

2013

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Michael Peterson

University of Richmond School of Law

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Recommended Citation

Michael Peterson, *Amending the Foreign Corrupt Practices Act: Should the Bribery Act 2010 by a Guideline?*, 12 Rich. J. Global L. & Bus. 417 (2013).

Available at: <http://scholarship.richmond.edu/global/vol12/iss3/4>

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AMENDING THE FOREIGN CORRUPT PRACTICES ACT: SHOULD THE BRIBERY ACT 2010 BE A GUIDELINE?

*Michael Peterson**

INTRODUCTION

On December 19th, 1977, President Jimmy Carter signed into law the Foreign Corrupt Practices Act (FCPA).¹ This Act prohibited the “furtherance of an offer, payment, promise to pay, authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value” to a foreign official.² As early as 1981, members of Congress introduced bills to amend the Act due to numerous complaints from the business and legal communities.³ Both proponents and opponents of amending the FCPA set forth arguments in May, June, and July of 1981.⁴ Similarly, in 2011, both sides debated the merits of the Act, along with what each side viewed as “improvements” to the Act.⁵

While the United States debated its own anti-bribery act, the United Kingdom passed the Bribery Act 2010.⁶ Until 2009, British prosecutors had never convicted a company of bribery due to outdated legislation and the perception of bribery as “a necessary cost of doing business in certain countries.”⁷ As one world power debates the merits of amending its long standing anti-bribery law and another world power passes a similar yet distinct law, it is appropriate to look at one in the context of the other. This paper compares American and British

* J.D. Candidate 2014, University of Richmond; B.A. 2011, The University of Kentucky.

¹ Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1, et seq. (1998). See Presidential Statement on Signing the Foreign Corrupt Practices and Investment Disclosure Bill (Dec. 20, 1977), available at <http://www.presidency.ucsb.edu/ws?pid=7036>.

² Foreign Corrupt Practices Act § 78 dd-1(a).

³ See Bartley A. Brennan, *Amending the Foreign Corrupt Practices Act of 1977: “Clarifying” or “Gutting” a Law*, 11 J. LEGIS. 56, 57 (1984).

⁴ *Id.* at 56.

⁵ See *Foreign Corrupt Practices Act: Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Security of the Comm. on the Judiciary*, 112th Cong. (2011) [hereinafter *FCPA: Hearing*] available at http://judiciary.house.gov/hearings/printers/112th/112-47_66886.PDF.

⁶ Bribery Act 2010, 2010, c. 23 (U.K.).

⁷ *UK Passes One of The World’s Strictest Anti-bribery Laws*, BAKER & MCKENZIE (Aug. 2010), <http://www.bakermckenzie.com/UKbriberyact>.

anti-bribery law, and proposes that while the United States should amend the FCPA, it should generally not amend its anti-bribery laws to be similar to the stricter Bribery Act of 2010.

This paper is divided into four sections. The first section discusses the individual legal aspects of the FCPA and the Bribery Act of 2010; the second section discusses the differing features of the two acts; the third section discusses the criticisms of each of the acts; and the fourth section lays out a proposal of effective amendments which the author feels should be made to the FCPA.

SECTION ONE: THE ACTS

Foreign Corrupt Practices Act

In the United States, the Foreign Corrupt Practices Act (FCPA) as passed in 1977 and amended in 1988 and 1999, “was enacted for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business.”⁸ In essence, this law makes it unlawful to cause, directly or through agents, an act furthering a corrupt payment either directly to a foreign official, or knowing that all or a portion will be given or offered to such foreign official, within the the United States.⁹ Specifically, the FCPA prohibits using an instrument of interstate commerce, “in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money or giving of anything of value” to: (1) any foreign official; (2) any foreign political party or official thereof; or (3) to any person when you know that all or a portion will go to any foreign official or foreign political party.¹⁰ This Act, however, also creates exceptions for payments, “to expedite or to secure the performance of a routine governmental action.”¹¹ These routine government actions include actions ordinarily and commonly performed in obtaining official documents, processing paper work, providing police protection, providing utilities, or in protecting perishable products.¹² As a defense, one can argue that the payments in question were (1) lawful under the written laws and regulations of the foreign country and/or (2) a reasonable and bona fide expenditure, such as travel and lodging expenses.¹³ The FCPA also has imposed certain requirements in maintaining records that accurately and fairly reflect

⁸ *Foreign Corrupt Practices Act – An Overview*, DEP’T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa> (last visited Mar. 6, 2013) [hereinafter DEPT. OF JUSTICE].

⁹ *Id.*

¹⁰ Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(a) (1998).

¹¹ *Id.* §78dd-1(b).

¹² *Id.* §78dd-1(f)(3)(A).

¹³ *Id.* §78dd-1(c).

transactions.¹⁴ It also requires a system of internal controls to ensure the accuracy of such books and records.¹⁵ As such, this Act extends to cover not only American corporations, but everyone conducting business within the United States.¹⁶ The International Anti-Bribery and Fair Competition Act of 1998 amended the FCPA to improve the competitiveness of American business and promote international trade.¹⁷ The penalties for breaching the FCPA range from jail time and large fines to exclusion from tendering for US government contracts.¹⁸ More specifically, penalties can include fines up to \$250,000 for individuals or \$2 million for companies, prison sentences of up to 20 years, federal oversight of company operations, nullification of contracts, revocation of import/export licenses, and loss of product registration.¹⁹ These penalties are in addition to the reputational damage and negative publicity of breaking the law and bribing foreign officials.²⁰ Meanwhile, neither the anti-bribery or accounting provisions have any express or implied private right of action.²¹

Bribery Act 2010

The Bribery Act 2010 made it an illegal for a person to offer, promise, or give a financial or other advantage to another person while i) intending the advantage to induce improper performance of a relevant function; ii) intending the advantage to reward a person for the improper performance; or iii) knowing or believing that acceptance of the advantage would constitute improper performance.²² It does not matter if the person receiving the advantage or the offer of an advantage is the person who may actually perform or has performed the function or activity, nor does it matter if the person intending to bribe acts directly or through a third party.²³ Section 6 of the Act creates a similar offense for anyone who bribes a foreign public official with the intention to influence the official in her or his capacity as a foreign public official.²⁴ This Act also makes it an offense for a person to: i)

¹⁴ See Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 419 (2012).

¹⁵ See *id.*

¹⁶ See DEPT. OF JUSTICE, *supra* note 8.

¹⁷ International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366.

¹⁸ WORLD COMPLIANCE, THE END OF CORRUPTION, *available at* <http://www.fcpa-worldcompliance.com/pdf/fcpa-brochure.pdf> (last visited Mar.6, 2013)

¹⁹ *Understanding Anti-Bribery Laws*, YALE, <http://world-toolkit.yale.edu/restrictions/fcpa> (last visited Mar. 3, 2013).

²⁰ See *id.*

²¹ *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1024 (6th Cir. 1990).

²² Bribery Act 2010, 2010, c. 23 § 1(1)-(3) (U.K.).

²³ *Id.* § 1(4)-(5).

²⁴ *Id.* § 6.

agree to or accept an advantage intending to improperly perform a relevant function as a consequence; ii) request or accept an advantage which itself constitutes improper performance; iii) agree or accept an advantage as a reward for an improper performance; or iv) perform an improper function in anticipation of or as a consequence of requesting or accepting an advantage.²⁵ Relevant functions are those that are (a) functions of a public nature; (b) any business activity; (c) activity in the course of a person's employment; or (d) any activity performed by or on behalf of a body of persons.²⁶ To qualify as a relevant function, the function must be conducted by a person expected to perform such activity in good faith, impartially, and in a position of trust.²⁷ Finally, this Act holds organizations responsible for failing to prevent a person associated with the organization from committing bribery with the intention of obtaining or retaining business or an advantage for the organization.²⁸ However, it is a full defense if the organization can show that it has in place, adequate procedures to prevent bribery by associated persons.²⁹ The Ministry of Justice produced guidance under Section 9 of the Act "about procedures which relevant commercial organizations can put into place to prevent persons associated with them from bribing."³⁰

SECTION 2: COMPARISON OF ANTI-BRIBERY ACTS

There are several important and distinct differences between the United States' FCPA and the UK Bribery Act 2010 including: 1) whom it is an offense to bribe; 2) offenses for receipt of bribes; 3) corporate offenses; 4) the extent of criminal penalties; and 5) exceptions.³¹ The foremost difference between the acts regards to whom it is an offense to make payments. While the FCPA prohibits direct or indirect payments to foreign officials and political parties,³² the UK Bribery Act 2010 prohibits any advantage paid to any person with the inten-

²⁵ *Id.* § 2.

²⁶ *Id.* § 3.

²⁷ *Id.*

²⁸ *Id.* § 7; MINISTRY OF JUSTICE, THE BRIBERY ACT 2010-GUIDANCE 8, available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>. The Bribery Act and its guidance use the British English spellings "organisation" and "defence," but for the continuity of this article, the author has used the American English spellings.

²⁹ Bribery Act 2010 § 7; MINISTRY OF JUSTICE, *supra* note 28 at 8.

³⁰ MINISTRY OF JUSTICE, *supra* note 28 at 2.

³¹ David Flint & Valerie Surgenor, *The UK Bribery Act 2010 v Foreign Corrupt Practices Act of 1977: How Different Are They and Should Your Business be Concerned?*, ASS'N OF CORP. COUNSEL (Apr. 23, 2010), <http://www.lexology.com/library/detail.aspx?g=fa55bb1d-ff5d-4575-81d3-07acb4cfc0d7>.

³² Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(a) (1998).

tion to induce an improper performance or reward for an improper performance,³³ including, but not limited to, foreign officials.³⁴ Under the FCPA, one can only be punished for paying an individual who is not a foreign official or a member of a foreign political party if the payment is made knowing that a portion of the value is going to a foreign official or political party.³⁵ The Bribery Act, however, does not require a connection to a foreign official for a bribe to fall within its purview.³⁶ By having made it an offense to bribe a larger group of individuals, it is much easier to violate the Bribery Act 2010 than the FCPA. It may be particularly relevant that it is illegal to make payments to corporate leaders who are not in any way connected to a foreign government under the Bribery Act 2010, but similar prohibitions are not included under the FCPA.

Second, the two laws differ greatly in whether it is only an offense to provide a bribe or whether it is also an offense to receive such benefits. The Bribery Act 2010 not only criminalizes providing a bribe, but also makes it an offense to request, receive, agree to receive, or anticipate an advantage as a consequence of performing an improper relevant function.³⁷ However, the FCPA contains no such provision concerning the receipt of bribes.³⁸

Third, the acts differ regarding strict liability offences of corporate offenders. The Bribery Act 2010 holds corporations strictly liable for failing to prevent bribery.³⁹ “Under the Bribery Act, companies will be liable if anyone acting under its authority commits a bribery offence. Such persons can include employees, consultants, agents, subsidiaries and joint venture partners.”⁴⁰ However, having adequate oversight procedures to prevent bribery offenses acts as a defense.⁴¹ Again, the FCPA does not contain such a provision and does not have strict liability offenses for companies.⁴²

Fourth, the acts differ in the severity of criminal penalties for bribery offenses. The FCPA creates fines of up to \$2 million per violation by companies and up to \$250,000 fines for individuals along with

³³ Bribery Act 2010, 2010, c. 23 § 1 (U.K.).

³⁴ *Id.* § 6.

³⁵ Foreign Corrupt Practices Act § 78dd-1(a)(3).

³⁶ *See* Bribery Act 2010 § 1.

³⁷ *Id.* § 2.

³⁸ Flint, *supra* note 31 (highlighting the differences between the FCPA and the Bribery Act).

³⁹ Bribery Act 2010, 2010, c. 23, § 7 (U.K.).

⁴⁰ Flint, *supra* note 31.

⁴¹ Bribery Act 2010 § 7; Flint, *supra* note 31.

⁴² Flint, *supra* note 31.

up to 5 years imprisonment.⁴³ The Bribery Act on the other hand allows prosecutors to impose an unlimited fine and sentences of up to 10 years.⁴⁴

Finally, the acts differ in how they treat legal facilitation payments versus bribes. The FCPA allows the facilitation or expedition of payments to expedite or secure the performance of a routine government action and payments, as long as the offers and gifts were lawful within the recipients' country.⁴⁵ Such payments are also allowed if they are part of reasonable and bona fide expenditures related to "the promotion, demonstration, or explanation of products or services" or the execution of a contract.⁴⁶ The Bribery Act 2010 has no such exceptions or defenses.⁴⁷

SECTION 3: CRITICISMS OF THE ACTS

Criticisms of FCPA

The FCPA has received harsh criticisms from its inception. As early as 1978, there were major criticisms regarding vagueness of the definitions, which prompted some commentators to suggest that the vagueness has "forced American corporations to forego business opportunities abroad for fear of violating the FCPA."⁴⁸ Since 1978, the corporate and non-corporate worlds have changed, and the United States' economy has recently suffered. "America is suffering through a severe and prolonged economic downturn," according to the Chairman of the House Subcommittee on Crime, Terrorism, and Homeland Security.⁴⁹ Businesses that try to comply with the FCPA claim that the law's enforcement is vague and impenetrable.⁵⁰ There has been a dramatic increase in the number of cases the Justice Department has prosecuted during this time. These cases have resulted in a staggering amount of

⁴³ *Id.* The maximum prison sentence for a violation of the Bribery provisions is 5 years. A 20-year prison sentence is applicable to willful violations of the Books and Records and Internal Control Provisions.

⁴⁴ *Id.*

⁴⁵ Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(b).

⁴⁶ *Id.* § 78dd-1(c).

⁴⁷ See Bribery Act 2010, 2010, c. 23 (U.K.); see also Flint, *supra* note 31 (comparing the FCPA and the Bribery Act).

⁴⁸ Brennan, *supra* note 3, at 62-63. See generally *Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 708 Before the Subcomm. on Securities and the Subcomm. on International Finance and Monetary Policy of the S. Comm. on Banking, Housing, and Urban Affairs*, 97th Cong. 4 (1981) (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Housing, & Urban Affairs).

⁴⁹ *FCPA: Hearing*, *supra* note 5, at 2 (statement of Rep. F. James Sensenbrenner, Jr., Chairman, Subcomm. on Crime, Terrorism, & Homeland Security).

⁵⁰ *Id.*

finances, making up half of all Department of Justice Criminal Division penalties in fiscal year 2010.⁵¹ In 2010 alone these fines totaled some \$1.8 billion dollars and included eight of the ten highest fines ever paid under the FCPA.⁵² The rise in prosecutions has been so drastic that the United States Department of Justice has prosecuted more cases than any of the other 37 member countries of the Organization of Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.⁵³ Some critics worry that the “over-aggressive enforcement” and the rise of prosecutions disadvantages U.S. companies, especially when competing with companies in the global marketplace that are not subject to U.S. law.⁵⁴ In response, the U.S. Chamber of Commerce has now prioritized amending the FCPA.⁵⁵ Corporate lobbyists’ attempts to curb the FCPA have also sparked widespread debate about how the legislation is enforced.⁵⁶ In 2011 the general concern regarded statutory definitions, specifically those of “foreign official” and “instrumentality.”⁵⁷ As Representative Robert Scott stated, “[o]ne of the problems is the contention that the Justice Department and the SEC are interpreting the definition of ‘foreign official’ too broadly, especially when it comes to payments to companies that are state owned or state controlled.”⁵⁸

The FCPA has also been criticized because it does not inquire about intent or willfulness when dealing with corporate violations. Violations of the FCPA have expanded to not only cover bribes that business officials actually authorized or know, but also include “bribes a business owner or executive should have known were being made.”⁵⁹ While Congress amended the “reason to know” standard in 1998, it has substituted concepts of willful blindness and conscious disre-

⁵¹ *Id.*

⁵² *FCPA Year in Review 2010*, STEPTOE & JOHNSON LLP (Mar. 15, 2011), http://www.steptoel.com/publications-newsletter-129.html#_ftn1.

⁵³ *FCPA: Hearing*, *supra* note 5 at 3 (statements of Rep. Robert C. Scott, Member, Subcomm. on Crime, Terrorism, & Homeland Security).

⁵⁴ *Id.*

⁵⁵ Joe Palazzolo, *Critics Target Bribery Law*, WALL ST. J. (Nov. 28, 2011), <http://online.wsj.com/article/SB10001424052970204753404577064061604755308.html?user=welcome&mg=id-wsj>.

⁵⁶ *Id.*

⁵⁷ *FCPA: Hearing*, *supra* note 5, at 3 (statements of Rep. Robert C. Scott, Member, Subcomm. on Crime, Terrorism, & Homeland Security).

⁵⁸ *Id.*

⁵⁹ Michael P. Tremoglie, *Foreign Corrupt Practices Act is ‘Sword of Damocles,’ Critic Says*, LEGAL NEWSLINE LEGAL J. (July 16, 2012), <http://legalnewsline.com/in-the-spotlight/236735-foreign-corrupt-practices-act-is-sword-of-damocles-critic-says>.

gard.⁶⁰ However, this has still left the Act to apply to those who are “aware of a high probability of the existence of such circumstances,” or “should have known.”⁶¹ The Act is essentially prohibiting actions that fall short of positive knowledge.⁶² While these amendments impose a mens rea requirement to reduce possible liability for accidental violations,⁶³ the “should have known” standard still leaves room for such violations to result in criminal liability. Amendments have been suggested for changes to the intent requirements for corporate defendants.⁶⁴

The FCPA, and the cases surrounding it, have also received criticism over the lack of a private right of action under the FCPA.⁶⁵ The basis of this criticism is that denying citizens the right to bring actions means that the inadequacies of the Act, ones that are not remedied by actions of government agencies, Congress, or the courts, are not being solved and the Act is being inadequately enforced.⁶⁶ While the recent increase in prosecution may have tempered the strength of this argument, commentators still contend that a private right of action should be included in FCPA enforcement because the rise in enforcement actions has led to collateral civil litigation based on alleged violations of federal securities laws, antitrust laws, state laws proscribing tortious interferences with prospective contractual relations, and other statutes being pursued as class actions or shareholder derivative actions.⁶⁷

Criticisms of Bribery Act 2010

Despite its relatively young age, the United Kingdom’s Bribery Act 2010 is not without its opponents. The main criticisms of the Act are that it is too broad and inhibits British corporations competing abroad. The Act, which was hurriedly passed in 2010 during the Labour government’s last days, saw growing warnings about its consequences as early as January 2011 before the Act even became

⁶⁰ H. Lowell Brown, *Parent-Subsidiary Liability Under The Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 31 (1998).

⁶¹ *Id.*; see also Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(f)(2)(ii) (1998).

⁶² Justin Serafini, *Foreign Corrupt Practices Act*, 41 AM. CRIM. L. REV. 721, 734 (2004).

⁶³ James A. Barta & Julia Chapman, *Foreign Corrupt Practices Act*, 49 AM. CRIM. L. REV. 825, 832 (2012).

⁶⁴ *Id.* at 861.

⁶⁵ Mark, *supra* note 14, at 448.

⁶⁶ Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 215-16 (1994).

⁶⁷ See Mark, *supra* note 14.

effective.⁶⁸ At that time, the Government confirmed that the Bribery Act 2010 would be reassessed as part of a drive to ease regulatory burdens on business.⁶⁹ Legal experts have said that the law could hypothetically punish companies just because of their weak compliance procedures, which could unduly hamper British companies competing abroad. There are also fears that what has been described as the toughest anti-bribery law in the world could go so far as to punish small corporate gifts and drive away corporate sponsors.⁷⁰ While the Act was rewritten prior to coming into force, business still feared the extremely broad corporate criminal offence of “failing to prevent a bribe by an associated person.”⁷¹

Another major criticism of the Bribery Act has been the ban on facilitation payments, which are allowed under the FCPA.⁷² Those most affected by this ban include pharmaceutical, defense, and energy and construction sectors. The Ministry of Justice has produced guidance on the Act that, along with comments from Justice Secretary Kenneth Clarke, suggest that only extreme cases are likely to result in enforcement activity.⁷³ However, this leaves ambiguity for corporations hoping to abide by the Act and avoid liability.⁷⁴ The Ministry of Justice’s guidelines did little to quash criticisms of the Act. Instead it caused new criticisms from those who believe the guidance watered down the Act’s intentions, while prosecuting authorities still have plenty to do, and companies plenty to worry about.⁷⁵ Some critics hold that Parliaments attempt to craft a zero-tolerance approach to bribery is overshadowed by various problems including enforcement difficulties and the failure of the Ministry of Justice’s Guidance in explaining

⁶⁸ See James Kirkup, *Bribery Act to be Reviewed After Business Fears*, TELEGRAPH (Jan. 14, 2011), <http://www.telegraph.co.uk/finance/yourbusiness/bribery-act/8258368/Bribery-Act-to-be-reviewed-after-business-fears.html>.

⁶⁹ *Id.*

⁷⁰ See *id.*

⁷¹ See Alex Bailin, *Revamped Bribery Act is Giving Firms the Jitters*, GUARDIAN (Apr. 1, 2011), <http://www.guardian.co.uk/law/2011/apr/01/revamped-bribery-act-firms-jitters>.

⁷² See *id.*

⁷³ *Id.*

⁷⁴ See *id.*

⁷⁵ See generally, Jonathan Russell, *Serious Fraud Office Risks Clash with Ministry of Justice over Bribery Act*, THE TELEGRAPH (July 1, 2011), <http://www.telegraph.co.uk/finance/yourbusiness/bribery-act/8609486/Serious-Fraud-Office-risks-clash-with-Ministry-of-Justice-over-Bribery-Act.html>.

compliance.⁷⁶ The Act has been referred to as “the ballyhooed U.K. Bribery Act” and “the caffeinated younger sibling of the FCPA.”⁷⁷

SECTION 4: PROPOSAL

In light of the criticisms of the existing anti-bribery law, and the lack of a comprehensive international bribery compliance program,⁷⁸ I propose amendments to the FCPA, but only one amendment that should be adopted from the U.K. Bribery Act 2010.

The only amendment that should be made to the FCPA to make the act more similar to the Bribery Act 2010 is a full defense for corporations who have adequate procedures, programs, and practices in place to monitor and prevent bribery by associated persons.⁷⁹ Such a provision would allow companies to avoid criminal liability if employees or contractors who committed the violation circumvent the procedures the company has in place to prevent bribery.⁸⁰ It is practical to allow compliance programs, which train employees and help identify actual or potential problems,⁸¹ to be a defense for the company on the occasion they do not work since these measures are a deterrent and companies invest substantial funds into them.⁸²

At a congressional hearing in 2011, members of the Committee on the Judiciary who both supported and opposed major amendments to the FCPA came together for a suggested amendment that added a compliance defense. This defense would allow companies to avoid criminal liability if individual employees or agents who committed FCPA violations circumvented adequate procedures that were other-

⁷⁶ See Bruce W. Bean & Emma H. MacGuidwin, *Beyond All Boundaries: The Extraterritorial Grasp of Anti-Bribery Legislation: Expansive Reach—Useless Guidance: An Introduction to the U.K. Bribery Act 2010*, 19 ILSA J. INT’L & COMP. L. 323, 346 (2012).

⁷⁷ See Joe Palazzolo, *Law Blog Job of Week: SFO Director*, WALL ST. J. (Oct 25, 2011, 1:15 PM), <http://blogs.wsj.com/law/2011/10/25/law-blog-job-of-week-sfo-director/>.

⁷⁸ See generally Jon Jordan, *The Need For a Comprehensive International Foreign Bribery Compliance Program, Covering A to Z, in an Expanding Global Anti-Bribery Environment*, 117 PENN ST. L. REV. 89 (2012) (suggesting that an analysis of the guidance on compliance procedures provided through various international and domestic agencies can provide a minimum set of procedures that should be included in any international foreign bribery compliance program.).

⁷⁹ Bribery Act, 2010, c. 23, § 7 (2) (U.K.).

⁸⁰ See *FCPA: Hearing*, *supra* note 5, at 3 (statements of Rep. Robert C. Scott, Member, Subcomm. On Crime, Terrorism, and Homeland Security).

⁸¹ See *id.*

⁸² See *id.*

wise reasonable in preventing bribery.⁸³ Similarly, as seen with the Bribery Act 2010, companies can implement these adequate procedures through training, internal and external communication, and instituting internal controls.⁸⁴ With these compliance devices and the encouragement of a corporate defense, companies can develop programs through a continuous process of implementation, monitoring, reporting, and improving compliance programs in order to achieve its objectives. By using a corporate defense amendment to encourage companies to invest in corporate-wide compliance programs, the FCPA will be more successful in preventing bribery and companies will have less fear of the exuberant penalties for violations of which the corporation was unable to stop.

The conclusion that the United States should avoid amending the FCPA to be more like the Bribery Act 2010 does not mean that the FCPA should never be amended. Amendments, for example, can still be made to further encourage companies to prevent bribery through internal controls. On this point, instead of adopting the Bribery Act 2010's adequate procedures defense, the FCPA could be amended to mandate that corporations doing business abroad have anti-bribery procedures in place. In essence, the FCPA could be amended to be similar to the United State's Sarbanes-Oxley Act of 2002.⁸⁵ The Sarbanes-Oxley Act mandated several reforms to enhance corporate responsibility and enhance financial disclosures in order to combat corporate and accounting fraud.⁸⁶ Section 302 of this Act, for example, required principal executive officers to, among other responsibilities, establish and maintain internal controls.⁸⁷ Section 404, meanwhile, requires an annual internal control report that shall:

- (1) state the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting; and (2)
- contain an assessment, as of the end of the most recent fiscal year of the issuer, of the effectiveness of the inter-

⁸³ See *FCPA: Hearing*, *supra* note 5, at 3-5 (statements of Rep. Robert C. Scott, Member, Subcomm. On Crime, Terrorism, and Homeland Security; statements of Rep. John Conyers, Jr., Member, Committee on the Judiciary).

⁸⁴ See PETER WILKINSON, *THE 2010 UK BRIBERY ACT ADEQUATE PROCEDURES: GUIDANCE ON GOOD PRACTICE PROCEDURES FOR CORPORATE ANTI-BRIBERY PROGRAMMES* 53-61 (Robert Barrington et al. eds., 2010), available at <http://www.transparency.org.uk/our-work/publications/95-adequate-procedures—guidance-to-the-uk-bribery-act-2010>.

⁸⁵ See generally Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201.

⁸⁶ See *The Laws That Govern the Securities Industry*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/about/laws.shtml> (last visited Mar. 7, 2013).

⁸⁷ See Sarbanes-Oxley Act § 7241.

nal control structure and procedures of the issuer for financial reporting.⁸⁸

By implementing similar requirements regarding bribery prevention, Congress can ensure that every company doing business abroad has adequate procedures to prevent bribery. This amendment would be implemented in a similar fashion as in the Sarbanes-Oxley Act, by having an agency (such as the Securities and Exchange Commission for the Sarbanes-Oxley Act) create the exact rules which must be followed in creating and auditing the internal controls designed to prevent bribery.

Congress should also amend the FCPA to eliminate concerns regarding vagueness, which is also an issue in the Bribery Act 2010, by providing more precise and workable definitions. Companies specifically cite problems with the current statutory definitions of “foreign official” and “instrumentality.”⁸⁹ U.S. companies contend that the Justice Department and the Securities and Exchange Commission are interpreting the definition of “foreign official” too broadly, especially when dealing with payments to state owned or state controlled companies.⁹⁰ The difficulty for U.S. companies and their employees is that it is not immediately apparent whether a manager or other employee is considered a foreign official in the sense contemplated by the law. Some feel that this allows for overly-aggressive enforcement which disadvantages U.S. companies in the global marketplace.⁹¹ While the law specifically prohibits payments to foreign officials, the U.S. Chamber of Commerce wants to clarify whether “employees of companies with state ownership or control behind them qualify as such.”⁹² Up to this point, the Justice Department has taken an expansive view of the definition and argued, “that virtually every employee a pharmaceutical company encounters in a state-run health-care system could be considered a foreign official.”⁹³ Again, the problem of not having a clear understanding of who is a “foreign official” has generated support for more clear and precise definitions from multiple congressional members within the House Committee of the Judiciary.⁹⁴ There are two potential ways that Congress could deal with these ambiguities, especially regarding the definition of “foreign official.” Congress could (1)

⁸⁸ See *id.* § 7262.

⁸⁹ See *FCPA: Hearing, supra* note 5, at 3 (statements of Rep. Robert C. Scott, Member, Subcomm. On Crime, Terrorism, and Homeland Security).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Palazzolo, *supra* note 55.

⁹³ *Id.*

⁹⁴ See *FCPA: Hearing, supra* note 5, at 3-5 (statements of Rep. Robert C. Scott, Member, Subcomm. On Crime, Terrorism, and Homeland Security; statements of Rep. John Conyers, Jr., Member, Committee on the Judiciary).

amend the FCPA to provide a more precise definition of “foreign official”; or (2) like the Bribery Act 2010, remove the “foreign official” requirement and create liability for bribing anyone in the course of business. However, the second option appears implausible since most, if not almost all, calls for amending the FCPA want to make the Act less powerful. However, giving a more precise statutory definition to “foreign official” will help guide companies, the Justice Department, the Securities and Exchange Commission, and the judiciary in enforcing the rules and rationale of the FCPA. Defining “foreign official” as only those who are a direct link to the government of a foreign nation will give clarity to U.S. companies dealing with state-run companies in the global marketplace.

Another amendment recommendation for the FCPA to assist corporations in avoiding the most severe penalties, while also assisting the enforcement of the FCPA, is to reduce the penalties for those who self-report violations. The shift from sporadic to more aggressive enforcement of the FCPA has been attributed, in part, by some Justice Department officials to the Sarbanes-Oxley Act 2002’s requirement for corporate officers to certify the accuracy of their financial statements.⁹⁵ According to these officials, this requirement has led to more companies discovering potentially illicit payments and has led to more companies disclosing such discrepancies to the Securities and Exchange Commission and the Justice Department.⁹⁶ While companies are already forced to make disclosures under Sarbanes-Oxley, and companies are developing more internal procedures for identifying potential FCPA violations, an amendment that would give companies a reduction in penalties for self-reporting violations would be a positive change. Such a proposal, reducing penalties by as much as 40%, is already under consideration by lawmakers.⁹⁷ While Justice Department officials say companies are already given credit for cooperation, these reductions for cooperation need to be specifically quantified so that companies and boards can make informed decisions, according to Robert Tarun of Barker & McKenzie LLP, who authored the discount proposal.⁹⁸ This proposal can also work hand-in-hand with the two other proposals mentioned above. Companies may be more likely than ever to self-report by combining a corporate defense for adequate procedures with a reduction in penalties for self-reporting. Both the adequate procedure incentive, which should help companies identify more possible violations, and the protection of lower penalties for self reported violations if the procedures are not found to be adequate will

⁹⁵ See Sarbanes-Oxley Act of 2002, 15 U.S.C. § 302(a); Palazzolo, *supra* note 53.

⁹⁶ Palazzolo, *supra* note 55.

⁹⁷ *Id.*

⁹⁸ *Id.*

encourage more self-reporting. Also, this amendment could be combined with a statutory requirement for internal controls and reporting on internal controls to raise awareness and reporting without fear of the stiffest penalties. Amendments combining the implementation of statutorily required internal controls and reporting with less severe penalties for self-reported infractions appears to be the avenue under which the United States could best lower instances of bribery violations and effectively deal with violations while not overly burdening United States companies competing abroad.

Finally, the FCPA could be amended or the courts' rulings overturned to create a private right of action, whether explicit or implied, for investors damaged by FCPA violations. This proposal, rather than deal with government enforcement for criminal liability, deals with what some see as the primary purpose of the FCPA, protecting investors.⁹⁹ If the intention of the Act is, at least in part, to protect investors in the United States, it appears that those investors, as private citizens, should be able to bring claims against companies for violations. Commentators have argued that the courts should recognize an implied private right of action, or that Congress should amend for an explicit private right of action, at least for violations of the anti-bribery provisions of the FCPA.¹⁰⁰ Such an amendment could be useful in enhancing clarification of the FCPA's provisions through increased enforcement.¹⁰¹ Approximately 77% of FCPA enforcements by the Department of Justice and Security and Exchange Commission are resolved by deferred prosecution agreements or non-prosecution agreements.¹⁰² This means that little is being done in the way of judicial scrutiny or interpretation with the result that the FCPA means "what the enforcement agencies say it means."¹⁰³ Allowing for private actions to be brought regarding FCPA enforcement, which explicitly removes the Department of Justice and Security and Exchanges Commission from the process, may result in more cases reaching the courts, allowing judicial review and interpretation of the provisions of the FCPA that have been criticized for ambiguities. However, even with the high number of cases being settled outside of full prosecution, as the enforcements brought by the Department of Justice continue to increase, judicial review may be possible without a private right of action.

⁹⁹ Tremoglie, *supra* note 59.

¹⁰⁰ See, e.g., Mark, *supra* note 14, at 419.

¹⁰¹ Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 220 (1994).

¹⁰² Joseph W. Yockey, *FCPA Settlement, Internal Strife, and the "Culture of Compliance"*, 2012 WIS. L. REV. 689, 697 (2012).

¹⁰³ Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 907 (2010).

CONCLUSION

The FCPA was passed in 1977 and amended in 1998 to combat bribery of foreign officials in the global marketplace. In 2010 the United Kingdom passed the Bribery Act 2010 in response to international criticisms for failing to effectively join the fight against bribery. These two acts differ in several key components, including: 1) whom it is illegal to bribe; 2) liability for the receipt of bribes; 3) corporate defenses for adequate internal procedures; 4) amount of monetary penalties and length of incarceration terms; and 5) the legality of “facilitation payments.” Neither act is free from an abundance of criticism and many specific calls are being made to amend the FCPA. It is important that the FCPA is amended in a way that will lower instances of bribery committed by companies while not limiting the ability of United States’ companies to compete in the global market place. This article shows that the FCPA should not be amended to mirror the Bribery Act 2010 except for allowing a corporate defense for companies with adequate procedures designed to identify and prevent bribes. However, there are several other options for amending the FCPA such as requiring internal controls and reports on these controls; judicially or congressionally clearing ambiguous definitions, specifically “foreign officer”; reducing penalties in instances of self-reported violations; and creating an implied or explicit private right of action for FCPA enforcement.

