2014

New Affirmative Defense to the FCPA for Countries Exiting Major Internal Strife

Chris Rohde
University of Richmond

A NEW AFFIRMATIVE DEFENSE TO THE FCPA FOR COUNTRIES EXITING MAJOR INTERNAL STRIFE

By: Chris Rohde[1]

TABLE OF CONTENTS

I. INTRODUCTION

In 1977, in the wake of the largest political scandal in American history, the U.S. Congress passed the Foreign Corrupt Practices Act (FCPA).[2] This law, the first of its kind in history, targets U.S. citizens and companies who bribe foreign officials.[3] After twenty years of almost no enforcement, the U.S. Department of Justice (DOJ) and Securities and Exchange Commission (SEC) began aggressively enforcing the FCPA in the early 2000s. Facing the threat of massive fines, the U.S. and U.S.-affiliated companies began pulling back from investing in countries that were perceived as "corrupt." While this is one of the specific goals of the FCPA, there have also been unintended consequences. In particular, this law has harmed countries that have a history of corruption, but because of some form of major internal strife ending recently, are in the perfect position for U.S. companies to enter

---

[1] Candidate for J.D., 2015 at the University of Richmond School of Law.
[2] Foreign Corrupt Practice Act, 15 U.S.C. § 78dd-1 (2006).
[3] 15 U.S.C. § 78dd-1(a).

their market and positively influence the development of a more transparent market.

This paper examines whether the current exception to the FCPA, or the affirmative defenses provided by the FCPA, allow American companies to be this positive influence. Part I examines the background of the FCPA, the current exception and affirmative defenses, and the recent increase in enforcement. Part II examines the issue of whether the current exceptions and affirmative defenses permit US companies to invest in countries currently exiting major internal strife.[4] Unfortunately, neither the exception nor the affirmative defenses provide companies the leeway necessary to enter these markets without serious risk of running afoul of the FCPA enforcers. Part IV argues that a new affirmative defense should be enacted, creating a system where companies can approach the DOJ and SEC with an outline of a strong compliance program and receive permission to enter these countries without fear of being targeted for investigation.

The Foreign Corrupt Practices Act currently hurts nations coming out of recent internal strife by dis-incentivizing companies from entering into these markets. As none of the current exceptions or affirmative defenses allow companies to enter these new markets, a new exception should be created allowing companies to pre-register with the U.S. government and enter these markets.

II. THE CREATION AND IMPLEMENTATION OF THE FCPA

A. Events Leading to the Enacting of the FCPA

The road to the FCPA began on the night of June 17, 1972, with the arrest of five men inside the Democratic National Committee's office in the Watergate complex.[5] These arrests precipated the biggest political scandal in United States history and led to the resignation of President Richard Nixon two years later, in August 1974.[6] While the larger story of Watergate is well known, the subplot leading to the first law to target corruption by domestic companies in foreign countries is not.[7] The need for this new law became apparent during the Watergate investigations when the Special Prosecutor, Archibald Cox, requested that companies that had made questionable or illegal contributions to the 1972 Presidential Campaign voluntarily disclose

---

[4] For the purposes of this paper, major internal strife is defined as a natural disaster, civil war, or political upheaval.

[5] *Watergate Retrospective: The Decline and Fall*, TIME, August 19, 1974.

[6] Carroll Kilpatrick, *Nixon Resigns*, WASH. POST, August 9, 1974, at A01.

[7] *See* Alejandro Posadas, *Combatting Corruption under International Law,* 10 DUKE J. COMP. & INT'L L. 345, 348 (2000) (providing an excellent overview of how the FCPA arose out of the Watergate Scandal).

that fact.[8] Many of these disclosures, which were later turned over to U.S. agencies, indicated that these companies were not only making questionable payments to American political campaigns, but also to foreign governments and political parties.

With this information, the SEC began to investigate payments from U.S. companies to foreign officials. They began in 1975 by investigating five companies—Gulf Oil Corporation, Phillips Petroleum Company, Northrop Corporation, and Ashland Oil—for violations of the reporting requirements of U.S. Securities law.[9] The SEC simultaneously began a separate investigation into United Brands after its Chairman, Eli Black, threw himself off the twenty-second floor of a New York City skyscraper.[10] During the investigation, it came to light that Mr. Black had paid the Honduran government $2.5 million to repeal a tax on bananas.[11] The SEC, relying on the laws at the time, found this payment to be a materially relevant payment for reporting purposes, and charged United Brands with violations of the U.S. securities laws.[12] This demonstrates how the contemporary laws in 1975 had to deal with actions covered by the FCPA today.

Meanwhile, in both houses of the U.S. Congress, the committees on Foreign Relations began their own investigations into the practices of multinational companies. After initially holding several closed hearings, the Senate Committee on Foreign Relations held its first public hearing on May 16, 1975.[13] By making these hearings public, the Senate did much to show transparency in an area where the primary problem is secrecy. These hearings, along with those that followed, produced extensive information on business and government corruption and highlighted the need for major reform.[14] In particular,

---

[8] *See Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corporations of the Senate Comm. of Foreign Relations*, 94th Cong. 5 (1975), *microformed on* CIS No. 76-S381-6 (Cong. Info. Serv.).

[9] *See The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on International Economic Policy of the House Comm. on International Relations*, 94th Cong. 37 (1975), *microformed on* CIS No. 76-H461-15 (Cong. Info. Serv.).

[10] *See* JOHN T. NOONAN, BRIBES 656 (1984).

[11] *See id.*

[12] *See id.*

[13] *See Multinational Corporations and United States Foreign Policy*, *supra* note 8, at 1.

[14] *See* NOONAN, *supra* note 10, at XVI. The legislative history of the FCPA is extensive. *See, e.g.*, *Multinational Corporations and United States Foreign Policy*, *supra* note 8; *The Activities of American Multinational Corporations Abroad*, *supra* note 9; *Foreign and Corporate Bribes: Hearings on S. 3133 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 94th Cong. (1976), *microformed*

the hearings showed how the authority vested in the regulatory agencies to deal with foreign payments at the time was in need of major bolstering.[15] These conclusions, along with the details from the various SEC investigations, led Congress to conclude that it was time to focus on this issue.

B. Passing the FCPA

By late 1975, Congress had examined government corruption both at home and abroad, and it faced the realization that the current regulatory scheme was inadequate. To fix this inadequacy, Congress would undertake the unenviable task of creating a new type of law targeting bribes occurring outside of U.S. boundaries.[16] This law was the first of its kind, and it laid the foundation for similar efforts by other nations in the past twenty years.[17] But how did it come to be, and what exactly does it say?

After the various investigations surrounding the issues Watergate raised, Congress began to focus on building a new regulatory scheme. In May 1976, the SEC submitted an intensive report to the Senate Banking, Housing, and Urban Affairs Committee concerning questionable and illegal corporate payments and practices.[18] This report showed that, out of the ninety-five companies involved in the report, fifty-nine had been involved in some form of payment to foreign officials, seventeen had paid foreign political parties, twenty-nine had had been involved in sales-type commissions, and twenty-seven were involved in "other foreign matters" including some sort of foreign payment or questionable activity.[19] Combining all of these payments, the total amount spent by these companies on questionable payments was approximately $250 million.[20] What this report really showed was

---

on CIS No. 76-S241-38 (Cong. Info. Serv.); *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearing on S. 305 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 95th Cong. (1977), *microformed on* CIS No. 77-S241-23 (Cong. Info. Serv.).

[15] *See The Activities of American Multinational Corporations Abroad*, *supra* note 9, at 40–47 (1975).

[16] It should be noted that this is not the first time that the U.S. Congress had done this. *See* Alien Tort Statute, 28 U.S.C. §1350 (2006).

[17] *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1; *see also* Bribery Act, 2010, c. 23 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2010/23.

[18] *See Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices Submitted to the Senate Banking, Housing, and Urban Affairs Committee*, *reprinted in* 353 SEC. REG. & L. REP. 36–41 (1976).

[19] *Id.* at 9.

[20] *Id.* at 16–41.

that, contrary to popular belief, these payments were neither rare nor miniscule, and a major legislative push was needed to root out this corruption.

Simultaneously, both the House of Representatives and the Senate took up this issue. In the House, the Committee on International Relations focused its efforts on this problem, while the Committees on Foreign Relations and on Banking, Housing, and Urban Affairs took it up in the Senate.[21] By that summer, it became apparent that some action would occur. The only question was what that action would be.

At this point, another branch of government entered the mix. After the Watergate scandal, President Nixon had resigned, leaving Vice President Gerald Ford, a former Representative in the House, to assume the Presidency. In the summer of 1976, President Ford released his legislative proposal on the issue of foreign payments.[22] His proposal focused on the reporting responsibilities of U.S. companies for large foreign payments, but unlike some other proposals, Ford was not in favor of criminalizing the payments if they complied with existing law.[23] This was a conservative approach that would have allowed the market to police itself, instead of relying on the government to interfere.

Unfortunately for President Ford, Congress opted to take a different approach. After passing drafts several times, the Senate chose to pursue a stricter approach proposed by Senator Proxmire, which included criminalizing both failing to report foreign payments and making those payments in the first place.[24] Eventually, both the House and the Senate approved the Senate Bill, and President Jimmy Carter signed the FCPA into law on December 19, 1977.[25]

---

[21] *See Foreign and Corporate Bribes: Hearing on S. 3133 Before the Senate Comm. on Banking, Housing, & Urban Affairs*, 94th Cong. (1976), *microformed on* CIS No. 76-S241-38 (Cong. Info. Serv.); *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearing on S. 305 Before the Senate Comm. on Banking, Housing, & Urban Affairs*, 95th Cong. (1977), *microformed on* CIS No. 77-S241-23 (Cong. Info. Serv.).

[22] *See* H.R. Doc. No. 94-572, at 1 (1974).

[23] The reports would have flowed through the Secretary of Commerce, who would have made the reports available to other agencies such as the IRS, the SEC, and the DOJ. Additionally, the Secretary of Commerce would have provided Congress with the reports as well. After a year these reports would have been made public, except when the State Department or Attorney General determined they should be withheld for reasons of foreign relations or judicial process. *See id.* at 2.

[24] S. 3664, 94th Cong. (1975).

[25] *See* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. § 78dd-2 (1994)).

Since being originally passed, Congress has amended the law twice, once in the late 1980s and again in the late 1990s.[26] The first amendment simply reaffirmed Congress's commitment to combating foreign corruption, while the second was to enact changes in line with the requirements of the Organization for Co-operation and Development (OECD) agreement concerning bribery.[27] Neither of these amendments fundamentally changed the FCPA, but they do show that Congress' desire to promote transparency and cooperation, while fighting corruption through the FCPA continues. This article proposes that further changes should be made to the FCPA without compromising either of these goals.

C. FCPA Structure

The FCPA is comprised of two major parts: first, the provisions that make bribing a foreign official a crime (i.e. the foreign corrupt practice); and, second, changes to required accounting practices.[28] Since this article is concerned with the current affirmative defenses and exceptions, it will focus primarily on the part of the statute covering what constitutes a corrupt practice, by examining what actions Congress prohibited, who the statute covers, and then outline what the current exception and affirmative defenses are.

The FCPA criminalizes offers of payment, or payment of anything of value, to foreign officials, foreign political parties, or third parties for the purpose of influencing their decisions in the accused favor.[29] While this sounds like simply a prohibition on an *American Hustle*-style exchange of a briefcase of cash in a hotel room,[30] it is a bit more complicated than that. By targeting the offering of anything of value, the statute significantly expands the scope of what it covers to include things such as expensive trips and non-monetary gifts. Additionally, the statute targets actions by third parties likely meant to insulate the American company from liability.[31] At its core, the statute targets any activity meant to give companies an unfair advantage over the marketplace.

---

[26] *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107; *see also* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, 112 Stat. 3302.

[27] *See* 102 Stat. 1107; *see also* 112 Stat. 3302.

[28] 15 U.S.C. § 78dd-2 (1994).

[29] *See* 15 U.S.C. §§ 78dd-1(a), 2(a).

[30] *See* AMERICAN HUSTLE (Columbia Pictures 2013) (the movie tells a fictionalized version of the ABSCAM events, where multiple public officials including a Senator and several House of Representative members were convicted of public corruption).

[31] *See* 15 U.S.C. § 78dd-1(a).

The FCPA applies to a wide swath of the American corporate community. The statute specifically calls out two large groups of people.[32] First, the statute covers issuers of securities on U.S. markets (i.e. companies).[33] Second, the statute targets officers, directors, employees, stockholders, or agents of these corporations.[34] Specifically targeting both corporations and the people involved in corporations covers most of the entities involved in the actions targeted by the FCPA, but how does the statute reach them. The statute lays out two jurisdictional "hooks"[35] for prosecuting these crimes. The first is the use of mail or any other means of interstate commerce in furtherance of a foreign corrupt practice.[36] The second is where there have been foreign corrupt practices outside the United States.[37] Additionally, the statute allows liability to extend to foreign companies and foreign natural persons, their officers, directors, employees, agents, and stockholders when actions occurring in furtherance of the corrupt practices occur while in U.S. territory.[38] As such, the FCPA has a wide reach, but the statute does give some breathing room through the exception and affirmative defenses.

There is currently one exception and two affirmative defenses to the FCPA. The exception is for routine government action.[39] This sole exception protects companies from liability in situations where payment is simply to get the ball moving on the process. This exception, generally known as the "grease payments exception," allows payments that merely expedite the process. Thinking about these payments as procedural payments, like fees to expedite permits, helps to distinguish them from prohibited payments meant to bypass the market making its determination.

In addition to the exception, two affirmative defenses to FCPA liability also exist. The first defense pertains to payments that are lawful under the foreign country's laws.[40] This is a fairly traditional de-

---

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] This terminology of jurisdictional hooks is adapted from Magistrate Judge Novak from the Eastern District of Virginia. It means the same thing as the traditional bases for jurisdiction.

[36] *See* 15 U.S.C. § 78dd(a).

[37] *See id.* §§ 78dd-1(g), 78dd-2(h)(i), *amended by* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, 112 Stat. 3302.

[38] *See* 15 U.S.C. § 78dd-3(f)(1).

[39] *See* 15 U.S.C. § 78dd-1(b). The exception, as well as the two affirmative defenses, was added in the 1988 amendment to the FCPA. The fact that the original bill did not contain any exceptions or defenses says something about how strongly the enacting Congress felt about corruption.

[40] *Id.* § 78dd-1(c)(1).

fense in U.S. laws governing actions outside the United States, as it follows a similar exception in U.S. labor law, which allows companies to discriminate if not doing so would violate the foreign country's law.[41] The desire to see a level playing field lies at the core of this defense. In all situations, the United States wants American companies to have an equal chance at earning business. If it holds them liable for actions that are legal in the country in question, it unfairly handicaps its companies.

The second affirmative defense is the reasonable and *bona fide* expenditure defense. This defense frees companies from liability when "the payment, gift, offer, or promise of anything of value. . .was a reasonable and *bona fide* expenditure, such as travel and lodging expenses. . .and was directly related to—the promotion, demonstration, or explanation of products or services; or the execution or performance of a contract with a foreign government or agency."[42] The best way to think about this is to distinguish between an American manufacturer flying a Chinese official in to show him some new product or system and paying for the flight, his hotel, and his meals while the company was hosting him. These would all likely be considered reasonable *bona fide* expenditures, but if the company had the flight stop in Las Vegas for four days and picked up the entire tab, it likely would be considered an illegal payment. The point with this defense is that the actions must be what you would expect a company to do in that case, nothing more.

D. Current Enforcement Actions

One might think that these exceptions and defenses sound fairly broad, but by looking at some of the enforcement actions involving the FCPA, one can get an idea of how the FCPA could be improved. Up until the early 2000s, the FCPA was rarely enforced and companies continued doing what they had always done.[43] In 2008, Siemens, a German conglomerate, was hit with fines over a billion dollars for their regular practice of sending suitcases of money with their agents to South America to further business interests.[44] In 2011, the SEC hit

---

[41] *See* 29 U.S.C. § 623(f)(1) (1967).

[42] 15 U.S.C. § 78dd-1(c)(2).

[43] *See* U.S. Securities and Exchange Commission, *SEC Enforcement Actions: FCPA Cases*, *available at* http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml.

[44] *See 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), *available at* http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html; *see also* U.S. Securities and Exchange Commission, *SEC Charges Siemens AG for Engaging in Worldwide Bribery* (Dec. 15, 2008), http://www.sec.gov/news/press/2008/2008-294.htm.

Siemens again with charges against some of its directors for a bribery scheme involving identification cards in Argentina. In 2013, one of these directors settled for a $275,000 fine.[45]

While not the first of the current stream of FCPA actions, the Siemens case does show several important points about current practice. First, the SEC and the DOJ have gotten very serious about policing violations. Second, most cases, like Siemens, settle out of court, but are multi-layered and can go on for years. Finally, the fines levied against these companies are massive, often millions or even billions of dollars.

Another good example of this trend is the fines levied against KBR, Inc. and Halliburton Co. for bribes to Nigerian officials over a ten-year period in order to obtain construction contracts, as well as record violations.[46] Once again, this was the conclusion of a long-term investigation and negotiations over the fine. In this case, the various entities agreed to pay a total of $579 million in fines ($177 million to the SEC and $402 million to the DOJ).[47]

Up until recently, Siemens was the poster child for FCPA enforcement, but in the last two years, the focus has shifted to the next big case, Wal-Mart. In April 2012, the New York Times ran a piece detailing how Wal-Mart's Mexican subsidiary paid $24 million in bribes for licenses to expand throughout the country.[48] As Wal-Mart began its internal investigation into possible FCPA violations, the cost of the investigation began to explode as the breadth of corruption became apparent.[49] It became clear that these bribes were not only occurring in Mexico, but also in other parts of the world, primarily in India and China.[50] As the investigation spread, the cost to keep it going ballooned, and by August of 2013 they had spent $300 million on simply investigating the bribes.[51] This says nothing of the actual cost of the bribes or the potential fines from both the SEC and the DOJ. Neither agency has given any indication of what the likely fine will be,

---

[45] U.S. Securities and Exchange Commission, *Securities and Exchange Commission v. Uriel Sharef, et al.*, Litigation Release No. 22676 (April 16, 2013), *available at* http://www.sec.gov/litigation/litreleases/2013/lr22676.htm.

[46] U.S. Securities and Exchange Commission, *SEC Charges KBR and Halliburton for FCPA Violations* (Feb. 11, 2009), *available at* http://www.sec.gov/news/press/2009/2009-23.htm.

[47] *Id.*

[48] David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart after Top-Level Struggle*, N.Y. TIMES, (Apr. 22, 2012), at A1.

[49] Richard L. Cassin, *Wal-Mart's Whopping FCPA Tab—$300 Million and Climbing*, FCPA BLOG (Aug. 16, 2013, 9:38 PM), http://www.fcpablog.com/blog/2013/8/16/wal-marts-whopping-fcpa-tab-300-million-and-climbing.html.

[50] *Id.*

[51] *Id.*

but considering how widespread the problem was, it is possible that Wal-Mart's fine will be the largest in history.

E. The FCPA's Collateral Damage to Countries in Desperate Need of Aid

After having established the origin and function of the FCPA, this article will now turn to the issue at hand. While the FCPA's goal of eradicating corruption is a noble one that should be supported, there is great potential for overzealousness to harm the very countries the law is trying to protect. The countries most at risk are those countries that are exiting a period of major internal strife. For the purposes of this paper, major internal strife is considered to be either a long period of government upheaval/civil war or a major natural disaster. These countries are often put in a situation where they are in desperate need of aid from foreign nations and companies, and are also prime locations for investment. They are often hamstrung, however, by the fact that they have a history of corruption, or a fear by foreign companies that simply entering these markets could lead to greater scrutiny from U.S. regulators.

One such country is South Sudan. South Sudan, the youngest nation in the world, came into existence in July 2011, after a January referendum where 98% of the population voted to separate from Sudan and create their own nation.[52] This was the culmination of negotiations to end an on-going civil war that engulfed Sudan since 1955.[53] As one would expect, the creation of South Sudan was met with excitement on an international level.[54] As South Sudan is a land-locked country whose primary source of revenue is oil, it was in desperate need of foreign investors to help build their fledgling economy. Unfortunately for South Sudan, the country faced several major hurdles.

One of the primary hurdles South Sudan faced in attracting foreign direct investment (FDI) was the perception of South Sudan being linked to corruption. One major contributor was the country's score on the Corruption Perception Index (CPI). The Corruption Perception Index is a score of 1 to 100 given to each nation in the world annually

---

[52] *See* Central Intelligence Agency, *Background, CIA World Factbook: South Sudan*, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/od.html (last updated May 12, 2014).

[53] *Id.*

[54] *See* Will Connors & Maggie Fick, *At South Sudan's Birth, Eyes Are on Northerner*, WALL ST. J. (July 9, 2011), http://online.wsj.com/news/articles/SB10001424052702304793504576434052777444130?KEYWORDS=South+Sudan.

by Transparency International.[55] For both 2011 and 2012, South Sudan was not given a score.[56] This alone would deter foreign investors, but on top of that, in both years, Sudan, the country South Sudan split from, scored in the bottom five in the world.[57] Why would a company in its right mind decide to enter such an environment when other companies are shelling out millions of dollars in fines every year out of fear of being found guilty of violating the FCPA? Sadly with South Sudan, the country may have missed their opportunity to attract necessary foreign investors, as the country has once again descended into civil war.

Another example of a nation exiting major internal strife is Haiti in the aftermath of the earthquake that hit that island in 2010.[58] Like South Sudan, Haiti has a history of corruption problems, and the earthquake did not help this perception. Prior to the earthquake, Haiti was ranked 168 out of 180 countries that had been given scores.[59] Since the earthquake, they have seen almost no progress and are currently ranked 163 out of 177.[60] Like South Sudan, this perception of corruption, whether accurate or not, has seriously harmed Haiti's recovery since the earthquake.

Luckily for Haiti, their plight has not gone unnoticed. In the aftermath of the Haitian earthquake several people began to advocate for changes to the FCPA to allow U.S. companies to enter Haiti and help rebuild both structurally and economically.[61] In particular, peo-

---

[55] *See Corruption Perception Index: Overview*, TRANSPARENCY INTERNATIONAL (2013), http://www.transparency.org/research/cpi/overview (last visited Apr. 12, 2014).

[56] *See Corruption Perception Index: Results 2011*, TRANSPARENCY INTERNATIONAL (2013), http://www.transparency.org/cpi2011/results; *see also Corruption Perception Index: Results 2012"*, TRANSPARENCY INTERNATIONAL (2013), http://www.transparency.org/cpi2012/results (last visited Apr. 12, 2014).

[57] *See Corruption Perception Index: Results 2011*, TRANSPARENCY INTERNATIONAL (2013), *available at* http://www.transparency.org/cpi2011/results; *see also Corruption Perception Index: Results 2012,* TRANSPARENCY INTERNATIONAL (2013), http://www.transparency.org/cpi2012/results (last visited Apr. 12, 2014).

[58] *See* José de Córdoba and David Luhnow, *Fierce Earthquake Rocks Haiti*, WALL ST. J., Jan. 13, 2010.

[59] *See* Transparency International, *Corruption Perceptions Index 2009*, TRANSPARENCY INTERNATIONAL ARCHIVE SITE, http://archive.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table.

[60] *See* Transparency International, *Corruption by Country: Haiti*, TRANSPARENCY INTERNATIONAL (2013), http://www.transparency.org/country#HTI_DataResearch_SurveysIndices.

[61] *See* Tyler Cowen, *One of the Best Ways to Help Haiti: Modify FCPA*, MARGINAL REVOLUTION (March 15, 2010, 9:24 AM) http://marginalrevolution.com/marginalrevolution/2010/03/one-of-the-best-ways-to-help-haiti.html; *see also* Ashby Jones, *Is the FCPA Standing in the Way of Haiti's Recovery?*, WALL ST. J. L.

ple were calling for the FCPA to be waived for a period to allow US companies to enter the market and provide the necessary services.[62] Sadly, this advice went unheeded and Haiti has continued to languish in the hands of a system where paying to play is the norm.

The point of both of these examples is to show how, for some countries, the FCPA actually hinders their development rather than helping it. Whether or not a country is corrupt, the fact that some countries' development is hurt as collateral damage necessitates examination of the current policy.

III. CAN CURRENT STATUTORY EXCEPTIONS AND AFFIRMATIVE DEFENSES ALLOW FOR ENCOURAGING U.S. COMPANIES TO INVEST IN THESE COUNTRIES?

A. Motivating Hypothetical

In order to evaluate whether current exceptions and affirmative defenses provide companies adequate room to enter into business in nations exiting major internal strife we will need a case to serve as the instrument of the evaluation. While a real world example would be great, it is far simpler to demonstrate the principles of this article through the use of a hypothetical situation. As a result, the next section of this article will be analyzed through the lens of the following hypothetical.

Imagepriority (IP),[63] is a U.S. corporation incorporated in Delaware that specializes in the design, manufacture, and installation of commercial signage.[64] In recent years, IP has seen rapid growth both domestically and internationally. In particular, one client, McBurger Joint, has just contracted IP to manufacture and install all their signage in the Middle East and Africa. In order to cut down costs and potentially open new markets, the president of the company, Mark Morin, decided to open a factory in South Sudan due to its emerging economy and his sympathy for the South Sudanese people.

Additionally, Morin was comforted by the fact that South Sudan seems to be making an effort to fight internal corruption.[65] Two

---

BLOG (Mar. 16, 2010, 4:10 PM) http://blogs.wsj.com/law/2010/03/16/is-the-fcpa-standing-in-the-way-of-haitis-recovery/.

[62] *Id.*

[63] IP is a fictional company, but is based on an industry with which I have some experience.

[64] Commercial signage includes all sorts of signage from the McDonald's arches to the cases surrounding ATMs. *See, e.g.*, *Architectural Graphics Incorporated*, YOUTUBE, http://www.youtube.com/watch?v=I85VW4ALj1c (last visited Apr. 12, 2014).

[65] *See* The South Sudan Anti-Corruption Commission Act, § 3, (2009) (S. Sudan), *available at* http://southsudanngoforum.org/wp-content/uploads/2012/02/Anti-Corruption%20Commission%20Act%202009.pdf; *see also* Penal Code Act of 2008

years after opening the factory business is going well, but it comes to Morin's attention that the SEC and DOJ have begun an investigation into IP's Sudanese facility and several payments made by the head of manufacturing, Miles Gardner, to Sudanese officials. IP opens their own investigation run by their outside counsel into the payments. The investigation finds that the purpose of the payments is not clear.

B. Exceptions and Defenses Applied

Using this hypothetical, this article will examine each of the current exceptions and affirmative defenses to see if IP is protected by any of them. The exception for facilitating payments will be analyzed first. The statute specifically exempts "facilitating or expediting payment[s] to a foreign official . . . . the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official . . . ."[66] For the exception to apply, the question is whether the payment is serving solely the role of speeding up the process and not influencing selection of a winner.[67]

Applying this to our situation, we see that the actions of Gardner, IP's head of manufacturing, do not fall under this exception. Unless the payments are to expedite the process, they do not fall under this exception. As the payments in this case are for an unclear purpose, they would likely not fall under this exception. This results in IP likely remaining liable for the payments. The facilitating payments exception does not help IP in their effort to continue operating in South Sudan.

Next is the analysis under the affirmative defenses. The first of these is the defense that the payments were lawful under the law of the foreign country.[68] This defense is meant to protect U.S. companies from being caught between what is required by the U.S. and a foreign country's laws.[69] Payments to government officials are illegal under several sections of South Sudan's Penal Code and are punishable by up to ten years in prison.[70] Therefore, these payments were not permissible under South Sudanese law and IP cannot raise the affirmative de-

---

§§ 88–93, 1 *The Southern Sudan Gazette* 1 (Supp. 2009) (S. Sudan) (South Sudan like many countries has an anti-corruption act, but enforcement of that law is less strenuous than it should be) [hereinafter Penal Code Act].

[66] 15 U.S.C. § 78dd-1(b).

[67] R. Christopher Cook & Stephanie Connor, *The Foreign Corrupt Practices Act: An Overview*, 3–4 (Jones Day 2010), *available at* http://www.jonesday.com/files/Publication/3325b9a8-b3b6-40ff-8bc8-0c10c119c649/Presentation/PublicationAttachment/d375c9ee-6a11-4d25-9c30-0d797661b5ff/FCPA%20Overview.pdf.

[68] 15 U.S.C. § 78dd-1(c)(1).

[69] Cook & Connor, *supra* note 67, at 4.

[70] *See* Penal Code Act, *supra* note 65, at § 88.

fense that the payments were lawful under foreign law. This leaves them one other option under current law.

The last affirmative defense IP can rely on is the defense of reasonable and *bona fide* expenditure. The statute provides the defense when the "payment. . .was a reasonable and bona fide expenditure[s]. . .incurred by or on behalf of a foreign official. . .was directly related to (A) the promotion. . .of products or services; or (B) the execution or performance of contract with a foreign government or agency thereof."[71] The DOJ has previously stated that luxury travel provided for foreign officials may form the basis of an FCPA charge.[72] In this case, this affirmative defense does not get IP very far since in no funds were spent on travel and lodging for officials or visits to the United States. However, even if such expenditures occurred, the defense could not be extended to protect IP for the other payments.

Ultimately, what this shows is that a company with good intentions can suddenly find itself in FCPA trouble for actions by its employees or even accidental actions.

Lest anyone think that this issue is being overblown, the *Wall Street Journal* recently ran an article on a situation that highlights my point exactly. In the run-up to the 2011 overthrow of former Libyan President Moammar Gadhafi, Goldman Sachs, Credit Suisse, J.P. Morgan Chase & Co, and several other major investment companies, with the encouragement and support of the U.S. government, began working with the Libya Fund, a state-run investment group.[73] In the aftermath of the Libyan Revolution these relationships attracted the attention of the new government.[74] What they discovered was a network centering on middlemen known as "fixers."[75] These "fixers" established the connections between the investment firms and the individuals with the connections with developing countries, including Libya.[76] Whether these fixers are funneling money is one of the big questions in this case.[77] One transaction under scrutiny is a $120 mil-

---

[71] 15 U.S.C. §§ 78dd-1(c)(2)–(c)(2)(B).

[72] *See* U.S. DEP'T OF JUSTICE, PUB. NO. 08-03, FCPA Review Opinion Procedure Release (2008), *available at* http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0803.pdf; U.S. DEP'T OF JUSTICE, PUB. NO. 07-02, FCPA Review Opinion Procedure Release (2007), *available at* http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2007/0702.pdf.

[73] Joe Palazzolo et al., *Probe Widens into Dealings Between Finance Firms, Libya*, WALL ST. J., Feb. 3, 2014; *see also* Richard Cassin, *Hedge Fund Manager Och-Ziff Discloses FCPA Probe*, FCPA BLOG (Mar. 20, 2014, 3:08 AM), http://www.fcpa.com/blog/2014/3/20/hedge-fund-manager-och-ziff-discloses-fcpa-probe.html#.

[74] Palazzolo, *supra* note 73.

[75] *Id.*

[76] *Id.*

[77] *Id.*

lion hotel project that has yet to be completed.[78] This case demonstrates the tension between the United States' desire to police corrupt practices and to encourage U.S. companies to enter developing countries. The fact is that companies can find themselves being punished for something the government encouraged them to do.

Does this mean the government should dump the entire statute and start anew? No, but it does show that there are holes in this statute and its regulatory system that need to be addressed. One possible solution to this concern is outlined below.

IV. A New Affirmative Defense for Companies Entering Developing Economies

Here is another hypothetical: after adding a room to your house, you walk into that room one day and notice that behind your couch there is a hole in the wall. What do you do? Do you tear down the wall and have it rebuilt, or do you pull out your tools and patch the hole? Hopefully, you make the economic decision to patch the hole instead of rebuilding. Like a hole in a wall, there is a hole in the statute. What shall we do? The U.S. government can do exactly what the system is supposed to do in these cases and tweak the statute by amending it slightly to provide for companies to enter emerging markets with less fear about their own government coming down on them.

What this article proposes is a new affirmative defense that would allow U.S. companies to get approval to enter countries exiting major internal strife and, as a result, be safe from close scrutiny by the DOJ and SEC. This is basically a cross between a compliance defense and the current practice of DOJ issuing opinions on what constitutes corrupt action.[79] As a result, it satisfies concerns of both sides of this issue, by giving companies a bit more room to take the risk of entering these markets that desperately need foreign direct investment, while still promoting the goal of encouraging clean business.

As with most things in government, this would necessarily be a multi-step process. A company like IP, could approach the Fraud Section of the DOJ[80], or likely a smaller division within that section, with

---

[78] *Id.*

[79] One provision of the FCPA that I have not discussed in detail is the practice of DOJ issuing opinions on what constitutes actionable conduct. This power is given to the Attorney General in the statute and is regularly used to clarify the rules concerning the FCPA. *See* 15 U.S.C. § 78dd-1(e); *see also* Mike Koehler, *An Examination of Foreign Corrupt Practices Act Issues*, 12 Rich. J. Global L. & Bus. 317, 355–57 (2013) (discussing the guidance system).

[80] *See* U.S. Department of Justice, *About the Fraud Section*, The United States Department of Justice, http://www.justice.gov/criminal/fraud (last visited Jan. 10, 2014).

its proposal to enter a foreign market exiting major internal strife, which we have previously defined as a major natural disaster or political upheaval. This proposal should give a brief summary of the circumstances in the foreign nation, as well as the reasons why the company desires to enter that market. The core of this proposal should be a detailed plan for how the company plans to oversee their employees and operations in that market and ensures implementation of anti-corruption measures. If the program was sufficient, the DOJ, along with the SEC could sign off on the program, allow the company to enter the market, and the DOJ and SEC would only investigate if there were reports of rampant, blatant corruption.

To be clear, following this procedure would not exempt companies from the FCPA. Instead, it would increase the threshold of when action should be taken. The new defense should only apply for a relatively short period of time, say four years. This would allow the company time to enter the market, get their business up and running, and hopefully have a positive influence on the country. Additionally, companies do not have to follow this procedure to enter that market, but without following this procedure they would remain under the same level of scrutiny they currently face.

The point of this policy is not to defang or destroy the FCPA, but to fix a fundamental conflict between two major policy concerns involved in the legislation. On one hand, you have the desire to discourage and even eradicate corporate corruption by American companies wherever they may preside.[81] On the other hand, you have the goal of promoting economic growth throughout the world, and especially in developing markets.[82] As it currently stands, these two policies are in conflict when it comes to U.S. companies entering developing markets and especially markets exiting major internal strife. This proposal finds a happy medium by requiring companies to continue to fight corruption in their midst as well as allowing them to enter into lucrative markets that are desperately in need of their business.

One potential way to evaluate this idea is to look at the policies of other countries toward their own companies. One great example is China. While China has long outlawed the paying of commercial bribes, it only recently amended its Criminal Code to prohibit bribes to

---

[81] This is most evident in Senator Proxmire's statements at the beginning of the hearings that led to the FCPA. *See Foreign and Corporate Bribes: Hearings on S. 3133 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong. (1976), *microformed on* CIS No. 76-S241-38 (Cong. Info. Serv.).

[82] *See* USAID Sudan, *About Us: USAID Mission*, EMBASSY OF THE UNITED STATES: SOUTH SUDAN, http://southsudan.usembassy.gov/embassy-sections/usaid-mission.html (last visited Jan.17, 2014).

foreign governments.[83] While this amendment has been compared to the FCPA, China's enforcement of their anti-bribery statutes outside China falls far short of the U.S.'s efforts in this area.[84] Given that it is only two years old and it did take the U.S. a few decades to aggressively begin enforcing the FCPA, some benefit of the doubt can be given to China. Still, despite the relatively young age of China's law it is enlightening to see how this is affecting Chinese companies' investments in foreign countries, especially those in Africa.

China, along with its other BRICS partners (Brazil, Russia, India, and South Africa), made the conscious choice to focus their investments in Africa. China especially has focused much of its outgoing investments into Africa.[85] In fact, as of last year 49 of the continent's 54 nations had formalized diplomatic ties to China.[86] The point here is that China, on a national level has made the decision to invest into the African continent, which has led Chinese companies to follow suit. If China is so interested in promoting investment in Africa, why would they hinder that by harming their own companies entering the market? The answer is they would not, and neither should the U.S.

The FCPA plays a vital role in the larger policy of encouraging transparency in business transactions, which is a noble and important goal. At the time of its passage, it shattered international norms about how business should conduct themselves in other countries, but this law, like all law, is not perfect. Fortunately, the United States has a mechanism to fix laws, through an amendment. What the FCPA needs is a new affirmative defense that allows companies to enter into nations exiting major internal strife with the regulators' permission and do the good work that follows.

V. CONCLUSION

In 1975, the U.S. Congress passed the Foreign Corrupt Practices Act as a reaction to the scandal of Watergate. This law, which criminalized bribery and other corrupt practices by U.S. companies in foreign countries, was the first of its kind, but it would spark an inter-

---

[83] Amy Riella & Holly J. Warrington, *Expanding the Boundaries of China's Anti-Corruption Regime*, 4 FIN. FRAUD L. REP. 63, 63 (2012).

[84] To this point there has been no reported cases of China actually enforcing this amendment.

[85] *See* 2 OLIVER C. RUPPEL ET. AL, CLIMATE CHANGE: INTERNATIONAL LAW AND GLOBAL GOVERNANCE 558 (2013) (Professor Ruppel devotes a chapter in this book to the relationship between the BRICS partners and African nations. In particular he provides great insights into China's role in this policy).

[86] *See* Zhang Chun, *A Promising Partnership between BRICS and Africa: A Chinese Perspective*, THE CHINA MONITOR, Mar. 2013, at 30–37.

national movement to fight corruption in all its forms.[87] A little over a decade into the FCPA's life, Congress identified the fundamental flaw in the initial law, that its prohibitions were far too vague for a law with such a wide reach. To solve this, Congress added an exception (the facilitating payments exception) and two affirmative defenses (the foreign law defense and reasonable bona fide expenditure).[88] All three of which went a long way in fixing the flaws with the FCPA.

The importance of understanding the FCPA skyrocketed once enforcement began in earnest. In the mid-2000s a fundamental change in the importance of the FCPA occurred when the Department of Justice and the Securities and Exchange Commission began aggressively enforcing the FCPA.[89] Companies quickly realized that an FCPA violation could cost them millions and maybe even billions of dollars.[90] In this environment, it is likely that these companies began to pass up good business opportunities out of fear of a sanction.

At the core of the FCPA is the need to balance two competing policies. The promotion of transparent business practices stands as the clearest policy behind the FCPA. This policy stands in tension with the desire to promote Americans and for American companies to be active in other countries, by helping those in need. Because the United States should be in the business of promoting both values involved, a middle ground needs to be struck.

That middle ground is a new affirmative defense. To encourage U.S. companies to enter markets exiting periods of civil war or in the aftermath of a natural disaster, Congress should enact a defense to the FCPA that allows companies to approach the DOJ and SEC with a program for entering such a market without knowingly violating the FCPA. If the regulators approved, the companies would be free from close scrutiny for a period of a few years to really pour their efforts into that market. This would not compromise the overall effectiveness of the FCPA or hinder the policy toward transparency, because it would have a limited application. The FCPA is an excellent example of Congress responding to a crisis and making U.S. law better, but it needs some work.

---

[87] *See* OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (2011), *available at* http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

[88] *See* 15 U.S.C. §§ 78dd-1(b-c)

[89] *See* U.S. Securities and Exchange Commission, *supra* note 43.

[90] *Id.*