



THE FCPA AND ITS IMPACT ON  
INTERNATIONAL BUSINESS TRANSACTIONS—  
SHOULD ANYTHING BE DONE TO MINIMIZE THE  
CONSEQUENCES OF THE U.S.'S UNIQUE POSITION ON  
COMBATING OFFSHORE CORRUPTION?

Committee on International Business Transactions

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## **The FCPA and its Impact on International Business Transactions – Should Anything Be Done to Minimize the Consequences of the U.S.’s Unique Position on Combating Offshore Corruption?**

### **International Business Transactions Committee The Association of the Bar of the City of New York \***

As lawyers who focus on cross-border mergers and acquisitions and other international transactions, we have witnessed a significant increase in the effects of the Foreign Corrupt Practices Act (the “FCPA” or the “Act”) in the past decade. This increase has resulted from substantial changes in the way the Act has been enforced in recent years. Companies that are subject to the FCPA—including all U.S. companies and non-U.S. companies that have equity securities listed on a U.S. exchange—have become increasingly wary of purchasing businesses that have not operated under the Act for fear of acquiring very costly liabilities. Similarly, companies that are not subject to the FCPA express substantial reservations about engaging in transactions that would bring them under the Act’s jurisdiction, including listing their equity securities on a U.S. exchange through an IPO or capital raising transaction or by acquiring a U.S. company in a stock-for-stock merger or exchange offer.

The effects of the FCPA on transactions are manifested principally in (1) transaction costs (e.g., increased due diligence efforts), (2) post-transaction integration costs (e.g., adding appropriate FCPA compliance procedures to an acquired company or across a company that was not previously subject to the FCPA), (3) the increased risk of exposure to an enforcement action and related costs (e.g., internal investigations and fines) and (4) as a result of the foregoing and other effects of the FCPA, the non-pursuit or abandonment of transactions that otherwise would have been completed. These FCPA-driven costs and considerations put companies covered by the FCPA (mostly U.S. companies and large, mature European companies) in a distinctively different regulatory position as compared to their non-covered

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competitors. In our experience, and in particular, recently, this asymmetry in regulation has had significant direct and indirect effects on companies subject to the FCPA as well as knock-on effects on the U.S. markets more generally.

As context, it is noteworthy that the past decade has seen a dramatic upsurge in FCPA enforcement. During the period from 2005 – 2009, the U.S. Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) brought approximately four times as many corporate enforcement actions as they did in the previous five years,<sup>1</sup> and actions against individual defendants have become considerably more common as well.<sup>2</sup> During 2010, U.S. enforcement activity saw another significant increase, more than doubling the number of enforcement actions from 2009.<sup>3</sup> This increase reflects not only heightened scrutiny of large publicly traded U.S. companies, but also an expansion of the scope of enforcement to include non-U.S. and non-publicly traded companies.

Moreover, the U.S. authorities have more frequently sought larger fines, greatly increasing the financial costs and other risks of a potential violation.<sup>4</sup> Although the FCPA was enacted in 1977, as of April 2011, eight of the ten largest FCPA settlements in history had occurred in 2010 or 2011 (with the remaining two having occurred since 2007) and both the DOJ and the SEC had announced plans to augment their resources dedicated to FCPA enforcement.<sup>5</sup> There can be little doubt that these recent increases in enforcement activity have amplified the effects of the FCPA on multinational companies and international business transactions.

These developments raise various questions: Why has the FCPA become an increasingly important factor in international transactions? What effect is the FCPA having on the various participants in the international transactions arena, including governments, companies subject to the FCPA and

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<sup>1</sup> See Danforth Newcomb & Philip Urofsky, Shearman & Sterling LLP, *FCPA Digest of Cases and Review Releases Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977* (October 1, 2009), 1 – 126 (2009), available at [www.shearman.com/files/upload/fcpa\\_digest.pdf](http://www.shearman.com/files/upload/fcpa_digest.pdf).

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

<sup>3</sup> See Trace Global Enforcement Report 2011, Figure II, available at <http://www.ibe.org.uk/userfiles/globalenforcementreport2011.pdf>.

<sup>4</sup> See Newcomb & Urofsky, *supra* note 1 at viii – ix.

<sup>5</sup> See Andrew Weissman and Alixandra Smith, *Restoring Balance, Proposed Amendments to the Foreign Corrupt Practices Act*, released by the U.S. Chamber Institute for Legal Reform, October 2010 at 2 and Richard L. Cassin, The FCPA Blog, *J&J Joins New Top Ten* (as of April 8, 2011), available at <http://www.fcpablog.com/blog/2011/4/8/jj-joins-new-top-ten.html>.

companies not subject to the FCPA? What changes, if any, should be made to the U.S. approach to combating foreign corruption? This paper explores these questions and concludes with the findings that (1) the United States has pursued, and is currently pursuing, a virtually stand-alone approach to deterring foreign corruption (at least in terms of enforcement activity and the significance of fines and other sanctions), (2) this approach places significant costs on companies that are subject to the FCPA as compared to their competitors that are not—i.e., there is a significant asymmetry in regulation and enforcement—and (3) if these circumstances are unlikely to change (e.g., through a substantial portion of other relevant countries adopting similar enforcement postures), the United States should reevaluate its approach to the problem of foreign corruption.

## I. BACKGROUND

There are three elements to the current approach to FCPA enforcement that are helpful in understanding the costs, risks and other constraints that the FCPA places on U.S.-regulated companies vis-à-vis their non-U.S. regulated competitors: (1) the U.S. enforcement agencies' expansive reading of the scope of the FCPA (both in terms of conduct and jurisdiction), (2) the limited checks on FCPA enforcement (whether judicial or otherwise) and (3) the massive size of the potential direct costs (e.g., fines, sanctions and defense and compliance costs) and indirect costs (e.g., reputational effects and “debarment” from current or future government business) of avoiding or defending an actual or threatened enforcement action.

### A. Key Terms of the Statute Are Interpreted Broadly

The FCPA prohibits giving or promising anything of value to a “foreign official” for the purposes of influencing his decisions or convincing him to use his authority to influence his government’s decisions.<sup>6</sup> The Act defines a “foreign official” as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof . . . or any person acting in an official capacity for or

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<sup>6</sup> 15 U.S.C. § 78 dd-1(a) (2006).

on behalf of any such government or department, agency, or instrumentality.”<sup>7</sup> The DOJ and the SEC take a broad view of what is meant by terminology such as “instrumentality” or “person acting in an official capacity for or on behalf of,” which brings a wide array of behavior under the FCPA’s coverage, including circumstances where a company might reasonably believe that it is not dealing with a foreign official or where oversight and control may be impracticable. For example, a state-owned enterprise (“SOE”) that is, in essence, a commercial enterprise is considered by the enforcement agencies to be an instrumentality of the government, with the result that nearly any SOE employee with managerial authority could be considered to be a “foreign official.”<sup>8</sup> In addition, companies that are substantially or even majority-owned and managed by the private sector may be considered SOEs.<sup>9</sup> This broad conception of “foreign official” finds little support in legislative history, other statutory language, or other countries’ approaches to foreign corruption,<sup>10</sup> and the breadth and uncertainty in the application of this and other substantive terms of the statute make corporate compliance efforts necessarily broad.<sup>11</sup> Finally, there is the overlay of *respondeat superior* which, in the context of the FCPA, makes a corporation in effect presumptively responsible for the actions of all employees and agents, in many cases regardless of whether the improper conduct was authorized, prohibited or even undetectable by the company’s management and control framework.

The Government also has an expansive concept of jurisdiction under the FCPA that complements its expansive interpretation of its substantive scope. The FCPA’s anti-bribery provisions apply to “domestic concerns,” which include U.S. citizens, nationals and residents, as well as any company with its principal place of business in the U.S. or organized under the laws of the U.S., a state or a territory.<sup>12</sup> This jurisdictional prong, while broad, is unobjectionable. Indeed, these domestic parties are the persons

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<sup>7</sup> *Id.* § 78 dd-1(f).

<sup>8</sup> See Joel M. Cohen, Michael P. Holland & Adam P. Wolf, *Under the FCPA, Who Is a Foreign Official Anyway?*, 63 BUS. LAW. 1243, 1250 (2008); *id.* at 1255 (“DOJ considers ‘all employees of public entities’ to be ‘public officials.’”).

<sup>9</sup> For example, Nigeria LNG Limited, a natural gas company, is 49% state-owned and 51% privately owned, yet the agencies considered it to be an SOE and, accordingly, an instrumentality of the Nigerian Government. See Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of its Decade of Resurgence*, 43 IND. L. REV. 389, 412 – 13 (2010).

<sup>10</sup> See Cohen, Holland, & Wolf, *supra* note 8, at 1255 – 63.

<sup>11</sup> See Koehler, *supra* note 9, at 413 – 14.

<sup>12</sup> 15 U.S.C. § 78 dd-2 (2006).

and entities over whom one would expect the United States to assert jurisdiction. However, the FCPA also applies to any issuer with a class of securities registered in the United States,<sup>13</sup> as well as to *any* person or company—even if his connection to the U.S. is attenuated—who engages in a corrupt act “while in the territory of the United States.”<sup>14</sup> The Government also interprets these provisions as including conduct by foreign subsidiaries and joint ventures of companies subject to the FCPA, including in cases where control by the parent company or investor is limited. Such a broad conception of jurisdiction—combined with the wide array of activity that the DOJ and the SEC allege violates the FCPA—subjects a very broad class of international conduct to the scrutiny of U.S. enforcement.

### B. Minimal Checks on Enforcement

This expansive reading of the FCPA might not present an issue if enforcement activities were appropriately tailored through prosecutorial discretion, judicial oversight or other means. We are not in a position to judge whether appropriate discretion or oversight has been applied. We do not, for example, have knowledge of potential violations that have been investigated by the DOJ or the SEC but not pursued to a resolution. We do, however, note that, based on the public record, the exercise of discretion appears to have been very limited. For example, it appears that almost every corporate enforcement action in the last 20 years has been resolved without a trial.<sup>15</sup> The DOJ and the SEC almost exclusively negotiate Non-Prosecution Agreements (NPAs), Deferred Prosecution Agreements (DPAs) or other settlements with the allegedly offending parties,<sup>16</sup> and none of these resolution mechanisms appears to be subject to significant judicial or other oversight.<sup>17</sup>

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<sup>13</sup> *Id.* § 78 dd-1.

<sup>14</sup> *Id.* § 78 dd-3. The latter provision is particularly far reaching; in some cases, a foreign company with little or no activity in the United States has been charged with violating the FCPA as a result of alleged corrupt payments made to a foreign government official, where the only U.S. connection was that the funds were routed through a U.S. bank. *See, e.g.*, Paul R. Berger, Erin W. Sheehy, Kenya K. Davis and Bruce E. Yannett, *Is That a Bribe?*, 26 INT’L FIN. L. REV. 76, 76 (2007) (discussing Statoil and Christian Sapsizian, both charged with FCPA violations based on the use of a U.S. bank account in the transfer of funds between them and a foreign official).

<sup>15</sup> Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907, 932 (2010). The lone exception that we are aware of to date is Lindsey Manufacturing Company in *United States v. Noriega et al.*, discussed *infra*, text accompanying notes 20 – 24. Nearly every individual prosecution in the same time period was also resolved without trial. *Id.*

<sup>16</sup> *Id.* at 933.

<sup>17</sup> NPAs are private agreements between the enforcement agency and the accused company, and are not filed with a court, leaving no room for input from the judiciary (*see* Koehler, *supra* note 15, at 934). DPAs, essentially NPAs that are filed with a court, are subject to the approval of the court which raises the opportunity for judicial oversight. (*Id.*) However, a study by the Government (. . . cont’d)

Why have so few cases gone to trial? One reason, of course, is that the alleged corrupt conduct actually occurred and it was clear that such conduct should be subject to U.S. enforcement, so the responsible parties could not prudently choose to defend themselves in court. Another, less satisfactory, reason is that, even in circumstances where the authorities have pushed the substantive or jurisdictional contours of the FCPA or the alleged conduct likely did not occur (or both), it is unlikely that a large multinational company would choose to bear the costs and risks of being indicted, much less going to trial, on an FCPA charge. The direct and collateral consequences of such an indictment are massive, virtually instantaneous and—potentially—fatal.<sup>18</sup> As a result of these legal and commercial realities, the enforcement agencies have broad power and discretion to enforce the FCPA as they determine appropriate.<sup>19</sup>

However, it should be noted that, recently, two district courts did have the opportunity to interpret the text of the FCPA. Both *United States v. Noriega*<sup>20</sup> and *United States v. Carson*<sup>21</sup> addressed the meaning of the terms “instrumentality” and “foreign official,” and while the defendants’ challenges to the FCPA failed, the holdings in each case appear to have placed some, albeit broad, limits on the Government’s interpretation of these key terms. In *Noriega*, Lindsey Manufacturing Company sought to do business with an electric utility that was wholly owned by the Mexican government. The indictment

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Accountability Office found that courts “routinely ‘rubber-stamp’ DPAs without inquiring into whether factual evidence exists to support the essential elements of the crime ‘alleged’ or to determine whether valid and legitimate defenses are relevant to the ‘alleged’ conduct.” (*Id.* at 936) It appears that no DPA in an FCPA action has ever been rejected by a court or modified prior to approval by the presiding judge (*Id.*).

<sup>18</sup> No firm wants to become the next Arthur Andersen, which collapsed in 2002 after being found guilty of obstruction of justice relating to the firm’s auditing of Enron. Arthur Andersen’s demise was complete well before a jury found it guilty of obstruction of justice, as news of its indictment prompted (and in some cases required) clients and employees alike to jump to other firms. Although the Supreme Court eventually reversed the conviction of Arthur Andersen, *Arthur Andersen v. United States*, 544 U.S. 696 (U.S. 2005), this legal relief came three years too late: the company was defunct and more than 28,000 individuals had already lost their jobs. Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 79 (2010).

<sup>19</sup> Several scholars have suggested that the DOJ and the SEC have become too aggressive, and that if their interpretations could be challenged in court, they would lose. See, e.g., Koehler, *supra* note 15 at 946 (“This section highlights that government enforcement agencies, when challenged, are vulnerable in contested actions in the hope that more FCPA defendants will challenge the many untested and dubious legal theories common in FCPA enforcement.”); Matthew J. Kovacich, *Backyard Business Going Global*, 32 HAMLIN L. REV. 529, 559 (2009) (“The DOJ and SEC have acted in a legislative capacity to unlawfully expand the definitions of key statutory terms and enforce the FCPA in ways that may exceed Congress’s intent.”).

<sup>20</sup> *United States v. Noriega et al.*, No. 10-cr-01031 (C.D. Cal. 2011). The defendants in *Noriega* were convicted of FCPA violations by a federal jury in May 2011. The conviction was subsequently vacated and the indictment dismissed with prejudice, see *United States v. Noriega et al.*, No. 10-cr-01031, Order Granting Motion To Dismiss (filed C.D. Cal. Dec. 1, 2011).

<sup>21</sup> *United States v. Carson*, No. 09-cr-00077 (C.D. Cal. 2011).

in the case alleged that the agent retained by Lindsey Manufacturing was in fact a conduit for bribes to high-ranking electric utility officials, who the Government claimed were “foreign officials” under the FCPA. The defendants challenged this interpretation.<sup>22</sup> Notably, the court did not hold that *all* SOEs are instrumentalities of a foreign government, as appears to be the enforcement agencies’ position.<sup>23</sup> Instead, the court described several characteristics that an SOE like the electric utility might share with government agencies and held that the utility at issue met the statutory definition of an SOE.<sup>24</sup>

### C. Compliance and Other Costs

The approach of the DOJ and SEC with regard to FCPA enforcement imposes a host of costs on companies subject to the Act. In addition to the more obvious costs of ensuring compliance, including the costs of due diligence, maintaining compliance programs and conducting internal investigations in the event indicia of corruption are present, companies face the more subtle costs of having to overcome other burdens that their competitors do not face (e.g., requiring foreign joint venture partners to adopt costly compliance measures and bear the risk of FCPA enforcement actions) and forgoing some overseas business opportunities altogether (e.g., in jurisdictions where the risk of corruption is so high that compliance efforts, no matter how costly, would not sufficiently reduce enforcement risk).

#### 1. Ongoing Direct Costs

The FCPA imposes direct out-of-pocket costs in the form of compliance programs, internal audits and investigations, and fines imposed for settlements or violations.

Companies subject to the FCPA generally dedicate substantial financial and other resources to implementing internal controls and conducting internal investigations to prevent and identify instances of potential misconduct. In addition, enforcement of the FCPA relies to a significant extent on (and, in

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<sup>22</sup> *Id.*

<sup>23</sup> See *supra* text accompanying notes 6 – 11.

<sup>24</sup> *United States v. Noriega et al.*, No. 10-cr-01031, Order (filed C.D. Cal. Apr. 20, 2011). Similarly, in *United States v. Carson*, the court held that, while “a mere monetary investment in a business entity by the government may not be sufficient to transform that entity into a governmental instrumentality,” the combination of a monetary investment “with additional factors that objectively indicate the entity is being used as an instrument to carry out governmental objectives” qualifies the entity in question as a governmental instrumentality. *United States v. Carson*, No. 09-cr-00077, Order (filed C.D. Cal. May 18, 2011).

essence, requires) voluntary self-reporting,<sup>25</sup> and an investigation into potential violations—often a prerequisite for a self-report to be acceptable to the authorities—can be extremely expensive. Estimates for a “preventive” investigation generally range from two to 20 million dollars.<sup>26</sup> Moreover, while engaging in an internal investigation can save money by reducing potential fines or even allowing a company to escape prosecution,<sup>27</sup> this trade-off only makes sense if the company would (or should) otherwise be liable for an FCPA violation. Looking at this from a different perspective, a criticism of the current regime is that it encourages substantial “overcompliance” by forcing corporations to adopt oversight and compliance standards that border on the extreme.<sup>28</sup> And companies that invest substantial resources in compliance receive no assurance that, in the event of an alleged violation, even one that could not reasonably have been detected or prevented, those efforts will be meaningfully rewarded.<sup>29</sup>

Lastly, the most obvious direct costs are fines and penalties, when the DOJ or the SEC have what they believe to be sufficient evidence of a violation. These fines have increased dramatically in severity in recent years. As of January 2007, the largest fine was \$28.5 million levied against Titan Corporation in 2005. In contrast, as of April 2011, the tenth largest fine was \$70 million and each of the top eight fines exceeded \$100 million with the top five exceeding \$300 million.<sup>30</sup> In addition, the penalties imposed generally total far more than any allegedly corrupt payments made or profit allegedly gained through corrupt means.<sup>31</sup> In light of the difficulty of challenging the approach of the enforcement agencies,

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<sup>25</sup> See Daniel J. Grimm, *The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Successor Liability and its Consequences*, 7 N.Y.U. J. L. & BUS. 247, 272 – 76 (2010).

<sup>26</sup> *Id.* at 278 (citing Susan F. Friedman, *Mission Possible: Developing in-House Counsel’s Role in the Fight Against Global Corruption*, 239 N.Y. L.J. 24 (2008)).

<sup>27</sup> See *id.* at 273 – 74.

<sup>28</sup> See Koehler, *supra* note 15 at 1001.

<sup>29</sup> In some countries, the adoption and the effective implementation of an adequate organizational, risk management and control model could exonerate companies from the liability for crimes, including bribery, committed by managers, executives, employees and external collaborators in the interest of such companies. In contrast, the U.S. authorities have not appeared willing to dilute the effects of the *respondeat superior* doctrine.

<sup>30</sup> See Newcomb & Urofsky, *supra* note 1, at vii – xiii and Cassin, *supra* note 5.

<sup>31</sup> See, e.g., *id.* at 2 (discussing *United States v. Helmerich & Payne, Inc.* (2009), in which H&P paid \$173,000 to avoid approximately \$200,000 in customs cost, and agreed to a penalty of \$1 million to the DOJ and disgorgement of nearly \$400,000 to the SEC); *id.* at 3 – 4 (discussing *U.S. v. Control Components, Inc.*, No. 09-00162 (C.D. Ca. 2009), in which CCI made corrupt payments of \$4.9 million and agreed to a fine of over \$18 million); see generally *id.* at 1 – 126 (discussing multiple cases, most of which follow this general pattern). The SEC also routinely seeks disgorgement, even for books-and-records violations, despite the fact that false entries may not even result in increased profits. *Id.* at x. As several executives have noted (with tongue in

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including the risks associated with being indicted and taking an issue to trial, it is doubtful that any healthy company subject to an enforcement action will be in a position to effectively challenge this substantial increase in the size of penalties.<sup>32</sup> In other words, currently, the only potential check on the continuing increase in the size of penalties is the discretion of those imposing them.

## 2. Transaction and Integration Costs

As the DOJ and the SEC have increased their enforcement efforts, FCPA due diligence has become a more important (and more expensive) component of cross-border business transactions. In our experience, this increased importance of FCPA due diligence can have significant effects on M&A transactions involving targets with international operations. In evaluating such acquisition targets, many companies covered by the FCPA (and in particular companies that have had prior experience with an FCPA enforcement matter) have required more time for their due diligence and have expended more resources on a “deeper dive” into the potential counterparty’s business practices than would have been expected a decade ago.

As a similar example in a different context, when a company subject to the Act enters into a consulting agreement with an agent for services outside the United States, it generally is advised by FCPA counsel to conduct a thorough background check, making sure to spot any potential “red flags” in order to best shield itself from FCPA liability for acts by the consultant.<sup>33</sup> Adding to this cost is the fact that the foreign agent must be monitored. It may not satisfy the authorities if a company claims that it was painstakingly thorough when it first entered into the arrangement with the agent if that company failed to analyze the agent’s activities over the term of the engagement.<sup>34</sup> The costs of appropriately managing an agent for FCPA compliance are not trivial, particularly in light of the fact that in many cases

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cheek but their heads hung low), the U.S. approach requires a compliance framework that catches every potential violation and then punishes the company for each violation it catches.

<sup>32</sup> *Id.* at x.

<sup>33</sup> See generally David Isaak, *FCPA Compliance – Navigating the Minefield of Intermediaries*, 17 CURRENTS INT’L TRADE L.J. 22 (2008). See also Koehler, *supra* note 15, at 1004.

<sup>34</sup> See *id.* at 26.

foreign agents are retained precisely because the company lacks knowledge of, or connections to, the particular country at issue.<sup>35</sup>

In addition, companies covered by the FCPA also have to factor into the cost of the transaction the increased time and resources they need to devote to the integration processes following an acquisition in order to implement compliance programs structured to discover and prevent latent and future FCPA violations. These costs are significant and recurring. While FCPA-specific compliance costs are difficult to measure due to the integrated nature of compliance programs, anecdotal evidence suggests that, for large multinational companies, the FCPA component of compliance costs is in the high tens of millions of dollars per year.

### 3. Indirect Costs

Along with the significant expense of compliance, defense and due diligence, companies subject to the FCPA may incur other indirect costs. These costs are due to the increased risk of pre-closing FCPA violations, time to complete transactions and the costs that such companies must absorb in M&A transactions as compared to companies not subject to the FCPA. When a company subject to the FCPA is competing to acquire or partner with a “target” company, it must factor into its offer the fact that its relative compliance costs associated with the transaction are likely to be higher. In other words, the company subject to the FCPA has to pay more for the same opportunity, which may place it at a competitive disadvantage.

Along with the increased cost of acquisitions or partnership arrangements comes the potential strain placed on business relationships as a result of the steps that companies take in order to ensure compliance, including requiring non-U.S. business partners to adopt U.S. style compliance practices. Due to the increased focus on enforcement, companies are essentially required to ask probing and uncomfortable questions of any foreign corporation that they intend to acquire or with which they intend

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<sup>35</sup> See Mike Koehler, *The FCPA, Foreign Agents, and Lessons From the Halliburton Enforcement Action*, 36 OHIO N.U. L. REV. 457, 458 – 60 (2010).

to merge or partner.<sup>36</sup> This can create discomfort or distrust between the U.S. regulated company and any foreign counterpart offended by the FCPA line of questioning. In this vein, we are aware of anecdotes where failing to adhere to the customs and traditions of a given country—such as celebratory meals or the exchange of gifts—has offended foreign corporate officers or government officials.<sup>37</sup> To state the obvious, it is difficult to mollify an offended business partner that is also a foreign official by citing the superiority of U.S. anti-corruption law.

Another substantial non-monetary cost is the fact that the risk of FCPA enforcement may prevent corporations subject to the Act from engaging in behavior that is *permitted* under the FCPA. This is because, as discussed above, the FCPA's scope is unclear and the DOJ and the SEC advocate a broad interpretation of its provisions.<sup>38</sup> This dynamic may render corporations and individual officers overly cautious, avoiding not only objectionable conduct but also acts that should be permitted and even encouraged.<sup>39</sup> After all, it cannot be the objective of the FCPA to discourage U.S. and other covered companies from engaging in international transactions; rather it should be to encourage such covered companies to conduct their overseas affairs the “right way.”<sup>40</sup>

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<sup>36</sup> See generally *Transcript of Panel Discussion: Effective FCPA/Export Controls Due Diligence in Mergers and Acquisitions*, 17 CURRENTS INT'L TRADE L.J. 28 (2008) (discussing the challenges of FCPA due diligence and the types of questions that must be asked).

<sup>37</sup> For example, it is common in Chinese culture to follow up the completion of contract negotiations with “large banquet-like celebrations attended by hundreds of individuals, complete with the exchange of gifts, which are common and expected throughout China.” Mike Koehler, *The Unique FCPA Compliance Challenges of Doing Business in China*, 25 WIS. INT'L L.J. 397, 417 (2008). The FCPA prohibits covered persons and entities from corruptly paying or offering to pay, directly or indirectly, money or “anything of value”. It does not provide for an express *de minimis* value exception.

<sup>38</sup> See *supra* text accompanying notes 6–19.

<sup>39</sup> There is the alternative of obtaining DOJ pre-clearance for certain conduct. The FCPA contains a self-reporting feature where a covered entity that wants to engage in a foreign transaction involving payments to (or other interaction with) foreign officials can seek an opinion letter from the DOJ as to whether the course of conduct it wishes to undertake would violate the FCPA in order to avoid later enforcement actions. However, this process can be time consuming and, in an auction or similar transaction context, may not be practical.

<sup>40</sup> See Koehler, *supra* note 15, at 1001–1005. For example, given the enforcement agencies' expansive interpretation of the FCPA and the crippling reputational blow that indictment visits upon a firm, it is often imprudent for companies to depend on the protection of the FCPA's “facilitating payments” exception when developing internal policies. Even though Congress expressly provided for this exception in the FCPA, as a practical matter the exception appears more useful as a post-hoc defense than as a reliable basis for making prospective managerial decisions.

## II. NON-U.S. APPROACHES TO COMBATING INTERNATIONAL CORRUPTION

There have been some noteworthy developments in the approaches of other countries to combating international corruption over the past 15 years. In 1997, the United States' efforts to create an international anti-corruption regime culminated with the adoption of the OECD Anti-Bribery Convention (the "Convention").<sup>41</sup> Among other things, Convention signatories are required to: (1) criminalize bribery of foreign public officials, (2) hold corporations and other legal persons liable for bribery, (3) prohibit "off-the-books" payments and other accounting practices that may facilitate corruption, (4) make bribery an extraditable offense and (5) provide mutual legal assistance to each other in bribery cases.<sup>42</sup> The Convention does not include a specific set of legal rules that are required to be adopted. Instead, adoption of the Convention's principles is to be undertaken and evaluated on a "functional equivalence" basis, allowing different countries to use different methods, according to the idiosyncrasies of their individual legal systems.<sup>43</sup>

The language and objectives of the Convention are very similar to the FCPA, which could suggest that participating countries have taken an approach to international corruption that is substantially similar to that of the United States. The data does not support this conclusion. While all state parties to the Convention have passed laws criminalizing foreign bribery, not all of these laws are effective (or, perhaps, even applied) in practice.<sup>44</sup> For example, while the U.S. brought 67 prosecutions under the FCPA in 2006 – 2007, 15 countries, "including Australia, Mexico, New Zealand, and Portugal," brought *none*.<sup>45</sup> Canada and Japan each brought only one prosecution, with relatively minor consequences.<sup>46</sup> According to one report, from 2000 to 2010 U.S. authorities brought more than 3.5 times more foreign

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<sup>41</sup> See Indira Carr & Opi Outhwaite, *The OECD Anti-Bribery Convention Ten Years On*, 5 MANCHESTER J. INT'L ECON. L. 3, 6 – 7 (2008). The Convention has been adopted by over 30 countries, and its standards were incorporated into the FCPA by the International Anti-Bribery and Fair Competition Act of 1998.

<sup>42</sup> *Id.* at 7 – 8.

<sup>43</sup> *Id.* at 8 – 10.

<sup>44</sup> See John Hatchard, *Recent Developments in Combating the Bribery of Foreign Public Officials: A Cause for Optimism?*, 85 U. DET. MERCY L. REV. 1, 8 (2007).

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

<sup>46</sup> *Id.*

bribery enforcement actions than *all other countries combined*.<sup>47</sup> These numbers are not proportionate to the level of international activity of each country and it is unlikely that these countries' corporations conduct international business substantially differently from those subject to the FCPA (and there are many companies that are subject to multiple regimes).<sup>48</sup> While the UK recently increased its enforcement profile with the passage of the Bribery Act,<sup>49</sup> it is only one country among the many signatories of the Convention.

It should be noted that commentators have cited a recent uptick in enforcement activities and fines by certain non-U.S. authorities as evidence of convergence among some OECD countries. This may be the case. However, this data also can be interpreted as demonstrating a “piggyback” phenomenon in certain jurisdictions—where there is a U.S. FCPA investigation or enforcement action, there is likely to be a parallel investigation and action (and additional costs imposed) by a non-U.S. authority. If this “piggybacking” is the reality in such jurisdictions—i.e., the increase in non-U.S. activity is focused on companies to which the FCPA applies—there is a widening, not a narrowing, of the gap between the burdens imposed on companies subject to the FCPA and those that are not. In other words, in some jurisdictions, companies subject to the FCPA are now at risk of being hit twice.

Taking a further step back, it is important to recognize that many countries that house important multinational enterprises are not parties to the OECD Convention.<sup>50</sup> It is incontrovertible that the economic activity in and involving these countries is increasing relative to both the United States and the other countries that are parties to the Convention and that the effectiveness of any transnational anti-corruption effort that does not cover these enterprises will necessarily be limited. A comparison that would provide valuable information but is difficult to make (partially because there are so few identifiable

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<sup>47</sup> See Trace Global Enforcement Report 2011, Figure II, *supra* note 3.

<sup>48</sup> Even the United Kingdom, one of the United States' most reliable and like-minded partners, has been criticized for its failure to prosecute foreign bribery. See Hatchard, *supra* note 44 at 8 – 9.

<sup>49</sup> For an overview of the Bribery Act, see generally F. Joseph Warin, Charles Falconer, and Michael S. Diamant, *The British are Coming!: Britain Changes its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 TEX. INT'L L. J. 1 (2010). The UK Bribery Act came into effect on July 1, 2011 and amends the UK criminal law to combat bribery in the UK and internationally. It applies to UK citizens, residents and companies established under UK law. In addition, non-UK companies can be held liable for a failure to prevent international bribery if they do business in the UK. See, *however*, note 76.

<sup>50</sup> See Hatchard, *supra* note 44 at 11.

actions) is how many non-U.S. companies that are not subject to the FCPA have been subject to large fines or other sanctions for engaging in, or allegedly engaging in, foreign corruption.

In what is perhaps an oversimplification, but nevertheless an illuminating paradigm, the global anti-corruption landscape can be viewed as having three tiers: (1) the FCPA (expansive law and zealous enforcement), (2) other OECD Convention signatories (law seemingly similar to the FCPA but lighter or episodic enforcement) and (3) non-OECD signatories (limited law and limited to no notable enforcement). The playing field is far from level.

Leveling the playing field is not an easy task. Difficulties in obtaining international cooperation and, where such cooperation exists,<sup>51</sup> differing definitions of the crime of bribery,<sup>52</sup> differing conceptions of jurisdiction,<sup>53</sup> and differing levels of commitment to enforcement<sup>54</sup> all lead to the conclusion that, absent a significant change in U.S. or other nations' law or enforcement policy, the U.S. approach to international corruption will continue to be more expansive and more zealous than other nations' approaches for the foreseeable future.

### III. WHAT ARE THE EFFECTS OF THIS ASYMMETRIC APPROACH TO ENFORCEMENT: A GAME-THEORETIC ILLUSTRATION OF INCENTIVES ON COMPANIES, GOVERNMENTS AND PROSECUTORS

Thus far, this article has discussed the scope of the FCPA and the disparate nature of various countries' foreign anti-corruption efforts. This section explores some of the potential effects of that asymmetric approach of governments on both private and public actors.

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<sup>51</sup> The United Nations alternative to the OECD convention has also proven unsuccessful in its ability to stamp out corruption. The United Nations Convention Against Corruption (UNCAC) similarly requires the criminalization of bribing foreign officials and orders countries to cooperate with each other as appropriate. *See*, for example, David C. Weiss, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471, 480 – 81 (2009). Unlike the OECD Convention, UNCAC is broadly inclusive, with 140 signatories and 93 ratifications or accessions, including key players like China, Russia and India. *See* Hatchard, *supra* note 44, at 12. If structured similarly to the FCPA, and rigorously enforced, UNCAC might serve to level the playing field among international corporations and create an effective international anti-bribery regime. Unfortunately, like the OECD, UNCAC is not always strictly enforced and, even if it were, key provisions are far weaker than the FCPA. Furthermore, UNCAC's monitoring process is "considerably weaker" than the OECD Convention's, (*see* Hatchard, *supra* note 44, at 12) which has itself so far proven insufficient to bring foreign anti-bribery laws into conformity with the FCPA. *Id.* at 7-11.

<sup>52</sup> Hungary's anti-bribery statute offers a particularly compelling example. Hungary's statute criminalizes bribing a foreign official, but the perpetrator is not subject to punishment if he or she "fear[s] unlawful disadvantage for refusing to offer the bribe," *see* Weiss, *supra* note 51, at 488 an exception that could swallow the rule.

<sup>53</sup> Canada, for example, only criminalizes acts performed in Canada, whereas the FCPA covers Americans who act anywhere in the world. *See* Weiss, *supra* note 51, at 493 – 94.

<sup>54</sup> *See supra* text accompanying notes 44 – 48.

In situations where participants can choose different strategies (e.g., work cooperatively or act selfishly) and outcomes differ depending on what strategies the various participants adopt, game theory provides substantial insight into individual incentives and their effects on global outcomes.<sup>55</sup> The oft-cited “prisoner’s dilemma” provides an illustration of the incentive (or temptation) for individuals to “cheat” and how that incentive can result in unfair cost allocation and sub-optimal group outcomes.<sup>56</sup>

#### A. Why Would Countries Play a “Non-Enforcer” Strategy?

With a few adjustments, the prisoner’s dilemma illustrates some of the incentives (and challenges) governments face when crafting and enforcing international anti-corruption regimes. Starting with a stark and perhaps extreme example, if multiple countries “agree” to craft and enforce anti-corruption statutes and some countries make it clear that they will enforce the laws zealously (“the enforcers”), there are significant incentives for other countries (the “non-enforcers”) not to implement or not to enforce their anti-corruption laws. For example, companies subject to the jurisdiction of the “non-enforcers” will be able to interact more freely with foreign officials and in industries and countries with higher risk and, as a result, have greater commercial opportunities. These are not isolated events. The additional profits made, costs saved, knowledge gained and relationships formed by companies subject to the jurisdiction of the “non-enforcers” could be used in subsequent endeavors, thus increasing their competitiveness. This “non-enforcer” strategy need not be taken to the extreme of encouraging or

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<sup>55</sup> We are not the first to consider the FCPA through the lens of the prisoners’ dilemma. *See, for example*, Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA J INT’L L 665 (2004).

<sup>56</sup> Roger B. Myerson, *Game Theory: Analysis of Conflict* 98 (1997). In the prisoners’ dilemma, a prosecutor makes allegations against two alleged conspirators, A and B. The prosecutor deals with the conspirators individually. However, each conspirator knows the possible global outcomes: (1) If both conspirators deny the allegations, they each escape with slight punishment. (2) If both conspirators confess to the allegations, they each receive significant but not extreme punishment. (3) If conspirator A confesses to the crime when conspirator B denies the crime, conspirator A’s confession is rewarded with little or no punishment and conspirator B receives extreme punishment—but critically, if conspirator A is the only one to confess, conspirator A receives even less punishment than he receives when both conspirators deny the allegations. (4) Similarly, if conspirator B confesses when conspirator A denies, conspirator B receives little or no punishment and conspirator A receives extreme punishment. The critical observation is that whether A assumes conspirator B will confess or deny, it is always in A’s interest to confess. Facing the same incentive structure, it is also always in B’s interest to confess. Each conspirator therefore ends up confessing and receives significant punishment, even though they – both individually and as a group – would have received less punishment had they both denied the allegations. It also is noteworthy that A and B would like to coordinate their behavior by obtaining promises from each other not to confess, but that each of A and B is incentivized to break such a promise—thus obtaining little to no punishment for himself while visiting significant punishment on his co-conspirator—unless the cost of breaking a promise is meaningful. Said another way, to break the prisoner’s dilemma, the individual consequences of breaking an agreement to cooperate must outweigh the individual benefits of cheating.

permitting bribery to have a meaningful effect, as it is clear that by “dialing back” enforcement or having a “lighter-touch” a country can provide a substantial advantage to its domestic enterprises. It also is noteworthy that this incentive to be a “non-enforcer” increases as the scope and significance of the actions of the “enforcers” increases. In other words, the more zealously the “enforcers” act, the more incentive there is to be a “non-enforcer”.

There is a corollary to the “non-enforcer” strategy in the private sector where a company that is not subject to the FCPA can use the potential for zealous enforcement of government authorities to its advantage. This illicit strategy can be illustrated by an example. When an asset or company is offered for sale and there are indicia of potential foreign corruption issues (e.g., the asset is located in a jurisdiction or is part of an industry where corporate corruption has been found relatively frequently in the past), it may be in the interest of a potential purchaser that is not subject to the jurisdiction of an “enforcer” to emphasize or “play up” the possibility of corruption. In doing so, the potential purchaser from the “non-enforcer” jurisdiction may increase the actual or perceived risks and costs of the transaction for the potential purchasers that are subject to the jurisdiction of an “enforcer”, thus lessening or eliminating their competition.

#### B. Why Would the United States Pursue a Singular Strategy of Zealous Enforcement?

This game-theoretic analysis provides some insight into why a country may not want to implement or strenuously enforce anti-bribery statutes aimed at the foreign activities of its domestic enterprises when the United States is pursuing a zealous enforcement strategy. But the analysis invites a more fundamental question: Why does the United States, almost alone, impose the costs of being an “enforcer” on U.S. firms and the non-U.S. firms that choose to register their securities in the U.S.?

The moral sense of the United States to “do the right thing” is clearly and laudably a motivating factor. The legislative history of the FCPA articulates both ethical and business arguments in support of the FCPA. The House Report declares that the payment of bribes to foreign officials runs “counter to the

moral expectations and values of the American public.”<sup>57</sup> With respect to economic considerations, the House Report further claims that obtaining contracts through bribery “short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service.” The House concluded that bribery “rewards corruption instead of efficiency.”<sup>58</sup>

The timing of the enactment of the FCPA provides a further explanation. In 1977, the 95th Congress legislated in a substantially less globalized marketplace than does today’s 111th. Although on the brink of a decade of economic expansion, Japan had yet to emerge as a major player in international trade and U.S. relations with China were in their infancy. Hence the House Report’s references that corrupt payments by U.S. companies “have been made not to ‘outcompete’ foreign competitors, but rather to gain an edge over other U.S. manufacturers.”<sup>59</sup> Congress thus worried that paying bribes abroad would give certain “corrupt” American companies an edge on their more efficient and more ethical *American* competitors. Foreign competition was not perceived as a meaningful threat in 1977. We believe this different economic landscape, combined, of course, with foreign policy considerations,<sup>60</sup> and perhaps even the national soul-searching that followed the Watergate Scandal, may explain the 95th Congress’s willingness to impose a unilateral burden on the international activities of U.S. regulated firms.

### C. Why Have U.S. Enforcement Efforts Intensified?

Observing that times have changed in the past 35 years would be a triumph of understatement, but given the competitive realities of the 21st century, why has the U.S. Government intensified its enforcement of the FCPA? Examination of incentives again provides a possible answer. Prosecutors are rational. They seek to perform well.<sup>61</sup> To advance a career, to clean up the streets, or simply to take pride

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<sup>57</sup> H.R. Rep. No. 95-640 (1977), available at <http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf> (visited November 8, 2011).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> The FCPA’s legislative history mentions three significant scandals involving U.S. firms paying money to foreign officials in Japan, Italy and The Netherlands. According to the House, these scandals gave to opponents of strong U.S. relations with those countries an “effective weapon” with which to argue against closer U.S. ties. *Id.* This perspective on U.S. foreign policy appears dated in today’s global marketplace.

<sup>61</sup> Conceiving of prosecutors as utility maximizers is hardly a new concept. Since William Landes’s seminal economic account of litigation, scholars have devoted significant attention to providing economic explanations of prosecutorial decision-making. See William M. Landes, *An Economic Analysis of the Courts*, 14 J. L. & Econ. 61 (1971).

in a job well done, prosecutors measure performance in wins and losses. In the corporate enforcement context, where an out-of-court settlement is the norm, a “win” is viewed differently from obtaining a guilty verdict from a judge or jury. Establishing a track record of sizable monetary settlements is one way to tally “wins.”<sup>62</sup> When this incentive from the side of the prosecution is coupled with the fact that, in light of the massive direct and indirect harms that accompany an indictment, companies facing FCPA enforcement actions are incentivized to settle quickly at significant sums,<sup>63</sup> the rational outcome is for prosecutors to focus their resources on identifying and prosecuting potential FCPA violations. The logic is straightforward: FCPA enforcement efforts provide prosecutors with an effective means to obtain sizeable settlements, thus punishing past wrongs and deterring future violations.<sup>64</sup> The effect that such an enforcement dynamic has on U.S. competitiveness is not (nor should it be) a principal concern of the prosecutor.<sup>65</sup> The competitiveness of U.S. companies and U.S. foreign policy are not matters for which prosecutors can or should be responsible.

In recent remarks at the 22nd National Forum on the FCPA, an assistant attorney general acknowledged the significant cost of FCPA compliance and confirmed that the relevant effects on competitiveness were not a primary concern.<sup>66</sup> His remarks also embodied the perspective of Congress in 1977. In an effort to assuage worries of FCPA over-enforcement, the assistant attorney general noted, “The cost of not being FCPA compliant . . . can be far higher [than the cost of compliance].”<sup>67</sup> It appears that the assistant attorney general was comparing compliance-oriented U.S. companies (those spending resources to comply with the FCPA) to other U.S. companies (those not spending such resources). But, in

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<sup>62</sup> See *id.* at 63 (proposing a prosecutorial utility function in which prosecutors seek to maximize the number and size of settlements).

<sup>63</sup> See *supra* text accompanying notes 30 – 32.

<sup>64</sup> This is not at all to suggest that utility-maximizing prosecutors are doing anything unethical, immoral or improper. To the contrary, they are doing their job well. The point is simply that, when deciding whether to devote resources to pursuing an FCPA violation or a more complex and difficult to prove violation, the rational prosecutor is more likely to bring an FCPA action.

<sup>65</sup> The impact on U.S. businesses can be viewed in economic terms as a negative externality of the enforcement process. That U.S. firms may be shut out of certain business ventures does not affect the prosecution. Again, speaking from an economic perspective, because the costs of enforcement go beyond the bi-lateral relationship between the prosecutor and the culpable party—from an economic perspective, prosecutors would tend to over-enforce the FCPA.

<sup>66</sup> “We recognize the issues of costs to companies to implement robust compliance programs, to hire outside counsel to conduct in-depth internal investigations, and to forego certain business opportunities that are tainted with corruption. Those costs are significant and we are very aware of that fact.” Lanny A. Bruer, Assistant Attorney General, Criminal Division, *Remarks to the 22nd National Forum on the FCPA* (Nov 17, 2009) at 4.

<sup>67</sup> *Id.*

a global marketplace, this is not the only relevant comparison and, in some markets where there is only one U.S. regulated firm, it is an irrelevant comparison. The more relevant comparison is between U.S. and non-U.S. companies required to comply with the FCPA, on the one hand, and non-U.S. companies that are not subject to the FCPA on the other. Such a comparison would almost certainly reveal that the costs of compliance with the FCPA are placing U.S.-regulated companies at a significant competitive disadvantage.

#### IV. CHANGES SUGGESTED BY EXPERTS

We are not alone in observing that the current U.S. approach to FCPA enforcement is having adverse consequences that should be addressed. Former Attorney General Michael B. Mukasey recently testified before Congress, making several suggestions as to how the FCPA could be refined and improved. He proposed: (1) clarifying the definition of terms used in the law, including “foreign official”; (2) adding an affirmative defense for companies that have rigorous compliance programs in place but who find themselves on the wrong end of a criminal probe; (3) adding a “willfulness” requirement for corporate criminal liability; (4) limiting successor liability for the prior corrupt activities of a business that was acquired; (5) improving the way the DOJ provides guidance and advice to companies that are trying to comply with the law; and (6) limiting a parent company’s liability when it did not know about the improper behavior of a subsidiary.<sup>68</sup> Changes along the lines suggested by Mr. Mukasey could provide companies more certainty as to whether or not their conduct risked violating the FCPA, and taken as a whole they represent an encouraging effort at making the FCPA relatively fairer. We believe Mr. Mukasey’s suggestions would be very beneficial, but they may not go far enough. The

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<sup>68</sup> See *The Foreign Corrupt Practice Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary* (June 14, 2011) (testimony of Michael B. Mukasey, Partner, Debevoise & Plimpton LLP).

limited amount of judicial oversight<sup>69</sup> or other checks on enforcement or any mechanism for ensuring a convergence of international enforcement efforts would continue to be problematic.<sup>70</sup>

Another proposal that could bring clarity to FCPA enforcement was made by James R. Doty, former General Counsel of the SEC. Mr. Doty suggests that the SEC create a “Reg. FCPA,” similar to Regulation D under the Securities Act of 1933 and other administrative schemes, which “would establish a permissive filing regime; by making the filing, a registrant would benefit from a regulatory presumption of compliance.”<sup>71</sup> Under this system, “Reg. FCPA would set forth items required to be described, represented or disclosed, with appropriate exhibits, constituting the registrant’s FCPA Compliance Program” and “[t]he filed FCPA Compliance Program would be subject to Staff review and comment, as with the Annual Report on Form 10-K.”<sup>72</sup> The SEC would also issue no-action letters based on a corporation’s filings.<sup>73</sup> Mr. Doty posits that this system would be relatively easy to administer, and the SEC could use its experience with other similar regulations to ensure that it functions smoothly.<sup>74</sup> Among the benefits that Doty predicts as a result of implementing a Reg. FCPA are that it would: (1) focus on questionable behavior and achieve greater deterrence; (2) complement other initiatives, including the OECD Convention and UNCAC; and (3) make U.S. companies more competitive.<sup>75</sup> Again, these suggestions may help bring greater clarity and, as a result, fairness, without jeopardizing the goals of the FCPA, but they may become cumbersome and do not address directly the crux of the issue: companies subject to the FCPA compete in the same international arenas as companies that are not, but those subject to the FCPA face substantially different rules and enforcement costs.

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<sup>69</sup> See *supra* text accompanying notes 15 – 19.

<sup>70</sup> See Koehler, *supra* note 15 at 935 – 38. It is necessary to have judges review these agreements because enforcement agencies currently have too much discretion, while corporations or individuals accused of violating the FCPA have too much incentive to accept a deal regardless of their innocence. See *id.* at 939 – 40.

<sup>71</sup> James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 *Bus. Law.* 1233, 1234 (2007).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1248 – 53.

## V. ADDITIONAL AREAS OF CONCERN—EFFECTS ON THE U.S. CAPITAL MARKETS, ENCOURAGING BRIBERY?

The costs to the United States of the FCPA extend beyond out-of-pocket costs and missed opportunities that are borne by specific firms subject to the FCPA. For example, the costs the FCPA imposes on U.S. regulated companies provide an incentive for non-U.S. companies not to offer or register their securities in the U.S., or, if they have previously listed their equity securities on a U.S. exchange, to delist, in an effort to avoid FCPA jurisdiction and other compliance costs.<sup>76</sup> It is clear that the FCPA has contributed to the decisions of several companies to terminate their U.S. stock exchange listing. At least 60 companies that delisted their securities from a U.S. stock exchange between 2007 and 2011 specifically referred to the high administrative, regulatory and other costs associated with a U.S. listing as the reason for such decision<sup>77</sup> and, in at least one case, the delisting was announced shortly after an FCPA settlement.<sup>78</sup>

The same incentives apply to the decision as to where to list in the case of an IPO or other equity offering. Recent global IPO statistics reveal a substantial decrease in the relative share of IPOs listed on U.S. exchanges. In the 1990s, the yearly average of the number of U.S. IPOs comprised 26.7% of all IPOs in the world. Since 2000, the U.S. share of all IPOs has fallen to 11.7%.<sup>79</sup> In 2010, seven of the ten largest global IPOs took place on Asian markets and only one in the U.S.<sup>80</sup>

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<sup>76</sup> It is noteworthy in this respect that guidance under the UK Bribery Act, published by the UK Ministry of Justice in March 2011 (*available at* <http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf> (visited November 8, 2011)), states that “the Government would not expect . . . the mere fact that a company’s securities have been admitted to the UK Listing Authority’s Official List and therefore admitted to trading on the London Stock Exchange, in itself, to qualify that company as carrying on a business or part of a business in the UK” and therefore falling within the scope of [the offense entitled “Failure of Commercial Organizations to Prevent Bribery”]. “Likewise, having a UK subsidiary will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies.”

<sup>77</sup> We recognize that the FCPA is far from the only body that imposes costs on U.S. listed companies. Compliance with the provisions of the Sarbanes-Oxley Act imposes significant costs and is frequently specifically stated as a reason for delisting securities from a U.S. stock exchange, although the financial penalties for violators of Sarbanes-Oxley do not appear to be as substantial.

<sup>78</sup> On April 1, 2010, Daimler announced that it would pay combined civil and criminal penalties of \$185 million in a settlement with the SEC. The company announced that it would delist its securities from NYSE on May 14, 2010.

<sup>79</sup> See Rene M. Stulz, *The U.S. Left Behind: The Rise of IPO Activity Around the World* available at <http://blogs.law.harvard.edu/corpgov/2011/04/07/the-u-s-left-behind-the-rise-of-ipo-activity-around-the-world/> (visited November 8, 2011) and Craig Doidge, George Andrew Karolyi, Rene M. Stulz, *The U.S. Left Behind: The Rise of IPO Activity Around the World*, available at <http://www.voxeu.org/index.php?q=node/6824> (visited November 8, 2011).

<sup>80</sup> See Renaissance Capital 2010 Global IPO Market Review and 2011 Outlook, *available at* <http://www.renaissancecapital.com/IPOHome/review/2010review.pdf> (visited November 8, 2011).

The costs imposed by the FCPA on U.S. regulated companies and on the U.S. capital markets more generally could be more acceptable if we had confidence that the goals of the FCPA were, or will be, furthered. However, there is a realistic possibility that the FCPA may be exacerbating the problem of corruption. We recognize that this may be a controversial statement. Nevertheless, it is logical that restricting U.S.-regulated firms from entering jurisdictions in which making improper payments to government officials is or may become more prevalent allows other companies—some of which operate under business principles and government regulations less transparent and public-regarding than the principles and regulations under which U.S. firms operate—to dominate those jurisdictions. A Fulbright Scholar based in India to study the FCPA observed:

[B]ecause FCPA enforcement lacks transparency and predictability, operating in a seeming due process and checks-and-balances vacuum, we too often scare companies away from certain transactions, or sectors, or even from certain countries. In doing so, we leave developing nations to be ravaged by companies that are not similarly restrained by human rights and anti-corruption laws. Such a result might exacerbate corruptive practices.<sup>81</sup>

Looking at the issue from the perspective of global compliance, it is difficult to identify evidence supporting that U.S. FCPA enforcement efforts have resulted in a significant reduction in foreign corruption.<sup>82</sup> We are not saying that it is clear that the FCPA has caused an increase in corruption. However, as demonstrated above, the U.S. approach does create an economic incentive for other countries to take a lighter touch and provides companies that may not be concerned about or constrained by U.S. morals with greater opportunities.

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<sup>81</sup> See Andrew Brady Spalding, *American Values or Chinese Profits?*, The FCPA Blog (May 23, 2011), available at <http://www.fcablog.com/blog/2011/5/23/american-values-or-chinese-profits.html> (visited November 8, 2011).

<sup>82</sup> As previously discussed, the number of FCPA enforcement actions has increased dramatically in the last ten years. This increase can be viewed as evidence that it is unlikely that corruption has been decreasing over the same period.

## VI. A CALL FOR ANALYSIS AND ACTION

To be clear, this paper is *not* offered in praise of a “lighter touch” on bribery.<sup>83</sup> Our exposure to international transactions and business confirms the view that corruption has a corrosive influence on business, government and society generally and that the identification and eradication of corruption provides societal and economic benefits that merit the expenditure of significant private and government resources. Moreover, it is *not* our place or intention to advocate any specific policy proposal. Our position is that (1) the competitive landscape of the 21st century global economy warrants the reevaluation of the United States’ strategy in fighting foreign corruption, (2) the current anti-bribery regime—which tends to place disproportionate burdens on U.S. regulated companies in international transactions and incentivizes other countries to take a “lighter touch” —is causing lasting harm to the competitiveness of U.S. regulated companies and the U.S. capital markets and (3) even putting aside the disproportionate costs borne by U.S. regulated companies, the continued unilateral and zealous enforcement of the FCPA by the United States may not be the most effective means to combat corruption globally—in fact, in some circumstances it may *exacerbate* the problem of overseas corruption.

To switch from the analytical to the proactive, we believe the U.S. should evaluate whether the asymmetry between companies that are subject to the FCPA and those that are not can be meaningfully reduced or eliminated on a basis that is consistent with U.S. policy, including the “moral expectations and values of the American people.” Addressing this regulatory asymmetry can be achieved either by ratcheting up enforcement pressure on companies not currently subject to the FCPA or by dialing back enforcement pressure on companies currently subject to the FCPA. That is easy to say, but we recognize that making headway in either area could be a daunting task.

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<sup>83</sup> Although there is a school of thought suggesting that the normative significance of bribery is not always clear, we are not advocating that position here. *See, for example*, Richard A. Posner, *The Economics of Corruption*, The Becker-Posner Blog (August 28, 2005), available at <http://www.becker-posner-blog.com/2005/08/economics-of-corruption—posner.html> (“In effect, bribes shift the financing of public services from taxes to a combination of taxes and fees for service. By injecting a market element into public services, bribes can actually improve efficiency when used to get around rigid or inefficient rules.”) (visited November 8, 2011).

The United States could intensify the regulatory scrutiny of firms not currently subject to the FCPA through various means, including: (1) convincing a substantial number of key countries to enact *and enforce* regimes that are as rigorous and punitive as the FCPA, or (2) unilaterally expanding U.S. jurisdiction to cover as many companies as practicable. The first option suffers from the same difficulties as the OECD Convention and the UNCAC, discussed earlier.<sup>84</sup> With the exception of recent efforts by some European countries, other countries have shown little willingness to take international corruption as seriously as the United States, and even those countries which recently have increased their enforcement activities have done so on a lesser scale. Given the pace of reform in the international arena in the past decade and the changing landscape of the global economy, we believe the United States should be extremely reluctant to rely on the development of a more vigilant and aggressive international framework in order to address the current asymmetry. The second option, unilateral expansion of U.S. jurisdiction, would address the asymmetry, but it is not clear that this is practicable or even possible. Extraterritorial application of United States law is already an extremely sensitive and controversial topic,<sup>85</sup> and even setting aside the substantial additional enforcement costs and diplomatic implications of such a policy, it remains unclear how the United States would obtain jurisdiction over foreign companies with no connection to its shores. The obstacles to expanded jurisdiction may be even greater than those to developing an international enforcement mechanism.

Alternatively, the United States could take steps to reduce the regulatory costs for firms currently subject to the FCPA without undermining any of the Act's fundamental objectives. For example, the U.S. could decide to (1) dial back the scope of FCPA enforcement with respect to companies and focus more on individuals engaged in foreign corruption, (2) encourage other countries to do the same and (3) agree with other countries to cooperate on international matters such as information sharing, investigations, and extradition. There may be other measures that the U.S. could take to reduce the costs of effective

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<sup>84</sup> See *supra* text accompanying notes 41 – 54.

<sup>85</sup> See generally *Developments in the Law – Extraterritoriality*, 124 HARV. L. REV. 1226 (2011).

deterrence and enforcement of foreign corruption, including extreme measures such as limiting enforcement efforts to jurisdictions that pursue a similar enforcement strategy. Yet any new U.S. approach would almost certainly face political difficulties. For example, a change to a less zealous enforcement posture or to giving more deference to the enforcement activities of other countries may be seen as an admission that the FCPA has failed. Admitting such a failure would be embarrassing and, perhaps, politically unpalatable, and the alternative of, in effect, blaming the inadequacy of the efforts of other countries for such failure would be at least insulting, if not diplomatically imprudent.

While the task is daunting and the discomfort of admitting that the current approach has significant flaws is unavoidable, that does not mean that action should not be taken. Any such action should begin with an assessment of the current circumstances and a recognition that, in today's global economy, meaningful international alignment of the world's leading economic powers is a necessary condition for combating foreign bribery.

## VII. CONCLUSION

While accepting and fully embracing the ultimate policy goal of the FCPA—the prevention of corruption worldwide—the purpose of this article is to call for an assessment of (1) the ability of the United States to achieve that goal unilaterally and (2) the direct and indirect costs of continuing such an effort. This paper has identified several factors, including the incentives of the various participants and the decrease in the relative importance of the U.S.-regulated companies in the international marketplace, that strongly and clearly suggest that the United States cannot continue to do it alone. The costs of pursuing such an approach are substantial and, in certain cases, irreversible and, consequently, a realignment of the U.S. position in the global anti-bribery enforcement regime is necessary.