus on areas of traditional prosecutorial discretion. In the case of the FCPA, the guidelines would be most effective if they focused mainly on defining when prosecutors should bring an extraterritorial case. The guidelines should start by taking the relevant international factors into account, with prosecutors keeping in mind that their client is "a *sovereignty* whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in criminal prosecution is not that it shall win a case, but that justice shall be done."[113]

2. FCPA Costs to U.S. Businesses and the Effects of Additional Extraterritorial Enforcement

Although some argue that FCPA enforcement increases costs for U.S. businesses, these arguments carry less weight as extraterritorial enforcement becomes more active. Legislative history from 1977 that focused on increased costs to American

112. *See* Michael Volkov, *Predictions for DOJ's Upcoming FCPA Guidance,* LECLAIRRYAN (Sept. 20, 2012) http://www.leclairryan.com/pubs/xprPubDetail.aspx?xpST=PubDetail&pub=787 (suggesting the new guidelines may relax successor liability and may further define "foreign official").

113. Berger v. U.S., 295 U.S. 78, 88 (1935) (emphasis added).

businesses was premised on the assumption that the Act would not have aggressive extraterritorial enforcement.[114] The concern about costs to U.S. businesses was a larger focus during the 1998 amendment, but enforcement was still concentrated domestically.[115] During the 2010 legislative hearing, questions of cost were rebutted with increased enforcement against foreign companies.[116]

As the international enforcement becomes greater, the argument that enforcement puts U.S. companies at a cost disadvantage loses weight. In addition, concerns about cost are rebutted with compelling arguments that companies who actually do participate in bribery deserve the high costs of enforcement and compliance.[117] These arguments apply equally to foreign and U.S. companies, since the FCPA was put into place to ratify the OECD Convention, which combats an international problem.[118] If cost is a problem in need of reform, legislative proposals can and do suggest appropriate amendments.[119] Because the increase in extraterritorial enforcement spreads the cost of FCPA prosecutions across countries, the arguments that there is a cost disadvantage to U.S. companies will become less compelling as extraterritorial enforcement increases.

B. INTERNATIONAL FACTORS SHOULD INFLUENCE DISCRETION

1. Foreign Policy & Comity

Early FCPA cases and scholars have advocated for the inclusion of foreign policy concerns when making prosecutorial decisions.[120] In the Act's early days, FCPA investigations and

114. *See* discussion, *supra* notes 18–19, 26, 28–31, and accompanying text.

115. *See* discussion, *supra* notes 27–31 and accompanying text.

116. *See 2010 Hearing*, *supra* note 33, at 9–10 (answering the question "[I]s this simply putting U.S.-headquartered companies at a disadvantage . . . ?" with ". . . I will say that we are clearly prosecuting foreign companies . . . there is an increased awareness in places like China and Russia.").

117. *See id.* at 2 ("Nobody likes to pay fines, but it does not amount to a whole lot in the context of what is going on here.").

118. *See* discussion *supra* notes 27–31, and accompanying text.

119. *See* Weinograd, *supra* note 10, at 517–19, 526–29 (giving an overview of the vague grease payment exception and asserting that costs on American companies demand reform).

120. *See* Mclean, *supra* note 68, at 1983 ("Courts and commentators alike have noted that FCPA investigations and prosecutions can implicate issues of foreign policy."); *Id.* at 1983 n.42 (citing Clayo Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 408–09 (9th Cir. 1983)) ("Any prosecution

enforcement actions were restrained by foreign policy concerns.[121] Empirical evidence now indicates that FCPA prosecutors do not take foreign policy goals into account when choosing how to proceed.[122] Foreign policy and comity goals would likely interfere with the consistent application of the FCPA by introducing the softer variable of diplomacy. Even so, enforcement agencies have taken these goals into account successfully in other contexts, and there are important policy reasons to consider the foreign policy ramifications of a particular FCPA prosecution.

FCPA investigations focus on the supply side of the corruption equation by punishing bribers instead of those who have been bribed.[123] The FCPA specifically prohibits targeting the foreign sovereign in the action.[124] In spite of this restriction, these investigations still have the potential to be embarrassing and destabilizing to the foreign governments taking bribes.[125]

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under the [FCPA] entails risks to our relations with the foreign governments involved."); Gillespie, *supra* note 70, at 9–11; Niles, *supra* note 74, at 359 (noting that prosecution implies a "decision that the interest against allowing the United States parties to bribe a foreign government's officials outweighs the interest against possibly offending that government").

121. *See* discussion *supra* note 70, and accompanying text; Gillespie, *supra* note 70, at 10–11 ("An informal procedure was established between the Justice and State departments to deal with questions of foreign- policy consequences of FCPA investigations."); Mclean, *supra* note 68, at 1983 n.42 (citing *Clayo Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 408–09 (9th Cir. 1983) ("The Justice Department and SEC share enforcement responsibilities under the FCPA. They coordinate enforcement of the Act with the State Department, recognizing the potential foreign policy problems of these actions.").

122. Mclean, *supra* note 68, at 2003 ("[M]ost proxies for foreign policy considerations do not appear to be significantly associated with cross-national variation in FCPA enforcement levels once other relevant factors are controlled for.").

123. *See* Newman, *supra* note 63 (criticizing the OECD and FCPA for extending penalties only to suppliers of bribes, and not to foreign officials demanding them).

124. 15 U.S.C. § 78dd-1(a)(1)(A) (2006).

125. *See* Spahn, *supra* note 49, at 178 ("[T]he interests of the foreign sovereign are very much in play, even though the foreign sovereign . . . can never personally become a defendant or target of an FCPA criminal investigation."); Mclean, *supra* note 68, at 1983 n.41 (referring to the Arab Spring as an example of "official corruption in galvanizing antigovernment protest"). *But see* Mike Koehler, *Shades of Gray,* FCPA PROFESSOR (Sept. 4, 2012), http://www.fcpaprofessor.com/shades-of-gray (highlighting a transcript in which a judge disagreed with the argument that the reputation of Thailand was hurt by alleged corruption, because the corruption may have stemmed from conduct by the U.S. citizen-bribers instead of the Thai foreign official-bribees, therefore sullying the reputation of the United States and not

The embarrassment may stem from the nationality of the company being investigated, from the nationality of the officials allegedly taking corrupt payments, or both.[126] This embarrassment could create friction between countries.

Guidelines could be based upon antitrust guidelines, which focus on jurisdictional and proximate cause issues.[127] This focus is valuable because it will also target the most harmful conduct to the U.S.[128] Because the FCPA's extraterritorial enforcement is clearly intended by Congress, these guidelines should include a balance between the intended enforcement process and the foreign policy or comity concerns. Even if comity is used as a restraint on civil cases, enforcement may still continue to rise through civil crackdown on U.S. and foreign corporations who fulfill jurisdictional and comity concerns, as well as through criminal enforcement.[129]

Comity and due process are used to enforce extraterritorial limitations when prosecuting under anti-trust statutes.[130] Extraterritorial enforcement has increased in the same ways under these statutes and "[t]he rise in FCPA prosecutions bears a family resemblance to trends in the antitrust . . . area."[131] These statutes have developed extraterritorial guidelines through judicial review and legislation.[132] Civil antitrust enforcement is limited by comity to foreign conduct with links

Thailand).

126. *See* Garrett, *supra* note 51, at 1833–34 (suggesting the difference between the two might be small, since bribes may be paid "in a foreign country and often by foreign employees of a foreign subsidiary" of a U.S. corporation).

127. *See* Antitrust Enforcement Guidelines for International Operations, *supra* note 89, at § 3.2.

128. *See* Garrett, *supra* note 51, at 1843 ("[P]rosecutors have strong incentives to target foreign conduct that significantly affects the United States.").

129. The use of comity has decreased civil cases in the antitrust area, but criminal enforcement continues to rise even with guidelines regarding defendant's intended effects on the U.S. market. *See* discussion *supra* note 89, and accompanying text; Harvard Law Review Association, *supra* note 102.

130. *See* Solow, *supra* note 102, at 1537–49 (2011) (comparing extraterritoriality due process tests in anti-trust and securities statutes to determine a prosecutorial jurisdiction test for terrorists); Harvard Law Review Association, *supra* note 102 (exploring the way comity has recently limited civil antitrust jurisdiction).

131. *See* Garrett, *supra* note 51, at 1837. The antitrust area also experienced an increase in extraterritorial enforcement. *Id.* at 1819–25 (describing the increase).

132. *See id.* at 1820. This judicial review is unlikely to be replicated in the FCPA case. *See* discussion *supra,* notes 74–89, and accompanying text.

to significant domestic effects,[133] and securities cases are limited by 5th amendment due process concerns to defendants causing "reasonably foreseeable" harm to U.S. securities markets.[134] These limits on extraterritoriality are still contentious in antitrust, but have thus far avoided repetition of international diplomacy issues.[135]

The FCPA is more clearly intended to have extraterritorial application than the Sherman Act.[136] However, issues of jurisdiction have already posed problems for the FCPA, and an explanation would ensure that enforcement agencies do not overstep while clarifying extraterritorial reach for other countries.[137] Even if prosecutors have good reasons to bring more actions on foreign corporations, or to impose higher fines on them, the trend of increased extraterritorial enforcement may raise questions internationally when comity concerns would advise discretion.[138] Prosecutors should learn from the

133. *See* F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) (holding that comity requires the jurisdiction of ambiguous statutes be construed "to avoid unreasonable interference with the sovereign authority of other nations"). This effectively limited civil suits to proximate cause. *See* Harvard Law Review Association, *supra* note 102, at 1273–74.

134. Harvard Law Review Association, *supra* note 102, at 1544–45 (citing *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972)) ("[I]f Congress ha[d] expressly prescribed a rule with respect to conduct outside the United States, even one going beyond the scope recognized by foreign relations law, a United States court would be bound to follow the Congressional direction unless this would violate the due process clause of the Fifth Amendment.").

135. Prior to comity restraints, international antitrust enforcement led to a diplomatic issue between Europe and the United States when the FTC approved a Boeing merger which was contested by Europe. *See* Harvard Law Review Association, *supra* note 102, at 1271; Mehra, *supra* note 102 (giving a thorough overview of the antitrust controversy and pointing out that although this dispute involved Europe's competing corporation Airbus, there are many comity related reasons that an international incident could develop).

136. Unlike the FCPA, the antitrust statute was not originally intended to have extraterritorial application, but its foreign enforcement has evolved over the last seven decades. *See* Solow, *supra* note 102.

137. *See* Mike Koehler, *Strange Things Happen in Threes – Another Challenge in a SEC FCPA Enforcement Action Filed,* FCPA PROFESSOR (Oct. 22, 2012, 7:02 AM) (citing Motion to Dismiss, U.S. S.E.C. v. Sharef, No. 11 Civ. 9073 (2nd Cir. filed Oct. 12, 2012), *available at* http://www.scribd.com/doc/110723792/U-S-v-Herbert-Steffen-Steffen-Motion-to-Dismiss), http://www.fcpaprofessor.com/strange-things-happen-in-threes-another-challenge-in-a-sec-fcpa-enforcement-action (giving an overview of three challenges to SEC FCPA enforcement actions and quoting from one motion to dismiss for lack of personal jurisdiction and failure to file within the statute of limitations).

138. Prosecutors may have reasons for a larger number of actions,

antitrust example and avoid the perception that U.S. agencies are attempting to artificially support U.S. businesses under the guise of an international solution.

In the potential News Corp case, comity would reason against prosecution out of respect for the U.K.'s Bribery Act, without regard to whether bribery has happened in the United States. According to the terms of the FCPA, there is no question as to U.S. jurisdiction. However, if the only discernible bribery happened in the U.K., the United States should not intervene with FCPA prosecution because the U.K.'s law is similar enough to the FCPA in severity to ensure precise prosecution of wrongdoers,[139] and comity dictates that the United States should allow a country to handle its own bribery issues. If there is discernible bribery in the United States, the argument for use of the FCPA is no stronger. The United States would not be able to go after News Corp. for bribery of U.S. officials within the U.S., since the FCPA only prohibits bribery of foreign officials.[140] There may be other reasons to prosecute News Corp. in the United States, but the FCPA is not the appropriate tool to use in those prosecutions.[141]

2. International Cooperation Agreements

Increased international cooperation and reliance on treaties could influence prosecutorial discretion so that FCPA allegations are pursued less frequently.[142] Currently, cooperation is taken into account to the extent that it makes information-gathering and therefore enforcement easier.[143] It is

including (1) a focus on more serious bribery on the part of foreign companies, (2) protection of U.S. companies from unfair competition, (3) deterrence of undetectable corruption by foreign companies by setting an example using detectable corruption, (4) a focus on the most problematic foreign companies, and a series of other reasons. *See* Garrett, supra note 51, at 1812–13.

139. *See* U.K. Bribery Act, *supra* note 62.

140. *Id.*

141. The U.K. tabloid *Daily Mirror* has suggested that targets of phone tapping might have included 9/11 victims and their family members. *See* Pompeo, *supra* note 14. Although there is almost no evidence to indicate that is the case, it would give the United States an uncontested jurisdictional hook to sue. *Id.* ("[T]he paper's sourcing was rail-thin . . . it hasn't gained much credence. . . . Credible or not, the D.O.J. and Federal Bureau of Investigation have been looking into the claims.").

142. *See* Mclean, *supra* note 68, at 1986–88; *see also* Garret, *supra* note 51, at 1834–43.

143. *See* Choi & Davis, *supra* note 68, at 5 (testing theories of enforcement including international coordination, and finding disproportionally greater sanctions when a corporation's home country has a cooperation agreement

also the only international factor that was mentioned in the newly issued FCPA guidance, indicating that prosecutors are taking some international factors into account already.[144] International cooperation could dovetail nicely with comity concerns to limit prosecution when the U.S. is considering prosecution of the same matters at the same time as other countries.[145] Under this logic, the U.S. would not have to abandon prosecution completely, but might impose lower sanctions based on knowledge that another prosecution is ongoing.[146] On the other hand, the increased use of mutual legal assistance treaties has made FCPA prosecutions easier, and the DOJ has increasingly relied upon them, increasing foreign enforcement actions.[147]

These treaties also ensure that the U.S. is not the sole enforcer of anti-bribery actions. While some U.S. requests for help investigating FCPA violations as agreed by the treaties have been denied, the "vast majority" of requests for assistance have been granted.[148] The treaties have opened doors to cooperation between countries to prosecute together.[149]

The shared information each country adds to the prosecution decreases enforcement costs for all countries, and

with the United States). *But see* Mclean, *supra* note 68, at 2003 ("Although the presence of a mutual legal assistance treaty with a given country was not a significant predictor of FCPA enforcement levels, the presence of regulatory and enforcement cooperation with the SEC was a significant determinant of FCPA enforcement."). Choi and Davis criticize Mclean's analysis, finding that "it does not take into account the defendant's home countries." Choi & Davis, *supra* note 68, at 14.

144. FCPA GUIDANCE, *supra* note 15, at 7–8, 63.

145. *See* Mclean, *supra* note 68, at 1988 (speculating that "perhaps when the United States has a strong enforcement relationship with the host country, U.S. authorities are more willing to defer to foreign prosecutors in the interests of international comity").

146. *See* Choi & Davis, *supra* note 68, at 10.

147. *See* Mclean, *supra* note 68, at 1987 (citing F Joseph Warin, John W.F. Chesley & Patrick F. Speice, Jr. *Nine Lessons of 2009: The Year-in-Review of Foreign Corrupt Practices Act Enforcement,* 38 SEC. REG. L.J. 19, 45 (2010)) ("[I]n 2009, a senior official noted 'at least twenty-five cooperation requests to foreign governments pursuant to mutual legal assistance treaties over the past twelve months.'").

148. *See* Mclean, supra note 68, at 1987–88 (citing U.S. DEP'T OF JUSTICE, RESPONSE OF THE UNITED STATES: QUESTIONS CONCERNING PHASE 3 OECD WORKING GROUP ON BRIBERY § 10.2 (2010)) ([T]he DOJ "has experienced the gamut of cooperation – from full scale sharing of domestic investigative files on short notice to outright non-compliance.'").

149. *See* George & Lacey, *supra* note 59 (examining concurrent investigations by many nations into Halliburton's alleged misconduct).

has made treaties popular enforcement tools. International cooperation has the potential to ease prosecution, and allow prosecutors to bring more actions with the same resources. The effect of international cooperation on a particular FCPA action depends on the context of the action, but often results in concurrent prosecutions.

The Siemens prosecution would not have begun without international cooperation. The case began when a bank in Lichtenstein noticed unusual transactions and informed Siemens as well as bank regulators in Germany and Switzerland.[150] The U.S. began to investigate only after German police arrested Siemens' officers two years later.[151] Because of the mutual legal assistance provisions in the OECD Convention, the SEC and DOJ were able to work closely with the Munich Public Prosecutor's Office and induce Siemens to plead guilty.[152] Under the plea agreement, Seimens paid fines of $450 million to the DOJ, $350 million to the SEC, and $800 million to the Munich Public Prosecutor's Office.[153] Siemens also avoided a U.S. judgment under the sentencing guidelines of $1.35 to $2.7 billion, more than twice the $800 million it paid to U.S. agencies.[154]

In other cases, international cooperation ensured a case's success. In the Halliburton case, French officials began an investigation of illicit payments to Nigerian officials by a joint venture that included a Halliburton subsidiary.[155] When they realized that an American corporation was involved, they provided information to the U.S. under their OECD convention mutual legal assistance duties.[156] The investigation, which began in France in 2002,[157] concluded in the United States in 2009 with a DOJ guilty plea and a criminal fine of $402 million[158] and an SEC settlement of an additional $177

150. *See* Garrett, *supra* note 51, at 1785.

151. *See generally id.*

152. *Id.* at 1785–86.

153. *Id.* at 1786 (citing Plea Agreement, United States v. Siemens Aktiengesellschaft, No. CR-8-367 (Dec. 15, 2008), *available at* http://www.justice.gov/opa/documents/siemens.pdf).

154. *Id.* at 1786.

155. *See* George & Lacey, *supra* note 59, at 504–505.

156. *Id.* This was roughly the same time that France adopted the OECD Convention. *Id.* at 507–08.

157. *Id.* at 507.

158. Press Release, Department of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million

million.[159] The press releases from both the SEC and DOJ acknowledged the role that international cooperation played in the resolution of the action.[160]

However, the interest in comity may be limited by other factors. For example, some countries are not willing to enforce anti-bribery laws aggressively. Conflicts in law or policy decisions may induce the United States to prosecute a particular company if it believes another country is not pursuing the case appropriately.[161] For example, in 2007, allegations emerged that a British company, BAE, bribed Saudi officials with hundreds of millions of dollars.[162] The British investigation was dropped because the investigation "would have been devastating for [the British] relationship with an important country with whom [the British] cooperate closely on terrorism, on security, on the Middle East Peace process."[163] The U.S. pursued its own action under the FCPA and eventually obtained a guilty plea from the U.S. subsidiary of BAE.[164] Since the BAE action, the U.K.'s new Bribery Act has been implemented, bringing British bribery law much closer to the FCPA.[165] U.S. enforcement agencies may still choose to bring an action under the FCPA, but may decide not to do so if they are confident that the U.K. will aggressively implement the new Bribery Act.

Criminal Fine, (Feb. 11, 2009) [hereinafter DOJ Halliburton Press Release], *available at* http://www.justice.gov/opa/pr/2009/February/09-crm-112.html.

159. Press Release, Securities and Exch. Comm'n, SEC Charges KBR and Halliburton for FCPA Violations, (Feb. 11, 2009) [hereinafter SEC Halliburton Press Release], *available at* http://www.sec.gov/news/press/2009/2009-23.htm.

160. *See* DOJ Halliburton Press Release, *supra* note 158 ("Significant assistance was provided by . . . authorities in France, Italy, Switzerland, and the United Kingdom."); SEC Halliburton Press Release, *supra* note 159 ("This case demonstrates the close and cooperative working relationships that have developed in FCPA investigations among the SEC, the U.S. Department of Justice, and foreign law enforcement agencies and securities regulators.").

161. *See* Garrett, *supra* note 51, at 1839–43 (laying out limits of international cooperation).

162. *See id.* at 1840–42.

163. *See id.* at 1841 ("The Saudis apparently told the British that, should the investigation continue, they would no longer cooperate with anti-terrorism efforts and a sale of seventy-two Eurofighter jets would be jeopardized.").

164. This guilty plea came in 2010, three years after the allegations surfaced. It was also after British officials rejected a DOJ request for assistance in violation of the mutual legal assistance treaty through the OECD Convention. *See id.* at 1840–41.

165. *See* discussion *supra,* notes 62–65, and accompanying text.

3. Corruption Indexes & Foreign Direct Investment

Corruption indexes may be an influential factor in a prosecutor's decision to pursue a particular case of bribery.[166] These indexes, such as the one promulgated by Transparency International, a non-governmental organization, measure the amount of corruption in a particular country using a single number indicator.[167] The reliance on this simple indicator may not be justified or effective given the complex enforcement analysis needed in FCPA actions. The corruption index on which prosecutors are relying may be from the country in which a company is headquartered or may be the corruption index of the country in which the bribery allegedly took place. A prosecution determination may be based on a measure of corruption in those countries. In spite of the existence of these indexes, the decision to prosecute should be based first on comity and foreign policy interests. When evaluating comity interests, a prosecutor may use more discretion when a company is headquartered in a country that enforces robust anti-bribery laws and a company that is headquartered in a country with lax enforcement. The country's level of enforcement is not directly tied to the corruption index of the country and comity serves as a more effective tool for prosecutorial discretion.

In addition, these indexes may not accurately measure the kind of corruption the FCPA prohibits. Corruption indexes can oversimplify the corruption in a particular country, for instance giving a high corruption rating to a particular country where corruption consists of many payments for routine governmental action, lawful under the FCPA.[168] Prosecutors relying on

166. *See* Mclean, *supra* note 68, at 1981–82 (explaining "the existence of such a relationship is, in a sense, intuitive" as long as FCPA enforcement is not highly selective geographically, since higher numbers of foreign officials accepting bribes should lead to more instances of corruption, and therefore higher levels of enforcement).

167. *See* Transparency International, CORRUPTION PERCEPTIONS INDEX (last visited Jan. 24, 2013), http://www.transparency.org/research/cpi/overview.

168. Corruption can be distinguished into two categories: top-down corruption, through which top officials extract rents from all levels of government to line their own pockets in return for major government contracts, and bottom-up corruption, through which officials at all levels extract small rents from the populous in return for various routine activities. These categories of corruption are not mutually exclusive, and some countries have a combination of the two instead of leaning more one way or the other. FCPA enforcement is meant to distinguish between the two, and punish only the first, but most corruption indexes do not make that distinction. *See, e.g.*,

corruption indexes will therefore over-prosecute in areas with routine "grease" payments. Moreover, corruption indexes based on perceptions may not indicate changes in actual corruption, and may miss corruption that is not perceived.[169] Some corruption indexes suffer from both of these issues: they conflate illegal with legal bribery, and rely on perceptions instead of individual experience.[170]

The U.S. has an interest in protecting investments abroad from bribery and corruption. For that reason, prosecutors may use the amount of U.S. money flowing into a country to determine whether to prosecute.[171] This reasoning could also be used to prosecute corporations headquartered in one country and bribing in another, potentially expanding extraterritorial enforcement with regard to two foreign countries at the same time.[172] Protecting American money and investment abroad is not in line with the original intent of the FCPA, which was enacted to protect the reputation of American companies. The new protections may be at odds with comity or foreign policy if foreign countries see FCPA enforcement actions as an intrusion. However, protecting foreign direct investment is in line with the new legislative intent of 1998 to combat corruption while ensuring that American businesses function without competitive disadvantage.[173] Importantly, prosecution taking corruption indexes and each of the other international

id. at 4 (capturing corruption as a "single aggregate indicator" and defining corruption as "the abuse of entrusted power for private gain").

169. *See* Mclean, *supra* note 68, at 1982 n.38 ("[P]erceptions, after all, might well have a tendency to persist over time.").

170. Some corruption surveys do attempt to use individual experience to gather data, but run into issues with defining the terms like "government official" and ignore cultural perceptions of what a bribe is in the first place. *See id.* at 1991–92 (using the International Crime Victims Survey (ICVS) question "During the past year has any government official, for instance a customs officer, police officer, or inspector in your own country, asked you or expected you to pay a bribe for his services?").

171. *Id.* at 1979–81 (giving reasons why investment may induce greater or lesser prosecution).

172. This line of reasoning may support prosecuting more US companies. *See* Krever, *supra* note 45, at 92–93 (citing J.S. Hellman, et al., *Are Foreign Investors and Multinationals Engaging in Corrupt Practices in Transition Economies?* TRANSITION 4, 6 (World Bank, 2000) ("A higher percentage of US firms pay public procurement kickbacks (over 40%) in the countries analyzed than do firms based in France, Germany, and the U.K.").

173. *But see A Tale of Two Laws,* ECONOMIST (Sept. 17, 2011), *available at* http://www.economist.com/node/21529103 (arguing that current enforcement of the FCPA in poor corruption-ridden countries deters American companies from entering those markets in the first place).

factors into account should be in line with legislative intent.

III. CONCLUSION

The nature of extraterritorial enforcement and its increased use in the FCPA context naturally raises difficulties regarding foreign policy, comity, and diplomacy that prosecutors do not seem to take into consideration. Although there are legislative proposals to clarify provisions of the FCPA, prosecutorial guidance from the DOJ and SEC that takes international factors into account is necessary, especially prosecutors often work outside of executive or judicial checks. Legislative intent regarding enforcement is already clear, but the enforcement agencies must issue guidance concerning the extraterritorial enforcement and international factors in order to clarify prosecution.

Foreign policy and comity should restrict extraterritorial prosecution to the extent that a foreign country is prosecuting its own corruption, and to the extent that the bribery had little direct or indirect effect on the United States. International cooperation may enhance prosecutions to the extent that it makes prosecution easier, but there may be limits to international cooperation's efficacy in prosecution, because of possible conflicts between U.S. and foreign law and the limits of comity. Corruption indexes and foreign direct investment may indicate a geographic focus for prosecution, but corruption indexes are unreliable measures of illegal bribery, and the use of foreign direct investment is not supported by legislative history. Prosecutors should limit their discretion by foreign policy and comity concerns, while taking international cooperation into account more as international motivation to combat bribery increases.