

DIRTY BUSINESS: The effect of international bribery and corruption by large corporations.

Brett A. Knight

I. Introduction

As the economic success of large corporations become increasingly dependent on global transactions the issue of how these transactions are conducted is likely to become a topic of increasing importance. This paper will focus on the impact that bribery and corruption has on these transactions, and how the world governments are reacting in the wake of bribery and corruption scandals. Section I will review relevant history of various events involving bribery and corruption by international companies, and governmental policies that followed. Section II will provide analysis on the issue of international bribery as well as future develops that would continue to encourage the growth of international regulations of corruption and bribery.

II. Background

A. Watergate and the Foreign Corrupt Practices Act

The Watergate scandal changed the way many Americans thought about corruption among politicians, the wake of this scandal also began to change the mindset of how governments viewed bribery among corporations.¹ The Foreign Corrupt Practices Act (FCPA) was a direct result of corruption hearings triggered by information about corporate bribery that was exposed during Watergate investigations.² In 1977 Congress enacted the FCPA as part of an amendment to the

1934 Securities and Exchange Act.³ The FCPA is divided into anti-bribery provisions, and accounting and record keeping provisions along with their respective penalties.⁴

Anti-Bribery Provisions: The anti-bribery provisions of the FCPA outlaw the payment of bribes to foreign officials, creating an offense that generally consists of five elements.⁵ The FCPA makes it illegal to: (1) make a payment of, offer or promise to pay, or authorize a payment of money or anything of value, whether directly or through a third party; (2) [to] any foreign official while “knowing” that the payment or promise to pay will be passed on to [any foreign official]; (3) with a corrupt motive; (4) for the purpose of influencing an official act or decision of that person, inducing that person to do or omit to do any act in violation of his or her lawful duty, securing any improper advantage, or inducing that person to use his influence with a foreign government to affect or influence any government act or decision; (5) in order to assist in obtaining or retaining business for, with, or to any person.⁶

Accounting and Record-Keeping Provisions: The FCPA addresses the problem of foreign bribery through the accounting and record-keeping provisions, which require companies to record accurately any payments they make. Unlike the anti-bribery offense, however, these provisions apply only to registered issuers and will be implicated by domestic conduct beyond the foreign official context.⁷ According to the FCPA, all domestic issuers must “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”⁸ Furthermore, issuers must: devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that (i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to

maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.⁹

Under the Act, “reasonable assurances” are defined as “such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.”¹⁰ It is important to note that a violation of this section will not rise to the level of a criminal offense unless a person acts knowingly in failing to maintain the proper record-keeping and accounting procedures.¹¹ Thus, even if a defendant could otherwise rely on the grease payments exception or on one of the affirmative defenses, if he knowingly failed to record the payment, he will still be criminally liable under the FCPA.¹²

Penalties: Finally, the FCPA establishes serious civil and criminal penalties for all violators. Under the Act, individual violators face a fine of up to \$100,000, which may not be paid by their employer or principal,¹³ and a term of imprisonment of not more than five years.¹⁴ Organizations that violate the Act may be fined up to \$2 million. These fines may be greatly increased under the Alternative Fines Act, which permits a fine of up to twice the amount of either the gain sought by the defendant or the pecuniary loss to the victim.¹⁵ The penalties are also greater for willful violators, with individuals facing a fine of up to \$5 million and a prison term of up to twenty years, and organizations facing a maximum fine of \$25 million. Finally, FCPA violators also face civil penalties of up to \$10,000 and several other collateral consequences such as ineligibility to do business with the federal government and suspension or debarment by the Securities and Exchange Commission (SEC).¹⁶

It is no secret that in recent years the United States government has become intensely focused on enforcement of the FCPA. Each week, it seems, there is a news headline involving a company that is penalized millions of dollars, investigated or criminally prosecuted. The United States Department of Justice (DOJ) and Securities and Exchange Commission (SEC) have collected billions in FCPA fines and penalties over the past few years, and the DOJ has criminally charged many individuals. Officials at the DOJ are on record stating that enforcement of the FCPA is the DOJ's number two enforcement priority-behind terrorism.¹⁷

Given recent trends, U.S. enforcement efforts are likely to continue to involve major violations, result in record dollar amounts of penalties and disgorgements of profits, and require close coordination between not only the SEC and the DOJ but also with foreign government enforcement authorities.¹⁸ The United States is actively coordinating its FCPA investigations with at least 23 other countries.¹⁹ Foreign governments have not only been assisting in U.S. investigations, but also actively pursuing their own prosecutions.²⁰

B. The Organization for Economic Co-operation and Development (OECD)

Following the enactment of the FCPA the United States strong lead in international efforts to combat bribery in government procurement and became a party to the Organization for Economic Cooperation and Development's anti-bribery convention.²¹ The American efforts with the FCPA “became the model for similar international initiatives, most notably the Organization for Economic Cooperation and Development (‘OECD’) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,”²²

Following the successful enactment of the FCPA the United States Congress urged the Executive Branch to begin to lobby for the creation of multilateral conventions on bribery.²³ The U.S. wanted to get other countries to adopt the U.S. position on corruption and bribery. Two major multilateral conventions, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the United Nations Convention Against Corruption, were negotiated and entered into force in 1999 and 2005. The United States ratified both conventions, as well as the Inter-American Convention Against Corruption.²⁴ U.S. pressure encouraged the OECD to draft an anti-bribery convention.²⁵

The OECD Convention “in large part tracked the normative aspects of the FCPA.”²⁶ The OECD agreement prohibited bribery of foreign public officials²⁷ these bribes are subject to seizure and confiscation.²⁸ Individuals are not the only target of the OECD agreement, corporations may also be liable.²⁹ The OECD anti-bribery convention took a “functional approach,”³⁰ focusing on national legislation rather than the individual rules.³¹ In many ways the OECD agreement resembles an E.U. Directive, indicating what is to be prohibited, but leaving to national law the means of accomplishing these objectives. Through these “soft laws’ an international norm against official bribery slowly has begun to be formed.³²

The global focus on bribery came largely from the success of the world community implementing major multilateral and regional conventions on bribery and corruption.³³ Several states have enacted their own anti-bribery legislation pursuant to the OECD convention.³⁴ The momentum of such state anti-bribery legislation is often credited to international organizations, such as the Organization for Economic Cooperation and Development (OECD)

C. Siemens

In addition to encouraging international bribery agreements, the United States has also been recognized for its robust anti-bribery enforcement actions.³⁵ This is true particularly in the past ten years when the number of investigations has increased nearly tenfold.³⁶ This increase in prosecution of bribery and corruption cases under the FCPA has also seen an increased use of innovative settlement methods, such as deferred-prosecution and non-prosecution agreements and SEC disgorgement proceedings.³⁷

The actions taken against the German company Siemens is a perfect example of the expanded use of FCPA enforcement, as well as international cooperation in such prosecutions. The Siemens case has been the largest of its kind to date.³⁸ It arguably changed the compliance landscape and brought criminal law out of its dark corner and to the attention of the corporate community.³⁹ Business leaders, legal advisors and accountants⁴⁰ all over the world painfully become aware that non-compliance may not only threaten the financial future of a company, but also may lead to personal criminal liability.

The scale of the Siemens case can be easily seen by the fines that Siemens paid. Total costs for Siemens totaled more than €2 billion.⁴¹ For years Siemens used many complex methods to disguise the purpose and ultimate recipient of illicit payments.⁴² In particular, shell companies and off-the-books “slush funds” were widely established and used as sources by employees and former employees to acquire business.⁴³ An excerpt detailing the penalties and pleas from the U.S. Department of Justice announcement follows:

Siemens Aktiengesellschaft (Siemens AG), a German corporation, and three of its subsidiaries today pleaded guilty to violations of and charges related to the Foreign Corrupt Practices Act (FCPA), the Department of Justice and U.S. Securities and Exchange Commission announced.

Siemens AG pleaded guilty to ... criminal violations of the FCPA's internal controls and books and records provisions... As part of the plea agreements, Siemens AG agreed to pay a \$448.5 million fine; and Siemens Argentina, Bangladesh, and Venezuela each agreed to pay a \$500,000 fine, for a combined total criminal fine of \$450 million.⁴⁴

According to court documents, beginning in the mid-1990s, Siemens AG engaged in systematic efforts to falsify its corporate books and records and knowingly failed to implement and circumvent existing internal controls...Siemens AG made payments totaling approximately \$1.36 billion through various mechanisms.⁴⁵

From 2000 to 2002, four Siemens AG subsidiaries-- each wholly owned by Siemens AG or one of its subsidiaries, were awarded 42 contracts with a combined value of more than \$80 million with the Ministries of Electricity and Oil of the government of the Republic of Iraq under the United Nations Oil for Food Program...paid a total of at least \$1,736,076 in kickbacks to the Iraqi government, and they collectively earned more \$38 million in profits on those 42 contracts⁴⁶

... Siemens Argentina made ... significant payments to various Argentine officials, both directly and indirectly, in exchange for favorable business treatment in connection with a \$1 billion national identity card project⁴⁷

... Siemens Venezuela admitted it made ... corrupt payments of at least \$18,782,965 to various Venezuelan officials, indirectly through purported business consultants, in exchange for favorable business treatment in connection with two major metropolitan mass transit projects⁴⁸

Siemens Bangladesh admitted that from May 2001 to August 2006, it caused corrupt payments of at least \$5,319,839 to be made through purported business consultants to various Bangladeshi officials in exchange for favorable treatment during the bidding process on a mobile telephone project⁴⁹

Today, Siemens AG also reached a settlement of a related civil complaint filed by the Securities and Exchange Commission (SEC) ... Siemens AG agreed to pay \$350 million in disgorgement of profits relating to those violations.⁵⁰

Also today, Siemens AG agreed to a disposition resolving an ongoing investigation by the Munich Public Prosecutor's Office of Siemens AG's operating groups other than the Telecommunications group Siemens AG agreed to pay €395 million or approximately \$569 million In October 2007, in connection with charges related to corrupt payments to foreign officials by Siemens AG's Telecommunications operating group, the Munich Public Prosecutor's Office announced a settlement with Siemens AG under which Siemens AG agreed to pay €201 million, or approximately \$287 million⁵¹

In connection with the cases brought by the Department, the SEC and the Munich Public Prosecutor's Office, Siemens AG will pay a combined total of more than \$1.6 billion in fines, penalties and disgorgement of profits, including \$800 million to U.S. authorities, making the combined U.S. penalties the largest monetary sanction ever imposed in an FCPA case since the act was passed by Congress in 1977.⁵²

These settlements are significant not just because of the large amount of the fines being imposed, but also because they are the product of cooperation between the DOJ and its foreign counterparts.⁵³ This globalization of anti-bribery enforcement efforts is a trend that does not appear to be going away, the DOJ has announced its intention to continue to emphasize cooperation with foreign enforcement agencies in the future.⁵⁴ In the Siemens case the DOJ and the SEC closely collaborated with the Munich Public Prosecutor's Office. The sharing of information and evidence, was made possible by the use of mutual legal assistance provisions of the OECD agreement.⁵⁵

The aftermath for Siemens of this prosecution was that Siemens started to radically improve its compliance program, the main features of which are presented in documents published by the company.⁵⁶ Among the changes are that Siemens has employed more than 500 full-time compliance officers, renewed standard compliance measures, created a compliance investigation unit, headed by a former Interpol official, it has created an online compliance help desk and a 24-hour compliance hotline, in addition to an external ombudsman, trained more than one third of its workforce on anti-corruption,. Siemens created advanced internal reporting lines and set up internal control mechanisms encompassing funds, bank accounts and payments processes that are audited by the corporate finance unit. Siemens implemented a compliance system that met any requirement of US and German regulation.⁵⁷ The DOJ described Siemens new compliance program initiative as a “new state-of-the-art system”.⁵⁸

D. BAE and the United Kingdom's Bribery act of 1010

As the U.S. was ramping up the enforcement of FCPA provisions, and International organizations were beginning to encourage state actions on bribery and corruptions, the United Kingdom found itself in a bribery scandal that would lead to an over haul of its laws governing bribery and corruption.

British Aerospace Electronic Systems (BAES) is a multinational defense contractor with headquarters in the United Kingdom. When allegations arose that BAE had improperly bribed Saudi officials while conducting an arms trade deal, the British Serious Fraud Office (SFO) began to investigate. However the SFO came under intense governmental pressure to drop the investigation. The United States then began its own investigation of the matter and ultimately brought charges against BAES for violating the FCPA. In March 2010, BAE Systems pleaded guilty to multiple charges and was sentenced to a four hundred million dollar fine. Excerpts from a U.S. Department of Justice press release follow:

BAE Systems plc (BAES) pleaded guilty today ... to conspiring to defraud the United States by impairing and impeding its lawful functions, to make false statements about its Foreign Corrupt Practices Act (FCPA) compliance program, and to violate the Arms Export Control Act (AECA) and International Traffic in Arms Regulations (ITAR) BAES was sentenced today ... to pay a \$400 million criminal fine, one of the largest criminal fines in the history of DOJ's ongoing effort to combat overseas corruption in international business and enforce U.S. export control laws.

According to court documents, from approximately 2000 to 2002, BAES represented to various U.S. government agencies ... that it would create and implement policies and procedures to ensure its compliance with the anti-bribery provisions of the FCPA, as well as similar, foreign laws implementing the Organization for Economic Cooperation and Development (OECD) Anti-bribery Convention. According to court documents, BAES knowingly and willfully failed to create mechanisms to ensure compliance with these legal prohibitions on foreign bribery [T]he gain to BAES from the various false statements and failures to make required disclosures to the U.S. government was more than \$200 million.

According to court documents, BAES made a series of substantial payments to shell companies and third party intermediaries that were not subjected to the degree of scrutiny and review to which BAES told the U.S. government the payments would be subjected. BAES admitted it regularly retained what it referred to as “marketing advisors” to assist in securing sales of defense items without scrutinizing those relationships.⁵⁹

The British Government, in response to the international criticism of its handling of the BAE Systems case, and in recognition of its confusing and outdated anti-bribery regime, launched a complete legislative overhaul of its laws on bribery and corruption. This project began in November 2007⁶⁰, passed the House of Commons on April 7, 2010,⁶¹ and the final text received Royal Assent on April 8, 2010.¹³⁴ The Bribery Act 2010 went into force on July 1, 2011.⁶² The Bribery Act follows the elements established in the FCPA:

(1) a payment or an offer to pay something of value, (2) to a foreign official, (3) for the purpose of inducing the official to act or refrain from acting (4) to assist the company in obtaining, retaining or directing business.⁶³

The Bribery Act of 2010 makes both bribery of a public official and private-to-private commercial bribery illegal, and imposes a strict liability offense on commercial organizations that fail to prevent bribery by persons associated with them. It applies both to transactions of British subjects or those that occur in British territory. A statutory defense of having “adequate procedures” in place to prevent bribery, may be raised which would exonerate the commercial organization from strict liability by actions of their “associated persons.” Unlike the FCPA the

Bribery Act of 2010 does not exempt grease payments from coverage. The Bribery Act put Britain back into compliance with its obligations under the OECD.⁶⁴

III. Analysis

So why is there such a focus on corruption? It is now mostly acknowledged that bribery represents a serious threat (to both national security and economic development).⁶⁵ As former United Nations Secretary-General Kofi Annan stated:

Corruption is an insidious menace. It debases democracy, undermines the rule of law, distorts markets, stifles economic growth, and denies many their rightful share of economic resources or life-saving aid. Corruption is therefore a major obstacle to economic and social development. And by contributing to poverty and a sense of hopelessness, corruption can be a midwife of terrorism, trafficking in people, and other threats to human security.⁶⁶

From an economic perspective corruption and bribery represents an increased transaction cost, a lack of transparency, and an obstacle to free trade. By this logic all states would benefit from the suppression of bribery.⁶⁷ Thus, it is in the interest of all countries to combat political corruption by criminalizing bribery of foreign officials.⁶⁸ Some commentators have argued that a concerted and unified effort to cut off the supply of foreign bribes from industrialized countries is the most efficient way to address political corruption.⁶⁹ Using a tried and tested model like the FCPA creates economies of scale and reduces uncertainty for multinational actors. That in fact it is a common phenomenon that standards of the most relevant regime dictate the approach that a multinational company takes in other jurisdictions, such as when the U.S. take a lead in international business initiatives.⁷⁰

A critique of this concept is that this is nothing more than an example of moral imperialism on the part of the Western world.⁷¹ Some would allege that the momentum against bribery being advanced by statutes like the FCPA and the Bribery Act of 2010 and encouraged by the OECD are not universal. Instead, these laws are economic sanctions on the developing world for refusing to accept the Western point of view.⁷² The following two quotes show just such a difference in views of the appropriateness of bribery in the BAE bribery scandal.

Now, if you tell me that building this whole country and spending \$350 billion out of \$400 billion, that we had a--misused or get corrupted with \$50 billion, I'll tell you, "yes." But I'll take that any time. But more important, who are you to tell me this? . . . I mean this is--This is human nature.

-- Saudi Prince Bandar, in response to allegations of bribery and corruption in the Al-Yamamah arms deal.⁷³

I am here today to launch the government's Foreign bribery strategy. As a minister I am proud to do this; as Foreign Secretary I saw the appalling consequences of bribery and corruption at first hand. But I am equally proud to do so as a private citizen. Any right thinking person knows that this is something which any decent society will not tolerate.

-- Justice Secretary Jack Straw, announcing the British government's new strategy for combating bribery abroad⁷⁴

Moral implications aside, if the current trend of piecemeal reform and enforcement continues, it is likely to be best served by modeling on a pre-existing standard like the FCPA. This will reduce uncertainty and limit costs incurred on compliance programs to conform to multiple anti-bribery regimes. However some occasional adjustments are to be expected as other states put their own concepts and ideas into this template. For example as was previously discussed, while the FCPA and the Bribery Act are similar in many respects, there are some areas where the two acts are not in line with each other and even have potential to conflict. These conflicts could force companies to make difficult choices about which standard to follow or in the alternative to expend valuable resources on dual compliance programs. As enforcement agencies from multiple states

continue to coordinate, it may also be advisable for these agencies to issue joint guidance on compliance standards to reduce these potential conflicts.⁷⁵ For example a corporations could be forced to admit to violating the Bribery Act if they wish to rely on the FCPA safe-harbor provision because of the conflict between both being required by the FCPA to record transactions, and the Bribery Act's banning of minimis payments.⁷⁶

One such example of conflict between the FCPA and the recommendations of the OECD⁷⁷, and the Bribery Act of 2010 is the issue of facilitation, or so called grease payments. While not allowed under the Bribery Act of 2010, and recommended against by the OECD, payments for “routine governmental action,” in other words, the ministerial rather than sovereign acts of the foreign official such as “facilitating or expediting payment to a foreign official, political party or party official” intending to “secure the performance of a routine governmental action,” are exempt from the FCPA.⁷⁸

Eliminating the facilitation payments exception to the FCPA would be an important step the United States could take to bring its laws more in line with the global anti-bribery regime, even before the Bribery Act, which eliminates de minimis exceptions, was passed, the “grease payments” exception and the travel expenses affirmative defense had long been highlighted as weaknesses of the FCPA.⁷⁹ Critics of these provisions point out that small grease payments are often the most harmful to the poorest members of society and do the most to stifle development in industrializing countries.⁸⁰ Thus, the American refusal to recognize grease payments as sanctionable bribes not only constitutes an expressive harm to the international community, signaling acquiescence to the culture of bribery, but also significantly impacts the daily lives of many of the world's poorest and most vulnerable citizens.⁸¹

State action may not be the only method for addressing the issue of corruption and bribery. Strongly supported by the World Bank as “advanced way of fighting corruption” are so called “collective actions”.⁸² Collective actions are a means of achieving the level playing field that was the goal of the FCPA, but is initiated by private companies. There are two categories of collective actions. 1) anti-corruption declaration and 2) integrity pact. The integrity pact are project-based and are agreed between the customer and the bidding company. Whereas the anti-corruption declaration leads only to enforcement by honor, the integrity pact⁸³ consists of a formal, written contract between the customer and the bidding company that includes provisions on an external monitoring process and sanctions in case of violations of the agreement.

Principle-based initiative and certifying business coalition are agreements between competitors.⁸⁴ The former binds competitors to not engage in corruption in their daily business on the ground of principles and does not include any enforcement mechanism. The latter is a coalition between competitors that fulfill requirements of an efficient compliance program and thus qualify for the coalition as well as certification.⁸⁵ The requirements are regularly checked by external audits. An audit with a negative result leads to the withdrawal of the certification. The “certifying business coalition” is the collective action that enhances the strongest degree of fairness between the stakeholders. It does not rely on “honor,” but forces companies actively to create a level playing field.⁸⁶ From the criminal law as well as compliance perspective, the certificate of a well-implemented coalition may, in cases of individual bribery, exculpate the board from charges of organizational deficit and thus shield from personal as well as corporate liability.

All companies should attempt to mitigate compliance risks by creating a robust corporate compliance program that is adequately designed to prevent and detect violations of the anti-corruption laws. A sound compliance program will, at a minimum, involve creating the right tone

and culture for the organization; creating policies and procedures; assessing risk; auditing and monitoring compliance; and investigating and remediating potential misconduct.⁸⁷ The existence of an effective program can mitigate penalties under the United States Federal Sentencing Guidelines; weigh in favor of a non-prosecution decision under the Principles of Federal Prosecution of Business Organizations; or be a complete affirmative defense to enforcement under the Bribery Act of 2010.⁸⁸

Corruption represents an increased transaction cost, a distortion of economic signals, a lack of transparency, an obstruction to free trade, and a source of inefficiencies such as nepotism and tax fraud. Thus, all states benefit from the suppression of corruption. Consequently, there is an ever-greater tendency to criminalize and prosecute bribery both internationally and domestically.⁸⁹

IV. Conclusion

“The US recognized that bribery of foreign public officials was not simply a US problem but a universal one. In aggressively promoting the adoption of similar legislation in other industrialized countries the US sought to ensure a level playing field for competing businesses and to increase market integrity and stability.”⁹⁰ This initiative has advanced and grown in depth and substance through international conventions such as the OECD, which has helped to create a standard by which states create their own bribery and corruption initiatives. In 2010, using the FCPA as a model, the United Kingdom took steps to create a modern and comprehensive set of laws to govern corporate responsibility in the light of corruption and bribery.

The next steps of the international community should be to continue to use the proven model of the FCPA as a guide to create comprehensive state endorsed laws governing corruption and

bribery. At the same time the United States must be willing to update and modify the FCPA to keep it current with international norms on bribery and corruption, much the way the FCPA was amended in 1998 to satisfy its implementation requirements under the OECD Convention.⁹¹ This should be done to avoid potential conflicts, and to encourage multinational prosecution of offenders like we saw in the Siemens case. Bribery remains a serious threat to the world today, and it will require the concerted effort of the international community to combat it successfully. If the United States wishes to promote increased enforcement efforts abroad, it should support the incorporation of this model in other developed countries.⁹² To this end the United States should seriously consider amending the FCPA to eliminate the facilitation payments exception and bring the country's laws more in harmony with the international standard.

The challenge for human rights and rule of law advocates alike is to figure out how best to generate business practices which will ultimately define just what is and isn't commercial bribery.⁹³ In addition corporate compliance measures and schemes should be researched, evaluated, and reviewed to assist international corporations who are striving to comply with the changing landscape of international law to navigate clear of any violations and the punishments that follow.

¹ F. Joseph Warin, Charles Falconer, Michael S. Diamant, *The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 *Tex. Int'l L.J.* 1, 4 (2010)

²Cherie O. Taylor, *The Foreign Corrupt Practices Act: A Primer*, *Currents: Int'l Trade L.J.*, Winter 2008, at 3

³ *Id.*

⁴ Lawrence J. Trautman & Kara Altenbaumer-Price, *The Foreign Corrupt Practices Act: Minefield for Directors*, 6 *Va. L. & Bus. Rev.* 145, 146 (2011)

⁵ Jacqueline L. Bonneau, *Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement*, 49 *Colum. J. Transnat'l L.* 365, 377-78 (2011)

⁶ Joel Androphy, *Elements of Bribery*, in *4 White Collar Crime Database* § 52:3 (2d ed. 2010) (available in Westlaw).

⁷ 15 U.S.C. § 78m(a).

⁸ Id. § 78m(b)(2)(A).

⁹ Id. § 78m(b)(2)(B).

¹⁰ Id. § 78m(b)(7).

¹¹ Id. § 78m(b)(4)-(5).

¹² Id. At 365, 382

¹³ Id. §§ 78dd-2(g)(3), 78dd-3(e)(3), 78ff(c)(2)(A).

¹⁴ Id. §§ 78dd-2(g), 78dd-3(e).

¹⁵ Alternative Fines Act, 18 U.S.C. § 3571(b)-(d) (2006). See also Lawrence J. Trautman & Kara Altenbaumer-Price, *The Foreign Corrupt Practices Act: Minefield for Directors*, 6 Va. L. & Bus. Rev. 145, 146 (2011)

¹⁶ U.S. Dept. of Justice, Foreign Corrupt Practices Act: Lay Person's Guide, available at <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf>.

¹⁷ Speech, DOJ, Charles McKenna, Current Issues in Medical Device and Pharmaceutical Litigation (Nov. 12, 2009).

¹⁸ Cherie O. Taylor, The Foreign Corrupt Practices Act: A Primer, *Currents: Int'l Trade L.J.*, Winter 2008, at 3

¹⁹ See Shearman & Sterling LLP, Recent Trends and Patterns in FCPA Enforcement at 6 (for a listing of the countries the U.S. has been coordinating with on parallel investigations).

²⁰ Cherie O. Taylor, The Foreign Corrupt Practices Act: A Primer, *Currents: Int'l Trade L.J.*, Winter 2008, at 3-4

²¹ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, 37 ILM 1 (1998).

²² Thomas F. McInerney, The Regulation of Bribery in the United States, 73 *Int'l R. of Penal L.* 81, 82 (2002), available at <http://www.cairn.info/revue-internationale-de-droit-penal-2002-1-page-81.htm>.

²³ 15 U.S.C.A. § 77dd-1 to 78dd-2, §5003, 102 Stat. 1415, 1424 (indicating that Congress urged the President to develop an anti-bribery agreement “with member countries of the Organization of Economic Cooperation and Development”).

²⁴ Organization of American States, Inter-American Convention Against Corruption, Mar. 29, 1996, OAS Doc. B-58, 35 I.L.M. 724.

²⁵ Indira Carr & Opi Outhwaite, The OECD Anti-Bribery Convention Ten Years On, 5 *Manchester J. of Int'l Econ. L.* 6 (2008), available at <http://epubs.surrey.ac.uk/578/1/fulltext.pdf> (“The prime mover for the OECD to take steps to combat corruption of foreign public officials was pressure applied by the United States ... which took almost two decades to bring about the intended result.”)

²⁶ Thomas F. McInerney, The Regulation of Bribery in the United States, 73 *Int'l R. of Penal L.* 89 (2002), available at <http://www.cairn.info/revue-internationale-de-droit-penal-2002-1-page-81.htm>.

²⁷ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents, Nov. 21, 1997, 37 *I.L.M.* 1 (1998), available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf>

²⁸ David C. Weiss, The Foreign Corrupt Practices Act, SEC Disgorgement Of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence, 30 *Mich. J. Int'l. L.* 480 (2009). (“Each implementing State must also ‘take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.’”)

²⁹ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents, Nov. 21, 1997, 37 *I.L.M.* 1 (1998), available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf> (Art. 2 artificial persons liability states: “Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.”)

³⁰ Indira Carr & Opi Outhwaite, The OECD Anti-Bribery Convention Ten Years On, 5 *Manchester J. of Int'l Econ. L.* 9 (2008), available at <http://epubs.surrey.ac.uk/578/1/fulltext.pdf>

³¹ *Id.* At 10 (“Practices and informal rules are part of this approach as well as other aspects of the legal system taking over ancillary functions. Therefore the focus of comparison would lie on overall effects produced by a country's legal system rather than the individual rules.”)

³²Andrea Bonime-Blanc, *The UK Anti-Bribery Act: How Global Companies Should Prepare*, *Ethical Corp.*, Sept. 14, 2010, <http://www.ethicalcorp.com/content.asp?contentid=7075>. (A recent study on enforcement of anti-corruption laws by OECD countries “showed slow but steady movement toward more proactive government enforcement of anti-corruption laws over the first decade of the OECD Convention. In the past couple of years, the Bush and now Obama Administrations have substantially ratcheted up the US Government's pursuit of all manner of cases in the anti-corruption space.”)

³³ The two major multilateral conventions are the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1977, OECD Doc. DAF/IME/BR(97)20, 37 I.L.M. 1 and the United Nations Convention Against Corruption, Dec. 9, 2003, UN Doc. A/58/422, 43 I.L.M. 37. There are also regional corruption conventions produced by the Council of Europe in the European Union as well as an African Union Convention. The OECD Convention requires signatory countries to pass implementing legislation to criminalize bribery, attempted bribery, or conspiracy to commit bribery and to include accounting provisions that are similar to those in U.S. legislation. OECD Convention, Art. 8, 37 I.L.M.1. See also U.S. Dep't. of Commerce, Int'l Trade Adm., *Addressing the Challenges of International Bribery and Fair Competition 2004* at Chapter 2 (July 2004), http://tcc.export.gov/wcm/groups/marketresearch/@tcc/documents/briberyreport/exp_000951.pdf (providing a U.S. review of the national implementing legislation efforts of countries to the OECD Convention).

³⁴ For a list of national legislation implementing the OECD Anti-Bribery Convention, see OECD Anti-Bribery Convention: National Implementing Legislation, OECD, <http://www.oecd.org/daf/anti-bribery/oecdanti-briberyconventionnationalimplementinglegislation.htm> (last visited April 10, 2013).

³⁵ Fritz Heimann & Gillian Dell, *Transparency Int'l, Progress Report on the Enforcement of the OECD Convention* 8, 11 (2009)

³⁶David C. Weiss, Note, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 *Mich. J. Int'l L.* 471, 482 (2009).

³⁷ *Id.*

³⁸ See Press Release, Dept. 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.usdoj.gov/criminal/pr/press_releases/2008/12/12-15-08siemans-guilty.pdf (discussing the U.S. Department of Justice (DOJ) terming the Siemens case as “unprecedented in scale and geographic scope”).

³⁹ See Peter von Blomberg, Siemens Gnadenlos, Die Welt Online, Jan. 6, 2009, http://www.welt.de/die-welt/article1854420/Siemens_gnadenlos.html. (explaining “a new era” and a “revolution” that the Siemens scandal has opened).

⁴⁰ Karl Sidhu, *Anti-Corruption Compliance Standards in the Aftermath of the Siemens Scandal*, 10 German L.J. 1343 (2009)

⁴¹ See Press Release, Dept. 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.usdoj.gov/criminal/pr/press_releases/2008/12/12-15-08siemans-guilty.pdf

⁴²See Statement of Siemens Aktiengesellschaft: Investigation and Summary of Findings with respect to the Proceedings in Munich and the US, Siemens, 10, Dec. 15, 2008, available at <http://w1.siemens.com/press/pool/de/events/2008-12-PK/summary-e.pdf>

⁴³Karl Sidhu, *Anti-Corruption Compliance Standards in the Aftermath of the Siemens Scandal*, 10 German L.J. 1343, 1347 (2009)

⁴⁴ U.S. Dep't of Justice News Release No. 08-1105, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines: Coordinated Enforcement Actions by DOJ, SEC and German Authorities Result in Penalties of \$1.6 Billion (Dec. 15, 2008), at <http://www.usdoj.gov/opa/pr/2008/December/08-crm-1105.html>.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Id.

⁵¹Id.

⁵² Id.

⁵³Lanny A. Breuer, Assistant Att'y Gen., Speech at the Twenty-Fourth National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010) (transcript available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>).

⁵⁴ Id.

⁵⁵ U.S. Dep't of Justice News Release No. 08-1105, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines: Coordinated Enforcement Actions by DOJ, SEC and German Authorities Result in Penalties of \$1.6 Billion (Dec. 15, 2008), at <http://www.usdoj.gov/opa/pr/2008/December/08-crm-1105.html>.

⁵⁶ See Statement of Siemens Aktiengesellschaft: Investigation and Summary of Findings with respect to the Proceedings in Munich and the US, Siemens, 20, Dec. 15, 2008, available at <http://w1.siemens.com/press/pool/de/events/2008-12-PK/summary-e.pdf>

⁵⁷Karl Sidhu, Anti-Corruption Compliance Standards in the Aftermath of the Siemens Scandal, 10 German L.J. 1343, 1351 (2009)

⁵⁸ See Memorandum from Dept. of Justice, United States v. Siemens Aktiengesellschaft, (D.D.C. 2008) (No. 1:08-cv-02167), available at <http://www.usdoj.gov/opa/documents/siemens-sentencing-memo.pdf>

⁵⁹ U.S. Dep't of Justice Press Release No. 10-209, BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine (Mar. 1, 2010), at <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html>.

⁶⁰ See Government Response to Joint Committee Report on Draft Bribery Bill, Ministry of Justice, Nov. 23, 2009, <http://www.justice.gov.uk/publications/draft-bribery-joint-cttee-govt-response.htm>.

⁶¹ Bill Stages--Bribery Bill [HL] 2009-10, Parliament (U.K.), <http://services.parliament.uk/bills/2009-10/briberyhl/stages.html> (last visited Feb. 27, 2011).

⁶² Press Release, Ministry of Justice, UK Clamps Down on Corruption with New Bribery Act (Mar, 30, 2011), available at <http://www.justice.gov.uk/news/newsrelease300311a.htm>.

⁶³ Jacqueline L. Bonneau, Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement, 49 Colum. J. Transnat'l L. 365, 386 (2011)

⁶⁴Eric Engle, I Get by with A Little Help from My Friends? Understanding the U.K. Anti-Bribery Statute, by Reference to the Oecd Convention and the Foreign Corrupt Practices Act, 44 Int'l Law. 1173 (2010)

⁶⁵ Bill Shaw, *The Foreign Corrupt Practices Act and Progeny: Morally Unassailable*, 33 *Cornell Int'l L.J.* 689, 691-94 (2000)

⁶⁶ Kofi Annan, U.N. Sec'y Gen., Remarks at the Harvard Kennedy School of Government (June 8, 2003) (transcript available at <http://www.un.org/apps/sg/sgstats.asp?nid=381>).

⁶⁷ *David C. Weiss, The Foreign Corrupt Practices Act, SEC Disgorgement Of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 *Mich. J. Int'l. L.* 471, 472-73 (2009).

⁶⁸ Bill Shaw, *The Foreign Corrupt Practices Act and Progeny: Morally Unassailable*, 33 *Cornell Int'l L.J.* 689, 691-94 (2000)

⁶⁹ Bill Shaw, *The Foreign Corrupt Practices Act and Progeny: Morally Unassailable*, 33 *Cornell Int'l L.J.* 689, 691-94 (2000)

⁷⁰ Karl Sidhu, *Anti-Corruption Compliance Standards in the Aftermath of the Siemens Scandal*, 10 *German L.J.* 1343, 1350 (2009)

⁷¹ See generally Elizabeth Spahn, *International Bribery: The Moral Imperialism Critiques*, 18 *Minn. J. Int'l L.* 155 (2009).

⁷² Jacqueline L. Bonneau, *Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement*, 49 *Colum. J. Transnat'l L.* 365, 405-08 (2011)

⁷³ *Frontline: Black Money* (PBS television broadcast Apr. 7, 2009) (showing footage from a 2001 interview with Prince Bandar), available at <http://www.pbs.org/wgbh/pages/frontline/blackmoney/view/>.

⁷⁴ Jack Straw, L.C. and Sec'y of State for Justice (U.K.), Remarks at Chatham House Announcing U.K. Foreign Bribery Strategy (Jan. 19, 2010) (transcript available at <http://www.justice.gov.uk/news/speech190110a.htm>).

⁷⁵ Jacqueline L. Bonneau, *Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement*, 49 *Colum. J. Transnat'l L.* 365, 405-08 (2011)

⁷⁶ See, e.g., *United States v. Kay*, 513 F.3d 432 (5th Cir. 2007), cert. denied, 129 S. Ct. 42 (2008) (holding that any payments to foreign officials that might assist in obtaining or retaining business by lowering the cost of operations can run afoul of the FCPA).

⁷⁷ OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, P VI (2009), available at <http://www.oecd.org/dataoecd/11/40/44176910.pdf>.

⁷⁸ Eric Engle, *I Get by with A Little Help from My Friends? Understanding the U.K. Anti-Bribery Statute, by Reference to the Oecd Convention and the Foreign Corrupt Practices Act*, 44 Int'l Law. 1173, 1177 (2010)

⁷⁹ Alexandros Zervos, *Amending the Foreign Corrupt Practices Act: Repealing the Exemption for "Routine Government Action" Payments*, 25 Penn. St. Int'l L. Rev. 194 (2006).

⁸⁰ *Id.* At 263-268

⁸¹ *Id.*

⁸² World Bank Institute, <http://info.worldbank.org/etools/edp/fightcorrupt.htm> (last visited May 10, 2013).

⁸³ The integrity pact approach was originally developed and is employed by Transparency International and its various national chapters.

⁸⁴ See *Wir Haben Fast Unser Eigenes FBI*, *Süddeutsche Zeitung*, Jan. 29, 2009, available at <http://www.sueddeutsche.de/wirtschaft/231/455904/text/5/> (stating Solmssen, the General Counsel and board member of Siemens, has named them in an interview "cartels of the good").

⁸⁵A "certifying business coalitions" has, for example, been founded by the Bavarian construction industry. Following various incidents of corruption an independent association for ethical management (EMB) was founded in 1996 to procure external audits for its members. Currently the EMB counts 43 audited members and 3 new members with their first audition outstanding. See *Bauindustrie Bayern*, <http://www.bauindustrie-bayern.de/ethik.html> (last visited May 28, 2009).

⁸⁶ The agreement of competitors upon certain anticorruption principles must be implemented under consideration of antitrust laws. Strategies, measures and meetings shall therefore at all times be coordinated with legal counsel to prevent violations of these laws.

⁸⁷ Weston C. Loegering, Joshua S. Roseman, Samantha Cox, *The Hidden Costs of Bribery*, 59 *The Advoc. (Texas)* 8, 9 (2012)

⁸⁸ Weston C. Loegering, Joshua S. Roseman, Samantha Cox, *The Hidden Costs of Bribery*, 59 *The Advoc. (Texas)* 8, 9 (2012)

⁸⁹David C. Weiss, *The Foreign Corrupt Practices Act, SEC Disgorgement Of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 *Mich. J. Int'l. L.* 471, 472-73 (2009).

⁹⁰ Carr & Outhwaite, *The OECD Anti-Bribery Convention Ten Years On*, 5 *Manchester J. of Int'l Econ. L.* 3, 4 (2008), available at <http://epubs.surrey.ac.uk/578/1/fulltext.pdf>., at 7.

⁹¹ International Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105-366, 112 Stat. 3302 (1998) (codified as 15 U.S.C. §§ 78dd-1 to 78dd-3, 78ff). The amendments, among other things, broadened the definition of “foreign official” and subjected foreign nationals who are agents or employers of U.S. issuers to criminal penalties under the FCPA.

⁹² Jacqueline L. Bonneau, *Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement*, 49 *Colum. J. Transnat'l L.* 365, 410 (2011)

⁹³ Eric Engle, *I Get by with A Little Help from My Friends? Understanding the U.K. Anti-Bribery Statute*, by Reference to the Oecd Convention and the Foreign Corrupt Practices Act, 44 *Int'l Law.* 1173, 1186 (2010)