

2011

## FCPA Sanctions: Too Big to Debar?

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### Recommended Citation

Drury D. Stevenson and Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 Fordham L. Rev. 775 (2011).  
Available at: <http://ir.lawnet.fordham.edu/flr/vol80/iss2/13>

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## FCPA SANCTIONS: TOO BIG TO DEBAR?

*Drury D. Stevenson\** & *Nicholas J. Wagoner\*\**

*The Foreign Corrupt Practices Act (FCPA) criminalizes bribery of foreign government officials. The frequency of enforcement actions and severity of fines levied against corporations under the FCPA have significantly increased in the last few years. There is an ongoing problem, however, with the sanctions for FCPA violations: enforcement authorities (the Department of Justice and the Securities and Exchange Commission) and contracting officials have limited themselves to fines, civil penalties, and occasional imprisonment of individual violators. Debarment from future federal government contracts, even temporarily, is an unused sanction for FCPA violations, even though Congress provided for this punishment by statute. Debarment offers a far more potent deterrent than fines and penalties, as multinational contractors that conduct business with the United States are much less likely to view the sanction as merely a cost of doing business. If ridding foreign markets of corruption truly is a top priority of the United States, it seems both unfair and imprudent for federal agencies to continue awarding lucrative, multi-billion dollar contracts to firms recently prosecuted for fraudulently obtaining them overseas.*

*Enforcement officials shy away from debarring entities that violate the FCPA due to the short-term inconvenience of an agency's inability to transact business with its favorite contractor, its inability to demand favorable bids from contractors when the field of potential bidders has thinned, the resulting job loss, and the risk of overdetering companies that might otherwise pursue lucrative opportunities in emerging markets. This is the "too big to debar" problem—the federal government is too dependent on a particular set of large, private sector corporations for equipment and services. In addition to the virtual immunity from debarment enjoyed by these firms when they violate the FCPA, the fines imposed for engaging in foreign corrupt practices comprise a tiny fraction of the potential revenue generated by lucrative contracts with the United States and foreign states. When discounted by the low probability of detection, these sanctions are far too low to deter unlawful activity.*

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*Debarment would deter potential wrongdoers and incapacitate actual offenders. The deterrent would induce more firms to comply with the law, which would allow the “too big to debar” problem to diminish over time. To help illuminate these concerns and lend support to the thesis, this Article will examine the third largest FCPA-related enforcement action to date: the BAE Systems case. On March 1, 2010, BAE Systems paid approximately \$400 million in fines for its corrupt practices abroad. In the year that followed, however, the federal government awarded BAE contracts in excess of \$6 billion. The United States’ refusal to debar BAE because of the potential “collateral consequences” provides a case study on the benefits and drawbacks of deterring foreign corruption through suspension and debarment. This Article concludes that the United States must begin to diversify its portfolio of federal contractors so that prosecutors may leverage the legitimate threat of suspension and debarment to more effectively deter foreign corruption.*

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#### INTRODUCTION

“A bribe is seen as a charm by the one who gives it; they think success will come at every turn.”<sup>1</sup>

Bribery of foreign officials by American businesses is a serious enough problem that Congress criminalized it in 1977 with the passage of the Foreign Corrupt Practices Act<sup>2</sup> (FCPA). Enforcement of the FCPA has been on the rise in recent years, as have the penalties.<sup>3</sup> Despite the dramatic escalation in fines and imprisonment for the violations,<sup>4</sup> a particularly potent sanction to combat overseas bribery remains unused; that is, debarment of the firm from future contracts with the United States.<sup>5</sup> Many of the firms caught bribing foreign government officials have

1. *Proverbs* 17:8 (NIV).

2. See Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 to -3 (2006)).

3. See, e.g., Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1449–51 (2008).

4. See *id.*

5. The FCPA does not mention debarment as a sanction; instead, it is available under the Federal Acquisition Regulation (FAR). See FAR 9.406-5 (2010). Federal prosecutors maintain that an FCPA violation may result in a company’s suspension or debarment from future government contracts. See DEP’T OF JUSTICE, RESPONSE OF THE UNITED STATES TO QUESTIONS CONCERNING PHASE 3, OECD WORKING GRP. ON BRIBERY at 45 (May 3, 2010) [hereinafter RESPONSE OF THE UNITED STATES, QUESTIONS CONCERNING PHASE 3]. Such a penalty would have a significant impact on a company’s bottom line, particularly if the company deals in national defense, oil services, or any other industry that largely relies on government business to stay afloat. From a law and economics perspective, the threat of debarment is perhaps one of the best ways to deter these companies from committing FCPA violations.

extensive contracts with a number of domestic federal agencies,<sup>6</sup> meaning debarment would be a particularly devastating punishment. Therefore, the threat of debarment, even for the standard two-year period, would serve as a singularly effective deterrent against such corruption; firms can recover and rebound from a large fine much more easily than from a loss of all government contracts, even for a limited time.

Even so, the federal agencies enforcing the FCPA—the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC)—have avoided exposing certain companies to potential debarment in even the most egregious cases of foreign corruption, citing concern for the “collateral consequences” that might result from a debarred company’s collapse. This raises the question: are certain government contractors too big to debar? As this Article demonstrates, it appears so. Consequently, the handful of private entities responsible for satisfying the vast majority of outsourced United States contracts have enjoyed bailouts from agency officials who refuse to sanction corrupt practices through suspension or debarment. This situation leads to the jaded viewpoint that paying fines when caught bribing foreign officials “simply become[s] a cost of doing business.”<sup>7</sup>

As discussed in Part I, not only does this practice deepen our nation’s entanglement with those who are undermining fledgling democracies overseas, agencies that continue to award billions of dollars in federal funding to contractors prosecuted for peddling bribes abroad send mixed messages about the United States’ commitment to accountability and transparency in foreign markets. The government’s failure to sever its partnership with a company after exposing egregious acts of foreign corruption undermines our nation’s credibility as a beacon of best practices to the increasingly global marketplace. From a less altruistic perspective, with zero risk of debarment and minimal risk of detection, companies have little incentive to comply with the FCPA when the fines imposed make up a fraction of the profit generated from foreign business procured through bribery. Without the realistic threat of debarment, companies partnering with the United States have little incentive to withdraw from the black market of foreign bribery.

To help illuminate these concerns, Part II of this Article will examine the third largest<sup>8</sup> FCPA-related<sup>9</sup> enforcement action to date, the BAE Systems

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6. 95.2 percent of BAE Systems’ revenue in 2009 came from defense-related contracts. *Defense News Top 100 for 2009*, DEFENSE NEWS (June 28, 2010), [http://defensenews.com/static/features/top100/charts/rank\\_2009.php?c=FEA&s=T1C](http://defensenews.com/static/features/top100/charts/rank_2009.php?c=FEA&s=T1C).

7. *Business Accounting and Foreign Trade Simplification Act: Joint Hearing on S. 430 Before the Subcomm. on Int’l Fin. & Monetary Policy and the Subcomm. on Sec. of the Comm. on Banking, Hous., & Urban Affairs*, 99th Cong. 2 (1986) (response of John C. Keeney, Deputy Att’y Gen., Criminal Division, DOJ, to written questions of Sen. Alfonse D’Amato).

8. Siemens holds the number one spot of the top FCPA prosecutions based on fines and penalties. In 2008, the company pleaded guilty and paid a fine of roughly \$800 million for paying bribes across the world. The second largest FCPA prosecution involved Kellogg Brown & Root (KBR), which, along with its former corporate parent Halliburton, paid \$579

case. On March 1, 2010, BAE Systems PLC paid approximately \$400 million in fines for its corrupt practices abroad.<sup>10</sup> Nevertheless, within a year, BAE won federal contracts in excess of \$6 billion.<sup>11</sup> Evidence suggests that this is not an isolated coincidence.<sup>12</sup> Yet this practice has gone largely unnoticed by the academic literature on the FCPA.

Part III helps frame the debarment debate by first revealing why fines are largely inconsistent with the United States' stated goal of rooting out corruption in foreign markets. This part then canvasses the law of suspension and debarment, and explains how these potent penalties are often the functional equivalent of sentencing a corporation to death. After explaining the benefits that may flow from an agency's increased use of discretionary suspension and debarment (namely, its deterrent effect on foreign corruption), Part III considers the collateral consequences of sanctioning FCPA violations in such a harsh manner.

After reviewing the Overseas Contractor Reform Act and teasing out the competing interests at stake—deterring foreign corruption while avoiding the collateral consequences of severely sanctioning corrupt contractors too big to debar—this Article concludes that the United States must begin to diversify its portfolio of federal contractors so that prosecutors may leverage the legitimate threat of debarment to deter foreign corruption more

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million in connection with bribes paid to undercover agents posing as Nigerian officials. *See* Leslie Benton et al., *Anti-Corruption*, 45 INT'L LAW. 345, 347 (2011); Bruce Hinchey, *Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements*, 40 PUB. CONT. L.J. 393, 406–07 (2011); Jon Jordan, *Recent Developments in the Foreign Corrupt Practices Act and the New UK Bribery Act: A Global Trend Towards Greater Accountability in the Prevention of Foreign Bribery*, 7 N.Y.U. J. L. & BUS. 845, 855–56 (2011).

9. As discussed below, BAE was technically not prosecuted for violating the FCPA; rather, its acts of bribery were prosecuted under the more general 18 U.S.C. § 1001 (2006) for submitting false statements by misrepresenting the nature of its bribe payments to the government. *See infra* Part III.

10. Press Release, U.S. Dep't of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine (Mar. 1, 2010), <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html>. According to the DOJ's press release, BAE Systems PLC "is a multinational defense contractor with headquarters in the United Kingdom and with a U.S. subsidiary—BAE Systems Inc.—headquartered in Rockville, Md. None of the criminal conduct described in the plea involved the actions of BAE Systems Inc." *Id.*

11. *See Prime Award Spending Data for BAE Systems PLC, Fiscal Year 2010*, USASPENDING.GOV, [http://www.usaspending.gov/explore?fromfiscal=yes&fiscal\\_year=2011&contractorid=243604&fiscal\\_year=2010&tab=By+Prime+Awardee&fromfiscal=yes&carryfilters=on&Submit=Go](http://www.usaspending.gov/explore?fromfiscal=yes&fiscal_year=2011&contractorid=243604&fiscal_year=2010&tab=By+Prime+Awardee&fromfiscal=yes&carryfilters=on&Submit=Go) (last visited Oct. 20, 2011) (reporting that U.S. agencies awarded BAE \$6,619,991,720 in "prime awards" during the fiscal year 2010 in 13,238 transactions). As of August 31, 2011, domestic government agencies have awarded BAE \$3,663,155,093 in "prime award" contracts in 7,825 transactions. *Prime Award Data for BAE Systems PLC, Fiscal Year 2011*, USASPENDING.GOV, [http://www.usaspending.gov/explore?fromfiscal=yes&fiscal\\_year=2010&contractorid=243604&fiscal\\_year=2011&tab=By+Prime+Awardee&fromfiscal=yes&carryfilters=on&Submit=Go](http://www.usaspending.gov/explore?fromfiscal=yes&fiscal_year=2010&contractorid=243604&fiscal_year=2011&tab=By+Prime+Awardee&fromfiscal=yes&carryfilters=on&Submit=Go) (last visited Oct. 20, 2011).

12. *See, e.g.,* Steven L. Schooner, *The Paper Tiger Stirs: Rethinking Suspension and Debarment*, 13 PUB. PROCUREMENT L. REV. 211, 214 (2004) ("With fewer major, critical contractors available to compete for the Government's most sophisticated requirements, it seems disingenuous to bar a key player from future competition. Such behaviour might be described as cutting off one's nose to spite one's face.").

effectively. In short, by rewarding subsequent lucrative contracts to firms fined for engaging in foreign corruption, the United States reinforces the perception that bribery brings success, as observed in the quote above from the book of Proverbs. The only way to change this perception, and in turn purify foreign markets polluted by corruption, is to end the government's subsidization of companies that carry out United States business in a corrupt manner.

## I. BACKGROUND

### A. *The Dark Side of Foreign Corruption*

"Sunlight is said to be the best of disinfectants."<sup>13</sup>

The cancerous effect of corruption abroad can quickly spread through the increasingly global marketplace and ultimately wreak havoc on the economy at home.<sup>14</sup> During a 2010 speech, Assistant Attorney General Lanny Breuer pointed to the estimated \$1 trillion in worldwide bribes paid each year<sup>15</sup> as evidence of just how severely such foreign corruption "undermines the health of international markets [by] stifling competition and repelling foreign investment."<sup>16</sup> In emerging economies, Breuer further explained that the routine bribery of officials means that "[r]oads are not built, schools lie in ruin, and basic public services go unprovided."<sup>17</sup>

There are several other toxic side effects of foreign bribery, such as its subsidization of terrorism and brutal tyrants. Companies that routinely engage in corrupt business practices abroad play an active role in helping maintain the "ungoverned states" that "continue to export poverty and serve as havens for all sorts of gangsters, pirates, and terrorists."<sup>18</sup> For example, investigators revealed that Siemens' indiscriminate use of its "web of secret

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13. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (1914).

14. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 268 (7th ed. 2007) ("How destructive, economically, is corruption . . . ? Perhaps very, because the heaviest burden falls on innovation." (citing Kevin M. Murphy et al., *Why Is Rent-Seeking So Costly to Growth?*, 83 AM. ECON. REV. PAPERS & PROC. 409, 412–13 (1993))).

15. Lanny A. Breuer, Asst. Att'y Gen., Speech at the United Nations for International Anti-corruption Day (Dec. 9, 2010), <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101209.html> [hereinafter Anti-corruption Day Speech]; see also Susan Rose-Ackerman, *Governance and Corruption*, in GLOBAL CRISES, GLOBAL SOLUTIONS 301, 301 (Bjorn Lomborg ed., 2004).

16. Anti-corruption Day Speech, *supra* note 15; see also Courtney C. Thomas, Note, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 441 (2010) ("Bribery inhibits economic growth by two primary mechanisms: economic inefficiency and reduced investment.").

17. Anti-corruption Day Speech, *supra* note 15.

18. Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 MICH. J. INT'L L. 129, 131 (2010); see also Lanny A. Breuer, Asst. Att'y Gen., Speech at the 3rd Russia & Commonwealth of Independent States Summit on Anti-corruption (Mar. 16, 2011), available at <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-110316.html> ("[C]orruption is a 'gateway crime,' allowing money laundering, gang violence, terrorism and other crimes to thrive.").

bank accounts and shadowy consultants” to secure government contracts abroad resulted in “\$1.7 million to Saddam Hussein and his cronies.”<sup>19</sup>

The Executive Branch has similarly identified foreign bribery as a threat to national security. As part of his post-9/11 foreign policy, President George W. Bush acknowledged corruption’s “serious adverse effects on . . . the security of the United States against transnational crime and terrorism.”<sup>20</sup> The Obama Administration has similarly “recogni[zed] that pervasive corruption is a violation of basic human rights and a severe impediment to development and global security.”<sup>21</sup>

In addition to its destructive economic consequences and links to terrorism, the spread of foreign corruption has produced several other side effects worth mentioning. For example, anecdotal evidence suggests that goods and services procured through corruption are more likely to be at best, defective, and at worst, deadly.<sup>22</sup> Likewise, businesses that resort to bribery abroad are more likely to bring the practice home.<sup>23</sup> For those concerned about nurturing democracy and free markets in developing countries, American companies that bribe foreign officials also undermine confidence in open governance and open markets.<sup>24</sup>

### B. Theories of Deterrence

Given the dire consequences associated with the spread of corruption in foreign lands, it is no surprise that central to the DOJ’s mission of “rooting

19. Siri Schubert & T. Christian Miller, *Where Bribery Was Just a Line Item*, N.Y. TIMES, Dec. 21, 2008, at C1.

20. Proclamation No. 7750, To Suspend Entry as Immigrants or Nonimmigrants of Persons Engaged in or Benefiting from Corruption, 69 Fed. Reg. 2287 (Jan. 12, 2004).

21. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 38 (2010), available at [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf); see also Eric Holder, Att’y Gen., Address at the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity (Nov. 7, 2009), <http://www.justice.gov/ag/speeches/2009/ag-speech-091107.html> (“President Obama has said, ‘The struggle against corruption is one of the great struggles of our time.’”).

22. See, e.g., Nicholas Ambraseys & Roger Bilham, *Corruption Kills*, 469 NATURE 153, 153–55 (2011); *Testimony of POGO’s Danielle Brian on “Contractor Debarment and Suspension: A Broken System,” Before the George Washington Law School, PROJECT ON GOV’T OVERSIGHT (POGO)* (Nov. 20, 2003), <http://www.pogo.org/pogo-files/testimony/contract-oversight/co-fcm-20031120.html> (“Why is it that the government continues to do the bulk of its business with companies that have . . . knowingly supplied defective helicopter parts to the government, that have resulted in the deaths of service men and women; or falsified tests on the cruise missile?”).

23. See, e.g., Carrington, *supra* note 18, at 140 (“German observers have also expressed support because of concerns that German firms engaged in corruption abroad may have brought the practices home, i.e., that ‘globalization has become a motor for corruption in Germany.’” (citing Carter Dougherty, *Germany Battling Rising Tide of Corporate Corruption*, N.Y. TIMES, Feb. 14, 2007, at C1)).

24. See *United States v. Castle*, 925 F.2d 834 (5th Cir. 1991); see also Michael S. Diamant et al., *Corruption Crackdown: The FCPA and Recent Enforcement Trends, Presentation at Global Economic Crime Survey & Anti-Corruption/FCPA Seminar*, PRICEWATERHOUSECOOPERS & GIBSON, DUNN & CRUTCHER LLP (Nov. 24, 2009), <http://www.gibsondunn.com/publications/Documents/Diamant-FCPAandRecentEnforcementTrends.pdf>.



out foreign bribery”<sup>25</sup> is its ability to send “a very strong deterrent message”<sup>26</sup> with each prosecution. In analyzing the deterrent effect of a given law, the traditional law and economics model operates on the basic assumption that people generally take calculative steps to advance their own self-interest.<sup>27</sup> Working from this assumption, Judge Richard Posner, “a veritable patriarch of deterrence theory,”<sup>28</sup> has stated, “The primary . . . function of law, in an economic perspective, is to alter incentives.”<sup>29</sup>

Within this framework, a corporate executive, manager, or agent has a rational incentive to pay bribes overseas where the anticipated pecuniary benefits exceed the anticipated costs of criminal punishment.<sup>30</sup> The expected pecuniary benefit to a corporation that engages in bribery is, of course, the profit it generates with the government contracts procured through its corrupt practices. At the individual level, an employee’s willingness to pay an occasional bribe or kickback to grease their supply chain or win a lucrative contract for their company may be quite tempting given the variety of benefits that may result: a promotion, a raise, a bonus, etc.

On the other side of this equation, Judge Posner identifies two key mechanisms for controlling the expected costs of criminal punishment—the amount of law enforcement activity and the severity of punishment.<sup>31</sup> Bribe payers, just like any other class of criminals, respond to incentives and perceived opportunity costs, which include punishments and the probability of getting caught.

The DOJ and SEC have successfully increased their ability to detect foreign bribery,<sup>32</sup> and have been equally effective at levying massive fines to punish such corrupt practices.<sup>33</sup> Even so, it undermines the government’s ability to deter continued corruption when one of the

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25. Lanny A. Breuer, Asst. Att’y Gen., Address at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>.

26. Skip Kaltenheuser, *Anti-corruption—US Leads the Way*, INT’L BAR ASS’N, <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=21F61C45-0318-41F6-89F8-3E8C01EC57B1> (last visited Oct. 20, 2011) (quoting then-head of enforcement of the DOJ, Mark Mendelsohn).

27. See POSNER, *supra* note 14, at 4 (“[M]an is a rational utility maximizer in *all* areas of life.”); Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1544–45 (2005) (“The traditional economic model assumes that people maximize their self-interest . . .”).

28. Stevenson, *supra* note 27, at 1552.

29. POSNER, *supra* note 14, at 266.

30. *Id.* at 219; see also David 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, 506 (2009) (“A perfectly deterrent punishment scheme would set the level of punishment at the level of the expected gains of participating in the criminal behavior.”).

31. POSNER, *supra* note 14, at 219.

32. See *infra* Part I.C.2.

33. See *infra* Part I.C.2.

potential costs of engaging in such corruption—a company’s suspension or debarment from partnering with the United States—is never at issue.<sup>34</sup>

### C. Enforcement of the FCPA

The DOJ maintains that FCPA enforcement helps eliminate foreign corruption where it already exists, and deters it from taking root in new situations.<sup>35</sup> Indeed, the DOJ has succeeded impressively in ratcheting up enforcement in recent years.<sup>36</sup> Executives reportedly spend sleepless nights wondering if their company will be the next target of an FCPA enforcement action.<sup>37</sup> On display in the DOJ and SEC’s ever-expanding FCPA trophy case are such blue-chip staples as General Electric, KBR/Halliburton, and Tyson Foods.<sup>38</sup>

#### 1. Enforcement Authorities

The DOJ, responsible for prosecuting criminal violations of the FCPA,<sup>39</sup> and the SEC, responsible for prosecuting civil violations of the FCPA,<sup>40</sup>

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34. See *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime & Drugs of the U.S. Senate Comm. on the Judiciary*, 111th Cong. 54, 66 (2010) (prepared statement of Professor Mike Koehler) [hereinafter *Koehler Statement*]. In his prepared statement delivered before Senator Arlen Specter and other members of the Senate Committee on the Judiciary, Professor Koehler wrote,

Deterrence is not achieved . . . when U.S. government agencies continue to award multi-million dollar contracts to companies in the immediate aftermath of bribery scandals.

In order for the DOJ’s deterrence message to be completely heard and understood egregious instances of corporate bribery that legitimately satisfy the elements of an FCPA anti-bribery violation involving high-level executives and/or board participation should be followed with debarment proceedings against the offender.

*Id.*

35. Breuer, *supra* note 25.

36. See *infra* Part I.C.2.

37. See Nathan Vardi, *The Bribery Racket*, FORBES (May 28, 2010, 10:20 AM), <http://www.forbes.com/global/2010/0607/companies-payoffs-washington-extortion-mendelsohn-bribery-racket.html> (quoting Lucinda Low, an FCPA specialist as saying, “[T]he scope of things companies have to worry about is enlarging all the time as the government asserts violations in circumstances where it’s unclear if they would prevail in court.”).

38. See SEC v. General Electric Co., No. 1:10-CV-01258 (D.D.C. 2010); SEC v. Halliburton Co., No. 4:09-cv-399 (S.D. Tex. 2009); United States v. Kellogg Brown & Root LLC, No. H-09-071 (S.D. Tex. 2009); United States v. Halliburton Co., 4:09-CV-399 (S.D. Tex. 2009); Deferred Prosecution Agreement, United States v. Tyson Foods Inc., No. 1:11-cr-00037 (D.D.C. Feb. 4, 2011).

39. See *Foreign Corrupt Practices Act: Antibribery Provisions*, U.S. DEP’T OF JUSTICE 2, <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> (last visited Oct. 20, 2011) (“The Department of Justice is responsible for all criminal enforcement and for civil enforcement of the anti-bribery provisions with respect to domestic concerns and foreign companies and nationals.”); see also Thomas, *supra* note 16, at 444 n.27 (“Though not precluded by statute, the DOJ does not enforce the accounting provisions often, if ever.”).

40. *Foreign Corrupt Practices Act*, *supra* note 39, at 2 (“The SEC is responsible for civil enforcement of the anti-bribery provisions with respect to issuers.”); see also Thomas, *supra*

together with the Federal Bureau of Investigation (FBI), form the trifecta of federal agencies tasked with investigating and enforcing the FCPA. Each agency publicizes its stance on rooting out foreign corruption.<sup>41</sup>

## 2. Growth in FCPA Enforcement

Congress has poured millions of dollars into these agencies to help fund their ambitious anticorruption initiatives. Some commentators have observed that, in recent years, the DOJ has “substantially enlarged its efforts to enforce corrupt practices law”<sup>42</sup> by initiating “discussions with the Internal Revenue Service’s Criminal Investigation Division about partnering with [the DOJ] on FCPA cases,” in addition to “pursuing strategic partnerships with certain U.S. Attorney’s Offices throughout the United States where there are a concentration of FCPA investigations.”<sup>43</sup>

In 2007, the FBI created a new unit dedicated solely to handling FCPA probes.<sup>44</sup> The SEC similarly stepped up its enforcement efforts in 2009 by creating a special FCPA unit that “focus[es] on new and proactive approaches to identifying violations” by “being more proactive in investigations, working more closely with [its] foreign counterparts, and taking a more global approach to these violations.”<sup>45</sup>

The robust growth of FCPA-focused units within these agencies has unsurprisingly translated into robust enforcement of the FCPA. Following an initial flurry of activity immediately after its enactment in 1977, the FCPA faded into relative obscurity for a quarter century, generating a mere sixty corporate cases<sup>46</sup> and no more than \$35.2 million in total fines during

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note 16, at 444 n.27 (“The SEC has typically been the safeguard of the accounting provisions, using civil actions such as injunctions to enforce the Act when the DOJ might not be able to bring criminal charges under the anti-bribery provisions.”).

41. See, e.g., Alice S. Fisher, Asst. Att’y Gen., Prepared Remarks at the American Bar Association National Institute on the Foreign Corrupt Practices Act (Oct. 16, 2006), available at [http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPA\\_Speech.pdf](http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPA_Speech.pdf) (“At the outset, let me address the most basic questions some of you might have about the government’s attitude toward FCPA enforcement. Do we care about the FCPA? Is the FCPA relevant in today’s global business climate? Is enforcing the FCPA a high priority? The answer to all of those questions is yes. Prosecuting corruption of all kinds is a high priority for the Justice Department and for me as head of the Criminal Division.”); Lanny A. Breuer, Asst. Att’y Gen., Speech at the Annual Meeting of the Washington Metropolitan Area Corporate Counsel (Jan. 26, 2011), available at <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-110126.html> (“As an initial matter, in the Criminal Division we have dramatically increased our enforcement of the Foreign Corrupt Practices Act in recent years.”).

42. Carrington, *supra* note 18, at 136.

43. Lanny A. Breuer, Asst. Att’y Gen., Speech at the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009), available at <http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf>.

44. Sue Reisinger, *Why Are More Companies Self-Reporting Overseas Bribes?*, LAW.COM (July 16, 2007), <http://www.law.com/jsp/article.jsp?id=900005486003>.

45. Robert Khuzami, Dir., Div. of Enforcement, SEC, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009), available at <http://www.sec.gov/news/speech/2009/spch080509rk.htm>.

46. John Gibeaut, *Battling Bribery Abroad*, A.B.A. J. (Mar. 18, 2007, 5:05 AM), [http://www.abajournal.com/magazine/article/battling\\_bribery\\_abroad/](http://www.abajournal.com/magazine/article/battling_bribery_abroad/).

that period.<sup>47</sup> The number of FCPA enforcement actions increased modestly from 2004 (five) to 2005 (twelve), and then again in 2006 (fifteen).<sup>48</sup> Beginning in 2007, however, the DOJ and SEC brought thirty-eight enforcement actions in a single year<sup>49</sup>—a 153 percent increase from the previous year. This trend held steady in 2008 and 2009, with thirty-three and forty enforcement actions, respectively.<sup>50</sup>

The DOJ's then-chief FCPA prosecutor, Mark Mendelsohn, stated his desire for the Department to sustain its rapidly increasing enforcement actions.<sup>51</sup> With an estimated \$644 million in FCPA-related sanctions imposed by the United States in 2009,<sup>52</sup> a total of forty enforcement actions brought by the DOJ and SEC in 2010,<sup>53</sup> and numerous ongoing investigations,<sup>54</sup> the DOJ has adhered to Mendelsohn's vision, although he has left the DOJ for private practice. The explosion of enforcement of the FCPA in recent years has allowed federal prosecutors to squeeze vast sums of wealth out of companies prosecuted under the Act. Congress's investment in anticorruption enforcement appears to have "abundantly reimbursed the national treasury"<sup>55</sup> and produced a significant "return on investment."<sup>56</sup> With backing from the Obama Administration,<sup>57</sup> the continued climb in the number of FCPA-related investigations and enforcement actions shows no signs of slowing in 2012 and beyond.

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47. Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 103 (2010). The number of FCPA actions during its first twenty to twenty-five years varies slightly by author. See, e.g., Thomas, *supra* note 16, at 449 ("Twenty years after the FCPA's passage, only seventeen companies and thirty-three individuals faced prosecution."). Despite disagreement over the number of FCPA prosecutions during this period, it is clear that "[d]uring the first two decades of the FCPA, enforcement was 'sporadic' at best." *Id.* at 448.

48. See *2010 Mid-year FCPA Update*, GIBSON, DUNN & CRUTCHER LLP (July 8, 2010), <http://www.gibsondunn.com/publications/pages/2010Mid-YearFCPAUpdate.aspx>.

49. *Id.*

50. See *id.*

51. See *Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007*, 22 CORP. CRIME REP. 36(1) (2008).

52. John E. Kelly et al., *White Collar Crime: FCPA Enforcement Update*, 34 CHAMPION 56, 56 (2010).

53. *2010 Year-End FCPA Update*, GIBSON, DUNN & CRUTCHER LLP (Jan. 3, 2011), <http://www.gibsondunn.com/publications/Documents/2010YearEndFCPAUpdate.pdf>.

54. See *id.* For more discussion of FCPA investigations earlier in the decade, see Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 1–3 (2006) (highlighting prosecutions from 2002–05).

55. Carrington, *supra* note 18, at 136.

56. *Protecting American Taxpayers: Significant Accomplishments and Ongoing Challenges in the Fight Against Fraud: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) [hereinafter *Protecting American Taxpayers*] (statement of Sen. Franken) ("I just want to ask something about return on investment . . . For every dollar invested in [healthcare procurement fraud] investigations, we get back \$17. And what I'm wondering is would you like more resources, and can they be used . . . [to] reduc[e] our deficit by spending more money . . .").

57. See Holder, *supra* note 21.

### 3. Dearth of Case Law

The DOJ and SEC have posted a record-breaking number of FCPA prosecutions in recent years, and have extracted vast sums of wealth from companies across the globe, yet courts have played a very small role in the FCPA's substantive expansion. Although individuals faced with incarceration have been less reluctant to challenge FCPA enforcement actions in court, fearing the negative publicity that might result from an FCPA trial, most companies have chosen to sweep charges under the rug by entering into a plea agreement. And prosecutors have been more than willing to plea bargain with multinational firms willing to accept massive fines to move on. As a result, "no business entity has publicly challenged either enforcement agency in an FCPA case in the last twenty years."<sup>58</sup>

### 4. Trends

The combination of robust enforcement and minimal judicial oversight has produced a number of trends unique to the FCPA. The first major trend to emerge in recent years is the DOJ's increased criminal prosecution of individuals.<sup>59</sup> Prosecutors have focused particular attention on corporate executives and high-level managers who fail to instill a culture that encourages transparency and compliance.<sup>60</sup> Moreover, although the FCPA has not typically reached individuals on the receiving end of a bribe, the DOJ has nevertheless deployed a variety of untested tactics to "target 'foreign official' recipients of bribe payments."<sup>61</sup>

Several distinct trends have emerged in the prosecution of commercial entities as well. Prosecutors have imposed vicarious liability on parent companies for the corrupt practices of their subsidiaries.<sup>62</sup> The DOJ has also stepped up its prosecution of foreign entities,<sup>63</sup> which conveniently avoids the political backlash that often accompanies corruption charges brought against domestic employers. That said, domestic corporations have certainly not been immune from prosecution under the FCPA. The DOJ, SEC, and FBI have increasingly focused on using "industry-wide sweeps" to prosecute FCPA violations efficiently, a practice in which "no industry is immune from investigation."<sup>64</sup> Specifically, prosecutors have targeted the

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58. Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 406 (2010).

59. *See id.*

60. *See* Colleen A. Conry, *Complying with the Foreign Corrupt Practices Act in the Global Healthcare Industry*, 3 J. HEALTH & LIFE SCI. L. 1, 1 (2010).

61. Koehler, *supra* note 58, at 405.

62. *See* Justin F. Marceau, *A Little Less Conversation, a Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt Practices Act*, 12 FORDHAM J. CORP. & FIN. L. 285, 296 (2007).

63. *See* Thomas, *supra* note 16, at 460.

64. Press Release, SEC, SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials (Nov. 4, 2010), <http://www.sec.gov/news/press/2010/2010-214.htm>.

tobacco, telecommunications, healthcare, and defense industries.<sup>65</sup> A related development in recent FCPA enforcement involved the “landmark SHOT Show sting operation” in which hundreds of federal agents descended on a Las Vegas trade convention to serve warrants to industry participants suspected of paying bribes to “FBI agents posing as representatives of the Gabonese Ministry of Defense.”<sup>66</sup>

In addition to the increased criminal prosecution of individuals, aggressive enforcement against entities, and industry-wide investigations, much of the FCPA’s success (or notoriety) is attributable to the growing number of companies that voluntarily disclose potential violations. The DOJ and SEC, realizing the incentive-altering force of massive sanctions, have parlayed a handful of highly publicized multi-million dollar prosecutions into many more self-disclosures by companies hoping for more lenient sentencing.<sup>67</sup> As one author pointed out, “The best evidence that the DOJ’s current enforcement of the FCPA deters bribery is in the sheer numbers of self-disclosers in recent years.”<sup>68</sup>

#### D. Legislative History

The FCPA has a rather peculiar genesis. Ironically, the issue of international corruption was first thrust into the spotlight not because of events abroad, but rather events at home—the Watergate scandal. The year was 1973 and Watergate Special Prosecutor Archibald Cox had requested that companies involved in President Nixon’s reelection campaign come forward and admit their illicit dealings.<sup>69</sup> The response from Corporate America exposed not only the rampant corruption that led to President Nixon’s resignation, but also the international market for black money.<sup>70</sup>

Understandably concerned about the pervasive international corruption brought to light during Watergate, the SEC initiated what was perhaps the first action against foreign corrupt practices in 1975,<sup>71</sup> as well as the first

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65. See generally 2010 Year-End FCPA Update, *supra* note 53, at 10–20 (describing efforts against these industries specifically).

66. *Id.* at 15.

67. See Bixby, *supra* note 47, at 115.

68. Thomas, *supra* note 16, at 467; see also Weiss, *supra* note 30, at 483.

69. See André M. Peñalver, Note, *Corporate Disconnect: The Blackwater Problem and the FCPA Solution*, 19 CORNELL J.L. & PUB. POL’Y 459, 469 (2010).

70. See *id.* (reporting that inquiries by federal investigators of the Watergate scandal uncovered a “series of foreign bribery scandals by a number of Fortune 500 companies”).

71. See Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT’L L. 345, 349 (2000). One historical account describes these actions as follows:

[T]he Securities and Exchange Commission . . . initiated its own investigations, and in 1975 it moved against four major companies: Gulf Oil Corporation, Phillips Petroleum Company, Northrop Corporation, and Ashland Oil, Inc. The SEC alleged that the establishment of secret slush funds for unaccountable distribution of moneys abroad violated U.S. securities law requiring that public companies file accurate financial statements.

voluntary disclosure program for unreported foreign bribes.<sup>72</sup> Shortly thereafter, Congress set out to assess the seriousness of foreign corruption.<sup>73</sup> What it uncovered has been described as “the most extensive documentation of business-government corruption ever produced in history.”<sup>74</sup>

In 1976, Senator William Proxmire introduced Senate Bill 3313 and persuaded Congress of the need to enact what would become a “pioneering statute at the time” because it was “the first ever domestic statute governing the conduct of domestic companies in their interactions . . . with foreign government officials in foreign markets.”<sup>75</sup> In rejecting President Ford’s more lenient proposal<sup>76</sup> in favor of legislation that criminalized both the failure to report bribery and the act itself,<sup>77</sup> Congress expressed its belief that the cost of getting caught bribing foreign officials must be high, otherwise “many companies will continue paying bribes if they can get away with it, because the potential rewards are so great and the risks are minimal.”<sup>78</sup>

In drafting the FCPA, Congress wrestled with several difficult questions concerning the scope of its new statute. Three questions garnered particularly vigorous debate. The first was whether a requirement that a company fully disclose its corrupt dealings with foreign officials could backfire and hurt the United States’ diplomatic relations (Congress decided full disclosure was more important).<sup>79</sup> The second was whether stopping the flow of bribe money abroad would hurt United States relations with allied nations where bribery was customary (Congress dismissed this concern by pointing out that most foreign countries prohibit bribery despite local custom).<sup>80</sup> Finally, debate centered on whether the FCPA would

*Id.* (citing *The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on Int’l Econ. Policy of the H. Comm. on Int’l Relations*, 94th Cong. 2 (1975) [hereinafter *Multinational Corporations Hearings*]).

72. *Id.* at 350.

73. See *Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corps. of the S. Comm. on Foreign Relations*, 93rd Cong. 5 (1975).

74. Posadas, *supra* note 71, at 350. Posadas’s article provides a comprehensive list of sources that report the FCPA’s legislative history from 1975–77. See *id.* at 350 n.10.

75. Koehler Statement, *supra* note 34, at 2.

76. See Message from the President of the United States, Foreign Payments Disclosure Act, H.R. Doc. No. 94-572, at 1 (1976). The Ford Administration’s proposed bill required that companies report “certain classes for foreign payments made by U.S. corporations (only significantly large payments), but would not make these payments unlawful as long as they complied with other existing applicable law. This was a conservative approach.” Posadas, *supra* note 71, at 356.

77. See *Foreign Payments Disclosure: Hearings on H.R. 15481 and S. 3664 Before the Subcomm. on Consumer Prot. & Fin. of the Comm. on Interstate & Foreign Commerce*, 94th Cong. (1976).

78. *Foreign and Corporate Bribes: Hearings on S. 3133 Before the S. Comm. on Banking, Hous. & Urban Affairs*, 94th Cong. 1 (1976) (statement of Sen. William Proxmire).

79. See *Multinational Corporations Hearings*, *supra* note 71, at 22; see also Posadas, *supra* note 71, at 358.

80. See *Multinational Corporations Hearings*, *supra* note 71, at 24; see also Posadas, *supra* note 71, at 358.

place American businesses at a serious disadvantage by prohibiting a practice that foreign companies were still free to engage in<sup>81</sup> (Congress rejected this too, opting to force American companies to take the high road instead).<sup>82</sup>

After resolving the remaining points of contention and carving out an exception for “grease payments,”<sup>83</sup> Senate Bill 305 passed in both houses<sup>84</sup> and President Carter signed it into law on December 19, 1977.<sup>85</sup> This was the birth of the Foreign Corrupt Practices Act. With the exception of a proposed amendment to quell concerns that the FCPA was overburdening American businesses,<sup>86</sup> the decade that followed was uneventful.

In 1988, concern over the FCPA’s chilling effect on American companies’ willingness to pursue opportunities abroad resurfaced, ultimately leading to the first of two amendments to the FCPA.<sup>87</sup> Although the amendment left the FCPA’s two-prong structure intact,<sup>88</sup> it created two affirmative defenses and elevated the grease payment exception from the accounting prong to its present position as a stand-alone exception.<sup>89</sup> The amendment created one affirmative defense for promotion or hospitality expenses,<sup>90</sup> and a second affirmative defense for bribes made pursuant to written law of the country in which the bribe was paid.<sup>91</sup>

81. See Posadas, *supra* note 71, at 358. Congress did make some concessions, however, carving out an exception for “so-called ‘grease’ payments such as payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties.” S. Rep. No. 95-114, at 10 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4108; *see also* H.R. Rep. No. 95-640 (1977).

82. See Posadas, *supra* note 71, at 358 (“[I]t appears that Congress ultimately adopted sanctions because it simply considered the practice to be wrong.”).

83. See S. Rep. No. 95-114; *see also* H.R. Rep. No. 95-640 (discussing the legislative history behind the “grease payments” exception).

84. See H.R. Rep. No. 94-831 (1977); 123 CONG. REC. 38,599, 38,779 (1977).

85. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 to dd-2 (2006)).

86. See *Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 708 Before the Subcomm. on Sec. & the Subcomm. on Int’l Fin. & Monetary Policy of the Comm. on Banking, Hous., and Urban Affairs*, 97th Cong. 1 (1981). The Senate joint hearings on the proposed amendment focused on “whether the [FCPA], including both its antibribery and accounting provisions, [was] the best approach [to deterring foreign corruption], or whether it has created unnecessary costs and burdens out of proportion to the purposes for which it was enacted, and whether it serves our national interest.” *Id.* (statement of Sen. D’Amato). Senator John Chafee echoed these concerns: “We’ve learned that the best of intentions can go awry and create confusion and great cost to our economy.” *Id.* at 8.

87. Omnibus Trade and Competitiveness Act of 1988, Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, tit. V, subtit. A, pt. I, §§ 5001–5003, 102 Stat. 1107, 1415–25.

88. See *infra* notes 98–100 and accompanying text (discussing the FCPA’s two-prong structure); *see also* Otto G. Obermaier & Robert G. Morvillo, *The Foreign Corrupt Practices Act*, in 2 WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES § 16.04 (Robert J. Anello et al. eds., 1990).

89. See §§ 5001–5003, 102 Stat. at 1415–25.; *see also* H.R. Rep. No. 100-576, at 916–20 (1988) (Conf. Rep.).

90. See 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2).

91. See *infra* Part I.E.



As globalization spread, 1988 was also an important year because it marked a “renewed awareness of international criminal activity” that would ultimately allow international “anti-corruption initiatives [to] flourish.”<sup>92</sup> In the years that followed, countries around the world joined (or at least claimed to join) the United States in its global war on corruption.<sup>93</sup> In 1997, thirty-two other nations joined the United States in signing the Organization for Economic Cooperation and Development Convention on Combating Bribery (OECD Convention) whereby each nation pledged to criminalize foreign bribery in its home country.<sup>94</sup>

One year later, in satisfaction of one of the United States’ obligations under the OECD Convention, President Clinton amended the FCPA for a second time by signing into law the International Anti-Bribery and Fair Competition Act of 1998 (International Anti-Bribery Act).<sup>95</sup> This amendment significantly expanded both the substantive and jurisdictional scope of the ever-growing statute.<sup>96</sup> Although the DOJ has subsequently stretched the scope of the FCPA through a number of novel, untested theories of prosecution,<sup>97</sup> the International Anti-Bribery Act marks the last legislative expansion of the FCPA to date.

#### E. The Provisions of the FCPA

The FCPA has two main prongs: an anti-bribery prong and an accounting prong. The FCPA’s anti-bribery prong prohibits employees and agents of a company<sup>98</sup> from giving or offering cash, or anything else of value, to a foreign official in order to obtain or retain business.<sup>99</sup> The FCPA’s accounting prong applies to a company (and its employees and

92. Posadas, *supra* note 71, at 370.

93. See Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 453 (2009) (describing numerous multilateral efforts to combat global corruption).

94. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1.

95. Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended at 15 U.S.C. §§ 78dd-1 to -3, 78ff (2006)).

96. See Thomas, *supra* note 16, at 447–48.

97. See generally Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907, 963–81, 998–1001 (2010).

98. See 15 U.S.C. §§ 78m(b), 78dd-2 to -3. “Companies” subject to the FCPA’s jurisdiction include “U.S. companies (whether public or private) and its [sic] personnel; U.S. citizens; foreign companies with shares listed on a U.S. stock exchange or otherwise required to file reports with the SEC; or any person while in U.S. territory.” Koehler, *supra* note 97, at 913 (citing 15 U.S.C. §§ 78m(b), 78dd-1 to -3).

99. See 15 U.S.C. § 78dd-2(a). The FCPA makes it unlawful

for any domestic concern . . . or for any officer, director, employee, or agent of such domestic concern . . . to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, [or] promise to pay . . . anything of value to . . . any person, while knowing that all or a portion of such money . . . will be offered, given, or promised, directly or indirectly, to any foreign official . . . for purposes of . . . influencing any act or decision of such foreign official . . . in his . . . official capacity . . .

*Id.*

agents) only if it fits within the definition of an “issuer.”<sup>100</sup> In the context of foreign bribery, the record-keeping provisions require issuers to maintain detailed, accurate records of all transactions overseas.<sup>101</sup> The internal control provisions supplement the record-keeping provisions by requiring that issuers instill a corporate culture of transparency through various anti-bribery policies and procedures, and holds managers accountable for the transactions that occur under their supervision.<sup>102</sup> The broadly worded provisions of the FCPA reach all (1) “issuer[s],”<sup>103</sup> (2) “domestic concern[s],”<sup>104</sup> and (3) any “person” who otherwise commits an act in furtherance of bribery while physically present in the United States or a United States territory.<sup>105</sup>

The more potent of the two affirmative defenses available under the FCPA places reasonable hospitality and promotional expenditures outside the ambit of “bribes” considered to violate the FCPA. This includes

the payment, gift, offer, or promise of anything of value that [is] . . . a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, . . . and was directly related to . . . the promotion, demonstration, or explanation of

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100. 15 U.S.C. § 78c(a)(8). The FCPA defines an issuer as any person who issues or proposes to issue any security; except that with respect to certificates of deposit for securities, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or of the fixed, restricted management, or unit type, the term “issuer” means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; and except that with respect to equipment-trust certificates or like securities, the term “issuer” means the person by whom the equipment or property is, or is to be, used.

*Id.*; see also 15 U.S.C. § 78m(b)(2)(A)–(B) (describing the record-keeping and internal control responsibilities of an issuer). It is worth noting that “[a]s a practical matter, the books and records and internal control provisions apply only to publicly-held companies with shares traded on a U.S. exchange—a category which can include numerous foreign companies with shares traded on a U.S. exchange.” Koehler, *supra* note 97, at 922 (citing Press Release, Dep’t of Justice, U.S. Resolves Probe Against Oil Company that Bribed Iranian Official (Oct. 13, 2006), [http://www.justice.gov/opa/pr/2006/October/06\\_crm\\_700.html](http://www.justice.gov/opa/pr/2006/October/06_crm_700.html)).

101. See 15 U.S.C. § 78m(b)(2)(A).

102. See *id.* § 78m(b)(2)(B).

103. *Id.* § 78c(a)(8).

104. *Id.* § 78dd-2(h)(1).

105. *Id.* § 78dd-3. The Government has argued that presence in the United States is sufficiently established by e-mails, telephone calls, and transfers through correspondent bank accounts in U.S. intermediary banks. See *Adler v. Federal Republic of Nigeria*, 219 F.3d 869, 875–76 (9th Cir. 2000) (“We have little trouble identifying a direct effect in the United States caused by the defendants’ acts. Adler used the United States mails and telephones to commit bribery in violation of the FCPA as an ‘immediate consequence’ of the defendants’ acts.”); *United States v. Bodmer*, 342 F. Supp. 2d 176, 190 (S.D.N.Y. 2004). For similar jurisdictional claims by the government, see also *United States v. Turner*, 624 F. Supp. 2d 206, 226–230 (E.D.N.Y. 2009); *Zurich Capital Mkts., Inc. v. Coglianese*, 388 F. Supp. 2d 847, 858–59, 866–67 (N.D. Ill. 2004).

products or services; . . . or the execution or performance of a contract with a foreign government or agency thereof.<sup>106</sup>

Hospitality and promotional expenditures that *may* fall within the scope of this affirmative defense include: (1) the cost of the foreign official's airfare to the United States,<sup>107</sup> (2) seminar fees,<sup>108</sup> (3) meals,<sup>109</sup> (4) reasonable lodging,<sup>110</sup> (5) ground transportation,<sup>111</sup> (6) product samples (presumably of minimal value),<sup>112</sup> (7) entertainment,<sup>113</sup> (8) FCPA-avoidance training for foreign directors of an overseas business partner,<sup>114</sup> (9) certain domestic expenses related to a six-week internship program,<sup>115</sup> and (10) costs related to an "educational and promotional tour" of United States facilities.<sup>116</sup>

The second of the two affirmative defenses under the FCPA immunizes bribery that would otherwise be prohibited but for its legalization in the country in which the bribe was made.<sup>117</sup> This affirmative defense does not cover bribes paid in countries where such corruption is merely customary; rather, it requires that "the payment, gift, offer, or promise of anything of value" be "lawful under the *written* laws" of the bribe recipient's country.<sup>118</sup> Critics claim, however, that this affirmative defense offers nothing more than a "hollow" Hail Mary,<sup>119</sup> because the large majority of countries where corruption is prevalent and bribery customary nevertheless outlaw the practice. Moreover, the defense has been rejected at least once in federal court.<sup>120</sup>

Often referred to as "grease" payments, the FCPA provides a single exception for bribe-like payments to foreign officials, "the purpose of which is to expedite or to secure the performance of a routine governmental

106. 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2).

107. *See, e.g.*, DEP'T OF JUSTICE, FCPA REVIEW PROCEDURE RELEASE No. 85-01 (1985).

108. *See, e.g.*, DEP'T OF JUSTICE, FCPA REVIEW PROCEDURE RELEASE No. 92-01 (1992).

109. *See, e.g., id.*

110. *See, e.g., id.*

111. *See, e.g., id.*

112. *See, e.g.*, DEP'T OF JUSTICE, FCPA REVIEW PROCEDURE RELEASE No. 82-01 (1982).

113. *See, e.g., id.*

114. *See, e.g.*, DEP'T OF JUSTICE, FCPA OPINION PROCEDURE RELEASE No. 93-01 (1993).

115. *See, e.g.*, DEP'T OF JUSTICE, FCPA OPINION PROCEDURE RELEASE No. 07-02 (2007).

116. DEP'T OF JUSTICE, FCPA OPINION PROCEDURE RELEASE No. 07-01 (2007).

117. *See, e.g.*, 15 U.S.C. § 78dd-1(c)(1) (2006).

118. *Id.* §§ 78dd-1(c)(1), dd-2(c)(1), dd-3(c)(1) (emphasis added).

119. *See* Kyle Sheahen, *I'm Not Going to Disneyland: Illusory Affirmative Defenses Under the Foreign Corrupt Practices Act*, 29 WIS. INT'L L.J. (forthcoming 2011), available at <http://ssrn.com/abstract=1657675>; *cf. The Law Ain't Broke*, THE FCPA BLOG (Aug. 18, 2010, 7:28 AM), <http://www.fcablog.com/blog/2010/8/18/the-law-aint-broke.html> (arguing that "[o]ne cannot deduce from the lack of successful uses of statutory defenses at trial the conclusion that those defenses are meaningless").

120. *See* United States v. Kozeny, 582 F. Supp. 2d 535, 539-41 (S.D.N.Y. 2008) (rejecting the defendant's argument that his bribes were legal under foreign law because the bribe was disclosed, rendering the crime unprosecutable under the Azerbaijan Criminal Code).

action.”<sup>121</sup> The exception allows grease payments to be made for such routine governmental actions as

- (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature.<sup>122</sup>

This exception does not, however, cover payments related to discretionary decisions made by foreign officials such as whether to award new business, continue existing business, or incorporate particular terms of agreement.<sup>123</sup>

#### F. Sanctions

Federal prosecutors have a wide array of weaponry with which to wage war on corruption. The arsenal of criminal and civil penalties at the DOJ and SEC’s disposal in FCPA cases allows prosecutors to apply varying degrees of force to deter future violations and extract plea agreements for past violations.<sup>124</sup> Penalties for violating the FCPA generally fall into one of two categories: economic sanctions or imprisonment.<sup>125</sup> When viewed through the lens of law and economics, “fines and imprisonment are simply different ways of imposing disutility on violators.”<sup>126</sup> Under this view, “[c]ommercial bribery is a deliberate tort, and one way to deter it is to make it worthless to the tortfeasor by stripping away all his gain”<sup>127</sup> either by imposing sanctions on the tortfeasor that make the conduct too costly to engage in, or imprisoning corrupt individuals.

##### 1. Criminal Sanctions

Individuals criminally prosecuted under the FCPA for willfully bribing foreign officials face up to five years in prison and/or fines of up to \$100,000 per violation.<sup>128</sup> Defendants face even stiffer penalties under the

121. 15 U.S.C. §§ 78dd-1(b), dd-2(b), dd-3(b).

122. *Id.* §§ 78dd-1(f)(3)(A), dd-2(h)(4)(A), dd-3(f)(4)(A).

123. See Eric Engle, *I Get By with a Little Help from My Friends? Understanding the U.K. Anti-bribery Statute, by Reference to the OECD Convention and the Foreign Corrupt Practices Act*, 44 INT’L LAW. 1173, 1177 (2010); F. Joseph Warin, Michael S. Diamant, & Jill M. Pfenning, *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VA. L. & BUS. REV. 33, 63 (2010).

124. POSNER, *supra* note 14, at 220 (“[T]he criminal sanction ought to be calibrated to make the criminal worse off by committing the crime.”).

125. See Matthew Shabat, *SEC Regulation of Attorneys Under the Foreign Corrupt Practices Act: Decisions on Efficiency and Their Role in International Anti-bribery Efforts*, 20 U. PA. J. INT’L ECON. L. 987, 1000 (1999).

126. *Id.* at 223.

127. *Williams Elecs. Games, Inc. v. Garrity*, 366 F.3d 569, 576 (7th Cir. 2004).

128. 15 U.S.C. §§ 78dd-2(g)(2)(A), dd-3(e)(2)(A), 78ff(c)(2)(A) (2006).

FCPA's accounting and record-keeping provisions, including up to twenty years in prison and/or fines not to exceed \$5 million.<sup>129</sup>

As business shifts to various emerging foreign markets, prosecutors have increasingly relied on the threat of imprisonment to deter corporate executives from engaging in corrupt practices overseas.<sup>130</sup> This is due in large part to the failure of civil remedies during the 2000s to deter corporate greed and corruption domestically, which ultimately led to the collapse of Enron in 2001 and the banking industry in 2008.<sup>131</sup> Prior to 1994, there were no incarcerations for violations of the FCPA.<sup>132</sup> Following the financial scandals that exposed corporate corruption in the United States, incarcerating individuals tendering bribes abroad became rather common.<sup>133</sup> Consequently, "[s]ome deterrent effect on corporate misconduct seems to exist now as a result of the recent 'spectacle of executives being handcuffed and hauled off to jail.'" <sup>134</sup>

All sanctions result in some cost to the government that imposes them. Imprisonment involves the cost of facilities, guards, feeding and clothing the inmates, etc.; imposing fines involves other costs, like the efforts to extract the funds. But the revenue from the fines can outweigh those costs.<sup>135</sup> Imprisonment in the white collar context (usually in nicer facilities) would seem to be especially costly for the government, making such a sanction even less appealing when compared to hefty fines and disgorgement for white collar offenses. Of course, debarment imposes significant short-term costs on the government as well—perhaps losing a favorite contractor or vendor—but the benefits debarment offers help offset these costs in the long term.

When sanctioning entities rather than individuals, organizations charged with criminal violation of the antibribery provisions may face fines of up to \$2 million per violation.<sup>136</sup> Moreover, an entity's criminal violation of the

129. 15 U.S.C. § 78ff(a).

130. *Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007*, 22 CORP. CRIME REP. 3 (2008) ("The number of individual prosecutions has risen—and that's not an accident," Mendelsohn said. "That is quite intentional on the part of the Department. It is our view that to have a credible deterrent effect, people have to go to jail.").

131. See generally Nicholas J. Wagoner, Comment, *Honest-Services Fraud: The Supreme Court Defuses the Government's Weapon of Mass Discretion in Skilling v. United States*, 51 S. TEX. L. REV. 1087, 1131–32 (2010) ("A more recent trend, which emerged during the 2000s, involved the endless string of highly publicized corporate scandals. Most notably, scandals involving Enron, WorldCom, Martha Stewart, options backdating, lobbyist Jack Abramoff, the mortgage crisis and subsequent bailout, Bernie Madoff, and Goldman Sachs each left their mark on what *Time Magazine* characterized as the 'Decade from Hell.'").

132. STUART H. DEMING, *THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS* 81 (2d ed. 2010).

133. *Id.*

134. Kathleen A. Lacey et al., *Assessing the Deterrent Effect of the Sarbanes-Oxley Act's Certification Provisions: A Comparative Analysis Using the Foreign Corrupt Practices Act*, 38 VAND. J. TRANSNAT'L L. 397, 435 (2005) (quoting Jonathan Peterson, *Corporate Fraud Cases Decline*, L.A. TIMES, Aug. 2, 2004, at C1).

135. POSNER, *supra* note 14, at 223.

136. 15 U.S.C. §§ 78dd-2(g)(1)(A), dd-3(e)(1)(A); 78ff(c)(1)(A)–(2)(A) (2006).

FCPA's accounting and record-keeping provisions can lead to a fine of up to \$25 million.<sup>137</sup>

## 2. Civil Sanctions

The DOJ has the power to pursue civil penalties for FCPA violations as well. Civil actions provide the government with the benefit of a lower burden of proof, and penalties that have somewhat fewer legal restrictions than do fines. Nevertheless, the DOJ has traditionally deferred to the SEC on civil matters.<sup>138</sup> The discretion given to SEC officials to determine the nature of its enforcement action, the type of redress it will seek, and the severity of sanctions it will impose rivals that of the DOJ.<sup>139</sup> As one might expect, the civil fine settlements obtained by the SEC in disgorgement and penalties appear to be close to the fine figures reported by the DOJ in criminal cases.<sup>140</sup>

## 3. U.S. Sentencing Guidelines

The penalty imposed on a given company for engaging in foreign corruption is usually the product of a complex matrix of provisions in the U.S. Sentencing Guidelines (USSG), which formulates a "corporate sentencing calculus" for prosecutors and courts.<sup>141</sup> This formula is neither rigid nor precise;<sup>142</sup> rather, it calls for the balancing of a variety of factors in determining the severity of the sentence.<sup>143</sup> First, the sentencing

137. *Id.* § 78ff(a).

138. *See* DEMING, *supra* note 132, at 75. There are, however, a few instances in which the DOJ has pursued FCPA violations civilly. *See, e.g.*, ORG. FOR ECON. COOP. & DEV., DIRECTORATE FOR FIN., FISCAL & ENTER. AFFAIRS, UNITED STATES: PHASE 2, REPORT ON APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 50 (2002), available at <http://www.oecd.org/dataoecd/52/19/1962084.pdf> (finding only four cases between 1979–2002 where the DOJ brought a civil action under the FCPA).

139. *See* Weiss, *supra* note 30, at 478 ("[T]he SEC retains a great deal of discretion in deciding which civil enforcement actions to bring against issuers as well as the appropriate type of penalties—fines, injunctions, or both—to seek in an action.").

140. Robert W. Tarun & Peter P. Tomczak, *Introductory Essay, A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 165–66 (2010). SEC officials tasked with prosecuting foreign corruption consider the following factors:

egregiousness of conduct, isolated or systemic nature of violations; widespread or systemic nature of conduct; degree of self-policing; remedial efforts; and the extent of cooperation with investigation. Additional factors include the degree of benefit to the company and the harm to others; the level of intent; the need for deterrence; and whether conduct was difficult to detect.

RESPONSE OF THE UNITED STATES, QUESTIONS CONCERNING PHASE 3, *supra* note 5, at 32.

141. *See* Tarun & Tomczak, *supra* note 140, at 161–62.

142. *See generally* United States v. Booker, 543 U.S. 220 (2005) (holding that sentencing ranges must be advisory in nature rather than mandatory, preserving federal judges' sentencing discretion).

143. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 2C1.1, 2B1.1 (2010). Although fines generally must fall within the range calculated under the U.S. Sentencing Guidelines, deferred prosecution agreements and non-prosecution agreements give prosecutors the

guidelines require a “base fine,”<sup>144</sup> which, in the case of international corporate crimes, will most likely be “the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly.”<sup>145</sup>

Second, a culpability score must be calculated<sup>146</sup> based on factors such as the extent to which upper level management condoned corrupt behavior, whether the prosecuted entity has a track record of corruption, whether the entity helped or hindered the investigation into its corrupt dealings, and the adequacy of the entity’s compliance program.<sup>147</sup> Third, a culpability range must be determined by taking the culpability score calculated in the first two steps and cross-referencing it with the table at USSG section 8C2.6 to determine the minimum and maximum multiplier.<sup>148</sup> The fine floor and fine ceiling create a range to help the court determine the appropriate fine. These calculated penalties are rarely imposed, however, as prosecutors typically enter into plea agreements with the prosecuted entities before turning the decision over to a sentencing judge.<sup>149</sup>

#### 4. Alternative Fines Act

Prosecutors may strap additional penalties onto the fines calculated under the federal sentencing guidelines for FCPA violations, which frequently, “in aggregate, exceed the statutory maximums.”<sup>150</sup> In theory, by increasing the severity of possible fines under the FCPA, prosecutors similarly enhance the deterrent force of the law. Under the Alternative Fines Act (AFA), an entity may be fined up to twice the gross gain resulting from its corrupt practices.<sup>151</sup> Conversely, when a prosecuted entity’s corruption results in pecuniary loss to a third party (e.g., where a defendant procures a contract in exchange for bribes, which would have otherwise been granted to a competitor), the contractor may face fines of up to twice the gross amount of the loss.<sup>152</sup> Similarly, individuals may similarly face additional fines of up to \$250,000, or up to twice the gross gain or loss under the AFA.<sup>153</sup>

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discretion to seek fines “below the bottom of the guidelines range to reflect voluntary reporting, extensive internal investigation, cooperation, remediation, and similar mitigating factors.” RESPONSE OF THE UNITED STATES, QUESTIONS CONCERNING PHASE 3, *supra* note 5, at 31.

144. U.S.S.G. § 8C2.4(a).

145. *Id.* § 8C2.4(a)(3).

146. See JULIE O’SULLIVAN, FEDERAL WHITE COLLAR CRIME 210 (3d ed. 2007).

147. See U.S.S.G. §§ 8B2.1(b)(1)–(7), 8C2.5(b)–(e), 8C2.5(f)(1); see also Tarun & Tomczak, *supra* note 140, at 162 (citing U.S.S.G. § 8C2.5(b)–(e)).

148. See O’SULLIVAN, *supra* note 146, at 213.

149. Tarun & Tomczak, *supra* note 140, at 165.

150. *Id.* at 161.

151. See 18 U.S.C. § 3571(a), 3571(d) (2006).

152. *Id.*

153. *Id.* § 3571(b), 3571(d).

## 5. Confiscation of Bribery and Proceeds of Bribery

### a. Civil Disgorgement

The government tries to mulct the accrued benefits of bribery either through criminal forfeiture (DOJ) or civil disgorgement of profits (SEC).<sup>154</sup> The SEC has increasingly sought to disgorge profits from companies that obtained them by corrupt means.<sup>155</sup> Commentators have questioned the SEC's disgorgement authority<sup>156</sup> because the relevant statute does not expressly authorize this penalty, nor is there support in the FCPA's legislative history,<sup>157</sup> and courts have not yet had the opportunity to review it.<sup>158</sup> Critics of disgorgement argue that, although the penalty theoretically "can provide perfect deterrence by depriving corporations of the entirety of the incentive for engaging in illegal bribing," this is "not necessarily [what occurs] in practice"<sup>159</sup> given the costly, time-consuming, and politically delicate nature of following the money trail of profits stashed away in banks across the world.

### b. Civil Forfeiture

The DOJ and SEC have several means by which they may force companies to forfeit assets linked to the investigation or prosecution of foreign corruption. For instance, under the Civil Asset Forfeiture Reform Act of 2000,<sup>160</sup> any offense listed as an "unlawful activity" in the Money Laundering Control Act,<sup>161</sup> which includes FCPA violations, may be civilly forfeited.<sup>162</sup> Similarly, although it rarely exercises its authority to do so, the DOJ may seize the assets of a company under investigation for foreign corruption.<sup>163</sup> It has done so on at least two occasions in recent years.<sup>164</sup>

## 6. Prohibition from Participating in Public Contracts/Advantages

When deciding which federal contractors to retain, federal agencies must conduct extensive audits to determine whether a potential private sector

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154. RESPONSE OF THE UNITED STATES, QUESTIONS CONCERNING PHASE 3, *supra* note 5, at 33.

155. See Weiss, *supra* note 30, at 478. Furthermore, "[t]he SEC will often follow a 'zero tolerance' policy in the case of companies that violate both the bribery and record-keeping provisions, but it has shown more willingness to work with companies that implement prompt and effective remedial measures." *Id.*

156. See e.g., *id.* at 486, 497; see also Tarun & Tomczak, *supra* note 140, at 165–66.

157. See James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233, 1237–38 (2007).

158. Tarun & Tomczak, *supra* note 140, at 166.

159. Weiss, *supra* note 30, at 506.

160. 18 U.S.C. § 983 (2006).

161. *Id.* § 1957.

162. See DEMING, *supra* note 132, at 82.

163. RESPONSE OF THE UNITED STATES, QUESTIONS CONCERNING PHASE 3, *supra* note 5, at 33.

164. See *id.* at 18.



partner will likely comply with foreign corruption laws like the FCPA.<sup>165</sup> Companies must have “appropriate internal controls” in order to qualify for public contracts.<sup>166</sup> Federal contractors can face suspension or debarment for knowingly withholding disclosure to the government of other contracts it obtained via “fraud, conflict of interest, bribery, or gratuity violations.”<sup>167</sup>

## II. BAE SYSTEMS: A CASE STUDY OF CORRUPTION

The unlikely facts that ultimately led to the prosecution of BAE began to unfold more than twenty years ago, when Saudi Arabia, a vital ally to the Western world’s fight against terrorism in the Middle East, placed an order for approximately 125 Tornado fighter jets manufactured by BAE. With approximately 100,000 employees serving more than 100 countries,<sup>168</sup> BAE Systems is the second largest global defense company.<sup>169</sup> In 2010 alone, it reported sales of over £22.4 billion.<sup>170</sup> With enough capacity and firepower to meet the Royal Saudi Air Force’s needs, BAE seemed like an obvious choice for the “Al-Yamamah” arms deal.

Whispers of corruption swirled around the deal from day one. There were rumors that BAE agents handed wads of cash to Saudi representatives, and of extravagant “gifts” like a mansion in the United States and a personal Airbus 340<sup>171</sup> in pursuing the Saudi arms contract. To conceal the illicit expenses, accountants at BAE invoiced them using cryptic language such as “support services.”<sup>172</sup>

The allegations of bribery ultimately prompted the prosecuting arm of the United Kingdom, the Serious Fraud Office (SFO), to begin investigating BAE in 2006. The SFO suspected that BAE had used shell companies to funnel money through Swiss bank accounts to Saudi officials.<sup>173</sup> When the Saudi prince who was brokering the deal learned of the investigation, he threatened to take the Al-Yamamah deal to a competing country if the

165. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-133, AUDITS OF STATES, LOCAL GOVERNMENTS, AND NON-PROFIT ORGANIZATIONS (rev. 2007), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/a133/a133\\_revised\\_2007.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/a133/a133_revised_2007.pdf).

166. RESPONSE OF THE UNITED STATES, QUESTIONS CONCERNING PHASE 3, *supra* note 5, at 45.

167. *Id.*

168. *Key Facts*, BAESYSTEMS.COM, <http://www.baesystems.com/AboutUs/FactSheet/index.htm> (last visited Oct. 20, 2011).

169. *Defense News Top 100 for 2009*, DEFENSE NEWS (June 28, 2010) [http://defensenews.com/static/features/top100/charts/rank\\_2009.php?c=FEA&s=T1C](http://defensenews.com/static/features/top100/charts/rank_2009.php?c=FEA&s=T1C) (last visited Oct. 20, 2011).

170. *Key Facts*, *supra* note 168.

171. R v. Director of the Serious Fraud Office, [2008] EWHC (Admin) 714, 2008 WL 833707, [8]-[38] (Divisional Court’s Judgment); see also R v. Director of the Serious Fraud Office, [2008] UKHL 60; *Interview with David Leigh, Frontline: Black Money*, PBS (Sept. 13, 2008), <http://www.pbs.org/wgbh/pages/frontline/blackmoney/interviews/leigh.html>.

172. Complaint at ¶ 43, United States v. BAE Sys., No. 1:10-cr-00035-JDB (D.D.C. Feb. 4, 2010).

173. See Ashish S. Joshi, *Britain’s Fight Against the “Silver Lance”: A Radical Overhaul of the U.K.’s Bribery Law*, 33 CHAMPION 36, 37 (2009).

investigation continued.<sup>174</sup> When this did not work, Saudi officials and their political allies pressured the director of the SFO with threats of cutting off the steady stream of military intelligence it was supplying to the U.K., placing “British lives on British streets . . . at risk.”<sup>175</sup>

London’s 7/7 bombings were still fresh in people’s memories when Prime Minister Tony Blair convinced the SFO to drop its investigation of BAE, citing concerns for national security.<sup>176</sup> Following this announcement, the U.K. “won” a contract from the Saudi Arabian government for seventy-two Typhoon jet fighters worth \$8 billion.<sup>177</sup> When questioned at the G8 Summit about his decision to suspend the investigation of BAE, Prime Minister Blair asserted:

[L]et me make one thing very clear to you—I don’t believe the investigation, incidentally, would have led anywhere except to the complete wreckage of a vital strategic relationship for our country in terms of fighting terrorism, in terms of the Middle East, in terms of British interests there, quite apart from the fact that we would have lost thousands, thousands of British jobs.<sup>178</sup>

In 2001, when questioned about his role in Saudi corruption, Prince Bandar was equally unapologetic.<sup>179</sup>

But BAE’s troubles were not over. When its CEO’s plane touched down in Houston, Texas on May 13, 2008, federal agents were there to greet him. In the two years that followed, federal officials unraveled a global network of bribes and kickbacks, which BAE fed with its multi-million dollar slush fund that helped it pay off the highest echelons of governments in return for defense contracts. In February 2010, the DOJ informed the court that it had discovered that “BAE provided substantial benefits to one [Kingdom of Saudi Arabia] public official, who was in a position of influence regarding the KSA Fighter Deals.”<sup>180</sup>

In court filings, the DOJ describes BAE’s marketing strategy, in which it used intermediaries to “purchase . . . travel and accommodations, security services, real estate, automobiles and personal items”<sup>181</sup> as they courted Saudi officials who held the purse strings to the Al-Yamamah contract. A travel agent involved would later explain the lavish lifestyles that BAE afforded Saudi officials as being one “beyond that of a film star, because [they have] the diplomatic passport.”<sup>182</sup>

174. *Id.* at 37.

175. *Id.*

176. *Id.*

177. See Sue Reisinger, *Mission Critical*, CORP. COUNSEL, Dec. 2008, at 90.

178. *Transcript, Frontline: Black Money*, PBS, <http://www.pbs.org/wgbh/pages/frontline/blackmoney/etc/script.html> (transcript of PBS television broadcast of Apr. 7, 2009).

179. See *id.* (quoting the Prince as suggesting that a degree of corruption was acceptable for the development of Saudi Arabia and asserting, “We did not invent corruption. This has happened since . . . Adam and Eve . . . [T]his is human nature.”).

180. Complaint at ¶ 43, *United States v. BAE Sys.*, No. 1:10-cr-00035 (D.D.C. Feb. 4, 2010).

181. *Id.* at ¶ 44.

182. *Transcript, supra* note 178.

The factual description and charging language used by the government to describe BAE's illicit activity "is frequently used by the DOJ in charging companies with FCPA violations."<sup>183</sup> Despite the seeming applicability of the FCPA's antibribery and reporting provisions, the DOJ instead charged BAE with conspiracy to make false statements to the United States government about the nature of its payments—a charge that, unlike the FCPA, does not trigger an agency's discretionary debarment authority.<sup>184</sup> The United States was able to assert jurisdiction over the British company because BAE facilitated its crooked operations abroad through agents working within the borders of the United States.<sup>185</sup>

A month later, the DOJ announced BAE's guilty plea to "mak[ing] false statements about its [FCPA] compliance program," in which it agreed to pay a \$400 million criminal fine.<sup>186</sup> Though the fine was touted as "one of the largest criminal fines in the history of DOJ's ongoing effort to combat overseas corruption,"<sup>187</sup> the absence of an FCPA charge meant that debarment was not an option. The government officials nevertheless took the opportunity to reaffirm their stated commitment to "hold[ing] accountable companies that impair the operations of the United States government by lying about their conduct and operations."<sup>188</sup> The Assistant Director of the FBI's Washington Field Office echoed these concerns: "Corporations and individuals who conspire to defeat this basic economic principle not only cause harm but ultimately shake the public's confidence in the entire system."<sup>189</sup>

It appears, however, that the government's desire to avoid the inconvenience that would result from an FCPA-related debarment (namely, having to hire a new contractor) outweighs its concern for maintaining the public's confidence in the democratic system.<sup>190</sup> BAE's indispensable

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183. Koehler, *supra* note 97, at 995.

184. Complaint at ¶ 5, United States v. BAE Sys., No. 1:10-cr-00035 (D.D.C. Feb. 4, 2010). The United States alleged that

[f]rom at least in or about 2000, BAE Systems plc knowingly and willfully conspired, and agreed, with others known and unknown to the United States, to: (a) knowingly and willfully impede and impair the lawful government functions of the United States government, . . . by making certain false, inaccurate and incomplete statements to the U.S. government . . . thereby defrauding the United States in violation of Title 18, United States Code, Section 371; and (b) . . . knowingly and willfully make materially false, fictitious, or fraudulent statements or representations; in violation of Title 18, United State Code, Section 1001.

*Id.* According to the government, the fruits of BAE's illicit payments included "gains" in excess of \$200 million. *Id.* ¶ 48.

185. *Id.* ¶ 44.

186. Press Release, Dep't of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine (Mar. 1, 2010), <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html>.

187. *Id.*

188. *Id.* (statement by Acting Deputy Att'y Gen. Gary G. Grindler).

189. *Id.*

190. Sentencing Memorandum at 11, United States v. Siemens Aktiengesellschaft, No. 1:08-cr-00367 (D.D.C. Dec. 12, 2008). In declining to bring anti-bribery charges against Siemens, prosecutors cited "[t]he Department's analysis of collateral consequences [which]

partnership with American agencies as the “fifth largest provider of defense materials to the United States government”<sup>191</sup> may have helped it dodge a bullet.

If companies in which “bribery was nothing less than standard operating procedure”<sup>192</sup> continue to receive preferential treatment because of partnerships with key United States officials, the deterrent effect of holding accountable companies that spread lies and corruption across the globe is stripped away. When companies weigh the benefits against the costs associated with paying bribes to receive contracts abroad, the government’s refusal to bring FCPA charges in cases like BAE places a heavy thumb on the benefits side of the scale. This becomes even more concerning when the government actually endorses these practices through continued partnership with untrustworthy contractors that take money out of the pocket of the American taxpayer and inject it into the foreign market for black money.

As pointed out by Professor Mike Koehler, the FCPA’s ability to accomplish its stated goal—to deter foreign corruption—is severely diminished when the message sent by prosecutors in cases like BAE “is that certain companies in certain industries, particularly those that sell certain products to certain customers, are essentially immune from FCPA.”<sup>193</sup> Perhaps most concerning, however, is the United States’ continued partnership with companies that recently admitted to engaging in foreign corruption. In categorically refusing to seriously consider suspending or debaring companies that undermine confidence in free markets overseas, our nation risks eroding the public’s trust in government institutions at home.

Roughly a year after the FBI and DOJ had uncovered BAE’s lies and corruption, the United States entered into no fewer than 13,000 contracts and subcontracts with BAE totaling upwards of \$6 billion.<sup>194</sup> When compared side by side, this \$6 billion promised to BAE in the year that followed its guilty plea makes the \$400 million fine imposed on it look less like a serious effort to root out corruption, and more like a cost of doing business.

Perhaps even more shocking than the staggering sums of United States tax dollars shelled out to BAE after the company admitted to bribery and fraud are the government entities that may be bankrolling such foreign corruption. For example, just seven months after the FBI lambasted BAE

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included the consideration of the risk of debarment and exclusion from government contracts” as influencing its decision not to charge Siemens under the FCPA. *Id.*

191. Sentencing Memorandum at 1, *United States v. BAE Sys.*, No. 1:10-cr-00035 (D.D.C. Feb. 22, 2010).

192. Press Release, Dep’t of Justice, *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines* (Dec. 15, 2008), <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>.

193. Koehler, *supra* note 97, at 996.

194. *See supra* note 11 and accompanying text.

for its crooked business practices,<sup>195</sup> the FBI entrusted BAE with a \$40 million contract to “provide critical information security safeguards . . . to ensure the confidentiality and privacy of FBI computer networks in the United States and around the world.”<sup>196</sup> One need not understand the intricacies of law and economics to grasp how the FBI’s decision to invite BAE to serve as the “gatekeeper” for the FBI “in the cyber world”<sup>197</sup> sends the exact opposite message about the government’s tolerance for foreign corruption.

### III. DEBARMENT AS A METHOD OF DETERRING FOREIGN CORRUPTION

#### A. *The Fallacy of Corporate Fines as a Deterrent*

Prosecutors at the DOJ and SEC frequently boast of the massive fines imposed on companies that violate the FCPA as a sign of success.<sup>198</sup> Similarly, scholars often point to the increasingly large FCPA-related fines imposed on companies as evidence of the Act’s “resurgence.”<sup>199</sup> Almost no attention has been given to the deterrent capability of alternative forms of punishment, however, such as suspension and debarment.

Despite this seemingly singular focus on corporate sanctions, fines offer little deterrent value in the corporate setting, and in some cases actually work against the FCPA’s goal of deterring foreign corruption. Fines provide an ineffective mechanism for deterring white collar crime committed by corporations because corporations, in essence, have “no soul to damn [and] no body to kick.”<sup>200</sup>

#### 1. Corruption as a Cost of Doing Business

The first popular fallacy is that the threat of a hefty fine deters corporations from engaging in misconduct much in the same manner as it would a person. This misses the reality that corporations are nothing more than a legal fiction; humans, on the other hand, are living, breathing, feeling, and thinking beings. Whereas a human may experience the painful, agonizing toll that steep fines have on their quality of life, corporations cannot be coerced in this manner. Moreover, “deterrence via corporate sanctions does not halt the individual behaviors of agents and officers

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195. See *supra* note 189.

196. Press Release, BAE Sys., BAE Systems to Provide Cyber Security to FBI in \$40 Million Order (Sept. 21, 2010), [http://www.baesystems.com/Newsroom/NewsReleases/2010/autoGen\\_11082113586.html](http://www.baesystems.com/Newsroom/NewsReleases/2010/autoGen_11082113586.html).

197. *Id.* (statement by BAE Systems’ Vice President and General Manager of Intelligence and Security Tom Sechler).

198. See, e.g., Breuer, *supra* note 25 (stating that the DOJ has “imposed the most criminal penalties in FCPA-related cases in any single 12-month period—ever. Well over \$1 billion.”).

199. See generally Koehler, *supra* note 58.

200. See generally John Coffee, “No Soul to Damn, No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386 (1981).

within the corporation, who feel peer pressure for profits or sales results that is greater than their expected norm of ethical and compliant behavior.”<sup>201</sup>

As rational calculators of costs and benefits, “a corporation might employ a simple cost-benefit analysis in whether to engage in bribery and merely suffer a large fine.”<sup>202</sup> When viewed from a law and economics perspective, it is not surprising that less than a decade after its enactment, debate in Congress centered on whether sanctions for violating the FCPA would merely be treated as a “cost of doing business.”<sup>203</sup>

Under this critique, FCPA fines have little if any deterrent effect when the benefits derived from the sanctionable conduct—landing massive overseas contracts by paying off foreign officials without risking the loss of equally profitable business with the United States—largely outweigh the cost of getting caught. As one author observed,

Even if it makes sense to threaten profits, legal sanctions have to be sensitive to the fact that, comparatively, they are of very little significance to a large corporation. Profits can be increased or undermined from many more sources: through personnel policies, competitors’ moves, investment or not in production and so on.<sup>204</sup>

As a result, the question for corporate actors is not “To bribe or not to bribe?” but rather “How much could this bribe cost the company?” Unfortunately, fines present a corporation with the opportunity to pay its way out of an FCPA violation.

## 2. Mixed Messages Sent by Monetary Sanctions

That FCPA-related fines are perceived merely as costs of doing business rather than punishment for morally repugnant corruption undermines the moral message embodied in the legislation. This in turn “undercuts the [FCPA’s] deterrent force.”<sup>205</sup> In his book *Punishment and Modern Society: A Study in Social Theory*, David Garland explains how “penalty communicates meaning not just about crime and punishment but also about power, authority, legitimacy, normality, morality, personhood, social

201. JAMES T. O’REILLY ET AL., PUNISHING CORPORATE CRIMES: LEGAL PENALTIES FOR CRIMINAL AND REGULATORY VIOLATIONS 14 (2009) (citing generally Coffee, *supra* note 200).

202. Thomas, *supra* note 16, at 467.

203. *Business Accounting and Foreign Trade Simplification Act: Joint Hearing on S. 430 Before the Subcomm. on Int’l Fin. & Monetary Policy and the Subcomm. on Sec. of the Comm. on Banking, Hous., & Urban Affairs*, 99th Cong. 2 (1986) (response of John C. Keeney, Deputy Att’y Gen., Criminal Div., DOJ, to written questions of Sen. D’Amato).

204. CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY 34 (2d ed. 2001).

205. See Eliason Says Shift to Deferred Prosecution Agreements Unduly Favors Corporations, 22 CORP. CRIME REP. 1 (2008); see also Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1217 (1983) (“Another inadequacy of fines is that they convey the impression that permission to commit a crime may be bought for a price. This impression conflicts with the goals of both deterrence and retribution, which are partly to express the notion that offenses are socially unwanted and that money alone cannot adequately compensate.”).

relations, and a host of other tangential matters.”<sup>206</sup> Thus, “[f]ines do not emphatically convey the message that serious corporate offenses are socially intolerable. Rather they create the impression that corporate crime is permissible provided the offender merely pays the going price.”<sup>207</sup>

By tolerating contractors’ corruption through continued patronage, domestic agencies send the message to contractors that paying bribes and falsifying reports is an excusable offense so long as a company that gets caught “can buy [its] way out of criminal liability.”<sup>208</sup> When those who get caught are making exponentially greater sums of money from government contracts, including United States contracts, the risk of getting caught tendering a bribe overseas (especially when discounted by the low probability of detection) becomes significantly diminished. Moreover, with the flow of new United States contracts on a regular basis, “[P]aying of bribes . . . will not [be] tolerated”<sup>209</sup> becomes, “Don’t worry about it, we’ll deduct it from your next paycheck.” This approach to FCPA enforcement

conflicts with the goals of both deterrence and retribution, which are partly to express the notion that offenses are socially unwanted and that money alone cannot adequately compensate. Whatever compensation victims receive after a harm has occurred, in many cases they would have been unwilling to prebargain for the harm in return for monetary compensation.<sup>210</sup>

### 3. Abusive Monetary Sanctions

Controversy surrounds the use of sanctions to punish companies for unethical behavior, due to the potential for inviting prosecutorial abuse. Prosecutorial abuse through monetary sanctions in the FCPA context typically takes one of two forms. First, critics contend that prosecutors threaten companies with massive unwarranted fines to coerce them into plea agreements.<sup>211</sup> Other critics take this concern a step further by pointing out that threats of large fines have helped extract plea agreements even in cases where the government’s legal theories were questionable.<sup>212</sup> The massive

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206. DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 252 (1990).

207. Brent Fisse, *Sentencing Options Against Corporations*, 1 CRIM. L.F. 211, 220 (1990); see also WELLS, *supra* note 204, at 31 (“It is interesting that the word ‘punishment’ is replaced when corporations are the object of criminal enforcement by the altogether less emotive ‘sanction.’”).

208. *Eliason Says Shift to Deferred Prosecution Agreements Unduly Favors Corporations*, *supra* note 205, at 3; see also Fisse, *supra* note 205, at 1217 (“Another inadequacy of fines is that they convey the impression that permission to commit a crime may be bought for a price.”).

209. Breuer, *supra* note 43.

210. Fisse, *supra* note 205, at 1217.

211. See, e.g., DEMING, *supra* note 132, at 77 (“Given the severity of the criminal penalty for a violation of the accounting and record-keeping provisions, and a greater ability to prove a violation, a prosecutor has an enhanced ability to negotiate a plea.”).

212. See Koehler, *supra* note 97, at 946–55.

finances and disgorgement of profits imposed under the FCPA may stand on similarly shaky ground.<sup>213</sup>

As discussed throughout this Article, although suspension or debarment can be far more crippling to a company's bottom line than the imposition of a fine, debarment offers an alternative to fines that is less susceptible to abuse. Settlements or plea bargains usually fall within prosecutorial discretion,<sup>214</sup> even in corruption cases. If a corporate defendant is risk-averse, officials can use the threat of large fines to induce the firms into plea bargaining even where the evidence of corruption is relatively thin. As with other sanctions, suspension and debarment are within the discretion of the enforcement agencies, so these punishments can become part of the threats used in plea bargaining with suspected violators.<sup>215</sup>

Second, some claim that the typical FCPA-related penalties imposed on companies facilitate prosecutorial cronyism. Those who endorse this perspective claim that a look behind the curtain reveals "Bribery Inc.," in which a booming industry exists that largely benefits ex-prosecutors who parlay their DOJ contacts into lucrative gigs as DOJ-appointed monitors and compliance officers at private corporations under investigation for foreign corruption. Critics point to the fact that the majority of these monitors are former DOJ prosecutors.<sup>216</sup>

Given the DOJ's and SEC's practically unfettered discretion over the terms of a company's plea agreement, federal prosecutors may engage in political patronage by levying massive fines and monitoring fees on a company, requiring legal fees "to the tune of billions of dollars," which trickle down to lawyers, "many with past ties to the U.S. Justice Department."<sup>217</sup> The argument continues, "[T]here is nothing to stop prosecutors from ginning up cases that will feed the lawyers who used to have their jobs or from looking forward to a payday in the private sector that will be made possible by their busy successors at Justice."<sup>218</sup> Expressing her "outrage, that people get \$50 million to be a monitor," U.S. District Court Judge Ellen Segal Huvelle declared the fines, fees, and other expenses generated by FCPA-related monetary sanctions as having created a "boondoggle."<sup>219</sup>

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213. *See id.* at 963–84.

214. Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 WASH. & LEE L. REV. 1569, 1569 (2010).

215. *See* FAR 9.406-1(a) (2010) ("It is the debarring official's responsibility to determine whether debarment is in the Government's interest.").

216. *See* Vardi, *supra* note 37, at 2 ("It seems that an important qualification for these gigs is having previously worked at the Justice Department—as 7 of the 13 FCPA monitors have done.").

217. *Id.* at 1.

218. *Id.*

219. Christopher Matthews, *Judge Blasts Compliance Monitors at Innospec Plea Hearing*, MAIN JUSTICE (Mar. 18, 2010), <http://www.mainjustice.com/justanticorruption/2010/03/18/judge-blasts-compliance-monitors-at-innospec-plea-hearing/>.



*B. The Law of Suspension and Debarment*

The Reagan Administration was the first major proponent of using debarment to deter “government waste, fraud, and exploitation of public funds in federal programs” and to enhance “governmental accountability.”<sup>220</sup> Although companies are mandatorily debarred from contracting with the United States<sup>221</sup> and European Union (EU)<sup>222</sup> for violating certain statutes, 31 U.S.C. § 6101 leaves the decision up to each agency’s discretion when contractors violate the FCPA.<sup>223</sup>

Companies that solicit, procure, or carry out a government contract by paying bribes, making false statements, or destroying evidence—conduct that obviously falls within the purview of the FCPA’s antibribery and accounting provisions—trigger an agency’s discretionary debarment authority.<sup>224</sup> This power to suspend or debar federal contractors during criminal FCPA prosecution arises under the Federal Acquisition Regulation (FAR), which calls for a company’s suspension or debarment for up to three years, “commensurate with the seriousness of the cause(s).”<sup>225</sup>

When agency officials assess the seriousness of the cause, “the contractor has the burden of demonstrating, to the satisfaction of the debarring official, its present responsibility, and that debarment is not necessary.”<sup>226</sup> In reviewing suspension and debarment decisions, courts have similarly taken into consideration the “mitigating circumstances in order to sustain a debarment or suspension.”<sup>227</sup>

The resulting harm that may occur to a contractor following its suspension or debarment is magnified by the fact that such decisions are said to flow down to all other contracting executive agencies.<sup>228</sup> In other words, each agency has the power to blacklist a contractor from conducting business with any other agency of the United States. This is not without

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220. See O’REILLY ET AL., *supra* note 201, at 252 (citing Exec. Order No. 12549, 51 Fed. Reg. 6370 (Feb. 18, 1986) (applying debarment to abuses of federal “grants, cooperative agreements, contracts of assistance, loans, and loan guarantees,” but not “procurement programs”)). In 1989, President George H.W. Bush subsequently expanded the utility of debarment by making an agency’s debarment of a company applicable to all agencies, government-wide. Executive Order 12689, 54 Fed. Reg. 34131 (Aug. 16, 1989).

221. See, e.g., Generic Drug Enforcement Act, 21 U.S.C. § 335a(a)(2)(B) (2006); Nuclear Non-Proliferation Act of 1978 § 2, 22 U.S.C. § 3201 (2006); Clean Water Act, 33 U.S.C. § 1368 (2006); Davis Bacon Act, 40 U.S.C. §§ 276a–277a-5 (2006); Buy American Act, 41 U.S.C. §§ 10–10d (2006); Walsh-Healey Act, 41 U.S.C. §§ 35–45; Service Contract Act of 1965, 41 U.S.C. §§ 351–358; Drug-Free Workplace Act of 1988, 41 U.S.C. § 701; Clean Air Act, 42 U.S.C. § 7606 (2006).

222. Council Directive 2004/18/EC, art. 45, 2004 O.J. (L. 134/114), 120–21 (EU).

223. See 31 U.S.C. § 6101 (2006).

224. FAR 9.406-2(a) (2010).

225. *Id.* § 9.406-4.

226. *Id.* § 9.401-(a)(10).

227. W. NOEL KEYES, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITIONS ACT 239 (3d ed. 2003) (compiling cases).

228. See FAR 52.212-5; see also U.S. DEP’T OF STATE, FIGHTING GLOBAL CORRUPTION: BUSINESS RISK MANAGEMENT 28 (2001). Significantly, a company that enters into a non-prosecution agreement or deferred prosecution agreement under the FCPA is still subject to debarment. See Finder & McConnell, *supra* note 54, at 36.

exception, however, as agencies may still pursue business with a blacklisted contractor so long as the agency produces a written statement from the agency's debarment official providing "the compelling reasons" for renewal or extension of its business with the contractor.<sup>229</sup>

### C. Suspension and Debarment as a "Corporate Death Sentence"

Commentators have described the severity of a company's preclusion from contracting with the government as being a "drastic penalty,"<sup>230</sup> a "virtual 'death sentence,'"<sup>231</sup> and as effectively "sound[ing] the death knell"<sup>232</sup> for many companies. This is particularly true when a company's bread and butter are bullets and bombs,<sup>233</sup> healthcare,<sup>234</sup> oil and gas, or any other industry heavily regulated by the United States. Although the FAR's purpose was to protect the government rather than punish criminal contractors,<sup>235</sup> officials resort to it only for the most egregious criminal violations.<sup>236</sup>

### D. Benefits of Debarment

#### 1. Increased Compliance Without Increased Enforcement Costs

Given its potency as a penalty, "[f]or large defense contractors, disbarment from U.S. government contracts could well be the most significant deterrent to engaging in conduct proscribed under the FCPA."<sup>237</sup> Thus, the heightened degree of severity associated with the risk of debarment, even when the risk of detection is minimal, will increase compliance with the FCPA. Penalizing corrupt contractors by suspending federal funding would more effectively dry up the market for bribe money

229. FAR 9.405-1(b).

230. O'REILLY ET AL., *supra* note 201, at 251.

231. Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1134 (2006); *see also* O'REILLY ET AL., *supra* note 201, at 256 ("The result is the corporate 'death penalty' because the pipeline of new product approvals is closed for that entity or that person, and no further approvals can be made—effectively ending the ability of the company to remain in that regulated field.").

232. Charles V. Weinograd, Note, *Clarifying Grease: Mitigating the Threat of Overdeterrence by Defining the Scope of the Routine Governmental Action Exception*, 50 VA. J. INT'L L. 509, 526 n.99 (2010).

233. *See supra* notes 168–70 and accompanying text.

234. *See* Conry, *supra* note 60, at 1.

235. *See* O'REILLY ET AL., *supra* note 201, at 254.

236. *See id.* ("Debarment from contracting with the government is an exceptional remedy."); *see also* FAR 9.406-4(a)(1) (2010) ("Debarment shall be for a period commensurate with the seriousness of the cause(s).").

237. James C. Nobles, Jr. & Christina Maistrellis, *The Foreign Corrupt Practices Act: A Systematic Solution for the U.S. Multinational*, L. & BUS. REV. AMS., Spring 1995, at 5, 11; *see also* J. Kelly Strader, *White Collar Crime and Punishment: Reflections on Michael, Martha, and Milberg Weiss*, 15 GEO. MASON L. REV. 45, 102 (2007) ("There is substantial evidence that white collar defendants are strongly deterred by civil/administrative sanctions, including debarment.").

than mere fines, which merely become costs of doing business to firms that continue to make multiples more through subsequent government contracts.

## 2. Increased Self-Disclosure Without Increased Enforcement Costs

Investigating foreign corruption can be time consuming and extremely expensive for the FBI, DOJ, and SEC. With limited resources at their disposal, federal prosecutors encourage companies to disclose cases in which the company believes it may have violated the FCPA. Doing so allows prosecutors to devote more of their time and energy towards prosecuting cases in which a suspected corporate wrongdoer has taken steps to conceal its corrupt practices. Seeking to avoid this, the DOJ would likely suggest debarment in only those cases that eat up public resources due to prolonged discovery that could have been avoided through voluntary disclosure.

To incentivize self-disclosure, the DOJ has promised that it will “meaningfully reward” voluntary disclosures with lesser penalties.<sup>238</sup> The “reward” for voluntary disclosure is a lighter sentence. Professor Koehler identifies a variety of means through which prosecutors entice companies to voluntarily disclose potential violations, which include a “corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents” as well as its “cooperat[ion] with the relevant government agencies.”<sup>239</sup> He also notes that an important consideration in deciding to self-disclose “is that such a course of conduct is more efficient and certain compared to the DOJ independently finding out about the conduct (however slight the possibility) and harshly penalizing the company for failing to voluntarily disclose.”<sup>240</sup> Given the dire results associated with debarment, the consequence of which is viewed by most companies as being more severe than being fined, companies will be even more inclined to dispose of such risk through voluntary disclosure.

The relevant debarment provisions of FAR similarly call for agencies to consider leniency when (1) the company conducted a thorough internal investigation of the matter, (2) it reported the findings of its investigation to the government, (3) the agency believes the corrupt employee or employees were adequately disciplined, (4) measures were implemented to ensure future compliance with the FCPA, and (5) adequate deterrent measures were in place when the violation occurred.<sup>241</sup>

Seeking to curry favor with prosecutors and agencies, the heightened severity associated with suspension or debarment may compel a greater number of companies to self-disclose their corrupt dealings in hopes of

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238. Breuer, *supra* note 43, at 5.

239. DEP’T OF JUSTICE, U.S. ATTORNEY’S MANUAL § 9-28.300 (2008) [hereinafter *Principles of Federal Prosecution of Business Organizations*]; see also Koehler, *supra* note 97, at 925.

240. Koehler, *supra* note 97, at 926.

241. FAR 9.406-1(a) (2010).

avoiding the FCPA's harshest of penalties.<sup>242</sup> By debarring companies in egregious, highly public cases of foreign corruption, federal prosecutors can leverage the escalated level of risk associated with debarment to incentivize more companies to come forward in exchange for leniency.<sup>243</sup>

### *E. The Discretionary Debarment Decision*

Prosecutors exercise a significant degree of charging discretion.<sup>244</sup> A prosecutor's decision to pursue claims of bribery under the FCPA (thereby triggering an agency's discretionary debarment power) rather than charging the contractor under an alternative applicable statute, directly affects whether the company is subject to mandatory debarment, discretionary debarment, or is altogether immune from the risk of suspension or debarment. Prosecutors also indirectly influence debarment officials through frequent meetings and intra-agency cooperation.

#### 1. Are Corrupt Government Contractors "Too Big to Debar"?

Although prosecutors exercise a significant degree of influence over an agency's discretionary debarment decision as discussed above, the ultimate decision rests with the agencies that do business with corrupt contractors. In 1987 alone, the Department of Defense's "total suspensions and debarments of contractors totaled 898," which was "over three times the 280 actions taken in fiscal year 1983."<sup>245</sup> Yet despite "[m]any of the U.S. government's largest contractors hav[ing] been found to have repeatedly broken the law or engaged in misconduct" between 1990 and 2002, only one of the top forty-three government contractors was suspended or debarred during this period.<sup>246</sup> These figures lend support to the Project on Government Oversight's conclusion "that large contractors enjoy an unfair advantage over smaller contractors in navigating the federal government's suspension and debarment system."<sup>247</sup>

Admittedly, debarment differs from other FCPA sanctions in the collateral costs it imposes on the government, besides its particular burdens on the sanctioned violator. Other agencies, which have no input in the decision about sanctioning FCPA violators, may have long running

242. See Wray & Hur, *supra* note 231, at 1115.

243. See, e.g., *id.* ("[The Department of Defense (DoD)] adopted a voluntary disclosure program that provides for the possibility of more lenient treatment for contractors that self-report. In order to encourage companies to self-report potential violations and agree to cooperate with the ensuing audits and investigations, DoD offers companies the increased likelihood of avoiding suspension and debarment—sanctions that are, for defense contractors, even more deathly than corporate criminal charges themselves.")

244. See Wagoner, *supra* note 131, at 1108–12.

245. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-88-5BR, DOD FRAUD INVESTIGATIONS: CHARACTERISTICS, SANCTIONS, AND PREVENTION (1988).

246. *Federal Contractor Misconduct: Failures of the Suspension and Debarment System*, POGO (May 10, 2002), <http://www.pogo.org/pogo-files/reports/contract-oversight/federal-contractor-misconduct/co-fcm-20020510.html>. The lone suspension lasted a mere five days. *Id.*

247. *Id.*

contractual relationships with the same company,<sup>248</sup> especially for large corporations like Lockheed Martin, Boeing, and Halliburton.<sup>249</sup> When such contracts come up for renewal (presumably debarment would not terminate all other existing contracts), the government has the inconvenience and bears the costs of finding a suitable replacement.<sup>250</sup> In some cases, this is virtually impossible due to the scale of some federal projects and the enormous set-up costs for providers.<sup>251</sup>

The DOJ echoed these concerns in its response to several questions about its stance on drafting legislation compelling mandatory debarment for FCPA violations: “If every criminal FCPA resolution were to carry with it mandatory debarment consequences, then prosecutors would lose the necessary flexibility to tailor an appropriate resolution given the facts and circumstances of each individual case.”<sup>252</sup> The real reason for the DOJ’s rejection of the mandatory debarment proposal appears to be evident in the preceding sentence of its response—that sanctioning those perceived as being too big to debar despite egregious FCPA violations “would likely lead to the cessation of revenues for a government contractor—a virtual death knell for the contractor–company.”<sup>253</sup>

## 2. Prosecutors’ Influence over Debarment Decisions

An agency’s decision to suspend or debar a contractor from future business with the United States is a direct result of whatever charges federal prosecutors brought against the firm. For example, BAE’s misrepresentation of \$5 million in bribes and kickbacks paid to a Saudi official fell squarely within the language of the FCPA’s accounting provision.<sup>254</sup> A more general statute criminalizes the submission of false statements to the United States.<sup>255</sup> Yet because BAE was prosecuted under the latter statute (which does not trigger an agency’s discretionary debarment authority) rather than the former (which triggers an agency’s

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248. See generally John S. Pachter, *The New Era of Corporate Governance and Ethics: The Extreme Sport of Government Contracting*, 13 PUB. PROCUREMENT L. REV. 247 (2004) (arguing against the use of debarment as a sanction).

249. See generally Jennifer S. Zucker, *The Boeing Suspension: Has Increased Consolidation Tied the United States Department of Defence’s Hands?*, 13 PUB. PROCUREMENT L. REV. 260 (2004).

250. See CATHERINE DONNELLY, *DELEGATION OF GOVERNMENTAL POWER TO PRIVATE PARTIES* 79–81, 94 (2007). For discussion of the “switching costs” problem in other areas of government contracting, see Dru Stevenson, *Privatization of State Administrative Services*, 68 LA. L. REV. 1285, 1291, 1303 (2008); Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83, 115 (2003).

251. See Danielle Brian, *Contractor Debarment and Suspension: A Broken System*, 13 PUB. PROCUREMENT L. REV. 235, 236–38 (2004); Zucker, *supra* note 249, at 273–76.

252. *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime & Drugs of the U.S. Senate Comm. on the Judiciary*, 111th Cong. (2010) [hereinafter *Examining Enforcement*] (questions for the record by Sen. Christopher Coons).

253. *Id.*

254. See Koehler, *supra* note 97, at 994–95.

255. See 18 U.S.C. § 1001 (2006).

discretionary debarment authority), BAE was insulated from suspension or debarment from its contracts with the United States.

The DOJ denies ever using specific language in settlements that would prevent debarments and suspensions. Breuer insisted at the Senate hearings, “I don’t think we ever do, Senator.”<sup>256</sup> As one commentator pointed out, however, this position is inconsistent given that the DOJ sentencing memoranda in its Siemens prosecution explicitly stated that it selected sanctions that would avoid “collateral consequences” that would result from criminal FCPA anti-bribery charges.<sup>257</sup> This included the “risk of debarment and exclusion from government contracts.”<sup>258</sup> BAE is another major United States government contractor; DOJ pleadings against it aver that in “2008, BAE was the largest defense contractor in Europe and the fifth largest in [America] as measured by sales.”<sup>259</sup>

The DOJ faced a series of follow-up questions after a November 2010 hearing on FCPA enforcement held by the Senate Judiciary Committee. When asked whether “a mandatory, conduct-based, debarment remedy for companies that engage in egregious bribery [would] further the deterrent effect of the FCPA,” the DOJ conceded the possibility, but stated that the deterrent effect of mandatory debarment “would likely be outweighed by the accompanying decrease in incentives for companies to make voluntary disclosures, remediate problems, and improve their compliance systems.”<sup>260</sup>

#### F. H.R. 5366: Overseas Contractor Reform Act

The infamous phrase “too big to fail” became part of our national lexicon following the collapse of the U.S. economy in 2008.<sup>261</sup> Initially, government officials used this phrase to describe the dire economic consequences that would follow the failure of one of the nation’s bedrock banks. Following the government’s “bailout” of banks that were seen as being too big to fail, however, enraged voters increasingly used the phrase to criticize the conflict of interest that resulted from the government’s overreliance on a handful of private sector entities. Thus, the phrase highlights the dangers of placing too many matters of public concern in the hands of too few companies.

Cognizant of this emerging concern among its constituents, on September 15, 2010, the House of Representatives passed the Overseas

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256. *Protecting American Taxpayers*, *supra* note 56 (statement of Asst. Att’y Gen. Lanny A. Breuer).

257. Koehler, *supra* note 97, at 996.

258. *Id.* (citing Sentencing Memorandum at 11, *United States v. Siemens Aktiengesellschaft*, No. 1:08-cr-00367 (D.D.C. Dec. 12, 2008)).

259. *Id.* at 996 (citing Complaint at ¶ 1, *United States v. BAE Sys.*, No. 1:10-cr-00035 (D.D.C. Feb. 4, 2010)).

260. *Examining Enforcement*, *supra* note 252.

261. See generally ANDREW ROSS SORKIN, *TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM FROM CRISIS—AND THEMSELVES* (2009).

Contractor Reform Act<sup>262</sup> (OCRA). The initial success of the OCRA, which would have required that federal agencies consider debaring government contractors that violate the FCPA, was likely due to the escalating concern that government contractors that engage in egregious acts of foreign corruption might similarly be viewed as “too big to debar.” In 2011, Senator Franken expressed this concern to Assistant Attorney General Breuer, as quoted above: “I think part of the problem is that we’re too dependent on a handful of very large contractors, particularly when it comes to the wars in Iraq and Afghanistan, and that too many contractors maybe now are too big to fail.”<sup>263</sup> The bill never came to a vote in the Senate.

Senator Franken’s follow-up question to Breuer called attention to the fundamental weakness of the OCRA’s proposed language, when he asked, “How frequently is DOJ putting in settlements—specific language that can be used to prevent debarments and suspensions?”<sup>264</sup> Mr. Breuer assured the Senator that the DOJ never considers the possibility of debarment when deciding whether to prosecute a large government contractor’s foreign bribery and subsequent cover-up under the FCPA (thereby triggering discretionary debarment) or a similar law (e.g., false statements under 18 U.S.C. §1001) that avoids triggering discretionary debarment.<sup>265</sup>

The DOJ and SEC have admitted to considering the “collateral consequences” of prosecuting foreign corruption under the FCPA on a number of occasions, and in fact, have official instructions to do so.<sup>266</sup> In prosecuting BAE for falsely recording bribe payments, the DOJ used non-FCPA charges to avoid exposing one of the United States’ key defense suppliers to the EU’s mandatory debarment provisions triggered by the FCPA.<sup>267</sup> Prosecutors similarly structured settlement language to avoid debarment in the Siemens<sup>268</sup> and Daimler<sup>269</sup> cases. Finally, when directly

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262. H.R. 5366, 111th Cong. (2010). The proposed language would require that “any person found to be in violation of the Foreign Corrupt Practices Act of 1977 shall be proposed for debarment from any contract or grant awarded by the Federal Government within 30 days after a final judgment of such violation” unless waived by the agency. *Id.*

263. *Protecting American Taxpayers*, *supra* note 56 (statement of Sen. Franken).

264. *Id.*

265. *Id.* (statement of Asst. Att’y Gen. Lanny A. Breuer).

266. See *Principles of Federal Prosecution of Business Organizations*, *supra* note 239, § 9-28.300. In determining whether and what to charge a corporation with, in connection to foreign corruption, the *Principles of Federal Prosecution of Business Organizations* instructs prosecutors to consider the “collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution” in bringing charges. *Id.* § 9-28.300-A.7.

267. BAE Sentencing Memorandum, *supra* note 191. BAE’s sentencing memorandum explained, “BAES’s business is primarily from government contracts, including with several EU customers.” *Id.* at 15.

268. Sentencing Memorandum at 11, *United States v. Siemens Aktiengesellschaft*, No. 1:08-cr-00367 (D.D.C. Dec. 12, 2008) (“The Department’s analysis of collateral consequences included the consideration of the risk of debarment and exclusion from government contracts.”).

questioned about its stance on imposing mandatory debarment on contractors that engage in particularly egregious acts of corruption, the DOJ asserted that “a mandatory conduct-based debarment remedy for companies could well have a negative impact on the Government’s ability to investigate and prosecute transnational corruption effectively.”<sup>270</sup>

These examples illustrate the fatal flaw of the OCRA’s requirement that agency heads consider suspending or debaring contractors that violate the FCPA—that is, the prosecutors still have the ability to avoid triggering such proceedings simply by refusing to prosecute foreign corruption under the FCPA. Prosecutors are not solely to blame, though. Even in cases outside the ambit of the FCPA, FAR provides agencies with the discretion to suspend or debar contractors that engage in bribery wholly apart from prosecutions conducted by the SEC and DOJ.<sup>271</sup> As Mr. Breuer pointed out to Senator Franken, federal prosecutors “don’t have the expertise of the department or agency who has to decide how valuable [a] particular contractor is,”<sup>272</sup> nor do they have statutory authority to do so.

As a result, the responsibility to deter foreign corruption through suspension and debarment largely falls on each federal agency that transacts business with private contractors. The leaders within these agencies should regularly consult with the DOJ, Congress, and other policy makers to determine whether avoiding the collateral consequences that may result from debaring contractors viewed as “too big to debar” justifies the mixed messages and toxic side effects that result from the United States’ complacency in preventing the spread of corruption.

### G. The “Collateral Consequences” of Debarment

All too often, corruption functions as a buffer against policy-based regulations.<sup>273</sup> Federal prosecutors play an important role as “vehicle[s] effecting widespread structural reform within corrupt corporate cultures,” and therefore must balance a number of competing interests when deciding

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269. Sentencing Memorandum at 12, *United States v. Daimler AG*, No. 1:10-cr-00063 (D.D.C. Mar. 22, 2010) (noting that the DOJ’s “analysis of collateral consequences included the consideration of the risk of debarment and exclusion from government contracts, and in particular included European Union Directive 2004/18/EC, which provides that companies convicted of corruption offenses shall be mandatorily excluded from government contracts in all EU countries.”).

270. *Examining Enforcement*, *supra* note 252.

271. Under FAR 9.406-2, an agency may, at its discretion, debar a contractor for “[c]ommission of . . . bribery, falsification or destruction of records, making false statements, . . . [or c]ommission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.” FAR 9.406-2(a)(3), (5) (2010) (emphasis added).

272. *Protecting American Taxpayers*, *supra* note 56 (statement of Asst. Att’y Gen. Breuer).

273. *See, e.g.*, Weiss, *supra* note 30, at 472 (describing the view that laws do not sufficiently deter multinationals from “vigorously pursu[ing] corruptly influenced contracts,” as well as the opposite view, which asserts that “moral signals from the countries that have prohibited corruption by statute” sufficiently deter foreign corruption).



how best to punish and deter foreign corruption.<sup>274</sup> In exercising their discretion over such matters, prosecutors must consider the broad-ranging implications that economic sanctions may have on companies with thousands of employees working in dozens of countries.

With so many moving parts, prosecutors have the unenviable task of considering the seemingly infinite number of scenarios that might unfold following charges of corruption. Thus, “[t]he FCPA ultimately proves to be a large-scale study in the law of unintended consequences.”<sup>275</sup> The global scale of most FCPA prosecutions makes balancing the United States’ desire “to aggressively root out corporate fraud” with its competing interest of “remaining sensitive to the considerable collateral consequences of moving criminally against an entire entity” a difficult task indeed.<sup>276</sup> The risk of negative “collateral consequences” is particularly high when an FCPA prosecution may lead to a company’s suspension or debarment from government contracts. As a result, in determining whether to prosecute a company under the FCPA, the DOJ and SEC “consider collateral consequences” of suspension and debarment when determining whether to charge companies under the FCPA or under alternative statutes that do not trigger discretionary suspension and debarment.<sup>277</sup>

Potential collateral consequences that may result from a government contract’s suspension or debarment include: (1) an oligopoly on government contracts by the remaining few contractors with enough capacity to satisfy government orders, (2) injured diplomatic relations with foreign allies, (3) the threat to national security that may occur if the United States severs ties with key suppliers in the areas of national defense and energy, (4) the risk that United States businesses may miss out on lucrative economic opportunities in emerging markets due to the overdeterrent effect of suspension and debarment, (5) the risk of “disproportionate harm to shareholders and others who are not personally culpable,”<sup>278</sup> and (6) the political risk associated with pursuing agency allies in the private sector.

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274. Thomas, *supra* note 16, at 454.

275. Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 358 (2010).

276. Peter Spivack & Sujit Raman, *Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 166 (2008).

277. Christopher M. Matthews, *Mendelsohn and Scarborough Spread the FCPA Gospel*, MAIN JUSTICE (Mar. 23, 2010, 1:27 PM), <http://www.mainjustice.com/2010/03/23/mendelsohn-and-scarboro-spread-the-fcpa-gospel/> (reporting that Mendelsohn admitted that the DOJ does consider the collateral consequences of suspension and debarment when structuring settlement agreements “[i]n response to a question about the DOJ’s recent settlement with BAE Systems”).

278. DEPT’ OF JUSTICE, RESPONSE OF THE UNITED STATES TO SUPPLEMENTARY QUESTIONS CONCERNING PHASE 3, OECD WORKING GRP. ON BRIBERY 16 (May 21, 2010) [hereinafter RESPONSE OF THE UNITED STATES, SUPPLEMENTARY QUESTIONS] (citing *Principles of Federal Prosecution of Business Organizations*, *supra* note 239, § 9-28.300).

Federal prosecutors have used these considerations in at least three cases to justify relatively generous plea agreements<sup>279</sup> that avoided exposing the prosecuted companies to potential suspension or debarment from United States contracts, and avoided exposing the United States to the collateral risks associated with such penalties. In response to OECD questions about the U.S. government's self-interest in shirking debarment sanctions, U.S. officials cited the DOJ's handling of the matters involving BAE Systems,<sup>280</sup> Siemens,<sup>281</sup> and Daimler<sup>282</sup> as examples of when "the harm [that] potential debarment would ca[u]se to the public, both in the U.S. and abroad . . . was taken into consideration in prosecution and sentencing."<sup>283</sup>

### 1. Concern for Diplomatic Consequences

Federal agencies are aware that the decision to suspend or debar a multinational company that services foreign allies may lead "to the complete wreckage of a vital strategic relationship" for the United States.<sup>284</sup> For instance, had federal agencies debarred BAE from continuing to transact business with the United States, BAE would not have received the billions of dollars in subsequent U.S. contracts, which in turn would have resulted in massive layoffs in BAE's offices across the globe, including the U.K., India, and Canada.

The U.K. government's decision to snuff out prosecutors' inquiry into the corrupt dealings of key Middle Eastern allies highlights the tension between the government's desire to uphold its pledge to root out foreign corruption and its desire to preserve vital strategic alliances "in critical and

279. That is, plea agreements that did not implicate potential suspension and debarment despite strong evidence of egregious acts of foreign corruption that likely otherwise justify such severe penalties.

280. BAE Sentencing Memorandum, *supra* note 191 ("European Union Directive 2004/18/EC, which has recently been enacted in all EU countries through implementing legislation, provides that companies convicted of corruption offenses *shall* be mandatorily excluded from government contracts.").

281. *See* Sentencing Memorandum at 11, *United States v. Siemens Aktiengesellschaft*, No. 1:08-cr-00367 (D.D.C. Dec. 12, 2008).

282. Sentencing Memorandum at 12, *United States v. Daimler AG*, No. 1:10-cr-00063 (D.D.C. Mar. 22, 2010). The Memorandum states:

In accordance with the Department's *Principles of Federal Prosecution of Business Organizations*, the Department considered a number of factors in its decisions regarding the overall disposition. Those factors included, but were not limited to, Daimler's cooperation and remediation effort, as well as any collateral consequences, including whether there would be disproportionate harm to the shareholders, pension holders, employees, and other persons not proven personally culpable, and the impact on the public, arising from the prosecution. The Department's analysis of collateral consequences included the consideration of the risk of debarment and exclusion from government contracts, and in particular included European Union Directive 2004/18/EC, which provides that companies convicted of corruption offenses shall be mandatorily excluded from government contracts in all EU countries.

*Id.*

283. RESPONSE OF THE UNITED STATES, SUPPLEMENTARY QUESTIONS, *supra* note 278, at 16–17.

284. *Transcript*, *supra* note 178.

volatile areas of the world.”<sup>285</sup> This may explain why “[t]he DOJ enforced the [FCPA] with great trepidation” during the first two decades of its existence, “fearing that the Act’s enforcement would damage relations with allies” because debarring companies that pay kickbacks to “allied government officials would be far from diplomatic.”<sup>286</sup>

## 2. Concern for Creating a Monopoly

In addition to the problem of existing interdependent relationships, where the government actually *needs* that vendor,<sup>287</sup> there is the problem of reduced competition for future bidding on new projects.<sup>288</sup> One in four federal requests for proposal (RFPs) currently receive only one bid, and are essentially non-competitive, so there are no competitive savings for the government. This percentage is likely to increase substantially if major federal contractors face debarment. The result is higher costs for the government and the taxpayers on future projects.<sup>289</sup>

Yet this picture is incomplete, and the cost increases are hard to quantify.<sup>290</sup> The sanction under consideration is for bribing foreign government officials in order to obtain lucrative contracts. The purpose of these bribes is to secure a contract for an inflated price—to win against lower-cost bidders—or to induce the foreign government to procure goods and services that it otherwise would not.<sup>291</sup> Inflated costs and superfluous procurements drain the public resources in the countries where the FCPA violations occur; if the local government is financing the projects through American foreign aid, the corruption misappropriates American government resources indirectly. When the same firm is obtaining myriad contracts domestically, there can be no confidence that it won these contracts fairly and competitively, at the lowest cost to the American taxpayers.<sup>292</sup> Even where a firm had no prior history of bribery, its success with the foreign bribe (which became the predicate for FCPA charges) can give the

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285. Spalding, *supra* note 275, at 398.

286. Thomas, *supra* note 16, at 448–49.

287. See, e.g., Zucker, *supra* note 249, at 264–70 (discussing the Boeing suspension).

288. See Brian, *supra* note 251, at 236–38.

289. For more on the problem of monopoly power of certain government contractors, see John Donahue, *The Transformation of Government Work: Causes, Consequences, and Distortions*, in GOVERNMENT BY CONTRACT 41, 58–61 (Jody Freeman & Martha Minow eds., 2009); Martha Minow, *Outsourcing Power: Privatizing Military Efforts and the Risks to Accountability, Professionalism, and Democracy*, in GOVERNMENT BY CONTRACT 110, 118. A similar market failure can also occur when the market is highly localized. See ELLIOT D. SCLAR, YOU DON’T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION 83–90 (2000).

290. See generally Charles E. Hyde & Jeffrey M. Perloff, *Can Monopsony Power Be Estimated?*, 76 AM. J. AGRIC. ECON. 1151 (1994) (discussing monopsony effects on prices and problems with speculating about the effects, outside the context of debarment).

291. See Brian, *supra* note 251, at 235–38.

292. See Susan M. Collins, *What the MCI Case Teaches About the Current State of Suspension and Debarment*, 13 PUB. PROCUREMENT L. REV. 218, 220–22 (2004).

corporation a taste for the convenience of ill-gotten gains.<sup>293</sup> We should not underestimate the corrupting influence of the bribe on the firm that makes it.<sup>294</sup>

Moreover, when large firms elude debarment due to the federal government's dependence on them, it contributes to the consolidation of the market (oligopoly trends),<sup>295</sup> which further undermines competitive bidding and potential cost savings from federal outsourcing.<sup>296</sup> In other words, existing monopsony problems<sup>297</sup> are the biggest obstacle to using debarment, but preventing monopsony problems is an argument in favor of using debarment.<sup>298</sup> Monopsony is a dysfunctional market situation where there is a single buyer of goods or services.<sup>299</sup> The "too big to debar" problem is actually an outgrowth of the inherent monopsony problems with

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293. See Brian, *supra* note 251, at 236–37 (“While there is nothing wrong *per se* with having such a programme [for waiving debarment if a contractor creates an internal ethics compliance program], there is no empirical evidence that the mere existence of these programmes truly alter the culture of the company. All of the most serious recidivist companies in the POGO [Project on Government Oversight] database have been members of the Defense Industry Initiative, and have had internal ethics programmes in operation for years.”).

294. See *id.*

295. See *id.* at 237.

296. See James J. McCullough & Abram J. Pafford, *Government Contract Suspension and Debarment: What Every Contractor Needs to Know*, 13 PUB. PROCUREMENT L. REV. 240, 243–45 (2004) (explaining that some firms ask the government to debar their competitors so that they can win the bids on future contracts, eliminating the competition).

297. See Edward Rubin, *The Possibilities and Limitations of Privatization*, 123 HARV. L. REV. 890, 920 (2010) (reviewing GOVERNMENT BY CONTRACT (Jody Freeman & Martha Minow eds., 2009)) (discussing the monopsony problem inherent in the outsourcing of public benefits to private entities).

298. Monopsony describes situations where there is only one purchaser or funder for particular services. See *id.*; see also Dru Stevenson, *A Million Little Takings*, 14 U. PA. J. L. & SOCIAL CHANGE 1, 47–49 (2011) (discussing monopsony in the Interest on Lawyers' Trust Accounts (IOLTA) context); Dru Stevenson, *Rethinking IOLTA*, 76 MO. L. REV. 455, 481–84 (2011) (same). Economists argue that monopsony tends to lower the availability of the purchased service or good to below-optimal levels. See R. Baldwin et al., *Regulating Legal Services: Time for the Big Bang?*, 67 MOD. L. REV. 787, 792 (2004) (discussing the monopsony problem with legal services in Great Britain); see also generally Robert L. Bish & Patrick D. O'Donoghue, *Public Goods, Increasing Cost, and Monopsony: Reply*, 81 J. POL. ECON. 231 (1973) [hereinafter Bish & O'Donoghue, *Public Goods*]; Robert L. Bish & Patrick D. O'Donoghue, *A Neglected Issue in Public-Goods Theory: The Monopsony Problem*, 78 J. POL. ECON. 1367 (1970); Michael Cooke & Daniel Lang, *The Effects of Monopsony in Higher Education*, 57 HIGHER EDUC. 623 (2009); Josse Delfgaauw & Robert Dur, *From Public Monopsony to Competitive Market: More Efficiency but Higher Prices*, 61 OXFORD ECON. PAPERS 586 (2009); Marvin B. Johnson, *The Effect of Monopsony Power on Teachers' Salaries*, 10 ST. & LOC. GOV'T REV. 56 (1978); Hirofumi Shibata, *Public Goods, Increasing Cost, and Monopsony: Comment*, 81 J. POL. ECON. 223 (1973).

299. See Rubin, *supra* note 297, at 920–21.

government outsourcing.<sup>300</sup> In this sense, however, debarment serves an incapacitation purpose more than it provides deterrence.<sup>301</sup>

The monopsony features inherent in government contracting allow service providers to manipulate the officials into funding unnecessary services and to stick with familiar entities rather than newcomers.<sup>302</sup> Edward Rubin observes that ultimately “government monopsony breeds contractor monopoly,”<sup>303</sup> and the monopsony and monopoly effects “reinforce each other.”<sup>304</sup> The state agencies contracting with private firms are “subject to concerted efforts from each potential contractor interested in persuading it to adopt a program design that only that contractor can fulfill.”<sup>305</sup>

### 3. Concern for Economic Consequences of Overdeterrence

One of the central tenets of law and economics holds that punishing borderline corporate misconduct with severe penalties may unintentionally lead to overdeterrence. In other words, “salutary . . . conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment.”<sup>306</sup>

No doubt the legitimate threat of suspension and debarment would significantly decrease American companies’ willingness to engage in corrupt practices to bolster their bottom line. That said, such a sword of Damocles<sup>307</sup> might deter U.S. companies from pursuing otherwise profitable business opportunities in emerging markets because of the company’s increased exposure to corrupt foreign officials.<sup>308</sup> As prosperity shifts to emerging markets overseas, those companies may forego profitable ventures to avoid the unlikely, but highly troubling risk of FCPA debarment.<sup>309</sup>

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300. See Brian, *supra* note 251, at 235 (“[Until 2004], it appeared that large federal contractors had been immune to being suspended or debarred from obtaining additional government contracts . . . [because] not one major contractor had been suspended or debarred in a decade—despite all the misconduct that populates [the Project on Government Oversight] database.”).

301. See generally Marcia G. Madsen, *The Government’s Debarment Process: Out-of-Step with Current Ethical Standards*, 13 PUB. PROCUREMENT L. REV. 252 (2004) (arguing in favor of more consistent use of debarment, an end to waivers for large corporations, and an incapacitation-designed approach to the sanction).

302. *Id.* at 921.

303. *Id.*

304. *Id.*

305. *Id.*

306. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 (1978).

307. See Schooner, *supra* note 12, at 214.

308. See Spalding, *supra* note 275, at 355–56; see also Bixby, *supra* note 47, at 104.

309. Lacey, *supra* note 134, at 440 (“The long-term effect of increasing corporate regulation during the past three decades and the worldwide interest in preventing business corruption should reduce the number of executives willing to risk the penalties and the public censure.”).

In addition to its chilling effect on commerce, penalizing FCPA violations with suspension and debarment may result in two other negative unintended side effects. First, such severe penalties may “breed[] overcompliance by risk-averse companies mindful of the consequences of a DOJ [FCPA] inquiry—even if that inquiry is not based on viable legal theories.”<sup>310</sup> By threatening to cut off a contractor’s primary revenue stream (i.e., government contracts) if one of its employees gets caught tendering bribes in a foreign country, suspension and debarment shift a company’s incentive away from making desirable capital outlays (streamlining its supply chain, R&D, increasing its capacity, etc.) to investing in extensive compliance measures.<sup>311</sup>

On the other hand, perhaps the threat of suspension and debarment provide the necessary incentive for companies that might not otherwise implement adequate ethics and compliance programs. Similarly, although the deterrent potency of the increased use of suspension and debarment may lead to an overinvestment in unnecessary corporate compliance, tendering briefcases full of cash to low-level officials, showering foreign royalty with lavish gifts, and stashing millions of dollars into secret corporate slush funds can hardly be viewed as sound investments.

The use of suspension and debarment as an FCPA sanction may also raise concerns that the increased possibility of such a severe penalty may have a chilling effect on a company’s voluntary disclosure of bribery.<sup>312</sup> Although legitimate, the chilling effect is easy to avoid for the same reasons that self-reporting has actually increased in recent years alongside the size of fines imposed under the FCPA. Prosecutors have successfully incentivized self-disclosure with promises of lenient sentencing in the form of lesser fines.

“Even when the Government impose[s] neither suspension nor debarment, the threat of a corporate death penalty provides incentive for firms to enter into less draconian compliance agreements, and then comply with the terms of those agreements.”<sup>313</sup> As a result, the perception that suspension and debarment are more severe than potential fines may actually result in a greater number of voluntary disclosures.<sup>314</sup>

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310. *Examining Enforcement*, *supra* note 34, at 8 (statement of Professor Mike Koehler).

311. On the other hand, perhaps the threat of suspension and debarment provides the necessary incentive for companies that might not otherwise implement adequate ethics and compliance programs. Similarly, although the deterrent potency of the increased use of suspension and debarment may lead to an overinvestment in unnecessary corporate compliance, tendering briefcases full of cash to low-level officials, showering foreign royalty with lavish gifts, and stashing millions of dollars into secret corporate slush funds can hardly be viewed as sound investments.

312. *See* Tarun & Tomczak, *supra* note 140, at 154.

313. Schooner, *supra* note 12, at 214.

314. *See* Tarun & Tomczak, *supra* note 140, at 154–55.

## CONCLUSION

The FCPA is an important statute for combating corruption globally, and for maintaining the integrity of federal outsourcing relationships at home. It has taken on increasing significance in recent years as FCPA enforcement has grown and penalties have spiraled upward. The sanctions are still too thin, however. The restricted set of sanctions the government has been using against violators is hampering the effectiveness of the FCPA in achieving Congress's purpose of deterring bribery and fraud in government contracting.

Despite the magnitude of recent fines and penalties for FCPA violators, these sanctions represent a tiny fraction of the potential revenue available from lucrative government contracts. Discounted by the low probability of detection, the fines and penalties are far too low to deter unlawful activity, especially when firms obtain even larger contracts with the federal government following the sanctions. There is also an inherent unfairness, or at least imprudence, in awarding enormous government contracts to firms that the government has just prosecuted for fraudulently obtaining foreign contracts. Worse, the largest firms with the most government contracts have the least incentive to comply with the law.

Debarment would be a far more potent deterrent, if the government was serious about reducing corruption, and would fit more logically into the policy goal of protecting public funds from misappropriation. Debarment would deter potential wrongdoers and incapacitate previous offenders. It is unfortunate, therefore, that the enforcement agencies consistently refuse to seek suspension or debarment of firms that flout the FCPA. Of course, it would not be painless for the government to lose certain established contractors, but given that debarments typically last only two years, this is more of a temporary inconvenience for the government. For the firms caught bribing foreign officials, however, a two-year hiatus from all government contracts presents remarkable opportunity costs. The deterrent would induce more firms to comply with the law, allowing the "too big to debar" problem to diminish over time. This would foster greater confidence in the federal government at home and abroad, and would help fledgling governments in developing countries mature into effective political systems.