Tweet to Defeat Government Bribes: Limiting Extraterritorial Jurisdiction under the Foreign Corrupt Practices Act to Combat Global Corporate Corruption

ABSTRACT

Congress enacted the Foreign Corrupt Practices Act (FCPA) in the 1970s to address the rampant bribery of foreign officials by US companies. Because that resulted in a competitive disadvantage to US companies in the global corporate community, Congress amended the Act to add § 78dd-3, which extended the FCPA’s jurisdiction to foreign entities and individuals whose alleged offenses had occurred within the United States. This led to a vast overall increase in enforcement matters, but foreign entities and individuals have been impacted the most, even if their actions have had virtually no connection to the United States. Not only have current enforcement patterns risked the reputation of the United States by infringing on other states’ sovereignty, but they have also resulted in increased costs to US agencies. This Note addresses these issues by discussing the historical evolution of the FCPA and potential future enforcement patterns by the Trump administration. It then rejects the recent enforcement patterns and advises President Trump—as well as future administrations—to adopt more strategic enforcement practices. Specifically, it argues that the Trump administration should read § 78dd-3 literally and ban FCPA matters against foreign entities and individuals whose actions have virtually no connection to the United States. It also argues that President Trump and his senior officials at the State Department should engage in public diplomacy to tackle global corporate corruption. Finally, it suggests that President Trump invoke the OECD Convention to aid his public diplomacy campaign.
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I. INTRODUCTION

Enacted in 1977, the Foreign Corrupt Practices Act (FCPA or the Act) was a laudable effort by Congress to tackle the epidemic of corporate greed in the international realm. Having recently dealt with extensive political corruption, the United States sought to regain its international prestige by criminalizing the corporate bribes of foreign officials. However, prosecuting US corporations and individuals while failing to account for foreign corporations and individuals resulted in a competitive disadvantage for US companies operating in the global market. To resolve this issue, Congress amended the Act to extend jurisdiction to foreign corporations and individuals. Consequently, US agencies were statutorily authorized to enforce the FCPA against entities and individuals who were not citizens of the United States.

This amendment has led to an increase in the prosecution of companies and individuals—both foreign and domestic—under the Act over the last decade. But the Act also leaves the United States vulnerable to criticism from the international community.

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2. Id. at 60.
4. Id. at 1335–36.
5. See Annalisa Leibold, Extraterritorial Application of the FCPA Under International Law, 51 WILLAMETTE L. REV. 225, 233 (2015) (noting that for twenty-two years “there were on average 3 FCPA matters per year compared to yearly investigation totals of around 100” in recent years).
6. See Mike Koehler, Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement, 49 U.C. DAVIS L.
Specifically, the Act’s broad language allows government agencies to bring charges against foreign entities and individuals whose illegal conduct has virtually no connection to the United States. This practice is bolstered by the fact that few individuals or corporations have challenged the Act’s broad language, so little judicial precedent limits the agencies’ authority. While this increase in enforcement ostensibly promotes the original purpose of the Act, the exercise of broad jurisdiction over foreign entities and nationals is not worth the risk to the international reputation of the United States, nor is it guaranteed to eradicate further corporate corruption. With a new administration in the White House as of last year, US agencies may now have an opportunity to change the direction of this enforcement.

This Note addresses the tension between the broad enforcement of the FCPA against foreign companies and individuals and the need to respect international norms of sovereignty. Part II outlines the background and context of the FCPA. Specifically, Part II details the origins of the FCPA, describes the Act’s evolution over the past few decades, and assesses potential patterns of enforcement based on the Trump administration’s current enforcement actions and its members’ opinions of the law. Part III discusses the purpose and framework of the FCPA and explains how US agencies are able to exercise jurisdiction over foreign corporations and individuals whose illegal actions take place almost entirely outside of the United States. It subsequently addresses the issues implicated by broad enforcement against those entities, including potential harms to the United States’ reputation and its economy. Finally, Part IV rejects the US Securities and Exchange Commission’s (SEC) and Department of Justice’s (DOJ) recent FCPA enforcement practices and recommends those agencies limit one provision’s jurisdiction over foreign entities and individuals to those who are physically within the United States. Furthermore, this Note suggests that the United States use its diplomatic channels, such as the State Department or influence in global organizations, to encourage other countries to enforce their own anti-corruption legislation to further eliminate international corporate corruption.

RIV. 497, 525 (2015) (listing several concerns about the FCPA that were articulated by an international organization).
7. See Leibold, supra note 5, at 255 (stating that the FCPA’s language concerning jurisdiction is unclear and agencies thereby enforce the Act as broadly as possible).
8. Id. at 239.
II. BACKGROUND

A. Enactment of the Foreign Corrupt Practices Act

Congress enacted the FCPA in direct response to the increased interest in political and corporate corruption during the 1970s. Still reeling from the public backlash against Watergate and Vietnam, the Carter administration was determined to restore the pristine image of the United States in the international arena. To do this, federal officials began probing into unusual payments by US corporations to foreign officials, as the US government feared that these exchanges were threatening the country’s reputation abroad.

One investigation demonstrated that the Nixon administration had personally benefitted from bribes of officials—both foreign and domestic—with money that was pooled together by US multinational corporations. At the same time, Congress held multiple hearings in which it discovered that the practice of bribing foreign officials was common among members of corporate America. These investigations culminated in an SEC report that detailed the rampant bribery of foreign officials by US corporations in exchange for business opportunities in their countries. After determining that no US law prohibited US corporations from bribing foreign officials, Congress enacted the FCPA to combat this issue in 1977 with overwhelming public support.

When it was enacted, the FCPA granted the DOJ and the SEC the ability to bring civil and criminal charges against corporate entities and their officers for bribing foreign officials in exchange for business opportunities. It was revolutionary for its time, as the United States was the only country that criminalized this type of behavior. Initially, the FCPA prohibited only US corporations and individuals from bribing foreign officials. Specifically, its two main anti-bribery provisions barred “issuers” and “domestic concerns” from bribing foreign officials.

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9. Rediker, supra note 1, at 57.
11. Rediker, supra note 1, at 57.
16. Rediker, supra note 1, at 58.
17. Id. at 60.
foreign officials.\textsuperscript{18} “Issuers” are defined as corporations that trade on a
US stock exchange, and “domestic concerns” are defined to comprise
American citizens and corporations that originated under US laws.\textsuperscript{19}
Although these definitions could include foreign individuals and
corporations as well, Congress and other US officials expressly limited
the FCPA’s jurisdiction to those residing within the United States.\textsuperscript{20}

Congress limited the FCPA’s jurisdiction to US entities and
individuals because it assumed foreign countries would enact and
implement their own anti-corruption statutes.\textsuperscript{21} However, foreign
countries failed to follow suit, which resulted in US corporations falling
to a competitive disadvantage compared with their foreign
counterparts.\textsuperscript{22} Because companies routinely secured government
contracts through bribes to foreign officials, the threat of criminal and
civil liability limited US corporations’ ability to pursue those contracts
compared with foreign entities that faced no such issues.\textsuperscript{23}
Consequently, public dismay over this inequity compelled Congress to
expand the Act’s jurisdiction to foreign entities and individuals.\textsuperscript{24}

B. 1998 Amendments: Extension of Jurisdiction to Foreign
Corporations and Nationals

To ensure other countries would enact anti-bribery laws that
corresponded with the standards set by the FCPA, the US government
participated in the Organization for Economic Cooperation and
Development Convention on Combating Bribery of Foreign Public
Officials in International Business Transactions (the OECD
Convention) in 1997.\textsuperscript{25} During that convention, thirty-four member

\textsuperscript{18} Id. at 58.
\textsuperscript{19} Id.
\textsuperscript{20} Id. at 58–59 (“Congress specifically refrained from asserting jurisdiction
over non-U.S. individuals and companies.”); Emily Willborn, Extraterritorial
Enforcement and Prosecutorial Discretion in the FCPA: A Call for International
statement indicated that the United States had no intention of enforcing the Act against
corporations headquartered abroad.”).
\textsuperscript{21} See Rediker, supra note 1, at 60 (“The initial purpose of the FCPA was to
police only the illicit conduct of American businesses. There was nonetheless an
expectation held by Congress and in policy circles that other nations would pass similar
legislation in the wake of the FCPA.”).
\textsuperscript{22} Id.; Natasha N. Wilson, Pushing the Limits of Jurisdiction over Foreign
(2014).
\textsuperscript{23} Kayla Feld, Controlling the Prosecution of Bribery: Applying Corporate Law
Principles to Define a “Foreign Official” in the Foreign Corrupt Practices Act, 88 WASH.
L. REV. 245, 256 (2013); see Steven R. Salbu, The Foreign Corrupt Practices Act As A
where U.S. distributor’s business was impeded due to the FCPA’s strict anti-bribery
enforcement).
\textsuperscript{24} Rediker, supra note 1, at 63.
\textsuperscript{25} Id. at 62; Leibold, supra note 5, at 232.
states of the OECD signed a treaty in which they agreed to enact new or modify existing anti-bribery legislation within their own countries so that their laws would more closely mirror the FCPA’s stringent anti-corruption provisions. Every member state increased its commitment to combating foreign corruption, even though each differed in the kind of legislation it propagated under the treaty. The OECD Convention’s call to reduce foreign corruption inspired the enactment of current, powerful anti-bribery legislation, such as the UK Bribery Act.

The treaty also stated that any jurisdiction governed by these pieces of legislation should be interpreted broadly so that no physical connection to the prosecuting country shall be required. Accordingly, for the United States, this treaty served the dual purposes of criminalizing foreign bribery on an international scale as well as ensuring that US corporations were ostensibly on the same legal playing field as their competitors. Emboldened by its success at the OECD Convention, the United States tried to further accomplish these goals by clearly extending the FCPA’s jurisdiction to non-US corporations and individuals through a 1998 amendment to the Act.

The 1998 amendment added a new provision, § 78dd-3, to the Act, which extended jurisdiction to foreign nationals through the concept of territorial jurisdiction. Section 78dd-3 prohibits any person from using mail or interstate commerce in the United States in furtherance of any act that constitutes bribery of a foreign official. The Act’s plain meaning and legislative history make it clear that individuals who have committed this offense “while in the territory of the United States” are liable regardless of whether they are foreign born. However, in practice, the DOJ and SEC have interpreted this provision to extend a broad reach over foreign corporations whose offenses have virtually no connection to the United States.

26. Leibold, supra note 5, at 232; see Feld, supra note 23, at 256 (noting that the OECD’s overall goal was to “level the playing field” among global corporate competitors).

27. Willborn, supra note 20, at 430.

28. See id. at 431–32 (stating that the FCPA and UK Bribery Act are similar, except that the latter has a strict liability standard and includes a compliance defense).

29. Rediker, supra note 1, at 62.

30. See Leibold, supra note 5, at 232 (referencing U.S. attempts “to build an international consensus for anti-corruption . . . because it was believed that the FCPA placed U.S. firms at a competitive disadvantage” and OECD mandates that helped achieve these goals).

31. See Willborn, supra note 20, at 426 (stating that Congress ratified the extraterritorial amendment due to the OECD’s declaration that anti-bribery legislation could be enforced against actions that had little connection to the prosecuting country).

32. Leibold, supra note 5, at 228.

33. Id. (citing 15 U.S.C. § 78dd–3 (2012)).

34. Id. (quoting 15 U.S.C. § 78dd–3 (2012)).

35. See Wilson, supra note 22, at 1063–64 (listing instances where foreign corporations have been prosecuted when their actions have no connection to the United States, such as when a corporation’s bribes have merely used the U.S. banking system as an intermediary for a wire transfer).
C. Increase in Overall Enforcement Matters under the FCPA from 1998 to Today

The DOJ and SEC have drastically increased criminal and civil enforcement matters under the FCPA since the start of the new millennium.  

However, as of 2013, each agency had somewhere around seventy to eighty matters that it was investigating.  

Indeed, over the past few years, officials at the DOJ and SEC have pursued high profile cases with large corporations that have yielded the largest settlements in FCPA history.  

This overall increase in enforcement is directly attributable to the expanded jurisdiction under the 1998 amendments.  

The financial collapse of Enron and ensuing litigation in the early 2000s also contributed to the dramatic increase in active FCPA matters.  

There, Enron’s auditor, Arthur Andersen LLP, was charged and ultimately convicted of obstruction of justice after its officers destroyed numerous documents related to the primary investigation of the Enron Scandal.  

Not only did the conviction impact Arthur Anderson as a corporation and its executives for engaging in criminal behavior, but it also resulted in the demise of the business.  

Consequently, several hundred Arthur Andersen employees lost their jobs and were negatively impacted by the harsh sanctions, even if they had nothing to do with the criminal behavior.  

In response to the devastating effect the prosecution had on Arthur Andersen’s business and employees, the DOJ released the Thompson Memorandum in which the agency encouraged the pursuit of “alternative resolution vehicles” as opposed to trials against corporations and their executives who have committed crimes.  

As a result, in 2004 the DOJ started

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36. Id. at 1068; Phillips, supra note 15, at 95.  
37. Willborn, supra note 20, at 428; Wilson, supra note 22, at 1068.  
38. Willborn, supra note 20, at 428.  
41. See Koehler, supra note 6, at 501 (describing the impact Enron had on the rise of NPAs and DPAs which coincided with the rise of enforcement).  
42. Id.  
43. Id. at 501–02.  
44. Id.  
45. Id. at 503.
negotiating non-prosecution agreements (NPA) and deferred prosecution agreements (DPA) instead of prosecuting companies for corporate crimes.\textsuperscript{46}

NPAs and DPAs remain the most popular form of dispute resolution under the FCPA because they allow corporations that are under investigation to avoid costly litigation by paying a civil fine, disgorging profits, and/or instituting FCPA compliance programs, among other mitigating tactics.\textsuperscript{47} These alternative resolution vehicles are privately negotiated between the government and corporations and are rarely subject to judicial review.\textsuperscript{48} Moreover, corporations would rather pay a fine than challenge jurisdiction and suffer the costs that accompany extensive investigations and trials.\textsuperscript{49} Consequently, federal officials have nearly unlimited discretion in determining which corporations and individuals are within the FCPA's jurisdiction and have subsequently pursued charges at an increasing rate over the last several years.\textsuperscript{50} Experts predict that the DOJ and SEC will continue this practice until more courts address cases concerning jurisdiction.\textsuperscript{51}

Most interestingly, although the majority of enforcement actions are brought against US domestic corporations, some of the largest settlements have stemmed from cases involving foreign companies.\textsuperscript{52} Foreign corporations have paid seven of the ten highest FCPA settlements to date, with the highest, USD 965 million, paid in 2017 by a Swedish corporation.\textsuperscript{53} Because many of these enforcement actions were based on tenuous connections to the United States, they

\textsuperscript{46} Id.
\textsuperscript{47} See Leibold, supra note 5, at 239 (noting that NPAs and DPAs were used for 77 percent of FCPA-related actions between 2004 and 2011).
\textsuperscript{48} Id. at 239.
\textsuperscript{49} See id. at 240 (stating that entering NPAs or DPAs “is generally the only viable option” for corporations); Koehler, supra note 6, at 554–55 (commenting that agencies can pressure companies in NPAs and DPAs with the threat of “government suspension and debarment; the loss of key licenses, such as banking licenses; the drain on the time and energy of corporate executives and other witnesses; legal costs; and costs associated with the uncertainty of a criminal investigation and potential indictment”). It is worth noting, however, that prosecutors frequently use these tactics to pressure defendants to plead guilty. Sarah Ribstein, A Question of Costs: Considering Pressure on White Collar Criminal Defendants, 58 DUKE L. J. 857, 860 (2009).
\textsuperscript{50} Id., supra note 5, at 240.
\textsuperscript{51} See Sean Hecker & Margot Laporte, Should FCPA “Territorial” Jurisdiction Reach Extraterritorial Proportions?, 42 ABA INT’L. L. NEWS 1 (2013) (stating that courts must hear more challenges to the FCPA’s broad jurisdiction for the DOJ and SEC to discontinue their expansive enforcement).
\textsuperscript{52} See Leibold, supra note 5, at 236 (noting that even though 30 percent of FCPA matters are brought against foreign companies, 67 percent of the fines are paid by those entities).
could spark controversy in the international community due to potential violations of norms of sovereignty. 54

D. Future Enforcement under the Trump Administration

The Obama administration not only adhered to these patterns of enforcement, but also expanded them. Under President Obama’s purview, the SEC developed and instituted the FCPA Unit within the Division of Enforcement that focused exclusively on FCPA matters. 55 The SEC created this unit to ensure some of its attorneys developed an expertise in investigating FCPA matters and to coordinate with the DOJ so that enforcement was consistent across agencies. 56 With the help of this unit, the DOJ and SEC executed 325 NPAs and DPAs during President Obama’s term. 57 Compared to the 130 agreements executed by the previous administration, 58 the sheer number of NPAs and DPAs under Obama’s agencies demonstrated the administration’s staunch interest in prioritizing the enforcement of FCPA matters.

Future enforcement patterns of the FCPA, however, are unpredictable due to today’s political climate. Last year, the United States experienced a shift of power in the Executive Branch as President Donald Trump took control of the White House. 59 Although President Trump has not officially commented on how or if he will enforce the Act since assuming office, 60 he has criticized the FCPA in the past, calling it a “horrible law” and finding “it ‘ridiculous’ that the United States would criminalize bribes that occur abroad.” 61  

54. See Lestelle, supra note 40, at 536 (suggesting that the DOJ and SEC’s interpretation of § 78dd-3 as granting jurisdiction over behavior that has an effect on the United States may be inappropriate).
56. Id.
58. Id.
explaining his reasoning, President Trump stated that “[e]very other country goes into these places and they do what they have to do” and that if US companies do not engage in this behavior—namely paying bribes to foreign officials—“[they’ll] do business nowhere.”62 Furthermore, sources indicate that President Trump’s company itself may be entangled in potential FCPA actions.63 Most recently, President Trump was linked to a corrupt real estate development project in Azerbaijan to which the Trump Organization at a minimum licensed its name.64 Combined with President Trump’s past criticisms, this involvement in a potentially corrupt project may presage an overall decrease in enforcement of the FCPA.

By contrast, President Trump’s appointments to head the DOJ and SEC have acknowledged the Act has some merit, which has left experts to speculate as to how it may be enforced in the future.65 For instance, President Trump’s pick for Chairman of the SEC, Jay Clayton, previously spoke about his desire to reform FCPA enforcement practices.66 As the Chair of the New York City Bar Committee on International Business Transactions (NYC Bar Committee), Clayton helped draft and review a paper criticizing the overzealous enforcement of FCPA matters by the DOJ and SEC in recent years.67 In this paper, the NYC Bar Committee claimed that these enforcement practices were detrimental to US corporate interests.68 More specifically, it stated that heavy US enforcement imposed greater civil and criminal penalties on corporations that were subject to the FCPA, including US companies and foreign entities trading on the US stock exchange, rendering them less competitive with companies that were free from these regulations.69 As a result,


62. Davidson, supra note 61.

63. See id. (reporting on a potential FCPA violation in Azerbaijan in which the Trump Organization was allegedly involved).

64. See id. (noting that the Trump Organization abandoned the deal shortly after the election in December 2016).


67. Id.


69. Id. at 21.
US companies were disproportionately punished compared to their foreign competitors.\textsuperscript{70}

The NYC Bar Committee posited several potential solutions that could reduce the costs of active US enforcement while maintaining a strong commitment to anti-bribery norms, but it failed to reach a conclusion.\textsuperscript{71} Although the NYC Bar Committee called for an open-ended assessment of the issue, it ultimately left the impression that the SEC should reduce enforcement to mitigate its costs.\textsuperscript{72} Since assuming office, however, Clayton has changed his views, stating that “the FCPA can be a powerful and effective means” to reduce corruption.\textsuperscript{73}

Similarly, Attorney General Jeff Sessions previously criticized FCPA enforcement patterns but has vowed to enforce the Act since assuming office. During a 2010 Senate Judiciary Committee hearing, he expressed skepticism about the proliferation of NPAs and DPAs in recent years.\textsuperscript{74} At that hearing, Sessions questioned the arbitrary strategy of pursuing FCPA alternative resolution vehicles in large quantities when prosecutors could instead charge companies who have clearly committed a crime.\textsuperscript{75} Since assuming office, however, Sessions has made strides to assure the public that the FCPA will still be vigorously enforced. In a speech to the Ethics and Compliance Initiative, Sessions publicly declared that the DOJ “will continue to enforce the [FCPA],” reasoning that “[c]ompanies should succeed because they provide superior products and services, not because they pay off the right people.”\textsuperscript{76}

\textsuperscript{70} Id.
\textsuperscript{71} Id. at 24.
\textsuperscript{72} See id. (“Alternatively, the United States could take steps to reduce the regulatory costs for firms currently subject to the FCPA without undermining any of the Act’s fundamental objectives. For example, the US could decide to (1) dial back the scope of FCPA enforcement with respect to companies and focus more on individuals engaged in foreign corruption, (2) encourage other countries to do the same and (3) agree with other countries to cooperate on international matters such as information sharing, investigations, and extradition.”).
\textsuperscript{73} See id. (“Normally, I was taught if they violated a law, you charge them. If they didn’t violate the law, you don’t charge them.”).
\textsuperscript{74} See Mike Koehler, Attorney General Nominee Jeff Sessions – “I was taught if they violated a law, you charge them. If they didn’t violate the law, you don’t charge them.”, FCPA PROFESSOR (Nov. 21, 2016), http://fcpaprofessor.com/attorney-general-nominee-jeff-sessions-taught-violated-law-charge-didnt-violate-law-dont-charge/ [http://perma.cc/767X-5B42] (archived Jan. 18, 2017) (featuring portions of the hearing transcript).
\textsuperscript{75} See id. (“Normally, I was taught if they violated a law, you charge them. If they didn’t violate the law, you don’t charge them.”).
Notwithstanding Clayton’s and Sessions’s assertions that they will continue enforcing the Act, departments under President Trump have so far ostensibly de-emphasized enforcement of the FCPA, launching only three actions by September 2017, compared with President Obama’s twenty-five matters in his first nine months.77 Furthermore, the DOJ has dismissed numerous prior investigations that were opened during the Obama administration without imposing any penalties on the companies involved.78 Given the available information, enforcement patterns could either decrease, as one would imagine is President Trump’s preference, or they could continue as they have over the past decade, as Clayton and Sessions have suggested. These conflicting views and the administration’s indecipherable pattern of enforcement to date have left experts unsure about how and if the administration will continue to enforce the FCPA during the administration’s tenure.79

III. ANALYSIS

A. Purpose and Framework of the FCPA

Congress enacted the FCPA in 1977 to minimize corporate corruption by prohibiting the bribery of foreign officers in exchange for advantageous business opportunities.80 The law is enforced by SEC and DOJ officers who pursue cases within their own spheres of authority.81 With jurisdiction over corporations that trade on a US stock exchange, the SEC has the power to bring civil charges against “issuers” of securities and their “officers, directors, employees, and agents.”82 Conversely, the DOJ has the ability to bring civil and criminal charges against “non-issuers” and their affiliated individuals.83

The FCPA has two major provisions with which certain individuals and entities must comply. The first provision requires companies that trade on a US stock exchange to meet certain accounting standards, including the maintenance of books and internal records.84 The second provision prohibits “issuers,” “domestic

77. Witzel & Kutoroff, supra note 73.
78. Id.
79. Levick, supra note 65.
80. See S. REP. NO. 95–114, at 2–3 (1998) (stating that the Act’s purpose is “to prevent the use of corporate funds for corrupt purposes”).
82. Id.
83. Id.
concerns,” or “any other persons” from bribing any foreign official in exchange for a business opportunity in the foreign official’s country.\textsuperscript{85} This subpart focuses on the extraterritorial jurisdiction exercised under the latter provision.

To launch a successful cause of action under the anti-bribery provision, a prosecutor must prove the following elements: (1) the action was committed by “an issuer, domestic concern, or any other person”; (2) who used “the mails or any means or instrumentality of interstate commerce”; (3) “corruptly”; (4) “to offer, pay, or authorize the payment of money or anything of value”; (5) “to any foreign official”; (6) “for the purpose of influencing any act or decision of any such official”; (7) in order “to obtain, retain, or direct business to any person.”\textsuperscript{86} The Act also provides a number of exceptions and affirmative defenses, some of which are discussed below.\textsuperscript{87}

The FCPA allows federal officials to exercise nationality, territorial, and extraterritorial jurisdiction over individuals.\textsuperscript{88} Under §§ 78dd-1 and 78dd-2 of the Act, the SEC and DOJ can exercise nationality jurisdiction over US issuers and domestic concerns.\textsuperscript{89} While § 78dd-1 addresses companies that have securities registered with US stock exchanges, § 78dd-2 addresses individuals who are citizens, nationals, or residents of the United States.\textsuperscript{90} Both groups are liable if they commit the acts that fall within the purview of the FCPA regardless of whether the acts occur within US borders.\textsuperscript{91}

Alternatively, the SEC and DOJ can exercise extraterritorial jurisdiction over foreign corporations and individuals under § 78dd-3.\textsuperscript{92} In practice, agencies have interpreted this provision to allow the prosecution of foreign entities and individuals when their offenses are committed abroad but have a “sufficient nexus” to the United States.\textsuperscript{93}

86. Lestelle, supra note 40, at 531–32.
87. Infra Part III.B.
91. Id.
93. See Leibold, supra note 5, at 253–54 (describing a hypothetical example where a foreign individual can be prosecuted when her foreign bribe is wired through a U.S. bank even if her other actions occur entirely outside of the United States).
B. Scope of Jurisdiction over Foreign Corporations and Individuals under § 78dd-3 and Affirmative Defenses

To exercise their authority to prosecute foreign companies and individuals with few connections to the United States, the SEC and DOJ invoke § 78dd-3 of the FCPA. This provision specifically forbids “any person other than an issuer . . . or a domestic concern” from bribing foreign officials “while in the territory of the United States” by means of mail or interstate commerce. Theoretically, the text of this provision limits liability of foreign actors for offenses that have occurred within US borders. Nonetheless, the SEC and DOJ prosecute many actions that have mere tenuous connections to the United States. Activities that are tangentially related to the United States and in furtherance of the bribery of foreign officials, such as the exchange of US dollars or a wire transfer that passes through a US bank during the transaction, are enough to trigger jurisdiction under the Act. Moreover, foreign corporations or citizens who are not covered by the FCPA whatsoever, and thus are not subject to its jurisdiction, can be criminally prosecuted for ancillary offenses. In that case, a foreign individual acting in furtherance of an FCPA violation committed by someone who is covered by the Act can be prosecuted for his or her actions under US law notwithstanding his or her tenuous connection to the United States. This creates issues for foreign entities and individuals who utilize third-party agents as liaisons to accomplish their business objectives.

The FCPA does provide exceptions and affirmative defenses that can be used to challenge the exercise of extraterritorial jurisdiction. Subsection (b) exempts any offers to foreign officials that are specifically made to “expedite or to secure the performance of a routine governmental action by [that] foreign official.” This means that mandatory payments to foreign bureaucrats to secure an existing business opportunity are exempt. Of more interest to foreign corporations or individuals, any person under investigation can assert

95. See Leibold, supra note 5, at 226 (stating that corporations whose headquarters are outside of the United States and who do not issue securities on U.S. stock markets are only subject to liability under § 78dd-3 on its face when their actions are taken within U.S. borders).
96. See id. ("[I]n practice FCPA jurisdiction can be based on a mere tangential connection (i.e. a bank wire transfer or an email) between the corruption and the United States, even though such an extraterritorial action may not be permitted under international law.") (emphasis added).
97. Id.; Wilson, supra note 22, at 1064.
99. Id.
100. Id.
an affirmative defense that his or her actions were exempt because they were legal under “the written laws and regulations” of the country in which the offense occurred.\(^{102}\) Despite this opportunity, foreign entities and individuals face many challenges in asserting this defense due to cultural and linguistic differences, which is discussed in further detail below.\(^{103}\)

C. The FCPA in Practice: Broad Enforcement with Little Oversight

The increase in overall enforcement matters, especially with regard to foreign entities and individuals, can be attributed in part to the proliferation of NPAs and DPAs as well as the ambiguity of language in the statute.\(^ {104}\) Both factors have led to several interesting consequences, including arbitrary enforcement of minute violations and confusion about the exact scope of the Act.\(^{105}\)

1. Increased NPA and DPA Enforcement

While the FCPA ostensibly limits enforcement to individuals or entities whose illegal conduct has a sufficient nexus to the United States, in practice the SEC and DOJ have pursued charges against foreign nationals whose corrupt actions have had little connection to the United States.\(^ {106}\) The SEC and DOJ’s use of NPAs and DPAs, as opposed to litigation, in cases involving foreign national and entities is largely responsible for this phenomenon.\(^ {107}\) NPAs and DPAs allow the DOJ and SEC to resolve disputes with litigants outside of court in exchange for a less severe penalty against the charged corporation.\(^ {108}\) Those government agencies began using NPAs and DPAs in 2004 as an alternative option to bringing charges against entities and individuals.\(^ {109}\) While the DOJ was incentivized to pursue this alternative to litigation due to fears that the threat of litigation would financially ruin corporations and subsequently lead to mass

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103. Id. at 425; infra Part III.D.1.A.
104. See Koehler, supra note 6, at 499 (stating that NPAs and DPAs produced a higher quantity but lower quality of FCPA enforcement matters).
105. Willborn, supra note 20, at 438.
106. See Leibold, supra note 5, at 226 (noting that the DOJ and SEC have applied the FCPA to foreign issuers even when the corrupt conduct in question “neither originated nor was completed within U.S. territory”).
107. See id. at 257 (“[M]ost FCPA matters are settled out of court by way of DPAs or NPAs.”).
108. See id. at 239 (noting that NPAs and DPAs typically involve paying fines, corporate governance reforms, monitors, or other penalties).
109. Koehler, supra note 6, at 500.
unemployment, the rise in NPAs and DPAs has produced several unintended consequences.\(^{110}\)

The use of NPAs and DPAs has resulted in more enforcement matters against corporations, but it has also stunted the development of case law pertaining to FCPA matters, as most cases fail to reach the court system.\(^{111}\) Because of the dearth of case law on the matter, government agencies have to rely on the text of the statute and vague guidelines to determine whether they can exercise jurisdiction over foreign nationals and corporations.\(^{112}\) Consequently, the DOJ and SEC have broadly interpreted the FCPA to bring enforcement actions against entities and individuals whose illegal conduct had a tenuous connection to the United States without much input from the judicial system.\(^{113}\)

This broad discretion to bring charges against individuals has been extremely profitable for the United States, resulting in several settlements that have nearly reached one billion dollars.\(^{114}\) The United States has profited so greatly because companies would understandably rather settle with agencies outside of court than incur large litigation costs and risk bad press and subsequent stock devaluation.\(^{115}\) Moreover, the DOJ and SEC have celebrated the rise in the number of enforcement actions as evidence of their success in curbing the bribery of foreign officials.\(^{116}\) Nonetheless, this broad interpretation of the Act’s jurisdiction runs the risk of violating principles of international law concerning sovereignty and poses a threat to its reputation abroad.\(^{117}\) There is also relatively little evidence demonstrating that pursuing these cases under a broad interpretation of the statute is particularly effective in deterring future

\(^{110}\) See id. at 502–03 (detailing the Thompson Memorandum’s mandate and its effects).

\(^{111}\) Id. at 505.

\(^{112}\) See Willborn, supra note 20, at 436 (noting that agencies typically use settlement agreements rather than case law as guidance for their decisions).

\(^{113}\) See Leibold, supra note 5, at 254 (stating that there is often little connection between the issue at hand and the United States).

\(^{114}\) See id. at 238 (listing several settlements with foreign companies that have generated hundreds of millions of dollars for the United States).

\(^{115}\) Id. at 240; Lestelle, supra note 40, at 529.

\(^{116}\) See Koehler, supra note 6, at 512–13 (citing an interview with the Assistant Attorney General in which he claimed that the high number of matters spawned by the pursuit of NPAs and DPAs resulted in “greater accountability for corporate wrongdoing”).

\(^{117}\) See Leibold, supra note 5, at 226 (“[E]xtension of FCPA jurisdiction to foreign non-issuers may constitute an exercise of extraterritorial jurisdiction contrary to principles of international law.”); Alan Cullison, Austrian Court Denies US Request to Extradite Dmytro Firtash, WALL ST. J. (May 1, 2015), http://www.wsj.com/articles/austrian-court-denies-u-s-request-to-extradite-dmytro-firtash-1430464915 [https://perma.cc/F8G8-AZXX] (archived Oct. 8, 2016) (describing a case where Austria refused to extradite an individual who was charged under the FCPA because it thought the United States’ charges were politically motivated).
crime.\textsuperscript{118} Despite these drawbacks, the DOJ continues to use its broad discretion to implicate foreign corporations and individuals under the FCPA primarily by forcing them to agree to NPAs and DPAs.\textsuperscript{119}

2. Ambiguity in the Definitions of “Foreign Official” and “Giving Value”

The academic and legal communities have extensively criticized the FCPA for failing to sufficiently define some of its key terms.\textsuperscript{120} The most common critiques are that it is unclear who constitutes a foreign official and what qualifies as a “foreign official” for purposes of bribery under the Act.\textsuperscript{121} The statute defines a foreign official as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of [the same].”\textsuperscript{122} However, numerous matters have demonstrated that the DOJ and SEC have interpreted this particular definition very broadly, which has resulted in unpredictable enforcement patterns.\textsuperscript{123}

Many companies have had trouble identifying which persons and which activities fall under the broad categories of government employees and instrumentalities thereof, neither of which is further defined by the Act.\textsuperscript{124} In the House of Representatives’ report for the original statute, legislators expressly distinguished between payments made to influence foreign governments’ policy, and procedural payments made to lower level bureaucrats; they proclaimed the latter to be exempt from the purview of the Act.\textsuperscript{125} The Senate followed suit by confirming this definition, thereby excluding routine payments to foreign clerical employees from being prosecuted under the FCPA.\textsuperscript{126}

\textsuperscript{118} See Mike Koehler, \textit{Do NPAs and DPAs Deter?}, FCPA PROFESSOR (Mar. 12, 2013), http://fcpaprofessor.com/do-npas-and-dpas-deter/ [https://perma.cc/S356-66T3] (archived Oct. 9, 2016) (citing several examples where corporations had committed FCPA violations after previously entering into NPAs or DPAs for prior violations).

\textsuperscript{119} See Leibold, \textit{supra} note 5, at 239 (noting that DPAs and NPAs were used to resolve approximately seventy-seven percent of all FCPA related actions).

\textsuperscript{120} See Alexander G. Hughes, \textit{Drawing Sensible Borders for the Definition of “Foreign Official” Under the FCPA}, 40 AM. J. CRIM. L. 253, 256–57 (2013) (stating that there is significant ambiguity as to who or what constitutes an instrumentality of a foreign government).

\textsuperscript{121} Id. at 261.


\textsuperscript{123} Id. (recognizing the lack of clarity as to what qualifies an entity as an instrumentality of a foreign government).

\textsuperscript{124} Id.; Feld, \textit{supra} note 23, at 249–50.

\textsuperscript{125} H.R. REP. NO. 95-640, at 8 (1977) (recommending that “a payment . . . made to influence the passage of law, regulations, the placement of government contracts, the formulation of policy or other discretionary governmental functions...would be prohibited” whereas “payments made to secure permits, licenses, or the expeditious performance of similar duties of an essentially ministerial or clerical nature” would not be).

\textsuperscript{126} See Alexander L. Harisiadis, \textit{Foreign Official, Define Thyself: How to Define Foreign Officials and Instrumentalities in the Face of Aggressive Enforcement of the
But during the last couple of decades, the DOJ and SEC have taken steps to broaden the meaning of both government employees and instrumentalities without attempting to define their limits.127 This has resulted in further confusion among companies charged under the Act.128 One of the most common challenges raised by defendant-corporations is that state-owned enterprises are not instrumentalities of foreign governments constituting foreign officials under the FCPA.129 During these investigations, the DOJ and SEC have insisted that state-owned enterprises, including hospitals and utility companies among other entities, do qualify as government instrumentalities for purposes of the Act.130 Consequently, the payment of foreign physicians and staff at state-owned hospitals in exchange for business opportunities is technically a violation of the Act.131 Further compounding the issue is the DOJ and SEC’s failure to specify the degree of state ownership that qualifies a state-owned enterprise as an instrumentality.132 The lack of judicial guidance has helped affirm the DOJ and SEC’s expansive view.133

Current guidelines issued by the DOJ and SEC are also unhelpful in further defining the disputed terms.134 Requests have been made to both agencies to clarify the terms so that corporations can adequately comply with the Act’s requirements.135 For instance, in 2012 the Chamber of Commerce requested that the DOJ provide more

Footnotes:

127. See id. at 533 (noting that the DOJ and SEC adopted a broader interpretation of foreign officials and instrumentalities which contravened the Act’s legislative history).


129. See Hughes, supra note 120, at 262–68 (detailing cases under which the interpretation of government instrumentality was challenged).

130. See Harisiadis, supra note 126, at 522–23 (referencing a specific case where SEC charged a company with violating the FCPA for making payments to physicians who worked at a Taiwanese state-owned hospital).

131. See id. (noting that in 2002 the SEC settled an FCPA enforcement proceeding that involved bribes to foreign physicians employed by state-run medical facilities).

132. See id. at 517 n.71 (citing an article that states while it is easy to determine if a foreign government owns some percentage of a company, it is difficult to determine if that government exercises enough control over the corporation in order for it to constitute an instrumentality of a foreign government).

133. See Morgan, supra note 128, at 437 (“American courts have acknowledged the undefined nature of ‘foreign official’ under the FCPA; however, they have only provided limited assistance in remedying the issue.”).

134. See Willborn, supra note 20, at 438 (“Unhelpful prosecutorial guidelines has led to significant confusion about the parameters of the FCPA and its enforcement.”).

135. See Hughes, supra note 120, at 273 (noting that guidelines supplementing the Act were “hailed as a ‘welcome clarification’ by the U.S. Chamber of Commerce”).
information on who constitutes a foreign official to no avail. The DOJ and SEC issued a joint FCPA Research Guide that merely reaffirmed that any government employee is considered a foreign official for purposes of the Act, and that a determination that a certain instrumentality is covered depends on a fact-driven analysis of the particular case. Combined with the few government-friendly decisions concerning these definitions, these vague guidelines encourage increased enforcement, which corresponds with further increases in investigations.

3. Consequences of Expansion to Foreign Entities and Individuals: Arbitrary Enforcement and Higher Penalties

This increase in investigatory matters has disproportionately impacted foreign entities that are charged under the Act because those companies often pay larger fines than their US competitors. For example, as of 2013, foreign cases were responsible for 67 percent of the overall value of financial penalties despite constituting only 30 percent of the entities being investigated. Indeed, foreign companies paid higher fines on average than their US counterparts. Moreover, of the top ten highest settlements ever under the Act, seven have been paid by non-US corporations and three by US companies. These seven foreign companies have altogether paid close to $4.6 billion in fees since 2008. This pattern of enforcement has not only impacted foreign corporations, but has also unfairly targeted non-US citizens. Of the eighteen individuals charged under the FCPA in 2011, twelve were from outside of the United States.

Given the potential complications that accompany extraterritorial jurisdiction, it is peculiar that the DOJ and SEC’s charges and penalties have continued to disproportionately impact foreign corporations and individuals. In one instance, a journalist speculates that US agencies bring cases against foreign individuals because the cases would be more difficult to defend based on said individuals’
egregious behavior. The underlying actions of these cases began decades ago, when foreign entities and individuals were not yet subject to the FCPA’s jurisdiction or even aware of its provisions, so they unwittingly committed blatant offenses. Others posit that because of the complications stemming from pursuing foreign corporations, the DOJ and SEC only bring charges against the biggest firms from which they can extract the largest penalties. Regardless of the reason, the government’s practice of targeting foreign firms, particularly those who have virtually no connection to the United States, poses several potential problems to the US economy and international reputation as well as to the non-US entities who are arbitrarily subject to the Act.

D. Issues Facing Enforcement against Foreign Entities and Individuals

The disproportionate impact on foreign companies and individuals has produced many consequences for US and foreign interests alike, including damage to diplomatic relations and unnecessary expenses to government agencies.

1. Violations of International Norms of Sovereignty and Ineffective International Enforcement

The seemingly endless expansion of extraterritorial jurisdiction under the FCPA has undoubtedly resulted in a significant increase in enforcement actions and subsequent revenue stemming from large, corporate settlements. Yet, it is important to consider what the potential costs of this course of action are as well.

a. Anti-Bribery Cultural Norms and International Customary Law Regarding Sovereignty

As illustrated by the OECD Convention, the elimination of international corruption through anti-bribery legislation remains a


147. Id.

148. See Brandon L. Garrett, Globalized Corporate Prosecutions, 97 VA. L. REV. 1775, 1780 (2011) (“One would expect prosecutors to pursue only more substantial foreign firms and only in more serious cases, given the practical obstacles to investigating foreign violations.”).

149. See Leibold, supra note 5, at 236–38 (noting that data shows a clear discrepancy in the amount of fines paid by foreign versus domestic firms).
universal value. However, what constitutes the bribery of foreign officials is a cultural construct varying from country to country. Therefore, a defendant’s “offense” as defined by US law may not even qualify as bribery in that individual’s home country. This issue presents problems of notice to the individual who is being charged with the crime as well as potential violations of norms of international sovereignty.

The affirmative defense as defined by § 78dd-3(c)(1) of the FCPA could mitigate the problem posed by accepting diverse understandings of bribery. Under this provision, actions that would ordinarily violate US law, but are expressly legal according to written statutes of the country in which the offense takes place, are not subject to the FCPA’s jurisdiction. However, this position ignores the fact that most legal actions are not expressly designated legal by statute but are presumed to be legal until stated otherwise. Furthermore, even if certain acts are designated as legal in a given country, US officials will need to read and accurately translate these pieces of legislation to determine what actions are necessarily lawful. Statutory interpretation is difficult in one’s native language, and the risk of misinterpreting these laws is even higher with the added complexity of reading them in another language. For those reasons, many actions that are presumably legal in the venue country will still be subject to the strict constraints of the FCPA because they are not explicitly stated as legal.

Overreaching legislation that ignores these cultural differences can at best decrease the level of comity between individual countries, and at worst constitute a violation of norms of sovereignty. Current enforcement actions under the FCPA rarely consider international

See Salbu, supra note 23, at 423–24 (citing to universal condemnation of bribery).

See id. at 424 (“[C]ondemnation of certain behaviors may vary in degree—some cultures may not censure bribery to the extent others do.”).

See id. (“[C]ountries in a highly pluralistic world are unlikely to agree about which reciprocities are acceptable and which are not.”).

See id. at 426 (stating that determining what conduct is punishable by law in several different legal systems is difficult).

See id. at 425 (introducing the affirmative defense that allows a target of an investigation to avoid charges if her actions are not illegal in her country).

Id. (citing 15 U.S.C. § 78dd-3 (2012)).

See id. at 426–27 (describing the challenges of linguistic and cultural translation).

See id. at 426 (noting that the translation process is “fraught with occasions for both the exercise of judgment and the commission of error”).

See id. at 427 (noting the challenges with interpretation).

See id. (recognizing that law enforcement officials would need to understand the scope of an express legislative proscription to determine exactly what acts are lawful).

Id.; see Willborn, supra note 20, at 423–24 (“This application of the FCPA leads to difficulties normally associated with extraterritorial application of U.S. law such as comity, conflict with foreign law, and diplomatic issues.”).
norms of sovereignty.\textsuperscript{161} While it has no official universal definition, the concept of sovereignty usually involves “the recognition of a government’s right to exercise exclusive control” over its own state.\textsuperscript{162} It is also widely recognized that the concept of sovereignty is crucial to the current system of international relations.\textsuperscript{163} Thus, US agencies’ current expansive exercise of extraterritorial jurisdiction under the FCPA violates norms of international sovereignty by impeding a foreign government’s ability to maintain control over its citizens and prosecute them for conduct that the foreign government, not the United States, designates a crime. This long-arm exercise of extraterritorial jurisdiction could ultimately undermine US goals by negatively impacting the relationship of the United States with officials in allied countries who feel that US prosecutors have violated their right to self-govern.\textsuperscript{164} Consequently, those countries may decline to cooperate in any anti-bribery investigations.\textsuperscript{165}

b. Unequal Global Enforcement of Foreign Bribery

Stronger enforcement against foreign entities and individuals not only damages the reputation of the United States in the international community, but it could also undermine US corporate and political interests by discouraging other countries from enforcing their own anti-bribery laws. As stated earlier, many other countries have enacted their own anti-bribery laws but have not been as diligent about enforcing these laws.\textsuperscript{166} The NYC Bar Committee speculates that this low level of enforcement by other countries is caused by over-regulation by US authorities.\textsuperscript{167}

The NYC Bar Committee illustrates this point by describing the incentives to enforce anti-bribery legislation through a prisoner’s dilemma analysis.\textsuperscript{168} In this analysis, countries that zealously enforce their anti-bribery legislation are known as enforcers and those that

\[\text{\textsuperscript{161} Willborn, supra note 20, at 423–24.}\]
\[\text{\textsuperscript{163} ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 1435 (John P. Grant \& J. Craig Barker eds., 3d ed. 2009).}\]
\[\text{\textsuperscript{164} See Willborn, supra note 20, at 445–46 (suggesting that US agencies adopt extraterritorial standards set by antitrust practices in order to avoid the notion that they are prosecuting foreign companies for ulterior motives).}\]
\[\text{\textsuperscript{165} See id. at 446–48 (detailing the benefits of international cooperation in prosecuting foreign bribery).}\]
\[\text{\textsuperscript{166} See N.Y.C. BAR ASS’N, supra note 68, at 12 (noting that “from 2000 to 2010 U.S. authorities brought more than 3.5 times more foreign bribery enforcement actions than all other countries combined”).}\]
\[\text{\textsuperscript{167} See id. at 15–16 ("[I]f multiple countries ‘agree’ to craft and enforce anti-corruption statutes and some countries make it clear that they will enforce the laws zealously (the enforcers’), there are significant incentives for other countries (the ‘non-enforcers’) not to implement or not to enforce their anti-corruption laws.").}\]
\[\text{\textsuperscript{168} Id.}\]
enforce their laws at lower levels are known as non-enforcers.\textsuperscript{169} The
NYC Bar Committee states that companies in non-enforcer jurisdictions are more likely to secure business in countries where
bribery is common because they are inherently less likely to face
prosecution for their offenses in their home countries.\textsuperscript{170} Pursuing that
business makes the companies of non-enforcer jurisdictions more
globally competitive compared with their counterparts in enforcer
countries.\textsuperscript{171} Because countries are likely to advocate for policies that
benefit their national entities, countries may accordingly be less
inclined to enforce their anti-bribery legislation when US agencies
zealously enforce the FCPA.\textsuperscript{172}

Unequal enforcement of anti-bribery legislation worldwide could
yield undesirable consequences to US corporate and political interests.
As stated previously, this inequity could lead corporations in non-
enforcer states to have a competitive advantage over their counterparts
in enforcer states.\textsuperscript{173} Consequently, US companies—which are
undeniably subject to the zealous enforcement of the FCPA—can
actually incur significant disadvantages in the global market even if
US agencies pursue foreign entities and individuals.\textsuperscript{174} Furthermore,
as discussed further below, FCPA investigations require significant
transaction costs, the bulk of which US agencies could bear if they
continue to discourage other countries from prosecuting corruption by
zealously enforcing the FCPA.\textsuperscript{175} Consequently, US interests may fare
better if US agencies limit the FCPA’s jurisdiction over foreign entities
and individuals and instead encourage other nations to further enforce
their anti-bribery legislation against their own citizens.

2. Practical Costs to US Interests

Although non-US entities and individuals on average pay much
larger settlement amounts than those residing in the United States,\textsuperscript{176}
the SEC and DOJ face significant operational difficulties during

\begin{itemize}
\item \textsuperscript{169} \textit{Id.}.
\item \textsuperscript{170} \textit{See id.} (noting that companies in jurisdictions that enforce anti-corruption
legislation at lower levels are less likely to be prosecuted for engaging in bribery in which
no anti-bribery legislation has been enacted).
\item \textsuperscript{171} \textit{See id.} (stating that companies can use “[t]he additional profits made, costs
saved, knowledge gained and relationships” made through their new business to gain a
competitive advantage).
\item \textsuperscript{172} \textit{See id.} (“[B]y ‘dialing back’ enforcement or having a ‘lighter-touch’ a
country can provide a substantial advantage to its domestic enterprises.”).
\item \textsuperscript{173} \textit{Id.}.
\item \textsuperscript{174} \textit{Id.}.
\item \textsuperscript{175} \textit{See infra} Part III.D.2 (discussing evidentiary challenges and fees affiliated
with FCPA investigations).
\item \textsuperscript{176} \textit{See Willborn, supra} note 20, at 430 n.52 (citing statistic that shows foreign
entities pay fines that are on average twenty-two times higher than those paid by US
corporations).
\end{itemize}
investigations of foreign firms.177 Whenever the DOJ or SEC commences an investigation of a foreign entity or individual, its officers face a barrage of institutional challenges to gathering evidence and witness testimony from other countries.178 Because the majority of evidence that is necessary to pursue a case against a foreign entity resides in that corporation’s host country, the DOJ and SEC have to either rely on the company itself to voluntarily provide that information or request it from the firm’s home government.179

The DOJ and SEC have separate channels through which they can obtain discovery from foreign governments. Because the DOJ focuses more on criminal matters, it must rely on US Mutual Legal Assistance Treaties (MLAT) with other nations in order to procure the necessary information.180 Under an MLAT, any nation that is party to the treaty is obligated to assist other signatories with their criminal investigations and cases.181 As a result, if the United States has an MLAT with a given country, the DOJ can invoke the treaty to request information from that country that is pertinent to any criminal prosecution.

The SEC primarily utilizes its Office of International Affairs (OIA) to submit a formal request to the opposing party’s government.182 OIA’s goal is to enhance cooperation among different nations to ensure effective cross-border regulatory compliance with securities law.183 By specializing in the laws of other foreign countries, OIA can more quickly navigate other countries’ different procedures regarding discovery requests and can more efficiently retrieve the relevant information than the SEC.184

Even though these mechanisms by which the DOJ and SEC can obtain discovery for their investigations are generally helpful, the need

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177. See Hecker & Laporte, supra note 51 (“[T]he process [of obtaining assistance from foreign authorities] can be lengthy, not all foreign authorities are willing to cooperate, and the resulting delays may implicate the U.S. statute of limitations for FCPA violations.”).


179. See Hecker & Laporte, supra note 51 (explaining requests of foreign evidence).

180. See id. (“MLATs are intended to ‘modernize law enforcement and judicial cooperation.’”).


182. See Hecker & Laporte, supra note 51 (noting that the SEC can also obtain evidence by having the DOJ invoke an MLAT or send formal letters rogatory).


184. Id.
to obtain evidence still presents a host of problems. The United States does not have a strong MLAT with every country, which means that some foreign officials can reject a discovery request for a particular case notwithstanding the fact that the charged corporation is within the FCPA’s jurisdiction.\textsuperscript{185} Furthermore, even if the United States has a strong MLAT with the corporation’s host country, generally there are major discrepancies in procedure and data privacy regulations between the United States and other nations.\textsuperscript{186} In cases where cooperation is difficult to obtain due to these discrepancies, federal prosecutors at the DOJ may face significant delays and expend exorbitant resources to obtain crucial information to support their cases.\textsuperscript{187} These delays could result in stale and potentially inaccurate information as it pertains to events that are far removed in time.\textsuperscript{188} Officers at the SEC may face similar costs in attempting to procure necessary discovery despite the existence of the OIA.\textsuperscript{189} Therefore, the prosecution of foreign entities and individuals, albeit profitable in some cases, may not always be worth the practical costs of obtaining discovery for certain investigations.

E. Using Diplomacy and International Treaties to Achieve Universal Goals

In cases where jurisdiction over foreign entities is an issue for US law enforcement, politicians and bureaucrats have used a variety of tactics to influence other nations and the international system to implement policies that promote US interests. One strategy is the use of public diplomacy, which is most commonly utilized by the State Department and other executive officials. Another is the invocation of international treaties, such as the OECD Convention.

1. Public Diplomacy Efforts by Politicians and Bureaucratic Agencies to Realize Global Objectives

Scholars define “public diplomacy” as “the set of practices and actions by which a state seeks to inform and influence citizens of foreign countries in ways that promote its national interest.”\textsuperscript{190}

\textsuperscript{185} See Hecker & Laporte, supra note 51 (commenting that U.S. authorities face significant challenges when requesting evidence from a country with which the United States does not have a strong MLAT).
\textsuperscript{186} See id. (recognizing the existence of procedural delays).
\textsuperscript{187} See id. ("Not only can these procedural challenges result in significant delays, but these delays often give rise to claims that the five year statute of limitations for FCPA violations has expired.").
\textsuperscript{188} Id.
\textsuperscript{189} Id.
Heavily utilized by the Obama administration, this strategy is used to pressure foreign governments to adopt policies that coincide with US interests by directly connecting with and influencing these states’ citizens.\textsuperscript{191} To do so, US officials advocate for certain policies through globally broadcast speeches and media campaigns.\textsuperscript{192} They also research the attitudes and cultures of foreign publics and carefully craft these messages to ensure that they appeal to target citizens and foster trust with the United States.\textsuperscript{193} The citizens, as constituents, pressure their governments to adopt changes that conform to US policies, which allows the United States to achieve its interests on an international level without directly confronting foreign state officials.\textsuperscript{194}

Bureaucratic officials, particularly those who work in the US State Department, are prone to using this tactic.\textsuperscript{195} This is not surprising given the State Department’s mission is nearly identical to that of public diplomacy.\textsuperscript{196} The State Department’s efforts to promote US policies on a global level extend to issues impacting businesses. The State Department’s Bureau of Economic and Business Affairs advocates other companies adopt policies that align with US interests in a variety of areas, including intellectual property, trade, and transportation.\textsuperscript{197} Most notably, its Investment Finance and Development subdivision is responsible for promoting investment policies that benefit US interests, including anti-corruption reforms, on a global scale.\textsuperscript{198} Therefore, the State Department has the capacity to publicly spread US interests with regard to anti-corruption without resorting to legal recourse that may violate norms of sovereignty.

\begin{footnotesize}
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\item \textsuperscript{191} See Bruce Gregory, American Public Diplomacy: Enduring Characteristics, Elusive Transformation, 6 HAGUE J. DIPL. 351, 353 (2011) (defining public diplomacy “as a state-based instrument used by foreign ministries and other government agencies to engage and persuade foreign publics for the purpose of influencing their governments”).
\item \textsuperscript{192} See id. at 361 (citing methods of advocacy that are used to influence the public).
\item \textsuperscript{193} Id. at 355; see Defining Public Diplomacy, UNIV. SOUTHERN CAL. CTR. ON PUBL. DIPL., http://uscpubdiplomacy.org/page/what-pd (last visited Mar. 14, 2018) [https://perma.cc/397J-W558] (archived Mar. 1, 2017) (defining public diplomacy as a “mechanism through which nations foster mutual trust and productive relationships”).
\item \textsuperscript{194} See Brown & Glaisyer, supra note 190, at 53 (describing President Obama’s efforts to influence Egyptian citizens to pursue democracy during the Arab Spring).
\item \textsuperscript{195} See Gregory, supra note 191, at 364–65 (noting that employees in nearly every level of the bureaucratic hierarchy engage in public diplomacy).
\item \textsuperscript{198} Id.
\end{itemize}
\end{footnotesize}
2. OECD Convention Mandates and Ways to Ensure Compliance

Similarly, US officials could further invoke the obligations of binding treaties to compel foreign states to comply with policies that are in the interests of the United States. Given that the OECD Convention was drafted with the purpose of encouraging states to adopt anti-bribery legislation that is similar to the FCPA, US officials could use this treaty to influence other nations to combat the bribery of foreign officials.

The OECD Convention mandates that each of its thirty-four member states "take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary . . . to a foreign official . . . in order to obtain or retain business." Thus, it obligates each member state to not only enact legislation that criminalizes the act of bribing foreign officials, but to also adequately enforce these laws and assist other parties with their own anti-corruption investigations. Reassured by this provision, the Senate ratified this treaty with the explicit goal of ensuring that signatory states criminalized the offense of bribing foreign officials so that US businesses did not succumb to a global competitive disadvantage. Much to their delight, each signatory enacted legislation that expressly prohibited this act.

Nevertheless, the OECD is broad enough to allow each member state to develop an anti-corruption plan that is well-adapted to their current legal system and culture. This idea is further bolstered by the preamble and commentaries on the treaty, which both embrace the "functional equivalence" principle that allows countries to use multiple approaches to achieve the ultimate goal of criminalizing bribery of foreign officials. Because member states have the flexibility to design their own anti-bribery regime within the broad constraints of

199. See Feld, supra note 23, at 256 (stating that the OECD Convention’s purpose was to “level the playing field” by requiring parties to adopt effective anti-bribery legislation).
200. See id. at 269 n.192 (quoting OECD Convention).
202. Id.
203. See id. ("Between 1999 and early 2004, all OECD member states criminalized in their domestic law the specific crimes of ‘bribery of a foreign public official’ defined in Article 1 of the Convention.").
204. See Andrew Tyler, Enforcing Enforcement: Is the OECD Anti-Bribery Convention’s Peer Review Effective?, 43 GEO. WASH. INT’L L. REV. 137, 147 (2011) (“The purpose of [the OECD’s] open-ended articles is to allow for the harmonization of Convention rules across legal systems that have vast divergences with respect to domestic procedures, jurisdiction, liability, and rules of evidence.”).
205. Id.
the OECD Convention, components of each nation’s system and its enforcement can vary widely.\(^{206}\)

Despite this fact, member states can ensure compliance with the OECD Convention’s overall goals through the treaty’s peer review mechanism.\(^{207}\) This system is comprised of representatives from member states who attempt to ensure general uniformity in enforcement by monitoring and reviewing the other states’ efforts to adhere to the treaty.\(^{208}\) After these representatives complete their reviews, the OECD’s Working Group on Bribery in International Business Transactions compiles their statements and produces a report and publishes it online.\(^{209}\) Consequently, all signatory states, including the United States, can easily monitor and single out other members who are not adequately enforcing their laws against corporate corruption.

IV. SOLUTION

A. Limit § 78dd-3 to Foreign Entities and Individuals Acting within US Borders

As mentioned above, the recent aggressive enforcement of the FCPA against foreign businesses and individuals has raised alarms among policy experts concerning potential violations of sovereignty and costs to US agencies.\(^{210}\) This issue particularly impacts foreign entities whose illicit activities have tenuous connections to the United States under § 78dd-3.\(^{211}\) To effectively resolve this issue, future administrations should ensure that the DOJ and SEC reign in the historically broad interpretation of extraterritorial jurisdiction under this provision by issuing new guidelines.\(^{212}\) These guidelines should

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206. \textit{Id.}

207. See Organisation for Economic Co-Operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 1, Dec. 17, 1997, 37 I.L.M. 1, art. 12 (“The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention.”).

208. See Tyler, supra note 204, at 149 (“The Convention’s success requires uniform and fair application to level the playing field and to prevent any nonconforming party from gaining a competitive advantage over conforming parties in securing business through bribery.”).

209. See \textit{id.} (“At the end of the monitoring process the WGB publishes its country monitoring reports online.”).

210. \textit{Supra} Part III.D.

211. \textit{Supra} Part III.C.3.

212. Future administrations could also consider several alternative solutions, but they are less desirable than the proposed solution. One way to resolve this issue is to revert back to the original text of the statute and fully eliminate jurisdiction over foreign entities and individuals. This solution is not ideal because it would undermine global anti-bribery efforts and result in a competitive disadvantage to U.S. companies.
direct agency officers to interpret § 73dd-3 literally so that they are limited to prosecuting foreign entities and individuals under the concept of territorial jurisdiction.\(^{213}\)

Under the proposed solution, the DOJ and SEC would direct their officers to limit their exercise of jurisdiction under § 73dd-3 to foreign entities and individuals who commit offenses while within the physical territory of the United States.\(^{214}\) As discussed previously, foreign entities and individuals have a difficult time determining if they have violated the FCPA, especially when their conduct would be considered acceptable in their own countries.\(^{215}\) At a minimum, this raises issues of notice for foreign individuals who are unable to anticipate enforcement actions and modify their behavior.\(^{216}\) It can also risk violations of the norms of comity and sovereignty by demonstrating that US agencies have little respect for other countries’ cultural differences and sovereignty.\(^{217}\) Limiting the DOJ and SEC’s reach to pure territorial jurisdiction ensures a bright-line rule that makes it easier for potential defendants to know that they are subject to the FCPA by virtue of being in the United States and that they must comply with the Act’s provisions.

Similarly, the limitation on the DOJ and SEC’s jurisdiction under a plain reading of § 78dd-3 strikes an ideal balance of maintaining the reputation of the United States in the international community and ensuring its companies’ competitive advantage abroad. The American judiciary has typically respected other states’ sovereignty by limiting the reach of its jurisdiction under norms of international comity.\(^{218}\) Consequently, this solution would allow the DOJ and SEC to uphold respect for state sovereignty by pursuing cases with foreign actors that are geographically tied to the United States rather than ones whose communications merely pass through its borders. Moreover, this

Another idea would be to reduce overall enforcement of the FCPA. However, this plan will likely lead to an increase in the bribery of foreign officials abroad, as it will effectively eliminate the most successful anti-bribery legislation. Finally, future administrations could continue enforcing the FCPA as past administrations have, but that alone would not eliminate any of the modern criticisms of those practices.

213. Territorial jurisdiction is consistent with a plain meaning interpretation of § 73dd-3 as both grant agencies the authority to exercise jurisdiction over entities and individuals who act within the borders of the United States. See 15 U.S.C. § 78dd-3 (2012) (prohibiting “any person” from bribing foreign officials “while in the territory of the United States”); Territorial Jurisdiction, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining territorial jurisdiction as “[j]urisdiction over cases arising in arising in or involving persons residing within a defined territory”).
214. Territorial Jurisdiction, supra note 213.
216. Id.
217. Id.
solution will not substantially disadvantage US companies because foreign companies whose actions have a sufficient nexus to the United States—such as those who commit offenses while in the United States—will still be prosecuted under these federal agencies’ jurisdiction.

Notwithstanding these benefits, this solution still has its shortcomings as it barely addresses certain issues discussed in this Note, such as the expenses of obtaining discovery abroad. However, implementing this solution would, at a minimum, reduce the overall number of foreign investigations, thereby mitigating the expense of discovery. Therefore, as a whole, this solution provides adequate notice to potential targets of investigations and fulfills the FCPA’s original goal of bolstering the United States’ reputation and § 78dd-3’s objective of boosting its corporate dominance abroad.

B. Utilize Diplomacy to Increase Prosecution in Other Countries

The aforementioned solution is not complete, as it does not address the issue of corporate corruption among actors whose actions do not have a sufficient nexus to the United States. Because other countries have not enforced anti-bribery legislation as diligently as the United States, limiting the FCPA’s jurisdiction may ultimately undermine the OECD Convention’s goal of reducing global corporate corruption. To address that concern, US officials, such as President Trump and his surrogates at the State Department, should engage in public diplomacy and promote the OECD Convention to encourage other states to combat the bribery of foreign officials.

1. Executive Branch Plan to Encourage Compliance

President Trump and his State Department have a powerful mechanism in public diplomacy to influence other countries’ policies in the interests of the United States. Unlike current enforcement practices of the FCPA, which undermine a foreign sovereign’s ability to define and prosecute its own corporate corruption crimes, public diplomacy bypasses government-to-government interactions altogether by allowing the president to directly influence foreign constituencies instead.

Rather than risk the chance of offending foreign governments by prosecuting their constituents with little cause, President Trump could delegate to bureaucrats the task of researching foreign citizens’
attitudes toward this issue. Subsequently, he could craft speeches, global media campaigns, or even tweets condemning corporate corruption that would resonate with the international community. These foreign constituencies, in turn, may pressure their governments to enforce laws against corporate corruption. The State Department’s Bureau of Economic and Business Affairs would be an excellent office to undertake this task as it is already involved in influencing anti-corruption efforts abroad.

2. Invoke the OECD Convention to Boost Compliance

President Trump could use the OECD Convention to further assist with these efforts. The OECD was devised to realize the goal of eliminating global corporate corruption, and consequently imposes binding obligations on all signatory states to enact and enforce legislation that criminalizes the bribery of foreign officials. However, due to the lack of an overarching international system, enforcement must be achieved by states imposing reputational sanctions with the help of the peer review system. By using its peer review system to identify any members who have not been adhering to their obligations, President Trump can tailor his public diplomacy efforts to those countries’ constituencies. His attempts will hopefully induce these constituents to lobby their public officials to abide by their obligations in the treaty and consequently result in higher enforcement within their own sovereign territories.

Some may argue that this strategy would result in a menial increase in enforcement at best because it only targets countries that, by virtue of being signatories to the treaty, are already likely to prosecute these crimes. In other words, it would not target the countries who are not members of the OECD Convention where enforcement is most lacking. Nonetheless, broader efforts at public diplomacy should include those countries and hopefully propel their citizens to lobby their governments for legislation that criminalizes bribery of foreign officials. Combining public diplomacy and the OECD Convention with an effort to eliminate jurisdiction over foreign countries whose actions have an insufficient connection to the United States should be the future enforcement strategy of the FCPA.

V. Conclusion

Enacted by Congress in the 1970s to combat the bribery of foreign officials, the FCPA is a meaningful piece of legislation that has

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221. See Tyler, supra note 204, at 149 (discussing the purpose of the OECD).
222. See id. at 148 (discussing reputational sanctions through a monitoring system).
effectively reduced corporate corruption on a global scale. However, the statute’s vague language and its minimal judicial oversight have enabled the DOJ and SEC to overextend their jurisdictional reach. This has resulted in an astronomical increase in enforcement matters overall. More alarmingly, it has prompted an increase in investigations of foreign actors whose alleged offenses have virtually no connection to the United States.

Not only does an increase in enforcement against these foreign entities and individuals risk undermining the reputation of the United States by infringing on other nations’ sovereignty, it also presents enormous costs for agencies who pursue these actions. Moreover, the ability to enforce the FCPA against these actors with virtually no connections to the United States makes it more difficult for foreign corporations to anticipate investigations and adequately protect against them. Despite this consequence, US agencies have continued to pursue investigations against foreign companies because they tend to yield higher fines and arguably reduce global corporate corruption.

With a new administration in the White House, the United States has an opportunity to change this troublesome pattern of enforcement. US agencies should interpret § 78dd-3 literally to limit their jurisdiction over foreign entities and individuals to those whose wrongful acts occur within the United States. To further reduce global corporate corruption by accounting for those actors acting completely outside of the United States, President Trump and his officials at the State Department should engage in public diplomacy and invoke the OECD Convention to influence constituents of other nations. In turn, those constituents will pressure their governments to enforce their own anti-bribery legislation. This strategy will serve the FCPA’s dual aims of maintaining the positive image of the United States in the global community and ensuring US corporations maintain a competitive international advantage.

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