IMPLICATIONS OF EXTRAJUDICIAL ENFORCEMENT OF THE U.S. FOREIGN CORRUPT PRACTICES ACT FOR ANTI-CORRUPTION COMPLIANCE AND ETHICS PROGRAMS

*Paul E. McGreal**

The United States Foreign Corrupt Practices Act ("FCPA") is a federal law that criminalizes bribery of foreign government officials. The United States Department of Justice and the United States Securities and Exchange Commission typically settle FCPA charges against companies, and so enforcement of this law largely occurs outside the judicial process. This Article discusses two implications of this extrajudicial enforcement. First, it leaves organizations facing a broad risk of foreign bribery given the government's tendency to apply the FCPA to its farthest reaches. This causes business organizations to expand the scope of their anti-corruption compliance and ethics programs, which increases the costs of these programs and interferes with doing business. Second, the government's FCPA settlements provide relatively fine-grained guidance concerning effective anti-corruption compliance and ethics programs, which may encourage business organizations to develop more credible programs. Since both implications of extrajudicial enforcement suggest practical consequences for business organizations, this Article suggests further study to understand the existence or degree of these tendencies.

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* Professor of Law, Creighton University. My thanks to Gretchen Winter and Nicola Sharpe for the invitation to participate in the symposium conference "FCPA at 40: So What? Now What?," and to the participants for their questions, comments, and discussion of my presentation of this topic.

I. INTRODUCTION

Bribery of government officials is a slippery concept. When I teach the topic to business people, they often struggle with the line between an illegal bribe payment and a permitted entertainment or lobbying expense. This may be because all expenses incurred to entertain or engage government officials are meant to influence the official in some way, even if only to catch their attention for a few moments.[1] As an in-house government affairs officer at a Fortune 500 company once shared, corporations seek to maximize profits and would not invest these funds without expecting a return on their investment.

Perhaps recognizing this uncertainty, the United States Supreme Court has narrowed the scope of domestic anti-corruption statutes. For example, the justices held that the government must prove a quid pro quo to support a bribery conviction, meaning that the government official promised a specific official act in exchange for something of value.[2] Also, the Court has limited the scope of what counts as an "official act" for which a federal or state official can be prosecuted.[3] In each case, the Court provided a limiting interpretation to keep federal anti-corruption law from engulfing all forms of constituent interaction.[4]

Federal courts have not had a similar opportunity to narrow the United States Foreign Corrupt Practices Act ("FCPA"),[5] which covers bribery of foreign government officials. Since FCPA enforcement takes place largely outside the judicial process, the terms of that statute are rarely litigated.[6] Typically, the United States Department of Justice ("DOJ") or the United States Securities and

1. *See* Raquel Meyer Alexander, Stephen W. Mazza & Susan Scholz, *Measuring Rates of Return for Lobbying Expenditures: An Empirical Case Study of Tax Breaks for Multinational Corporations*, 25 J.L. & POL. 401, 402 (2009) ("The common perception among both the public and lobbyists is that lobbying expenditures provide high returns to contributors."); Usha R. Rodrigues, *The Price of Corruption*, 31 J.L. & POL. 45, 47–48 (2015) (describing author's empirical research project to identify dollar threshold for lobbying expenses that triggers a heightened risk of quid pro quo corruption).

2. *See* United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404–05 (1999) ("[F]or bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act.").

3. McDonnell v. United States, 136 S. Ct. 2355, 2372 (2016) ("Setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit th[e] definition of 'official act.'").

4. *Id.* at 2371 ("[I]f every action somehow related to [a government] research study were an 'official act,' the requirement that the public official make a decision or take an action on that study, or agree to do so, would be meaningless.").

5. *See* Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 U.C. DAVIS L. REV. 497, 506 (2015) [hereinafter Koehler, *Measuring the Impact*].

6. *See id.* at 551–52.

Exchange Commission ("SEC") initiates an investigation against a corporation, and the corporation concludes a negotiated settlement of the potential charges.[7] The settlement often takes the form of a nonprosecution agreement ("NPA") or deferred prosecution agreement ("DPA") and may require the appointment of an independent monitor to oversee compliance.[8] Even though these agreements are ultimately filed in court, their terms are agreed between the parties, and judges do not substantively review or approve those terms.[9]

This Article discusses two implications of extrajudicial FCPA enforcement. First, FCPA interpretation is effectively left to the DOJ and the SEC through their decisions when to bring enforcement actions. Given the government's incentive to expand the scope of its enforcement power, this regime often yields broad interpretations. Second, because FCPA charges are settled through a negotiated process, the sanctions may be tailored to the specific circumstances and culpability of the corporation under investigation. One relevant circumstance will be the effectiveness of a business organization's pre-existing compliance and ethics program, which consists of policies, procedures, and other measures intended to assure compliance with relevant law and to promote a culture consistent with the organization's values.[10] In a negotiated resolution, the government can review the effectiveness of a program in a relatively fine-grained, individualized manner, which will give business organizations robust guidance about the efficacy of specific anti-corruption compliance and ethics measures.

These two implications lead to two connected phenomena for FCPA compliance and ethics programs. First, because business organizations are interested in avoiding DOJ and SEC scrutiny, they implement compliance and ethics programs designed to address the business behaviors that fall within the government's interpretation of the FCPA.[11] We would expect, then, to see the scope of anti-corruption compliance and ethics programs to mirror the DOJ and SEC's broad interpretations of the FCPA.

Second, because business organizations will likely settle any DOJ and SEC investigation of alleged FCPA violations, they will want to know what compliance measures will receive leniency in settlement negotiations.[12] As a case-specific resolution tailored to a business organization's individual culpability, each DPA or NPA implicitly provides fine-grained guidance about what the DOJ and SEC consider effective anti-corruption compliance and ethics measures that will merit leniency. This guidance, then, should influence the decisions of business organizations as they design and implement anti-corruption compliance and ethics programs. Consequently, we should expect to see more robust compliance

7. *Id.* at 503–06.

8. *Id*. For a general discussion of DPAs and NPAs, see Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007); F. Joseph Warin & Andrew S. Boutros, *Deferred Prosecution Agreements: A View from the Trenches and a Proposal for Reform*, 93 VA. L. REV. 121 (2007).

9. United States v. Fokker Servs. B.V., 818 F.3d 733, 742–44 (D.C. Cir. 2016) (explaining how separation of powers principles prohibit federal courts from reviewing the substantive terms of a DPA).

10. *See* Paul E. McGreal, *Corporate Compliance Survey*, 73 BUS. LAW. 817, 817 (2018).

11. *See infra* notes 82–86 and accompanying text.

12. *See* McGreal, *supra* note 10, at 819.

and ethics measures for anti-corruption than for other risks where such guidance and incentives do not exist.

This Article proceeds in three parts. Part II reviews the statutory requirements of the FCPA as background for the discussion of the implications of extrajudicial enforcement. Part III then describes the current regime of extrajudicial enforcement. Part IV discusses two implications of this regime: DOJ and SEC interpretation and more tailored sanctions. This Part also discusses related phenomena: the anticipated broad scope of anti-corruption compliance and ethics programs as well as a possible incentive to develop and implement more robust FCPA compliance measures. This Article then concludes with suggestions for further study and research.

II. THE FCPA: STATUTORY TEXT AND INTERPRETATION

The FCPA has two parts: the accounting provision and the anti-bribery provisions. The accounting provision requires that all public companies keep accurate financial records and maintain internal controls adequate to produce those records.[13] The anti-bribery provisions, which are the focus of this Article, make it a federal crime to bribe a foreign government official.[14] The government must prove the following requirements to show a violation of the anti-bribery provisions:

> A person or entity covered by the statute;
>
> "[M]ake[s] use of the mails or any means or instrumentality of interstate commerce";
>
> To "corruptly";
>
> Make an "offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value";
>
> To a "foreign official";
>
> "[F]or purpose of . . . (i) influencing [or] (ii) inducing [an] act in violation of the lawful duty [of,] or (iii) securing any improper advantage" from, the foreign official; and
>
> "[T]o assist such issuer [or domestic concern or person] in obtaining or retaining business for or with, or directing business to, any person."[15]

The first element, which defines those covered by the FCPA, includes three groups of actors: (1) companies with securities registered under federal law and their officers and employees;[16] (2) "domestic concern[s]," including companies

13. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 103(a), 91 Stat. 1494, 1495–96 (codified as amended at 15 U.S.C. § 78m(b)(2) (2015)).

14. 15 U.S.C. §§ 78dd-1 to 78dd-3 (2018).

15. *Id.*

16. *Id.* § 78dd-1(a).

incorporated or located in the United States and their officers and employees,[17] as well as United States citizens, nationals, and residents;[18] and (3) any person or company that took action in furtherance of a prohibited bribe "while in the territory of the United States."[19] As discussed below, the provision covering those who act "while in the territory of the United States" potentially expands the FCPA to a wide range of people and business organizations.[20]

Given the inherent imprecision of language and the difficulty of statutory drafting, it is not surprising that many terms in the FCPA are subject to interpretation. Typically, the available interpretations will range from those more favorable to the government to those more favorable to the defendant. The practical scope of the FCPA, then, depends on specific interpretive choices, which, in turn, depends on whose choices control the statute's meaning. In a regime like the FCPA, where the government decides the effective meaning of the statute, we would expect the prevailing interpretations—on the whole—to expand the meaning and reach of the statute. The remainder of this Part discusses examples of ambiguous FCPA text, along with broad DOJ and SEC interpretations. Part III then specifically discusses the regime of extrajudicial DOJ and SEC interpretation.

First, consider the provision noted above that applies the FCPA to "any person" who participates in a bribery scheme "while in the territory of the United States."[21] One possible interpretation of this provision is that the person must be physically present within the legal territory of the United States while taking an action in furtherance of the bribery scheme. For example, a person could attend a meeting in New York City where the bribery scheme is planned or make a bribe payment from an office in Dallas. This interpretation would narrow the statute by excluding people or business organizations that were not physically present in the United States, limiting the scope of enforcement.

Perhaps unsurprisingly, the DOJ and SEC have offered a broader interpretation of "within the territory of the United States."[22] Before turning to that interpretation, though, it is worth a detour to describe three ways that the DOJ and SEC communicate their interpretations of the FCPA. First, they do so through communications about investigations and settlements of alleged FCPA violations. For example, a section of the DOJ web page collects "Related Enforcement Actions" under the FCPA,[23] and the page for each action contains documents

17. *Id.* § 78dd-2(a), (h)(1).

18. *Id.* § 78dd-2(h).

19. *Id.* § 78dd-3(a).

20. *See infra* notes 21–22, 34–37 and accompanying text.

21. 15 U.S.C. § 78dd-3(a).

22. CRIMINAL DIV. OF THE DOJ & ENF'T DIV. OF THE SEC, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 11 (Nov. 14, 2012) [hereinafter RESOURCE GUIDE], http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

23. *Foreign Corrupt Practices Act: Related Enforcement Actions*, DOJ, https://www.justice.gov/criminal-fraud/related-enforcement-actions (last updated Feb. 22, 2019).

such as press releases, copies of DPAs and NPAs, and any court filings.[24] These documents typically describe the alleged behavior that the DOJ has concluded violates the FCPA,[25] which implicitly reveals the DOJ's interpretation of the statute.

Second, the FCPA charges the DOJ with responding to requests for guidance regarding application of the FCPA to specific transactions,[26] and the DOJ has promulgated rules governing such requests, which it answers in a document known as an "opinion procedure release."[27] A typical request sets forth the facts of a contemplated transaction or course of action and asks the DOJ to state whether it anticipates bringing an enforcement action under the FCPA.[28] The DOJ responds with a release that explains the basis for the DOJ's conclusion, and this explanation often provides express or implied interpretations of the FCPA.[29] For public reference, the DOJ collects these opinion procedure releases on its web page.[30]

Third, the DOJ and SEC provide informal guidance through public speeches and written guides. One commentator has described an FCPA phenomenon he called "luncheon law" to describe "high-priced events at which enforcement agency officials would speak to private audiences."[31] As for written guidance, in November 2012,[32] the DOJ and SEC released a 120-page document entitled, "A Resource Guide for the U.S. Foreign Corrupt Practices Act,"[33] which collected a wide array of FCPA sources that showed the DOJ and SEC's thinking on FCPA interpretation and enforcement.

Returning to the specific interpretive question raised above, the DOJ-SEC Resource Guide addressed when a person or entity acts "while in the territory of the United States." The document provides in relevant part: "Since 1998, the FCPA's anti-bribery provisions have applied to foreign persons and foreign non-

24. *See, e.g.*, *Foreign Corrupt Practices Act: Related Enforcement Actions*, In re *Credit Suisse*, DOJ, https://www.justice.gov/criminal-fraud/fcpa/cases/in-re-credit-suisse (last updated July 13, 2018).

25. *See, e.g.*, Press Release, U.S. Dep't of Justice, Credit Suisse's Investment Bank in Hong Kong Agrees to Pay $47 Million Criminal Penalty for Corrupt Hiring Scheme that Violated the FCPA (July 5, 2018), https://www.justice.gov/opa/pr/credit-suisse-s-investment-bank-hong-kong-agrees-pay-47-million-criminal-penalty-corrupt.

26. *See* 15 U.S.C. §§ 78dd-1 to 78dd-2 (2018).

27. *See* Foreign Corrupt Practices Act Opinion Procedure, 28 C.F.R. §§ 80.1–80.16 (2017).

28. *Id.*

29. *Id.*

30. *See Foreign Corrupt Practices Act: Opinion Procedure Releases*, DOJ, http://www.justice.gov/criminal/fraud/fcpa/opinion/ (last updated June 17, 2015).

31. Mike Koehler, *An Examination of Foreign Corrupt Practices Act Issues*, 12 RICH. J. GLOBAL L. & BUS. 317, 359 (2013) [hereinafter Koehler, *Examination of Foreign Corrupt Practices*].

32. For most of the FCPA's history, the DOJ's only written guidance was a rather slim document that added little gloss to the statute's text and provided no enforcement or compliance guidance. Memorandum from the U.S. Dep't of Justice & U.S. Dep't of Commerce, Foreign Corrupt Practices Act: Antibribery Provisions (2011), http://insct.syr.edu/wp-content/uploads/2013/02/lay-persons-guide.pdf.

33. *See* RESOURCE GUIDE, *supra* note 22, at 2.

issuer entities that, either directly or through an agent, engage in any act in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in the territory of the United States."[34]

The footnote to that text elaborated on what is meant by "either directly or through an agent": The DOJ "interprets [Section 78dd-3(a)] as conferring jurisdiction whenever a foreign company or national *causes an act to be done* within the territory of the United States by any person acting as that company's or national's agent."[35] Note that this provision extends the FCPA to any person or entity that "causes an act to be done within the territory of the United States," regardless of whether the person was ever physically present in the United States. For example, a foreign national who has never been physically present in the United States would come within this provision by transferring money from, to, or through a bank located in the United States. Because most FCPA investigations settle,[36] and there are no decided cases interpreting this provision,[37] the DOJ's interpretation takes on great importance for compliance and ethics professionals. That is, if a business organization knows that the DOJ and SEC will investigate extraterritorial actions, and if the organization expects to settle any DOJ or SEC investigation, it will treat this DOJ-SEC interpretation as law for purposes of deciding how to comply with the FCPA.

Another area of ambiguity is the FCPA's treatment of payments to third parties or intermediaries. In addition to payments directly to a foreign government official, the statute also covers payments to a third party, such as an agent or contractor, "knowing" that the third party will then make a forbidden payment to a foreign government official.[38] The FCPA defines "knowing" and "knowledge" as follows:

> (A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if—
>
> > (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

34. *Id.* at 11.

35. *Id.* at 107 n.55 (emphasis added) (quoting DOJ, CRIMINAL RESOURCE MANUAL § 9-1018 (Nov. 2000)).

36. *See SEC Enforcement Actions: FCPA Cases*, SEC, https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last updated May 13, 2019).

37. The government's first FCPA trial against a corporation was not until 2011. The trial resulted in a jury verdict of guilty. *See* Press Release, U.S. Dep't of Justice, California Company, Its Two Executives and Intermediary Convicted by Federal Jury in Los Angeles on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico (May 10, 2011), http://www.justice.gov/opa/pr/2011/May/11-crm-596.html. The conviction was later overturned by the trial court judge. United States v. Aguilar, 831 F. Supp. 2d 1180, 1182 (C.D. Cal. 2011).

38. 15 U.S.C. § 78dd-1(a)(3) (2018) ("[Prohibiting payment to] any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office . . . .").

> (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.
>
> (B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.[39]

Thus, a business organization or individual may be deemed to "know" of an agent's bribe if they were "aware of the conduct," had a "firm belief" that the conduct was occurring, or were "aware of a high probability" that a bribe might be made.[40] The first two definitions require subjective awareness or belief that the specific conduct is occurring, which narrows the definition of knowing. The third definition, though, expands the term to include circumstances where a business organization or individual knows enough facts to have inferred that the bribe would occur. This third definition, then, turns on how strong the inference must be for an organization to be deemed "aware of a high probability" that a third party will make a bribe.

The phrase "aware of a high probability" can be interpreted either narrowly or broadly. A narrow interpretation would require that the company or individual was actually aware of "red flags" indicating that a third party posed a "high probability" of bribing a foreign official.[41] A broad interpretation would find knowledge if the company or individual were merely negligent, such as failure to undertake due diligence when retaining a third party as an agent. The former definition would require actual awareness of suspicious facts, such as a request for payment in cash under an assumed name, a higher than usual commission, or a refusal to document expense reimbursement requests.[42] The fact that such red flags never came to the attention of appropriate decision-makers would absolve them of "knowing." The latter definition would treat all third parties as inherently suspicious, with the lack of due diligence deemed a willful failure to learn the truth about the third party. While the DOJ has advocated the broader definition, the United States Court of Appeals for the Second Circuit rejected that position in a 2009 case.[43]

39. *Id.* § 78dd-1(f)(2).

40. *Id.*

41. The Delaware courts apply a similar standard in deciding when a corporate director has breached their fiduciary duty to oversee a corporation's compliance and ethics program. *See* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006); *see also* Paul E. McGreal, Caremark *in the Arc of Compliance History*, 90 TEMPLE L. REV. 647, 656–68 (2018).

42. These are generally recognized red flags of potential bribery by a third-party agent. *See* RESOURCE GUIDE, *supra* note 22, at 22–23.

43. United States v. Kozeny, 667 F.3d 122, 134–35 (2d Cir. 2011) (applying the narrower definition of "knowing" over the negligence-based definition).

A commentator has noted that the term "foreign official" also poses interpretive challenges.[44] The FCPA defines the term as follows:

> The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.[45]

In a series of enforcement actions, the DOJ and SEC have asserted that "employees of foreign health care systems such as physicians, nurses, mid-wives and lab personnel, are 'foreign officials' under the FCPA."[46] While these health care workers are government employees, the interpretive question is whether they are "acting in an official capacity for or on behalf of" the foreign government. An affirmative answer would expand the FCPA to cover a wide range of government employees, and a commentator notes that this broad reading is arguably at odds with the FCPA's history and purpose:

> The enforcement theory is aggressive because the FCPA's legislative history is clear that the main reason motivating Congress to enact the FCPA was the foreign policy implications of discovered corporate payments to foreign government officials such as the Prime Minister of Japan, the President of Korea, the President of Gabon, and Italian political parties. In other words, in passing the FCPA Congress was concerned with corporate payments to bona fide foreign government officials.[47]

Regardless of the correct interpretation, the point for current purposes is that the government once again acted on a broad understanding of the FCPA.[48]

As these three examples illustrate, the FCPA poses interpretive choices that can expand or contract the statute's reach. In each case, the DOJ and SEC advanced a broader interpretation to widen the FCPA's reach. The next Part describes how extrajudicial enforcement leaves these broad interpretations to effectively control the statute's meaning.

44. *See* Koehler, *Measuring the Impact*, *supra* note 5, at 551–52.

45. 15 U.S.C. § 78dd-3(f)(2)(A).

46. Koehler, *Measuring the Impact*, *supra* note 5, at 551.

47. *Id.* at 552.

48. Of course, judicial review does not ensure narrow interpretations of the FCPA. United States v. Esquenazi, 752 F.3d 912 (11th Cir. 2014), is an example of a court of appeals adopting the government's broad interpretation of the term "instrumentality" of a foreign government. Recall that the FCPA makes it a crime to bribe a foreign government official, which the statute defines to include employees of an "instrumentality" of a foreign government. 15 U.S.C. § 78dd-2(h)(2)(A) (2018). The DOJ interpreted that term to include any entity that is effectively controlled by the foreign government, while the defendant sought to limit the term to only those entities that performed functions traditionally undertaken by a government. The Eleventh Circuit sided with the DOJ in holding that a Haiti telecommunications company was a foreign government instrumentality because the Haitian government exercised sufficient control over the company's operations. *Esquenazi*, 752 F.3d at 925–26.

III. EXTRAJUDICIAL ENFORCEMENT AND INTERPRETATION OF THE FCPA

Professor Michael Koehler, the founder of the FCPA Professor Blog[49] and a participant in this symposium, has chronicled the government's move to extrajudicial enforcement over the last decade and a half.[50] He notes that, starting in 2004, the DOJ dramatically increased the use of DPAs and NPAs to settle corporate FCPA investigations.[51] Consequently, the DOJ rarely indicts an organization for a suspected violation of the FCPA,[52] and in the few instances where it does, a guilty plea resolves the matter without trial.[53] Consequently, it is exceedingly rare for an FCPA prosecution against an organization to go to trial.[54]

A relatively straightforward calculus leads the DOJ and companies to settle criminal FCPA investigations. First, consider the situation of a company under investigation for violating the FCPA. The consequences of an FCPA conviction can be quite severe. Official criminal sanctions include potentially large criminal fines[55] and disgorgement of any ill-gotten gains[56] as well as a possible bar to doing business with the government.[57] In addition, the company would bear the ongoing costs of criminal litigation associated with taking an FCPA case to trial and the associated disruption of business and harmful publicity of criminal proceedings.[58] Business organizations, then, choose a DPA or NPA to reduce the fine, other sanctions, and associated costs.

On the other side of the equation, Professor Koehler notes four reasons that the DOJ would prefer to settle an FCPA investigation with a DPA or NPA. First, DPAs and NPAs consume relatively little prosecutorial resources—both financial and personnel—compared to a criminal trial.[59] This reduces the cost of enforcement, and frees prosecutors to undertake additional FCPA investigations.[60] Second, the greater number of FCPA resolutions are touted as a measure of enforcement success by the government and other stakeholders, which burnishes the government's reputation.[61] Third, the large fines and recoupment generated

49. *FCPA Professor*, FCPA PROFESSOR (2016), http://fcpaprofessor.com.

50. *See* Koehler, *Measuring the Impact*, *supra* note 5, at 503.

51. *Id.* at 503–11.

52. *Guilty Verdicts in Lindsey Case*, FCPA PROFESSOR (May 11, 2011), http://fcpaprofessor.com/guilty-verdicts-in-lindsey-case/.

53. Koehler, *Measuring the Impact*, *supra* note 5, at 516–21.

54. *Id.*

55. Under the Alternative Fines Act, 18 U.S.C. § 3571(d) (2018), an FCPA violation may yield a criminal fine as high as three times the profit obtained from the bribery scheme. Under the United States Sentencing Guidelines, depending on the culpability of the corporate defendant, the top of the fine range could be as high as four times the gain from the bribery scheme. U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 8C2.5 (2016).

56. *See* Kokesh v. SEC, 137 S. Ct. 1635, 1640 (2017) (describing the origins of the SEC's disgorgement power).

57. *See* Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 FORDHAM L. REV. 775, 806–11 (2011) (describing circumstances under which a business organization could be debarred for a violation of the FCPA).

58. *See* Mike Koehler, *Foreign Corrupt Practices Act Ripples*, 3 AM. U. BUS. L. REV. 391, 442 (2014).

59. Koehler, *Measuring the Impact*, *supra* note 5, at 522.

60. *Id*.

61. *Id.* at 524–25.

by DPAs and NPAs are an attractive source of revenue for the government.[62] And fourth, by settling FCPA investigations and avoiding trial, the government avoids judicial review and possible rejection of its broad interpretations of the FCPA.[63]

Professor Koehler notes a third important constituent that favors DPAs and NPAs—what he calls "FCPA Inc." "While perhaps viewed by some as a derogatory term, it is not intended to be. Rather, FCPA Inc. is a short-hand term used to describe a vibrant, niche industry consisting of numerous market participants such as law firms, accounting firms, compliance consulting firms and others."[64] FCPA Inc., then, is the aggregation of firms that specialize in investigation, defense, and compliance concerning the FCPA. Professor Koehler argues that these firms have a collective interest in the government's current use of DPAs and NPAs to settle FCPA investigations.[65] He notes two aspects of this approach that encourage FCPA Inc.: "Because FCPA Inc. benefits from more FCPA enforcement that results from NPAs and DPAs, as well as the post-enforcement action compliance obligations that are frequently required in NPAs and DPAs, many members of FCPA Inc. quickly embraced the DOJ rhetoric regarding alternative resolution vehicles."[66] Also, Professor Koehler and others have noted that former DOJ and SEC attorneys regularly join firms that provide FCPA-related services,[67] and active FCPA enforcement will ensure the vitality of this hiring.

In sum, a range of incentives encourage various actors to settle FCPA investigations through DPAs and NPAs. Because these settlements are not reviewed by judges and prevent investigations from maturing into prosecutions, FCPA enforcement takes place largely outside of the judicial process. The next Part reviews two implications of this extrajudicial enforcement regime.

IV. IMPLICATIONS OF EXTRAJUDICIAL ENFORCEMENT OF THE FCPA

The preceding Parts show how the DOJ and SEC have advanced broad readings of the FCPA and how business organizations caught within these broad readings regularly settle the investigations through DPAs and NPAs. This Part discusses two important implications of this extrajudicial enforcement regime

62. *Id.* at 522.

63. *Id.* at 521 ("[T]he use of alternative resolution vehicles insulates the DOJ's FCPA enforcement theories from judicial scrutiny and places the DOJ in the role of prosecutor, judge, and jury all at the same time.").

64. *Id.* at 523; *Mike Koehler Takes on FCPA Inc*, 24 CORP. CRIME REP. 15 (Apr. 12, 2010) [hereinafter *Mike Koehler Takes on FCPA*], http://www.corporatecrimereporter.com/fcpainc041210.htm ("There are maybe ten lawyers at the Department of Justice who work full time enforcing the Foreign Corrupt Practices Act. (FCPA). There are fifty or so lawyers at big corporate law firms who spend a big chunk of their time defending corporations in FCPA cases. And there are the big accounting firms who run an active FCPA compliance business. Put them together. Mike Koehler calls them FCPA Inc.") (originating the term "FCPA Inc.").

65. Koehler, *Measuring the Impact*, *supra* note 5, at 523–24.

66. *Id.* at 523.

67. *Mike Koehler Takes on FCPA*, *supra* note 64; Tom McGinty, *SEC Lawyer One Day, Opponent the Next*, WALL ST. J. (Apr. 5, 2010), https://www.wsj.com/articles/SB10001424052702303450704575160043010579272.

from the perspective of compliance professionals. Section A discusses how extrajudicial enforcement effectively leaves interpretation of the statute in the hands of the federal enforcement agencies. This means that the scope of an FCPA compliance and ethics program will be determined by the anticipated enforcement approach of the DOJ and SEC, including their communicated interpretations of that law. Section B then discusses the incentives that extrajudicial enforcement creates for the design and operation of an organization's compliance and ethics program. Because DPAs and NPAs typically address the effectiveness of a business organization's past and future compliance efforts, compliance professionals look to these documents for guidance on addressing FCPA risks.

A. The Scope of FCPA Compliance Programs

The fact that the FCPA is subject to interpretation poses a challenge for compliance professionals charged with addressing the risk of foreign bribery. Consider the situation of a compliance officer participating in drafting their organization's FCPA policy. Faced with the statutory ambiguities discussed above, they will look to the views of the DOJ and SEC when determining what behavior raises FCPA risks.[68] This is because the risk matures simply when the DOJ or SEC initiates an investigation.[69] Since organizations typically settle the charges, the investigation triggers the settlement process that will impose consequences for an alleged violation. Thus, organizations will want to know what conduct the DOJ and SEC might pursue, which will be quite broad given the government's aggressive interpretations of the FCPA.

Not surprisingly then, the DOJ and SEC's aggressive interpretations of the FCPA appear in the anti-corruption compliance documents of business organizations. First, consider the discussion above about the DOJ and SEC treating employees of government-run businesses as foreign officials covered by the FCPA.[70] Though there is credible commentary that the interpretation is aggressive,[71] several business organizations have incorporated this interpretation into their anti-corruption compliance policies:

68. *See supra* Part II.
69. *See supra* notes 55–58 and accompanying text.
70. *See supra* notes 38–48 and accompanying text.
71. Koehler, *Examination of Foreign Corrupt Practices*, *supra* note 31, at 347.

TABLE 1

Company	Policy Provision
Pfizer Inc.	"Government Official" shall be broadly interpreted and means . . . any employee or individual acting for or on behalf of a Government Official, agency, or enterprise performing a governmental function, or owned or controlled by, a Government (e.g., a healthcare professional employed by a Government hospital or researcher employed by a Government university) . . . .[72]
Merck & Co., Inc.	The term "foreign officials" under the FCPA includes, but is not limited to, the following: Those employed by foreign government agencies, which includes government-owned or government-controlled businesses that perform a function that in other countries is performed privately, such as physicians and purchasing agents at state-owned hospitals.[73]
FedEx Corporation	Note: An employee of a government-owned or government-controlled business is considered a "Government Official" and is subject to the same restrictions under this Policy as an official, employee or representative of a Government.[74]
Halliburton Company	Regulators consider government employees, candidates for political office, party officials, members of the royal family, and even all employees of government-owned businesses (such as national oil companies) to be "government officials."[75]

For these business organizations, employees are trained and held accountable to the DOJ and SEC's broad interpretation of the FCPA.

Another example of anti-corruption compliance and ethics programs following the DOJ and SEC interpretations can be seen in the treatment of charitable donations.[76] The legal issue is whether a donation to a charity in a country where an organization conducts business could be considered a bribe under the FCPA. Since a donation would be "anything of value," the question would be whether that value went to a foreign official. If the donation is made to a legitimate charity, then the donation itself has not been provided to a foreign official.[77] The issue is more complicated, however, if a government official is an officer or employee of the charity to which the donation is made. The DOJ and SEC have

72. Pfizer's International Anti-Bribery and Anti-Corruption Business Principles at 1, available at https://www.pfizer.com/sites/default/files/corporate_citizenship/pfizer_antibribery_anticorruption91112.pdf.

73. Merck's Ethical Operating Standards Handbook at 8, available at https://www.merck.com/about/pdf/2014-EOS-Handbook.pdf.

74. FedEx Global Anti-Corruption Policy at 4, available at http://investors.fedex.com/governance-and-citizenship/policies/Global-Anti-Corruption-Policy/default.aspx.

75. Halliburton Code of Business Conduct at 26, available at http://www.halliburton.com/content/dam/halliburton/public/about_us/pubsdata/policies/pdf/cobc-english.pdf.

76. *See* John P. Giraudo, *Charitable Contributions and the FCPA: Schering-Plough and the Increasing Scope of SEC Enforcement*, 61 BUS. LAW. 135, 136 (2005); William Nelson, *No Good Deed Goes Unpunished: Charitable Contributions and the Foreign Corrupt Practices Act*, 11 DEPAUL BUS. & COM. L.J. 332, 341–44 (2013).

77. *See* Nelson, *supra* note 76, at 346–54 (discussing examples of permitted donations to foreign charities or governments).

brought enforcement actions against organizations that made such charitable contributions.[78] For example, in one case, a health care organization made contributions to a charity that restored historic castles in Poland.[79] The health care organization was attempting to do business with the government health care system, and an official with the Polish health authority was president of the charity.[80] The Polish government official was not the decision-maker for the business opportunity, but it was alleged that the official could exercise influence on that decision.[81] Based on these facts, the SEC brought an enforcement action against the organization for violations of the FCPA's accounting provisions and intimated that the charitable payments violated the anti-bribery provisions.[82] The organization settled the allegations with the SEC.[83]

It is unclear whether the FCPA covers such charitable contributions. For one, it is not certain that "enhancing [the government official's] reputation as a successful fund-raiser" is the type of benefit that would qualify as "anything of value."[84] In addition, the government must show that the contribution was made in a quid pro quo for a specific act by the government official.[85] In the face of this uncertainty, though, business organizations will tend to err on the side of avoiding conduct that would lead to an investigation: "Good arguments can be made that the FCPA should not even cover the payments described in the cases described above. Unfortunately, winning those arguments can be prohibitively expensive. Empowering personnel to recognizing [sic] these issues before they become problematic can save enormous sums in the long run."[86] Again, evidence of this caution can be seen in the anti-corruption policies of several business organizations:

78. *Dubious as It Was, The Schering-Plough Enforcement Action Was Notable*, FCPA PROFESSOR (Feb. 5, 2018) [hereinafter *Schering-Plough Enforcement Action Was Notable*], http://fcpaprofessor.com/dubious-schering-plough-enforcement-action-notable.

79. *Id.*

80. *Id.*

81. *Id.*

82. Schering-Plough Corp., Securities Exchange Act Release No. 49838, 2004 WL 1267922 (June 9, 2004), https://www.sec.gov/litigation/admin/34-49838.htm; Giraudo, *supra* note 76, at 150 ("The SEC repeatedly characterized the payments to the Foundation as 'improper.' It would have been enough for the SEC to characterize the payments as inaccurate. Yet the SEC seemed determined to make it understood that it viewed these 'improper' payments as more than just accounting violations.").

83. *Schering-Plough Enforcement Action Was Notable*, *supra* note 78.

84. *See* Giraudo, *supra* note 76, at 138, 152.

85. 15 U.S.C. § 78dd-1(a)(1)–(3) (2018).

86. David Smyth & Brook Pierce, *Charity That Isn't So Charitable*, PHARMACEUTICAL COMPLIANCE MONITOR (Feb. 22, 2016), http://www.pharmacompliancemonitor.com/charity-that-isnt-so-charitable/10457/.

TABLE 2

Company	Policy Provision
FedEx Corporation	Anything of Value—Money or anything that has value to the recipient, such as gifts, favors, travel expenses, charitable donations, or political contributions.[87] Prior to making charitable contributions, the background and reputation of the intended recipient must be reviewed. In addition, prior written approval of your company's Legal Department must be obtained in any of the following circumstances: • The recipient or amount has been suggested by a Government or Government Official; • An officer or employee of the recipient is or is related to a Government Official; or • There is any suggestion or suspicion that the contribution may influence a Government action or the decision of a Government Official.[88]
Halliburton Company	Bribes can take many forms other than cash payments. Any of the following could constitute bribes under certain circumstances: • Trips or entertainment • Kickbacks (payment of part of the money received from a contract to the official who awarded the contract work) • Gifts, particularly lavish, frequent or regular gifts • Charitable donations • Offers of employment • Loans[89]

And there is some evidence that these interpretations have limited foreign philanthropy by business organizations, especially in countries with perceived high levels of corruption.[90] The government's interpretation effectively serves as the law for compliance purposes.

The broad scope of the DOJ and SEC interpretations, then, result in a correspondingly broad scope of FCPA compliance programs. That is, business organizations define the scope of their FCPA risk based on the behaviors that the DOJ and SEC interpret to fall within the statute.[91] And this reality imposes at

87. FedEx Global Anti-Corruption Policy at 4, available at http://investors.fedex.com/governance-and-citizenship/policies/Global-Anti-Corruption-Policy/default.aspx.

88. *Id.* at 12.

89. Halliburton Code of Business Conduct at 27, available at http://www.halliburton.com/content/dam/halliburton/public/about_us/pubsdata/policies/pdf/cobc-english.pdf.

90. *See* Nelson, *supra* note 76, at 360–61. The anti-corruption public interest group Transparency International publishes an annual survey of business professionals that ranks countries by the perceived level of corruption associated with doing business. *Corruption Perception Index 2017*, TRANSPARENCY INT'L (Feb. 21, 2018), https://www.transparency.org/news/feature/corruption_perceptions_index_2017. Some data shows that business organizations more severely limit their corporate philanthropy in countries with higher levels of perceived corruption. Nelson, *supra* note 76, at 361.

91. Andrew Brady Spalding, *Four Uncharted Corners of Anti-Corruption Law: In Search of Remedies to the Sanctioning Effect*, 2012 WIS. L. REV. 661, 663 (2012).

least two costs on business organizations. First, it causes business organizations to forgo otherwise beneficial business opportunities and transactions.[92] Second, business organizations may divert disproportionate compliance resources to FCPA risks, depriving other business and compliance needs of necessary funds.[93] In each case, the government's interpretation of the FCPA burdens businesses without an effective check or accountability.

Further empirical research could investigate these effects of extrajudicial interpretation. It would be useful to know the degree to which a large sample of corporate anti-corruption compliance policies incorporate DOJ and SEC interpretations of the FCPA. Also, it would be important to understand the magnitude of the costs of the broad DOJ and SEC interpretations. These findings could support either amending the FCPA to clarify key terms or changing the current enforcement regime.

B. The Design and Operation of FCPA Compliance and Ethics Programs

The second implication of extrajudicial FCPA enforcement is that the DOJ and SEC can make more fine-grained decisions about the effectiveness of an organization's compliance and ethics programs in determining an organization's precise sanction. This is because the DOJ and SEC have almost unfettered discretion in negotiating the terms on which to settle an FCPA investigation.[94] A resolution could range from declining prosecution, on the one hand, to full prosecution, on the other hand. In between, the enforcement officials can tailor the terms of a DPA or NPA to the individual case, including the severity of the alleged offense and the business organization's alleged culpability. Part of this determination will be analysis of the effectiveness of the organization's anti-corruption compliance and ethics program, with more effective programs meriting greater leniency. The government, then, has wide discretion in making this effectiveness determination.

The government has corresponding freedom to determine the degree of leniency merited by the assessed effectiveness of an organization's compliance and ethics program. The leniency can affect the amount of the fine, the duration of the DPA or NPA, any obligation to implement additional compliance measures, and whether the business organization must live with an independent monitor.[95]

The government's review of a business organization's anti-corruption compliance and ethics program occurs without judicial oversight.[96] The only federal appellate court to address the question has held that trial judges do not have constitutional authority to review the substantive terms of DPAs and NPAs.[97] Ra-

92. *See id.* at 665–66.
93. *See id.* at 666.
94. *See supra* Part II.
95. *See* United States v. Fokker Servs. B.V., 818 F.3d 733, 738 (D.C. Cir. 2016).
96. *See id.*
97. *See id.*; *see also* United States v. HSBC Bank USA, N.A., 863 F.3d 125, 129 (2d Cir. 2017).

ther, separation of powers principles entrust those decisions to prosecutorial discretion.[98] Consequently, business organizations know that the DOJ and SEC's assessment of its anti-corruption compliance and ethics program will not be reviewed in the judicial process.

To provide guidance to business organizations, the DOJ recently released written guidance about how it will review a compliance and ethics program as part of an FCPA investigation. In a document entitled "Evaluation of Corporate Compliance Programs," the DOJ provides 119 separate questions that a business organization can expect the DOJ to ask concerning an anti-corruption compliance and ethics program.[99] The questions cover all the components of an effective compliance and ethics program recognized by compliance professionals, and they do so in a specific and practical manner.[100] For example, one grouping of questions addresses the "autonomy and resources" on the compliance and ethics program.[101] To illustrate the level of detail covered by this guidance, this section is reproduced in Appendix B. While not a "checklist" or "formula," the DOJ and SEC will use these questions to assess various aspects of a business organization's compliance and ethics program, and tailor its proposed resolution to that assessment.

This enforcement regime stands in contrast to other areas of the law where the decision-maker who is evaluating a compliance and ethics program has only two choices—effective or ineffective. Under such a regime, the decision-maker's choice has one of two consequences—a finding of an effective compliance and ethics program means no liability or sanction, and a finding of an ineffective compliance and ethics program means full liability or sanction. There is no in-between outcome for different degrees of effectiveness. Knowing that the decision is so high-stakes, a decision-maker faced with such a choice will tend toward a low threshold of "effectiveness."[102] This ensures that those subject to full sanction have higher culpability, and it avoids the possible unfairness of imposing full sanction or liability on an organization that made significant compliance efforts, albeit with nontrivial flaws.

These yes-no decisions typically provide minimal compliance and ethics program guidance.[103] An example is sexual harassment and the judicial standard set forth in the United States Supreme Court's decisions in *Faragher v. City of Boca Raton*[104] and *Burlington Industries, Inc. v. Ellerth*.[105] Those cases established an affirmative defense to vicarious liability under Title VII for supervisor

98. *Fokker Servs.*, 818 F.3d at 738.

99. FRAUD SECTION, CRIMINAL DIV., DOJ, EVALUATION OF CORPORATE COMPLIANCE PROGRAMS 1 (2017), https://www.justice.gov/criminal-fraud/page/file/937501/download.

100. The document sets forth eleven "sample topics," many of which are addressed in other DOJ documents. *Id*.

101. *Id.* at 2–3.

102. *See id.* at 1.

103. Faragher v. City of Boca Raton, 524 U.S. 775, 785–86 (1998).

104. *Id.*

105. 524 U.S. 742 (1998).

sexual harassment that does not result in a tangible employment action.[106] One prong of the defense asks whether "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," which entails analysis of how the organization's compliance and ethics program addressed this risk.[107] The decision is "yes-no" in that the court must decide whether the employer exercised reasonable care. The difference in consequences of being on one side of this line or the other is quite stark—vicarious liability or no vicarious liability.[108] In such cases, courts and other decision-makers tend to seek objectively verifiable criteria that require little, if any, subjective or qualitative analysis.[109] This promotes consistency in judicial decisions as well as greater certainty for business organizations.

Not surprisingly, then, one commentator has noted that lower court decisions applying *Ellerth* and *Faragher* rely on formalistic criteria, only asking whether an employer had a sexual harassment policy, reporting procedures, training, and enforcement.[110] Lower courts do not assess the quality or effectiveness of these compliance measures, such as reviewing data concerning the training, enforcement, and operation of the procedures.[111] Further, the cases do not consider the many other elements of an effective compliance and ethics program, such as commitment and oversight of the board; the authority, independence, and resources for compliance personnel; auditing and monitoring; and a continuous improvement process that updates the compliance and ethics program based on experience. In short, *Ellerth* and *Faragher*'s yes-no regime has yielded deferential judicial review that provides little guidance on elements of an effective compliance and ethics program.

The hypothesis offered here is that the FCPA regime's more fine-grained approach to sanctions provides an incentive to develop a robust compliance and ethics program, whereas a yes-no regime like *Ellerth* and *Faragher* does not. As just noted, experience under *Ellerth* and *Faragher* is that judges accept evidence of relatively meager compliance and ethics measures to satisfy the defense.[112] The question for further study is whether business organizations settle for this low level of compliance, rather than stretching beyond the case law's low floor.

Conversely, extrajudicial enforcement of the FCPA allows the DOJ and SEC to reach more gradated decisions about the effectiveness of an ethics and

106. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

107. *Ellerth*, 524 U.S. at 765.

108. The same analysis applies to an employer's vicarious liability for punitive damages under federal employment discrimination laws. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545–46 (1999). Here, the stakes are also quite high, as the yes-no decision triggers liability for punitive damages.

109. R. George Wright, *Objective and Subjective Tests in the Law*, 16 U. N.H. L. REV. 121, 133–38 (2017).

110. *See* Blair T. Jackson & Kunal Bhatheja, *Easy as P.I.E.: Avoiding and Preventing Vicarious Liability for Sexual Harassment by Supervisors*, 62 DRAKE L. REV. 653, 658 (2014) ("A thorough review of case law reveals that using a code of conduct and its harassment policies to shield a corporation from vicarious liability for sexual harassment committed by its supervisors is as easy as P.I.E. There must be a policy in place containing the appropriate provisions, the policy must be sufficiently implemented, and the policy must be sufficiently enforced.") (emphasis omitted).

111. *Id.* at 662–63 n.42.

112. *See id.* at 658.

compliance program, which provides greater guidance for business organizations. The empirical question is whether the tailored sanctions and greater guidance have encouraged business organizations to develop and implement more robust FCPA compliance and ethics programs. The discussion in Section IV.B suggests that this may be the case, since some business organizations have incorporated DOJ and SEC interpretations of the FCPA into their compliance policies. The question is whether business organizations respond to these incentives by developing and implementing other elements of their FCPA and ethics compliance programs.

V. CONCLUSION

Extrajudicial enforcement of the FCPA has been a mixed blessing with two competing implications. On the one hand, it leaves organizations facing a broad risk of foreign bribery given the government's tendency to apply the FCPA to its farthest reaches. This causes business organizations to expand the scope of their anti-corruption compliance and ethics programs, which increases the costs of these programs and limits business opportunities. On the other hand, the DOJ and SEC's negotiated FCPA settlements provide relatively fine-grained guidance concerning effective anti-corruption compliance and ethics programs, which may encourage business organizations to develop more credible programs.

Since both implications of extrajudicial enforcement suggest practical consequences for business organizations, further study is required to understand the existence or degree of the phenomena that they predict.[113] Empirical research could explore whether and to what extent the scope of anti-corruption compliance and ethics programs is affected by the broad DOJ-SEC interpretations of the FCPA. Do organizations that expand their programs in response to the government's aggressive interpretations incur greater compliance costs, or do their businesses suffer from greater compliance restrictions? As for the effectiveness of the anti-corruption compliance and ethics programs, does the relatively fine-grained FCPA enforcement regime encourage greater program quality? This research may suggest useful changes to the FCPA enforcement regime and identify lessons for encouraging effectiveness of compliance and ethics programs for other areas of legal risk.

113. For an important empirical study conducted by a participant in this conference, see Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075 (2016).

APPENDIX A

Text of the FCPA

The following provision is the section of the FCPA that covers issuers of federally-regulated securities. The FCPA has two additional, parallel provisions that cover "domestic concerns" and "any other person"[114] participating in a bribe scheme "while in the territory of the United States."[115] Other than the difference in naming who is covered by the statute's prohibition, each of these provisions are identical.

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality . . . .[116]

The FCPA also has three exceptions and defenses:

(b) Exception for routine governmental action Subsections (a) and (i) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (i) of this section that-

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to--

114. 15 U.S.C. § 78dd-1(b) (2018).
115. *Id.* § 78dd-1(c)(1).
116. *Id.* § 78dd-1(a)(1).

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.[117]

APPENDIX B

3. Autonomy and Resources

Compliance Role – Was compliance involved in training and decisions relevant to the misconduct? Did the compliance or relevant control functions (e.g., Legal, Finance, or Audit) ever raise a concern in the area where the misconduct occurred?

Stature – How has the compliance function compared with other strategic functions in the company in terms of stature, compensation levels, rank/title, reporting line, resources, and access to key decision-makers? What has been the turnover rate for compliance and relevant control function personnel? What role has compliance played in the company's strategic and operational decisions?

Experience and Qualifications – Have the compliance and control personnel had the appropriate experience and qualifications for their roles and responsibilities?

Autonomy – Have the compliance and relevant control functions had direct reporting lines to anyone on the board of directors? How often do they meet with the board of directors? Are members of the senior management present for these meetings? Who reviewed the performance of the compliance function and what was the review process? Who has determined compensation/bonuses/raises/hiring/termination of compliance officers? Do the compliance and relevant control personnel in the field have reporting lines to headquarters? If not, how has the company ensured their independence?

Empowerment – Have there been specific instances where compliance raised concerns or objections in the area in which the wrongdoing occurred? How has the company responded to such compliance concerns? Have there been specific transactions or deals that were stopped, modified, or more closely examined as a result of compliance concerns?

Funding and Resources – How have decisions been made about the allocation of personnel and resources for the compliance and relevant control functions in light of the company's risk profile? Have there been times when requests for resources by the compliance and relevant control functions have been denied? If so, how have those decisions been made?

Outsourced Compliance Functions – Has the company outsourced all or parts of its compliance functions to an external firm or consultant? What has been the rationale for doing so? Who has been involved in the decision to outsource? How has that process been managed (including who oversaw and/or liaised with

117. *Id.* § 78dd-1(b)–(c).

the external firm/consultant)? What access level does the external firm or consultant have to company information? How has the effectiveness of the outsourced process been assessed?