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Nika A. Antonikova

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# PRIVATE SECTOR CORRUPTION IN INTERNATIONAL TRADE: THE NEED FOR HEIGHTENED REPORTING AND A PRIVATE RIGHT OF ACTION IN THE FOREIGN CORRUPT PRACTICES ACT

*Nika A. Antonikova*

## I. INTRODUCTION

The World Bank estimates that bribery, one form of corruption, costs the world's economies about one trillion dollars annually.<sup>1</sup> Even beyond this tremendous figure lie costs related to theft and embezzlement, lost investments, and corruption between private companies.<sup>2</sup> Corruption is an elusive term that is difficult to define because it has numerous manifestations and cultural nuances.<sup>3</sup> For the purposes of this Comment, corruption is defined as the "abuse or misuse of a position of trust or responsibility for private gain rather than for the purpose for which that trust or responsibility is conferred."<sup>4</sup>

For years, corruption in the private sector was overlooked or downplayed by scholars and the public because it was assumed that corruption in the public sector was more damaging to the public interest and, therefore, constituted a more serious offense.<sup>5</sup> As a result, even though the idea of regulating commercial bribery has been around since at least 1922, it has yet to translate into effective legislation.<sup>6</sup> Today, however, new quantitative and qualitative research illuminates the high costs of private sector corruption<sup>7</sup> and suggests that the problem is almost as pervasive as corruption in the public sector.<sup>8</sup>

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<sup>1</sup> See, e.g., *Six Questions on the Cost of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann*, THE WORLD BANK (2013), <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html>.

<sup>2</sup> *Id.*

<sup>3</sup> Philip M. Nichols, *The Business Case for Complying with Bribery Laws*, 49 AM. BUS. L.J. 325, 329–30 (2012).

<sup>4</sup> This definition is one of the most general. E.g., *id.* at 330; Joseph S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417, 419 (1967).

<sup>5</sup> W. PAATII OFOSU-AMAAH, RAJ SOOPRAMANIAN & KISHOR UPRETY, *COMBATING CORRUPTION: A COMPARATIVE REVIEW OF SELECTED LEGAL ASPECTS OF STATE PRACTICE AND MAJOR INTERNATIONAL INITIATIVES* 66 (1999), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/1999/10/07/000094946\\_99092110080687/Rendered/PDF/multi\\_page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/1999/10/07/000094946_99092110080687/Rendered/PDF/multi_page.pdf). See also Antonio Argandoña, *Private-to-Private Corruption*, 47 J. BUS. ETHICS 253 (2003).

<sup>6</sup> Note, *Bribery in Commercial Relationships*, 45 HARV. L. REV. 1248, 1250 (1932).

<sup>7</sup> See, e.g., Blake E. Ashforth et al., *Re-Viewing Organizational Corruption*, 33 ACAD. MGMT. REV. 670, 672–76 (2008) (discussing the harms of private sector corruption at firm, industry, national, and systems levels).

<sup>8</sup> TRANSPARENCY INTERNATIONAL, *BRIBE PAYERS INDEX REPORT 3*, 19 (2011), available at <http://bpi.transparency.org/bpi2011/results>. Private sector corruption can be manifested by offering clients gifts and corporate hospitality, demanding bribes or kickbacks from potential suppliers, as well as paying bribes to secure beneficial contracts. *Id.* In fact, corruption in the private sector

Due to recent trends in the international marketplace, the potential harm of corruption has grown to the point that it can no longer be ignored. With the removal of many trade barriers between nations in recent years, companies face intense competition in emerging markets, which, in turn, has led to a proliferation of corrupt practices.<sup>9</sup> Other trends affecting corruption are the privatization of many publicly owned companies and the resulting blurring of the distinction between private corruption and the more effectively punished public sector corruption.<sup>10</sup> With ever-growing volumes of international trade, federal legislation prohibiting private sector corruption has become a necessity.

This Comment will first examine current federal legislation and its shortcomings, then offer a blueprint for preventing some of the costs associated with private sector corruption by encouraging the United States to amend the Foreign Corrupt Practices Act (FCPA) in two ways: 1) adding a private right of action for victims of private sector corruption to recover damages, and 2) stepping up regulation of private corruption through heightened accounting and reporting requirements.

Section II of this Comment examines existing regulations of private sector corruption in the U.S., including the FCPA,<sup>11</sup> and discusses why they are currently inadequate. Section III discusses various international agreements on combating corruption and their implications for U.S. companies involved in international trade.—Finally, Section IV of this Comment considers different options and explains why amending the FCPA to extend its accounting and reporting provisions to private sector corruption, together with providing victims of private sector corruption with a private right of action to recover damages, is the most sensible solution.

## II. U.S. ANTI-CORRUPTION STATUTES AND REGULATIONS: THE NEED FOR REFORM

This Section will discuss existing anti-corruption regulations, both state and federal. First, this Section explores the FCPA and its criticisms, and it argues that these same criticisms should be considered in addressing private sector corruption. Next, this Section explores the inability of existing state and federal commercial bribery statutes to effectively address the problem of corruption in the private sector of international trade. Even the FCPA—the only statute that undoubtedly has extra-territorial reach—does not currently cover corruption in the private sector.

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became more “visible” with the growth of international efforts to fight public sector corruption. *See* Argandoña, *supra* note 5.

<sup>9</sup> Argandoña, *supra* note 5, at 253–54.

<sup>10</sup> *Id.* at 254. *See also* OFOSU-AMAAH, SOOPRAMANIEN & UPRETY, *supra* note 5, at 66.

<sup>11</sup> The FCPA plays an important role in the analysis because it is thus far the only U.S. anti-bribery statute that has transnational reach, and the lessons learned from an examination of public sector bribery regulations can potentially be translated into the private sector. *See* Nichols, *supra* note 3, at 331.

## A. The FCPA: Lessons Learned and Future Challenges

This subsection discusses the inception of the FCPA, its two major provisions and how they have been supplied, and its three major criticisms and relevant responses.

### 1. History of Enactment

The FCPA is the child of a number of high-profile corruption scandals, including the Watergate scandal<sup>12</sup> and the notorious Lockheed case, where a company bribed foreign public officials in the Netherlands, Japan, and Italy to obtain government contracts.<sup>13</sup> In 1975, Congress faced a grim picture: about 400 companies, including 117 in the Fortune Top-500, disclosed illegal or questionable payments to foreign officials after the U.S. Securities and Exchange Commission (SEC) instituted a voluntary disclosure program.<sup>14</sup> Many of these cases had entirely domestic effects since companies had paid bribes to “outcompete” their American peers rather than their foreign competitors.<sup>15</sup> Still, Congress responded by proclaiming that bribing foreign public officials is “counter to the moral expectations and values of the American public.”<sup>16</sup> In addition to these economic dilemmas,<sup>17</sup> corporate bribery caused foreign policy problems for the United States, jeopardizing its positions in the Cold War with the Soviet Union.<sup>18</sup> After lengthy congressional debates on how to tackle corruption, President Carter signed the FCPA into law in December 1977.<sup>19</sup>

The FCPA was amended twice, in 1988 and 1998.<sup>20</sup> The 1988 amendment was mostly in response to complaints from businesses that the FCPA was too vague.<sup>21</sup> The amendment established a standard of

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<sup>12</sup> Courtney C. Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 442–43 (2010). Thomas points out that the Nixon Administration engaged in illegal activities, including the creation of secret “slush funds” used to fund illegal political campaign contributions and international bribery. *Id.* (quoting Lowell Brown, *Extraterritorial Jurisdiction Under the 1988 Amendments to the Foreign Corrupt Practices Act*, 26 N.C.J. INT’L L. & COM. REG. 239, 241 (2001)).

<sup>13</sup> Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARV. J. ON LEGIS. 303, 307 (2012).

<sup>14</sup> See H.R. REP. NO. 95-640, at 4 (2006).

<sup>15</sup> *Id.* at 5.

<sup>16</sup> *Id.* at 4 (quotations omitted).

<sup>17</sup> *Id.* at 5. Members of Congress noted that bribery eroded public confidence in the free market by placing contracts in the hands of inefficient companies that cannot compete without bribing. *Id.* at 4–5. It also led to costly lawsuits, cancellation of contracts, and other negative economic consequences. *Id.*

<sup>18</sup> *Id.* at 5. The Report states that corporate bribery “embarrass[es] friendly governments” and “lower[s] the esteem for the United States among the citizens of foreign nations.” *Id.*

<sup>19</sup> See Klaw, *supra* note 13, at 308; Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT’L L. & COM. REG. 83, 87 (2007).

<sup>20</sup> See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1419-1425 (1988); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302, 3302-3312 (1998).

<sup>21</sup> See Krever, *supra* note 19, at 88–89.

“knowing” for conduct by third parties<sup>22</sup> and clarified the exception for “facilitating” or “grease-the-wheels” payments.<sup>23</sup> The 1988 amendment also introduced some affirmative defenses to corruption charges.<sup>24</sup> This latter amendment extended the reach of the FCPA to “any person” over which the U.S. Department of Justice had jurisdiction,<sup>25</sup> as well as to any violations of the law “while in the territory of the United States,”<sup>26</sup> thus making the law truly extra-territorial in nature.<sup>27</sup>

## 2. A Brief Overview of the FCPA

The FCPA has two major types of provisions: accounting<sup>28</sup> and anti-bribery.<sup>29</sup> Under its accounting provisions, all publicly-held companies either registered or required to file reports with the SEC, including companies that hold American Depository Receipts,<sup>30</sup> are subject to the FCPA’s record-keeping and internal control provisions. The FCPA requires every issuer of securities to<sup>31</sup> “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets.”<sup>32</sup> Seemingly innocuous, this provision applies to a broad class of securities issuers, including those not having any foreign operations.<sup>33</sup>

<sup>22</sup> 15 U.S.C. § 78dd-1(f)(2)(A)(i)-(ii) (2006) (defining “knowing” as a person’s state of mind when a person is aware or has a strong belief as to the circumstances or that a result is certain to occur. Knowledge is also inferred when a person is aware of a high probability, unless a person actually believes that the circumstance does not exist); 15 U.S.C. § 78dd-2(h)(3)(A) (2006) (defining the same); 15 U.S.C. § 78dd-3(f)(3) (2006) (defining the same); *cf.* 15 U.S.C. § 78dd-1(a)(3) (Supp. V 1981).

<sup>23</sup> 15 U.S.C. § 78dd-1(B) (2006); 15 U.S.C. § 78dd-2(B) (2006); 15 U.S.C. § 78dd-3(B) (2006) (all three sections defining the same for different groups of affected entities); *cf.* 15 U.S.C. § 78dd-1(B) (Supp. V 1981).

<sup>24</sup> *See* Krever, *supra* note 19, at 89. Payments are exempt if they are legal under the laws of the receiving official’s country or if the payment is for “a reasonable and bona fide expenditure.” *Id.*

<sup>25</sup> *See* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 4, 112 Stat. 3302, 3306 (codified in 15 U.S.C. § 78dd-3(a) (2006)).

<sup>26</sup> *Id.* §§ 2(d), 3(d) (codified in 15 U.S.C. §§ 78dd-1(g), 78dd-2(i) (2006)). *See* Thomas, *supra* note 12, at 448 (suggesting that even foreign nationals are potentially subject to prosecution).

<sup>27</sup> *See* H.R. REP. NO. 105-802, at 54–55 (1998) (explaining that the 1998 amendments were meant to extend the reach of the FCPA to the acts taken on behalf of U.S. businesses “by their officers, directors, employees, agents or stockholders outside the territory of the United States, regardless of the nationality of the officer, director employee, agent, or stockholder”).

<sup>28</sup> Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 103, 14 Stat. 1494 (1977) (codified in 15 U.S.C. § 78m(b)(2)(A)-(B) (2006)).

<sup>29</sup> *Id.*; Pub. L. No. 95-213, § 102, 14 Stat. 1494 (1977) (codified in 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3 (2006)).

<sup>30</sup> Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act – 1977 to 2010*, 12 SAN DIEGO INT’L L.J. 89, 96 (2010). The FCPA also covers American Depository Receipts holders. David E. Dworsky, *Foreign Corrupt Practices Act*, 46 AM. CRIM. L. REV. 671, 675 (2009). Depository Receipts are instruments issued by U.S. banks representing a specified amount of shares of a foreign company that is traded on a U.S. exchange. *Id.* Thus, the FCPA potentially covers all the foreign companies traded on any U.S.-based exchanges. *Id.*

<sup>31</sup> *See* 15 U.S.C. § 78(a) (2006).

<sup>32</sup> 15 U.S.C. § 78m(b)(2) (2006).

<sup>33</sup> ROBERT W. TARUN, *THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK: A PRACTICAL GUIDE FOR MULTINATIONAL GENERAL COUNSEL, TRANSACTIONAL LAWYERS AND WHITE-COLLAR CRIMINAL PRACTITIONERS* 19 (2010).

The FCPA uses a broad definition of “records” that includes practically all “transcribed information of any type.”<sup>34</sup> “Reasonable detail” is defined as satisfying “prudent officials in the conduct of their own affairs.”<sup>35</sup> Thus, FCPA record-keeping provisions are broad in scope and imply that even inaccurate records of non-material payments may be criminally punishable.<sup>36</sup> The FCPA also requires companies to establish a system of controls to reasonably assure that transactions are properly authorized.<sup>37</sup>

Two acts have been introduced to increase the effectiveness of the FCPA. The Sarbanes-Oxley Act of 2002 introduces some notable changes to the accounting provisions of the FCPA.<sup>38</sup> This Act increases penalties for violations of the FCPA’s reporting requirements.<sup>39</sup> Additionally, it requires securities issuers to report results of internal control effectiveness assessments and to report any corrective measures needed to remedy deficiencies and material weaknesses.<sup>40</sup>

The Dodd-Frank Act of 2010 establishes a new whistleblower program to encourage reporting of any Securities Exchange Act violations, including the FCPA.<sup>41</sup> Under this program, whistleblowers that provide “original information” about FCPA violations are protected from retaliation and may even receive a monetary reward from the amounts recovered by the Department of Justice (DOJ) and SEC in enforcement actions.<sup>42</sup> Under another Dodd-Frank provision, the “resource extraction issuers” are required to report any payments made to foreign governments for the purpose of the commercial development of oil, natural gas, or minerals.<sup>43</sup>

In addition to these accounting provisions, the FCPA has several anti-bribery provisions. These provisions constitute the “heart” of the statute. The anti-bribery provisions are broader in reach than the accounting provisions: they cover not only “issuers” of securities, but also “domestic concerns” and “any person . . . while in the territory of the United States.”<sup>44</sup> These provisions criminalize bribery of foreign

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<sup>34</sup> *Id.*

<sup>35</sup> 15 U.S.C. § 78m(b)(7) (2006).

<sup>36</sup> See Bixby, *supra* note 30, at 96; Dworsky, *supra* note 30, at 675.

<sup>37</sup> 15 U.S.C. § 78m(b)(2)(B)(i). See also Dworsky, *supra* note 30, at 677 (listing factors the SEC considers in determining the adequacy of the internal controls system: (i) the role of the board of directors; (ii) communication of corporate procedures and policies; (iii) assignment of authority and responsibility; (iv) competence and integrity of personnel; (v) accountability for performance and compliance with policies and procedures; and (vi) objectivity and effectiveness of the internal audit function).

<sup>38</sup> Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C. (2006)).

<sup>39</sup> Pub. L. No. 107-204, § 1106, 116 Stat. 745, 810 (2002) (codified at 15 U.S.C. § 78ff(a) (2006)).

<sup>40</sup> *Id.*; § 302(a)(6), 116 Stat. at 777 (codified at 15 U.S.C. § 7241(a)(6) (2006)).

<sup>41</sup> Pub. L. No. 111-203, §§ 922-924, 124 Stat. 1376, 1841-50 (2010) (codified at 15 U.S.C. §§ 78u-6, 78u-7 (2006 & Supp. IV 2010)).

<sup>42</sup> 17 C.F.R. §§ 240.21F-3 (2014).

<sup>43</sup> 15 U.S.C. § 78m(q)(1)(D)-(2)(A) (2012).

<sup>44</sup> 15 U.S.C. §§ 78dd-1(a) (“issuers”), 78dd-2(a) (“domestic concerns”), 78dd-3(a) (“any person”) (1998). See also Peter W. Schroth, *The United States and the Int’l Bribery Conventions*, 50 AM. J. COMP. L. 593, 602-04 (2002) (discussing that actions under this section have in some

officials in order to “influence any act,” induce any unlawful action, or induce any action that would “assist . . . in obtaining or retaining business” or “securing any improper advantage.”<sup>45</sup> Individuals or businesses are prohibited from “directly or indirectly offering, paying, promising, or authorizing to pay money or anything of any value to any foreign official.”<sup>46</sup>

Originally, prosecuting violations of these anti-bribery provisions was difficult for two reasons. The first difficulty was, and continues to be, the requirement of proving certain elements, including the intent to corruptly influence any official act or decision.<sup>47</sup> The second difficulty to successful prosecution was the requirement of a territorial nexus between the corrupt act and the United States.<sup>48</sup> Fortunately, the FCPA was amended in 1998 to exclude the territorial nexus requirement, making the use of interstate commerce no longer necessary for prosecution of securities issuers and domestic concerns under the FCPA.<sup>49</sup>

It is also important to note that the FCPA does not prohibit “facilitating” or “grease” payments to foreign public officials for the performance of routine governmental actions.<sup>50</sup> Of further note, the FCPA outlines two affirmative defenses.<sup>51</sup> First, if offering a payment, gift, or “anything of value” to a foreign official is within the written laws of the host country, such payments do not fall within the scope of the FCPA.<sup>52</sup> The second defense covers “reasonable and bona fide expenditure[s]” made without a corrupt purpose.<sup>53</sup>

### 3. Ongoing Criticisms of the FCPA

The FCPA has been the target of criticism since its enactment in 1977. Three major criticisms are that the FCPA 1) leads to a competitive

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instances reached foreign persons who were neither doing business in the U.S. nor were residents of the U.S.).

<sup>45</sup> 15 U.S.C. § 78dd-1(a)-3(a)(1998).

<sup>46</sup> Dworsky, *supra* note 30, at 678.

<sup>47</sup> *Id.* at 680–82 (providing the full list of elements). *See also* Bixby, *supra* note 30, at 94.

<sup>48</sup> *See* 15 U.S.C. § 78dd-1(g) (providing alternative bases for jurisdiction over issuers); § 78dd-2(i) (providing alternative bases for jurisdiction over domestic concerns).

<sup>49</sup> Dworsky, *supra* note 30, at 673.

<sup>50</sup> *Id.* However, in *Wabtec*, the DOJ asserted that periodic payments to railroad officials to speed up shipments ranging from \$67 to \$358 and totaling \$2,175 per year violated the FCPA. Non-Prosecution Letter re *Wabtec* from Criminal Div., U.S. Dept. of Justice, at 4 (Feb. 8, 2008), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/westinghouse-corp/02-08-08wabtec-agree.pdf>.

<sup>51</sup> 15 U.S.C. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c) (1998); *see also* H.R. REP. No. 100-579, at 921-22 (1988) (Conf. Rep.) (discussing affirmative defenses included in the 1988 amendments to the FCPA).

<sup>52</sup> 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1). The statute itself does not set a cap on the maximum allowable amount. *See, e.g.*, Bixby, *supra* note 30, at 96. Bruce Klaw suggests setting it at the level of five thousand dollars per official because most payments below this threshold would fall under existing FCPA exceptions or defenses and would be too inconsequential to satisfy the “obtaining or retaining business” element of the FCPA. *See* Klaw, *supra* note 13, at 351–52. However, in *Wabtec*, the company was prosecuted for payments as small as \$67. *See supra* note 50.

<sup>53</sup> 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2). *See also* Dworsky, *supra* note 30, at 684 (explaining when the defense is available).

disadvantage for American corporations, 2) presents an example of moral imperialism, and 3) is blind to the “demand” side of corruption. Because the same reasoning may be used to criticize attempts to regulate private sector corruption, addressing each of these criticisms is important in designing a response to the problem of private sector corruption.

First, scholars and business leaders criticize the FCPA as being a competitive disadvantage for U.S. corporations. For example, studies conducted in the U.S. in the 1980–90s show that the market share of U.S. companies increased significantly in regions where bribery was common,<sup>54</sup> as well as in some industries that were deemed susceptible to bribery.<sup>55</sup> Additionally, defending against FCPA lawsuits has become a major legal expense item for corporations,<sup>56</sup> leaving these corporations with decreased resources. Further, some economic analysts claim that the FCPA and its enforcement result in companies forgoing economic opportunities out of the fear of prosecution.<sup>57</sup>

On the other hand, there is evidence that the FCPA’s anti-bribery provisions may indeed be an advantage to some U.S. companies.<sup>58</sup> First, scholars argue that the ability to give bribes can hardly be described as a “competitive advantage” since such payments result in inefficiency both on the macro<sup>59</sup> and micro economic levels;<sup>60</sup> thus, the FCPA guards against these economic inefficiencies. Second, companies that give bribes also show slower growth rates and lower productivity, experience higher direct costs, and are more likely to have strained internal and external relationships.<sup>61</sup> Third, some U.S. companies report the FCPA’s

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<sup>54</sup> See Krever, *supra* note 19, at 90–91.

<sup>55</sup> *Id.* (noting that in those industries more susceptible to corruption the growth rates were even higher than in other industries).

<sup>56</sup> See Joe Palazzolo, *FCPA Inc.: The Business of Bribery*, WALL STREET JOURNAL BLOG (Oct. 2, 2012), <http://online.wsj.com/article/SB10000872396390443862604578028462294611352.html> (reporting that Wal-Mart Stores, Inc., Avon Products, Inc., and Weatherford International Inc. spent \$456 million on internal investigation of corruption before even being charged, and that most of the money went to law firms and other specialists hired to conduct investigations and improve internal control systems).

<sup>57</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, AFMD-91-34, IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS, 14 (1981), *available at* <http://www.gao.gov/assets/140/132199.pdf>. See also U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 6 (2010), *available at* [http://ilr.iwssites.com/uploads/sites/1/restoringbalance\\_fcpc.pdf](http://ilr.iwssites.com/uploads/sites/1/restoringbalance_fcpc.pdf) (stating that “up to \$1 billion” in “lost U.S. export trade” results from the FCPA every year).

<sup>58</sup> See Nichols, *supra* note 3 (citing research on the effects of corruption and highlighting its devastating effects at the company level). *But see* Krever, *supra* note 19, at 90–92 (citing studies showing that the FCPA did not have such a detrimental economic effect on businesses).

<sup>59</sup> See generally SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 25–26 (1999). Rose-Ackerman was one of the first scholars who discussed detrimental effects of corruption on the overall government legitimacy and how it deters direct foreign investment. See also Elizabeth Spahn, *Nobody Gets Hurt?*, 41 GEO. J. INT’L L. 861, 869–70 (2010) (arguing that bribery destroys “rational markets” because contracts go into the hands of those willing to pay bribes, without regard to such traditional rational market factors as price and quality).

<sup>60</sup> See Nichols, *supra* note 3, at 328.

<sup>61</sup> *Id.* at 335 (direct costs), 338 (lower growth rates), 340 (lower productivity), 341 (internal relationships), 344 (external relationships).

prohibitions on giving bribes as helping them avoid unnecessary expenses.<sup>62</sup>

Moreover, U.S. companies that do not engage in corruption may not be at a disadvantage to companies that do; economic analysts claim that FCPA enforcement reaches beyond U.S. borders and results in “economic sanctions” in the form of “a reduction in investments” for corporations in developing countries with widespread corruption.<sup>63</sup> Additionally, the 1977 House Report notes that paying bribes could be unnecessary, as many U.S. companies have successful export programs without engaging in corruption.<sup>64</sup>

The second criticism of the FCPA is that it constitutes moral imperialism. Scholars emphasize that the definition of corruption can be dependent on “cultural and linguistic gaps”: what some cultures consider hospitality, others outlaw as corruption.<sup>65</sup> Imposing an American definition of corruption on other nations is, in some cases, incompatible with their practices.<sup>66</sup> Moreover, such cultural imposition might cause parties to forgo economically efficient transactions because they violate U.S. moral standards (as incorporated in the FCPA).<sup>67</sup>

In response, other scholars argue that the FCPA demonstrates a certain degree of cultural sensitivity by facilitating payment provisions and allowing affirmative defenses to allegations of corruption.<sup>68</sup> Indeed, the 1977 House Report explains that while some payments “may be reprehensible in the United States, the committee recognizes that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments.”<sup>69</sup>

The third and final criticism of the FCPA is that it focuses on the supply side of corruption, leaving foreign public officials who take or solicit bribes out of its reach.<sup>70</sup> In other words, the FCPA fails to accomplish the global trend of attempting to punish both supply and demand sides of corruption.<sup>71</sup> Scholars argue that it would be reasonable for American legislators to consider enacting similar provisions both to

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<sup>62</sup> Christopher L. Hall, *The Foreign Corrupt Practices Act: A Competitive Disadvantage, But For How Long?*, 2 TUL. J. INT'L & COMP. L. 289, 309 (1994) (referencing how the FCPA helped Colgate-Palmolive to avoid questionable payments while negotiating a joint venture in China).

<sup>63</sup> Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 366 (2010).

<sup>64</sup> H.R. REP. NO. 95-640, at 5 (1977).

<sup>65</sup> Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419, 429 (1999).

<sup>66</sup> Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 276–78 (1997).

<sup>67</sup> Marie M. Dalton, *Efficiency v. Morality: The Codification of Cultural Norms in the Foreign Corrupt Practices Act*, 2 N.Y.U.J.L. & BUS. 583, 608 (2006).

<sup>68</sup> Spalding, *supra* note 63, at 365.

<sup>69</sup> H.R. REP. NO. 95-640, at 8 (1977).

<sup>70</sup> See generally Spalding, *supra* note 63, at 358–64.

<sup>71</sup> See Part III of this Comment.

address problems within the U.S. and to contribute to global efforts to eradicate corruption on both sides<sup>72</sup>

## B. Regulation of Private Sector Corruption in the United States

The United States has long considered punishing private sector corruption.<sup>73</sup> Domestically, there are many legal theories one can use to sue a company that obtains business by means of bribery. However, while many states have extensive commercial bribery regulations, many of these statutes lack the extra-territorial reach of the FCPA and do not cover foreign corruption. This causes state laws to be inadequate in that they condemn commercial bribery domestically, but do nothing about bribery in the context of international trade.<sup>74</sup> This subsection first explores state remedies for private sector corruption and then covers the following federal statutory remedies: the Robinson-Patman Act, the Wire and Mail Fraud Statute, and the Travel Act.<sup>75</sup>

### 1. State Remedies and Challenges Regarding Private Sector Corruption

Many states offer a variety of legal avenues to pursue claims of private sector corruption, such as unfair competition laws, tortious interference with prospective business relations laws, and—most importantly—criminal laws prohibiting commercial bribery.<sup>76</sup> Yet, even at the beginning of the Twentieth Century, scholars and legislators realized that state-to-state differences in such regulations posed a great problem in prosecuting commercial bribery across state lines.<sup>77</sup> If prosecuting across state lines proves to be a challenge, it is easy to see the difficulty in prosecuting corruption based in another country.

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<sup>72</sup> See Klaw, *supra* note 13, at 320–24, 334–36, 361–68. Klaw argues that punishing only bribe payers is inequitable because, under the current provisions, corrupt public officials who solicit or accept illegal payments go free. He claims that neither jurisdictional basis nor immunity of said officials would pose an obstacle to prosecution if the host country were unwilling or unable to prosecute.

<sup>73</sup> *Bribery*, *supra* note 6, at 1248–51 (1932). The appearance of an editorial on the subject of commercial bribery in Harvard Law Review indicates the scholarly and societal debate of the issue.

<sup>74</sup> A recent Supreme Court decision in *Kiobel* raises additional concerns by introducing the “touch and concern test” to displace a general presumption against extra-territoriality of U.S. laws. *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 1669 (2013). Essentially, the majority opinion precludes any litigation against U.S. corporations committing torts abroad in the U.S. courts because it focuses on where the conduct has occurred, not citizenship of a corporate defendant. See Kedar S. Bhatia, Comment, *Reconsidering the Purely Jurisdictional View of the Alien Tort Statute*, 27 EMORY INT’L L. REV. 447, 474–77 (2013). Because commercial bribery is likely classified as a tort or a crime in other foreign jurisdictions, U.S. corporations are likely protected from any tort claims if the bribing occurred outside the U.S. under *Kiobel*’s arduous “touch and concern” test. In countries that do not recognize commercial bribery as a tort or a crime, plaintiffs will be without any legal means to recover the damages suffered. Thus, only the adoption of an FCPA-like statute, where Congress states clearly that it is extra-territorial in nature, would be a solution for the problem of private sector corruption in international trade.

<sup>75</sup> Robinson-Patman Anti-Discrimination Act, 15 U.S.C. §13a, 13b, 21a (1936); Mail and Wire Fraud Statute, 18 U.S.C. §1341 (2008); Travel Act, 18 U.S.C. §1952 (2012).

<sup>76</sup> See, e.g., COMMERCIAL BRIBERY & CORPORATE CRIMINAL LIABILITY (2012), (LexisNexis 2012).

<sup>77</sup> See Note, *supra* note 6 at 1249–50.

Despite these challenges, many states have adopted criminal provisions prohibiting commercial bribery.<sup>78</sup> These state regulations vary, however. Some states punish commercial bribery as a felony, others as a misdemeanor.<sup>79</sup> Some states define commercial bribery broadly; others define it as applying only to certain activities.<sup>80</sup> Further, the elements of the offense vary a great deal from state to state, including varying “degrees of culpability, levels of intent, relationships among the parties, and showings of harm, among others.”<sup>81</sup>

In addition to the challenge presented by the lack of uniformity among state anti-corruption statutes, several major problems arise when applying state criminal laws to international trade. First, many statutes apply only to acts of bribery committed within the state’s territory or by the state’s residents.<sup>82</sup> This makes it impossible to apply those laws to commercial bribery abroad, even when it is a U.S. company that has committed the bribery.<sup>83</sup> Second, state statutes do not establish a private right of action,<sup>84</sup> leaving victims of bribery (both consumers and competitors) without any redress for the harm suffered. Finally, because of the difficulty of proving commercial bribery, local prosecutors rarely enforce such laws.<sup>85</sup>

Another problem with punishing international corruption under state anti-corruption statutes is that some states punish corruption under tort schemes with ineffective deterrents (e.g. unfair competition and tortious interference with business relationships).—As Judge Richard Posner said, “[B]ribery is a deliberate tort, and one way to deter it is to make it worthless to the tortfeasor by stripping away all his gain.”<sup>86</sup> Such tort cases can be difficult to pursue because courts are reluctant to let such cases stand.<sup>87</sup>

<sup>78</sup> COMMERCIAL BRIBERY, 2 LAWS OF PURCHASING CHAPTER 33:1 INTRODUCTION (2014).

<sup>79</sup> Ryan J. Rohlfen, *Recent Developments in Foreign and Domestic Commercial Bribery* laws, 2012 U. CHI. LEGAL F. 151, 163 (2012).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> COMMERCIAL BRIBERY & CORPORATE CRIMINAL LIABILITY (2012), (LexisNexis 2012).

<sup>83</sup> For example, in *U.S. v. Welch*, a famous case about Salt Lake City officials bribing the International Olympic Committee (IOC), the district court held that the Utah commercial bribery statute did not apply to the members of the IOC and dismissed the charges. 248 F. Supp. 2d 1048 (D. Utah 2001). The case was reversed and remanded by *U.S. v. Welch*, 327 F.3d 1081 (10th Cir. 2003). Yet, Welch was not prosecuted for giving over \$1 million in gifts and payouts to the members of the IOC. Additionally, at least some episodes of bribing happened in Utah or within the U.S., which made the reversal and application of U.S. laws possible. It is an open question, however, whether state laws, even with the help of the Travel Act, can be applied to events that occurred completely outside the United States, like when an American corporation’s agent gives a bribe to secure a contract in another country.

<sup>84</sup> Editorial Staff, COMMERCIAL BRIBERY, 2 LAWS OF PURCHASING, Ch. 33 § 1, at Introduction (2014).

<sup>85</sup> *Id.* This position is understandable: in the world of limited resources, public agencies will always have to choose what law enforcement priorities to pursue. The potential effects of commercial bribery pale in comparison to the devastating effects of murder, human and drug trafficking, and other “traditional” crimes. Additionally, criminal law imposes a very high standard of proof—beyond a reasonable doubt—on the prosecution.

<sup>86</sup> *Williams Elec. Games, Inc. v. Garrity*, 366 F.3d 569, 576 (7th Cir. 2004).

<sup>87</sup> For example, in New York, the burden of proof in such cases rests on the victim, and the amount of damages is generally limited to the bribe amount. See John P. Woods, *Civil Forfeiture as*

This reluctance seems reasonable for several reasons. First, the line between bona fide promotional business expenditures and bribes lacks clarity. Additionally, there is always the risk of discouraging legal business practices and encouraging competitors' rent-seeking behavior by setting easy-to-establish prima facie case elements. However, the amount of the bribe (and sometimes the revenue the bribe generates) usually limits the award of damages in commercial bribery cases.<sup>88</sup> Ultimately, though, state tort corruption actions and criminal corruption laws will likely fail in foreign commercial bribery cases because the Constitution prohibits the states from dealing with international trade issues.<sup>89</sup>

## 2. Federal Statutes Relating to Commercial Bribery

One recent study that explores the attitudes of Americans towards bribery shows that Americans disapprove of commercial bribery almost as much as they do government bribery, especially among corporate executive and high-ranking public officials.<sup>90</sup> Such attitudes are not new; in 1922, concern of widespread commercial bribery prompted the House of Representatives to declare a need for additional deterrence in the form of uniform federal legislation.<sup>91</sup> Although the 1992 House introduced and even passed such legislation, the Senate did not agree, so it never became law.<sup>92</sup>

Still, several federal statutes currently allow for the prosecution of bribery. The Robinson-Patman Act regulates discriminatory pricing and so-called "dummy commissions."<sup>93</sup> The Mail and Wire Fraud Statutes and the doctrine of "honest services" give companies a right of action against employees who act contrary to the interests of the company by accepting or giving bribes.<sup>94</sup> And the Travel Act makes it a criminal

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*a Remedy for Corruption in Public and Private Contracting in New York*, 75 ALB. L. REV. 931, 961 (2011). Woods argues that this encourages private sector corruption and that imposing forfeiture and reimbursement remedy in this context would change the situation significantly. *Id.*

<sup>88</sup> See *Williams Elec. Games, Inc.*, 366 F.3d at 576 ("The victim of commercial bribery, who usually as here is the principal of an agent who was bribed, can obtain by way of remedy either the damages that he has sustained (the damages remedy) or the profits that the bribe yielded (the restitution or unjust enrichment remedy). The total profits would consist of the bribe itself (received by Barry, of course, not by Garrity or Arrow), plus the revenue that the bribe generated for the briber, minus the cost of goods sold and any other variable costs incurred in making the sales that generated that revenue." (citation omitted)).

<sup>89</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>90</sup> See Stuart P. Green & Mathew B. Kugler, *Public Perceptions of White Collar Crime Culpability: Bribery, Perjury, and Fraud*, 75 LAW & CONTEMP. PROBS. 33, 47, table 2 (2012). Authors assert that though corrupt government officials are still perceived as more blameworthy and deserving higher punishment, almost eighty percent of respondents think that corrupt conduct of corporate board members should be treated as a crime. *Id.* at 46. Authors claimed that this finding was "striking" given that federal laws do not regulate commercial bribery, at least not within the FCPA. *Id.*

<sup>91</sup> *Bribery*, *supra* note 6, at 1250.

<sup>92</sup> *Id.*

<sup>93</sup> 15 U.S.C. § 13 (2014) [hereinafter "Robinson-Patman Act"].

<sup>94</sup> 18 U.S.C. § 1341 (2014).

offense to violate state commercial bribery regulations while traveling between states.<sup>95</sup>

Congress enacted the Robinson-Patman Act in 1936.<sup>96</sup> The thrust of the statute prohibits sellers from charging disparate prices for different customers. This Act also prohibits sellers from making payments to a purchaser's agents or brokers with the purpose of inducing the purchaser to enter into a transaction.<sup>97</sup> Many courts recognize this Act as applying to commercial bribery.<sup>98</sup> In these jurisdictions, the illegal payment itself qualifies as a violation.<sup>99</sup>

Notably, the Robinson-Patman Act can also be applied to commercial bribery involving foreign transactions.<sup>100</sup> However, the language of the statute is not focused on international bribery, and courts have narrowly interpreted the language of the statute by limiting the meaning of "within the flow" of commerce among the several states or with foreign nations under 15 U.S.C. § 13(c).<sup>101</sup> Courts have yet to rule that the Robinson-Patman Act applies to private sector commercial bribery in foreign trade.<sup>102</sup>

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<sup>95</sup> 18 U.S.C. § 1952 (2014).

<sup>96</sup> 15 U.S.C. § 13.

<sup>97</sup> 15 U.S.C. § 13(c) reads, in the relevant part: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

<sup>98</sup> See, e.g., *FTC v. Henry Broch & Co.*, 363 U.S. 166, 169–70 n.6 (1960) (mentioning that the Act might apply to commercial bribery); *Bridges v. MacLean-Stevens Studios, Inc.*, 201 F.3d 6 (1st Cir. 2000) (discussing, without deciding, that commercial bribery is actionable under § 2(c)).

<sup>99</sup> Editorial Staff, COMMERCIAL BRIBERY, 2 LAWS OF PURCHASING, Ch. 33 § 1, at Introduction (2014).

<sup>100</sup> In 1978, the Federal Trade Commission (FTC) issued identical consent orders against the Lockheed Corporation and the Boeing Company for making payments to foreign government officials in connection with the sales of aircrafts. See *In re Lockheed Corp.*, 92 F.T.C. 968 (1978); *In re Boeing Co.*, 92 F.T.C. 972 (1978). The FTC concluded that such payments had an effect on other domestic competitors by depriving them of sales opportunities with bribed governments and officials.

<sup>101</sup> In *Rotec Industries v. Mitsubishi Corp.*, the court found that payments made by a Japanese company to a Chinese company to secure a contract for equipment in China were outside of the Robinson-Patman Act's reach, even though a U.S. company suffered damages as a result. *Rotec Industries v. Mitsubishi Corp.*, 348 F.3d 1116 (9th Cir. 2003).

<sup>102</sup> Although not on an issue of commercial bribery, a recent decision of the Seventh Circuit Court of Appeals held that the Foreign Trade Antitrust Improvements Act bars litigation in the U.S. of antitrust claims "'unless such conduct has a direct, substantial, and reasonably foreseeable effect on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations,' and also, in either case, unless the 'effect gives rise to a claim' under federal antitrust law." *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842, 844 (7th Cir. 2014), vacated by 12704 U.S. App LEXIS, July 1, 2014. (citing *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161–62 (2004); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 853–54 (7th Cir. 2012) (en banc), cert. denied 134 S. Ct. 23 (2013), opinion and judgment vacated by the order on July 1, 2014, rehearing granted. Judge Posner, who wrote the opinion, concluded that unless price fixing of foreign suppliers to Motorola foreign subsidiaries had a "'direct, substantial, and reasonably foreseeable effect' on commerce within the United States," and alleged violations occurred not on U.S. soil, an antitrust claim brought in a U.S. court should be dismissed because of the policy against extra-territorial application of U.S. laws. See *id.* "[R]ampant extra-territorial application of U.S. law 'creates a serious risk of interference with a

In addition to the Robinson-Patman Act, the Mail and Wire Fraud Statutes<sup>103</sup> play an important role in fighting domestic corruption, both private and public. These Statutes prohibit the use of the mail or interstate wires to execute any “scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.”<sup>104</sup> Historically, these Statutes helped to hold individuals accountable both for monetary losses and for the losses based on the “honest services” doctrine.<sup>105</sup> However, the statute did not apply to international corruption, and became even less effective with the Supreme Court’s decision in *McNally v. United States* when the Court held that the Wire Fraud Statute applies only to the protection of property rights, and “does not extend to the intangible right of the citizenry to good government.”<sup>106</sup> Although this case concerned public sector corruption, it affected the prosecution of cases involving commercial bribery as well.<sup>107</sup>

After *McNally*, Congress reacted swiftly by promulgating Section 1346, which provided the new statutory basis for the “intangible right to honest services” fraud.<sup>108</sup> Yet again, in 2010, the Supreme Court in *Skilling v. United States* limited the interpretation of the Statutes only to schemes involving bribery and kickbacks,<sup>109</sup> leaving undisclosed self-dealing by public officials and private employees completely out of the Statutes’ reach.<sup>110</sup> For now, the fate of the Mail and Wire Fraud Statutes’ effort to create a right to honest services, with the implied right of action

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*foreign nation’s ability independently to regulate its own commercial affairs.”* *Id.* at 8 (citing *F. Hoffman-La Roche Ltd.*, 542 U.S. at 161–62). Allowing the Sherman Act to have extra-territorial reach would create “friction with many foreign countries and ‘resent[ment at] the apparent effort of the United States to act as the world’s competition police officer,’ a primary concern motivating the foreign trade act.” *Id.* at 8 (citing *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942, 960–62 (7th Cir. 2003) (en banc) (dissenting opinion), overruled on other grounds by *Minn-Chem, Inc.* 683 F.3d 845, 853–54). Extending this logic to the Robinson-Patman Act would lead to a similar—and paradoxical—conclusion in the context of private sector corruption in foreign trade: it is akin to allowing one’s child to destroy a neighbor’s yard and not punishing him or her for it because of some illusory considerations of comity and potential frictions justified by lack of effect on one’s own yard.

<sup>103</sup> 18 U.S.C. §§ 1341, 1343, 1346 (2012).

<sup>104</sup> 18 U.S.C. § 1341.

<sup>105</sup> J.B. Perrine & Patricia M. Kipnis, *Navigating the Honest Services Fraud Statute After Skilling v. United States*, 72 ALA. L. REV. 294, 295–96 (2011).

<sup>106</sup> *McNally v. United States*, 483 U.S. 350, 356 (1987).

<sup>107</sup> For example, in *United States v. Covino*, the Second Circuit ruled that an employee who directed business opportunities to a contractor in exchange for money and property did not breach the duty of loyalty to his company because there was no evidence that his employer overpaid for the contractor’s services or suffered any property loss beyond the intangible, non-property interest in the honest and faithful services of an employee. *United States v. Covino*, 837 F.2d 65, 70 (1988).

<sup>108</sup> 18 U.S.C. § 1346 (2012).

<sup>109</sup> *Skilling v. United States*, 561 U.S. 358 (2010). Jeffrey Skilling was the Enron CEO who was charged with self-dealing under the Mail and Wire Fraud Statutes and the related doctrine of “honest services.” The majority of the Supreme Court justices rejected the arguments that the law covers prosecuting for “self-dealing”—that is, taking some action that gives one personal gain, without disclosing that fact. The Justices reasoned that expanding the interpretation of the statute to cover anything more than bribes and kickbacks would be unconstitutional because the plain language of the statute does not give people clear understanding of what is forbidden.

<sup>110</sup> Hon. Pamela Mathy, *Honest Services After Skilling*, 42 ST. MARY’S L.J. 645, 701 (2011).

when that right is violated, remains unclear.<sup>111</sup> The Statutes might yet be effectively used in bribery and kickback foreign trade cases, but they no longer cover other forms of private sector corruption and they do not give employers and citizens the right to sue for breach of loyalty and fiduciary duties.

Finally, the Travel Act applies to any person participating “in interstate or foreign commerce,” or who uses “mail or any facility in interstate or foreign commerce” with the intent to commit enumerated criminal acts, including the violation of state or U.S. bribery laws.<sup>112</sup> Initially, some disagreement existed over whether the generic term “bribery” applied to commercial bribery, however the Supreme Court settled the dispute in *Perrin v. United States*.<sup>113</sup> In *Perrin*, the Court held that violating state commercial bribery statutes could indicate a Travel Act violation.<sup>114</sup> Since *Perrin*, however, only a few reported cases have applied the Travel Act to commercial bribery.<sup>115</sup>

Though the Travel Act applies to international trade,<sup>116</sup> it can be difficult to prove that commercial transactions happening outside a U.S. territory violate any U.S. federal or state laws. The Travel Act does not state that the predicate violation can be based on a law of a foreign country,<sup>117</sup> and no other federal law directly criminalizes commercial bribery. As with state commercial bribery statutes, the Travel Act does not provide a private right of action to victims of private sector corruption.<sup>118</sup> This leaves enforcement susceptible to the pressures of international policy and resource scarcity, further limiting the Travel Act’s influence on international trade.

### C. The Need for Reform

U.S. regulations of private sector corruption currently resemble a patchwork quilt. Many states have criminal laws prohibiting commercial bribery; however, such laws are inconsistent from state to state, and the scope of their application to international transactions is not clear. State tort law is equally variable. Current state approaches to damages likely discourage victims from starting expensive litigation.<sup>119</sup> In the absence of a federal statute prohibiting commercial bribery, the efforts of private plaintiffs to recover under the doctrine of honest services or under the

<sup>111</sup> See Perrine, *supra* note 105, at 297–98.

<sup>112</sup> Pub. L. No 87-228, 75 Stat. 498 (1961), codified as 18 U.S.C. § 1952 (Travel Act). Specifically, § 1952(b)(2) states that bribery in violation of the laws of the State in which committed or of the United States is an “unlawful activity” within the meaning of the statute.

<sup>113</sup> *Perrin v. United States*, 444 U.S. 37 (1979).

<sup>114</sup> *Id.* at 45.

<sup>115</sup> Rohlfson, *supra* note 79, at 151.

<sup>116</sup> *Welch*, 327 F.3d at 1081. See *supra* note 83.

<sup>117</sup> 18 U.S.C. § 1952(b)(2) specifically covers “bribery . . . in violation of the State in which committed or of the United States.” It is doubtful that the word “State” in its ordinary sense encompassed foreign countries. The Supreme Court or any other federal courts have not addressed this issue yet.

<sup>118</sup> 18 U.S.C. § 1952 (2014).

<sup>119</sup> See *supra* notes 86-89 and related text.

Robinson-Patman Act could prove unsuccessful in international trade cases. The Mail and Wire Fraud Statutes' effectiveness in deterring private sector corruption remains unclear and could remain quite limited. Further, though the Travel Act criminalizes bribery committed in violation of state laws, it does not give a private right of action and it requires significant governmental resources to put together a viable international trade case. Finally, although the FCPA has the requisite extra-territorial reach, it simply does not cover private sector corruption.

Nevertheless, corruption consistently remains one of the top concerns of the DOJ and the Federal Bureau of Investigations "because of the extent and seriousness of their existence to a free democratic society."<sup>120</sup> Another DOJ goal remains to promote international efforts in fighting corruption.<sup>121</sup> Despite these concerns, U.S. national anti-corruption legislation falls significantly behind that of other nations—including China and Russia<sup>122</sup>—in terms of prohibiting private sector corruption, leading to questions as to whether the United States will retain its status as a global leader in the fight against corruption.

The U.S. should take action now to consider what options provide it with the ability to regulate private corruption in international trade. The current legislative void needs to be filled either by amending the FCPA to cover private sector corruption abroad, or by enacting a separate federal statute.<sup>123</sup> The FCPA just celebrated its thirty-fifth anniversary and, despite the criticism, has proven to be an efficient, if limited, instrument in deterring and prosecuting bribery of foreign public officials. The FCPA has helped change business culture: companies now almost universally adopt business conduct codes and provide trainings to employees on various ethics topics.<sup>124</sup> Therefore, the best option is to amend the FCPA.

### III. INTERNATIONAL RESPONSE TO THE PRIVATE SECTOR CORRUPTION PROBLEM

To give an overview of the global efforts in fighting private sector corruption, this Section will explore the United Nations Convention Against Corruption (UNCAC); the Organization for Economic Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments; The Council of Europe Civil and Criminal Conventions on

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<sup>120</sup> OFFICE OF THE ATT'Y GEN., U.S. DEP'T OF JUSTICE, STEWARDS OF THE AMERICAN DREAM: STRATEGIC PLAN FY 2007–2012, at 6 (2007); *see also* OFFICE OF THE ATT'Y GEN., U.S. DEP'T OF JUSTICE, STRATEGIC PLAN FY 2012–2016, at 11 (2012).

<sup>121</sup> *Strategic Plan FY 2012-2016*, *supra* note 120, at 11.

<sup>122</sup> *See* Part III.D.

<sup>123</sup> Which in fact means amending the Securities Exchange Act for accounting and reporting provisions and 15 U.S.C. § 78dd-1 for inclusion of private sector bribery as a punishable criminal offense.

<sup>124</sup> U.S. GEN. ACCOUNTING OFFICE, IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS 17 (Mar. 4, 1981), *available at* <http://www.gao.gov/assets/140/132199.pdf>.

Corruption; and some recent national legislative initiatives in countries such as the United Kingdom, China, and Russia.

With many countries adopting private sector corruption regulations, U.S. companies abroad may find themselves under much stricter scrutiny in light of local laws. Thus, compliance with the FCPA fails to shield a corporation from undesirable investigations and lawsuits in foreign jurisdictions.

#### A. The United Nations Convention Against Corruption

The UNCAC provides a global and legally binding instrument for fighting corruption at the international level.<sup>125</sup> The Convention aims at preventing and combating various forms of corruption through encouraging international cooperation and technical assistance; providing mechanisms of asset recovery; and promoting integrity, accountability, and proper management of public affairs and property.<sup>126</sup>

Corruption has concerned the United Nations (UN) for several decades.<sup>127</sup> The idea of creating an international legal instrument against corruption grew out of the preparatory work for the UN Convention against Transnational Organized Crime.<sup>128</sup> In December 2000, the UN General Assembly tasked the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime with negotiating the new anti-corruption convention.<sup>129</sup> In January 2002, the UN General Assembly decided that the Ad Hoc Committee should draft and negotiate a comprehensive anti-corruption convention.<sup>130</sup> The General Assembly adopted the UNCAC on October 31, 2003, and opened it for signatures by Member States in December 2003.<sup>131</sup> The convention then entered into force on December 14, 2005.<sup>132</sup> As of October 19, 2012, UNCAC was signed by 140 countries, and listed 165 countries as “State

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<sup>125</sup> Antonio Argandoña, *The United Nations Convention Against Corruption and its Impact on International Companies*, 74 J. BUS. ETHICS 481, 481 (2007). [hereinafter, Argandoña 2007].

<sup>126</sup> U.N. Convention against Corruption art. 1, G.A. Res. 58/4, U.N. Doc. A/58/422, 3249 U.N.T.S. 41 (entered into force Dec. 14, 2005) [hereinafter UNCAC].

<sup>127</sup> U.N. OFFICE ON DRUGS AND CRIME, TRAVAUX PRÉPARATOIRES OF THE NEGOTIATIONS FOR THE ELABORATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION (2010), available at

[https://www.unodc.org/documents/treaties/UNCAC/Publications/Travaux/Travaux\\_Preparatoires\\_-\\_UNCAC\\_E.pdf](https://www.unodc.org/documents/treaties/UNCAC/Publications/Travaux/Travaux_Preparatoires_-_UNCAC_E.pdf). Argandoña cites as examples: CODE OF CONDUCT FOR LAW ENFORCEMENT OFFICIALS (1979), MANUAL OF PRACTICAL MEASURES AGAINST CORRUPTION (1990), BASIC PRINCIPLES ON THE ROLE OF LAWYERS (1990), INTERNATIONAL CODE OF CONDUCT FOR PUBLIC OFFICIALS (1996), and DECLARATION ON CRIME AND PUBLIC SAFETY (1996). Argandoña 2007, *supra* note 125, at 493 n.4.

<sup>128</sup> Argandoña 2007, *supra* note 125, at 485.

<sup>129</sup> G.A. Res. 55/61, U.N. Doc. A/RES/55/61 (Dec. 4, 2000).

<sup>130</sup> G.A. Res. 56/260, U.N. Doc. A/RES/56/260 (Jan. 31, 2002).

<sup>131</sup> U.N. OFFICE ON DRUGS AND CRIME, *supra* note 127, xlii.

<sup>132</sup> *Id.* at xliii.

parties.”<sup>133</sup> The United States ratified the convention on October 30, 2006.<sup>134</sup>

The UNCAC does not give a clear definition of corruption. Instead, it focuses on identifying the most common forms of corruption, such as bribery, money laundering, embezzlement and misappropriation of property by public officials, trading in influence, abuse of positions, and others.<sup>135</sup> The UNCAC, however, does provide room for the adopting countries to choose a set of measures they want to implement.<sup>136</sup> Although some anti-corruption provisions are mandatory for adoption by the state-parties, other provisions—including provisions on private sector corruption—are only recommended measures.<sup>137</sup>

Provisions on private sector corruption represent one of the UNCAC’s most significant and controversial innovations.<sup>138</sup> The UNCAC addresses both preventive measures, such as enhancing accounting and auditing standards, promoting transparency of the private sector, directly prohibiting certain practices, and potentially criminalizing bribery and embezzlement in the private sector.<sup>139</sup> Interestingly, the United States (the country that has long led the global fight against public sector corruption) actively opposed regulation of purely private sector conduct.<sup>140</sup> As a result of the United States’ opposition, the final version of the UNCAC includes only non-mandatory measures for private sector corruption criminalization.<sup>141</sup> By 2011, fewer than half of the State parties had criminalized bribery in the private sector, but many countries had adopted criminal provisions against embezzlement.<sup>142</sup>

Another significant innovation of the UNCAC is the creation of a private right of action for the entities or persons who have suffered damage resulting from corrupt acts.<sup>143</sup> The provision was adopted despite the protests of U.S. companies that feared increasing exposure to

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<sup>133</sup> U.N. OFFICE ON DRUGS AND CRIMES, UNCAC SIGNATURE AND RATIFICATION STATUS AS OF SEPTEMBER 24, 2012, (Feb. 12, 2013, 10:50 AM), <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>.

<sup>134</sup> *Id.*

<sup>135</sup> UNCAC, *supra* note 126, art. 14 (money laundering), art.15 (bribery of domestic officials), art. 16 (bribery of foreign officials), art. 21 (private sector bribery), art. 14 (money laundering), art. 17 (embezzlement), art. 18 (trading in influence), and art. 19 (abuse of functions).

<sup>136</sup> Argandoña 2007, *supra* note 125, at 485–88.

<sup>137</sup> *Id.* at 488–89.

<sup>138</sup> U.N. OFFICE ON DRUGS AND CRIME, TECHNICAL GUIDE TO THE UNITED NATIONS CONVENTION AGAINST CORRUPTION 56 (2009), *available at* [http://www.unodc.org/documents/treaties/UNCAC/Publications/TechnicalGuide/09-84395\\_Ebook.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/TechnicalGuide/09-84395_Ebook.pdf); *see also* Philippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?*, 8 J. INT’L. ECON. L. 191, 213 (2005).

<sup>139</sup> UNCAC, *supra* note 126, arts. 12, 21.

<sup>140</sup> Webb, *supra* note 138, at 213. Webb reports that the U.S. representative said that the country deals with this problem “in another way.”

<sup>141</sup> *See id.* at 214 (2005); Argandoña 2007, *supra* note 125, at 494 n.21.

<sup>142</sup> Conference of the State Parties to the United Nations Convention Against Corruption, Oct. 24–28, 2011, *Report on Implementation of Chapter III (Criminalization and Law Enforcement) of the United Nations Convention against Corruption*, ¶¶ 11–12, CAC/COSP/2011/2 (Aug. 25, 2011).

<sup>143</sup> UNCAC, *supra* note 126, art. 35.

lawsuits brought by foreign parties.<sup>144</sup> Each State party, however, retains an unabridged right to determine under which circumstances its courts will be available for such actions.<sup>145</sup>

The UNCAC reflects the growing international recognition of corruption and promotes anti-corruption culture.<sup>146</sup> Although the UNCAC is a product of political compromise and does not provide a mandatory framework to deal with private sector corruption, its measures at least attempt to curb corruption.

#### B. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

In the early 1990s, the issue of promoting international instruments that prohibit bribery of public officials became a priority for the United States government.<sup>147</sup> As a result of joint efforts by the Departments of State, Commerce, and the Treasury, the issue of international bribery started to appear on the agendas of many international organizations.<sup>148</sup>

Corruption and bribery of public officials were first internationally discussed in 1996 at the meeting of the G-7 heads of state in Lyon, France.<sup>149</sup> On November 21, 1997, the OECD Council of Ministers adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>150</sup> The Convention entered into force on February 15, 1999.<sup>151</sup> Initially not very popular, the Convention gained momentum in the 2000s, and is currently ratified by thirty-nine countries.<sup>152</sup> These countries represent two-thirds of all international trade and three-quarters of all international investment.<sup>153</sup> The OECD Working Group on Bribery in International Business Transactions keeps track of the implementation of the Convention and related instruments in the State parties.

The Convention requires all member parties to criminalize bribery of foreign public officials—both active and passive forms—and eliminates

<sup>144</sup> See Webb, *supra* note 138, at 214.

<sup>145</sup> U.N. GAOR, 58th Sess., *Rep. of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the Work of its First to Seventh Sessions, Addendum: Interpretative Notes for the Official Records (travaux préparatoires) of the Negotiation of the United Nations Convention against Corruption*, add., A/58/422/Add.1, (Oct. 7, 2003), [https://www.unodc.org/pdf/crime/convention\\_corruption/session\\_7/422add1.pdf](https://www.unodc.org/pdf/crime/convention_corruption/session_7/422add1.pdf).

<sup>146</sup> See Argandoña 2007, *supra* note 125, at 482, 485; Webb, *supra* note 138, at 215.

<sup>147</sup> Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 AM. J. COMP. L. 593, 610 (2001).

<sup>148</sup> *Id.* at 611 (mentioning that the OECD started to issue anti-bribery recommendations in 1994 and citing to *Recommendation of the Council on Bribery in International Business Transactions*, OECD Doc. No. C(94)75/Final (27 May 1994), 33ILM 1389 (1994)).

<sup>149</sup> OFOSU-AMAAH, *supra* note 5, at 74.

<sup>150</sup> *Id.*

<sup>151</sup> Organisation for Economic Co-operation and Development, OECD Anti-Bribery Convention: Entry into Force of the Convention, Dec. 17, 1997, (Feb. 12, 2013, 11:39 AM), <http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/oecdanti-briberyconventionentryintoforceoftheconvention.htm>.

<sup>152</sup> *Id.*

<sup>153</sup> Misty Robinson, *Global Approach to Anti-Bribery and Corruption, An Overview: Much Done, But a Lot More to Do . . .*, 37 T. MARSHALL L. REV. 306–7 (2012).

the tax deductibility of such bribes, but it does not cover private sector corruption.<sup>154</sup> This does not mean, however, that OECD members turn a blind eye to this problem. The 2011 Guidelines for Multinational Enterprises contain a general prohibition of bribery by companies, including offering bribes to employees of business partners.<sup>155</sup> The Guidelines go beyond the scope of the FCPA, suggesting that companies should discourage even small, facilitating payments.<sup>156</sup>

The OECD Convention is indicative of the growing attention of the international community to the problem of private sector corruption. Though not recognized in the Convention itself, private sector corruption is condemned in the guidelines and in other instruments issued in furtherance of the Convention.

### C. The Council of Europe's Civil and Criminal Conventions on Corruption

Around the same time the OECD started working on its anti-bribery convention, the Council of Europe started developing its own legal instruments to fight corruption.<sup>157</sup> A Multidisciplinary Group on Corruption was tasked with developing a comprehensive strategy of fighting corruption, which was endorsed in 1996.<sup>158</sup> After extensive consultations, the Criminal Law Convention on Corruption was opened for signatures on January 27, 1999,<sup>159</sup> and was adopted on November 4, 1999.<sup>160</sup>

In May 1998, the Committee of Ministers, during the 102nd Session in Strasbourg, authorized the establishment of the Group of States against Corruption (GRECO).<sup>161</sup> Established on May 1, 1999 GRECO

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<sup>154</sup> See generally Organisation for Economic Co-operation and Development, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (entered into force on Feb. 15 1999), [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf).

<sup>155</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 47 (ed. 2011), <http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationaenterprises/48004323.pdf> (“In particular, enterprises should: Not offer, promise or give undue pecuniary or other advantage to public officials or the employees of business partners.”).

<sup>156</sup> *Id.* at 47–48.

<sup>157</sup> Ofosu-Amaah, *supra* note 149, at 75 (1999). At the 19th Conference of the Council of Europe in Valetta, Malta in 1994, European officials called upon the member-countries to respond to the threat of corruption, which undermined democracy, the rule of law, and human rights. *Id.*

<sup>158</sup> *Id.* See also COUNCIL OF EUROPE, GROUP OF STATES AGAINST CORRUPTION: HISTORICAL BACKGROUND (Feb. 13, 2013, 11:45 AM), [http://www.coe.int/t/dghl/monitoring/greco/general/2.%20Historical%20Background\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/general/2.%20Historical%20Background_en.asp).

<sup>159</sup> Council of Europe, Criminal Law Convention on Corruption, Jan. 27, 1999, ETS No. 173 (1999), available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm> [hereinafter Criminal Law Convention].

<sup>160</sup> Council of Europe, Civil Law Convention on Corruption, Nov. 4, 1999, ETS No. 174 (1999), available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/174.htm> [hereinafter Civil Law Convention].

<sup>161</sup> COUNCIL OF EUROPE, *supra* note 158.

currently includes fifty countries, including the U.S.<sup>162</sup> In addition to OECD and GRECO, on July 22, 2003, the Council of the European Union adopted Framework Decision 2003/568/JHA f, which aims at ensuring that corruption in the private sector is criminalized in all member states, requiring effective, proportionate and dissuasive penalties, including criminal liability of legal entities.<sup>163</sup>

Both the Criminal and Civil Law Conventions on Corruption recognize “passive” (i.e. bribe-taking) and “active” (bribe-giving, solicitation) corruption. Articles 7 and 8 of the Criminal Convention on Corruption provide for mandatory criminalization of both active and passive bribery in the private sector.<sup>164</sup> The Convention also calls for criminal liability for violations of accounting regulations intentionally made to disguise corrupt acts.<sup>165</sup>

The Civil Convention on Corruption requires that all signatories establish effective remedies for people who have been harmed by corruption.<sup>166</sup> Notably, the Convention establishes an affirmative defense of contributory negligence.<sup>167</sup> If any part of a contract calls for corrupt acts, such a part should be declared null and void.<sup>168</sup> However, a contract obtained by corrupt means is merely voidable.<sup>169</sup>

#### D. Country Case Studies: United Kingdom, China, and Russia

Corruption in the private sector has been addressed not only at the international level, but also at the national level. Besides joining various international anti-corruption treaties, some countries are amending their domestic legislation to address the corruption problem. This Section will highlight three recent and notable examples of such amendments: the United Kingdom, Russia, and China. Recent legislative developments in these countries indicate a shift in attitudes toward corruption of the big players on the international trade scene. When compared to these changes, the FCPA seems unhelpful in providing guidance to U.S. companies because some of its provisions—like facilitating payments—would be illegal in other countries.

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<sup>162</sup> COUNCIL OF EUROPE, GROUP OF STATES AGAINST CORRUPTION: MEMBERS AND OBSERVERS (Feb. 14, 2013, 1:48 PM), [http://www.coe.int/t/dghl/monitoring/greco/general/members\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/general/members_en.asp).

<sup>163</sup> 2003 O.J. (L. 192) (European Union Council Framework Decision 2003/568/JHA of July 22, 2003 on combating corruption in the private sector), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003F0568:EN:NOT>.

<sup>164</sup> Criminal Law Convention on Corruption, *supra* note 159, arts. 7–8.

<sup>165</sup> *Id.* at art. 14.

<sup>166</sup> Civil Law Convention, *supra* note 160, art. 1, April 11, 1999, art. 4 (outlining the prima facie case elements: (i) the defendant has committed or authorized the act of corruption, or failed to take reasonable steps to prevent the act of corruption; (ii) the plaintiff has suffered damage; and (iii) there is a causal link between the act of corruption and the damage).

<sup>167</sup> *Id.* at art. 6.

<sup>168</sup> *Id.* at art. 8.

<sup>169</sup> *Id.*

### 1. *The U.K. Bribery Act of 2010*

In 2010, the U.K. adopted the Bribery Act, but it did not go into force until July 2012.<sup>170</sup> The Act covers bribe-giving, solicitation of bribes, and acceptance of bribes.<sup>171</sup> The Act's influence is so broad, in fact, that the U.S. Chamber of Commerce recognizes the Act as having the potential, under some circumstances, to influence U.S. companies.<sup>172</sup> One of the major innovations of the Act is that it criminalizes bribery in the private sector along with bribery of public officials.<sup>173</sup>

The U.K. Bribery Act differs from the FCPA in its treatment of “grease” payments: the Act prohibits such payments, but gives companies an affirmative defense of having “adequate procedures” designed to deter bribery.<sup>174</sup> The U.K. has issued guidelines on what are deemed “adequate procedures,” but plenty of ambiguity remains.<sup>175</sup> Such an approach is likely to encourage companies to invest in corruption prevention strategies and programs. On the other hand, the ambiguity of the Act might lead to economically inefficient levels of investment in such initiatives, creating “paper shields” instead of effective mechanisms for prevention and detection of corrupt practices. Another potential consequence is withdrawal from regions where corruption is common, similar to what scholars labeled as “unintended consequences” of the FCPA.<sup>176</sup> Some scholars also raise concerns that corrupt businesspersons and officials will just invest more into hiding their criminal dealings, deflecting valuable resources from other productive activities.<sup>177</sup>

### 2. *Countries with Endemic Corruption: China and Russia*

Russia and China have both been characterized as countries with corruption so pervasive that it could potentially paralyze foreign investment projects or simply render such projects economically unprofitable.<sup>178</sup> Both countries, in attempts to secure foreign investment

<sup>170</sup> Bribery Act, 2010, c. 23 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2010/23/contents> [hereinafter U.K. Bribery Act].

<sup>171</sup> *Id.*

<sup>172</sup> Andrew Weissmann & Alixandra Smith, Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act, 11-14, (2010), available at [http://ilr.iwssites.com/uploads/sites/1/restoringbalance\\_fcpa.pdf](http://ilr.iwssites.com/uploads/sites/1/restoringbalance_fcpa.pdf).

<sup>173</sup> U.K. Bribery Act, *supra* note 168, § 3(2). The section lists that to be actionable, the bribery should relate to “(a) any function of a public nature, (b) any activity connected with a business, (c) any activity performed in the course of a person’s employment, (d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporate).”

<sup>174</sup> *Id.* § 7(2).

<sup>175</sup> Robinson, *supra* note 153, at 319.

<sup>176</sup> Spalding, *supra* note 63 at 358.

<sup>177</sup> See, e.g., Eric Engle, *I Get By with a Little Help from my Friends? Understanding the U.K. Anti-Bribery Statute, by Reference to the OECD Convention and the Foreign Corrupt Practices Act*, 44 INT’L LAW. 1173, 1187 (2010) (highlighting certain anti-corruption statutes, however, criticism is applicable to any anti-bribery statute).

<sup>178</sup> See WILLIAM L. MILLER, ÅSE B. GRØDELAND, & TATYANA Y. KOSHECHKINA, A CULTURE OF CORRUPTION?: COPING WITH GOVERNMENT IN POST-COMMUNIST EUROPE (2001).

and fulfill their international commitments, recently adopted significant changes to their anti-corruption regulations.<sup>179</sup> Russia signed and ratified the UNCAC in 2006,<sup>180</sup> and on January 10, 2009, Russia's new anti-corruption legislation came into effect.<sup>181</sup> After that, Russia applied for accession to the OECD Convention and became a full member of GRECO.<sup>182</sup> As a consequence, new federal statutes that criminalize corruption in both the public and the private sectors went into effect.<sup>183</sup> The statutes provide for administrative liability for corrupt acts committed "on behalf or in the interests" of a company.<sup>184</sup> Though there is no criminal liability for corporations,<sup>185</sup> individuals can be sentenced for up to twelve years in prison and fined up to 100 times the bribe amount, not to exceed \$500 million RUR (approximately \$17 million USD).<sup>186</sup> In addition, Russian anti-corruption laws have the same extra-territorial reach as the FCPA and the U.K. Anti-Bribery Act.<sup>187</sup> Moreover, Russia recognizes neither the U.K. "compliance" defense nor the U.S. "facilitating payments" exception, which makes Russia's statutory framework one of the most demanding in the world.<sup>188</sup> Because of this, American companies relying on the FCPA for guidance on doing business in Russia are no longer insulated from prosecution for "ministerial" payments and should take steps to bring their compliance programs up to speed with Russian regulations.

Chinese anti-corruption legislation has undergone significant changes as well. China joined the UNCAC in 2006.<sup>189</sup> In May 2011, China's new anti-corruption legislation criminalizing both active and passive corruption took effect.<sup>190</sup><sup>191</sup> This legislation is significant since private sector corruption and bribing public officials (both domestic and

<sup>179</sup> See TRANSPARENCY INTERNATIONAL, BRIBE PAYERS INDEX 2011, 12–13 (2011).

<sup>180</sup> U. N. OFFICE ON DRUGS AND CRIME, U. N. CONVENTION AGAINST CORRUPTION SIGNATURE AND RATIFICATION STATUS AS OF 5 SEPTEMBER 2014 (Sep. 26, 2014, 3:25 PM), <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>.

<sup>181</sup> UGOLOVNYI KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code] art. 201-04 (Russ.) (abuse of position in private enterprises), art. 285-93 (abuse of position in public service); Federal'nyi Zakon RF O Protivodeystvii Korruptsii [Federal Law of the Russian Federation on Anti-Corruption Measures], ROSSIISKAIA GAZETA [ROS. GAZ.] Dec. 30 2008 (available at <http://www.russian-criminal-code.com>).

<sup>182</sup> Robinson, *supra* note 151, at 317.

<sup>183</sup> UGOLOVNYI KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code] (Russ.) art. 201-04 (abuse of position in private enterprises), art. 285-93 (abuse of position in public service).

<sup>184</sup> KODEKS ROSSIISKOI FEDERATSII OB ADMINISTRATIVNYKH PRAVONARUSHENIIAKH [KOAP RF] [Code of Administrative Violations] art. 19.28.

<sup>185</sup> Corporate criminal liability simply does not exist under Russian law (author's note).

<sup>186</sup> Robinson, *supra* note 153, at 316.

<sup>187</sup> *Id.*

<sup>188</sup> *See id.*

<sup>189</sup> U. N. OFFICE ON DRUGS AND CRIME, *supra* note 178.

<sup>190</sup> Amanda Turnill, et al., *What to Do when You Suspect Corruption: Disclosure Obligations and Enforcement Processes in the UK, the US, Australia and China*, PRACTICAL LAW (Oct. 11, 2014, 10:10PM), [www.practicallaw.com/2-520-1484](http://www.practicallaw.com/2-520-1484).

<sup>191</sup> *See* Xing fa (刑法) [Criminal Code] (promulgated by Standing Comm. Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) ch. III, § 1, arts. 163, 164, ch. VIII, arts. 385, 386, 389 (China), translated in Criminal Law of the People's Republic of China (Jan. 15, 2013) available at <http://www.cecc.gov/pages/newLaws/criminalLawENG.php>.

foreign) are equally recognized under the law.<sup>192</sup> As with Russian laws, Chinese laws do not have criminal liability for corporations (though such corporations can be fined)<sup>193</sup> and corporate officials directly involved or responsible for the illegal conduct can be imprisoned.<sup>194</sup> For large-scale commercial bribery, a person can be punished by a minimum sentence of five years and have his or her property confiscated.<sup>195</sup> Chinese law, however, provides mitigated sentences for voluntary reporting and cooperation during investigation.<sup>196</sup>

China and Russia, with the combined population of over 1.5 billion people,<sup>197</sup> represent a big market for U.S. companies. Thus, changes in their anti-corruption regulations inevitably affect any U.S. corporations doing business in these countries. This new generation of anti-corruption statutes, modeled after the UNCAC, has the same extra-territorial reach as the FCPA, but covers other forms of corrupt conduct outside of bribery, including corruption in the private sector.<sup>198</sup> Thus, corporate managers should not lightly dismiss new anti-corruption initiatives in developing markets; prosecution always remains a possibility, even if the current number of cases is small.<sup>199</sup>

To illustrate the magnitude of the risk of prosecution, in 2012 alone, more than 7,000 people were sentenced by Russian courts for various corruption offenses.<sup>200</sup> Notably, there are already some examples of private sector corruption cases. For instance, an IKEA Russia employee has recently been tried and convicted for aiding and abetting in soliciting a bribe of 6.5 million rubles to renew a lease contract with an IKEA lessee.<sup>201</sup> Similarly, anti-corruption initiatives in other countries might pick up pace with the development of international cooperation instruments.

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<sup>192</sup> *Id.* ch. III, § 1, arts. 163, 164, ch. VIII, arts. 385, 386, 389.

<sup>193</sup> *Id.* ch. VIII, art. 393.

<sup>194</sup> *Id.* ch. VIII, arts. 386, 383 (providing punishment for up to five years in prison if the circumstances are serious and the amount of the bribe is relatively large; domestic public officials accepting large bribes can be sentenced from ten years to a lifetime in prison, or even death penalty, with confiscation of all their property).

<sup>195</sup> *Id.* ch. III, art. 163.

<sup>196</sup> *Id.* ch. III, art. 163, ch. VIII, art. 390.

<sup>197</sup> According to the Population Reference Bureau, the population of China in 2014 is 1,364 million people, and the population of Russia is 144 million, totaling together for a 1,508 million people. 2014 World Population Data Sheet, Population Reference Bureau, [http://www.prb.org/pdf14/2014-world-population-data-sheet\\_eng.pdf](http://www.prb.org/pdf14/2014-world-population-data-sheet_eng.pdf).

<sup>198</sup> See *supra* notes 189-196 and the related text.

<sup>199</sup> Nichols, *supra* note 3, at 359.

<sup>200</sup> Сергей Иванов рассказал о “реальных посадках” коррупционеров [Sergey Ivanov on “real sentencings” for corruption], ПБК (Feb. 14, 2013, 3:49 PM), <http://top.rbc.ru/politics/14/01/2013/840081.shtml> (in Russian).

<sup>201</sup> Samuel Rubinfeld, *Russia Accuses IKEA Manager of Extorting a Bribe*, WALL ST. J. CORRUPTION CURRENTS BLOG (December 19, 2011, 4:11 PM), <http://blogs.wsj.com/corruption-currents/2011/12/19/russia-accuses-ikea-manager-of-extorting-a-bribe/>; See Andrew E. Kramer, *Ikea Tries to Build Public Case Against Russian Corruption*, N.Y. TIMES, Sept. 11, 2009, [http://www.nytimes.com/2009/09/12/business/global/12ikea.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2009/09/12/business/global/12ikea.html?pagewanted=all&_r=0). This case is especially interesting because IKEA was famous for taking an uncompromising stand against corruption in Russia and even stopped all new business projects in Russia when faced with unprecedented levels of corruption among government employees.

## IV. POTENTIAL SOLUTIONS

This Section proposes three approaches the U.S. Congress can take to tackle the problem of private sector corruption: (1) adopt an FCPA-like statute criminalizing private sector corruption or amend the FCPA; (2) leave legislation in its current state and rely on the courts to solve arising problems; or (3) adopt a hybrid solution: extend the FCPA's accounting/reporting provisions and give a private right of action to victims of corruption. While each solution has its benefits and drawbacks, it might be premature and inefficient to criminalize private sector corruption altogether. On the other hand, it is also clear that some steps have to be taken to give the market clear signals that unethical business practices will no longer be tolerated, be it in the United States or abroad. If everything is left as it is now, corporations will still be tempted to act corruptly in private dealings because there is no punishment and no way for competitors or victims to recover damages through litigation. This Section advocates the hybrid solution—incorporating both a private right of action and heightened reporting requirements—because the idea of criminalizing private sector corruption has no widespread support yet, but the problem is big enough to turn society's attention to it.

## A. Adoption of an FCPA-like Statute for Private Sector Corruption

The first solution is the most apparent one. Since the U.S. is a State party to the UNCAC and is also a full member of GRECO, it should follow the U.N. Convention and adopt a federal statute—or amend the FCPA—criminalizing private sector corruption. Though criminalization of private sector corruption is considered to be a non-mandatory offense,<sup>202</sup> meaning that State parties only need to consider criminalizing such offenses, some countries have already taken steps in this direction.<sup>203</sup> This statute would be a good vehicle for such legislative changes. It already has general books and records provisions complying with Article 12 of the UNCAC, and the only amendment necessary would be inclusion of private sector corruption into its anti-bribery provisions. Most importantly, unlike existing federal statutes, the FCPA has extra-territorial reach.<sup>204</sup> This solution would be in line with some leaders' congressional intent when adopting the FCPA.<sup>205</sup>

This solution, however, has quite a few potential drawbacks. First, criminalizing private sector corruption would likely be highly unpopular

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<sup>202</sup> U. N. OFFICE ON DRUGS AND CRIME, DIVISION FOR TREATY AFFAIRS, LEGISLATIVE GUIDE FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION 95 (2nd rev. ed., 2012), [http://www.unodc.org/pdf/corruption/CoC\\_LegislativeGuide.pdf](http://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf).

<sup>203</sup> See Part III.D. (stating that the U.K., China, Russia, and many other countries adopted comprehensive legislation dealing with private and public corruption alike).

<sup>204</sup> See Part II.B.2.

<sup>205</sup> H.R. REP. NO. 95-640 at 19 (stating that simply adding accounting provisions would not deter bribery, but that criminal sanctions would).

with corporations.<sup>206</sup> In 2010, the U.S. Chamber Institute for Legal Research published a paper on FCPA reform,<sup>207</sup> which urges the government to ease the FCPA's grip on companies by adding a "compliance defense" and by defining "foreign officials" more narrowly.<sup>208</sup> In response to these and other concerns, the U.S. Department of Justice (DOJ) released its Resource Guide to the FCPA on November 14, 2012.<sup>209</sup> The guide affirms previous positions taken by the government: though compliance is not a defense, it is a relevant factor to consider in deciding penalties,<sup>210</sup> and "foreign officials" still includes employees of "state-controlled or state-owned" enterprises.<sup>211</sup> There is no reason to think that the government would digress from these views if it were to decide to criminalize corruption in the private sector through the FCPA. It is very likely that there would be similar push-back from the business community.

Sweetening the pill by allowing the compliance defense, similar to the U.K. Bribery Act, might be a logical step should the FCPA be amended to cover private sector bribery cases. First, employees sometimes act corruptly despite existence of business conduct codes and extensive training programs simply because the value of personal gains for them is higher than the chances of being prosecuted.<sup>212</sup> For example, in a recent case, a Morgan Stanley employee responsible for the company's real estate business in China pled guilty to bribing Chinese public officials.<sup>213</sup> The employee received seven trainings on the FCPA from Morgan Stanley in addition to at least thirty-five reminders to comply with the statute.<sup>214</sup> "Morgan Stanley's compliance personnel regularly monitored transactions, randomly audited particular employees, transactions, and business units, and tested to identify illicit payments."<sup>215</sup> In the Morgan Stanley case, existence of extensive anti-corruption policies, regulations, and enforcement mechanisms within a corporation was not enough to deter the employee from engaging in corrupt practices. So far, it remains the only case where the DOJ decided to not prosecute the company and to charge only the employee.<sup>216</sup>

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<sup>206</sup> The FCPA has been criticized as being a competitive disadvantage to U.S. companies doing business abroad. *See supra* text accompanying notes 58-63.

<sup>207</sup> U.S. CHAMBER INSTITUTE FOR LEGAL RESEARCH, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 5 (Oct. 27, 2010), *available at* [http://ilr.iwssites.com/uploads/sites/1/restoringbalance\\_fcpa.pdf](http://ilr.iwssites.com/uploads/sites/1/restoringbalance_fcpa.pdf).

<sup>208</sup> *Id.* at 11-14, 24-27 (respectively).

<sup>209</sup> CRIMINAL DIV., U.S. DEP'T OF JUSTICE, ENFORCEMENT DIV., SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE FOREIGN CORRUPT PRACTICES ACT 20 (2012), *available at* <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf> [hereinafter THE FCPA GUIDE].

<sup>210</sup> *Id.* at 54.

<sup>211</sup> *Id.* at 20.

<sup>212</sup> *See Id.* at 61.

<sup>213</sup> Press Release, Dep't of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), *available at* <http://www.justice.gov/opa/pr/2012/April/12-crm-534.html>.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> Extensive compliance efforts are one of the factors the DOJ considers when deciding whether to prosecute a case or not. *See* THE FCPA GUIDE, *supra* note 209.

Second, legislators should consider that many people still think that corruption in the private sector is a less serious offense than in the public sector because there is no direct loss of taxpayer monies and because the harm to society is less apparent.<sup>217</sup> The effects of corruption and fraud on the corporate level, however, may be quite tangible. Sometimes employees commit corrupt acts to advance the goals of their organization, and sometimes they act corruptly just for personal gains.<sup>218</sup> Both types of corrupt conduct result in the company “spinning its wheels” to regain the lost money while its competitors fully reinvest their profits—or pay larger dividends to their shareholders—and generate more income.<sup>219</sup>

Finally, introducing a compliance defense for private sector corruption offenses would incentivize corporations to invest in effective compliance programs. Providing such incentives would thus increase compliance with the statutory requirements.<sup>220</sup> Corruption, even when committed to promote corporate interests, is not costless. Compliance and corruption programs can save corporations from costs associated with corruption, such as defending anti-corruption lawsuits.<sup>221</sup> Providing a compliance defense gives corporations an extra incentive to invest in such programs.

Amending the FCPA, or introducing a similar statute criminalizing private sector corruption, would likely be a step welcomed by many international organizations. Though it may cause an outcry among American corporations, “sweetening the pill” by allowing a compliance defense, at least in private sector corruption cases, may ultimately benefit American corporations. This is because a compliance defense will likely increase overall compliance and encourage investment in corresponding corporate programs.<sup>222</sup>

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<sup>217</sup> See Green, *supra* note 90, at 47, table 2 (2012). Authors assert that though corrupt government officials are still perceived as more blameworthy and deserving of higher punishment, almost 80% of respondents think that corrupt conduct of corporate board members should be treated as a crime. *Id.* at 46.

<sup>218</sup> Conan C. Albrecht et al., *The Debilitating Effects of Fraud in Organizations*, in CRIME AND CORRUPTION IN ORGANIZATIONS: WHY IT OCCURS AND WHAT TO DO ABOUT IT 164 (Ronald J. Burke et al. eds., 2010).

<sup>219</sup> *Id.* at 166. Authors give General Motors as an example. General Motors suffered a loss of \$436 million from dealership fraud back in the 1980s. To regain the losses, General Motors would have to generate \$436 billion dollars in additional revenue, assuming that the profit margin at that time was around 10%.

<sup>220</sup> This is one of the reasons advanced by the U.S. Chamber Institute for Legal Reform for introduction of compliance defense. See U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, *supra* note 57, at 13.

<sup>221</sup> See Palazzolo, *supra* note 56 for costs of litigation estimates.

<sup>222</sup> For an example of a recent case where a company avoided FCPA liability because it provided its employees with substantial FCPA training, see *supra* notes 212-216 and related text. The author thinks it is a sufficient incentive to invest in compliance training.

## B. Leaving Everything “As Is”

Another potential solution is to leave the situation “as is.” The U.S. already has federal statutes to prosecute private sector corruption,<sup>223</sup> and many corporations already have voluntarily invested in business conduct training and corruption prevention because they understand the benefits of compliance programs.<sup>224</sup> One might argue that there is no need to impose additional sanctions and requirements, especially in such a nuanced and sensitive area as business relations between private parties. Unlike government agencies that act within strict limitations of statutory-defined budgets, corporations have more freedom to align compensation with economic results or employees’ conduct. This freedom may be enough in itself to lower the level of private sector corruption.

Currently, the DOJ considers the existence and effectiveness of a compliance program as one of the relevant factors in determining whether to charge a corporation and in negotiating plea bargains or other agreements.<sup>225</sup> The DOJ recognizes that effective compliance programs should be tailored to individual companies’ needs and there is no “one size fits all” solution.<sup>226</sup> Yet, certain hallmarks are expected, including formal policies, training, senior management commitment, risk assessment, disciplinary measures, confidential reporting, and others.<sup>227</sup>

Many positive examples of collective business actions aimed at reducing corruption exist. One such example of collective business actions focusing on the reduction of corruption is pharmaceutical industry. The medical device and pharmaceutical industries have long been considered as exemplifying industries with a high intrinsic level of corruption,<sup>228</sup> especially for industry-sponsored clinical trials of medical devices.<sup>229</sup> Such corruption occurred because companies sought ways to maximize shareholder results, and some doctors conducting trials received unethical incentives to provide more favorable data.<sup>230</sup> The need for unbiased opinions pushed the industry to develop and promote an

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<sup>223</sup> See Part II.B.

<sup>224</sup> In 1981, the General Accounting Office reported that one of the outcomes of the FCPA was the introduction of company-level conduct codes. U.S. GEN. ACCOUNTING OFFICE, IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS 6 (Mar. 4, 1981), available at <http://www.gao.gov/assets/140/132199.pdf>.

<sup>225</sup> THE FCPA GUIDE, *supra* note 209, at 53.

<sup>226</sup> *Id.* at 57.

<sup>227</sup> *Id.* at 57–62.

<sup>228</sup> WORLD ECONOMIC FORUM, *The Business Case Against Corruption 2* (2011), available at <https://members.weforum.org/pdf/paci/BusinessCaseAgainstCorruption.pdf>. The pharmaceutical industry, in particular, has been known for creating fake academic journals and submitting falsified articles to academic journals and other publications. Ronald J. Burke, *Crime and Corruption in Organization*, in CRIME AND CORRUPTION IN ORGANIZATIONS: WHY IT OCCURS AND WHAT TO DO ABOUT IT, 10–12 (Ronald J. Burke et al. eds., 2010).

<sup>229</sup> Waleed Brinjikji and David F. Kallmes, Editorial, *How Everybody Wins When Playing by the Rules: The Benefits of Investigator-Initiated Industry-Sponsored Clinical Trials*, 32 AM. J. NEURORADIOLOGY 427, 427 (2011) (reporting that industry-sponsored clinical studies of devices developed by the industry have a significantly greater probability of demonstrating positive results than studies of their non-industry-sponsored counterparts).

<sup>230</sup> *Id.* at 428. Such incentives included “financial awards, material awards, or promise of future research funding.” *Id.*

industry-wide code of conduct addressing interactions with healthcare professionals.<sup>231</sup> The Advanced Medical Technology Association (“AdvaMed”) has created a code of ethics to govern the interactions with health care professionals.<sup>232</sup> A voluntary certification process enforces compliance with the Code.<sup>233</sup> AdvaMed keeps an online list of companies who follow the Code and pass the certification.<sup>234</sup> Almost all large medical device companies (such as Abbot, Allergan, CareFusion, and Johnson & Johnson) are on the list.<sup>235</sup> This list may create necessary peer pressure for smaller companies to opt in and play by the rules. The AdvaMed Code seems to be an effective attempt at an instrument of industry self-regulation.

However, relying on self-regulation and existing anti-corruption instruments might not be the optimal solution. Without external reinforcement, companies lack the incentive to create the corruption-free environment expected of them when dealing with business partners in regions with stricter corruption regulation.<sup>236</sup> Additionally, even for the many businesses who do have conduct codes that prohibit self-dealing, commercial bribery, and other practices, rogue employees might not be deterred from unethical conduct,<sup>237</sup> especially given difficulties in prosecuting private sector corruption cases involving international trade.<sup>238</sup> Such voluntary instruments may therefore fail to induce employee compliance<sup>239</sup> because simply adopting an ethics code fails without various organizational structures to support it.<sup>240</sup> Absent such support, employees use various strategies to rationalize their corrupt conduct,<sup>241</sup> and most of them do not even perceive their actions as being corrupt.<sup>242</sup>

<sup>231</sup> Paul A. LaViolette, *Medical Devices and Conflict of Interest: Unique Issues and an Industry Code to Address Them*, 74 CLEV. CLINIC J. OF MED. S26 (supp. 2, 2007).

<sup>232</sup> ADVAMED CODE OF ETHICS ON INTERACTIONS WITH HEALTH CARE PROFESSIONALS, 2 (2008), available at <http://advamed.org/res/112/advamed-code-of-ethics-on-interactions-with-health-care-professionals>

<sup>233</sup> Code Certification Program, ADVAMED (Feb. 14, 2013, 4:21 PM), <http://advamed.org/issues/2/certification-program>.

<sup>234</sup> *Id.* at 2.

<sup>235</sup> AdvaMed, ADVAMED CODE CERTIFYING COMPANIES, <http://advamed.org/issues/33/code-certifying-companies> (last visited Oct. 10, 2014).

<sup>236</sup> See David Hess, *Combating Corruption Through Corporate Transparency*, 21 MINN. J. INT’L L. 42 (2012).

<sup>237</sup> See *supra* notes 212–216 and accompanying text. Rose-Ackerman notes that many individuals express strong norms of moral behavior but do not apply these norms to their work life. Susan Rose-Ackerman, *Measuring Private Sector Corruption*, U4 Anti-Corruption Resource Center, p. 3 (Sept. 2007), <http://www.u4.no/publications/measuring-private-sector-corruption/>. See also Albrecht, *supra* note 218 at 171. People use various rationalizations to feel good about themselves, so slipping into corruption becomes relatively easy when an opportunity and need present themselves. *Id.* at 171–72.

<sup>238</sup> See Part III.A–B.

<sup>239</sup> See *supra* notes 212–216 and accompanying text for an example.

<sup>240</sup> Vikas Anand et al., *Business as Usual: The Acceptance and Perpetuation of Corruption in Organizations*, 18 ACAD. OF MGMT. EXEC. 39, 49 (2004).

<sup>241</sup> *Id.* at 41. Authors list a number of strategies, such as denial of responsibility, denial of injury, denial of victim, social weighting, appeal to higher loyalties, metaphor of the leger. *Id.* at 41 table 1.

<sup>242</sup> *Id.* at 40.

Thus, even though companies have incentives to invest in compliance programs and internal investigations, and though there are some successful examples of industry self-regulation efforts, these incentives do not guarantee compliance and they leave enough room for misconduct. The lack of sanctions provides a powerful temptation to cut corners in the name of competition, while enforcement of self-regulation becomes even more problematic because courts interpret current laws narrowly.<sup>243</sup>

### C. Hybrid Solution

Another possible solution to the problem of private sector corruption in international commerce—and the one this Comment recommends—stands as middle ground between criminalization and the free-market approaches. This solution includes reforming the FCPA to include specific reporting requirements on private corruption and giving the victims of such corruption a private right of action to recover damages.

The first component of this solution—extending FCPA reporting requirements to include prohibition of misreporting various forms of private sector corruption—creates a strong incentive for companies to create and enforce zero-tolerance corruption policies. This plan includes a total ban on facilitating payments and suspicious “rebates” and fees. In fact, most companies that fall under FCPA accounting provisions already have similar policies in place,<sup>244</sup> making it unlikely to create any inconveniences or disadvantages for them. This solution follows the spirit of the Sarbanes-Oxley and Dodd-Frank changes.<sup>245</sup> Additionally, disclosure might help civil society organizations, such as Transparency International, in independently evaluating corruption prevention programs and “policing” deviations.

Extending FCPA reporting requirements to include public reporting creates another benefit: companies will be able to analyze policies in place at peer companies and share and discuss best practices. This, in turn, will lead to cheaper ways of creating effective compliance systems.

A combination of new public reporting requirements and the defense of having an effective corruption prevention system in place (akin to the U.K. Bribery Act) is also a sensible suggestion.<sup>246</sup> This combination would give companies both an incentive to invest in such programs and an assurance that the authorities will consider their efforts in making a decision to charge the company with corruption.

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<sup>243</sup> See Parts A.2 and B for a more thorough discussion.

<sup>244</sup> New York Stock Exchange and NASDAQ, the two largest U.S. stock exchanges, require all listed companies to adopt and disclose mandatory code of conduct that applies to both employees and directors. *The impact of Code of Conducts on Corporate Culture: Measuring the Immeasurable*, LRN, at 1 (2006), <http://www.ethics.org/files/u5/LRNImpactofCodesofConduct.pdf>. Adding provisions relating to zero-tolerance policy for commercial bribery to the existing codes is not likely to result in significant expenses.

<sup>245</sup> See *supra* notes 38–43 and accompanying text.

<sup>246</sup> See *supra* notes 172–173 and accompanying text.

However, companies are not likely to be enthusiastic about new public reporting requirements. After all, more reporting means more expense. Additional reporting does not guarantee that companies will fail to hide the old corrupt culture.<sup>247</sup> Further, the reporting requirements under the FCPA cover only “issuers,” not all the companies.<sup>248</sup> Publicly traded “issuers,” however, are usually leaders in their industries.<sup>249</sup> If the new public reporting requirements require this class of companies to report any suspicious payments to private counterparties, it will inevitably affect their supply chains. Thus, the proposed changes will affect medium and small companies as well.

The second component of this solution would give a private right of action to competitors or victims to recover damages. Such a right should exist independent of the SEC’s ability to penalize companies for violations of reporting requirements. This component is justified in the context of purely private nature of conduct in commercial bribery and private sector corruption cases.

A private right of action is more efficient than criminal prosecution because criminal prosecution of bribery requires tremendous budget expenditures. Criminal sanctions, though a strong deterring factor, do not necessarily strike the optimal balance between efficient allocation of societal resources and crime prevention. Some scholars advocate for a private right of action in this area because it will give the competitors an incentive to “police” the market.<sup>250</sup> Many view a private right of action as a more efficient way to combat private corruption.<sup>251</sup> Private citizens would have the same rights as government to compel disclosure, but, unlike in criminal cases, the standard of proof in civil cases will likely be lower than “beyond a reasonable doubt” standard used in criminal cases.<sup>252</sup>

Of course, this solution raises the issue of frivolous lawsuits by competitors. After all, lack of express private right of action has not stopped competitors and shareholders in bringing lawsuits for bribery of foreign public officials under other legal theories.<sup>253</sup> Yet, some scholars describe private right of action as a “dramatically effective source of

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<sup>247</sup> Anand et al., *supra* note 240, at 49. *See also* Klaw, *supra* note 13 at 315–19 (discussing that the recent changes to reporting requirements under the Dodd-Frank Act and the Sarbanes-Oxley Act were not effective in preventing corruption).

<sup>248</sup> *See supra* note 33 and accompanying text.

<sup>249</sup> Usually, public offering of securities alone requires significant monetary expenses. *See Considering an IPO? The Costs of Going and Being Public May Surprise You*, PwC at 1 (July 2012), [http://www.pwc.com/en\\_us/us/transaction-services/publications/assets/pwc-cost-of-ipo.pdf](http://www.pwc.com/en_us/us/transaction-services/publications/assets/pwc-cost-of-ipo.pdf). Being traded on a public stock exchange is generally available only to larger companies having significant market shares.

<sup>250</sup> Klaw, *supra* note 13, at 358–61. Klaw also gives an interesting analysis why Congress rejected the idea of giving competitors a private right of action when enacting the FCPA in 1977. *Id.* at 310–11.

<sup>251</sup> Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 MICH. J. INT’L L. 129, 150–51 (2010).

<sup>252</sup> *Id.* Carrington discusses proceedings under the federal False Claims Act, but the same logic applies to the proposed amendments to the FCPA. *Id.*

<sup>253</sup> For a brief overview of such cases, *see* Klaw, *supra* note 13, at 359–60.

deterrence and appropriate retribution.”<sup>254</sup> Klaw makes the following argument in support of private right of action under the FCPA:

Moreover, criminological research shows that *likelihood* of detection and subsequent sanction, rather than *severity* of sanction is the key determinant to deterrence. Civil suits are thus a particularly apt deterrent, because competitors are likely to bring them (making the costs of defending litigation a sanction in itself) and they require a lower standard of proof than criminal cases.<sup>255</sup>

Thus, the combination of a threat of private lawsuits together with market incentives to maintain a company’s reputation would indeed be a powerful tool deterring corruption, even without criminalizing it.

## V. CONCLUSION

Despite serious criticism, the introduction of the FCPA made companies treat issues of corruption and bribery abroad more seriously. A growing trend in the global community condemns and criminalizes private sector corruption. The United States does not expressly regulate private sector corruption at the federal level. A long tradition of criminalizing commercial bribery exists at the state level, but these statutes have limited effect on the international trade transactions. Although competitors can bring lawsuits under different legal theories against companies that obtain business by means of corruption or bribery, such attempts have had limited success so far.

This situation calls for definitive steps to be taken to prohibit private sector corruption, including commercial bribery, at the federal level. Only comprehensive federal legislative changes will be able to fill the void in the regulations that previously allowed transnational commercial bribery to slip through the cracks. The U.S. cannot rely on the efforts of the U.N. or other countries to enact such legislation and punish U.S. companies for their own misdeeds abroad.

At the same time, given the political discourse and the attitude of the business community toward the FCPA, criminalizing private sector bribery is premature. Leaving everything in its current state, however, also fails as a rational solution. Overreliance on the efficiency of the free market has led to many problems in the past and provides no guarantee that the free market will be able to deal with private corruption efficiently. After all, corruption, by definition, distorts markets. Amending the FCPA’s accounting and reporting provisions to include reporting requirements for the private sector corruption provides the most sensible solution at the moment. It would promote the exchange of

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<sup>254</sup> *Id.* at 359.

<sup>255</sup> *Id.* at 360.

best practices and will allow civil society organizations to “police” compliance with those provisions. Creating a private right of action for the victims of corruption will help the investigation and prosecution such allegations without over-extending public resources.

As the case in *Wabtec*, if no measures are taken, many companies will remain tempted to simply buy the loyalty of local officials and business partners in developing countries rather than competing by providing better goods and services at better prices. Reform should begin at home to make corporations more accountable for this trillion-dollar problem.