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COMMENT

Resolving Ambiguity in the FCPA through Compliance with the OECD Convention on Bribery of Foreign Public Officials

ERIC J. SMITH[†]

INTRODUCTION

In the 1970s, the investigation into the Watergate scandal exposed corruption at the highest level of government.¹ Less well known are the various corporate bribery schemes the investigations uncovered, including the discovery by the Securities Exchange Commission (SEC) of over \$300 million in potential bribes to foreign officials from over four hundred U.S. companies.² Americans responded by demanding greater corporate accountability, and Congress passed the Foreign Corrupt Practices Act (FCPA) to prevent and sanction American corruption in international business.³ Despite this new authority, deregulation remained the dominant ideology of the time period, and the commercial world continued to operate largely free of restrictions throughout the 1980s and 90s.⁴

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1. H. Lowell Brown, *Avoiding Bribery When Doing Business Overseas: A Primer on the Foreign Corrupt Practices Act*, 20 ME. BAR J. 78, 78 (2002). See also Melysa Sperber, *Foreign Corrupt Practices Act*, 39 AM. CRIM. L. REV. 679, 679 n.2 (2002) (“Congress passed the FCPA to restore public confidence in the business community after a series of bribery scandals tarnished corporate America’s image at home and abroad.”).

2. Fraud Section, Crim. Div., U.S. Dep’t of Justice, *Foreign Corrupt Practices Act Antibribery Provisions* <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> [hereinafter *FCPA Guide*].

3. Sperber, *supra* note 1, at 679 n. 2.

4. See Simon Johnson & James Kwak, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 89 (2010) (“Despite the scandals and crises that marked the 1990s . . . Wall Street translated its growing economic power into political power and . . . the ideology of . . . deregulation became conventional wisdom in Washington on both sides

Recently, however, the United States Department of Justice (DOJ) and the SEC have cracked down and steadily increased both the number of investigations and the penalties sought under the FCPA.⁵ In fact, prosecution of FCPA violations has increased exponentially every year since 2005.⁶ In 2010, half of the two billion dollars in judgments and settlements secured by the DOJ's Criminal Division came from FCPA enforcement.⁷ Furthermore, whereas they formerly targeted primarily business entities, recent FCPA prosecutions have implicated more individuals than ever before, including many corporate officers and directors.⁸ Prosecutors hope this pursuit of individual employees will act as a significant deterrent to bribery, as the corporate form "cannot provide a safe haven" for the officers, even following the resolution of an action against the company itself.⁹

While many companies have responded to the growth in FCPA prosecutions by creating expanded compliance programs,¹⁰ the continually expanding reach of private enterprise leaves many violators beyond the reach of U.S. enforcement authorities.¹¹ Furthermore, payments to foreign officials remain a part of the

of the political aisle." See also *id.* (describing the passage of the Riegle-Neal Act of 1994 and the Gramm-Leach-Bliley Act of 1999 as "only confirmed trends that had begun in the 1970s, and signified that the federal government would no longer attempt to resist the desires of," industry).

5. Joel M. Cohen et al., *Under the FCPA, Who is a Foreign Official Anyway?*, 63 BUS. LAW. 1243, 1247 (2008).

6. See *id.* at 1247 (noting the increase in FCPA activity from thirty-five prosecutions and seventeen investigations in 2005 to sixty-seven prosecutions and sixty investigations in 2007). See also Don Lee, *Doing Sticky Business in China; A Pasadena Firm Gets Caught up in a Market Rife with Corruption*, L.A. TIMES, Jan. 12, 2009, at A1. ("Currently, at least 91 cases are open, triple the number four years ago . . .").

7. Press Release, U.S. Dep't of Justice, Department of Justice Secures More Than \$2 Billion in Judgments and Settlements as a Result of Enforcement Actions Led by the Criminal Division (Jan. 21, 2011), available at <http://www.justice.gov/opa/pr/2011/January/11-crm-085.html>.

8. Jeffrey Clark et al., *Anti-Corruption*, 44 INT'L LAW., 451, 451 (2010).

9. *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 4 (2010) (statement of Greg Andres, Deputy Assistant Attorney General).

10. See Cohen, *supra* note 5, at 1272 ("Many companies, especially U.S.-based companies, have responded to heightened FCPA enforcement by installing comprehensive anti-corruption compliance programs.").

11. See, e.g., Colleen A. Conry, *Complying with the Foreign Corrupt Practice Act in the Global Healthcare Industry*, 3 J. HEALTH & LIFE SCI. L. 1, 9-11 (2010) (describing the global reach of the pharmaceutical industry and the attendant FCPA implications).

commercial landscape in emerging markets around the world.¹² Fortunately, many nations are now subject to the same prohibitions as U.S. businesses,¹³ yet ambiguities in the FCPA and its vigorous application by domestic enforcement authorities still disadvantage American commercial interests by subjecting them to prohibitions that do not apply to companies in much of the world.¹⁴

In the competition-driven private sector, the United States has historically demanded a level playing field.¹⁵ Perhaps in response to such demands, the Organization for Economic Cooperation and Development (OECD) drafted the Convention on Bribery of Foreign Public Officials in International Business Transactions (Convention).¹⁶ Despite the existence of the Convention, a lack of parity between the Convention and the FCPA remains due to vigorous U.S. enforcement of the FCPA. By aligning enforcement of the FCPA with the international standards in the Convention, the U.S. could achieve the parity desired in the business world. Furthermore, shifting the focus on corporate ethics to the international framework already in place would provide the comprehensive approach to bribery prevention that enforcement authorities demand. Moreover, by following the prohibitions of the Convention, the United States could act as a model for other nations and remain a leader in international commerce and the prevention of bribery.

This comment will show how international law and the ratification of the Convention require the SEC and the DOJ to align their interpretation of the FCPA with the Convention. Part II begins with a review of the statutory language of the FCPA.¹⁷ After introducing the FCPA, Part II also explores the most significant areas

12. See, e.g., Mary Anastasia O'Grady, *Democrats and Haiti Telecom*, WALL ST J., Mar. 15, 2010, at A21 (describing Haiti as "pure pay to play").

13. See Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105-43, 37 I.L.M. 1, available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf> [hereinafter OECD Convention].

14. See *infra* Part III.A.

15. See Johnson & Kwak, *supra* note 1 at 30-35 (narrating the historical attempts to limit concentrated financial power).

16. See OECD Convention, *supra* note 16, pmb1. ("Recognising that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention . . ."). In fact, a number of multinational conventions exist, see *infra* note 102, but this paper will focus on the OECD Convention on account of its effectiveness, particularly in the creation and enforcement of implementing legislation in member states. See *OECD Anti-Bribery Convention: National Implementing Legislation*, OECD, http://www.oecd.org/document/30/0,3746,en_2649_34859_2027102_1_1_1_1,00.html (last visited Apr. 13, 2012).

17. See *infra* Part II.A.

of ambiguity in the statute.¹⁸ Part II.B reviews the language of the Convention and the implementing legislation of a few of the Convention's significant parties.¹⁹ Finally, Part III.A notes where the FCPA and the Convention differ,²⁰ and Part III.B explains why the applicable law requires an interpretation of the FCPA that fits more closely with the Convention.²¹ This alignment with international law would clarify certain elements of the FCPA for courts, business entities, and individuals, and achieve the desired parity in international business.

I. THE TEXT OF THE FCPA AND THE CONVENTION

A. *The FCPA*

The FCPA prohibits payments to foreign officials by U.S. businesses and individuals for the purposes of:

- (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage . . . in order to assist the company in obtaining or retaining business for or with, or directing business to, any person.²²

The FCPA prohibits the making of such payments by “issuers,”²³ “domestic concerns,”²⁴ and since 1998,²⁵ “any person.”²⁶ A

18. *See infra* Part II.A.

19. *See infra* Part II.B.

20. *See infra* Part III.A.

21. *See infra* Part III.B.

22. 15 U.S.C. § 78dd-1(a) (2006). The FCPA specifically prohibits payments by “any issuer which has a class of securities registered” in the United States or “which is required to file reports,” or “for any officer, director, employee, or agent” of the company acting on its behalf “to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to” (1) a “foreign official,” (2) “foreign political party or official thereof, or any candidate,” or (3) “any person, while knowing” it might end up in the hands of a foreign official, political party, or candidate. *Id.* § 78dd-1(a)(1)–(3).

23. *Id.* § 78dd-1(a). An issuer is any company that has securities registered with the SEC under § 12 of the 1934 Exchange Act or that is required to file reports under §15(d) of that act. *Id.* The FCPA also contains “accounting provisions,” which apply only to issuers. Sperber, *supra* note 1, at 683. These provisions require companies “to keep accurate books and records in order to fairly report the transactions of the corporation,” in order to prevent concealment of bribery through creative accounting practices. *Id.* at 683 & n. 15.

24. 15 U.S.C. § 78dd-2(a). The FCPA defines a domestic concern as:

prohibited payment may consist of “any money, or offer, gift, promise to give, or authorization of the giving of anything of value.”²⁷ The violator must also have acted corruptly and made the payment in order to obtain or retain business. Additionally, one violates the FCPA if he gives anything of value to a third party with knowledge that it will be “offered, given, or promised” to a foreign official to obtain or retain business.²⁸

The FCPA, therefore, has five elements for criminal liability:

- (1) An issuer, domestic concern, or any other person, makes;
- (2) an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value;
- (3) to a foreign official, political party, or candidate;
- (4) corruptly;
- (5) in order to assist such (issuer, domestic concern, or person) in obtaining or retaining business for or with, or directing business to, any person.²⁹

(A) any individual who is a citizen, national, or resident of the United States; and (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States. *Id.* § 78dd-2(h).

25. 15 U.S.C. § 78dd-3(a). The expansion of liability under the FCPA to “any person” in 1998 occurred in a Congressional amendment to implement U.S. obligations under the OECD Convention. Sperber, *supra* note 10, at 680. Article 1 of the OECD Convention requires that “[e]ach party shall take such measures as may be necessary to establish that it is a criminal offense under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official. OECD Convention, *supra* note 14, art. 1.

26. The FCPA also proscribes payments by “any officer, director, employee, or agents of such issuer or any stockholder acting on behalf of” an issuer, domestic concern, or person. 15 U.S.C. § 78dd-1(a). The Fifth Circuit has held that an employee may not be convicted under the FCPA if his employer “has not and cannot” be convicted under that act. *United States v. McLean*, 738 F.2d 655, 656 (5th Cir. 1984). The court in *McLean* discusses the Eckhardt Amendment, which was added to Title 15 out of concern for the potential that corporations might use their employees as scapegoats, as well as to provide employees “the benefit of the superior resources of the corporation in presenting a defense in a criminal proceeding.” *Id.* at 658–59. For the text of the Eckhardt Amendment see 15 U.S.C. §§ 78ff(c)(3), 78dd-2(b)(1)(B)(3).

27. 15 U.S.C. § 78dd-1(a).

28. *Id.* § 78dd-1(a)(3).

29. *Id.* §§ 78dd-1(a) to -3(a).

Subsection (f) of the FCPA defines some of the statute's material terms. First, it defines a "foreign official" as "any officer or employee of a foreign government or any department, agency or instrumentality thereof, or of a public international organization," or anyone "acting in an official capacity" for one of those same bodies.³⁰ Second, the statute defines knowledge as awareness or "a firm belief." Therefore, the statutory knowledge requirement for third party payments is satisfied when one has "a firm belief" that the third party will give the money to a foreign official.³¹

The statute provides a few ways to avoid liability. First, the FCPA contains an exception for payments to facilitate or expedite standard governmental procedures,³² often referred to as "grease" payments.³³ Second, an FCPA defendant may have an affirmative defense if the bribe was lawful under the written laws and regulations of the foreign official's country.³⁴ Third, a defendant may also have an affirmative defense if the payment was a "reasonable and bona fide" expenditure directly related to a product demonstration or the performance of a contract.³⁵

Jurisdiction under the FCPA occurs under both the territorial and nationality principles.³⁶ Together, these quintessential jurisdictional principles allow a state to regulate any conduct occurring within its territory or having a significant effect therein (territorial), as well as any conduct by its nationals occurring anywhere in the world

30. *Id.* § 78dd-1(f)(1)(A).

31. *Id.* § 78dd-1(f)(2)(A)(i)–(ii). Compare this standard with the knowledge standard from American criminal law, where one acts "knowingly if he is aware that that result is practically certain to follow from his conduct, whatever his desire may be as to that result." *United States v. Bailey*, 444 U.S. 394, 404 (1980) (internal quotation marks and citations omitted).

32. 15 U.S.C. §§ 78dd-1(b), 78dd-1(f)(3).

33. 15 U.S.C. § 78dd-1(f)(3). Permissible "grease" payments to foreign officials include those made for the purpose of:

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature. *Id.* § 78dd-1(f)(3)(A)(i)–(v).

34. 15 U.S.C. § 78dd-1(c)(1).

35. *Id.* § 78dd-1(c)(2).

36. *FCPA Guide*, *supra* note 2, at 3.

(nationality).³⁷ In other words, jurisdiction under the FCPA exists over non-nationals only if their actions connect them territorially with interstate commerce.³⁸ However, through the nationality principle, jurisdiction exists over bribes by “United States person[s]” without any linkage to interstate commerce.³⁹ Therefore, foreign corporations and foreign nationals may only be liable under the FCPA if they use the mails or another instrumentality of interstate commerce to make a bribe, but U.S. nationals may be held liable for any bribe to a foreign official.

Enforcement of the FCPA is done by both the SEC and the DOJ.⁴⁰ The SEC handles civil enforcement of violations by issuers, while the DOJ handles civil enforcement of violations by domestic concerns and foreign companies, as well as all criminal enforcement of FCPA violations.⁴¹ Both agencies have significantly increased the number of FCPA prosecutions over the past five years,⁴² prioritizing FCPA enforcement as “second only to fighting terrorism.”⁴³ Additionally, a few courts have allowed private individuals to bring FCPA claims under the Racketeering Influenced and Corrupt Organizations Act.⁴⁴

In addition to the investigation and prosecution of FCPA violations, the DOJ monitors FCPA compliance through the FCPA Opinion Procedure. Created as part of the 1988 Congressional Amendments to the FCPA⁴⁵ and contained in a massive trade bill,⁴⁶

37. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)–(2) (1987).

38. See 15 U.S.C. §§ 78dd-1(a) to -3(a).

39. 15 U.S.C. §§ 78dd-1(g), 78dd-2(i).

40. Sperber, *supra* note 1, at 692 & nn. 82–83. Private rights of action against FCPA violators rely on the “Racketeer Influenced and Corrupt Organizations Act (“RICO”).” *FCPA Guide*, *supra* note 2, at 1 (“An action might be brought under RICO by a competitor who alleges that bribery led to the defendant winning a foreign contract.”).

41. *FCPA Guide*, *supra* note 2, at 2.

42. Conry, *supra* note 12, at 1.

43. Don Lee, *Doing Sticky Business in China; A Pasadena Firm Gets Caught up in a Market Rife with Corruption*, L.A. TIMES, Jan. 12, 2009, at 1.

44. Sperber, *supra* note 1 at 692 & n. 82; *FCPA Guide*, *supra* note 2, at 3. (“[A]n action might be brought under RICO by a competitor who alleges that bribery led to the defendant winning a foreign contract.”).

45. See Julia Christine Bliss & Gregory J. Spak, *The Foreign Corrupt Practices Act of 1988: Clarification or Evisceration*, 20 LAW & POL’Y INT’L BUS. 441, 444, 449 (1988).

46. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 5003(a), (c), 102 Stat. 1107, 1417, 1422 (1988) (codified as amended in scattered sections of 15 U.S.C.). The impetus for the 1998 amendments was a concern that the FCPA hindered American businesses in the international market. *United States v. Kay*, 200 F. Supp. 2d 681, 684 (S.D. Tex. 2002).

this procedure allows any “issuer” or “domestic concern” facing potential liability under the FCPA “to obtain an opinion of the Attorney General as to whether certain specified, prospective—not hypothetical—conduct conforms with the Department’s present enforcement policy.”⁴⁷ The applicable regulations then provide that the Attorney General’s office will return an opinion on the situation within 30 days after receiving a completed request.⁴⁸ If the Attorney General approves of the requestor’s conduct, the requestor receives a “rebuttable presumption” that the conduct was legal in any future enforcement action.⁴⁹

Few cases exist interpreting the elements of the FCPA and commentators consider much of the statute subject to varying interpretations.⁵⁰ Some even suggest that the FCPA’s ambiguity may rise to the level of unconstitutionality,⁵¹ but the statutory language likely does not reach the required level of vagueness.⁵² The statute’s ambiguity does, however, create a great deal of uncertainty for those subject to its provisions. As a result of the statute’s uncertain breadth, companies and business leaders subject to the FCPA often choose to pay a fine rather than litigate their charges and risk receiving an unfavorable judgment, which could have more costly and unpredictable effects on a company’s good will.⁵³ Due to the frequency with which FCPA violations proceed to settlement, and the dearth of litigation, the law of international bribery lacks the level of appellate review required to act as a check on prosecutorial aggression.

47. Foreign Corrupt Practices Act Opinion Procedure, 28 C.F.R. § 80.1 (2010).

48. *Id.* § 80.8.

49. *Id.* § 80.10.

50. See Cohen, *supra* note 5, at 1250; Stacy Williams, *Grey Areas of FCPA Compliance*, 17 CURRENTS INT’L TRADE L. J. 14, 16 (2008) (noting the many ambiguous terms in the FCPA and its failure to provide definitions); Conry, *supra* note 12, at 15 (commenting on the “potential pitfalls faced . . . when dealing with foreign officials”).

51. Kay, 513 F.3d at 440 (“Defendants argue that the statute failed to give fair notice that their conduct was illegal and that proceeding to trial with the late arriving clarification of the Act violated their due process rights.”); *United States v. Bodmer*, 342 F. Supp. 2d 176, 189 (S.D.N.Y. 2004) (“[T]he portion of the indictment charging [the defendant] with conspiracy to violate the FCPA contravenes the constitutional fair notice requirement.”).

52. Cohen, *supra* note 5, at 1267 (“Despite the available ‘vagueness’ arguments in FCPA cases, it would be difficult for a defendant to convince a court applying the *Lanier* test that the term ‘instrumentality thereof’ is so vague and ambiguous that it is not reasonably clear enough for a common individual to understand its meaning”).

53. Cohen, *supra* note 5, at 1248.

As companies subject to the FCPA try to establish compliance with the statute to avoid the significant penalties imposed,⁵⁴ the ambiguity in the statute causes great difficulty for business leaders and those advising them. While the Opinion Procedure allows resolution of particularly confusing questions, it remains cumbersome and time consuming.⁵⁵ Fast-paced commercial enterprises in the midst of a business transaction may not be able to afford the thirty-day waiting period expected for the return of a DOJ opinion. Moreover, in the absence of significant case law, commentators have been forced to assemble insights into the meaning of key FCPA terms from limited sources, including the relevant Opinion Procedure releases and public statements by officials at the DOJ.⁵⁶

A few courts have had opportunities to clarify the terms of the FCPA. In *United States v. Bodmer*, the government alleged that the defendant, Hans Bodmer, acted as the agent of two Delaware businesses when he gave bribes to Azerbaijani officials in order to secure shares in the State Oil Company of the Azerbaijan Republic (SOCAR).⁵⁷ Bodmer argued that prior to the 1998 amendments to the FCPA, foreign nationals were not subject to criminal penalties for violations of the Act. He claimed that because his conduct had occurred prior to those amendments, the rule of lenity mandated the dismissal of the FCPA charges against him.⁵⁸ Over the government's argument that the FCPA had always applied to "non-resident foreign nationals who had 'minimum contacts' with the United States,"⁵⁹ the court went on to review the legislative history leading up the 1998 amendment. The *Bodmer* court found that, "after consideration of the statutory language, legislative history, and judicial interpretations of the FCPA, the jurisdictional scope of the statute's criminal penalties [was] still unclear."⁶⁰ Applying the rule of lenity, the court dismissed

54. *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 2 (2010), 3–4 (statement of Michael Volkov, Esq., Partner, Mayer Brown LLP) [hereinafter *Volkov*].

55. The opinion procedure allows for a requestor to receive a DOJ interpretation of a hypothetical situation within 30 days of a completed request, which could result in a lengthy wait from the time of the requestor's initial inquiry. See 28 C.F.R. § 80.8 (2010).

56. Cohen, *supra* note 5, at 1251–55.

57. *United States v. Bodmer*, 342 F. Supp. 2d 176, 178–79 (S.D.N.Y. 2004).

58. *Id.* at 181. A rule of statutory construction, the rule of lenity requires that an ambiguous criminal statute be construed in favor of the defendant. See, e.g., *United States v. Dauray*, 215 F.3d 257, 264 (2000).

59. *Id.* at 182.

60. *Id.* at 187.

the FCPA charges against Bodmer for lack of fair warning.⁶¹ Although the court upheld the defendant's fair warning argument, that argument relied on retroactive application of the statute, rather than on the FCPA's ambiguity.⁶²

In a related case, *United States v. Kozeny*, the U.S. District Court for the Southern District of New York considered whether a payment made was "lawful under the written laws and regulations" of the receiving nation.⁶³ If so, this would have provided the defendant an affirmative defense to an act otherwise prohibited under the FCPA.⁶⁴ The defendant, Frederic Bourke, Jr., a former client of Hans Bodmer, was charged with violation of the FCPA for his participation in the same scheme involving shares of SOCAR. Bourke argued that Azerbaijani criminal law permitted his payments.⁶⁵ The court found that although Azerbaijani law "relieved" the defendant of "criminal responsibility," the FCPA focuses on the "payment, not the payer," and the payment remained unlawful.⁶⁶ Therefore, the initial payment was still illegal.⁶⁷ Nevertheless, the court acknowledged that the possibility of extortion could allow Bourke to argue that he "lacked the requisite corrupt intent to make a bribe" that violates the FCPA.⁶⁸

In *United States v. Kay*, the defendant, David Kay, was charged with FCPA violations including payments made to reduce customs duties and taxes on rice exports to Haiti.⁶⁹ In defense, Kay argued that the FCPA "failed to give fair notice that [his] conduct was

61. *Id.* at 189, 192–93.

62. *Id.*

63. 582 F. Supp. 2d 535, 537 (S.D.N.Y. 2008).

64. *See supra* Part II.B.

65. *Kozeny*, 582 F. Supp. 2d at 537. This argument was based on the fact that the payments were the product of extortion, and Bourke reported them to the President of Azerbaijan. *Id.*

66. *Id.* at 539. The court in *Kozeny* treated the question of foreign law as a question of law per Rule 26.1 of the Federal Rules of Criminal Procedure. *Id.* at 538. Rule 26.1 requires a "party intending to raise an issue of foreign law" to "provide the court and all parties with reasonable written notice." FED. R. CRIM. P. 26.1. That rule also allows the court to "consider any relevant material or source—including testimony—without regard to the Federal Rules of Evidence." *Id.*

67. *Kozeny*, 582 F. Supp. 2d at 540.

68. *Id.* at 540. At trial, the court instructed the jury on the required corrupt intent for an FCPA violation, defining that intent as "knowledge of and the intention to further its objective of corruptly and willfully bribing foreign officials." *United States v. Kozeny*, 664 F. Supp. 2d 369, 390 (S.D.N.Y. 2009). That jury found Mr. Bourke guilty, and his Rule 29 motion for acquittal or alternatively a new trial under Rule 33 was denied. *Id.* at 372, 397.

69. 513 F.3d 432, 439 (5th Cir. 2007), *reh'g denied*, 513 F.3d 461 (5th Cir. 2007).

illegal.”⁷⁰ The U.S. District Court for the Southern District of Texas agreed and granted Kay’s motion to dismiss on these grounds, holding that the FCPA’s prohibition of payments to “obtain or retain business” did not include payments made to reduce customs duties and taxes.⁷¹ On appeal, however, the Fifth Circuit refuted Kay’s fair notice argument, finding that the statute is not “so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.”⁷² The Fifth Circuit interpreted the FCPA’s business nexus requirement literally and broadly, holding that the FCPA prohibited the defendant’s conduct, provided it was intended to “assist in obtaining or retaining business.”⁷³ On remand, the district court declined Kay’s motion to dismiss for lack of fair warning,⁷⁴ and following a second appeal the Fifth Circuit denied Kay’s argument again.⁷⁵ The court found that its earlier decision had not expanded the scope of the FCPA and affirmed the conviction.⁷⁶

Despite refuting the defendant’s vagueness arguments, the Fifth Circuit acknowledged in *Kay* that significant ambiguity does exist in the FCPA’s business nexus element.⁷⁷ The court found it necessary to conduct a lengthy statutory analysis to determine the meaning of “obtaining or retaining business,”⁷⁸ and the case also required multiple appeals to reach a conclusion. Although the court found no lack of fair warning,⁷⁹ the lengthy judicial process in *Kay* exemplifies how greater clarity in the FCPA would benefit both companies attempting to comply with its provisions and courts seeking greater judicial economy.

70. *Id.* at 440.

71. *United States v. Kay*, 200 F. Supp. 2d 681, 686–87 (S.D. Tex. 2002).

72. *Kay*, 513 F.3d at 441 (quoting *United States v. Lanier*, 520 U.S. 259 (1997)). The court in *Kay* applied all four tests of fair notice: (1) “vagueness of the statute’s language”; (2) “court’s retroactive enlargement of the scope of a statute”; (3) “the rule of lenity”; and (3) the “touchstone principle.” The FCPA satisfied none of these tests. *Id.* at 446.

73. *United States v. Kay*, 359 F.3d 738, 761 (5th Cir. 2004). The Fifth Circuit conducted a lengthy statutory analysis of the FCPA, focusing particularly on the “business nexus” element of the statute. *Id.* at 741–55.

74. *Kay*, 513 F.3d at 440.

75. *Id.* at 461.

76. *Id.*

77. *Kay*, 359 F.3d at 744.

78. *Id.* at 746 (“As the statutory language itself is amenable to more than one reasonable interpretation, it is ambiguous as a matter of law. We turn therefore to legislative history in our effort to ascertain Congress’s true intentions.”). *See also id.* at 738.

79. *Kay*, 513 F.3d at 446.

Many other ambiguities in the FCPA have not yet received any clarification from the courts. Interpretation of these elements is left to the speculative judgments of attorneys and the Opinion Procedure process.⁸⁰ First, a significant amount of uncertainty exists regarding who qualifies as a foreign official to whom payments are prohibited.⁸¹ The FCPA defines a foreign official as “any officer or employee of a foreign government or any department, agency or instrumentality thereof, or of a public international organization,” or anyone “acting in an official capacity” for one of those same bodies.⁸² This definition clearly includes elected or appointed government officials. But the public and private sectors often blend, and many national governments own shares in various commercial enterprises.⁸³ In those circumstances, the FCPA’s definition of a foreign official remains open for speculation as to what constitutes an “instrumentality” of a foreign government.

Second, the “grease payments” exception for “routine governmental actions” also results in confusion for those subject to the FCPA.⁸⁴ While the statute provides some concrete examples of governmental actions for which one may permissibly exchange money,⁸⁵ such as obtaining permits, it concludes with an allowance for payments to procure other “actions of a similar nature.”⁸⁶ This broad statement prompts the question of why a payment to a foreign official to secure a permit would be permitted, but a standardized payment to secure efficient customs treatment (as in *Kay*) would not be “of a similar nature.”⁸⁷ Furthermore, the question remains whether permissible payments to secure “routine” governmental actions may vary among nations and cultures along with their routines.

Third, uncertainty exists regarding the content of the “reasonable and bona fide expenditure” exception. The enforcement authorities have interpreted this exception very narrowly.⁸⁸ Excessive expenses not directly tied to conduct business or which appear excessive in

80. *Cohen*, *supra* note 5, at 1251–55.

81. *See infra* Part II.D.

82. 15 U.S.C. § 78dd-1(f)(1)(A) (2006).

83. Conry, *supra* note 12, at 3 (noting how the enforcement authorities’ interpretation of the foreign official element of the FCPA may lead to “unexpected liability”).

84. 15 U.S.C. § 78dd-1(b) (2006).

85. *Id.* § 78dd-1(b). *See supra* note 29 for a list of permissible “routine governmental actions.”

86. 15 U.S.C. § 78dd-1(f)(3)(A) (2006).

87. *Compare id. with* United States v. Kay, 200 F. Supp. 2d 681, 686 (S. D. Tex. 2002).

88. Conry, *supra* note 12, at 24.

light of the circumstances may result in million dollar fines for violators.⁸⁹ As with many of the statutory terms, however, there remains a significant gap between the interpretation of the enforcement authorities and the actual language of the statute, considering the breadth of potential interpretations by courts and laypersons.

B. THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS

Congress enacted the FCPA in 1977, and for many years the United States stood alone in prohibiting bribery of foreign officials.⁹⁰ This unilateral prohibition on bribery placed U.S. companies at a disadvantage in global markets.⁹¹ In response to the complaints of U.S. business leaders, the government began a campaign to persuade other nations of the necessity of preventing international bribery.⁹² While most nations traditionally prohibited bribery of their own officials, multinational conventions regulating cross-border bribery began to spring up only recently, aided by the urgings of Congress and the Executive Branch.⁹³ The most prominent of these conventions is the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Officials in International Business Transactions, which resulted from the realization that bribery had become “a widespread phenomenon in international business transactions.”⁹⁴ Signed in 1997 and entered into force in 1999, current signatories include 34 OECD member countries and four countries that are not OECD members.⁹⁵

89. *Id.* at 19.

90. Sperber, *supra* note 1, at 679-80.

91. President’s Message to the Senate Transmitting the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1 PUB. PAPERS 664 (May 1, 1998) [hereinafter President’s Message].

92. *Id.*

93. See Brown, *supra* note 1, at 76 (noting the recent vintage of multinational conventions).

94. OECD Convention, *supra* note 14, pmb. See also United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Oct. 31, 2003) (listing “multilateral instruments to prevent and combat corruption”).

95. *OECD Anti-Bribery Convention: Entry into Force of the Convention*, OECD, http://www.oecd.org/document/12/0,3343,en_2649_34859_2057484_1_1_1_1,00.html (last visited Oct. 3, 2011); *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD, http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html (last visited Apr. 13, 2011). The four non-member countries are Argentina, Brazil, Bulgaria, and South Africa. *Id.* The United States ratified the Convention without reservations, and Congress acted to amend the FCPA

The Convention requires all parties to:

take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any pecuniary or other advantage . . . to a foreign public official . . . in order to obtain or retain business or other improper advantage in the conduct of international business.⁹⁶

Article 1 goes on to define the term “foreign public official as “any person holding a legislative, administrative or judicial office in a foreign country,” as well as “any person exercising a public function for a foreign country, including for a public agency or public enterprise.”⁹⁷

Many signatories to the Convention have enacted legislation to implement the required prohibitions.⁹⁸ While the Convention requires only “functional equivalence” amongst the laws of its signatories, it also prohibits the use of derogations in ratification.⁹⁹ Accordingly, many nations’ implementing legislation closely tracks the language of the Convention. The experiences of Australia, Germany, Hungary, and the United Kingdom are illustrative.

Australia’s Criminal Code Amendment (Bribery of Foreign Public Officials) Act of 1999 defines all of the significant terms for the offense of bribery of a foreign official.¹⁰⁰ The statute specifies that one may not give a foreign official “any benefit,” a term not limited to tangible property. Importantly, and in great contrast to the FCPA, the Australian statute goes into great detail regarding who qualifies as a foreign public official.¹⁰¹ The statute draws a clear line regarding employees of state owned enterprises. When a foreign government holds more than fifty percent of the shares or voting power, or the ability to appoint more than fifty percent of the directors of a company, then one may not exchange money for business with an employee of that company. The statute also

according to the OECD shortly thereafter. *United States v. Kay*, 359 F.3d 783, 753–55 (5th Cir. 2004).

96. OECD Convention, *supra* note 14, art. 1(1).

97. *Id.* ¶ 4.

98. OECD *Anti-Bribery Convention: National Implementing Legislation*, *supra* note 19.

99. OECD Convention, *supra* note 14, pmb., para. 8.

100. *Criminal Code Act 1995* (Cth) div 70.1 (Austl.).

101. *Id.*

prohibits payments to employees of companies whose directors are clearly influenced by the foreign government.¹⁰²

German implementing legislation follows the Convention very closely. The German statute prohibits the giving of any advantage to a foreign official in exchange for any advantage in an international business transaction.¹⁰³ The German definition of foreign official focuses on government employees, including members of the judiciary and the military.¹⁰⁴ In close cases, the statute focuses on whether the individual receiving the bribe exercises a “public function.”¹⁰⁵

Hungary was second to the United States with 27 individuals sanctioned for bribery of foreign officials between 2000 and 2009,¹⁰⁶ but significant skepticism remains concerning the scope and application of the Hungarian statute.¹⁰⁷ Peripheral nations like Hungary will likely experience the most difficulty in obtaining widespread governmental adherence to an anti-bribery regime. Both Hungary’s location in east-central Europe and its post-communist identity make it prone to continuing concerns regarding corruption.¹⁰⁸ Furthermore, Hungary’s implementing legislation contains considerable uncertainty regarding the “quid pro quo” requirement, which is similar to the FCPA’s business nexus element.¹⁰⁹ The United States and other western nations must closely monitor the actions of their own companies operating in Hungary and other similar nations in order to ensure that the prohibitions of the Convention achieve the parity they intended.

102. *Id.*

103. Gleichstellung von ausländischen mit inländischen Amtsträgern bei Bestechungshandlungen [Act on Combating Bribery of Foreign Public Officials in International Business Transactions], Sep. 10, 1998, Bundesgesetzblatt, Teil II [BGBl II], art. 2, § 2, translated in *Act on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD, <http://www.oecd.org/dataoecd/62/3/2377209.pdf> (last visited Mar. 12, 2012).

104. *Id.* art. 2, § 1.

105. *Id.*

106. *Working Group on Bribery Data on Enforcement of the Anti-Bribery Convention*, OECD, 3 (June 2010), <http://www.oecd.org/dataoecd/11/15/45450341.pdf>.

107. See *Hungary: Phase 2 Report on the Application of the Convention on Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions*, OECD, 39–41 (May 6, 2005), <http://www.oecd.org/dataoecd/39/34/34918600.pdf>.

108. See *id.* at 6–7.

109. *Id.* at 39–40.

The United Kingdom stands poised to join the United States as a leader in combating international bribery. In April 2010, the U.K. passed the Bribery Act of 2010 (Bribery Act).¹¹⁰ The Act prohibits the giving of a bribe to a government official or an individual exercising a “public function” on behalf of a government to obtain or retain business or a business advantage.¹¹¹ In an expansion that far exceeds the scope of the Convention, the Bribery Act also prohibits the giving of a financial advantage to any person in exchange for the “improper” performance of a “relevant activity.”¹¹² Jurisdiction is extended only to acts which take place in the territory of the U.K.,¹¹³ in accordance with the Convention’s mandate for territorial jurisdiction.¹¹⁴ But the Bribery Act prohibits the same “grease” payments for which the FCPA provides an exception,¹¹⁵ and the Act only provides affirmative defenses for certain situations relating to the national defense.¹¹⁶ While it appears that the U.K. statute may vault the nation into the lead role for international bribery prevention, its enforcement by U.K. authorities will ultimately decide the weight that international business interests ought to place on it.¹¹⁷

II. THE RELATIONSHIP BETWEEN THE FCPA AND THE CONVENTION

A. *Material Differences Between the FCPA and the Convention*

The Convention differs from the FCPA in two material ways. First, they diverge regarding the proscribed benefits following a payment to a foreign official. Second, the two documents define the term foreign official differently.

The Convention prohibits bribing a foreign official “in order to obtain or retain business or other improper advantage.”¹¹⁸ The Convention thus captures a very broad range of behavior, including bribes to obtain new contracts, as well as those intended to reduce

110. Press Release, Ministry of Justice, Bribery Act Implementation (July 20, 2010), available at <http://www.justice.gov.uk/news/newsrelease200710a.htm>.

111. Bribery Act, 2010, c. 23, § 1 (Eng.).

112. *Id.*

113. *Id.* § 12.

114. *See supra* note 32 and accompanying text.

115. *See* § 4.

116. *Id.* § 12.

117. Prior to the enactment of the Bribery Act, the U.K. sanctioned only one individual between 2000 and 2009. *See Working Group on Bribery Data on Enforcement of the Anti-Bribery Convention*, *supra* note 103, at 4 tbl.

118. OECD Convention, *supra* note 14, art. 1(1).

expenses or gain favorable treatment in the country whose official receives the bribe. The FCPA, on the other hand, utilizes a more complex “business nexus element” to define the proscribed behavior.¹¹⁹

The initial version of the FCPA left out any language referring to an “improper advantage,” but after Congress ratified the Convention, it added that language in amendments to the FCPA.¹²⁰ Rather than including the prohibition of an “improper advantage” along with other “obtained business”, however, Congress chose to place it in front of the business nexus requirement, so that the FCPA prohibits bribes to a foreign official in order to secure an “improper advantage” which assists the briber in “obtaining or retaining business.”¹²¹ Therefore, while “obtaining or retaining business” clearly refers to the awarding of contracts, the extent to which the FCPA prohibits the acquisition of other favorable treatment is unclear. The “grease payments” exception further confuses the issue, by creating a list of specific exceptions along with an undefined catch-all phrase at the end.¹²²

In *United States v. Kay*, the Fifth Circuit interpreted the FCPA’s “business nexus requirement” to include bribes made for the purposes of favorable tax and customs treatment.¹²³ The *Kay* court extensively reviewed the legislative history of the FCPA, concluding that, “Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person.”¹²⁴ While the court observed that there might be a gap between what the FCPA and the Convention each prohibit, it found that the Convention clearly prohibited the payments in question.¹²⁵ The fact that Congress ratified the

119. See *United States v. Kay*, 359 F.3d 738, 754 (5th Cir. 2004). The FCPA’s business nexus element seems to contain an extra step, prohibiting payments made “in order to assist [the briber] in obtaining or retaining business.” 15 U.S.C. § 78dd-1(a)(1) (2006).

120. *Kay*, 359 F.3d at 754.

121. 15 U.S.C. § 78dd-1(a)(1) (2006).

122. See *supra* Part I.A.

123. *Kay*, 359 F.3d at 755.

124. *Id.*

125. *Id.* at 754. The court explained itself in a footnote:

We recognize that there may be some variation in scope between the Convention and the FCPA. The FCPA prohibits payments inducing official action that ‘assists . . . in obtaining or retaining business’; the Convention prohibits payments that induce official action ‘to obtain or retain business or other improper advantage in the conduct of international business.’ Potential variation exists because it is unclear whether the Convention’s ‘other improper

Convention “without any reservation, understandings, or alterations” furthered the *Kay* court’s willingness to interpret the FCPA broadly, prohibiting the defendants’ payments to foreign officials.¹²⁶ While the *Kay* court willingly closed the gap between the FCPA’s business nexus requirement and the proscribed benefits under the Convention, that decision only controls the Fifth Circuit, and uncertainty remains because of the language of the FCPA and the potential for varying interpretations by other courts.

The different definitions of a foreign official contribute to further uncertainty for those subject to the FCPA. The Convention defines a foreign public official as any official of a foreign government as well as “any person exercising a public function for a foreign country, including for a public agency or public enterprise.”¹²⁷ The FCPA, however, defines a “foreign official” as “any officer or employee of a foreign government or any department, agency or instrumentality thereof, or of a public international organization,” or anyone “acting in an official capacity” for one of those same bodies. Clearly both statutes prohibit bribes to all elected and high level appointed officials, but uncertainty exists regarding employees of state-owned agencies, enterprises, or instrumentalities. The OECD defines a “public enterprise” as one “in which the government holds a majority stake,” or “over which the government may exercise a dominant influence either directly or indirectly.”¹²⁸ The FCPA, on the other hand, provides no definition of what constitutes an instrumentality of a foreign government. While the OECD prohibits payments to officials or those exercising a public function, the FCPA’s prohibition of payments to “any officer or employee” of any government or instrumentality appears to capture a broader range of behavior. In sum, the OECD contains a narrower, clearer standard. By setting a broader, more unclear standard, the United States increases uncertainty and impedes American commercial success.

This lack of guidance poses an unnecessary problem as companies attempt to remain compliant in the face of increased FCPA enforcement. A large number of foreign states have varying degrees of ownership and control of business entities, including those

advantage in the conduct of international business’ language requires a business nexus to the same extent as does the FCPA.

Id. at 755 n.68 (omissions in original).

126. *Id.* at 755 & n.68.

127. OECD Convention, *supra* note 14, art. 1(4).

128. *Corruption: A Glossary of International Criminal Standards*, OECD, 29 (2007), <http://www.oecd.org/dataoecd/1/9/39532693.pdf>.

within their borders and those in other nations.¹²⁹ Successful business with these companies often calls for behavior with uncertain implications under the FCPA. This uncertainty is unnecessary, however, as Congress has already ratified the Convention, which provides clear guidance on prohibited activities. Therefore, by interpreting all ambiguities in the FCPA in accordance with U.S. obligations under the Convention, the United States could continue to lead the world in preventing bribery in international business, while continuing to honor its obligations under international law.

B. The Effect of the Convention on the FCPA

Article VI of the U.S. Constitution states that “all treaties made . . . under the authority of the United States, shall be the supreme law of the land.”¹³⁰ In the exercise of this authority, Congress encouraged the creation of the Convention,¹³¹ ratified it, and passed legislation to amend the FCPA in accordance with its obligations thereunder.¹³² Both international law and Supreme Court jurisprudence abound with support for the binding effect of treaties duly ratified.¹³³ Consequently, the Convention is the “supreme law of the land.”¹³⁴ Despite its support for the Convention, however, Congress failed to provide definitions under the FCPA that measure up to those provided in the Convention.¹³⁵ Insofar as the FCPA prohibits less conduct than the Convention, the United States violates its obligations under domestic and international law. Therefore, Congress must amend the statute to give full credit to the Convention. Alternatively, Courts may rectify that failing through consistent

129. Conry, *supra* note 12, at 5.

130. U.S. CONST. art. VI.

131. *See infra* Part I.E.

132. Sperber, *supra* note 1, at 680.

133. Article 29 of the Vienna Convention on the Law of Treaties, which the United States has signed (but not ratified), states that a treaty applies throughout the territory of all signatories. *See Vienna Convention on the Law of Treaties*, art. 29, May 23, 1969, 1115 U.N.T.S. 331 (“Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.”); *Vienna Convention on the Law of Treaties*, U.S. DEP’T STATE, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Mar. 3, 2012) (noting that “U.S. Senate has not given its advice or consent” to the Vienna Convention). *See also Baldwin v. Franks*, 120 U.S. 678, 683 (1887) (“[T]reaties made by the United States and in force are part of the supreme law of the land, and that they are as binding within the territorial limits of the states as they are elsewhere throughout the dominion of the United States.”).

134. *See* U.S. CONST. art. VI.

135. *See supra* Part I.D.

interpretation of the FCPA in line with the prohibitions of the Convention.

The Convention's prohibition of bribery likely applies to the United States as a rule of customary international law as well. "A rule of international law is one that has been accepted . . . by the international community of states by international agreement."¹³⁶ When an international agreement is "intended for adherence by states generally" and is "in fact widely accepted," it may "lead to the creation of customary international law."¹³⁷ The Convention has been signed by 38 countries. Furthermore, the Convention is clearly "intended for adherence by states generally," because "all countries share a responsibility to combat bribery in international business transactions."¹³⁸ The mere creation of the Convention was based on international recognition that bribery is unacceptable, and its prevention in international business requires adherence by all states. Therefore, the Convention may have risen to the level of customary international law, further solidifying U.S. obligations to assure compliance with the Convention through prohibition of all activity prohibited by the Convention.

Furthermore, traditional rules of treaty interpretation support a reading of the FCPA that is consistent with the Convention. In interpreting a statute within the bounds of international law, U.S. courts have recognized the long-standing principle that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."¹³⁹ The Fifth Circuit followed this principle by avoiding a conflict of laws when it read the FCPA's "business nexus element" in conformity with the Convention.¹⁴⁰ This interpretation should provide the standard for other courts' interpretations of the business nexus element, as well as any other element of the FCPA that diverges from the Convention.

In addition to ensuring that no elements of the FCPA prohibit less activity than under the Convention, the United States should ensure that the FCPA does not prohibit any more activity than the Convention. Prosecutions of FCPA violations have reached all time

136. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1)(b) (1987).

137. *Id.* §102(3).

138. OECD Convention, *supra* note 14, pmb., para. 2.

139. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

140. *United States v. Kay*, 359 F.3d 738, 755 n.68 (5th Cir. 2004).

highs in recent years.¹⁴¹ These prosecutions have resulted in massive liability on the part of many U.S. companies, as well as their officers, directors, and employees.¹⁴² While no justification exists for bribery, comity concerns abound with regard to prosecutions of international businesses and foreign nationals, and parity requires equal standards for all entities and individuals subject to international bribery laws.¹⁴³

Prior to the creation of the Convention, both Congress and the Executive Branch had an acute awareness for the disadvantages suffered by U.S. businesses under the unilateral prohibitions of the FCPA.¹⁴⁴ In response to these disadvantages, Congress urged the drafting of the Convention in order to achieve the parity desired in commerce.¹⁴⁵ Shortly after ratification of the Convention, Congress enacted implementing legislation to achieve the goals of the Convention by amending the FCPA.¹⁴⁶ Because a treaty, particularly one with implementing legislation, becomes the “supreme law of the land,” the amended FCPA should be interpreted in accordance with the intentions of Congress and the Executive branch when the Convention was ratified in 1998. Currently parts of the FCPA, as enforced by the DOJ, capture more than was intended by Congress, and achieve the opposite result. In order to comply with the intentions of Congress, which focused on promoting parity for U.S. businesses, the DOJ must temper its enforcement of the FCPA, and courts must interpret the statute with regards to Congress’ intention to alleviate the disadvantages to U.S. businesses by such vigorous enforcement.

Policy reasons also call for more moderate prosecution under the FCPA. When the enforcement agencies relentlessly prosecute U.S. companies for FCPA violations, they risk injuring the competitiveness of those companies in the global marketplace. Certain countries in the world operate on a “pay to play” basis.¹⁴⁷ Prohibiting U.S. companies from competing in “pay to play” nations

141. *See supra* notes 5–6 and accompanying text.

142. Jeffrey Clark et al., *Anti-Corruption*, 44 INT’L LAW. 451, 451–63 (2010) (noting 11 prosecutions against companies, and 17 prosecutions against individuals for violations of the FCPA).

143. While these concerns remain valid for all state parties to the Convention, Article 5 of the Convention does prohibit consideration of the “national economic interest,” or the “potential effect upon relations with another State.” OECD Convention, *supra* note 14, art. 5.

144. *See supra* President’s Message note 88; S. Rep. No. 105-277, at 2 (1998).

145. S. Rep. No. 105-277, at 2.

146. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302.

147. *E.g.*, O’Grady, *supra* note 13 (regarding Haiti).

can injure their economies as well, and often “pay to play” nations are those in the developing world. Fear of prosecution under the FCPA, due to zealous enforcement coupled with ambiguous statutory provisions, may stifle investment in the developing world, reducing the availability of the capital necessary for economic growth.¹⁴⁸ Because the provisions of the Convention are already valid in the United States, reliance on the Convention would suffice to combat bribery, as well as to relieve some of the disadvantages to U.S. businesses and the burgeoning economies of “pay to play” nations.

In addition to aligning the FCPA with the Convention, U.S. legislators, enforcement authorities, and courts could help domestic companies and foreign development by changing their approach to the FCPA. They could apply the exceptions for grease payments and routine governmental actions with more fidelity to the text of the FCPA, especially for payments in developing nations that need economic stimulus. Congress enacted the FCPA to restore confidence in the integrity and morality of the American market.¹⁴⁹ Doing business in “pay to play” markets such as Haiti often requires payments that would currently result in substantial fines and jail time under the FCPA. Allowing these payments would not erode confidence in the American market. By allowing more payments to facilitate business, the United States could permit companies to pay foreign officials in order to reduce customs and tax obligations, especially in nations where it is customary to do so. Furthermore, U.S. enforcement agencies could temper their prosecution of the FCPA while companies scramble to add compliance programs and internalize the prohibitions of the FCPA.

CONCLUSION

The U.S. role in combating bribery in international business is commendable, and the end of bribery remains a necessary goal for

148. *Id.* O’Grady explains:

An American entrepreneur who does business in the Caribbean recently explained the Haitian landscape to me this way: “We did not bother with Haiti as the Foreign Corrupt Practices Act precludes legitimate U.S. entities from entering the Haitian market. Haiti is pure pay to play. The benefit of competitive submarine cables would be transformative for the Haitians. Instead, they were stuck with Clinton cronies taxing the poor.” *Id.*

149. H.R. Rep. No. 95-640, at 4–5 (1977), (noting that bribery is “unethical,” and “counter to the moral expectations and values of the American public,” which in turn “erodes public confidence in the integrity of the free market system”).

world markets.¹⁵⁰ But businesses should operate on a level playing field, with success depending on merit rather than who can afford to pay the largest bribes.¹⁵¹

U.S. enforcement authorities have increased FCPA prosecutions to unparalleled highs.¹⁵² Paired with ambiguity in statutory construction, this unwavering enforcement stifles U.S. companies in their competition for business abroad and prevents the receipt of U.S. investment in many developing nations.¹⁵³ First, courts and legislators should ensure that the FCPA prohibitions match those of the Convention on Bribery of Foreign Public Officials.¹⁵⁴ As other nations follow, this statutory convergence will increase parity in international business while ensuring U.S. compliance with treaty obligations.¹⁵⁵ International cooperation on the interpretation of the Convention will resolve a great deal of ambiguity in both the FCPA and the implementing legislation of other nations.¹⁵⁶ Second, the SEC and DOJ should reduce the penalties sought and match their enforcement of the FCPA with education regarding its terms. While the FCPA has been very lucrative for the DOJ, those same funds that fill government coffers have left the accounts of some of the world's largest employers, reducing needed global capital and hampering development.

150. *See supra* Part I.

151. *Id.*

152. *See supra* notes 17–20 and accompanying text.

153. *See supra* Part II.A.

154. *See supra* Part III.B.

155. *Id.*

156. *Id.*