

**THE BEST OFFENSE IS A GOOD DEFENSE:
HOW THE ADOPTION OF AN FCPA
COMPLIANCE DEFENSE COULD
DECREASE FOREIGN BRIBERY**

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I. INTRODUCTION

In the 2005 film *Syriana*, a U.S. oil company, Connex, initiates a merger with a smaller oil company, Killen, after Connex lost natural gas drilling rights in the Middle East to a Chinese company.¹ Killen had recently been awarded drilling rights in Kazakhstan.² However, an internal investigation quickly revealed, as the U.S. Department of Justice (DOJ) had suspected, that Killen did so by bribing Kazakh officials.³ This conduct implicates the U.S. Foreign Corrupt Practices Act (FCPA or the Act), which prohibits bribery of foreign officials.⁴ Although it was suggested in the film that both companies knew and approved of the conduct, in order to avoid prosecution by the DOJ, the companies denied knowledge about the bribe and used the employee who initiated the bribes as a fall guy.⁵ When the employee was informed he would be given up to the DOJ, he ridicules the FCPA, stating: “Corruption charges! Corruption?! . . . We have laws against it precisely so we can get away with it. Corruption is our protection. Corruption keeps us safe and warm Corruption is why we win.”⁶

Of course, because top-level managers were involved and the companies knew about the bribes yet took no action to remedy the situation, nobody would feel sorry for the companies if they were subjected to criminal penalties under the FCPA. But few FCPA cases have such egregious facts as presented in *Syriana*.⁷

1. SYRIANA (Warner Bros. Pictures 2005). The film depicts several parallel storylines that revolve around the oil industry.

2. *Id.*

3. *Id.*

4. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1-3 a, 78dd-1, 78dd-2, 78ff, 78m, 78o (2012)).

5. SYRIANA, *supra* note 1.

6. *Id.*

7. See Mike Koehler, *Revisiting A Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 619 (2012) [hereinafter Koehler, *Revisiting Compliance Defense*] (noting that egregious facts—such as a corporate culture that tolerates or rewards bribery at the highest levels of the company—“are seldom the cause of corporate FCPA enforcement actions”).

In fact, many FCPA violations are not due to executive management or a board of directors approving the bribes.⁸ Rather, “[a] typical FCPA enforcement action involves allegations that a small group of people (or perhaps even a single individual) within a subsidiary or business unit of a business organization engaged in conduct in violation of the FCPA.”⁹ Yet because of respondeat superior principles, the company is exposed to FCPA liability even if the employee’s conduct is contrary to the company’s pre-existing FCPA policies and procedures.¹⁰

Despite the employee’s statements in *Syriana*, most would agree that corruption is an enormous problem in our growing global economy. In 2004, a study by the World Bank Institute found that over \$1 trillion in bribes are paid each year worldwide.¹¹ Sadly, the victims of bribery are often trapped in poverty, despite living in developing countries with considerable resources and wealth.¹² “Corruption impedes economic growth by diverting public resources from important priorities such as health, education, and infrastructure.”¹³ Accordingly, the DOJ

8. Mike Koehler, *FCPA 101*, FCPA PROFESSOR (Sept. 10, 2013), <http://www.fcprofessor.com/fcpa-101> [hereinafter Koehler, *FCPA 101*]. In contrast to *Syriana*, in Dell’s code of conduct, aptly titled *How We Win*, Michael Dell states: “Winning with integrity means we operate legally and ethically, everywhere we are and in everything we do.” DELL INC., HOW WE WIN: OUR CODE OF CONDUCT (2012) [hereinafter DELL CODE OF CONDUCT], available at <http://i.dell.com/sites/doccontent/corporate/corp-comm/en/Documents/Dell-Code-of-Conduct-External.pdf>.

9. Koehler, *FCPA 101*, *supra* note 8.

10. *Id.*; Koehler, *Revisiting Compliance Defense*, *supra* note 7, at 657.

11. *The Costs of Corruption*, WORLD BANK (Apr. 8, 2004), <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190187~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html>.

12. See generally *Corruption and Poverty*, GLOBAL POVERTY PROJECT, <http://www.globalpovertyproject.com/infobank/corruption> (last visited Sept. 28, 2013) (explaining that corruption occurs in developed as well as underdeveloped countries and diverts resources from the most impoverished and vulnerable citizens); see also *The Victims of Corruption: The Human Cost of Bribery in the Developing World I*, PBS FRONTLINE/WORLD, Feb. 24, 2009, <http://www.pbs.org/frontlineworld/stories/bribe/2009/02/spotlight-the-victims-of-corruption.html> (“While the vast majority of these citizens remain very poor, often living on \$1 a day, their elected officials accumulate enormous personal wealth, taking millions in bribes from corporations looking to secure lucrative contracts.”).

13. U.S. DEP’T OF JUSTICE & U.S. SEC. & EXCH. COMM’N, A RESOURCE GUIDE TO

and SEC have ramped up enforcement efforts of the FCPA in recent years.¹⁴

However, this has led to increased scrutiny of the Act. Although critics of the statute recognize that a U.S. anti-bribery law is necessary to prevent this conduct from occurring, they argue the statute is flawed and should be improved.¹⁵ Supporters, on the other hand, applaud the aggressive enforcement of the FCPA, believing that aggressive enforcement is the only way to prevent substantial bribery that has crippled economies and damaged the reputation of governments.¹⁶ Some have even called for increased enforcement against companies.¹⁷

One of the most frequent proposals offered to improve the FCPA is to add a compliance defense to the statute.¹⁸ On its face, adding a compliance defense to the FCPA seems counterintuitive to the Act's goals of preventing foreign bribery. However, this Article will conclude that adding such a defense will have a "carrot on a stick" effect on companies, thereby providing companies with a stronger incentive to put in place

THE U.S. FOREIGN CORRUPT PRACTICES ACT 2 (2012) [hereinafter FCPA RESOURCE GUIDE], available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

14. ANDREW WEISSMANN & ALIXANDRA SMITH, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 2 (2010), available at http://www.instituteforlegalreform.com/sites/default/files/restoringbalance_fcpa.pdf.

15. See *id.* at 6–7 (noting that doing away with the FCPA would permit American companies to engage in bribery but arguing that the FCPA is "ripe" for "clarification and reform through improvements to the existing statute").

16. See, e.g., DAVID KENNEDY & DAN DANIELSEN, OPEN SOC'Y FOUNDS., BUSTING BRIBERY: SUSTAINING THE GLOBAL MOMENTUM OF THE FOREIGN CORRUPT PRACTICES ACT 5–8 (2011), available at <http://opensocietyfoundations.org/sites/default/files/Busting%2520Bribery2011September.pdf> (arguing against proposed changes to the FCPA by the U.S. Chamber of Commerce, which they believe would reverse progress made towards fighting bribery and corruption).

17. See J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, U.S. Enforcement of the Foreign Corrupt Practices Act of 1977: Some Observations and Thoughts, Remarks at the Forum for EU-US Legal-Economic Affairs (Sept. 13, 2012), in 2012 WL 4328247 (F.T.C.), at *4 (quoting Professor Harry First and arguing that the DOJ's use of deferred and nonprosecution agreements is a "fix-it-after approach" that is too lenient and that corporations should be held criminally responsible when committing a crime generates millions in revenue).

18. See, e.g., WEISSMANN & SMITH, *supra* note 14, at 11; Koehler, *Revisiting Compliance Defense*, *supra* note 7.

protections against bribery. Promoting this form of internal policing will ultimately prove to be a more effective method of detecting and preventing bribery. Part II of this Article will discuss the background and history of the FCPA. Part III will examine the arguments for and against adding a compliance defense to the FCPA. Part IV will discuss a five-part compliance defense proposed by William Jacobson, the former assistant chief of FCPA enforcement at the DOJ. Part V will then discuss various options available to a company that will help it design a compliance program that would satisfy the defense. In addition to other sources, it will use a statistical analysis of the top fifty Fortune 500 companies to help companies determine what should be included in their compliance programs.

II. BACKGROUND

A. *History of the FCPA*

The United States has long prohibited domestic bribery of federal officials. Indeed, “[a]mong the first laws adopted after the ratification of the Constitution was a provision making it a federal crime to bribe customs officers and federal judges.”¹⁹ U.S. law later expanded in 1853 to cover all federal officers, “making it a crime to offer or give a thing of value to any federal officer ‘with intent to influence his vote or decision’ on an official action.”²⁰ However, anti-bribery laws did not cover bribes to foreign officials until the passage of the FCPA in 1977.²¹ The FCPA was passed following an investigation by the U.S. Securities and Exchange Commission (SEC), which resulted in over four hundred U.S. companies admitting to have paid questionable or illegal payments in excess of \$300 million to foreign officials, politicians, and political parties.²² These

19. PETER J. HENNING & LEE J. RADEK, *THE PROSECUTION AND DEFENSE OF PUBLIC CORRUPTION: THE LAW AND LEGAL STRATEGIES* 3 (2011) (citing Act of July 30, 1789, ch. 5, § 35, 1 Stat. 46 (1789); Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 117 (1790)).

20. *Id.* at 3–4 (citing Act of Feb. 26, 1853, ch. 81, § 6, 10 Stat. 171 (1853)).

21. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1, 78dd-2 (2012)).

22. H.R. REP. NO. 95-640, at 4 (1977) (Conf. Rep.). According to the House Report,

payments, along with being morally suspect, hurt the image of the U.S. political and economic system and resulted in numerous foreign policy problems.²³ Congress acted quickly to address these problems, enacting the FCPA through an amendment to the Securities Exchange Act of 1934.²⁴ In doing so, the United States became the first country to prohibit bribery committed abroad.²⁵

The FCPA seeks to accomplish its goal of preventing foreign bribery through two principle provisions. The anti-bribery provisions make it unlawful to pay or offer to pay anything of value to a foreign official in order to obtain or retain business.²⁶ These provisions are far-reaching, as they apply not only to U.S. residents and companies, but also to foreign persons and companies if they have publicly traded securities in the United States or if they take any act in furtherance of a corrupt payment while in the United States.²⁷ Violations of these provisions are likewise costly.²⁸ Corporations are subject to criminal fines up to \$2 million.²⁹ Individuals are subject to criminal fines up to \$100,000 and imprisonment up to five years

117 of those companies were Fortune 500 companies at the time. *Id.*

23. *Id.*; see also Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1583 (1990) (“In the wake of [the disclosures], three foreign governments collapsed, American relations with some of its western allies became strained, and a monarchy was weakened.”).

24. Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 500 (2010) (citing the Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78a, 78dd-1, 78ff, 78m, 78o (2012))).

25. *Id.* at 501; see also *History of The FCPA: How a Tough Anti-Bribery Law Came to Pass*, PBS FRONTLINE/WORLD (Feb. 13, 2009), <http://www.pbs.org/frontlineworld/stories/bribe/2009/02/history-of-the-fcpa.html> [hereinafter *FCPA History*] (“It was more than 20 years before other countries followed suit and outlawed foreign bribery . . .”).

26. 15 U.S.C. §§ 78dd-1 to 78dd-3 (2012).

27. *Id.* §§ 78dd-1 (extending to issuers of publicly traded stock), 78dd-2 (extending to “domestic concerns,” which include U.S. residents and companies), 78dd-3 (applying to foreign persons and corporations). Apart from the fact they apply to different actors, these three provisions are essentially the same in regards to their operation and the penalties that are assessed for violations.

28. *Id.* § 78dd-2(g).

29. *Id.* § 78dd-2(g)(1)(A).

for willful violations.³⁰ Additionally, these fines may be even higher under the Alternative Fines Act—“the actual fine may be up to twice the benefit that the defendant sought to obtain by making the corrupt payment.”³¹ Along with criminal fines, violations can result in being debarred from conducting business with the Federal government, civil fines following SEC actions, and even private civil causes of action.³² The other set of provisions, the accounting provisions,³³ were designed to work “in tandem with the anti-bribery provisions.”³⁴ They require companies to keep accurate books and records and implement internal accounting controls to combat foreign bribery.³⁵

Even at the time of its creation, the FCPA was a controversial statute.³⁶ Attention given to the statute waned

30. *Id.* § 78dd-2(g)(2)(A).

31. FCPA RESOURCE GUIDE, *supra* note 13, at 68 (citing 18 U.S.C. § 3571(d) (2012)). Considering that some bribes, by companies’ own admissions, bring in massive amounts of profits, the potential fine amounts for violations would surely give even the most iron-willed general counsel nightmares.

32. *Id.* at 69–70. Additionally, the same conduct relating to the FCPA violation may give rise to private causes of action. See Philip Segal, *Coming Clean on Dirty Dealing: Time For a Fact-Based Evaluation of The Foreign Corrupt Practices Act*, 18 FLA. J. INT’L L. 169, 196–97 (2006). These causes of action can be from competitors alleging they lost foreign contracts due to bribery or from shareholders alleging securities fraud.

33. 15 U.S.C. § 78m (2012).

34. FCPA RESOURCE GUIDE, *supra* note 13, at 38.

35. 15 U.S.C. § 78m (2012). This Article will specifically address an affirmative defense for violations of the anti-bribery provisions, not the accounting provisions.

36. Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT’L L. 419, 420 (1999). In an interview on the PBS show *Frontline*, Jimmy Carter, who signed the Act into law, discussed the difficulty of getting it passed, claiming he “ran into a hornet’s nest, because a lot of the leading . . . corporations claimed that they couldn’t [compete with foreign businesses] if they didn’t bribe officials.” *FCPA History*, *supra* note 25. This is a common criticism of the FCPA. See S. REP. NO. 105-277, at 2 (1998) (discussing the impact of the enactment of the FCPA and the losses of U.S. businesses due to bribery by foreign competitors, further noting that some even “explicitly encouraged such bribes by permitting businesses to claim them as tax-deductible business expenses”). However, realizing this, the United States severely pushed for foreign countries to enact similar legislation of their own to combat foreign bribery. See *id.* (noting Congress’s efforts to “level the play field” by encouraging enactment of similar legislation in foreign countries). This eventually led to the signing of an international treaty in 1997 by members of the Organization for Economic Cooperation and Development (OECD). Organization for Economic Co-Operation and Development: Convention on Combating Bribery of Foreign

over time, likely due to the fact that “[f]ew individuals or organizations . . . were prosecuted in the first two decades after the FCPA was enacted.”³⁷ However, controversy surrounding the statute resurfaced as the DOJ and SEC began drastically increasing enforcement efforts following the 1998 Amendment to the FCPA.³⁸ In just a three-year period between 2007 and 2009, the DOJ and SEC nearly doubled the number of enforcement actions brought in the Act’s first twenty-eight years of existence.³⁹ Accompanying the greater number of enforcement actions are increasingly severe fines.⁴⁰ For example, in 2009, the Houston-based engineering firm Kellogg Brown & Root (KBR) was hit with a \$402 million criminal fine in connection with bribery of Nigerian officials.⁴¹ Likewise, in 2010, BAE Systems, the British multinational defense contractor, was sentenced to pay a \$400 million fine.⁴² Currently, the largest monetary fine

Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105-43, reprinted in 37 I.L.M. 1 (1997), available at <http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/38028044.pdf>.

37. Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1829 (2011).

38. *Id.* at 1829–30. The 1998 Amendment, which is the second, and most recent amendment to the Act made the FCPA conform to, and implement, the requirements of the OECD Convention. S. REP. NO. 105-277, at 2 (1998); see also Westbrook, *supra* note 24, at 502 (noting the FCPA has been amended twice).

39. Westbrook, *supra* note 24, at 522.

40. Roger M. Witten et al., *Prescriptions for Compliance with the Foreign Corrupt Practices Act: Identifying Bribery Risks and Implementing Anti-Bribery Controls in Pharmaceutical and Life Sciences Companies*, 64 BUS. LAW. 691, 692 (2009); see also Breon S. Peace & James Corsiglia, *Foreign Corrupt Practices Act: Law, Compliance & Recent Developments*, 1973 PLI/CORP 565, 574 (2012) (“In the past few years, the number of enforcement actions has risen substantially, and the magnitude of the penalties imposed for FCPA violations has significantly increased [F]ines for FCPA violations have soared into the hundreds of millions of dollars.”).

41. Judgment in a Criminal Case at 5, *United States v. Kellogg Brown & Root LLC*, No. 4:09-cr-00071 (S.D. Tex. Feb. 11, 2009) [hereinafter Judgment for KBR], available at <http://www.justice.gov/criminal/fraud/fcpa/cases/kelloggb/02-12-09kbr-judgment.pdf>; Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges KBR and Halliburton for FCPA Violations (Feb. 11, 2009) [hereinafter KBR Press Release], <http://www.sec.gov/news/press/2009/2009-23.htm>. In addition, KBR’s current and former parent companies, KBR, Inc. and Halliburton Company, agreed to pay \$177 million to settle parallel civil charges with the SEC. *Id.*

42. Judgment in a Criminal Case, *United States v. BAE Systems PLC*, No. 1:10-cr-00035 (D. D.C. Mar. 1, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/>

for FCPA violations is \$800 million, imposed in 2008 against the German company Siemens AG.⁴³ Massive fines such as these, combined with the increased enforcement effort, has put a spotlight on some of the deficiencies in the FCPA, particularly with regard to the liability of corporations under the Act.⁴⁴

B. Corporate Criminality and the FCPA

Despite disagreement on how to punish and the reasons for punishment, there is virtually no debate about the need for a set of criminal laws that applies to conduct of individuals. Corporate criminal liability, on the other hand, is more contested.⁴⁵ Indeed, some scholars suggest that companies should have a compliance defense that would apply in all situations.⁴⁶

Although there are strong arguments for and against

cases/bae-system/03-02-10baesystems-judgment.pdf.

43. Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008), available at <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>. This amount combines a \$450 million criminal fine assessed by the DOJ and a \$350 million civil fine to the SEC. *Id.* In addition, Siemens was assessed \$856 million in fines for violations of Germany's anti-bribery statute, bringing the total combined fines to \$1.6 billion. *Id.*

44. See Garrett, *supra* note 37, at 1829–30 (noting that in “carefully scrutiniz[ing] recent trends in FCPA enforcement,” the defense bar highlights “aggressive enforcement and larger penalties”); see also Peter J. Henning, *Taking Aim at the Foreign Corrupt Practices Act*, N.Y. TIMES DEALBOOK (Apr. 30, 2012, 1:55 PM), <http://dealbook.nytimes.com/2012/04/30/taking-aim-at-the-foreign-corrupt-practices-act/> [hereinafter Henning, *Taking Aim at the FCPA*] (“The push for changes in the statute coincided with its expanded enforcement as companies now have to deal with the vagaries of the law once viewed as a mild nuisance at best.”).

45. See, e.g., Andrew Weissmann with David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411 (2007) (challenging the criminal corporate liability doctrine).

46. See, e.g., Ellen S. Podgor, *A New Corporate World Mandates a “Good Faith” Affirmative Defense*, 44 AM. CRIM. L. REV. 1537, 1538 (2007) (advocating for an affirmative defense available to corporations faced with criminal charges and arguing that “law-abiding corporations . . . who present ‘good faith’ efforts to achieve compliance with the law” should be offered an affirmative defense); Weissmann with Newman, *supra* note 45, at 411, 414 (stating that the government should bear the burden of proving the corporation failed to establish internal policies and procedures to detect and deter illegal conduct and arguing that tying criminal liability to the lack of an effective compliance program will effectively incentivize companies to devise, implement, and monitor compliance programs).

adopting a general compliance defense for companies, it is apparent that the FCPA is unique and should be considered separately.⁴⁷ First of all, the conduct that the FCPA seeks to restrict can at times be nearly indistinguishable from conduct that is legal. For instance, campaign contributions are not only legal in this country, they are encouraged.⁴⁸ Of course, the run of the mill bribe and the run of the mill campaign contribution are easily distinguishable.⁴⁹ But when dealing in grey areas, there is a thin and blurry line between a legal campaign contribution and an illegal bribe.⁵⁰ Some scholars have even pointed out that “[b]ribery is an act distinguished from other reciprocities only if it is socially identified and socially condemned.”⁵¹ When illegal conduct and legal conduct are difficult to distinguish, greater consideration should be given to including defenses for that illegal conduct.

Most importantly, the need for a compliance defense in the FCPA is great due to the vast amount of uncertainty surrounding the statute.⁵² There has been very little legislative guidance with the FCPA, as Congress has only amended the Act twice in its forty years of existence.⁵³ Additionally, there are relatively few court decisions interpreting the Act, as a vast

47. See Koehler, *Revisiting Compliance Defense*, *supra* note 7, at 619 (arguing for a specific FCPA compliance defense due to the “unique aspects and challenges of complying with the FCPA”). Additionally, for practical concerns, it would be much easier for a legislature to pass an amendment to one statute rather than enact sweeping legislation that would allow a compliance defense for all corporate criminal laws. See Peter J. Henning, *Be Careful What You Wish For: Thoughts on a Compliance Defense Under the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 883, 890–91 (2012) (discussing other criminal provisions for which corporations would like to use compliance as a defense).

48. See HENNING & RADEK, *supra* note 19, at 315.

49. See *id.* (“The enticer does not generally pay money directly to the public representative.”).

50. See *id.* (noting the difficulties in this distinction).

51. JOHN T. NOONAN, JR., BRIBES 3 (1984).

52. See Westbrook, *supra* note 24, at 498 (“At present, the lines are sketched by a disjointed collection of ad hoc and ex post decisions, and speculation on the part of the bar—hardly the way to run a railroad, much less a regulatory statute with criminal sanctions, where clarity is at a premium.”).

53. *Id.* at 496–97.

number of FCPA cases settle.⁵⁴ Although it may seem strange to think of settling a criminal case, this is essentially what occurs due to the DOJ's prevalent practice of using deferred prosecution agreements (DPAs) or non-prosecution agreements (NPAs).⁵⁵ Because no company wants to risk becoming the next Arthur Anderson, it is much easier to simply negotiate with the DOJ rather than face trial.⁵⁶ As a result of these realities, "companies that intend to comply with the FCPA must do so with no recent legislative, and little judicial or administrative, guidance."⁵⁷ Businesses hate uncertainty.⁵⁸ The majority of businesses try to follow the law, but those efforts are much harder when the law is unclear.⁵⁹

The final reason why the FCPA warrants individual consideration is that it seeks to regulate conduct committed abroad. "[T]he international nature of all FCPA prosecutions, while not unique, is certainly unusual compared with other federal criminal statutes."⁶⁰ Unfortunately, the reality of doing

54. *Id.* at 497; *see also* Michael B. Mukasey, *Correct the Foreign Corrupt Practices Act*, USA TODAY, Apr. 30, 2012, at A8, available at <http://usatoday30.usatoday.com/news/opinion/story/2012-04-29/Foreign-Corrupt-Practices-Mukasey/54631334/1> ("Most cases are decided not in court but in prosecutors' offices, where costly settlements substitute for risky legal fights."). Moreover, the few cases that do not settle and are resolved by courts usually involve individuals. *See, e.g.*, *United States v. Kay*, 513 F.3d 432, 439–40 (5th Cir. 2007); *United States v. Kozeny*, 667 F.3d 122 (2d Cir. 2011). Virtually all FCPA allegations against a corporation are settled or result in a guilty plea.

55. Koehler, *Revisiting Compliance Defense*, *supra* note 7, at 649 & n.171.

56. Thomas Fox, *FCPA Enforcement: Why Corporations Support DPAs & NPAs*, CORP. COMPLIANCE INSIGHTS (Apr. 12, 2012), <http://www.corporatecomplianceinsights.com/fcpa-enforcement-why-corporations-support-dpas-npas/>; *see also* Koehler, *Revisiting Compliance Defense*, *supra* note 7, at 649.

57. Westbrook, *supra* note 24, at 497.

58. *See* Mukasey, *supra* note 54 ("Without clear standards, American businesses will begin to cede global markets to less ethical foreign competitors, making America less competitive and costing jobs.").

59. *See* Westbrook, *supra* note 24, at 498–99 (noting that due to the confusion surrounding what the law requires and resulting uncertainty in how to design an efficient and effective compliance program, compliance programs are likely to be expensive and ineffective). For an example of how businesses react to an unclear provision of the FCPA, *see infra* notes 160–67 and accompanying text (noting how companies struggle to communicate to their employees what constitutes a "foreign official" under the FCPA).

60. William B. Jacobson, *No Legislation Necessary: A Five-Part Test to Negate*

widespread international business is that it is extremely difficult to avoid corrupt officials.⁶¹ Indeed, the DOJ's former FCPA Unit Chief noted that companies with business in international markets are "reacting to a world not of their making," and that "[a]s the world shrinks[,] companies who seek to do the right thing can't help but confront corrupt officials—as customers, regulators and adjudicators—and confront them often."⁶² Others have observed that while many nations now have "anti-corruption statutes on their books," those laws are seldom enforced and "honored mainly in the breach."⁶³ Thus, there are some who claim that "[i]t is this reality that most warrants a specific FCPA compliance defense."⁶⁴ Because of these various concerns, this Article will exclusively argue the merits of a compliance defense for the FCPA, as opposed to corporate criminal liability in general.

III. SHOULD A COMPLIANCE DEFENSE BE ADOPTED?

In the debate surrounding adoption of an FCPA compliance defense, there are a variety of positions on each side. This Part will begin by examining the critics' principle arguments, pointing out counter-arguments along the way.⁶⁵ It will then examine arguments from supporters of a defense, in addition to those concerns that have already been raised. ⁶⁶ After nit

Corporate Criminal Liability in FCPA Cases, 91 CRIM. L. REP. (BNA) 77, 79 (2012).

61. Koehler, *Revisiting Compliance Defense*, *supra* note 7, at 619–20.

62. *Id.* (quoting Joseph Covington). Even courts have acknowledged the fact that paying bribes in certain countries is just "business as usual." *United States v. Kay*, 513 F.3d 432, 439 (5th Cir. 2007). *Kay* concerned bribes made in Haiti by an employee of American Rice, Inc., paid through the company's Haitian subsidiary, Rice Corporation of Haiti (RCH). *Id.* The Fifth Circuit noted that "the standard practice of Haitian government officials was to routinely press companies like RCH to pay for local service, and almost all companies, including RCH's competitors, paid." *Id.*

63. Jacobson, *supra* note 60, at 79.

64. Koehler, *Revisiting Compliance Defense*, *supra* note 7, at 620.

65. *See infra* Part III.A. It seems that the overall battle cry of critics is to make the Act clearer. *See, e.g.*, WEISSMANN & SMITH, *supra* note 14, at 6 ("Of course, the solution . . . is not to do away with the FCPA and permit American companies to engage in bribery alongside their foreign competitors. Rather, the FCPA should be modified to make clear what is and what is not a violation.").

66. *See supra* Part II.B. Indeed, the arguments in favor of considering the FCPA separately serve a dual role and are some of the strongest arguments for adoption of a

picking these various points-of-view, it becomes clear that critics of the idea are less persuasive.⁶⁷

A. Arguments Against a Compliance Defense

In 2010, the U.S. Chamber of Commerce proposed, among other things, the addition of a compliance defense to the FCPA.⁶⁸ In response, Professors David Kennedy and Dan Danielsen claimed that adding an affirmative compliance defense would be “potentially very dangerous.”⁶⁹ They further argued that “[c]reating a ‘compliance defense’ to knowing and intentional violations of the Act would amount to eliminating criminal liability under the Act all together by permitting a ‘fig leaf’ compliance program to insulate companies from knowing and intentional wrong-doing.”⁷⁰ The crux of their argument relies on the FCPA’s high mens rea requirements.⁷¹ Because a defendant can only be guilty upon a finding of high intent standards, they argue, a “good faith” compliance defense is “logically incompatible.”⁷²

However, this analysis ignores the role of respondeat

compliance defense—especially the uncertainty surrounding the FCPA and the harsh realities of international business. *Id.*

67. A compliance defense may not add the desired clarity to existing provisions for individual violators. *But see infra* Part IV.B (arguing that a compliance defense would encourage companies to challenge other aspects of the FCPA and, over time, lead to greater clarity going forward). However, it would undoubtedly provide some protection for companies against unclear provisions and equip them with much-needed leverage against an aggressive DOJ. *See infra* notes 76–77, 96–110 and accompanying text (discussing the power imbalance between the DOJ and an FCPA corporate defendant).

68. *See generally* WEISSMANN & SMITH, *supra* note 14. The proposal for a compliance defense is seen as relatively modest compared to the Chamber’s other suggestions. *See* KENNEDY & DANIELSEN, *supra* note 16, at 6 (acknowledging that the compliance defense is “[o]ften seen as the least concerning of the Chamber’s proposals”).

69. KENNEDY & DANIELSEN, *supra* note 16, at 6.

70. *Id.* at 31.

71. *Id.* at 29–31. The FCPA requires that a defendant act corruptly and willfully. 15 U.S.C. §§ 78dd-2(a), (g) (2012). Unfortunately, the mens rea is not as clear as Kennedy and Danielsen claim it is. *Compare* KENNEDY & DANIELSEN, *supra* note 16, at 30 (labeling the mens rea terms under the FCPA as “articulated and clearly-defined standards”), *with* *United States v. Kay*, 513 F.3d 432, 447–49 (5th Cir. 2007) (stating that “[t]he definition of ‘willful’ in the criminal context remains unclear” and struggling with which of the various definitions should apply in the context of the FCPA).

72. KENNEDY & DANIELSEN, *supra* note 16, at 30.

superior in satisfying the mens rea.⁷³ Under respondeat superior, a company can be liable for bribes paid by their agents or employees acting within the scope of their employment and intending to benefit the company.⁷⁴ Thus, one rogue employee can cause massive FCPA liability for a company.⁷⁵ Additionally, Kennedy and Danielsen fail to take into account the enormous power the DOJ has in prosecuting violations of the FCPA. Because companies refuse to take the risk of challenging them, and instead choose to settle, the DOJ essentially never has to prove the mens rea in court.⁷⁶ Rather, companies readily admit in DPAs and NPAs, among other things, that they had the requisite intent.⁷⁷ Therefore, although there is a high mens rea standard, in practice, it rarely prevents the DOJ from imposing massive corporate fines under respondeat superior principles.

Other critics argue, rather simplistically, that a compliance program is not effective if it failed to prevent bribery in the first place, and thus it should not allow the company to escape liability.⁷⁸ Because even the DOJ itself concedes that “no

73. See Podgor, *supra* note 46, at 1539 (acknowledging the “growth of respondeat superior accountability for the corporation by caselaw” resulting in using the “collective knowledge of individuals within an entity” to allow a finding of criminal conduct). Professor Mike Koehler, an ardent supporter of an FCPA compliance defense, observed that Kennedy and Danielsen “simply gloss over this fundamental concept in their compliance defense rebuttal and the term (or general concept) *respondeat superior* does not even appear in their analysis.” Koehler, *Revisiting Compliance Defense*, *supra* note 7, at 627.

74. *Id.* at 657.

75. See WEISSMANN & SMITH, *supra* note 14, at 13 (noting that the FCPA “permits indictment of a corporation even for the acts of a single, low-level rogue employee”).

76. See Koehler, *Revisiting Compliance Defense*, *supra* note 7, at 627 n.73 (“The only time in the FCPA’s history that a corporate FCPA charge was presented to a jury was in the Lindsey Manufacturing case in 2011.” (quoting Mike Koehler, *Off-Target*, FCPA PROFESSOR (Oct. 17, 2011), <http://www.fcpaprofessor.com/off-target>)). However, a judge later vacated the convictions against Lindsey and dismissed the indictment due to prosecutorial misconduct. *Id.*

77. See, e.g., Deferred Prosecution Agreement at 2–3, *United States v. Orthofix Int’l, N.V.*, No. 4:12-cr-00150 (E.D. Tex. July 10, 2012) [hereinafter Orthofix DPA], available at <http://www.justice.gov/criminal/fraud/fcpa/cases/orthofix/2012-07-10-orthofix-dpa.pdf> (admitting responsibility for its employees and agreeing to not contradict the statement of facts, which claims that an Orthofix executive had knowledge of bribes paid to Mexican officials).

78. See, e.g., *Concerns About the U.S. Chamber Institute of Legal Reform’s*

compliance program can ever prevent all criminal activity by a corporation's employees," this is a weak argument.⁷⁹ In fact, quite ironically, several companies that have been investigated for, or charged with FCPA violations have simultaneously been recognized as being some of the "World's Most Ethical Companies."⁸⁰

In addition, other critics claim that a compliance defense, if adopted, will have little effect on the FCPA landscape.⁸¹ Howard Sklar articulates the argument nicely:

Companies cannot and will not raise affirmative defenses. The reason for this is simple: for a company to raise an affirmative defense, it has to actively defend itself in an FCPA litigation. Corporations cannot afford to fight these cases through to the stage where an affirmative defense becomes relevant.⁸²

Although this is an interesting point, it is highly speculative, and is certainly not a strong enough reason by itself to justify rejection of a compliance defense.⁸³

Finally, critics cite the fact that companies continue to

Proposals for Amending the FCPA, GLOBAL FIN. INTEGRITY, http://www.gfintegrity.org/storage/gfip/documents/Capitol_Hill/fcpa_response_to_us_chamber.pdf (last visited Nov. 3, 2013) ("If a company is found to be in violation of the FCPA, then the existence of a company's compliance program must not have prevented the acts of bribery.").

79. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-28.800 (2008) [hereinafter USAM], available at http://www.justice.gov/usa/eousa/foia_reading_room/usam/title9/28mcrm.htm. Additionally, the U.S. Sentencing Guidelines Manual concedes that "[t]he failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct." U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 8B2.1(a) (2012) [hereinafter SENTENCING GUIDELINES], available at http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/2012_Guidelines_Manual_Full.pdf.

80. See Koehler, *Revisiting Compliance Defense*, *supra* note 7, at 616 & n.16 (describing Ethisphere's "World's Most Ethical Companies" award and listing nine companies that have received the designation after resolving FCPA enforcement action or while "otherwise subject to FCPA scrutiny").

81. See, e.g., Howard Sklar, *Against an FCPA Compliance Defense*, FORBES (Oct. 18, 2011, 4:32 PM), <http://www.forbes.com/sites/howardsklar/2011/10/18/against-an-fcpa-compliance-defense/> (noting that "making compliance an affirmative defense is useless" due to the fact that most FCPA violations are settled as opposed to ending up in court).

82. *Id.* In short, a company "cannot rely on a defense that requires it to fight." *Id.*

83. For more on this argument, see *infra* Part IV.A.

violate the FCPA, despite being aware of the severe consequences for such violations.⁸⁴ Therefore, critics argue, the FCPA should not be weakened by adding a compliance defense.⁸⁵ Recently, the New York Times broke a story that Wal-Mart had suppressed internal inquiries into bribes paid by their Mexican subsidiary in 2005.⁸⁶ The scandal quickly dominated headlines, bringing the FCPA “to the attention of the public in a way not seen since the 1970s scandals that led to its adoption.”⁸⁷ Some critics cite the scandal as proof that a compliance defense would not discourage bribery.⁸⁸ Regardless of whether this is true, practically speaking, in this environment, “Congress may find it politically impossible to adopt changes to the statute.”⁸⁹ However, the actions of one

84. See *Editorial: Wal-Mart Scandal Makes Case for Tough Bribery Law*, USA TODAY, Apr. 30, 2012, <http://usatoday30.usatoday.com/news/opinion/editorials/story/2012-04-29/Wal-Mart-bribery-Mexico/54631534/1> (criticizing a compliance defense as amounting to a “get-out-of-jail-free card” for violators following revelation of foreign bribes by Wal-Mart).

85. See, e.g., Samuel Rubinfeld, *Wal-Mart Bribery Allegations Stir Up FCPA Debate Anew*, WALL ST. J. (Apr. 24, 2012, 5:01 PM), <http://blogs.wsj.com/corruption-currents/2012/04/24/wal-mart-bribery-allegations-stir-up-fcpa-debate-anew/> (statement of Stefanie Ostfeld, a policy advisor for Global Witness) (“Congress should think seriously about how introducing a bill that would weaken [the FCPA] would damage their reputations. The United States should be doing more to crack down on corruption; this is not a time for backsliding.”). Of course, this assumes that adding a compliance defense would indeed weaken the Act. Some challenge that assumption, and instead feel that the FCPA would be strengthened by a compliance defense. See, e.g., Mike Koehler, *That’s Strengthening, Not Weakening And That’s A Race to the Top, Not the Bottom*, FCPA PROFESSOR (Apr. 11, 2012) [hereinafter Koehler, *Strengthening the FCPA*], <http://www.fcpaprofessor.com/thats-strengthening-not-weakening-and-thats-a-race-to-the-top-not-the-bottom> (arguing that an FCPA compliance defense strengthens the FCPA and advances the objective of reducing bribery); see also *infra* Part IV.B.

86. David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 22, 2012, at A1.

87. Henning, *Taking Aim at the FCPA*, *supra* note 44.

88. See, e.g., Thomas Fox, *How Wal-Mart Killed the Compliance Defense*, FCPA BLOG (Apr. 27, 2012, 2:28 AM), <http://www.fcpablog.com/blog/2012/4/27/how-wal-mart-killed-the-compliance-defense.html> (“The Wal-Mart scandal demonstrates clearly that amending the FCPA to allow a compliance defense won’t incentivize compliance. Here, the world’s largest retailer had a compliance program in place yet is now alleged to have paid over \$24 million in bribes, and then covered it up. It is hard to see how having a compliance defense would have led to greater compliance at Wal-Mart.”).

89. Henning, *Taking Aim at the FCPA*, *supra* note 44; see also Rubinfeld, *supra*

corporation, no matter what size, should not single-handedly determine the future of an FCPA compliance defense.⁹⁰ More importantly, those who use Wal-Mart as a battle cry for quelling reform efforts fail to consider if a compliance defense would even apply to Wal-Mart.⁹¹

B. Arguments For a Compliance Defense

One of the principle reasons advanced in support of a compliance defense is the claim that the FCPA deters foreign investment. Indeed, there is empirical evidence to back up this claim.⁹² After examining multiple empirical studies, Professor Andrew Spalding concluded that “the latest empirical studies suggest that anti-bribery legislation has a deterrent effect on investment in countries where bribery is perceived to be more prevalent.”⁹³ Thus, in practice, the FCPA produces a disincentive to invest in emerging markets, which is counterintuitive to one of the FCPA’s primary goals of promoting ethical business in those markets.⁹⁴ Many, including Professor

note 85 (statement of James Post) (“[T]he Wal-Mart case is so consequential it basically freezes the possibility of reform any time soon.”). Even supporters of a compliance defense acknowledge this. See, e.g., Mike Koehler, *What Will Be Wal-Mart’s Effect on FCPA Reform?*, CORP. COMPLIANCE INSIGHTS (May 11, 2012), <http://www.corporatecomplianceinsights.com/what-will-be-wal-marts-effect-on-fcpa-reform/> (recognizing that “recent news regarding Wal-Mart could impact FCPA reform” due to the press surrounding the case).

90. See Rubinfeld, *supra* note 85 (noting that Ian Koski, a spokesman for Democratic Senator Chris Coons who is open to amending the FCPA, stated that “the Wal-Mart investigation is ongoing and that the senator wouldn’t decide legislative policy based on a news story”). Indeed, Koski stated that “Wal-Mart was allegedly ignoring the FCPA,” and that “[i]t doesn’t look like changing the law would change the situation in the Wal-Mart case.” *Id.* (statement of Ian Koski).

91. See *infra* notes 144–47 and accompanying text (arguing that Wal-Mart would not be able to use a proposed compliance defense).

92. See generally Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions against Emerging Markets*, 62 FLA. L. REV. 351 (2010) [hereinafter Spalding, *Unwitting Sanctions*] (discussing the collateral effects of anti-bribery legislation).

93. *Id.* at 374.

94. See *id.* at 401 (noting that any changes in the drafting or enforcement of anti-bribery legislation “should create a disincentive to bribe but not a disincentive to invest” due to the purpose of the FCPA in promoting ethical business in emerging markets); see also Mukasey, *supra* note 54 (“[S]ome companies have not pursued foreign business

Spalding, believe that a compliance defense would “substantially mitigate the sanctioning effect of FCPA enforcement, as the risk of doing business in foreign markets would significantly decrease.”⁹⁵

In addition, a compliance defense should be considered to help counter questionable DOJ enforcement efforts that have been heavily criticized at times.⁹⁶ Again, due to the enormous power the DOJ has, few choose to challenge its interpretation of the Act.⁹⁷ Thus, in the FCPA environment, the law has proven to be not what courts interpret it to be, but rather what the DOJ says the law is.⁹⁸ The DOJ should be enforcing the law, not creating the law. Moreover, some have speculated that the DOJ unfairly targets foreign companies.⁹⁹ Out of the ten highest FCPA settlements, only one of those companies is American.¹⁰⁰ Assistant Attorney General Lanny A. Breuer, who is the head of the DOJ’s Criminal Division, suggested the reason for this could be that foreign companies are slower to adapt to the American

development or exited foreign countries altogether, leaving the field to less scrupulous foreign competitors.”).

95. Spalding, *Unwitting Sanctions*, *supra* note 92, at 406; *see also* WEISSMANN & SMITH, *supra* note 14, at 5–7 (discussing the chilling effect of FCPA enforcement on companies doing business in foreign countries and suggesting that the addition of compliance defense would provide a solution to this problem).

96. *See* Charlie Savage, *With Wal-Mart Claims, Greater Attention on a Law*, N.Y. TIMES, Apr. 26, 2012, at B6 (quoting Mike Koehler regarding the Wal-Mart case and how enforcement of the FCPA “has just gone off the rails”). In large part, given the damaging impact that bribery can have, the DOJ’s objective of stopping bribery should be commended. *See supra* notes 11–13 and accompanying text. Indeed, the DOJ has accomplished a great deal and increased global awareness of bribery. KENNEDY & DANIELSEN, *supra* note 16, at 11–12. Nevertheless, the DOJ has a duty to uphold the law and not abuse its prosecutorial discretion.

97. Mukasey, *supra* note 54 (noting that most FCPA cases are decided in prosecutors’ offices, “where costly settlements substitute for risky legal fights”).

98. *See* Savage, *supra* note 96, at B6 (“[T]here is almost no judicial oversight on prosecutors’ interpretation of the act.”); *Bribery Abroad—A Tale of Two Laws*, ECONOMIST, Sept. 17, 2011, at 37, available at <http://www.economist.com/node/21529103> (noting that because only a few number of cases go to trial, “judges have given little guidance as to what the FCPA’s bewildering text actually means” and that “for now, it means whatever an aggressive prosecutor says it does”).

99. *See generally* Leslie Wayne, *Foreign Firms Most Affected by a U.S. Law Barring Bribes*, N.Y. TIMES, Sept. 4, 2012, at B1.

100. *See id.* (noting that KBR is the lone American company).

law.¹⁰¹ He further stated that “[o]ver all, we have pursued cases against American and foreign companies equally.”¹⁰² While that may be true, as long as prosecutors have as much discretion as they currently have, the DOJ will continue to be scrutinized for which companies they target and—more importantly—which companies they do not.

Morgan Stanley, an American financial services firm, is one such company that the DOJ refused to charge with FCPA violations.¹⁰³ After conducting various property dealings with a Chinese official, Garth Peterson, a former executive of Morgan Stanley, pled guilty to violating the FCPA’s internal controls provisions.¹⁰⁴ However, Morgan Stanley avoided any FCPA related claims, in large part because it constructed and maintained a “robust system of internal controls, which provided reasonable assurances that its employees were not bribing government officials.”¹⁰⁵ In short, Morgan Stanley avoided prosecution due to its compliance program.¹⁰⁶ This leads to another argument in favor of adding a compliance defense—if the DOJ recognizes a de facto compliance defense, what would

101. *Id.* at B5.

102. *Id.* (statement of Lanny A. Breuer). According to Breuer, the DOJ “call[s] it down the middle”, as “[s]ome years we are criticized for it being too American, other years that it is too much international. It is usually from the very same critics.” *Id.*

103. Amy Conway-Hatcher, *The Big Three FCPA Lessons from the Morgan Stanley Case*, CORP. COUNSEL (June 14, 2012), <http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202559365222&thepage=1&slreturn=20121019123126>.

104. *Id.*

105. *Id.*; see also Press Release, U.S. Dep’t of Justice, *Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA* (Apr. 25, 2012) [hereinafter Morgan Stanley Press Release], available at <http://www.justice.gov/opa/pr/2012/April/12-crm-534.html> (further detailing the compliance steps taken by Morgan Stanley and the DOJ’s decision not to prosecute the company).

106. Conway-Hatcher, *supra* note 103. However, Professor Mike Koehler suggests that Morgan Stanley avoided charges not because of its compliance program, but because the charges, if brought, would have been extremely weak. See Mike Koehler, *Stop Drinking the Kool-Aid*, FCPA PROFESSOR (Nov. 5, 2012), <http://www.fcprofessor.com/stop-drinking-the-kool-aid> (“The reason Morgan Stanley was not prosecuted for Peterson’s actions is because there was *no basis* to hold Morgan Stanley liable even under lenient respondeat superior standards.”).

be the harm in adding an explicit defense to the statute?¹⁰⁷ The DOJ's own prosecution guidelines provide credit for FCPA compliance programs.¹⁰⁸ In addition, under the U.S. Sentencing Guidelines, compliance programs can result in lower sentences.¹⁰⁹ Indeed, opponents of a compliance defense might spin the question to ask: With these various benefits, what would be the *point* in adding an explicit defense to the statute? Unfortunately, however, the current benefits of a compliance program "are subject to unlimited prosecutorial discretion, are available only after the liability phase of a FCPA prosecution, or both."¹¹⁰ Thus, an explicit statutory defense would be needed to ensure that a company receives the benefit from instituting a robust compliance program.

Furthermore, many point to the anti-bribery laws of other countries to support adoption of an FCPA compliance defense.¹¹¹ According to Professor Mike Koehler, twelve countries—all signatories to the OECD convention—have adopted a compliance-like defense.¹¹² Included in those twelve countries is the United Kingdom, who recently enacted the U.K. Bribery Act that came into force on July 1, 2011.¹¹³ Even though the U.K. Bribery Act is widely considered to be a far more aggressive anti-bribery statute than the FCPA,¹¹⁴ it provides a defense if a

107. See Koehler, *Revisiting Compliance Defense*, *supra* note 7, at 646–48 (discussing the instances in which the DOJ currently recognizes a "de facto compliance defense").

108. See USAM, *supra* note 79, § 9–28.800 (explaining that the "existence and effectiveness of the corporation's pre-existing compliance program" is a factor to be considered in determining whether to charge a corporation).

109. SENTENCING GUIDELINES, *supra* note 79, §§ 8A1.2(b)(2)(D), 8B2.1.

110. WEISSMANN & SMITH, *supra* note 14, at 11.

111. See, e.g., *id.* at 11–13 (discussing compliance-like defenses adopted by other countries); Koehler, *Revisiting Compliance Defense*, *supra* note 7, at 636 ("[S]everal countries have a compliance-like defense relevant to their 'FCPA-like' law.").

112. Koehler, *Revisiting Compliance Defense*, *supra* note 7, at 636, 638.

113. Bribery Act, 2010, c. 23, § 7(2) (Eng.) [hereinafter U.K. Bribery Act], available at http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf; see also Koehler, *Revisiting Compliance Defense*, *supra* note 7, at 636–37 (discussing the Act).

114. Koehler, *Revisiting Compliance Defense*, *supra* note 7, at 636; see also, *Bribery Abroad—A Tale of Two Laws*, *supra* note 98 ("In contrast to the FCPA, it makes no exception for small 'facilitation payments' to speed up routine business such as customs checks or visas.").

company can show that despite a particular case of bribery, the company nevertheless “had in place adequate procedures designed to prevent persons associated with [the company] from [bribing].”¹¹⁵ Critics claim that referencing the U.K. Bribery Act is misleading because it only provides this defense for the strict criminal liability offense created in the U.K. Act.¹¹⁶ Nevertheless, growing international support for a compliance defense at the very least should gain the attention of U.S. lawmakers.

In conclusion, the arguments in favor of adding a compliance defense are much stronger and receive vast support. Even so, drafters should keep in mind concerns of the critics when drafting a compliance defense for the FCPA. Fortunately, many concerns noted by the critics can be quelled by carefully considering what should be required of a company in order to gain the benefits of a compliance defense.¹¹⁷

IV. A POTENTIAL SOLUTION: EXAMINING WILLIAM JACOBSON’S PROPOSAL

William Jacobson, who is the former assistant chief for FCPA enforcement at the DOJ, recently outlined a five-part compliance program defense for FCPA violations.¹¹⁸ The

115. U.K. Bribery Act, *supra* note 113, § 7(2); *see also* Ministry of Justice, The Bribery Act of 2010: Guidance 15 (2011) [hereinafter U.K. Bribery Act Guidance], available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> (further explaining the compliance defense).

116. KENNEDY & DANIELSEN, *supra* note 16, at 31. Kennedy and Danielsen further observed that the U.K. Act “tellingly does not provide any affirmative defense of compliance for those offenses which include a mens rea requirement equivalent to the FCPA”). *Id.* A response to the critics could be simply that the mens rea element is hardly an obstacle for the DOJ when charging a company, and thus is similar to the strict liability offense for which the U.K. Bribery Act allows a compliance defense. *See supra* text accompanying notes 73–77; *see also* Richard L. Cassin, *Justice for Corporate Defendants?*, FCPA BLOG (June 10, 2008, 3:28 AM), <http://www.fcpablog.com/blog/2008/6/10/justice-for-corporate-defendants.html> (“If respondeat superior sounds oppressive and unbalanced, that’s because it is. . . . So forget intent, mens rea, good faith and so on; think instead of strict liability for the employee’s criminal conduct.”).

117. *See infra* Part IV.B (arguing that adopting William Jacobson’s compliance defense would prevent many of the situations that critics point to as a reason for rejecting a compliance defense).

118. Jacobson, *supra* note 60, at 77–78.

proposal has received support from those who vigorously advocate for an FCPA compliance defense.¹¹⁹ Jacobson's test states that a company should not be charged with an FCPA violation if: (1) the company voluntarily discloses the violation; (2) the potential breach did not include illegal conduct by senior leaders within the company; (3) the company cooperates fully with the government; (4) the company agrees to implement appropriate remedial measures to mitigate the chances for future violations; and (5) the company had in place a robust compliance program prior to discovering the misconduct.¹²⁰ Unlike many compliance defense proposals, however, Jacobson suggests his plan should be adopted as DOJ policy, rather than as an amendment to the FCPA.¹²¹

Jacobson states that his plan is necessary because "[c]urrent FCPA enforcement policy punishes rather than rewards companies that do all they can reasonably be expected to do to deter corruption and to cooperate with the government."¹²² According to Jacobson, his plan will produce numerous benefits for both responsible corporations and the U.S. government.¹²³ The government will benefit by an increased amount of voluntary disclosures, which would help expose more bribery than the DOJ could expose through its own investigations.¹²⁴ Furthermore, the DOJ would still be free to pursue FCPA claims against the individuals who committed the violations.¹²⁵ Indeed,

119. See, e.g., Richard L. Cassin, *Revive Jacobson's Good-Faith Compliance Plan*, FCPA BLOG (Aug. 27, 2012, 4:28 AM), <http://www.fcpablog.com/blog/2012/8/27/revive-jacobsons-good-faith-compliance-plan.html> [hereinafter Cassin, *Revive Jacobson's Plan*]; Mike Koehler, *How Many Does it Take?*, FCPA PROFESSOR (Apr. 30, 2012), <http://www.fcpaprofessor.com/how-many-does-it-take> [hereinafter Koehler, *How Many Does it Take*].

120. Jacobson, *supra* note 60, at 77–78.

121. See *id.* at 77 (“[T]here is no need to tinker with the statute. Instead, the Department of Justice could, and should, exercise its prosecutorial discretion and commit to not bringing FCPA-related criminal charges against companies [that meet the five-part test].”). For criticism of this approach, see *infra* Part IV.A.

122. Jacobson, *supra* note 60, at 80.

123. *Id.* at 79.

124. *Id.* Additionally, those disclosures could result in the discovery of additional violations of other companies. *Id.* (noting that “one disclosure could lead to multiple enforcement actions,” as it has before in freight-forwarder and medical device cases).

125. *Id.*

those prosecutions would be made easier for the DOJ with the requirement that companies cooperate with any investigations.¹²⁶ Responsible corporations will benefit by being rewarded for their efforts in implementing a compliance program.¹²⁷ In addition, this would make the decision to disclose a less stressful one, allowing management and the board of directors to focus on their business.¹²⁸

A. *Explicit, Affirmative Defense or Procedure for DOJ to Follow?*

Although each step of Jacobson's plan is sensible and insightful, his proposal to adopt a compliance defense as DOJ policy is more questionable. Jacobson's suggestion would be a nice response to the assertion that an affirmative defense would be useless and that companies would never risk raising it.¹²⁹ However, it would do little to correct the enormous power imbalance that the DOJ has in FCPA cases.¹³⁰ As a DOJ policy, prosecutors would still possess vast amounts of discretion, especially in determining whether the company had a robust compliance program or not. Even those who have endorsed

126. *Id.*

127. *Id.*

128. *Id.* Currently, the decision to disclose an FCPA violation is a very difficult, time-consuming process. See Assistant Attorney General Lanny Breuer, Prepared Address at the 22nd National Forum on the Foreign Corrupt Practices Act, at 4 (Nov. 17, 2009), available at <http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf> ("We recognize the issues of costs to companies to implement robust compliance programs, to hire outside counsel to conduct in-depth internal investigations, and to forego certain business opportunities that are tainted with corruption."); Alexandra Wrage, *Should Companies Turn Themselves in for FCPA Violations?*, CORP. COUNSEL (Aug. 24, 2012), <http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202568710892&slreturn=20121012234648> (discussing the resulting efficiency that can occur from a company's disclosure and the distractions that can be avoided by full cooperation of the company). Despite the DOJ's statements that companies who voluntarily disclose will be treated more favorably, there is nothing to prove this actually occurs. *Id.*; Jacobson, *supra* note 60, at 79. According to Wrage, "[t]hose that disclose make a bet on lenience; those that don't make a different bet, that the certainty of a fine, penalty, or reputational hit from disclosing an FCPA issue offsets the government's assurance that it is better to go to the DOJ before it comes to you." Wrage, *supra* note 128.

129. See *supra* notes 81–83 and accompanying text (introducing and discussing that argument).

130. See *supra* notes 76–77 and 96–110 and accompanying text.

Jacobson's plan have scrutinized this approach because of these concerns.¹³¹ On the other hand, a legislative amendment would provide increased balance and clarity.¹³² Further, even if a company still chooses to settle an FCPA case, they would have more leverage if they could arguably meet the defense—therefore, a company will still receive a real, tangible benefit from attempting to deter bribery from within. For these reasons, Jacobson's plan should be adopted as a legislative amendment to the FCPA, rather than as a non-binding DOJ policy.¹³³

B. How this Solution Could Further the Goals of the FCPA

Most bribes are paid by individuals acting without the consent of high-level management, the board, or the shareholders of a company.¹³⁴ Thus, it stands to reason that to prevent bribery, individuals need to be deterred from doing so.¹³⁵ This can be done by punishing individuals who commit bribery and through incentivizing companies to cut off bribery before it begins. Adopting Jacobson's plan as an amendment would help accomplish both of those objectives. As discussed, because one of the elements requires cooperation from

131. See, e.g., Koehler, *How Many Does it Take*, *supra* note 119.

132. See *id.* (stating that “non-binding DOJ policy and procedure is not the best way to accomplish real and meaningful FCPA reform,” and claiming that the “best solution” is to add a compliance defense to the FCPA).

133. Admittedly, this runs directly counter to the point of Jacobson's article—after all, the title of the article is *No Legislation Necessary*. Nevertheless, given the reasons discussed, it seems a modified version of Jacobson's plan is the best approach.

134. Koehler, *FCPA 101*, *supra* note 8; see also Interview by Corporate Crime Reporter with Thomas Fox, 26 CORP. CRIME REP. 18 (May 1, 2012) [hereinafter Interview with Thomas Fox], available at <http://www.corporatecrimereporter.com/walmartfcpa05012012.htm> (observing that using respondeat superior is “how typically you would get to a corporation [for] . . . an FCPA violation”); Koehler, *Revisiting Compliance Defense*, *supra* note 7, at 619 (noting that egregious facts such as in the Siemens case, where the corporate culture encouraged bribery, “are seldom the cause of corporate FCPA enforcement actions”).

135. Lanny Breuer himself has acknowledged this is the best way to deter bribery. Assistant Attorney General Lanny A. Breuer Speaks at IBC Legal's World Bribery & Corruption Compliance Forum, U.S. DEP'T OF JUSTICE (Oct. 23, 2012), available at <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-121023.html> (“As I have said repeatedly, the strongest deterrent against corporate wrongdoing is the prospect of prison time. That is why I have put such a high priority on making sure that individuals are prosecuted . . .”).

companies, Jacobson's proposal would indeed increase prosecutions against individuals, providing an increased deterrent effect.¹³⁶ Furthermore, a compliance defense, such as Jacobson's, would "encourage companies to implement rigorous training and compliance programs most likely to head off misconduct at the pass."¹³⁷ Companies should be incentivized to implement compliance programs, as that would inevitably lead to less bribery.¹³⁸ In fact, without the protection of a compliance defense, a company could be dissuaded from implementing a program entirely.¹³⁹ Moreover, the alleged benefits a company can receive from the DOJ for self-detecting and self-disclosing are too unclear and speculative to change this.¹⁴⁰ Jacobson's defense, on the other hand, would provide a clear and explicit benefit that would encourage companies to put more effort into complying with the FCPA.

In addition to the above, providing companies with Jacobson's compliance defense would lead to further clarity in the Act. Charged companies that believe they could satisfy the defense would be more likely to take the risk of defending themselves in court. Once there, they likely would also challenge other provisions of the FCPA. This would lead to more judicial

136. *Supra* notes 125–26 and accompanying text.

137. T. Markus Funk & M. Bridget Minder, *The FCPA in 2011 and Beyond: Is Targeted FCPA Reform Really the "Wrong Thing at the Wrong Time"?*, 6 BLOOMBERG L. REP.—CORP. AND M&A LAW 1, at 2 (2011).

138. *See* Koehler, *Revisiting Compliance Defense*, *supra* note 7, at 654–57 (providing an in-depth analysis of a compliance defense incentivizing corporate compliance).

139. WEISSMANN & SMITH, *supra* note 14, at 13–14. The Supreme Court has made this argument in the Title VII context. *See generally* *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999). In *Kolstad*, the Court held that "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with Title VII." *Id.* at 545 (internal citations and quotations omitted). In so holding, the Court recognized that—similar to the FCPA—Title VII's "primary objective is a prophylactic one; it aims, chiefly, not to provide redress but to avoid harm." *Id.* (internal citations and quotations omitted). The Court then claimed that holding otherwise "would reduce the incentive for employers to implement antidiscrimination programs." *Id.* at 544.

140. Jacobson, *supra* note 60, at 79; *see also* Wrage, *supra* note 128 (explaining that the benefits from disclosing "are unclear and hard to quantify").

decisions concerning the Act. Additionally, perhaps this would allow companies to focus their finite compliance resources and create programs that more efficiently and effectively combat bribery. Of course, this depends on companies' willingness to defend themselves in court. But it would be a sad state of affairs if companies that meet the requirements felt unable to defend themselves against criminal allegations.

Many critics assert that a compliance defense would give companies a free pass to commit bribery.¹⁴¹ But this view assumes the defense would apply to every company with some form of a compliance program. Clearly, the defense requires more than just having a compliance program on paper—Jacobson's proposal calls for a robust compliance program.¹⁴² Additionally, the defense would not prevent all FCPA enforcement efforts.

On its face, Jacobson's proposal eliminates the possibility of a company acquiring the defense if high-level management participated in violations, if the company did not disclose violations, or if the company did not have in place its compliance program at the time of the violation.¹⁴³ Examining the facts of Wal-Mart helps illustrate this point. As discussed, Wal-Mart is often used as a "poster child" for those opposed to a compliance defense.¹⁴⁴ However, Wal-Mart clearly does not meet the requirements for this defense.¹⁴⁵ First of all, Wal-Mart did not disclose its violations. Indeed, according to the allegations, it did the opposite; after reports of bribery of Mexican officials

141. See Christopher M. Matthews, *An FCPA Debate For The Ages*, WALL ST. J. (Mar. 28, 2012, 6: 27 PM), <http://blogs.wsj.com/corruption-currents/2012/03/28/an-fcpa-debate-for-the-ages/> (quoting Mark Mendelsohn, former deputy chief of the DOJ's FCPA team, who stated that a call for a compliance defense is "a longing for the days, years ago, when there were relatively few prosecutions under the statute").

142. Jacobson, *supra* note 60, at 78.

143. *Id.* at 77–78.

144. Interview with Thomas Fox, *supra* note 134 (stating that after the Wal-Mart case, the DOJ "will just hold up a picture of Wal-Mart and that will be the poster child").

145. See Andy Spalding, *The Good Faith Compliance Defense, Unscathed*, FCPA BLOG (Apr. 26, 2012, 2:52 AM), <http://www.fcpablog.com/blog/2012/4/26/the-good-faith-compliance-defense-unscathed.html> ("Let me be blunt: assuming the allegations to be true, had the FCPA been amended to include a good-faith compliance defense, Wal-Mart would not be eligible for it.").

surfaced, top executives took steps to cover up the bribes.¹⁴⁶ When Wal-Mart eventually approved an internal investigation into the bribes, rather than assign an independent and impartial investigator, it assigned investigative duties to management of the Mexican subsidiary that committed the bribes.¹⁴⁷ In these circumstances, it is difficult to picture any form of a compliance defense applying. Thus, pointing to situations where the compliance defense is not applicable—such as Wal-Mart—as a reason for anti-reform is not convincing. Jacobson’s defense ensures that the only companies that can use the defense are those that are actively trying to detect and prevent bribery.

V. HOW TO MAKE A COMPLIANCE PROGRAM EFFECTIVE

Although Jacobson’s proposal addresses many concerns of both supporters and critics of an FCPA compliance defense, the proposal leaves an open question of what a “robust” compliance program is. Compliance programs should be tailored to the specific needs of each company that implements one.¹⁴⁸ Because of this customization, it would be unwise to include specified requirements for a compliance program in legislative form.¹⁴⁹

146. Barstow, *supra* note 86, at A1.

147. *Id.*

148. For example, a small U.S. retail company whose only international business is conducted with private companies in Canada would need a far less rigorous FCPA compliance program than a large U.S. pharmaceutical company that operates in numerous foreign countries, including Mexico and Iraq. First of all, the pharmaceutical company does business in countries with higher FCPA risks. See *Corruption Perceptions Index 2012*, TRANSPARENCY INT’L, <http://cpi.transparency.org/cpi2012/results/> (last visited Sept. 15, 2013) (ranking countries by perceived level of public corruption, and listing Canada at 9 (tied), while listing Mexico at 105 and Iraq at 169). Additionally, the second company operates in a high-risk industry that the DOJ aggressively pursues. See Breuer, *supra* note 128 (noting stepped-up enforcement in the pharmaceutical industry and stating that “[i]n some foreign countries and under certain circumstances, nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a drug product may involve a ‘foreign official’ within the meaning of the FCPA”). Finally, the retail company only deals with private companies, meaning less interaction with government officials. All of this adds up to considerably less risk of FCPA violations for the retail company.

149. Continuing the example provided in *supra* note 148, it is readily apparent that what would qualify as a robust compliance program for the retail company would not qualify as a robust compliance program for the pharmaceutical company. Likewise,

Indeed, given the defense would apply to a vast array of companies, it would be extremely difficult to craft such legislation.¹⁵⁰ Nevertheless, without any further instructions on how to satisfy the final element of the defense, companies will be left with just as much uncertainty as they had originally.¹⁵¹

Fortunately, there are a multitude of sources that companies can use for guidance. Companies can compare their compliance programs with other companies.¹⁵² They can look to what the DOJ views as an effective compliance program, such as what is stated in the Thompson Memo and what the DOJ has required from companies entering into a DPA or NPA.¹⁵³ Additionally, the U.S. Sentencing Guidelines, OECD guidance, and the U.K. Bribery Act Guidance all provide further insight as to which compliance programs would qualify.¹⁵⁴

This Part will analyze these various sources. In doing so, it will serve two primary purposes. First, it will serve as a guide to companies for how to improve their compliance programs and—in the event a compliance defense is added to the FCPA—what constitutes a robust or effective program. Second, it will provide insight to courts faced with analyzing individual programs and determining whether they meet the defense's requirements.¹⁵⁵

the retail company would not, and should not, have to implement the same costly program as the pharmaceutical company just to make the defense applicable. *Accord* U.K. Bribery Act Guidance, *supra* note 115, at 20.

150. *See id.*

151. *See supra* notes 52–59 and accompanying text (discussing the uncertainty that arises due to lack of legislation and court decisions concerning the FCPA).

152. *Infra* Part V.A.

153. *Infra* Part V.B.

154. *Infra* Part V.C.

155. Similarly, these sources could inform the DOJ on whether to prosecute a company that claims the compliance defense applies. However, the DOJ already has its own idea of what an effective compliance program is, and may be unwilling to look to other sources. *See supra* notes 103–06 and accompanying text (discussing a situation where the DOJ did not prosecute a company, citing its compliance program as a principle reason). Rather, for those programs that conform to other sources but do not meet DOJ standards, the DOJ would probably challenge the defense and attempt to limit it, as it has done for the facilitating payments exception. *See* RICHARD W. GRIME & SARA S. ZDEB, *THE ILLUSORY FACILITATING PAYMENTS EXCEPTION: RISKS POSED BY ONGOING FCPA ENFORCEMENT ACTIONS AND THE U.K. BRIBERY ACT 3* (2011), *available at* <http://seclawcenter.pli.edu/wp-content/uploads/2011/05/Grime-Risks-Posed-by-Ongoing->

A. Analyzing the Top Fifty Fortune 500 Companies¹⁵⁶

A good indicator of the strength of a company's compliance program is to compare it to other companies' programs. Further, a company's code of conduct is typically the focal point of an FCPA compliance program.¹⁵⁷ A code of conduct should be the first resource that an employee looks to when legal or ethical issues arise.¹⁵⁸ Thus, a company's code will reveal a lot about its overall compliance program. Moreover, because the SEC requires companies to make their codes publicly available, these documents are readily available.¹⁵⁹ Given this easy access, companies can see how their compliance program measures up to others'. Using a statistical analysis of the top fifty Fortune 500 companies, the following Sections will attempt to provide a quick view of what companies can learn from examining other compliance programs.

1. Method

Although this statistical analysis will use the top fifty Fortune 500 companies,¹⁶⁰ it is worth mentioning that it would be more informative for an individual company to analyze compliance programs from the same or comparable

FCPA.pdf (stating that the DOJ's "narrow interpretation of the facilitating payments exception is making that exception ever more illusory, regardless of whether the federal courts—or Congress—would agree").

156. The idea for this section was inspired by a project I worked on for Houston attorney Ryan McConnell, which involved analyzing corporate codes of conduct. See University of Houston Law Center, Analysis of Corporate Codes of Conduct (2012) [hereinafter Corporate Codes of Conduct Analysis] (on file with author).

157. Joan Dubinsky, *Code Redux Part One: Tips for Writing and Updating Your Corporate Code of Conduct*, CORP. COMPLIANCE INSIGHTS (Jan. 31, 2011), <http://www.corporatecomplianceinsights.com/corporate-code-of-conduct-guidelines-policy-tips-writing-updating/> ("A Code of Conduct is the single most important element of your ethics and compliance program."). Corporate codes of conduct are a relatively new concept. Pitt & Groskaufmanis, *supra* note 23, at 1574. Indeed, the FCPA "may have been the primary catalyst for the development of corporate codes." *Id.* at 1582.

158. Dubinsky, *supra* note 157.

159. 17 C.F.R. § 229.406 (2013).

160. This analysis uses the 2012 Fortune list. See *Fortune 500*, CNN MONEY, http://money.cnn.com/magazines/fortune/fortune500/2012/full_list/ (last visited Nov. 3, 2013). The top ranked company is Exxon Mobil and the 50th ranked company is Kraft Foods. *Id.*

industries.¹⁶¹ As noted earlier, compliance programs and codes of conduct should be customized to the needs—and more importantly, risks—of each particular company.¹⁶² Nevertheless, analyzing Fortune 500 companies can provide great insight, even for smaller companies.

Even though a code of conduct covers a wide variety of laws and issues,¹⁶³ this analysis only examines provisions of codes that either directly refer to the FCPA or have some relation to FCPA issues. Specifically, this analysis examines the companies' investigation policies, discipline policies, and FCPA—or gift giving—policies.¹⁶⁴ In order to take subjective determinations out, the results were gathered using broad questions, such as: Does this company have a policy on bribing public officials?¹⁶⁵ Interestingly, in addition to informing companies looking to strengthen their compliance programs, the results provide additional evidence of the need for a compliance defense.

2. *Results*

Out of the top fifty Fortune 500 companies, twenty-seven specifically refer to the FCPA by name in their codes of conduct.¹⁶⁶ Forty-two deal with the bribing of government officials generally, without explicitly referencing the FCPA.¹⁶⁷

161. Pitt & Groskaufmanis, *supra* note 23, at 1639 n.461.

162. *Id.* at 1639–40. Websites may be helpful in examining codes of conduct by industry. See World's Most Ethical Companies—Honorees, ETHISPHERE, <http://ethisphere.com/worlds-most-ethical/wme-honorees/> (listing the most ethical companies by industry) (last visited Nov. 3, 2013).

163. See Pitt & Groskaufmanis, *supra* note 23, at 1602 (noting that insider trading, antitrust, and FCPA are common issues seen in codes).

164. A potential problem of this analysis is that a company could have a separate, internal policy that deals exclusively with FCPA or anticorruption issues and is not available to the public.

165. Corporate Codes of Conduct Analysis, *supra* note 156.

166. *Id.*

167. *Id.* This is not surprising, as these companies operate in a vast array of countries, many of which have anti-bribery laws of their own. See Koehler, *Revisiting Compliance Defense*, *supra* note 7, at 636, n.101 and accompanying text (discussing the increased amount of international anti-bribery laws and every country that is party to the Anti-bribery Convention). The fact that over fifty percent of the companies single out the FCPA, despite being subject to multiple other FCPA-like laws, helps show companies' constant awareness of the U.S. anti-bribery law.

However, out of those forty-two that discuss bribery, only fourteen define what a “foreign official” or “government official” is.¹⁶⁸ This data point stands out, as it emphasizes some of the confusion surrounding the FCPA. A key element in any FCPA violation is whether the receiver of a bribe is in fact a foreign official.¹⁶⁹ But the term is not as obvious as it may seem on its face. Although the FCPA provides a definition, it has been criticized as being unhelpful.¹⁷⁰ For example, the definition includes “any officer or employee of a[n] . . . instrumentality” of a foreign government, yet it does not define what an “instrumentality” is.¹⁷¹ This creates problems; the governments of some countries, such as China, own many businesses within their borders, even though the businesses might otherwise act like private entities.¹⁷² Thus, it is extremely unclear whether Congress meant for “foreign official” to include employees of these state-owned entities.¹⁷³ This is a logical reason for why more than 65% of the examined companies with anti-bribery provisions do not define this key element. Unfortunately, the

168. Corporate Codes of Conduct Analysis, *supra* note 156.

169. 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A) (2012); *see also* Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907, 916 (2010) [hereinafter Koehler, *FCPA Enforcement*] (“No FCPA element contributes more to the façade of enforcement . . . than the FCPA’s ‘foreign official’ element.”).

170. WEISSMANN & SMITH, *supra* note 14, at 24.

171. 15 U.S.C. §§ 78dd-1 to 78dd-2 (2012); *see also* WEISSMANN & SMITH, *supra* note 14, at 24 (noting the text of the statute does not define “instrumentality”).

172. *See* WEISSMANN & SMITH, *supra* note 14, at 6 (explaining potential confusion regarding what constitutes a “foreign official” that may arise from situations in which companies are state-owned); *see also* Koehler, *FCPA Enforcement*, *supra* note 169, at 916–17, 964 (discussing how state-owned or controlled enterprises can have publicly traded stock, yet have other characteristics of private businesses).

173. Grey areas quickly arise when dealing with these state-owned entities. *See, e.g.*, Koehler, *FCPA Enforcement*, *supra* note 169, at 916–17. For instance, in the KBR case, which was mentioned in Judgment for KBR, *supra* note 41 and accompanying text, the DOJ claimed that the officers and employees of a Nigerian company were “foreign officials.” *See* Plea Agreement at 7, United States v. Kellogg Brown & Root LLC, No. 4:09-cr-00071 (Feb. 11, 2009), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/kelloggb/02-11-09kbr-plea-agree.pdf>. However, because the Nigerian government was only a minority owner of the company, some criticized this as being an overly expansive reading of the term. *See, e.g.*, WEISSMANN & SMITH, *supra* note 14, at 26–27; Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 412–13 (2010) [hereinafter Koehler, *FCPA Resurgence*].

less a company can communicate to its employees about what constitutes illegal conduct, the less effective their compliance program will be.

Despite the lack of clarity, it is apparent that the companies are making an effort to provide anti-bribery guidance to their employees—84% of them address the topic.¹⁷⁴ Thus, companies looking to implement an effective compliance program should do the same. Another common element seen in the codes is a description of internal investigation procedures.¹⁷⁵ Thirty-six of the companies provide at least some information on these procedures in their codes, although some are more descriptive than others.¹⁷⁶ Typically, these provisions lay out how to report violations, or potential violations, and whether an employee's identity will remain confidential following a report.¹⁷⁷ For instance, many of the companies provide an anonymous reporting hotline that allows employees to quickly report concerns.¹⁷⁸ Some of the codes describe in step-by-step form exactly what happens when a report is filed.¹⁷⁹ Additionally, others provide that a reporting employee receive feedback on the outcome of the report.¹⁸⁰ Nearly all of the codes explicitly

174. Corporate Codes of Conduct Analysis, *supra* note 156.

175. *Id.*

176. *Id.*

177. *See, e.g.*, INTL FCSTONE, INC., CODE OF ETHICS 1 & app.1 (2013) [hereinafter INTL FCSTONE CODE OF CONDUCT], available at http://files.shareholder.com/downloads/AMDA-MQNVA/2165831184x0x523641/c4545788-773c-4a95-b50c-c2723b8d3202/Code_of_Ethics.pdf; VALERO ENERGY CORP., CODE OF BUSINESS CONDUCT AND ETHICS 7–8 (2012) [hereinafter VALERO CODE OF CONDUCT], available at <http://www.valero.com/Financial%20Documents/Code%20of%20Business%20Conduct%20and%20Ethics.pdf>.

178. *E.g.*, TARGET CORP., BUSINESS CONDUCT GUIDE 63 (2011) [hereinafter TARGET CODE OF CONDUCT], available at http://media.corporate-ir.net/media_files/irol/65/65828/BusinessConductGuide.pdf; PFIZER INC., THE BLUE BOOK: SUMMARY OF PFIZER POLICIES ON BUSINESS CONDUCT 9 (2012), available at http://www.pfizer.com/files/investors/corporate/blue_book_english.pdf; VALERO CODE OF CONDUCT, *supra* note 177, at 7–8.

179. *See* GENERAL ELECTRIC CO., THE SPIRIT & THE LETTER 10 (2008) [hereinafter GE CODE OF CONDUCT], available at <http://files.gecompany.com/gecom/citizenship/pdfs/TheSpirit&TheLetter.pdf> (describing four steps to GE's investigation process).

180. *See, e.g., id.*; CARDINAL HEALTH, INC., STANDARDS OF BUSINESS CONDUCT 14 (2010) [hereinafter CARDINAL HEALTH CODE OF CONDUCT], available at <http://www.cardinal.com/us/en/AboutUs/Commitment/EthicsAndCompliance/StandardsOfBusinessConduct>.

prohibit retaliation against employees who report violations.¹⁸¹ These various options provide employees with information on how to report violations, and, more importantly, they can encourage reporting when violations do occur. Fostering a culture where employees are not scared to report could help a company learn of improper conduct, and perhaps stop the conduct or limit it early on.¹⁸²

Additionally, thirty-three of the codes expressly lay out disciplinary measures that will result from code violations.¹⁸³ A standard provision will be something along the lines of this: “All violations of the Code of Conduct, Company policies, contractual obligations, or laws will be taken seriously and may result in discipline, up to and including termination of employment and possible legal action.”¹⁸⁴ Some companies even go above and beyond this basic disciplinary policy. JP Morgan Chase, AIG, and General Electric, among other companies, discipline employees for failure to report violations or suspected violations of others.¹⁸⁵ Whereas the majority of codes only provide for

181. See, e.g., WELLPOINT, STANDARDS OF ETHICAL BUSINESS CONDUCT, INC. 7 (2011), available at <http://wellpoint.empsystem.com/file.php/1/public/SOEBBC.pdf> (“WellPoint prohibits retaliation against an associate for reporting in good faith an ethics or compliance concern or for participating in an investigation of such a report.”); CARDINAL HEALTH CODE OF CONDUCT, *supra* note 180, at 14 (“Cardinal Health will not discharge, demote, suspend, threaten, harass or, in any manner, retaliate against an employee based on that employee truthfully raising a concern about any actual or suspected misconduct or other risks to the business.”); INTL FCSTONE CODE OF CONDUCT, *supra* note 177, at 6 (“The Company strictly prohibits retaliation against any person reporting possible violations of law, ethics or this Code which are made in good faith.”).

182. Additionally, this could potentially prevent bribes altogether. For example, the rogue employee may be less willing to bribe a foreign official if he knows that any one of his co-workers could report him anonymously.

183. All fifty companies likely have disciplinary measures, either implied or in some other employment document. Including them in the codes, however, really stresses the importance of abiding by a company’s compliance policies.

184. See, e.g., UNITEDHEALTH GRP., CODE OF CONDUCT: OUR PRINCIPLES OF ETHICS & INTEGRITY 4 (2011), available at <http://www.unitedhealthgroup.com/about/UNH-Code-of-Conduct.pdf>.

185. See, e.g., GE CODE OF CONDUCT, *supra* note 179, at 11; JP MORGAN CHASE & CO., CODE OF CONDUCT 8 (2012), available at http://www.jpmorganchase.com/corporate/About-JPMC/document/2012CodeofConduct_05_15_12_ada.pdf; AM. INT’L GRP., CODE OF CONDUCT: THE RIGHT CHOICE, INC. 7 (2013), available at <http://www.aigcorporate.com/>

discipline when an employee himself violates the code, these policies force employees to be active, and turn every employee into a compliance watchdog. Dell further specifies that it will “timely self-report compliance violations to applicable government authorities and cooperate with any resulting official proceedings.”¹⁸⁶ This policy would help companies satisfy parts of the Jacobson test.¹⁸⁷

Of course, simply inserting a policy into a code of conduct would not be enough by itself to satisfy the robust compliance program requirement. A company will have to follow through with the policies in its code. Otherwise, the program would indeed be a “fig leaf” program.¹⁸⁸ Companies should actively enforce their policies and—for purposes of proving the defense—keep records of all reports made and steps taken following those reports. In addition, companies with high FCPA risks should train their employees and keep them informed of FCPA developments.¹⁸⁹ Actions such as these will go far in proving that a company’s program has a bite as well as a bark.

B. What the DOJ Considers an Effective Compliance Program

Currently, the DOJ’s interpretation of the law is often determinative in most FCPA cases against companies, and its opinion will continue to be relevant if an FCPA compliance defense is adopted.¹⁹⁰ Fortunately, there are multiple sources to help discern what the DOJ considers an effective compliance program. The Thompson Memo, written by former Deputy

corp/governance/Code_of_Conduct2010/AIGCodeOfConductEng.pdf.

186. DELL CODE OF CONDUCT, *supra* note 8, at 2.2.

187. *See supra* notes 120, 124–28 and accompanying text (describing the elements of self-reporting and cooperation).

188. *See* KENNEDY & DANIELSEN, *supra* note 16, at 31 (detailing how the creation of a compliance defense to knowing and intentional violations of the Act would insulate companies through “fig-leaf” compliance programs).

189. Marathon Petroleum provides for this in its compliance program: “The Company requires comprehensive FCPA and anti-corruption compliance training for all employees whose job responsibilities involve [those areas].” MARATHON PETROLEUM CORP., CODE OF BUSINESS CONDUCT 11 (2011), *available at* http://www.marathonpetroleum.com/content/documents/investor_center/corporate_governance/code_bus_conduct.pdf.

190. *See* Mukasey, *supra* note 54 and accompanying text.

Attorney General Larry Thompson to help prosecutors decide whether to charge a corporation, discusses compliance programs.¹⁹¹ According to the document, to determine the effectiveness of a particular compliance program, prosecutors should consider, among other things, “the comprehensiveness of the compliance program; . . . the promptness of any disclosure of wrongdoing to the government[;] . . . [and] whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation’s compliance efforts.”¹⁹² Although this document confirms the DOJ’s view that a compliance program alone will not preclude it from bringing charges,¹⁹³ it is still helpful for companies looking to impress the DOJ.

Companies can also study DPAs and NPAs that the DOJ has entered into with other companies in the past.¹⁹⁴ These agreements will frequently have an “Attachment C,” which lists what the DOJ expects from a company’s compliance plan going forward.¹⁹⁵ A common requirement found in DPAs and NPAs is for companies to designate specific individuals that will be responsible for compliance matters.¹⁹⁶ For example, the DOJ required Pfizer to create a position of “Chief Compliance and Risk Officer” and for each of its business units to appoint a head

191. Memorandum from Deputy Attorney General Larry D. Thompson to the Heads of Dep’t Components of the U.S. Attorneys 1 (Jan. 20, 2003) [hereinafter Thompson Memo], available at <http://www.albany.edu/acc/courses/acc695spring2008/thompson%20memo.pdf>. The Thompson Memo was superseded on other issues by the McNulty Memo. See Memorandum from Deputy Attorney General Paul J. McNulty to the Heads of Dep’t Components of the U.S. Attorneys 2 (2006), available at http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf.

192. Thompson Memo, *supra* note 191, at 10.

193. See *id.* at 8 (“[T]he existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal conduct undertaken by its officers, directors, employees, or agents.”).

194. These are all available on the DOJ’s website. See *FCPA and Related Enforcement Actions*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/cases/a.html> (last visited Nov. 3, 2013).

195. See, e.g., Deferred Prosecution Agreement at 20–23, *United States v. Tyson Foods, Inc.*, No. 1:11-cr-00037 (D. D.C. Feb. 10, 2011), available at http://www.justice.gov/criminal/fraud/fcpa/cases/tyson-foods/02-10-11tyson_foods_dpa.pdf.

196. See *id.* at 21 (specifying Tyson will assign the responsibility to oversee and implement compliance to “one or more senior corporate executives”).

of compliance.¹⁹⁷ This should send a message to companies to act similarly—employees should be able to point out assuredly who handles compliance matters for their particular region or business unit. Another common requirement is for companies to conduct thorough FCPA checks on any business entities they seek to acquire.¹⁹⁸ This suggests the DOJ will not show leniency for a company who has FCPA violations imputed to it through an acquired company. Companies should therefore be very careful when acquiring other entities, especially those that operate in high-risk areas.

This Section has discussed only a couple of provisions seen in DPAs and NPAs; companies should carefully consider adopting others. Many of these agreements are similar, but that may not necessarily be a bad thing—it could mean that the DOJ has a very specific program in mind that would constitute an effective one. Thus, if a compliance defense is adopted, the DOJ would be less likely to challenge a company's program as ineffective or not robust if it mirrors the requirements in DPAs and NPAs.

C. Additional Sources that Provide Guidance as to What a Robust Compliance Program Is

In addition to observing the views of the DOJ and examining compliance programs of other companies, many other sources provide guidance on creating an effective or robust compliance program.¹⁹⁹ One source, the U.S. Sentencing Guidelines, permits compliance programs to be taken into account at the sentencing phase.²⁰⁰ Those guidelines lay out seven elements for an

197. Deferred Prosecution Agreement at C.2-1, *United States v. Pfizer H.C.P Corp.*, No. 1:12-cr-00169 (D. D.C. Aug. 7, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/pfizer/2012-08-07-pfizer-dpa.pdf>.

198. See *Orthofix DPA*, *supra* note 77, at C-5 (“Orthofix will ensure that new business entities are only acquired after thorough FCPA and anti-corruption law due diligence by legal, accounting, and compliance personnel.”).

199. A thorough analysis of each source is beyond the scope of this Article. Moreover, many of the suggestions from these sources overlap with each other. Therefore, this Section will briefly point out the various options.

200. See *SENTENCING GUIDELINES*, *supra* note 79, § 8C2.5(f) (allowing a three point reduction in culpability score).

effective compliance program.²⁰¹ The elements consist of many issues this Article has already covered, such as disciplining misconduct,²⁰² assigning specific individuals responsibility for compliance matters,²⁰³ and maintaining effective training programs.²⁰⁴ An element that has not yet been mentioned is denying leadership positions to individuals who have engaged in misconduct.²⁰⁵ This suggests companies should be careful and perform due diligence when recruiting high-level management. Similar to the Sentencing Guidelines, the OECD adopted and published *Good Practice Guidance*.²⁰⁶ This lists out twelve different good practices in order to ensure effective compliance programs.²⁰⁷ Because the United States was a primary advocate for the formation of the OECD, a company should take note of these various practices.

International law can also be an instructive source. Following passage of the U.K. Bribery Act, the Ministry of Justice released guidance for the law.²⁰⁸ Included in the guidance are six principles used to determine whether a compliance program would meet the U.K. Act's "adequate procedures" defense.²⁰⁹ The six principles are: (1) proportionate procedures; (2) top-level commitment; (3) risk assessment; (4) due diligence; (5) communication; and (6) monitoring and review.²¹⁰ The document also offers insightful commentary discussing each principle, and it lays out multiple case studies as hypotheticals.²¹¹ Although these principles would carry little weight in an American court, they could nevertheless be helpful

201. *Id.* § 8B2.1(b).

202. *Id.* § 8B2.1(b)(6).

203. *Id.* § 8B2.1(b)(2)(C).

204. *Id.* § 8B2.1(b)(4).

205. *Id.* § 8B2.1(b)(3).

206. *Good Practice Guidance on Internal Controls, Ethics, and Compliance*, OECD (2010), available at <http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/44884389.pdf>.

207. *Id.*

208. U.K. Bribery Act Guidance, *supra* note 115, at 2.

209. *Id.* at 20–31; see also *supra* notes 114–15 and accompanying text (discussing briefly the "adequate procedures" defense).

210. U.K. Bribery Act Guidance, *supra* note 115, at 21–31.

211. See *id.* at 21–43.

when constructing a compliance program. Additionally, it would be best for an international company that operates in the United States and the United Kingdom to design its compliance program in a way that would attain approval in both countries.²¹²

Companies should carefully contemplate these various sources and craft their compliance program to meet their individual needs. In order to prevent bribery and avoid FCPA liability, this should be done irrespective of whether an FCPA compliance defense is adopted. Hopefully in time, however, a thorough and well-designed compliance program can indeed serve as a defense for ethical companies that put ample effort into abiding by the FCPA.

VI. CONCLUSION

Without a compliance defense, it is still in a company's best interest to prevent its employees from committing bribery. But rather than trying to stop bribery, a company may choose instead not to operate in areas that present greater FCPA risk.²¹³ That is not an acceptable solution. A compliance defense would help a company—which is otherwise ethical and law-abiding—avoid massive FCPA liability following the actions of a single employee. More importantly, it would help prevent foreign bribery by providing a tangible, clear benefit to companies that would incentivize them to adopt carefully designed programs. This would remove a great amount of discretion from prosecutors and hinder the possibility of prosecutorial misconduct.

Contrary to what some would suggest, a compliance defense will not allow a company to have a paper program serve as a full shield against liability for foreign bribes. William Jacobson's proposal would require a great deal from companies, including

212. Further, some scholars advocate for adopting the U.K.'s "adequate procedures" defense in the United States. See, e.g., Jon Jordan, *The Adequate Procedures Defense Under the UK Bribery Act: A British Idea for the Foreign Corrupt Practices Act*, 17 STAN. J.L. BUS. & FIN. 25, 55–56 (2011) (arguing in favor of a compliance procedures defense "much like the adequate procedures defense").

213. Spalding, *Unwitting Sanctions*, *supra* note 92, at 374.

that they have in place a robust compliance program.²¹⁴ Therefore, a company would have to prove its compliance efforts go beyond what is stated in employee manuals or on the company website—it must follow through with actions to reinforce those words. This Article has discussed numerous sources available to help companies strengthen their programs. Once a company puts into practice these various concepts, it will inevitably lead to decreased bribery.²¹⁵

The goals of the FCPA are admirable, and anti-bribery laws such as it are fundamental to stifle the pervasiveness of foreign bribery. However, “[i]t is widely recognized, including by those who helped frame the FCPA and by current government officials, that the FCPA is a unique law that demands specific forward-looking solutions to achieve its purpose of reducing bribery.”²¹⁶ Adopting William Jacobson’s proposal as an amendment to the FCPA would help satisfy this need.

214. Jacobson, *supra* note 60, at 77–78.

215. See Funk & Minder, *supra* note 137, at 1–2.

216. Koehler, *Revisiting Compliance Defense*, *supra* note 7, at 627.