

---

---

## Note

### New Solutions to the Age-Old Problem of Private-Sector Bribery

Sarah Clark\*

Seedy, underhanded, illicit, illegal—just a small sample of countless adjectives that spring to mind with the mention of bribery. In both the public and private sectors, the presence of bribery “fosters a culture” of corruption, “moral ambivalence and reckless opportunism.”<sup>1</sup> After infiltrating private businesses, bribery can increase costs of business and decrease moral and honest practices, but the potential for enormous gains from such an unfair advantage still entices individuals and businesses to pay bribes.<sup>2</sup>

A case study of Control Components, Inc. (CCI) underscores the excessive gains a company willing to commit bribery could achieve. From 2003 to 2007, CCI paid approximately \$1.95 million in bribes to officers and employees of foreign private companies.<sup>3</sup> Each payment’s sole purpose was to give CCI a competitive advantage through either increasing the number

---

\* J.D. Candidate 2013, University of Minnesota Law School; B.A. 2008, Franklin and Marshall College. The author thanks JaneAnne Murray for her encouragement and insightful comments; Staci Lieffring and the editors and staff of *Minnesota Law Review* for their hard work and diligence; and her family and friends for their continuous love and support. Copyright © 2013 by Sarah Clark.

1. Transparency Int’l, *The Scale and Challenge of Private Sector Corruption*, in GLOBAL CORRUPTION REPORT 2009: CORRUPTION AND THE PRIVATE SECTOR 3, 7 (2009), available at <http://www.transparency.org/whatwedo/publications/doc/gcr/>.

2. See David Hess, *Corruption in the Value Chain: Private-to-Private and Private-to-Public Corruption*, in GLOBAL CORRUPTION REPORT 2009, *supra* note 1, at 19, 22.

3. See Information at 3–4, *United States v. Control Components, Inc.*, No. 8:09-cr-00162-JVS (C.D. Cal. July 22, 2009) (charging Control Components, Inc. with one count of conspiracy and one count of violating the Foreign Corrupt Practices Act).

of contracts awarded to CCI or skewing competitive tenders favorably for CCI.<sup>4</sup> As a direct result of these bribes, CCI produced a staggering \$14.82 million in additional net profits from sales, to the detriment of any CCI competitor.<sup>5</sup>

Despite any inherent wrongfulness of CCI's bribes, federal prosecutors could not, and still cannot, prosecute CCI for any of its bribes made to foreign private companies under the Foreign Corrupt Practices Act, the main federal statute governing foreign bribery by American companies.<sup>6</sup> The Foreign Corrupt Practices Act (FCPA) prohibits payments or gifts by U.S. companies or issuers to foreign public officials.<sup>7</sup> Remarkably, the FCPA does not contain a corresponding provision for bribery between completely private entities.<sup>8</sup>

Private-sector bribery, also known as private-to-private or commercial bribery, is the lesser-known and prosecuted relation of public-sector bribery.<sup>9</sup> However, recent scandals, increased deregulation, and the globalization of business have highlighted the need to take action against both public and private bribery.<sup>10</sup> To account for this need, the Department of Justice (DOJ) currently uses statutes outside the FCPA to prosecute private-sector bribery. The Travel Act, the "little brother" of the FCPA, and the mail and wire fraud statutes can individually, or as a tag-along to FCPA actions, prosecute all acts of bribery, whether public or private.<sup>11</sup>

Even though use of these statutes can supplement the FCPA's private-bribery shortcomings, it is a makeshift, inefficient, and problematic solution. Since its enactment, the FCPA has "curtailed 'business as usual'" for American companies paying bribes to foreign public officials.<sup>12</sup> Its power lies in its mono-

---

4. See Thomas R. Fox, *Robert Kennedy, the Travel Act and the FCPA*, FCPA COMPLIANCE & ETHICS BLOG (Jan. 11, 2010, 1:44 PM), <http://tfoxlaw.wordpress.com/2010/01/11/robert-kennedy-the-travel-act-and-the-fcpa/>.

5. See Information, *supra* note 3, at 4.

6. See Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2 (2006).

7. See *id.* § 78dd-2(a).

8. See *id.*

9. Antonio Argandoña, *Private-to-Private Corruption*, 47 J. BUS. ETHICS 253, 253–54 (2003).

10. *Id.* at 254.

11. See Fox, *supra* note 4.

12. NEAL ASBURY, CONSCIENTIOUS EQUITY 68 (2010).

lithic deterrent effect; from its widespread use in prosecuting foreign public bribery, American businesses understand that a FCPA prosecution can bring large fines and public notoriety.<sup>13</sup> Conversely, the DOJ must prosecute private foreign bribery through a patchwork of statutes.<sup>14</sup> This system fails to provide the same coherent and intimidating basis to deter private bribery.<sup>15</sup> Until the DOJ can call upon a single, prominent statute to prosecute foreign private bribery, it will lack the ability to instill the same fear of prosecution as it can for public bribery under the FCPA.<sup>16</sup>

Not all countries use a roundabout method to prosecute private bribery. On July 1, 2011, the United Kingdom's Bribery Act 2010 (U.K. Bribery Act) went into effect, rivaling the FCPA as the most severe anti-bribery statute in existence.<sup>17</sup> The U.K. Bribery Act bars bribery of both foreign officials and private companies and individuals.<sup>18</sup> By encompassing all forms of corporate bribery, the U.K. Bribery Act makes it clear to prosecutors and businesses alike that committing acts of private bribery is a serious offense.<sup>19</sup>

This Note argues that there is a need to reform current techniques of prosecuting foreign private bribery in the United States, as current methods are haphazard, confusing, and neglect to take advantage of the symbolic power of the FCPA. Part I describes private-to-private bribery and the background of federal laws most associated with private bribery prosecutions—the FCPA, the Travel Act, and the mail and wire fraud statutes. Part II elaborates on the strengths and weaknesses of private-sector bribery prosecution in the United States and the United Kingdom. Finally, Part III explains why the process to prosecute private-to-private bribery in the United States must be updated by amending the FCPA and highlights the U.K.

---

13. *Id.*

14. *See Hess, supra* note 2, at 23.

15. *Id.* (discussing how internationally, differing standards on private bribery detract from effective private-to-private corruption deterrence).

16. *See id.*

17. *See* Jonathan Russell, *Fears Bribery Act Will Harm PLC*, TELEGRAPH, Jan. 21, 2011, <http://www.telegraph.co.uk/finance/yourbusiness/bribery-act/8272140/Fears-Bribery-Act-will-harm-UK-plc.html>.

18. *See id.*

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

Bribery Act as a model for reform. Despite existing statutes' ability to supplement FCPA prosecutions, an FCPA that encompasses all forms of foreign bribery is the most efficient and fair way to eradicate corporate bribery.

## I. REGULATING PRIVATE-SECTOR BRIBERY

Despite the fact that the FCPA was enacted over thirty-five years ago, much confusion still exists as to who can be subject to a bribery prosecution in the United States. The FCPA only proscribes bribes paid to foreign officials by individuals and companies affiliated with the United States.<sup>20</sup> Because the FCPA cannot prosecute foreign private-sector bribery, other federal statutes, self-regulation, and international legislation have attempted to fill the void.<sup>21</sup>

### A. BRIBERY

#### 1. Bribery Defined

Although it can take many shapes and forms, “[v]ery simply, a bribe is a payment made with an intention to corrupt the recipient, not for its own sake, but in the process of providing a good or service to the giver.”<sup>22</sup> In other words, a bribe is a type of payment made to influence another to perform his or her duties dishonestly.<sup>23</sup> The bribe itself can span the gamut of a few dollars to “grease the wheels” of a business transaction to millions spent by corporations to obtain or maintain business deals.<sup>24</sup> Bribery laws can criminalize either the giver of the bribe or the bribe recipient.<sup>25</sup> Under American law, the giver of bribes traditionally faces prosecution.<sup>26</sup>

Bribery by corporations can be separated into two categories: public and private. Public-sector bribery, targeted by the FCPA, is the bribing of a foreign government official to obtain

---

20. See Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2 (2006).

21. See Fox, *supra* note 4.

22. C. Gopinath, *Recognizing and Justifying Private Corruption*, 82 J. BUS. ETHICS 747, 748 (2008).

23. See *id.*

24. See Samart Powpaka, *Factors Affecting Managers' Decision to Bribe: An Empirical Investigation*, 40 J. BUS. ETHICS 227, 227 (2002).

25. See *id.*

26. See Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(a) (2006).

or retain business.<sup>27</sup> In most cases, public-sector bribery is fairly easy to recognize. Classic cases of public-sector bribery include illegal payments to government officials, often by companies attempting to expand into new foreign markets.<sup>28</sup>

Less frequently prosecuted, but equally as important to recognize, is private-sector bribery.<sup>29</sup> Private-sector bribery occurs when a manager or employee who has power or responsibility in a corporation acts contrary to his responsibilities and either “directly or indirectly harms the company or organization, for his own benefit or for that of another person, company, or organization.”<sup>30</sup> This type of bribery encourages a private-sector employee to either act or refrain from acting, in breach of his or her required duties.<sup>31</sup> An example of private-sector bribery is a payment by a company manager to a distributor to obtain a new distribution agreement or license.<sup>32</sup>

## 2. Effects of Public-Sector and Private-Sector Bribery

In both the private and public sectors “[t]ransnational bribery . . . inhibits economic development and distorts competition. It disrupts distribution channels, destroys incentives to

---

27. See CRIMINAL DIVISION, DOJ & ENFORCEMENT DIVISION, SEC, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012) [hereinafter FCPA RESOURCE GUIDE], available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

28. See 15 U.S.C. § 78dd-2; Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of its Decade of Resurgence*, 43 IND. L. REV. 389, 398 (2010); see also Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, S. TREATY DOC. NO. 105-43 (1997) (requiring new signatory countries to recognize a definition of bribery of public officials similar to that in the FCPA). For a recent example of public-sector bribery, see Stephanie Clifford & David Barstow, *Wal-Mart Takes a Broader Look at Bribery Cases*, N.Y. TIMES, Nov. 16, 2012, at A1 (discussing the inquiry by Wal-Mart and the Justice Department on whether Wal-Mart subsidiaries paid illegal bribes to gain better access to markets in Mexico).

29. See Gopinath, *supra* note 22, at 749.

30. See Argandoña, *supra* note 9, at 255.

31. See Memorandum from the International Chamber of Commerce to the OECD Working Group on Bribery in International Business Transactions § 2 (Sept. 13, 2006) [hereinafter ICC Memorandum], available at <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2006/Memorandum-to-the-OECD-Working-Group-on-Bribery-in-International-Business-Transactions/>.

32. See Argandoña, *supra* note 9, at 256.

compete on quality and price, undermines market efficiency and predictability,” and causes firms and countries to lose long-term competitiveness.<sup>33</sup>

Within the public sector, bribery incentivizes governments to increase regulation and red tape. Although the bribe was originally intended to avoid unnecessary delays and costs, paying a bribe almost always leads to the need to pay more or higher bribes, entirely negating any attempt to “grease the wheels.”<sup>34</sup> Further, studies indicate that bribes are more likely to be taken in countries with a low per capita income.<sup>35</sup> This, coupled with research indicating that corrupt countries are associated with lower levels of investment, productivity, growth, direct foreign investment, education spending, environment quality, and reduced appearance of governmental legitimacy,<sup>36</sup> demonstrates that bribery by businesses can deny impoverished nations the chance to have a minimal standard of living.<sup>37</sup> Additionally, these bribes can harm the payers’ home countries as safety and quality controls suffer when corrupt businesses attempt to make money as quickly as possible.<sup>38</sup>

While it is generally accepted that bribes cause social harm,<sup>39</sup> private-sector bribery in particular can cause negative

---

33. See Powpaka, *supra* note 24, at 227 (citation omitted).

34. Elizabeth Spahn, *Nobody Gets Hurt?*, 41 GEO. J. INT’L L. 861, 864–69 (2010).

35. See Miriam F. Weismann, *The Foreign Corrupt Practices Act: The Failure of the Self-Regulatory Model of Corporate Governance in the Global Business Environment*, 88 J. BUS. ETHICS 615, 628 (2008).

36. See Susan Rose-Ackerman, *The Law and Economics of Bribery and Extortion*, 6 ANN. REV. L. & SOC. SCI. 217, 218 (2010); see also Randal C. Archibold, *Even as It Hurts Economy, Bribery Is Taken in Stride*, N.Y. TIMES, Apr. 24, 2012, at A4 (discussing negative economic effects of overlooking public-sector bribery in Mexico); Dev Kar, *Mexico: Illicit Financial Flows, Macroeconomic Imbalances, and the Underground Economy*, GLOBAL FINANCIAL INTEGRITY (Jan. 2012), <http://mexico.gfintegrity.org/en/> (summarizing the results of an economic study of Mexico that found that Mexico lost over \$872 billion from 1970 to 2010 through illicit financial flows composed mainly of corruption, bribery, and kickbacks).

37. See James H. Davis & John A. Ruhe, *Perceptions of Country Corruption: Antecedents and Outcomes*, 43 J. BUS. ETHICS 275, 275–76 (2008).

38. See Spahn, *supra* note 34, at 892–98.

39. See Nancy Zucker Boswell, *Combating Corruption: Focus on Latin America*, 3 SW. J.L. & TRADE AM. 179, 180 (1996) (finding corruption, including bribery, can have severe economic, political, and social costs).

economic, political, and commercial impacts in the countries where the bribe occurs.<sup>40</sup> Private-sector bribery causes “significant harm to society by distorting the marketplace.”<sup>41</sup> In instances of private-sector bribery, the action may appear to be a seemingly harmless hiring of a less qualified employee or the favoring of an inferior supplier.<sup>42</sup> However, on a broad, international scale, such actions in the aggregate degrade certainty and honesty in business, increasing transaction costs for all.<sup>43</sup> Employees from large companies can demand bribes or kickbacks from potential suppliers, or even disguise bribes through inappropriate gifts and hospitality to clients.<sup>44</sup> As such, private-sector bribery, committed repeatedly, has the effect of eliminating the principles of merit-based selection and fair competition that are essential to the functioning of efficient markets.<sup>45</sup> In fact, Transparency International’s 2011 Bribe Payers Index, which interviewed 3016 business executives across thirty countries, found that the perceived frequency of private-sector bribes was usually as high, if not higher than bribery of public officials, across all studied business sectors.<sup>46</sup> The survey warned that without national legislation barring private-sector bribery, it will continue to affect entire supply chains, distort markets and competition, and penalize small businesses that cannot pay such bribes and those that simply refuse to do so.<sup>47</sup>

The recognition of the harms caused by private-sector bribery to both the briber and the bribee is crucial. Private-to-private bribery “undermines the smooth functioning and credibility of free, open and global competition” by contributing to the cost of business and “penaliz[ing] loyal market partici-

---

40. See Powpaka, *supra* note 24, at 227.

41. Hess, *supra* note 2, at 20.

42. See *id.* at 21 (citing the example of how bribery in supplier and sub-contractor transactions can distort the bidding process and create strong incentives to pay bribes to remain competitive or gain information about competitors’ bids).

43. See *id.* at 22.

44. See DEBORAH HARDOON & FINN HEINRICH, TRANSPARENCY INT’L, BRIBE PAYERS INDEX REPORT 2011, at 19 (2011), available at <http://bpi.transparency.org/bpi2011/results/>.

45. See Hess, *supra* note 2, at 22.

46. See HARDOON & HEINRICH, *supra* note 44, at 18–19.

47. See *id.*

pants.”<sup>48</sup> Recognizing the problems caused by private commercial bribery, governments have attempted to criminalize such behavior.

#### B. FOREIGN CORRUPT PRACTICES ACT

The mere whisper of a potential FCPA investigation causes terror to American companies transacting in international business.<sup>49</sup> Calls for a statute like the FCPA began in the aftermath of the Watergate scandal.<sup>50</sup> In 1973, an investigator discovered that Gulf Oil and its Vice President had spent over \$10 million from 1960 to 1973 “on illegal political activities and in business transactions abroad.”<sup>51</sup> As disturbing as this discovery was to the Securities and Exchange Commission (SEC), it led to the question: how many other companies were participating in this same behavior?<sup>52</sup> To answer this question, the SEC offered an amnesty program for corporations to self-report any similar payments by their own organization.<sup>53</sup> With this potential reprieve from indictment, more than 400 companies reported their practice of making payments to foreign officials, political parties, and politicians, totaling over \$300 million.<sup>54</sup> Realizing the systemic nature of these foreign political payments, Congress unanimously passed the FCPA in 1977.<sup>55</sup>

The FCPA has two principal mechanisms to deter bribery abroad: prohibiting payments to foreign officials and requiring strict corporate accounting and record-keeping practices.<sup>56</sup> Although the accounting and record-keeping provisions are extremely important to ensure companies utilize proper account-

---

48. ICC Memorandum, *supra* note 31, § 1.

49. See Jordan Weissmann, *The Corruption Law That Scares the Bejesus out of Corporate America*, ATLANTIC (Apr. 25, 2012, 5:08 PM), <http://www.theatlantic.com/business/archive/2012/04/the-corruption-law-that-scars-the-bejesus-out-of-corporate-america/256314/> (discussing how the FCPA “keeps corporate lawyers and c-suite executives tossing in their sleep”).

50. See Weissmann, *supra* note 35, at 617.

51. *Id.*

52. *See id.*

53. *See id.*

54. *See id.*

55. *See id.*

56. See STUART H. DEMING, *THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS* 3–4 (2d ed. 2010).



ing controls,<sup>57</sup> the anti-bribery provisions dominate most discussions of the FCPA.<sup>58</sup> These anti-bribery provisions prohibit U.S. companies and their employees, U.S. citizens, foreign companies that list shares on a U.S. stock exchange or file reports with the SEC, and any person within the United States from: “(i) corruptly paying, offering to pay, promising to pay, or authorizing the payment of money, a gift, or anything of value; (ii) to a foreign official; (iii) in order to obtain or retain business.”<sup>59</sup>

Despite questions as to the FCPA’s efficacy,<sup>60</sup> or to its potentially ambiguous language,<sup>61</sup> the FCPA is clear in its purpose to provide tough sanctions for those who commit foreign public-sector bribery abroad.<sup>62</sup> Under the FCPA, criminal sanctions for businesses could include fines up to \$2,000,000.<sup>63</sup> Individuals, officers, directors, stockholders, employees, and agents can face fines up to \$100,000 and five years in prison.<sup>64</sup> But, with the addition of the Alternative Fines Act, the fine could potentially rise to twice the benefit the defendant attempted to receive in paying the bribe.<sup>65</sup> Additionally, the FCPA allows the DOJ to pursue civil remedies that can include sanctions on business entities and individuals of up to \$16,000 per violation.<sup>66</sup> However, as the FCPA only applies to bribes of foreign

---

57. *See id.* at 41.

58. *See id.* at 7.

59. Koehler, *supra* note 28, at 389–90; *see also* Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2 (2006) (FCPA anti-bribery provision).

60. *See, e.g.*, Koehler, *supra* note 28, at 410–12 (noting that many FCPA enforcement actions are based on ambiguous or untested legal theories); Weismann, *supra* note 35, at 625–26 (finding that the FCPA’s reliance on mandatory self-regulation by corporations has failed, evidenced by recent, large-scale prosecutions).

61. *See* Dionne Searcey, *But Who’s a ‘Foreign Official?’ FCPA to Get Key Test Next Month*, WALL ST. J. L. BLOG (Feb. 22, 2011, 2:45 PM), <http://blogs.wsj.com/law/2011/02/22/but-whos-a-foreign-official-fcpa-to-get-key-test-next-month/> (noting that the term “foreign official” is ineffectively defined in the FCPA).

62. *See* Andre M. Penalver, Note, *Corporate Disconnect: The Blackwater Problem and the FCPA Solution*, 19 CORNELL J.L. & PUB. POL’Y 459, 469–70 (2010).

63. FCPA RESOURCE GUIDE, *supra* note 27, at 68.

64. *Id.*

65. *See* 18 U.S.C. § 3571(d) (2006).

66. *See* FCPA RESOURCE GUIDE, *supra* note 27, at 69.

officials,<sup>67</sup> the DOJ has had to use creative methods to prosecute foreign private-sector bribery.

### C. CURRENT METHODS TO PROSECUTE TRANSNATIONAL PRIVATE-SECTOR BRIBERY

In an effort to find a way to prosecute foreign private-sector bribery, the DOJ has turned to statutes not originally intended for such a purpose. The Travel Act and the mail and wire fraud statutes permit the DOJ to rely on violations of state bribery laws and illegal uses of mail or interstate wire communications as the basis for federal private-sector bribery actions. Comparatively, in one all-encompassing statute, the U.K. Bribery Act authorizes prosecutions of both public and private foreign bribery. Both the United States and the United Kingdom also attempt to encourage self-regulation of businesses as a means to supplement bribery laws.

#### 1. The Travel Act

Notably, the DOJ has with increasing frequency joined Travel Act charges to FCPA actions to account for the FCPA's inability to prosecute private-sector bribery.<sup>68</sup> Enacted in 1961, the Travel Act's original purpose was to "combat[] organized crime and racketeering by making illegal certain activities that extend across state and national borders."<sup>69</sup> A violation of the Travel Act essentially requires a two-step process by the DOJ: it must demonstrate that the activity meets the required elements in the Travel Act, as well as that it violates a separate state or federal law.<sup>70</sup> Because of its organized crime origins,<sup>71</sup>

---

67. See Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 to -2 (2006) (referring only to public-sector bribery).

68. See Samuel Rubinfeld, *Law Firm: DOJ Increasingly Using Travel Act to Prosecute Commercial Bribery*, WALL ST. J. CORRUPTION CURRENTS (Sept. 28, 2010, 2:14 PM), <http://blogs.wsj.com/corruption-currents/2010/09/28/law-firm-doj-increasingly-using-travel-act-to-prosecute-commercial-bribery/>.

69. Keith E. Henderson & Karen A. Guida, *United States*, in PRIVATE COMMERCIAL BRIBERY 479, 493 (Günter Heine et al. eds., 2003).

70. See, e.g., Stuart F. Pierson, *The Travel Act: FCPA's Sidekick Can Ride Alone—Globally*, TROUTMAN SANDERS (Aug. 24, 2009), <http://www.troutmansanders.com/08-24-2009/> (identifying the elements of the Travel Act and noting its increased use by the Justice Department in FCPA prosecutions).

71. See *Perrin v. United States*, 444 U.S. 37, 42 (1979) (noting that the

the Travel Act criminalizes only certain “unlawful activities,” including, among others, extortion, bribery, and arson.<sup>72</sup> Because bribery is a covered “unlawful activity,” the federal government can prosecute foreign private-sector bribery under the Travel Act if it first proves that a person:

(a) traveled in or used the facilities of interstate commerce; (b) attempted to or actually did promote, manage, establish, carry on, or facilitated the promotion, management, establishment, or carrying on . . . of . . . an unlawful activity . . . and (c) formed a specific intent to promote, manage, establish, carry on, or facilitate one of the predicate crimes.<sup>73</sup>

Second, the federal government must also prove that the bribe violates a separate state or federal law that prohibits private bribery.<sup>74</sup> Since no federal law specifically bars foreign private-sector bribery, the United States government can only prosecute private-sector bribery under the Travel Act if the bribe violates a state law.<sup>75</sup> In sum, to bring a Travel Act action for foreign bribery, a federal prosecutor must show that a person committed a predicate violation of state law, and that the bribery was committed intentionally by travelling in or using some facility of interstate commerce. Currently, at least twenty-nine states have laws against private commercial bribery.<sup>76</sup>

While using state laws to serve as a predicate for Travel Act violations is not a novel approach, the use of the Travel Act as a tag-along to FCPA indictments is a new and increasing

---

Travel Act was “one of many bills enacted by the 87th Congress” that addressed organized crime).

72. Travel Act, 18 U.S.C. § 1952 (2006).

73. Henderson & Guida, *supra* note 69, at 493–94.

74. See Travel Act § 1952(b); see also Richard L. Cassin, *Prosecuting Private Overseas Corruption*, FCPA BLOG (Aug. 10, 2009, 8:02 PM), <http://fcpublog.squarespace.com/blog/tag/private-overseas-bribery> (using a case study to explain the process and restrictions of Travel Act actions).

75. See Richard L. Cassin, *We Repeat, It's the Travel Act*, FCPA BLOG (May 4, 2011, 6:49 AM), <http://www.fcpublog.com/blog/2011/5/4/we-repeat-its-the-travel-act.html> (noting that state laws prohibiting bribery to private parties are “enough to support a Travel Act charge in a federal prosecution”).

76. See John P. Rupp & David Fink, *Foreign Commercial Bribery and the Long Reach of U.S. Law*, BLOOMBERG L. REP.—CORP. & M&A L., Jan. 2012, at 1, 2 (2012), available at [http://www.cov.com/files/Publication/6f93a9ee-340d-49b3-83fe-252d3ddc8ced/Presentation/PublicationAttachment/5af5fff4-f264-42f2-aace-2781d6869cd9/Foreign\\_Commercial\\_Bribery\\_and\\_the\\_Long\\_Reach\\_of\\_U.S.\\_Law.pdf](http://www.cov.com/files/Publication/6f93a9ee-340d-49b3-83fe-252d3ddc8ced/Presentation/PublicationAttachment/5af5fff4-f264-42f2-aace-2781d6869cd9/Foreign_Commercial_Bribery_and_the_Long_Reach_of_U.S._Law.pdf).

trend.<sup>77</sup> On July 31, 2009, the DOJ announced that Control Components Inc. (CCI), a California company that designs and manufactures valves, had pled guilty to violations of the FCPA and the Travel Act.<sup>78</sup> The DOJ found that CCI had participated in “a decade-long scheme to secure contracts in approximately thirty-six countries by paying bribes to officials and employees of various foreign state-owned companies as well as foreign and domestic private companies.”<sup>79</sup> The DOJ’s press release specifically noted that CCI had made corrupt payments to “officers and employees of state-owned and privately-owned customers around the world, including in China, Korea, Malaysia and the United Arab Emirates, for the purpose of obtaining or retaining business for CCI.”<sup>80</sup> In CCI’s case, its private-sector bribery violated California law, which formed the basis for the Travel Act indictment by the DOJ.<sup>81</sup> By bringing a Travel Act action against CCI, the DOJ demonstrated its enthusiasm to prosecute both public and private foreign bribery.

In *United States v. Carson*,<sup>82</sup> the DOJ brought FCPA and Travel Act charges against six executives of CCI, including Stuart Carson, CEO of CCI, and his wife, Hong “Rose” Carson (the *Carson* defendants).<sup>83</sup> Challenging the Travel Act indictments, the *Carson* defendants brought one of the first legitimate challenges to the application of the Travel Act to private foreign bribery by claiming, among other things, that the Travel Act does not apply extraterritorially.<sup>84</sup> In disagreeing with

---

77. See Cassin, *supra* note 75 (noting the increase of Travel Act charges in FCPA cases in recent years).

78. Press Release, Dep’t of Justice, Control Components Inc. Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$18.2 Million Criminal Fine (July 31, 2009), available at <http://www.justice.gov/opa/pr/2009/July/09-crm-754.html>.

79. *Id.*

80. *Id.*

81. See Cassin, *supra* note 74.

82. *United States v. Carson*, No. SACR 09-cr-00077-JVS, 2011 WL 7416975 (C.D. Cal. Sept. 20, 2011).

83. See Press Release, Dep’t of Justice, Six Former Executives of California Valve Company Charged in \$46 Million Foreign Bribery Conspiracy (Apr. 8, 2009), available at <http://www.justice.gov/opa/pr/2009/April/09-crm-322.html>.

84. See Richard L. Cassin, *Carson Case Tests the Travel Act*, FCPA BLOG (Aug. 10, 2011, 7:28 AM), <http://fcpablog.squarespace.com/blog/2011/8/10/carson-case-tests-the-travel-act.html>.

the *Carson* defendants, Judge James Selna found that, although this case did not require Travel Act could be applied extraterritorially.<sup>85</sup> In his order, Judge Selna commented on future use of the Travel Act in foreign private bribery cases by stating that “criminal statutes may apply extraterritorially even without an explicit Congressional statement . . . . The Court agrees with the Government that ‘plain language of the Travel Act demonstrates Congress’s desire to reach conduct overseas.’”<sup>86</sup> Although yet to be tested by other judicial districts, the Central District of California has seemingly cemented the government’s ability to use the Travel Act as a tool in prosecuting international private-sector bribery.

Another Travel Act prosecution involved Nexus Technologies, a Pennsylvania-based corporation.<sup>87</sup> In Nexus Technologies’ case, three sibling executive employees were charged with knowingly and willfully using a facility in foreign commerce with the intent to commit bribery in violation of Pennsylvania law.<sup>88</sup> Two of the sibling defendants, Nam Nguyen and his brother An, pled guilty to a violation of the Travel Act in connection with “commercial bribes, and money laundering”<sup>89</sup> and consequently received prison sentences.<sup>90</sup> The cases against CCI and Nexus Technologies demonstrate the DOJ’s willing-

---

85. See *Carson*, 2011 WL 7416975, at \*6–7, \*12 (denying defendants’ motion to dismiss). The court noted that, if it had needed to, it could apply the Travel Act extraterritorially as the “nature of the offense expressly contemplates foreign conduct.” *Id.* at \*7–8 (internal quotations omitted). As support, the court compared the congressional intent of applying the Travel Act abroad to the intent of applying the FCPA abroad. *Id.* at \*8.

86. *Id.* at \*6–7 (internal citations omitted).

87. See Superseding Indictment at 24, *United States v. Nexus Techs., Inc.*, No. 2:08-cr-00522-TJS (E.D. Pa. Oct. 29, 2009).

88. See *id.*

89. Press Release, Dep’t of Justice, Former Nexus Technologies Inc. Employees and Partner Sentenced for Roles in Foreign Bribery Scheme Involving Vietnamese Officials (Sept. 16, 2010), available at <http://www.justice.gov/opa/pr/2010/September/10-crm-1032.html>.

90. See Richard L. Cassin, *Four Sentenced for Vietnam Graft*, FCPA BLOG (Sept. 16, 2010, 11:04 AM), <http://fcpablog.squarespace.com/blog/2010/9/16/four-sentenced-for-vietnam-graft.html>. Violating the Travel Act can lead to a sentence of up to five years in prison, a fine, or both; multiple Travel Act violations could warrant prosecution under the Racketeer Influenced and Corrupt Organizations Act (RICO). See Rupp & Fink, *supra* note 76, at 2.

ness to attempt to find a way to remedy the FCPA's inability to prosecute acts of foreign private-sector bribery.

## 2. Mail and Wire Fraud Statutes

The mail<sup>91</sup> and wire fraud statutes,<sup>92</sup> and the honest services law,<sup>93</sup> which amends the mail and wire fraud statutes, apply to cases of foreign private-sector bribery. The mail and wire fraud statutes “make it a crime to devise a scheme to deprive another of the right of honest services” through the use of mail, wire, radio, or television communications.<sup>94</sup> Both statutes use the phrase “fraudulent scheme,” which is very broad and includes bribery.<sup>95</sup> As such, these statutes are used with great frequency in today's global market, as it is virtually impossible to do business without using interstate or international mail or wire communications, such as telephone calls, facsimiles, or sending letters and packages.<sup>96</sup> The elements of each statute are almost identical, except for the difference in the trigger instrument (whether through use of the mails or wires) and the fact that the wire fraud act requires a communication to cross state lines.<sup>97</sup> Also, to fall under the scope of the mail and wire fraud statutes, a prosecutor does not need to prove an underlying crime;<sup>98</sup> a defendant does not need to personally wire or mail a letter containing a bribe, but only cause the interstate mailing or wire communication.<sup>99</sup> The ease in proving such a violation makes the mail and wire fraud acts a “federal prose-

---

91. See 18 U.S.C. § 1341 (2006).

92. See *id.* § 1343.

93. See *id.* § 1346.

94. David M. Howard et al., *Private Commercial Bribery: The Next Wave of Anti-Corruption Enforcement?*, DECHERT ON POINT (Dechert LLP), Apr. 2010, at 4 (citing *United States v. Sancho*, 157 F.3d 918, 920 (2d Cir. 1998)), available at [http://www.dechert.com/files/Publication/06d068f9-52ef-4c4e-a956-44345cb1a4b1/Presentation/PublicationAttachment/9e04f35f-aeae-4418-95a8-4eae8ae3e5cb/White\\_Collar\\_SA\\_04-10\\_Private\\_Commercial\\_Bribery.pdf](http://www.dechert.com/files/Publication/06d068f9-52ef-4c4e-a956-44345cb1a4b1/Presentation/PublicationAttachment/9e04f35f-aeae-4418-95a8-4eae8ae3e5cb/White_Collar_SA_04-10_Private_Commercial_Bribery.pdf).

95. *Commercial Bribery*, EXECUTIVE LEGAL SUMMARY 54 (2012), available at Westlaw EXECLSUM.

96. See DAN K. WEBB ET AL., CORPORATE INTERNAL INVESTIGATIONS § 2.03 (2004) (noting “[i]t is difficult to imagine a commercial transaction today” that does not involve these communication methods).

97. See *id.*

98. See *Commercial Bribery*, *supra* note 95.

99. See WEBB ET AL., *supra* note 96, at § 2.03, 2-9.

cutor's 'true love,' because they provide a basis for criminal liability in a broad spectrum of instances."<sup>100</sup>

In 1988, Congress amended and enlarged these already wide-reaching statutes through enactment of the honest services amendment.<sup>101</sup> Originally, its language encompassed any "scheme or artifice to deprive another of the intangible right of honest services,"<sup>102</sup> which greatly expanded public officials and business professionals' potential for liability under the mail and wire fraud acts.<sup>103</sup> The amendment aimed to criminalize any situation where a fiduciary deprived a person they were in a fiduciary relationship with of "honest services."<sup>104</sup> This would include situations involving private actors paying bribes that were not otherwise covered in other federal bribery statutes (like the FCPA that only applied to public officials).<sup>105</sup> However in 2010, the Supreme Court found such a broad interpretation unconstitutionally vague, and subsequently narrowed the honest services amendment to only situations where a fiduciary

---

100. CHARLES DOYLE, CONG. RESEARCH SERV., R40852, DEPRIVATION OF HONEST SERVICES AS A BASIS FOR FEDERAL MAIL AND WIRE FRAUD CONVICTIONS 1 (2010).

101. Act of Nov. 18, 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346 (2006)). Prior to *McNally v. United States*, circuit courts allowed a broad reading of the mail statute to include the right to honest services, in addition to deprivations of money or property, within "a scheme or artifice to defraud." See Margaret Ryznar, *The Honest-Services Doctrine in White-Collar Criminal Law*, 34 HAMLIN L. REV. 83, 87-88 (2011). After the decision in *McNally* pared back the mail fraud statute to include only deprivations of money or property, Congress passed the honest services amendment to once again allow a "scheme or artifice" to defraud to include the right to honest services. See *id.* at 88.

102. See DOYLE, *supra* note 100, at 5 (emphasis omitted).

103. See Ryznar, *supra* note 101, at 88.

104. See Paul M. Kessimian, Note, *Business Fiduciary Relationships and Honest Services Fraud: A Defense of the Statute*, 2004 COLUM. BUS. L. REV. 197, 211. Such a broad reading of the mail and wire fraud acts caused significant outcry when prosecutors tested the outer limits of the statutes prior to amendment; one such case involved a lawyer convicted of mail fraud for breaching his duty of loyalty to the firm's clients. See Ryznar, *supra* note 101, at 87.

105. See Ryznar, *supra* note 101, at 84 (noting that prosecutors used the honest services amendment to prosecute individuals in both the public and private sectors). Over time, the honest services amendment has applied to corporate officers, purchasing agents, stockbrokers, and others in the private sector who owe "clear fiduciary duties to their employees or unions." *McNally v. United States*, 483 U.S. 350, 363 (1987) (Stevens, J., dissenting).

deprives a person of “honest services” through a bribery or kickback scheme.<sup>106</sup> Despite its narrowing by the Supreme Court, the honest services amendment should still apply to acts of private sector bribery, as bribery and kickback schemes directly limit a victim’s right to have honest services from an official or employee.<sup>107</sup>

Additionally, to ensure that the government can prosecute international private-sector bribery, the Supreme Court has upheld application of the mail and wire fraud statutes extraterritorially.<sup>108</sup> With their adaptability to most instances of criminal fraud and the assurance under the honest services amendment that they are applicable to bribery and kickback schemes in the private-sector, the mail and wire fraud statutes can be used to supplement FCPA actions and are “frequently . . . the sole instrument of justice that could be wielded against the ever-innovative practitioners of deceit.”<sup>109</sup>

### 3. Corporate Self-Regulation

Another technique used in the United States to combat foreign bribery, either by design or due to a previous lack of understanding as to the implications of foreign private-sector bribery, is corporate self-regulation.<sup>110</sup> Many companies prefer

---

106. See *Skilling v. United States*, 130 S. Ct. 2896, 2931–34 (2010). A practical example of using an honest services violation to bring a mail or wire fraud statute action is when a corporate officer or employee acts against their company’s best interests to pursue a self-interested transaction, and in doing so, uses the mail or some form of wire communication. See DOYLE, *supra* note 100, at 6–7. (quoting *United States v. Rybicki*, 354 F.3d 124, 126–27 (2d. Cir. 2003) (en banc)). In this instance, the DOJ would be able to supplement a FCPA action with either the mail or wire fraud statute and bring charges for private-sector bribery. See *supra* note 91 and accompanying text.

107. See DOYLE, *supra* note 100, at 17 (citations omitted) (noting that Congress intended to reach fraud and kickback schemes by protecting that “intangible right to honest services”).

108. See *Howard et al.*, *supra* note 94, at 4 (citing *Pasquantino v. United States*, 544 U.S. 349 (2005)). Although not specifically applying the mail and wire fraud statutes extraterritorially, the *Pasquantino* Court noted in dicta that the statutes’ language was surely not intended to have “only domestic concerns in mind.” *Pasquantino*, 544 U.S. at 371–72 (internal quotation marks omitted).

109. WEBB ET AL., *supra* note 96, at § 2.03, 2-8 (quoting Jed S. Rakoff, *The Federal Mail Fraud Statute, Part 1*, 18 DUQ. L. REV. 771, 772 (1980)).

110. See *Argandoña*, *supra* note 9, at 253–54.



to self-police internal acts of bribery, thus avoiding high legal costs and the imposition of government in business affairs.<sup>111</sup> Self-regulation is a fairly controversial method, as it relies on the would-be-perpetrators (or their companies) of the bribery to enact and enforce corporate governance guidelines to eradicate bribery issues.<sup>112</sup> The effectiveness of self-regulation can generally be viewed on a spectrum from completely ineffective to a good supplement to existing criminal and civil bribery statutes.

Advocates of using internal corporate regulation to police bribery argue that the private sector is more efficient than outside actors at regulating itself.<sup>113</sup> As support, advocates argue that: (1) corporations have a vested interest in self-preservation and will stop employees from taking actions that could harm the business; (2) there are few incentives for this type of behavior as competitive markets eventually penalize inefficient behavior; and (3) private-sector bribery inherently has less of an economic, social, and ethical impact than public-sector bribery as it does not involve the corruption of public officials.<sup>114</sup> Also, critics of bribery statutes believe that bribery actions create an enormous boon for government agencies and specialized law firms and waste corporate resources on mandated DOJ investigations that could be more effectively used if companies self-regulated.<sup>115</sup>

Some critics go so far as to advocate no governmental regulation of bribery whatsoever. Opponents of statutes like the FCPA argue that bribery is an unavoidable cost of business in international business transactions and that bribery prosecutions hinder American companies who can no longer adequately compete abroad.<sup>116</sup> The main arguments against governmental regulation of bribery, especially in an international business

---

111. *See id.* at 259.

112. *See* Gopinath, *supra* note 22, at 749 (noting that even though some corporations have enacted ethics codes and training programs to combat corruption, “the practice of private corruption continues to exist”).

113. *See* Argandoña, *supra* note 9, at 253.

114. *See id.* at 253–54.

115. *See* Nathan Vardi, *The Bribery Law Racket*, FORBES, May 24, 2010, at 70, 72 (noting that “a thriving and lucrative anti-bribery complex has emerged” but questioning “[w]hether it’s having any impact on reducing bribery”).

116. *See* Spahn, *supra* note 34, at 862.

context, are that bribes are necessary to “grease[] the wheels of excessive government regulation,” that they do not cause personal harm to individuals, that they can actually be a benefit to spurring new business, and that bribes are simply a practical business measure, utilized by numerous companies.<sup>117</sup> Additionally, business leaders argue that FCPA prosecutions create a “lopsided playing field” for American businesses that have to compete with international companies not hindered by stringent bribery laws.<sup>118</sup>

However, such arguments against any monitoring of bribery are outweighed by the acceptance that bribery creates problems and causes strong negative societal implications, and, as such, should be eliminated.<sup>119</sup> Despite arguments in the United States about how to go about such monitoring and regulation, the United Kingdom has recently taken an extremely proactive and definitive approach to prosecuting foreign private-sector bribery.

#### 4. United Kingdom’s Bribery Act 2010

In contrast to the multi-statute approach used to prosecute bribery in the United States, the United Kingdom’s Bribery Act 2010 explicitly makes illegal the bribery of public officials and private businesses by companies or individuals,<sup>120</sup> domestically and internationally.<sup>121</sup> The United Kingdom passed the U.K. Bribery Act in response to criticism that its then-existing bribery laws were inadequate to prosecute newer and more intricate forms of bribery and that they were difficult to apply in practice.<sup>122</sup>

---

117. *Id.*

118. Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT’L L. & COM. REG. 83, 89 (2007).

119. *Id.* at 254.

120. See Eric Engle, *I Get by with a Little Help from My Friends? Understanding the U.K. Anti-Bribery Statute, by Reference to the OECD Convention and the Foreign Corrupt Practices Act*, 44 INT’L LAW. 1173, 1173 (2010).

121. See Arvinder Sambei, *The U.K. Bribery Act 2010: An Overview*, 27 INT’L ENFORCEMENT L. REP. 803, 803 (2011).

122. See Joseph Warin et al., *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, 4–5 (2010) (noting that “[l]ittle had changed in [the prior] legal framework during the last ninety years”).

Before the enactment of the U.K. Bribery Act, the United Kingdom did not have a comprehensive statute proscribing bribery or corruption.<sup>123</sup> Now, immediately in Section 1, the U.K. Bribery Act states that it is an offense for *a person* to induce or reward *a person* to bring about an improper performance in their relevant professional function.<sup>124</sup> Using intentionally vague language—referring simply to a “person” and to “improper performance”—the U.K. Bribery Act ensures that “bribery in both the public and private sectors is covered.”<sup>125</sup> These revisions have arguably allowed the U.K. Bribery Act to surpass the FCPA in aggressiveness to eliminate bribery.<sup>126</sup>

Revising its bribery statutes was a bold step for the United Kingdom as it clearly branched away from the FCPA’s system of only targeting bribery of public officials. The United Kingdom took an opportunity in updating its bribery laws to use FCPA language and ideas, while also making a clear statement to businesses that private bribery would not be tolerated. In recognizing the ineffectiveness of its previous patchwork system of prosecuting bribery,<sup>127</sup> the United Kingdom passed a single comprehensive piece of bribery legislation to provide prosecutors with the necessary tools to work toward eradicating all forms of bribery.<sup>128</sup>

The United States and the United Kingdom have different techniques to combat the increasingly prevalent and recognized issue of foreign private-sector bribery. The DOJ currently utilizes pre-existing statutes to supplement the FCPA’s inability to prosecute private-sector bribery. On the other hand, the United Kingdom created the U.K. Bribery Act, to encompass all bribery offenses within a single statute. Each technique can eventually reach the result of prosecuting international private-sector bribery, but their separate processes can make all the difference in the effectiveness of such a prosecution.

---

123. *See id.* at 5.

124. MINISTRY OF JUSTICE, THE BRIBERY ACT 2010 GUIDANCE 10 (2011).

125. *Id.*

126. *See* Margaret Ryznar & Samer Korkor, *Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing*, 76 MO. L. REV. 415, 420 (2011).

127. *See* Warin et al., *supra* note 122, at 4–5.

128. *See* Ryznar & Korkor, *supra* note 126, at 420.

---

---

## II. CRITIQUING CURRENT METHODS USED TO ERADICATE PRIVATE BRIBERY

Each method used to prosecute or correct instances of private-sector foreign bribery in the United States is an attempt at supplementing the FCPA. However, since each option is a “fix” rather than a full solution to eliminate foreign private-sector bribery, each is inferior to an amended FCPA that encompasses all forms of foreign bribery. While the Travel Act and mail and wire fraud statutes are capable of prosecuting foreign bribery if the action violates a state private bribery law or is an illegal use of interstate mail or wire communication, these laws require cumbersome additional hurdles for the DOJ. Also, while reliance on self-governance by private companies as a means to combat private-sector bribery requires few resources, it is not a reliable stand-alone method. Finally, all of these supplemental prosecutorial methods fail to take advantage of the arresting intimidation and public awareness inherent in FCPA actions. As such, the U.K. Bribery Act’s method to combine into one, forceful statute the means to prosecute both public and private bribery is the best way to ensure all forms are bribery are effectively discouraged and efficiently prosecuted.

### A. CURRENT TECHNIQUES IN THE UNITED STATES

#### 1. The Travel Act

As no federal statute specifically outlaws the bribing or receiving of bribes in private business settings, the Travel Act is an important way for the DOJ to supplement FCPA actions and prosecute foreign commercial bribery.<sup>129</sup> However, the benefit of being able to rely on a statute outside the FCPA to prosecute private-sector bribery is also the Achilles’s heel of prosecuting private bribery under the Travel Act.

The Travel Act criminalizes “extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.”<sup>130</sup> Since neither the FCPA, nor any other feder-

---

129. Jeffrey J. Ansley et al., *Commercial Bribery and the New International Norms*, BLOOMBERG L. REP., Sept. 2009, available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1005&context=don\\_berthiaume](http://works.bepress.com/cgi/viewcontent.cgi?article=1005&context=don_berthiaume).

130. Travel Act, 18 U.S.C. § 1952(b) (2006).

al statute specifically criminalizes private-sector bribery, Travel Act actions must rely on state laws as the necessary predicate statute.<sup>131</sup> Currently, there are at least twenty-nine states with bribery statutes that deal either directly with or are general enough to include private commercial bribery.<sup>132</sup> Regrettably for the DOJ, the remaining states likely lack the predicate statute needed to bring a Travel Act action and the twenty-nine states that do have private bribery statutes greatly vary on the sentences imposed for a violation.<sup>133</sup>

Such a system of disparate applicability can appear simultaneously unfair and confusing. For instance, if the private commercial bribery is committed in Idaho, where there is no predicate state private bribery law, there could be no Travel Act action and the potential defendant seemingly gets away (at least regarding a federal prosecution) “scot-free.” However, if the private bribery took place in California, the location of CCI’s predicate Travel Act prosecution, a defendant could face a state penalty of imprisonment in the county jail for one year if the bribe is \$1000 or less, or imprisonment in a county jail or state prison for sixteen months to three years for bribes over \$1000.<sup>134</sup> In Minnesota, if the bribe is for \$500 or more, the convicted defendant would face state sanctions of up to five years in prison and a fine of \$10,000.<sup>135</sup> Additionally, the Travel Act imposes a range of penalties based on the severity of the violation, from a sentence of no more than five years to life imprisonment, on top of what a defendant would face under state law.<sup>136</sup> One can imagine, given the variety of potential penal-

---

131. See generally Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 to -3 (2006).

132. Rupp & Fink, *supra* note 76, at 2 n.11 (noting these states include Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, and Washington).

133. Compare CAL. PENAL CODE § 641.3(c) (West 2010), with MINN. STAT. ANN. § 609.86, subdiv. 3(1) (West 2012) (illustrating how states handle foreign private bribery sentencing’s differently).

134. See PENAL § 641.3(c).

135. See § 609.86, subdiv. 3(1).

136. See 18 U.S.C. § 1952(a)(3)(A) to (B) (2006).

ties, the difficulties in maintaining uniform federal prosecutions of private commercial bribery in the United States.

One of the greatest hindrances of the Travel Act becoming an effective anti-bribery tool is the fact that many businesses are unaware of its existence. Although prosecutions for Travel Act violations are increasing,<sup>137</sup> U.S. authorities still tend not to bring private-sector bribery charges unless they relate to a larger public-sector bribery prosecution or if prosecutors believe a successful FCPA action is improbable.<sup>138</sup> The fact that the Travel Act relies on varied state laws contributes to this issue, as does the Travel Act's muted origins and lack of judicial input.<sup>139</sup> Due to the FCPA's widespread recognition in the business sphere, many companies have in place strict measures to ensure compliance.<sup>140</sup> But, unlike the FCPA, the Travel Act was not enacted following a watershed investigation, nor was it even created to prosecute private bribery.<sup>141</sup> In this way, the Travel Act lacks the immense publicity the FCPA had upon its enactment, and with the current lack of public Travel Act prosecutions,<sup>142</sup> its threat to companies as a private-sector bribery statute will remain hidden until it garners the same awareness as FCPA actions.

Proponents of the Travel Act point to the success of Travel Act tag-along actions to FCPA prosecutions.<sup>143</sup> As noted earlier, in July 2009, Control Components Inc. pleaded guilty to violations of the FCPA and the Travel Act.<sup>144</sup> Additionally, in September 2010, Nexus Technologies Inc. and two of its executives

---

137. See, e.g., Press Release, Dep't of Justice, *supra* note 78.

138. See Rupp & Fink, *supra* note 76, at 2.

139. See Barry J. Pollack & Laura Billings, *After 30 Years of the FCPA, Will Courts Finally Get into the Act?*, 34 CHAMPION 34, 34 (2010) (“[O]nly a handful of FCPA cases have actually been litigated.”).

140. See Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 1004 (2010).

141. See Rupp & Fink, *supra* note 76, at 1 (identifying the original purpose of the Travel Act as “combat[ing] organized crime”).

142. See *id.* (stating that “foreign commercial bribery is not yet a primary focus of U.S. enforcement activity”).

143. See, e.g., Press Release, Dep't of Justice, *supra* note 78 (discussing Control Components, Inc.'s guilty plea to both FCPA and Travel Act violations).

144. Press Release, Dep't of Justice, *supra* note 78.

pleaded guilty to FCPA and Travel Act violations.<sup>145</sup> However, these successes for the DOJ do not necessarily speak to the efficacy of the Travel Act, but rather companies' fear of FCPA actions.<sup>146</sup>

Since the FCPA's inception, most companies have chosen to settle pre-indictment or immediately after a FCPA indictment by the DOJ.<sup>147</sup> If a company is one of the few not offered a non-prosecution agreement (NPA) or a deferred prosecution agreement (DPA) pre-indictment, then it will likely agree to the DOJ filing a criminal information that is then resolved by a plea agreement.<sup>148</sup> For corporations, settling pre-indictment is crucial to avoiding the "potential downside of litigation."<sup>149</sup> By settling, companies avoid "bad press and a subsequent stock devaluation" that would almost definitely result from a prosecution.<sup>150</sup> In fact, in the FCPA's history, only two companies have attempted to defend FCPA charges and "put the DOJ to its high burden of proof at trial."<sup>151</sup> As more Travel Act pri-

---

145. Press Release, Dep't of Justice, *supra* note 89.

146. See Mike Emmick, *The Travel Act—The FCPA's Red-Haired Stepchild*, THOMSON REUTERS NEWS & INSIGHT (Feb. 1, 2012), [http://newsandinsight.thomsonreuters.com/New\\_York/Insight/2012/02\\_-\\_February/The\\_Travel\\_Act\\_%E2%80%93\\_The\\_FCPA\\_s\\_red-haired\\_stepchild/](http://newsandinsight.thomsonreuters.com/New_York/Insight/2012/02_-_February/The_Travel_Act_%E2%80%93_The_FCPA_s_red-haired_stepchild/) (warning companies to not prematurely celebrate when internal investigations reveal no bribes to foreign officials and to not forget the Travel Act); see also Rupp & Fink, *supra* note 76, at 2 (questioning whether the U.S. government would have even pursued Travel Act charges in the Control Components case absent public-sector bribery).

147. See Pollack & Billings, *supra* 139, at 34.

148. See *FCPA 101*, FCPA PROFESSOR, <http://www.fcprofessor.com/fcpa-101> (last visited Apr. 19, 2013). See generally Allen R. Brooks, Comment, *A Corporate Catch-22: How Deferred and Non-Prosecution Agreements Impede the Full Development of the Foreign Corrupt Practices Act*, 7 J.L. ECON. & POL'Y 137, 153 (2010) (DPAs and NPAs are alternatives to litigation, as a prosecutor can "forgo a trial in exchange for an agreement that punishes, deters, and rehabilitates a defendant."). DPAs first require that formal charges are filed, whereas under an NPA a defendant may escape the filing of any formal charges. *Id.*

149. See Pollack & Billings, *supra* note 139, at 34.

150. Evan P. Lestelle, Comment, *The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction*, 83 TUL. L. REV. 527, 529 (2008).

151. See *FCPA 101*, *supra* note 148 ("In 1991, Harris Corporation (and certain of its executives) prevailed in an FCPA trial when a federal court judge granted a verdict of acquittal . . . . In 2011, Lindsey Corporation (and certain of its executives) were found guilty by a federal jury of conspiracy to violate

vate bribery actions are filed concurrently with FCPA investigations, corporations are likely to use the same cost-benefit, settlement-minded analysis when deciding whether to contest a Travel Act indictment as they do for FCPA indictments.

Because the Travel Act exists as an option to pursue private foreign bribery in the United States does not make it the best or most efficient method to eradicate bribery. The Travel Act's reliance on various state laws, its piecemeal approach, and its unfamiliarity to businesses make it a less than ideal choice for foreign private bribery actions. To compensate for times when the Travel Act is inapplicable as an FCPA supplement, the DOJ looks to the mail and wire fraud statutes to prosecute acts of foreign private-sector bribery.

## 2. Mail and Wire Fraud Statutes

Mail and wire fraud statutes are usually applicable to cases of foreign-commercial bribery because businesses rely on interstate or international mail and wire communications in most of their daily transactions.<sup>152</sup> However, despite the seeming ease of attaching a mail and wire fraud action to an FCPA indictment, these statutes face difficulties in effectively prosecuting private-sector bribery. First, although the honest services law was created to add clarity to the mail and wire fraud statutes' scope, courts and many attorneys still find 18 U.S.C. § 1346 unconstitutionally broad.<sup>153</sup> Additionally, the Supreme Court's limiting of § 1346 to only bribery and kickback schemes<sup>154</sup> has created additional questions as to its allowance in purely private-sector situations.

As a first hurdle, a number of circuits have found that additional layers of analysis are required when pursuing an honest services claim in a mail or wire fraud action.<sup>155</sup> When the Supreme Court attempted to limit § 1346 in *Skilling v. United States*, it also emphasized the need to refer to "pre-*McNally* cases," which were tied to breaches of fiduciary duty.<sup>156</sup> The

---

the FCPA and substantive FCPA violations.").

152. WEBB ET AL., *supra* note 96, § 2.03, 2-16.

153. See DOYLE, *supra* note 100, at 10 (discussing a generally recognized need to limit the scope of § 1346).

154. See *Skilling v. United States*, 130 S. Ct. 2896, 2907 (2010).

155. See DOYLE, *supra* note 100, at 10-11.

156. See *Skilling*, 130 S. Ct. at 2905; Charion L. Vaughn, Note, *Power Cor-*



idea of a fiduciary duty in a public company is clear, but the corresponding role of fiduciary duties of purely private actors, where the only victim is a private company, still remains under debate as *Skilling* declined to define how or when such fiduciary duties arise.<sup>157</sup> As such, the First, Fourth, Seventh, and Ninth Circuits have found that for a violation of the honest services statute to constitute a breach of fiduciary duty, there must also be a “recognizable scheme formed with intent to defraud.”<sup>158</sup> In fact, the Seventh Circuit would go so far as to require defendants to aim for a personal private gain before recognizing a violation of the honest services statute.<sup>159</sup> Conversely, the Fifth Circuit, and to some extent the Third and Eighth Circuits, require a state law violation before allowing a honest services charge to continue.<sup>160</sup> This attempt to limit § 1346’s reach is due to federalism concerns and creates an additional required layer of inquiry for the federal government before it can pursue private bribery charges under the mail or wire fraud statutes.<sup>161</sup>

This confusion as to whether a mail or wire fraud action requires demonstrating personal gain by defendants or an initial state law violation adds additional obstacles to bringing federal private bribery charges. Such additional analysis wastes resources which could be more effectively utilized in pursuing or investigating additional instances of private-sector foreign bribery. As the Supreme Court has not clearly described the requirements for § 1346 actions in private bribery instances, the DOJ should not have to wait for additional clarification by Congress or the Supreme Court before pursuing such actions. The FCPA was a “game changer” for foreign public bribery prosecutions and the DOJ should have an equally strong and clear law to prosecute acts of foreign private bribery.

---

*rupts: Honest Services Fraud and Fiduciary Duties*, 50 WASHBURN L.J. 713, 726 (2011).

157. See *Skilling*, 130 S. Ct. at 2936–37; Steven Wisotsky, *Honest Services Fraud after Skilling v. United States*, FEDERALIST SOC’Y FOR L. & PUB. POL’Y STUDIES (Nov. 28, 2011), <http://www.fed-soc.org/publications/detail/honest-services-fraud-after-skilling-v-united-states>.

158. See Vaughn, *supra* note 156, at 719 (quoting *United States v. Bohonus*, 628 F.2d 1167, 1172 (9th Cir. 1980)).

159. See DOYLE, *supra* note 100, at 11.

160. See Vaughn, *supra* note 156, at 719–20.

161. *Id.* at 721.

### 3. Self-Regulation by Companies

As opposed to creating new, or supplementing existing bribery statutes, some scholars and business insiders believe the best method to eliminate private international commercial bribery is through self-regulation by the companies themselves.<sup>162</sup> The argument follows that companies are “much more efficient” at protecting and monitoring their own interests.<sup>163</sup> These critics also generally find that fiduciary relationships are already monitored in the United States, mainly through shareholder class actions and derivative litigation,<sup>164</sup> making the addition of a criminal penalty on top of this pre-existing avenue for recovery superfluous.<sup>165</sup>

Most agree that leaving some regulation of private bribery to corporations positively contributes to its eradication. “Corporations who are keenly aware of the deleterious effects of corruption have established ethics codes and conduct training programs to make the employees aware of the standards of behavior expected within the organization.”<sup>166</sup> This has led some companies to create policies about receiving non-monetary gifts and benefits—“such as tickets, trips, meals, favors, etc.”<sup>167</sup> However, the existence of a company code of ethics or anti-bribery management attitude does not guarantee that a company’s employees will always behave as instructed, “whether out of ignorance or because their personal interests lie elsewhere, or because the actual culture of the company is at odds with its declared aims.”<sup>168</sup> And in fact, press reports suggest that private corruption in companies that claim to self-regulate continues to exist.<sup>169</sup>

---

162. See Argandoña, *supra* note 9, at 259–63 (providing suggestions for companies looking to protect themselves from corruption).

163. *Id.* at 253.

164. See *id.* at 258–59 (stating that penalties for private-to-private corruption are based on fiduciary relationships and civil laws that provide for damages).

165. *Cf. id.* (discussing the limited results of criminal corruption legislation and the preference for civil law remedies).

166. Gopinath, *supra* note 22, at 749.

167. See *id.*

168. Argandoña, *supra* note 9, at 259.

169. See Gopinath, *supra* note 22, at 749.

The self-regulatory model, especially in an international context, fails as a stand-alone method. Self-regulation is premised on “self-policing with regulatory oversight,” as government enforcement creates a baseline of “normative ethical principles” against which companies could structure their internal oversight and provides tangible consequences of non-compliance.<sup>170</sup> Without effective statutory enforcement of self-regulation, corporate compliance plans can become “little more than a protective measure designed to feign voluntary compliance under the Federal Sentencing Guidelines in the unlikely event that a company gets caught . . . .”<sup>171</sup>

Additionally, in the context of globalization, creating a credible internal oversight program that is applicable and enforceable in every country is extremely difficult.<sup>172</sup> “Cultural mores in each country provide differing views about the legitimacy of bribery as a market behavior in the first instance.”<sup>173</sup> Also, these corporate compliance programs can lose effectiveness with increased organizational distances and when in countries with decreased regulatory presence.<sup>174</sup>

Although self-regulation by companies is a positive technique that encourages companies to take a more proactive role in eliminating bribery, it cannot function as a stand-alone method to eradicate private bribery. As such, the only practical solution to handle private-sector bribery is through increased governmental enforcement in combination with existing internal policing measures.<sup>175</sup> The U.K. Bribery Act has attempted to combine both private and public-sector bribery regulation and incentives for companies who attempt to self-regulate in a single statute.<sup>176</sup>

#### B. U.K. BRIBERY ACT

Stepping away from the United States’s piecemeal approach to prosecuting all forms of bribery, the U.K. Bribery Act

---

170. See Weismann, *supra* note 35, at 625–26.

171. *Id.* at 616.

172. See *id.* at 626.

173. *Id.*

174. See *id.* at 627.

175. See *id.* at 628.

176. See Pulina Whitaker, *The UK Bribery Act: Be Prepared*, 41 LAWYER’S BRIEF, Aug. 31, 2011, at 2.

was created to cover both public officials and private citizens and specifically criminalize private-sector bribery.<sup>177</sup> The guidance to Section 1 of the U.K. Bribery Act is explicit that any use of the term “person” is intentionally broad, so as to include both public and private-sectors.<sup>178</sup> In rejecting the notion that private-sector bribery deserves less attention than public-sector, the U.K. Bribery Act earned the nickname: the “FCPA on steroids.”<sup>179</sup>

Despite its succinctness and broad applicability in addressing all forms of bribery, the U.K. Bribery Act is relatively untested and faces its own critics. For instance, the U.K. Bribery Act has faced criticism for including an affirmative defense for companies that have “adequate procedures.”<sup>180</sup> Section 7 of the U.K. Bribery Act assigns liability to businesses that fail to prevent bribery within their organizations, regardless of whether the bribe is to a private organization or a public official.<sup>181</sup> However, under the “adequate procedures” defense, corporations that can demonstrate they have acceptable safeguards in place can avoid liability.<sup>182</sup> It has also faced criticisms for ambiguity, overreach, and even for being too difficult to execute and draconian in nature.<sup>183</sup>

Despite these and other criticisms, the U.K. Bribery Act’s inclusion of all types of bribery within one statute is an important new way to allow for governmental regulation of foreign private-sector bribery. Any potential later issues, such as

---

177. See *id.* Also, unlike the FCPA, the U.K. Bribery Act has no defense for facilitation payments, has a provision making it an offense for corporations to fail to prevent bribery, and does not require proof of “corrupt” intention. *Id.*

178. See MINISTRY OF JUSTICE, *supra* note 124, at 9 n.3.

179. See Johannes Scholtes, *The UK Bribery Act, “FCPA on Steroids,”* AIIM EXPERT BLOG (Sept. 12, 2011, 4:46 AM), <http://www.aiim.org/community/blogs/expert/The-UK-Bribery-Act-e2809cFCPA-on-steroidse2809d>.

180. Cf. Engle, *supra* note 120, at 1173 (discussing the adequate procedures defense and criticisms of the Act’s “ambiguity”).

181. MINISTRY OF JUSTICE, *supra* note 124, at 15.

182. See Warin et al., *supra* note 122, at 30–31.

183. See Engle, *supra* note 120, at 1173; George Rosenberg, *New UK Bribery Act 2010—Draconian in Theory but Is It Enforceable in Practice?*, 5 CONSTRUCTION L. INT’L 19, 24 (2010); Maria Caspani, *Interview—UK Bribery Act Likely to End Up as “A Farce”—British Peer*, TRUSTLAW (Oct. 29, 2012, 12:04 PM), <http://m.trust.org/trustlaw/news/interview-uk-bribery-act-likely-to-end-up-as-a-farce-british-peer/> (noting the lack of prosecutions under the U.K. Bribery Act).

disputes on the vagueness of terms in the U.K. Bribery Act, which is a frequent critique of the FCPA, are easily correctable either through the development of U.K. Bribery Act case law or by turning to the terms' definitions in literature and case law on corporate governance.<sup>184</sup> Any concerns about the "draconian" and all-encompassing nature of the U.K. Bribery Act will likely be corrected or avoided with continued use of the U.K. Bribery Act, as evidenced by the Minister of Justice's explanation that "the ultimate aim of [the Bribery Act] is to make life difficult for the minority of organizations responsible for corruption, not to burden the vast majority of decent and law-abiding businesses."<sup>185</sup> Despite its criticisms, the U.K. Bribery Act is an important attempt to raise international standards of bribery regulation and to force corporations to institute internal controls to prevent bribery.<sup>186</sup>

### III. AMENDING THE FCPA TO INCLUDE A PROVISION BANNING INTERNATIONAL PRIVATE-SECTOR BRIBERY

The United States currently uses a number of methods to prosecute those who commit private-sector bribery. Although each method helps to eliminate acts of bribery, none are able to fully accomplish DOJ goals on an individual basis. To truly ensure that the United States remains a world leader in working to eradicate both public and private-sector bribery, other "after the fact" methods to prosecute private-sector bribery must be replaced with an amended FCPA that criminalizes all forms of foreign bribery.

#### A. AMENDING THE FCPA TO INCLUDE A PRIVATE-SECTOR BRIBERY COMPONENT

The addition of a private-sector bribery component to the FCPA is the ideal method to ensure that the United States remains a leader in eliminating foreign bribery. The DOJ's current techniques, including tag-along Travel Act actions and mail and wire fraud statute prosecutions, require additional

---

184. See Engle, *supra* note 120, at 1185.

185. Robert Amaee, *Robert Amaee on U.K. Bribery Act Guidance*, FCPA PROFESSOR (Mar. 31, 2011, 12:08 AM), <http://fcpaprofessor.blogspot.com/2011/03/robert-amaee-on-uk-bribery-act-guidance.html> (quoting U.K. Minister of Justice Kenneth Clarke).

186. See Engle, *supra* note 120, at 1188.

hurdles that squander crucial resources from the more important discovery and investigation of new instances of private-sector bribery. Additionally, without a foreign private-sector bribery component in the FCPA, the DOJ misses the opportunity to use the full weight, power, and threat of FCPA actions to deter acts of private-sector bribery by companies. If both public and private-sector bribery were contained within a single statute, similar to the U.K. Bribery Act, prosecutors could avoid tedious and confusing prosecutions while increasing awareness of the illegality of private-sector bribery.

Fortunately for the United States, amending the FCPA to include a provision on private bribery does not require reinventing the wheel. First, definitions of private commercial bribery, or general bribery, can be found in twenty-nine state statute books.<sup>187</sup> Currently, the FCPA is explicit in defining public-sector bribery as an entity separate from other forms of bribery.<sup>188</sup> If Congress preferred to keep the statute's language in its current form, it could easily add a separate definition for commercial bribery and leave other sections untouched. Conversely, the amendment could borrow the spirit, if not the wording, of the U.K. Bribery Act.<sup>189</sup> The U.K. Bribery Act makes no distinction between public and private-sector bribery.<sup>190</sup> Taking this route, Congress would need to restructure the definition of bribery in the FCPA to expand its breadth, and hopefully, simplicity. As such, Congress has dual alternatives for amending the FCPA to include a foreign private-sector component; Congress could either (1) eliminate all references to the "public" nature of the bribery, or (2) add a new section to the FCPA that specifically refers to commercial bribery. Either option would guarantee that private-sector bribery becomes a significant part of the FCPA.

However, in its current form, the FCPA is much more amenable to the addition of private bribery language, as opposed to the modification of existing language. Each section of the FCPA denotes ways a party might violate the FCPA.<sup>191</sup> As

---

187. See Rupp & Fink, *supra* note 76, at 2.

188. See Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(a)(1)–(3) (2006).

189. See *generally* Bribery Act, 2010, c. 23, § 1 (defining bribery).

190. *Id.*

191. See 15 U.S.C. § 78dd-1(a)(1)–(3).

opposed to changing this oft-referenced definition, Congress could add a provision that additionally bars the use of commercial bribery to garner unfair business advantages. This change would ensure that each reference in the FCPA to the definition of “bribery” would also include reference to bribes of private actors. Borrowing language from both the FCPA and the U.K. Bribery Act, an example to the changes to each section of the FCPA could read as such:

(a) Prohibition

It shall be unlawful for any person other than an issuer that is subject to section 78dd-1 of this title or a domestic concern (as defined in section 78dd-2 of this title), or for any *person*, officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act 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—

(4) *any person, officer, director, employee, or agent of such person for purposes of—*

*(A)(i) inducing a person to perform improperly a relevant function or activity, or (ii) to reward a person for the improper performance of such a function or activity.*

The disadvantage to only amending existing FCPA language is that it would be difficult to account for those who accept bribes, as opposed to only those who make bribes, as done in the U.K. Bribery Act.<sup>192</sup> Currently, this group is entirely excluded from FCPA prosecution. However, this suggested “quick-fix” of FCPA language would avoid the arduous task of revising existing FCPA language and would take great strides in exponentially expanding the breadth of FCPA bribery actions until the appropriate time to undertake a complete overhaul of the FCPA.

#### B. ADDITION OF A PRIVATE-SECTOR COMPONENT IS CONSISTENT WITH CURRENT DOJ GOALS

According to a statement by Assistant Attorney General Greg Andres, the “investigation and prosecution of transnational bribery is an important priority for the Department of Justice.”<sup>193</sup> He followed by noting that “bribery in international

---

192. See Bribery Act, 2010, c. 23, § 2.

193. *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing*

business transactions weakens economic development; it undermines confidence in the marketplace; and it distorts competition.”<sup>194</sup> This mindset demonstrates the government’s recognition of international bribery as a great harm, and though he was referring to public-sector bribery, his words could easily apply to the harms of private-sector bribery as well.

As of September 2011, there was an estimated thirty-three resolved FCPA enforcement actions for the year, behind 2010’s record of seventy-four resolved FCPA actions.<sup>195</sup> Although FCPA prosecutions also fell during 2012, the decline is likely attributable to the lengthy “trench warfare” necessary to take a successful FCPA action to trial.<sup>196</sup> In line with still sizable numbers of FCPA indictments, the number of tag-along Travel Act actions that prosecute private bribery is also increasing.<sup>197</sup> Recognizing the immense harm that bribery can cause through the “diversion of resources, the distortion of free markets and damage to society,”<sup>198</sup> the DOJ must encourage Congress to amend the FCPA to include international private-sector bribery.

The FCPA was passed after Congress’s realization that foreign bribery was a legitimate threat to both the payer and the recipient of bribes.<sup>199</sup> However, the DOJ’s inability to efficiently prosecute all forms of bribery under the FCPA hampers this original goal and highlights the necessity for a new FCPA that can prosecute both public-sector and private-to-private bribery. This amendment would ensure that the FCPA is in full

---

*Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 111th Cong. 4 (2010) (statement of Greg Andres, Acting Deputy Assistant Att’y Gen., Criminal Division, Dep’t of Justice).

194. *Id.* at 4–5.

195. Benjamin D. Klein et al., *DOJ and SEC Affirm Continued Commitment to Rigorous FCPA Enforcement*, MORGAN LEWIS (Nov. 14, 2011), <http://www.morganlewis.com/index.cfm/fuseaction/publication.print/publicationID/3ea3637d-4eb4-49c1-aaef-53ac7fb6bcf9/>.

196. *See 2012 Year-End FCPA Update*, GIBSON DUNN (Jan. 2, 2013), <http://www.gibsondunn.com/publications/Pages/2012YearEndFCPAUpdate.aspx> (noting that “vast government resources [were] poured into the comprehensive FCPA Resource Guide” in 2012).

197. *See Cassin, supra* note 75 (finding that prior to 2005, the Travel Act was only used in a handful of cases to prosecute private bribery).

198. JOINT COMM. ON THE DRAFT BRIBERY BILL, FIRST REPORT OF SESSION 2008–09, 2008–09, H.L. 115-I, H.C. 430-I, at 8.

199. *See Weismann, supra* note 35, at 617.



compliance with Congress's wishes to eliminate the potential harms caused by bribery to all parties and society at large. Despite the DOJ's inability to prosecute bribery under one, clear statute, it is a sign of progress that private-sector international bribery is becoming more recognized. With the increased recognition of private-sector bribery as a credible threat, the next step must be strong legislation that enables clarity in the law and eradicates foreign private-sector bribery.

### C. THE CURRENT GOVERNMENT CLIMATE IS IDEAL FOR AN AMENDMENT TO THE FCPA

Now is the ideal time to add an international private-sector bribery component to the FCPA. On June 14, 2011, the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Securities (Subcommittee) listened to arguments on whether the FCPA needed amending.<sup>200</sup> Faced with calls from groups that the FCPA is too vague and damages American business competitiveness abroad, the Subcommittee considered proposals by the Chamber of Commerce, including: adding a compliance defense to FCPA actions, limiting a company's liability for actions of acquired companies and for its subsidiaries, adding a "willfulness" requirement for corporate liability, and clearly defining "foreign official" under the statute.<sup>201</sup> Following such review, in 2012, the DOJ released new guidance on the FCPA to help quell such concerns,<sup>202</sup> but critics still argue that the FCPA could use revision to increase its clarity and transparency.<sup>203</sup>

Critics concerned with vagueness might find that the addition of more terms to the FCPA would only increase its sometimes confusing and overbroad nature. As noted, many are attempting to work for specific, clear definitions to be included in

---

200. See *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. (2011).

201. See *id.* at 19–20 (statement of Hon. Michael Mukasey).

202. See FCPA RESOURCE GUIDE, *supra* note 27.

203. Mike Koehler, *Former Attorney General Alberto Gonzales Criticizes Various Aspects of DOJ FCPA Enforcement*, FCPA PROFESSOR (Apr. 4, 2013), <http://www.fcpaprofessor.com/former-attorney-general-alberto-gonzales-criticizes-various-aspects-of-doj-fcpa-enforcement> (noting former Attorney General Alberto Gonzales's discontent with the slow pace of FCPA reform).

the FCPA. However, the addition of the public-sector component has the potential to reduce such criticized ambiguities. In line with the U.K. Bribery Act, if the terms were specific to include all "persons," this would negate questions as to who is allowed to accept a bribe. By encompassing all forms of bribery in the FCPA, a need for a distinction between private companies and public officials would vanish.

The recently released FCPA Guidance by the DOJ shows that Congress and the executive branch are amenable to listening to calls for change to the FCPA and that now is the ideal time to ask Congress to also consider bringing the FCPA in line with new international norms by adding a private-sector bribery component.

### CONCLUSION

Private-sector bribery regulation is not a new idea, but it is novel for the United States to directly incorporate such regulation in the FCPA. Both domestically and internationally, states and countries have recognized the corrosive effect of allowing businesses to unfairly compete and pay bribes, whether such bribe is to a government official or any other person in international business. Such actions disadvantage newcomers, competitors, and hurt industries, as well as the countries in which they reside. The United States has already begun to follow the trend of other countries to prosecute transnational private-sector bribery through the use of pre-existing statutes that were not originally intended to handle such crimes. Unsurprisingly, the use of statutes such as the Travel Act and the mail and wire fraud statutes are inadequate solutions for the international goal of eradicating private-sector bribery.

The United Kingdom had experienced issues similar to the United States in the application of its existing bribery laws. Without amendment, the British bribery laws did not meet the standards of the international community and were vague and difficult to apply. By renovating its entire bribery regulatory system, the United Kingdom not only joined the United States as a leader in prosecuting public and private-sector bribery, but surpassed it in breadth. The FCPA does not need to be entirely rewritten, but as a statute originally passed by Congress in 1977, it must be updated to coincide with modern trends in prosecuting international private-sector bribery. An addition of

a commercial bribery component to the FCPA will ensure that the United States is not surpassed by other nations as a leader in fighting international bribery and will demonstrate its continuing dedication to championing fair and honest international business practices.