Universal Anti-Bribery Legislation Can Save International Business: A Comparison of the FCPA and the UKBA in an Attempt to Create Universal Legislation to Combat Bribery around the Globe

Lindsey Hills
University of Richmond Law School

Follow this and additional works at: http://scholarship.richmond.edu/global

Part of the Antitrust and Trade Regulation Commons, Banking and Finance Law Commons, Comparative and Foreign Law Commons, and the International Trade Law Commons

Recommended Citation
Available at: http://scholarship.richmond.edu/global/vol13/iss3/3

This Article is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in Richmond Journal of Global Law & Business by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.
UNIVERSAL ANTI-BRIBERY LEGISLATION CAN SAVE INTERNATIONAL BUSINESS: A COMPARISON OF THE FCPA AND THE UKBA IN AN ATTEMPT TO CREATE UNIVERSAL LEGISLATION TO COMBAT BRIBERY AROUND THE GLOBE

By: Lindsey Hills*1

TABLE OF CONTENTS

I. INTRODUCTION ........................................... 470

II. A COMPARATIVE ANALYSIS OF THE UKBA AND THE FCPA IN THE INTERNATIONAL REALM ........................................... 470

1. The Foreign Corrupt Practices Act ......................... 471
2. The United Kingdom Bribery Act .......................... 472
3. Differences Between the FCPA and the UKBA Lead to Inconsistencies, Leading to a Call for Universal Legislation ........................................... 474

   a. Facilitating Payments .............................. 476
   b. Affirmative Defenses .............................. 476
   c. Compliance Defense .............................. 477
   d. These Inconsistencies Lead to Varying Enforcement Patterns for Multi-National Corporations, Creating Difficulty for Adequate Compliance ..... 478

      i. FCPA Enforcement .............................. 478
      ii. UKBA Enforcement .............................. 481

III. DIFFERENCES WITHIN THE FCPA AND THE UKBA CREATE DUPICATIVE ENFORCEMENT AS WELL AS A COMPETITIVE DISADVANTAGE ........................................... 482

   1. Universal Legislation Is Necessary to Remedy Duplicative Enforcement ........................................... 482
   2. Because the OECD Lacks Enforcement Power, Establishment of an Act with Universal Enforcement Jurisdiction Is Imperative ........................................... 485

IV. THE DESPERATE NEED FOR A SOLUTION ................. 487

   1. How to Accomplish Universal Legislation ................. 490
   2. Proposed Provisions .................................. 490

V. CONCLUSION ............................................. 492

*1 *J.D. 2014, University of Richmond T.C. Williams School of Law; B.A. 2010, Furman University.
I. INTRODUCTION

We are facing an epidemic where bribery is infiltrating the international business realm in a way that demands immediate action. The United States has attempted to combat this via the Foreign Corrupt Practices Act ("FCPA") in conjunction with the Organization for Economic Co-Operation and Development ("OECD"). In addition, the OECD's peer-pressure influence resulted in the United Kingdom enacting the U.K. Bribery Act ("UKBA") in 2011.

Taken together, these varying acts may have one believing that corruption is facing a solid wall of enforcement legislation. On the contrary, the UKBA and the FCPA contain a multitude of different standards, which require companies to create two separate compliance programs while spending millions of dollars to deal with these discrepancies. The unfair disadvantage to companies trying to comply, as well as the argued competitive disadvantage to companies from the U.K. and U.S. respectively, has led to the need for universal anti-bribery legislation.

These two acts set up a solid foundation, however, there needs to be universal alignment in order to successfully combat corruption in the global realm, and achieve international anti-bribery success. In this Article, Part I will compare and contrast the similarities and differences in both acts based on their language, enforcement, and practices. Part II will then discuss the effects these differences in enforcement provisions have had on the international business arena. Lastly, Part III will demonstrate why there is such a vital need for universal legislation regarding anti-bribery, and will propose sample legislation combining the most effective provisions from both acts in an attempt to cohesively universalize the anti-bribery international business realm. This will detail how universal legislation not only improves international business, but incentivizes the world to aid in combating worldwide corruption.

II. A COMPARETIVE ANALYSIS OF THE UKBA AND THE FCPA IN THE INTERNATIONAL REALM

While the FCPA and the UKBA have a common goal, their differences have lead to a multitude of problems for multi-national corporations. Complying with different textual definitions, as well as differing enforcement practices and defenses, such as facilitating payments and adequate procedures, creates a dichotomy that cripples international companies actively trying to comply with both the UKBA and the FCPA. These differences demand further legislative action so as to aid, not hinder, international business.

While the differences between the FCPA and the UKBA highlight the need of universal legislation, the goals and motives surrounding their enactment and continued enforcement remain the same. This
combined end game drives the fight against international bribery in a relatively cohesive manner.

1. The Foreign Corrupt Practices Act

The FCPA was enacted in 1977 under President Jimmy Carter as a response to widespread bribery discoveries by the Securities and Exchange Commission (“SEC”), as part of the investigation into the Watergate scandal. The major catalyst was the investigation into Lockheed, which uncovered a series of bribes made by officials to negotiate sales of Lockheed aircrafts. The FCPA's principal goal was to effectively halt corrupt practices, and create a level playing field for international businesses, in addition to restoring public confidence. While it was enacted in 1977, the Act remained relatively un-litigated until the late 1990s.

The Foreign Corrupt Practices Act specifically prohibits paying, offering to pay, promising to pay, or authorizing someone to pay forward anything of value to a foreign official to obtain or retain business. This applies to issuers, domestic concerns, and anyone within the limits of territorial jurisdiction. An issuer is someone listed on a national securities exchange in the United States, or on an American Depository Receipt, or a company who trades stocks “over-the-counter” in the United States. A domestic concern is any United States citizen or national, or any resident in the United States, or company organized under U.S. law, or one that has their principal place of business in the United States. Put simply, there are five elements that must be met for an FCPA violation: (1) the briber must be a U.S. citizen, busi-

---

5 See U.S. Dep’t of Justice & U.S. Sec. and Exch. Comm’n, supra note 2, at 2.
8 Id.
9 Id.
ness entity or employee of a U.S. business entity or any company listed on a U.S. stock exchange; (2) the bribe must be made with corrupt intent; (3) payment or offer of payment must be anything of value; (4) the recipient must be a foreign government official; and (5) the bribe must have been offered or paid to obtain or retain business.\(^\text{11}\) It is noteworthy that domestic concern is defined broadly, as described above. In addition, foreign activity of private United States companies falls within the FCPA’s scope;\(^\text{12}\) yet the FCPA does not prohibit bribes paid to officers or employees of private, non-governmental entities.\(^\text{13}\) While this sets up a solid foundation for any potential universal legislation, there are loopholes that should be amended in order to make these provisions more effective as a bribery combatant. The limit on which types of bribes are offered is problematic and needs to be addressed with any future legislation; however, the broad definition of domestic concern is a good start to encompassing as many international business actors as possible.

2. The United Kingdom Bribery Act

In the simplest of terms, the United Kingdom implemented the Bribery Act due to the OECD bullying the United Kingdom. The OECD did this by essentially exposing them for having a lackluster, non-impactful, and passive anti-bribery implementation system. It was said that the UK’s “inadequate anti-bribery laws were the subject of constant criticism by the OECD,\(^\text{14}\)” magnified in a 2008 report published by the OECD, which “extensively criticized the UK’s persistent failure to address its deficient anti-corruption and anti-bribery laws.”\(^\text{15}\) The response was an Act, implemented in 2011, which creates new offenses and has further international reach than the scope of the United States’ FCPA.\(^\text{16}\)

A brief summation of the relevant sections of the UKBA is critical at this point. Sections 1 and 2 refer to general offenses, which prohibit the giving and taking of bribes in both the public and private sector; it also bans commercial bribery,\(^\text{17}\) which includes bribes offered


\(^{12}\) Id. at 94.

\(^{13}\) Id. at 96–97.

\(^{14}\) See id. at 91–92.

\(^{15}\) Id. at 92.

\(^{16}\) Id.

or paid in connection with purely commercial activities. Provisionally, this is very broad and extends to any activity “connected with business, performed in the course of a person’s employment or performed on behalf of a company.” Section 7 establishes a new corporate offense for failing to prevent bribery with the exception of proof of adequate reporting procedures in place. This Section applies to any company which “carries on a business or part of a business” in the U.K. regardless of where the offense takes place. The UKBA’s general offenses prohibit bribery of any person; this includes non-public officials, with the intent to induce improper performance of a relevant duty.

There are four separate offenses under the UKBA: bribing, being bribed, bribing a foreign public official, and failing as a commercial organization to prevent bribery. These are governed by a “close connection” test, with no corrupt intent required, and primarily deal with inducements to improperly perform a relevant duty, agreeing to receive a bribe, and the strict liability corporate offense of failing to prevent bribery. This added offense of failing to prevent bribery is a huge step forward in combating international corruption. It builds off the provisions of the FCPA and holds an even larger group of people and entities accountable for any act of bribery, or feigned ignorance, in regards to bribery’s impact on international business deals. This provision greatly expands who is subjected to accountability under anti-bribery legislation. However, the implementation of this provision under the UKBA, with a complete absence of any similar provision in the FCPA creates an international regulation divide, which leads to numerous problems for complying companies.

The most important similarities between the FCPA and the UKBA are in the plain text. Most notable, are their similar definitions of public official, as well as the fact that their actual practice in most areas may not substantially differ. In addition, they are both vague on payments. The FCPA does not define “anything of value,” while the UKBA simply says “any other financial or other advantage.” This ambiguity can lead to differing enforcement practices. Their extraterritorial provisions, as will be discussed in further detail later, are similar in reach, with the UKBA being slightly broader. Most importantly however, both acts’ ideals and goals mirror one another.

18 Id. at 11.
19 Id.
20 Id. at 2–3.
21 Id. at 3.
22 Id. at 6.
23 See Hunter, supra note 11, at 93–95.
24 Id. at 95–96.
25 See Fine, supra note 17, at 3.
26 Id. at 7.
3. Differences Between the FCPA and the UKBA Lead to Inconsistencies, Leading to a Call for Universal Legislation

The differences between the Acts lead to potentially duplicative enforcement and undefined ambiguity, leaving multi-national corporations in the dark as to how best to decipher the inconsistencies in determining how to effectively frame their internal compliance provisions. The differences range from language discrepancies, to exceptions, to affirmative defenses, to penalties, and to compliance. All of which are vital in the enforcement of these acts and create a dichotomy which businesses are left to define.

The FCPA deals with bribery of foreign officials, while the UKBA deals with bribes to any person.\(^27\) This discrepancy creates ambiguity with regard to whom companies can conduct different aspects of their business. In addition, the FPCA deals with payment to obtain or retain business, while the UKBA deals with intention to induce improper performance.\(^28\) Not only are these both imprecise in regards to what meets their requirements, but they also show that at the very foundation of both acts, bribery is defined differently. This discrepancy is not an effective international bribery combatant.

While the definitions of bribery remain dissimilar, there is also the concern of intent. The FCPA requires corrupt intent, while the UKBA requires intent to induce, not necessarily in a corrupt manner.\(^29\) The differences in intent requirements can lead to abstruseness and, effectively, a gray area for companies trying to conduct business within the provisions of these acts. In addition, the FCPA limits their corporate strict liability to accounting provisions, under a “Books and Records Provision” while the UKBA established a new offense of failure by a commercial organization to prevent bribery.\(^30\) One Act requires your books and records to be on display, while the other holds you accountable for not stopping bribery. This creates a level of ambiguity that makes it incredibly difficult, if not impossible, for international companies to effectively and efficiently regulate against bribery. There are also significant differences in their senior official liability. To be liable, the FCPA requires that the senior official simply fail to adequately supervise the conduct of those that work for him,\(^31\) while the UKBA requires the senior official to “consent or connive” in the act of bribery.\(^32\) These differences could be significant in the event of liti-
gation. If under one act, a senior official is liable due to his position, but under the other act, he is liable only if there is consent, then this clearly creates a problem for any and all international corporations.

One of the most significant linguistic differences between the Acts is how they define their extraterritorial jurisdictional limits. The FCPA includes anything listed on the U.S. stock exchange, as well as U.S. companies, or companies with their principal place of business in the U.S.\textsuperscript{33} The UKBA does not have the stock exchange provision, however, the UKBA follows a “conducting business” requirement where even part of their business activities being conducted in the U.K. will satisfy to afford jurisdiction under the Bribery Act.\textsuperscript{34} This “conducting business” provision has the potential to reach numerous international companies that have very little connection with the U.K. This creates the potential for corporate susceptibility at a “significantly greater” level than what is provided under the FCPA.\textsuperscript{35} In addition, the UKBA prohibits both public and commercial bribery, another provision not accounted for under the FCPA.\textsuperscript{36} By expanding their jurisdiction in this way, the UKBA inevitably holds more people accountable to bribery violations, while the FCPA does not. Lastly, the FCPA provides for successor liability, where the parent company can be held liable for past anti-bribery violations of a company, even if it happened before the acquisition;\textsuperscript{37} alternatively, the Bribery Act leaves open whether there is successor liability over acquired companies or not.\textsuperscript{38} With the ever-expanding international business realm, the issue of successor liability has become a provision that affects most multi-national corporations during their day-to-day operations. With this high standard for successor liability, and with no remedy for ‘good behavior’ or adequate provisions, the FCPA holds corporations accountable at a new level, potentially stalling the progressive expansion of international business.

These examples of differences are merely based on the plain text of the Acts. As we look toward the application side of both Acts, it will reaffirm that there is a significant enforcement problem due to these discrepancies for international companies: a problem that needs to be resolved sooner rather than later. This multitude of discrepancies requires multi-national corporations to expense numerous hours and immeasurable finances on complying with small differences between

\textsuperscript{34} See generally U.K. Bribery Act, 2011, c. 23 (Eng.).
\textsuperscript{35} Fine, supra note 17, at 11.
\textsuperscript{36} Hunter, supra note 11, at 97.
\textsuperscript{38} Id.
each act in an attempt to combat bribery. This seems excessive and taxing on corporations simply trying to comply.

A. Facilitating Payments

Facilitating payments is an area where the discrepancies greatly hurt international business and lead to the above-mentioned duplicative enforcement. For example, the FCPA allows facilitating or grease payments, which are made to expedite or secure the performance of routine governmental actions.\(^{39}\) On the other hand, the UKBA will offer no exception for facilitating payments, unless it is a payment allowed by local law;\(^{40}\) the UKBA holds a zero tolerance policy for any type of facilitating payments.\(^{41}\) The FCPA exception allows payments that “merely move a particular matter toward an eventual end.”\(^{42}\) This would most likely include gratuities to customs officials in order to expedite customs documents. The lack of exception under the UKBA causes U.K. companies to be placed at a competitive disadvantage.\(^{43}\) Another disadvantage to U.K. companies is the ambiguity regarding prosecution of these facilitating payments. While the Serious Fraud Office (“SFO”), the chief enforcement agency of the UKBA, has continually stated that they do not anticipate many prosecutions regarding facilitating payments,\(^{44}\) the government has discussed their seriousness in eliminating facilitating payments worldwide and has expressed interest in doing so via aggressive prosecutions.\(^{45}\) This disastrously large discrepancy between the two Acts causes a multitude of practical business problems. It fosters different everyday business practices depending on which Act’s jurisdiction a corporation is complying with in an operational sense. For example, one company dealing with shipping to different areas could potentially have to deal with using facilitating payments for one shipment, while they are prohibited from using facilitating payments for the other shipment. This causes companies to have to comply with different regulations for the same business practices. This hardly seems practical or efficient. This very notion exemplifies the call for uniformity among anti-bribery acts.

B. Affirmative Defenses

The differences between the FCPA and the UKBA regarding affirmative defenses might be one of the most difficult discrepancies

\(^{39}\) See Hunter, supra note 11, at 99.

\(^{40}\) Id. at 100.

\(^{41}\) See Fine, supra note 17, at 18.

\(^{42}\) Hunter, supra note 11, at 99-100.

\(^{43}\) Id. at 100.

\(^{44}\) Id.

\(^{45}\) Fine, supra note 17, at 19.
for companies to overcome. In short, the FCPA allows for reasonable and _bona fide_ expenditures as long as it complies with local laws.\footnote{Hunter, supra note 11, at 101.} These reasonable _bona fide_ expenditures can include payments of gifts or anything of value, if lawful under the written laws of the region or if it was directly related to the promotion, demonstration, or execution of performance of the contract with a foreign government or agency.\footnote{Id. at 101–02.} For example, this includes travel and lodging expenses, meals, etc. This however excludes any payments made with corrupt intent, which would effectively void any _bona fide_ expenditures defense.

The UKBA has no similar defense. That being said, guidance from the U.K.’s Ministry of Justice has strongly implied that reasonable and proportionate promotional expenditures will be allowed as long as they remain small and do not constitute a pattern.\footnote{Id. at 102.} But what does this mean in practice? An interesting development under the UKBA has been the application of a national security defense. If something conflicts with national security issues, then it can preclude any prosecutorial action for UKBA violations.\footnote{Fine, supra note 17, at 20.} This was evidenced in the BAE Systems case where Tony Blair was concerned about a terrorist attack if prosecutorial actions were commenced any further, and so the investigation was essentially halted on national security grounds.\footnote{Elizabeth K. Spahn, _Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention_, 53 VA. J. INT’L. L. 1, 23 (2012).} The FCPA has no such provision. However, this begs the question, what is a national security ground? How broad does that exception reach? This uncertainty in prosecutorial conduct once again leaves companies in an undefined gray area.

\section*{C. Compliance Defense}

One of the biggest critiques of the FCPA is its lack of a compliance defense, especially in light of the UKBA's prominent stance on compliance defenses. In continued efforts of ambiguousness all-around, the U.S. enforcement authorities have said they will take compliance into consideration during prosecutions.\footnote{Hunter, supra note 11, at 104.} However, in action, companies are generally credited for good practice, but the effects of the “good deeds” usually only affect the sentencing areas of prosecution.\footnote{Fine, supra note 17, at 21.} It affords little-to-no aid anywhere else in the prosecutorial system. There has been large critique over the FCPA's lack of compliance program; many have pushed toward a compliance program's positive...
effects, given the UKBA’s provision. Critics argue it would be invaluable to protect U.S. companies operating overseas.\footnote{Hunter, supra note 11, at 106.}

The Adequate Procedures Provision, a compliance defense to corporate liability under the UKBA, affords companies certain levels of complete deniability if they can demonstrate adequate procedures were in place and geared towards preventing bribery.\footnote{Id. at 103.} This defense to liability for each provision of the UKBA greatly aids corporations in conducting their businesses efficiently. These procedures aided in preventing those associated with the company from engaging in conduct that would result in violations of the Act.\footnote{Id. at 106.} Some examples of the adequate procedures are laid out in Section 7 of the Act: overall program design, tone at the top, risk assessment, due diligence, communication (including training), and monitoring and review.\footnote{See Hunter, supra note 17, at 21.} If companies fail to demonstrate adequate procedures, there is a strict liability offense. However, if there are adequate procedures in place, the company is “off the hook” for violations. This discrepancy is too wide. One Act allows and the other does not, which leaves companies unsure of whether their actions amount to a violation.

D. These Inconsistencies Lead to Varying Enforcement Patterns for Multi-National Corporations, Creating Difficulty for Adequate Compliance

Due to linguistic differences in both Acts, enforcement and remedial measures have greatly differed, as have each enforcement agencies’ practices. The FCPA has led the way in various additional enforcement actions to hold multi-national corporations accountable, while the UKBA’s stringent enforcement policies could potentially fail under the realities of the business world.

i. FCPA Enforcement

While the United States’ Department of Justice (“DOJ”) and Securities and Exchange Commission (“SEC”) both have jurisdiction over certain issuers and domestic concerns, most cases never actually get to trial. Almost all FCPA issues are resolved via non-prosecution agreements and deferred prosecution agreements.\footnote{FCPA 101, FCPA PROFESSOR (2011), http://www.fcpaprofessor.com/fcpa-101.} A non-prosecution agreement, or NPA, is a privately negotiated agreement between the DOJ and the violating company, where the DOJ agrees not to prosecute under the condition that the company admits fault and agrees to
UNIVERSAL ANTI-BRIBERY LEGISLATION

compliance undertakings.\(^{58}\) NPAs are not filed with a court.\(^{59}\) A deferred prosecution agreement, or DPA, is technically filed with a court and has the same appearance as a criminal indictment, however, here the DOJ agrees to defer prosecution of the company if it acknowledges responsibility and again agrees to host compliance undertakings.\(^{60}\) Under these agreements, the companies have to acknowledge fault or responsibility, but they do not have to plead guilty to any charges, and they are never found in violation of the FCPA; consequently, they are not debarred.\(^{61}\) Under the FCPA provisions, if one is charged and found guilty, debarment is a potential consequence, which is a huge catalyst behind the increasing use of NPAs and DPAs within the U.S.\(^{62}\)

While it may be perceived in the press that companies are continuously convicted of anti-bribery violations, it is not in fact the case. For example, Siemens, who had to pay approximately $800 million to U.S. authorities as an FCPA settlement, was never convicted of FCPA violations.\(^{63}\) As stated above, if they had been convicted, they may have been debarred from doing business in the United States. Instead, Siemens simply settled under an agreement with the U.S. government. The same is true for BAE Systems, a well-known case in 2010 regarding bribes to Saudi public officials.\(^{64}\) BAE was also never convicted of FCPA violations.\(^{65}\) Both companies settled under various NPAs and DPAs. The DOJ has said that the issue of debarment was a significant factor in why they did not charge Siemens or BAE with FCPA anti-bribery violations.\(^{66}\) If there were different end results, one that either afforded companies a compliance defense under the FCPA, such as the UKBA’s adequate procedures defense, or offered solutions other than debarment, then maybe the DOJ would not have to rely so heavily on the NPAs and DPAs. That being said, NPAs and DPAs are a couple of the best available solutions for anti-corruption, creating a level of accountability without completely crippling an international corporation.

In addition, FCPA actions have increased rapidly over the last few years for both the DOJ and the SEC. The SEC claims it gets about

\(^{58}\) Id.
\(^{59}\) Id.
\(^{60}\) Id.
\(^{61}\) Id.
\(^{62}\) Id.
\(^{63}\) Id.
\(^{64}\) Id.
\(^{65}\) Id.
\(^{66}\) Id.
eight tips a day.\textsuperscript{67} That being said, the fines are rarely as high as one might expect.\textsuperscript{68} FCPA violations have spread vastly around the world, with the most prevalent area for bribery being China, followed by Iraq, and Nigeria.\textsuperscript{69} Due to the world’s increased manufacturing presence in China, it is no surprise that bribery in China is magnified. In addition, it is common knowledge that bribery is rampant in the course of business in India. This leads to a ‘cost of doing business’ argument, which will be discussed below. Investigations in the United States totaled 106 investigations in 2010 and 113 in 2011, whereas the total number of cases in those years respectively was 227 and 275.\textsuperscript{70} In addition, the SEC had thirteen actions brought in 2011, eight of which were resolved through consent judgments, four were resolved through administrative cease and desist orders, and one was resolved through a DPA.\textsuperscript{71} In contrast, the DOJ brought only one contested action in 2011, and ten other criminal cases, most of which were resolved either through a NPA or a DPA.\textsuperscript{72} FCPA enforcement has increased over the years because of these alternatives: “what[ has] really changed is not so much the legislation, but the enforcement and approach to enforcement by U.S. authorities.”\textsuperscript{73} These numbers show that bribery remains a major thorn in the realm of international business. It has not lessened, and in fact has become more prevalent in countries that are expanding further into the global business world. The FCPA’s NPAs and DPAs afford an additional type of enforcement, which punishes the appropriate violators without creating an international debarment issue. This increase in FCPA cases further shows the demand for a new level of enforcement action to combat the growing bribery problems.


\textsuperscript{69} Id. at xi. (Asia (excluding China) 20%, China 9%, Middle East (excluding Iraq) 10%, Iraq 9%, Central Asia and Russia 8%, Europe 12%, Africa (excluding Nigeria) 9%, Nigeria 9%, and the Americas 14%).


\textsuperscript{71} See Shearman & Sterling LLP, supra note 68, at xii.

\textsuperscript{72} Id. at xi.

\textsuperscript{73} FCPA 101, supra note 57.
This lack of actual enforcement and heavy reliance on NPAs and DPAs urges us to ask the question: should the FCPA enforcement action procedures be restructured to better reflect the actual goings-on? Should there be explicit language discussing the NPAs and DPAs in more depth? If almost all of the prosecution is going to be through these agreements, shouldn’t the UKBA also have these procedures? What will the UKBA do when it comes time to prosecute without this alternative? More enforcement leads to further compliance in a country hesitant to change due to lackluster rulings. DPAs and NPAs bring that raised level of enforcement.

**ii. UKBA Enforcement**

The UKBA does not have a remedy equivalent to the FCPA’s NPAs and DPAs, which could greatly cripple their enforcement capabilities. The SFO recently revised its enforcement policies in October 2012 to restate the SFO’s primary role as investigator, to ensure consistency, and to meet certain OECD requirements.\(^74\) The newfound provisions provide for a “Full Code Test,” which requires sufficient evidence to provide a realistic prospect of conviction as well as evidence that the prosecution is in the public’s interest.\(^75\) The SFO goes on to clarify that they will not waiver in regard to facilitating payments – small amounts will be unacceptable in the course of doing business – and that facilitating payments are illegal in the U.K. irrespective of their size or frequency.\(^76\) Lastly, the SFO declared a focus on investigating business expenditures\(^77\) without truly defining what these business expenditures entailed.\(^78\) These new provisions hardly seem revolutionary. In fact, they seem to attempt to provide clarity without clearly defining what facilitating payments or business expenditures really are.

In addition, the lingering question of what the UKBA enforcement will actually look like in light of these revisions is something we must look into, in anticipation of creating a structure for universal legislation. These revisions to the UKBA came about due to the continued critique that the prosecutorial appetite of the SFO was minimal. The U.K. investigated a total of seventeen cases in 2010 and twenty-three in 2011.\(^79\) That being said, there have been only a few prosecutions

---


\(^75\) Id.

\(^76\) Id.

\(^77\) Id.

\(^78\) See Navigant, supra note 70.

\(^79\) Id.
under the Bribery Act to date, and most have involved individuals rather than corporations.\textsuperscript{80} However, while the critics comment that the SFO’s prosecutorial appetite is small, and while it may very well be minimal, one major reason for the lack of cases is because the Bribery Act does not act retrospectively.\textsuperscript{81} The SFO is limited in their enforcement of any new provisions to bribes occurring after the enactment of the UKBA in July 2011, and one must also factor in time to conduct an investigation.\textsuperscript{82} While enforcement will most likely remain limited for the foreseeable future, when it does occur, the U.K. is going to have to revise the Bribery Act. It will have to come up with some sort of solution to the lack of clarity and ambiguous provisions, which do not mirror the FCPA. Universal legislation could solve all of these problems at once. As soon as the SFO begins to increasingly and proactively regulate on an international scale, these companies will have a more escalated problem in dealing with issues such as, eliminating loopholes, defining the gray area, and avoiding duplicative enforcement by spending millions of dollars on varying degrees of compliance to each country’s individual Act(s).

III. DIFFERENCES WITHIN THE FCPA AND THE UKBA CREATE Duplicative Enforcement AS WELL AS A COMPETITIVE DISADVANTAGE

Whether one is looking at the potential harm of duplicative enforcement for multi-national corporations, or analyzing the lack of enforcement power of the OECD, it is clear that there is a desperate need for a solution. These differing provisions have so far been unsuccessful in solving the infectious bribery epidemic; in fact, the discrepancies are facilitating it. An act with universal enforcement jurisdiction needs to be implemented to properly fight for the fundamental goals established under the FCPA and the UKBA.

1. Universal Legislation Is Necessary to Remedy Duplicative Enforcement

The potential for duplicative enforcement causes a vast logistical problem within the international business realm, and must be remedied via universal legislation. Universal anti-bribery enforcement is necessary to combat the growing encroachment of duplicative enforce-


\textsuperscript{81} See Bribery and Corruption, Ashurst LLP 5, Feb. 2014, https://www.google.com/url?q=http://www.ashurst.com/doc.aspx%3Fid_Resource%3D4649&amp;sa=U&amp;ei=w51RU9CpEPSosQTUsIHBg&amp;ved=0CBsQFjAA&amp;usg=AFQjCNG7T4f5f5f5djElm30MDvj2zgJ0DA.

\textsuperscript{82} See id.
ment. Whether through extended extraterritorial reach, or enactment of a compliance defense in the FCPA, there needs to be a solution to the continuing trend of duplicative enforcement problems for multinational corporations.

The most practical way to solve the potential for increased duplicative enforcement issues is to create a universal anti-bribery enforcement system to combat corruption in the international business world. Duplicative enforcement is not a hypothetical; there have already been cases where companies have been brought to justice under more than one Act.

The first case is Siemens. Siemens was under investigation by the DOJ and the SEC, as well as the Munich Public Prosecutor’s Office.\(^{83}\) Siemens successfully cooperated with both countries, but nonetheless ended up having to pay significant fines in both jurisdictions for the same offense.\(^{84}\) BAE, as discussed previously, was due for trial in the United Kingdom, and then under the umbrella of national security concerns, Tony Blair called off the investigation.\(^{85}\) Soon after, the United States’ DOJ initiated its own investigation into BAE Systems, leading to the establishment of a cooperative prosecution by the two countries.\(^{86}\)

In addition, Halliburton/TSKJ has recently come into some anti-bribery concerns. Their troubles spanned over twelve different jurisdictions.\(^{87}\) Currently, the DOJ has spearheaded the investigation encouraging the SFO to take a back seat. If there is cooperation, this twelve-jurisdiction claim could result in Halliburton/TSKJ being prosecuted in one area alone. However, if international agency cooperation is unsuccessful, Halliburton/TSKJ could end up with duplicative investigations in multiple regions around the world. Lastly, there is Innospec. This situation deals with the U.K.’s SFO taking over a case after enforcement competition with the United States.\(^{88}\) After the agencies decided that the SFO would lead the investigation, there was cooperation from three U.S. agencies, which helped lead the SFO to one of their first global settlements.\(^{89}\)

This idea of cooperative efforts works well in theory, and so far has not caused many international problems. However, what happens

---

\(^{83}\) See Spahn, *supra* note 50, at 26–27.

\(^{84}\) *Id.* at 26 n.133, 27.


\(^{86}\) See Spahn, *supra* note 50, at 25.

\(^{87}\) *Id.* at 27.

\(^{88}\) *Id.* at 31.

\(^{89}\) *Id.*
when both countries want to prosecute? Does the company then have to deal with investigations in numerous arenas under different Acts with various criteria? Under the current laws, yes.

There is potential for all of this to change. There are currently two international investigations pending which could set the stage for the next wave of anti-bribery enforcement. The DOJ is investigating Wal-Mart, while the SFO is investigating Rolls Royce. Both cases have the ability to set major precedent in which direction each Act’s enforcement will trend. In both cases, the companies are helping with the investigation by providing the DOJ and SFO, respectively, with information regarding their company’s practices in various countries around the globe.

Wal-Mart has reacted by taking a defensive, yet active stance: it has fired most of the executives that were involved in the bribery allegations90 and as the investigation expanded into India, the Bharti Wal-Mart suspended its CFO and its legal team for the entire country.91 It has also publicly stated its cooperation numerous times92 in addition to conducting a “worldwide review of its compliance controls,” it is also already making substantial changes to its infrastructure, such as updating compliance procedures, which has cost around $30 million.93 Furthermore, Wal-Mart hired a new head of international legal compliance in an effort to centralize its compliance in international operations (totaling 26 countries).94 They claim this hiring is “consistent with their ongoing efforts,” such as strengthening their compliance programs through concrete actions.95

On the other side, the SFO has begun an investigation into Rolls Royce, which makes aircraft engines. This investigation is based on whistleblower information regarding the company’s violations of anti-bribery law in China and Indonesia.96 Due to the company con-

93 Id.
94 Id.
95 Id.
ducting some of its business in the U.K., Rolls Royce availed itself of the Bribery Act’s jurisdiction. The debate in this case is whether or not the SFO will prosecute. There has been much speculation that the SFO may prosecute this case because of the public perception that they prefer civil settlements to criminal prosecutions.97

These cases have the potential to shape foreign bribery laws. Wal-Mart could potentially be tried for bribery violations in the U.S., India, China, and Brazil, among other nations, while Rolls Royce could potentially be tried for bribery violations in the U.K., China, and Indonesia. Both of these companies could be liable in different countries under differing Acts, for the same exact bribes. How is this fair? Each company should definitely be held accountable for their actions, however this form of duplicative enforcement, which borders on double jeopardy, is not the way to accomplish it. What if there was one act with the same jurisdiction, penalties, and enforcement? Would this stop a potential duplicative prosecution?

2. Because the OECD Lacks Enforcement Power, Establishment of an Act with Universal Enforcement Jurisdiction Is Imperative

The OECD Working Group has previously attempted to address concerns raised due to these multijurisdictional bribery prosecutions. The Working Group discussed the possibility of establishing certain criteria for a single jurisdiction prosecution, however, nothing was agreed upon.98 The OECD’s apparent lack of enforcement power distances it from being promising legislation, and closer to simply being effective monitoring and policing.

It has been argued that there is no need for universality because the OECD Convention on Combating Bribery has been in effect since 1997.99 However, ironically enough, the OECD developed this branch to combat bribery due to pressure from the United States,100 stemming from corruption concerns and unfair competitive disadvantages to U.S. companies due to the United States’ FCPA provisions. The OECD’s main goals are to encourage various sanctions against bribery, encourage countries to make bribery illegal, and to level the international business playing field.101 The OECD operates under a

97 Id.
98 See Spahn, supra note 50, at 23.
100 Id.
486 RICHMOND JOURNAL OF GLOBAL LAW & BUSINESS [Vol. 13:3

“horizontal enforcement model in which each signatory state enforces against foreign bribery through its own distinct domestic legal system.”102 However, this horizontal enforcement model has little to no enforcement power.

The OECD includes a provision requiring signatories to make it a crime to bribe foreign officials during international business transactions.103 However, despite this provision’s enactment fifteen years ago, there is still not full compliance. The OECD does however boast that there has been significant success in implementation through its peer-review process (similar to the way it pushed the U.K. to enact the Bribery Act).104 The OECD historically chastised countries in an attempt to drive them to fix their enforcement actions and make peer-review processes more actionable.105 In short, the OECD has past success in its peer-pressure format, but lacks the jurisdiction to actively implement any universal enforcement mechanisms. The Convention also lacked the ability to change worldwide levels in corruption according to recent studies, which reveal shortcomings in the Convention itself.106 The study shows public perception of limited enforcement possibilities, and a call for facilitation payments, further international cooperation, greater whistleblower protection, and broader preventative measures, yet the problems inevitably circle back to the OECD’s lack of enforcement power.107

There are only four countries that actively enforce anti-bribery measures as a result of the OECD’s push, and there are fifteen countries that enforce a moderate level of anti-bribery legislation.108 Its future is in serious jeopardy because there are a limited number of parties who adequately enforce the Convention.109 The most influential signatories to the OECD are the United States, the United Kingdom, Italy, Norway, Switzerland, Denmark, and Germany.110 The entire success of the OECD hinges upon the signatory countries imple-

---

102 Spahn, supra note 50, at 49.
103 Tyler, supra note 99, at 137.
104 Id. at 139.
106 Tyler, supra note 99, at 166.
107 Id. at 163.
108 Id. at 168.
110 Exporting Corruption, supra note 101, at 8.
menting the OECD’s suggestions. How does the OECD combat that implementation problem without the power to do so, and without becoming a universal enforcement act?

IV. THE DESPERATE NEED FOR A SOLUTION

The inconsistencies’ effect on enforcement causes bribery to slip through gaps in enforcement power and remain prominent in the international business realm. Bribery has an enormously damaging effect on international business. “Bribery. . .inhibits free trade and economic development in many countries by undermining competition in these international markets.” Setting up a system of international business soaked in bribery creates unfair advantages to more developed countries, which can afford to pay the bribes and do not have anti-bribery legislation. It also gives an advantage to bigger and more affluent companies. The World Bank echoed this sentiment by saying, “corruption has a negative relationship with per capita GDP. . .lowers the quality of public infrastructure. . .lowers public satisfaction. . .undermines the official economy, and reduces the effectiveness of development aid and increases inequality and poverty.” The inconsistencies within the two Acts exacerbate these problems on a global scale. They lead to unfair advantages, a multitude of expenses, and duplicative enforcement, all while deterring business due to unfair competitive disadvantages. This problem can be fixed.

The FCPA and UKBA’s immense impact has been an ideal first step in combating bribery, but the Acts can only take it so far. Ten years ago, bribes were a culturally acceptable business practice. They led to long-standing relationships, and were even tax deductible in Europe. Now everything has changed. The OECD has pushed for further regulation and the countries have complied. The FCPA has “become a major legal issue for all multinational companies across various industry sectors” as it has surged to the forefront of these corporations’ concerns. The UKBA is likely to quickly follow in its footsteps. How do we smooth this transition so we remain active in the fight against bribery and corruption while maintaining international business’s fervor?

112 See Hunter, supra note 10, at 90.
113 Id.
115 Id.
First of all, there needs to be a way to eliminate the ambiguity in the Acts. For example, the concept of both “bribe” and “foreign official” are so vaguely defined in both the FCPA and the UKBA that it is better to simply not give money to anyone, however, that has proven to be impractical. Another problem is the indistinctness in definitions of bona fide expenditures. While these are not present in the UKBA, the FCPA’s guidelines on “wining and dining” leave too much room for interpretation. Companies need to know where the line is between simply taking someone out to dinner and an anti-bribery violation. There needs to be a line drawn that allows for more clarity. Further clarifications would allow companies to operate knowing exactly what can and cannot be done, while helping to minimize the competitive disadvantage companies subject to FCPA and UKBA jurisdiction have in the international business world. As shown above, the vagueness in which each act defines certain key terms leads to a large disadvantage to all multi-national corporations. It comes down to this: companies cannot actively or effectively combat bribery while maintaining business and complying with these separate Acts if the rules, regulations, and provisions are not laid out coherently across all continents. A universal act, or a form of universal legislation, would accomplish these desperately needed goals. While both the FCPA and the UKBA have had a great impact on fighting bribery, the impact needs to expand into a universal blanketed act, which clearly defines what companies are expected to do.

The impact of the FCPA alone has been astronomical. However, being the first major act with direct enforcement action has caused the United States to feel like they are fighting this battle alone, which greatly harms U.S. based companies in a competitive international realm. The costs, both competitively and financially, are substantial.

Besides immediate financial concerns, when a company subject to the FCPA is competing with another company to acquire a third company, the U.S. company has to factor in numerous additional costs for compliance, giving them a competitive disadvantage in the market; the same initial disadvantage applies to companies under the arm of the UKBA. This creates a huge logistical problem for companies trying to comply with the proper anti-bribery provisions of the UKBA and FCPA. In addition, the UKBA has been deemed the “strictest anti-corruption legislation to date.”116 The FCPA has been the world leader in enforcing anti-corruption legislation; however, this could all change if the prosecutorial appetite of the SFO grows. Without further instruction, the strictness of these Acts could lead to further international business problems due to ambiguous enforcement standards.

116 Id. at 109.
It is incredibly costly to keep companies’ anti-bribery provisions up to date due to the differing Acts. In order to maintain a level playing field, there should be one system. This would allow companies to establish an effective internal system to combat bribery on an international level, while being able to continue to conduct business successfully. These discrepancies are crippling companies. Not only are those companies who are complying forced to deal with an uneven playing field in comparison to those companies not under the jurisdiction of either Act, but these companies are also expected to spend an unreasonable amount of time and money complying with two relatively different lists of provisions. To effectively meet the requirements of each Act, due to their multitude of differences, companies are spending countless hours trying to come up with a proper internal system, which takes away from international business progress. There should be a system, with global enforcement power, so companies can reasonably focus on one internal compliance system and still be able to effectively compete in the international realm, while combating bribery.

The crux of the problem is that FCPA compliance does not equate to Bribery Act compliance. There needs to be universality. There needs to be a “meaningful international alignment of the world’s leading economic powers” to combat bribery. There is concern that the British Government’s rigid implementation of Bribery Act provisions could cause companies to terminate various foreign relationships in an effort to avoid prosecution. For example, because the Bribery Act does not impose a facilitating payments exception, it could cause companies associated with the U.K. to impose a higher cost when doing business, and in return, cause a competitive disadvantage, as shown above with the FCPA. This has been the worry of companies from the beginning, setting up this unfair disadvantage concern due to their home country. A universal act would change that. Bribery greatly increases the cost of doing business worldwide, but now with differing legislative requirements, compliance to combat bribery is becoming an additional exorbitant cost as well. These increasing costs can acts as a disincentive that impedes further international business expansion: a consequence that businesses cannot afford.

118 Hunter, supra note 11, at 110.
1. How to Accomplish Universal Legislation

The extraterritorial reach of both acts pushes towards universal jurisdiction. The FCPA has prosecuted companies all across the world, and the UKBA’s extraterritorial reach is even broader with its “close connection” test and offense for failure to prevent bribes. These trends are causing multinational corporations with connections to both countries to become nervous, and rightly so. On the other hand, it is forcing them to become more familiar with the acts and look at their own compliance standards, which is the goal. Global companies now have to be aware that both the FCPA and the UKBA can directly impact their operations, even if they only have limited activity within the U.S. and the U.K., ultimately forcing them to create more effective anti-corruption internal programs.


The greater the international business realm gets, the greater the need for universal anti-bribery legislation becomes. Therefore, there should be one universal act, one with actual enforcement power. While the OECD has the right idea, it simply urges countries along; it has little power to actively enforce legislation. The ideal legislation proposed by this Article would have the following key elements:

- **Adequate Provisions** – from the UKBA, to allow a company to install procedures to combat bribery, and be rewarded for maintaining that level of accountability.
- **Alternative Enforcement** – such as NPAs and DPAs from the FCPA. This will encourage enforcement and provides a penalty without complete debarment, which is more appropriate and effective under practical business circumstances.
- **Compliance Defense and Voluntary Disclosures** – from the UKBA. A compliance defense has a similar rationale to the adequate provisions. This provides that if a company notices problems and actively alters its programs to stop them right away and then works with the government to remedy its mistakes, it should be given some leniency during its investigation and prosecution.

---


120 *Id.* at 4–5.
UNIVERSAL ANTI-BRIBERY LEGISLATION

- Whistleblower Provisions – the FCPA has these incorporated via the Dodd Frank Act. This is something that should be universal. Whistleblower provisions hold companies accountable on a whole new level, and would greatly lead to a reduction in anti-bribery violations.
- Facilitating Payments – in an ideal world, the international standard would align with the UKBA and have a zero tolerance policy for facilitating payments. In reality, some facilitating payments, if minimal, not patterned, and not qualified as bribes, are simply the cost of doing business in most countries. That being said, the move would be to universalize what is acceptable with the goal of eventually eliminating facilitating payments completely.
- Bona Fide and Hospitality Expenditures – these issues are even more important than facilitating payments and are not bribery. If costs extend past a clear definition of bona fide expenditures then there should be repercussions; however, if costs are simply normal business costs that do not exceed to a level of bribery or inducement to commit improper acts, then a company should not risk debarment for something as trivial as flying an official out to a board meeting.
- Passive Offenses – the UKBA’s offense of failing to prevent a commercial bribe is a great step in the right direction. It not only penalizes those who commit bribery, but also punishes those that willfully allow it. This is a great way to combat bribery on an international scale.
- Criminal and Civil Enforcement – the FCPA’s system of equal levels of criminal and civil enforcement is important and the most effective way to attempt to combat bribery, as there are so many different bribery violation types. This way all areas are covered and no bribery act violations slip through the cracks simply because they are not quite to the level of a criminal violation.

These provisions are simply a suggestion for a universal act that would potentially embody each important and effective provision necessary to create a fully functioning universal legislation to combat bribery. It would afford companies a realistic way to deal with their internal compliance programs while maintaining an even broader set of jurisdictional capabilities. This would place all multi-national corporations on a level playing field with a uniform act to combat corruption in the international realm.

Individuals are tried for the crimes they commit once. Countries have to choose where to prosecute, and there is such a thing as

---

double jeopardy. But who has jurisdiction over these international companies so they are protected from double jeopardy? One entity should have jurisdiction over all international business. A universal system to combat bribery in the international realm is imperative, and should be implemented as soon as possible. The ideal would be to create a piece of universal legislation with the above provisions that could somehow maintain jurisdiction over each area of the international business realm. The enforcement issue is one of the biggest critiques regarding the inconsistencies with these two acts, and in order to effectively solve the problem, there needs to be an act that can actively hold each country and company accountable to maintaining its provisions. Whether this can be done through the WTO or the UN remains an entirely different, but crucial argument. Clearly, the enforcement power of the OECD is inadequate, so there needs to be a different entity to harness this enforcement power, one that would have the power to reach beyond its signatories and create an unprecedented expansive extraterritorial reach. If that can be figured out and enacted using the above provisions, international business can be saved.

V. CONCLUSION

While every company should be held liable for the bribes it commits, it should not be penalized for failing to provide different internal procedures in each separate jurisdiction. The current system is simply not practical in the ever-expanding international business arena. If companies are continuously expected to comply with multiple acts and their individual provisions and discrepancies, then there will be no time left to conduct actual business in the global business world and it will all be spent organizing compliance provisions for each individual anti-bribery act. In order to conduct international business efficiently and combat anti-bribery productively, there needs to be universal enforcement. One with the exact provisions proposed above might not be necessary, but action in this area is. The OECD has mentioned the idea, but their lack of available enforcement power creates a serious problem. Universal alignment of anti-bribery legislation is imperative for international business to more effectively, and fairly, combat corruption for all parties involved. What is needed is a remedy for the OECD’s lack of enforcement capabilities. This can be done by incorporating the detailed and effective provisions of the FCPA and UKBA (as listed above) into construction of a universal act with universal enforcement power, outlining each provision in black and white. We need universality to combat worldwide corruption, and this needs to happen quickly. If such an act can be implemented, either under the purview of the WTO or the UN while maintaining a level of universal enforcement power, it would inevitably save international business from this growing bribery epidemic.