
COMMENT

DANGEROUS LIAISONS:
CRIMINALIZATION OF “RELATIONSHIP HIRES” UNDER
THE FOREIGN CORRUPT PRACTICES ACT

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INTRODUCTION

On August 17, 2013, the *New York Times* published a front page story on JPMorgan Chase & Co. that cast the firm at the center of an international bribery scandal and sparked a media firestorm.¹ The article reported that the U.S. Securities and Exchange Commission (SEC) had opened a bribery investigation into the firm's hiring practices in China pursuant to the Foreign Corrupt Practices Act (FCPA),² a statute that regulates bribery and public corruption in foreign countries.³ The story continued to garner national attention in the weeks following the article's release, especially after the Department of Justice (DOJ) joined the SEC's investigation.⁴ At the center of the controversy was the unusual nature of the investigation itself: unlike most FCPA bribery investigations, which target financial

¹ See Jessica Silver-Greenberg, Ben Protess & David Barboza, *Hiring in China by JPMorgan Under Scrutiny*, N.Y. TIMES, Aug. 18, 2013, § 1, at 1 [hereinafter Silver-Greenberg, Protess & Barboza, *Hiring in China by JPMorgan*] (reporting that the SEC was investigating JPMorgan Chase's hiring practices in China).

² 15 U.S.C. §§ 78dd-1 to -3 (2012).

³ See *id.*; Silver-Greenberg, Protess & Barboza, *Hiring in China by JPMorgan*, *supra* note 1.

⁴ See, e.g., Cynthia Koons, *J.P. Morgan Looks into Its Hiring Practices in Asia*, WALL ST. J. (Aug. 29, 2013, 9:17 AM), <http://online.wsj.com/news/articles/SB10001424127887324009304579042432300112344>, archived at <http://perma.cc/6UDQ-6XQL> (reporting JPMorgan's internal investigation); Dawn Kopecki, *JPMorgan Bribe Probe Said to Expand in Asia as Spreadsheet Is Found*, BLOOMBERG (Aug. 28, 2013, 11:51 PM), <http://www.bloomberg.com/news/2013-08-29/jpmorgan-bribe-probe-said-to-expand-in-asia-as-spreadsheet-found.html>, archived at <http://perma.cc/3HFL-EZBC> (publicizing allegations that DOJ had joined the SEC in investigating JPMorgan's hiring practices in China); Anjani Trivedi, *JPMorgan China Hiring Practices Investigation Spreads to Asia*, TIME (Aug. 30, 2013), <http://business.time.com/2013/08/30/jpmorgan-china-hiring-practices-investigation-spreads-to-asia>, archived at <http://perma.cc/74G6-C657> (describing how the "scrutiny" of certain Chinese employees in JPMorgan "has . . . spread across [Asia]").

payments to foreign officials in exchange for business advantages,⁵ the central issue underpinning the JPMorgan investigation was the firm's apparent practice of hiring well-connected children of Chinese business and political leaders.⁶ More specifically, the government's investigation targeted the firm's "Sons and Daughters" program in China, a hiring program that allegedly favored children of Chinese owners of state-controlled enterprises in China.⁷ JPMorgan purportedly relied on this hiring process to gain a competitive advantage in China, where state-owned enterprises dominate the economy.⁸

Although most media reports on the JPMorgan investigation characterize it as an unusual approach for the government,⁹ probes into corporate hiring practices are part of an increasingly apparent trend in FCPA enforcement.¹⁰ About eight months after the JPMorgan investigation began, DOJ and the SEC sent letters to at least five other financial institutions, requesting information on their hiring practices in Asia.¹¹ Federal agencies have justified these types of "relationship hire" investigations as well within the scope of the FCPA.¹² The FCPA prohibits the exchange of "anything of value" with foreign officials for any "improper advantage"—language that appears to encompass offers of employment to relatives of foreign officials.¹³ Critics of the FCPA's application to

⁵ See generally U.S. Dep't of Justice, *FCPA and Related Enforcement Actions*, <http://www.justice.gov/criminal/fraud/fcpa/cases/2014.html> (last visited May 11, 2015), archived at <http://perma.cc/DVM4-25BY> (highlighting recent FCPA cases).

⁶ See Silver-Greenberg, Protess & Barboza, *Hiring in China by JPMorgan*, *supra* note 1 ("Federal authorities have opened a bribery investigation into whether JPMorgan Chase hired the children of powerful Chinese officials to help the bank win lucrative business in the booming nation . . .").

⁷ See Jessica Silver-Greenberg & Ben Protess, *For China Elite, JPMorgan Jobs on Easy Track*, N.Y. TIMES, Aug. 30, 2013, at A1 [hereinafter Silver-Greenberg & Protess, *China Elite*].

⁸ Keith Bradsher, *China's Grip on Economy Will Test New Leaders*, N.Y. TIMES, Nov. 19, 2012, at A4.

⁹ See, e.g., Tracy Alloway & Jamil Anderlini, *JPMorgan's China Hiring Under Scrutiny*, FIN. TIMES (Aug. 19, 2013, 1:09 PM), <http://www.ft.com/cms/s/0/799f837e-0816-11e3-badc-00144feabdc0.html#axzz312clI000>, archived at <http://perma.cc/N7JL-2K7U> (remarking that U.S. authorities have "rarely investigated Wall Street's business practices in China").

¹⁰ See *infra* Section I.C.

¹¹ See Enda Curran & Jean Eaglesham, *Regulators Step Up Probe into Bank Hiring*, WALL ST. J., May 7, 2014, at A1 (reporting that the SEC has sent letters to Credit Suisse, Goldman Sachs, Morgan Stanley, Citigroup, and UBS "seeking more information about their hiring in Asia").

¹² See *infra* Section II.B.

¹³ See 15 U.S.C. § 78dd-1(a) (2012).

relationship hires have questioned the government's reading of the Act's language, characterizing it as an "aggressive" interpretation.¹⁴

Despite the publicity surrounding the JPMorgan scandal, very little scholarship has examined relationship hires as an issue that defines and tests the limits of future FCPA enforcement. This Comment begins this discussion by analyzing both the rationale for the government's application of the FCPA to relationship hires and the implications of this type of FCPA enforcement.

Part I of this Comment presents the legislative history of the FCPA, focusing specifically on who and what Congress intended to regulate when it passed the Act in 1977. Part I also provides a brief description of the FCPA's antibribery provision, which serves as the statutory basis for the government's investigations into corporate hiring practices in foreign countries. Part II introduces the relationship hire issue by focusing on the highly publicized probe into JPMorgan's hiring program in China. By comparing the unusual nature of this investigation with the government's previous relationship hire investigations, Part II shows that federal agencies are broadening the range of hiring practices subject to FCPA scrutiny. Part III explores the implications of this expansion, arguing that while sham or "no show" employment agreements resemble the type of bribery that the FCPA is supposed to regulate, the government's current approach produces troublesome legal and policy consequences. The government's expansive reading of the FCPA in recent relationship hire investigations runs contrary to congressional intent. The government's interpretation is also likely to raise a number of policy concerns. In particular, the government's new position threatens to undermine U.S. business relationships overseas, concentrate power in the hands of prosecutors at the expense of the judiciary, and provoke accusations of American imperialism in foreign nations. This Comment concludes by arguing that, while DOJ and the SEC should continue to use the FCPA as a tool to combat hiring practices that serve as bribes, both agencies should refrain from using the law to target foreign hiring practices that do not resemble sham employment programs.

¹⁴ Neil Irwin, *Did JPMorgan Commit Bribery by Hiring the Kids of Chinese Politicians?*, WASH. POST. (Aug. 19, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/08/19/did-jpmorgan-commit-bribery-by-hiring-the-kids-of-chinese-politicians>, archived at <http://perma.cc/GW4V-ZLKT>; see also Arthur Levitt, "Influence Peddling" Makes the World Go Round, WALL ST. J., Dec. 26, 2013, at A13 (asserting that relationship hire investigations are "scurrilous and hypocritical").

I. BACKGROUND ON THE FCPA

A. Legislative History

1. Congress Intended the FCPA to Address Government Leaders

The FCPA prohibits certain individuals and corporations from offering or authorizing the giving of "anything of value" to foreign officials to influence their official actions.¹⁵ Although the Act bars bribery of foreign officials, it was domestic events that inspired its passage. After Watergate, several federal authorities, including the Office of the Watergate Special Prosecutor, the SEC, and Senator Frank Church's Subcommittee on Multinational Corporations, conducted large-scale investigations into the financial activities of U.S. corporations in foreign countries.¹⁶ In May 1976, the SEC released its first survey on the status of foreign corporate payments, which reported problems including

falsifications of corporate financial records, designed to disguise or conceal the source and application of corporate funds misused for illegal purposes, as well as the existence of secret "slush funds" disbursed outside the normal financial accountability system. These secret funds were used for a number of purposes, including in some instances, questionable or illegal foreign payments. These practices cast doubt on the integrity and reliability of the corporate books and records which are the very foundation of the disclosure system established by the federal securities laws.¹⁷

Soon after the report was released, Congress conducted several hearings to evaluate the extent of U.S. corporate bribery in foreign countries.¹⁸ The

¹⁵ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2012).

¹⁶ See, e.g., *Foreign Payments Disclosure: Hearings on H.R. 15481, S. 3664, H.R. 13780 and H.R. 13953 Before the Subcomm. on Consumer Prot. & Fin. of the H. Comm. on Interstate & Foreign Commerce*, 94th Cong. 1 (1977) [hereinafter *Foreign Payments Disclosure*] (statement of Rep. John M. Murphy, Chairman, Subcomm. on Consumer Prot. & Fin. of the H. Comm. on Interstate & Foreign Commerce); see also, e.g., *id.* at 140 (statement of Rep. Stephen J. Solarz); Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 932 (2012). See generally S. REP. NO. 105-277, at 1 (1998) (summarizing post-Watergate congressional efforts to identify bribery by U.S. companies).

¹⁷ SEC, 94TH CONG., REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 3 (Comm. Print 1976) (submitted to the S. Comm. on Banking, Housing, & Urban Affairs).

¹⁸ See, e.g., *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. 1 (1975) [hereinafter *American Multinational Corporations Abroad*] (statement of Rep. Robert N.C. Nix, Chairman, Subcomm. on Int'l Econ. Policy of the H. Comm. on Int'l Relations); see also *Foreign Payments Disclosure*, *supra* note 16, at 1.

hearings focused on the donations of major American companies—including Lockheed, Northrop, and Gulf Corp.—to the political campaigns of foreign leaders.¹⁹ These sessions show Congress’s primary intention was to use the Act to “combat the foreign policy implications of American companies bribing foreign public officials.”²⁰ For example, in the Gulf Oil hearing, Congress focused on the company’s payments to the President of the Republic of Korea,²¹ while in the Lockheed hearing, Congress highlighted the aerospace firm’s contributions to Japanese Prime Minister Kakuei Tanaka and Italian political parties.²² In characterizing these payments as a source of concern, Congress emphasized their ability to “embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States.”²³ These statements underscore Congress’s focus on political leaders operating in the public context.

Although there were other social and political trends during this period that influenced the congressional support for the FCPA,²⁴ the legislative record makes clear that Congress’s biggest priority was regulating relations between U.S. corporations and foreign government leaders.²⁵ The focus on foreign public officials was also apparent in the two legislative proposals that eventually formed the FCPA, which focused explicitly on transactions with foreign governments and officials.²⁶

¹⁹ See *American Multinational Corporations Abroad*, *supra* note 18, at 2, 127 (statement of Rep. Robert N.C. Nix, Chairman, Subcomm. on Int’l Econ. Policy of the H. Comm. on Int’l Relations).

²⁰ Court E. Golubic & Jonathan P. Adams, *The “Dominant Influence” Test: The FCPA’s “Instrumentality” and “Foreign Official” Requirements and the Investment Activity of Sovereign Wealth Funds*, 39 AM. J. CRIM. L. 1, 8 (2011).

²¹ See *American Multinational Corporations Abroad*, *supra* note 18, at 2 (statement of Rep. Robert N.C. Nix, Chairman, Subcomm. on Int’l Econ. Policy of the H. Comm. on Int’l Relations).

²² See *Foreign Payments Disclosure*, *supra* note 16, at 2 (statement of Rep. John M. Murphy, Chairman, Subcomm. on Consumer Prot. & Fin. of the H. Comm. on Interstate & Foreign Commerce); see also Golubic & Adams, *supra* note 20, at 7 n.40.

²³ H.R. REP. NO. 95-640, at 5 (1977).

²⁴ While the SEC report and the 1976 congressional hearings served as specific catalysts for the FCPA, the Act resulted from a combination of many historical factors, including “post-Watergate morality,” concerns regarding the economic ramifications of bribery, and Congress’s desire to lead a global movement against public corruption. Koehler, *supra* note 16, at 938. These forces together increased support for regulation to curb the influence of corporate bribery in foreign markets. *Id.*

²⁵ See *id.* (“[F]oreign policy was the primary policy concern from the discovered foreign corporate payments which motivated Congress to act.”).

²⁶ See H.R. REP. NO. 95-640, at 4 (1977) (suggesting that foreign officials means government and political leaders); S. REP. NO. 95-114, at 17 (1977) (indicating that the law targets payments to “an official of a foreign government,” “an official of a foreign political party,” or “a candidate for foreign political office”).

By contrast, the legislative record does not show any evidence of congressional intent to regulate “acts of bribery in the private context.”²⁷ Although media reports published during this period discussed the role of family members in corporate bribery schemes, Congress did not mention or identify family members in any of the bills or legislative proposals devoted to the drafting of FCPA.²⁸ This is unsurprising given that nepotism was a “widespread practice” within Congress in the 1970s, and it is possible that the members of Congress did not consider the issue of relationship hires as particularly salient.²⁹

The legislative history of the Act also shows that Congress did not intend to use the FCPA to regulate state-owned enterprises. The absence of any reference to these entities in the final legislative proposals for the Act was not due to a lack of oversight; Congress was well aware that state-owned enterprises existed in foreign markets and that many of the illegal payments discovered by the SEC in 1976 were made to these enterprises.³⁰ Although some of the initial bills designed to regulate foreign corporate payments did attempt to include leaders of state-owned enterprises in the definition of a foreign official,³¹ Congress did not adopt the language—perhaps because the definition was too “ambiguous.”³² The omission of the language in the final legislation shows that the scope of the Act was confined to foreign government leaders and that Congress did not intend to broaden its scope to include government-controlled corporations in foreign

²⁷ Golumbic & Adams, *supra* note 20, at 9.

²⁸ See Milton S. Gwirtzman, *Is Bribery Defensible?*, N.Y. TIMES, Oct. 5, 1975, § 6 (Magazine), at 19 (describing how the market economy in Asia and Africa is governed by “oligarchic arrangements of social connections, family relations and reciprocal obligations”).

²⁹ See CQ PRESS, GUIDE TO CONGRESS 1160 (7th ed. 2013) (discussing nepotism on Capitol Hill).

³⁰ See Koehler, *supra* note 16, at 1010-11 (“Foreign governments are becoming increasingly involved in the production, distribution and acquisition of goods and services This involvement increases the opportunities and incentives to induce governmental conduct (by bribery and other techniques) in the service of private anticompetitive purposes.” (quoting *American Multinational Corporations Abroad*, *supra* note 18, at 87 (statement of Donald I. Baker, Deputy Assistant Att’y Gen., Antitrust Division, U.S. Department of Justice))); see also *id.* at 1011 (indicating that a major problem in foreign markets was the rise of “[g]overnment-controlled businesses run in many cases by officials” (quoting *Foreign and Corporate Bribes: Hearings Before the S. Comm. on Banking, Hous., & Urban Affairs*, 94th Cong. 63 (1976) (statement of Ian MacGregor, Chairman, AMAX Inc.))).

³¹ See H.R. 15149, 94th Cong. § 2(h)(3) (1976) (defining “foreign government” to include “a corporation or other legal entity established or owned by, and subject to control by, a foreign government”); S. 3741, 94th Cong. § 2(h)(3) (1976) (same).

³² See *Foreign Payments Disclosure*, *supra* note 16, at 216 (reflecting concerns of an ABA committee).

countries—much less to the relatives of executives at government-controlled entities.

2. Congress Limited the Scope of the FCPA

In passing the FCPA, Congress aimed to regulate several aspects of corporate bribery in foreign markets, including public corruption and inefficient business conditions. The 1977 House report accompanying the FCPA stated:

The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. It short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business.³³

As the language of the House report shows, Congress believed bribery results in political, economic, and moral costs, and it enacted the FCPA to eliminate these costs. Despite the sweeping language of the House report, however, the legislative record shows that “the FCPA was intended to be a limited statute.”³⁴ For example, even though Congress intentionally chose to prohibit exchanges involving “anything of value,” rather than just financial payments, members of Congress heard that some exchanges, such as charitable donations or tips, were often “normal and accepted” practices in foreign countries, and should not be automatically subject to criminal sanctions.³⁵ In a 1975 hearing, Senator Frank Church, one of the Act’s primary proponents, suggested that the motivation for the then-pending FCPA legislation was not to eliminate all corruption but rather to target the “massive and widespread perversion of the free enterprise system,” such as the “arms industry campaign to flood the Middle East with weapons.”³⁶

³³ H.R. REP. NO. 95-640, at 4-5 (1977).

³⁴ See Koehler, *supra* note 16, at 1003.

³⁵ See *American Multinational Corporations Abroad*, *supra* note 18, at 6 (statement of Michael F. Butler, Vice President and General Counsel, Overseas Private Investment Corporation).

³⁶ *Protecting the Ability of the United States to Trade Abroad: Hearing on S. Res. 265 Before the Subcomm. on Int’l Trade of the S. Comm. on Fin.*, 94th Cong. 7 (1975) [hereinafter *Protecting the Ability of the United States to Trade Abroad*] (statement of Sen. Frank Church).

Similarly, in the Senate report that later served as the basis for the FCPA, the Committee on Banking, Housing, and Urban Affairs acknowledged that the FCPA "would not reach all corrupt overseas payments" but ensured that the FCPA applied to payments made "to influence legislation or regulations of the Government."³⁷ The legislative history shows that the purpose of the statute was to prevent public corruption, not to prohibit any type of exchange that could potentially influence activities overseas.³⁸

Congress passed the FCPA in 1977, regulating domestic business transactions with foreign officials overseas. Its passage was "almost immediately met with criticism."³⁹ In particular, opponents of the Act disagreed with its emphasis on criminalization.⁴⁰ These critics favored a more disclosure-oriented strategy, which resisted governmental interference in foreign business negotiations.⁴¹ The Chairman of the SEC during this period publicly announced his reluctance to regulate particular forms of foreign payments, noting instead that the agency preferred to use disclosure laws as the primary deterrent to bribery overseas.⁴² The State Department also expressed concerns regarding the foreign policy ramifications of unilaterally enforcing legislation that regulated business relations between U.S. entities and foreign officials.⁴³ Despite this criticism, Congress still passed the Act, including its criminal penalties.

³⁷ See S. REP. NO. 95-114, at 10-11 (1977).

³⁸ MIKE KOEHLER, THE FOREIGN CORRUPT PRACTICES ACT IN A NEW ERA 117-18 (2014) ("The legislative history . . . makes clear that in passing the FCPA Congress intended to capture only a narrow category of payments . . .").

³⁹ Juscelino F. Colares, *The Evolving Domestic and International Law Against Foreign Corruption: Some New and Old Dilemmas Facing the International Lawyer*, 5 WASH. U. GLOBAL STUD. L. REV. 1, 6 (2006).

⁴⁰ Koehler, *supra* note 16, at 1002 (describing the "vocal minority opposition to a direct criminal payment provision").

⁴¹ *Id.* at 994 (highlighting the finding by the Task Force on Questionable Corporate Payments Abroad that a disclosure regime would be an effective deterrent while an outright criminal prohibition would be difficult to enforce); see also Mike Koehler, *Hail to the Chief*, FCPA PROFESSOR (Feb. 17, 2014), <http://www.fcpaprofessor.com/hail-to-the-chief-3>, archived at <http://perma.cc/ASB3-9482> ("The great debate at this time was whether the foreign payments problem should be addressed through a disclosure regime or through a criminalization regime.").

⁴² See Koehler, *supra* note 16, at 962-63 ("Under present law, if it is material, we cause its disclosure, and we need not get into the finer points of whether it is or is not legal." (quoting *Foreign Payments Disclosure*, *supra* note 16, at 25 (statement of Roderick M. Hills, Chairman, U.S. SEC))).

⁴³ *Id.* at 964-67.

3. Amendments to the Act

Despite its controversial start, Congress has expanded the FCPA over the last few decades. In 1988, Congress amended the Act to incorporate two affirmative defenses: (1) the “lawful” payment defense and (2) the “reasonable and bona fide expenditure” defense.⁴⁴ The “lawful” payment affirmative defense authorizes payment or conduct that is legal in the target’s country.⁴⁵ The “reasonable and bona fide expenditure” defense permits miscellaneous expenses, such as travel, directly related to “the promotion, demonstration, or explanation of products or services” or “the execution or performance of a contract with a foreign government or agency.”⁴⁶

Ten years later, Congress amended the FCPA again to (1) include payments designed to secure “any improper advantage,” (2) cover foreign nationals who engaged in actions that furthered a bribery transaction while located in the United States, (3) expand the definition of “foreign official” to include public international organizations, (4) expand jurisdiction on the basis of nationality, and (5) enforce criminal penalties against foreign agents of U.S. corporations.⁴⁷ These amendments significantly broadened the scope of the FCPA, particularly regarding extraterritorial jurisdiction.⁴⁸ Finally, the Sarbanes–Oxley Act of 2002⁴⁹ further widened the FCPA’s reach by imposing several compliance, monitoring, and management obligations on issuers.⁵⁰ These amendments show the growing number of

⁴⁴ Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, § 5003(a), 102 Stat. 1415, 1415-19 (codified as amended at 15 U.S.C. § 78dd-1 (2012)).

⁴⁵ 15 U.S.C. § 78dd-1(c)(1) (2012).

⁴⁶ *Id.* § 78dd-1(c)(2).

⁴⁷ International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified at 15 U.S.C. §§ 78dd-1 to -3 (2012)). Many of these amendments were designed to conform to the requirements of the 1988 OECD Anti-Bribery Convention, an international treaty that required parties to ban bribery in international commercial transactions. See S. REP. NO. 105-277, at 2-3 (1998); CRIMINAL DIV., U.S. DEP’T OF JUSTICE & ENFORCEMENT DIV., U.S. SEC. & EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 4, 7 (2012) [hereinafter DOJ & SEC RESOURCE GUIDE], available at <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>.

⁴⁸ Cf., e.g., 15 U.S.C. § 78dd-2(i) (2012). The U.S. government has repeatedly stated that parties may be subject to FCPA investigations if they “plac[e] a telephone call or send[] an e-mail, text message, or fax from, to, or through the United States” or “send[] a wire transfer from or to a U.S. bank or otherwise us[e] the U.S. banking system.” DOJ & SEC RESOURCE GUIDE, *supra* note 47, at 11.

⁴⁹ Pub. L. No. 107-204, § 302, 116 Stat. 745, 777 (codified at 15 U.S.C. § 7241 (2012)) (requiring corporate officers to make certifications about corporate compliance and governance).

⁵⁰ Cf. Laura E. Kress, Note, *How the Sarbanes–Oxley Act Has Knocked the “SOX” off the DOJ and SEC and Kept the FCPA on Its Feet*, PITTSBURGH J. TECH. L. & POL’Y, Fall 2009, art. 2, at 12-15 (attributing the recent surge in FCPA enforcement to the enactment of Sarbanes–Oxley).

enforcement possibilities under the FCPA, a remarkable trend considering historical resistance to the Act’s intervention in foreign business transactions.

B. *Statutory Analysis*

DOJ and the SEC share the enforcement obligations under the Act.⁵¹ DOJ has criminal FCPA enforcement authority over public companies (“issuers”), while the SEC has civil enforcement authority.⁵² DOJ also has both criminal and civil enforcement authority over “domestic concerns.”⁵³

The FCPA addresses two key aspects of foreign transactions. The first aspect involves the Act’s antibribery provision,⁵⁴ while the second focuses on accounting procedures.⁵⁵ This Comment will only focus on the FCPA’s antibribery provision because only this provision has been used to authorize relationship hire investigations. The following subsection will summarize some of the key elements of the antibribery provision.⁵⁶

1. Parties Subject to the FCPA

Codified in section 30A of the Securities Exchange Act of 1934,⁵⁷ the antibribery provision makes it unlawful for certain individuals and businesses to “offer, pay[,], promise to pay or authoriz[e] . . . the payment of . . . money . . . or . . . anything of value to . . . any foreign official for purposes of . . . influencing any act or decision of [the] foreign official in his official capacity . . . or . . . securing any improper advantage.”⁵⁸ On the supply side of the illegal transactions—the “payer” of the bribe—this provision applies to (1) “issuers”⁵⁹ and their officers, directors, employees,

⁵¹ Both agencies collaborate with a number of other federal and international agencies to investigate FCPA violations. *See* DOJ & SEC RESOURCE GUIDE, *supra* note 47, at 4-8.

⁵² *Id.*

⁵³ *Id.* at 4.

⁵⁴ 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a) (2012).

⁵⁵ *See id.* § 78m(b)(2)(A) (requiring maintenance of accurate and truthful books and records).

⁵⁶ The antibribery provision is multifaceted. This subsection does not offer an exhaustive analysis of the provision, but rather introduces some key parts that provide the context for and address the purpose of the Act.

⁵⁷ 15 U.S.C. § 78dd-1 (2012).

⁵⁸ *Id.* § 78dd-1(a).

⁵⁹ A company is an “issuer” under the FCPA if it has a class of securities registered under section 12 of the Exchange Act or is subject to the SEC’s reporting requirements under section 15(d) of the Exchange Act. Effectively, this definition encompasses any company with securities listed on a national securities exchange in the United States or any company with securities listed in the over-the-counter market in the United States that files periodic reports with the SEC. *See id.*; *see also* DOJ & SEC RESOURCE GUIDE, *supra* note 47, at 10.

agents, and shareholders; (2) “domestic concerns”⁶⁰ and their officers, directors, employees, agents, and shareholders; and (3) certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States.⁶¹ On the recipient side—the “receiver” of the bribe—the provision is limited to a “foreign official,” which the Act defines 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 any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.⁶²

2. The “Business Purpose” Test

The FCPA’s scope is limited to transactions or payments that assist in “obtaining or retaining business for or with, or directing business to, any person.”⁶³ This requirement, known as the “business purpose test,” is broadly interpreted to encompass all payments (or analogous exchanges) made to secure business advantages, including favorable tax treatment, regulation, or licensing requirements.⁶⁴

⁶⁰ These “domestic concerns” encompass American nationals and residents, American businesses, and foreign agents that act to promote FCPA violations while they are in the United States. The SEC maintains civil enforcement authority over issuers. *See* 15 U.S.C. § 78dd-2(a) (2012); *see also* DOJ & SEC RESOURCE GUIDE, *supra* note 47, at 11.

⁶¹ 15 U.S.C. § 78dd-3(a) (2012); *see also* DOJ & SEC RESOURCE GUIDE, *supra* note 47, at 11.

⁶² 15 U.S.C. § 78dd-1(1)(A) (2012). This broad definition has been subject to criticism because it does not recognize distinctions between different categories of officials, such as low-level employees, honorary officials, or employees of state-controlled entities. *See, e.g.*, Golumbic & Adams, *supra* note 20, at 47 (identifying some of the problematic implications of applying the “foreign official” definition to companies in which sovereign wealth funds have a minority interest); Lisa A. Rickard, *The Ambiguous FCPA: In Need of Updates and Clarifications*, TOWNHALL (May 5, 2011), http://townhall.com/columnists/lisaarickard/2011/05/05/the_ambiguous_fcpa_in_need_of_updates_and_clarifications/page/full, archived at <http://perma.cc/M36H-ASTG> (criticizing the FCPA’s failure to clarify the meaning of a foreign official and to explain whether individuals in state-owned entities qualify as foreign officials).

⁶³ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2012).

⁶⁴ *See, e.g.*, *United States v. Kay*, 359 F.3d 738, 756 (5th Cir. 2004) (holding that payments made to Haitian government officials to reduce a corporation’s taxes could satisfy the business purpose test); *see also, e.g.*, Press Release, SEC, SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials (Nov. 4, 2010), available at <https://www.sec.gov/news/press/2010/2010-214.htm> (announcing SEC allegations that “companies bribed customs officials in more than 10 countries in exchange for such perks as avoiding applicable customs duties on imported goods, expediting the importation of goods and equipment, extending drilling contracts, and lowering tax assessments”).

3. "Corrupt" State of Mind

To be liable under the FCPA, the business or individual responsible for engaging in the transaction must possess a sufficiently culpable state of mind.⁶⁵ Specifically, the offer, promise, or authorization of payment must be made "corruptly."⁶⁶ The Act does not define the term "corruptly," although the legislative history of the statute indicates that this term refers to the "intent or desire wrongfully to influence the recipient."⁶⁷

In addition, individual defendants must act "willfully" to be criminally liable under the FCPA.⁶⁸ While the term "willful" is subject to varying interpretations, several circuit courts have held that defendants prosecuted under the FCPA "must act with a bad" or "unlawful" purpose to be found criminally liable.⁶⁹

4. "Anything of Value"

The FCPA prohibits individuals and businesses from offering or authorizing the exchange of "anything of value" with foreign public officials for business advantages.⁷⁰ In adopting the term "anything of value," Congress aimed to regulate many forms of bribery, not just cash transactions.⁷¹ Congress, however, was aware that "[t]he definition of a bribe . . . differ[s] from country to country," and transactions that are permissible and commonplace in one nation could be deemed illegal in

⁶⁵ See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2012).

⁶⁶ See *supra* note 65.

⁶⁷ See H.R. REP. NO. 95-640, at 8 (1977). It appears that Congress intended the definition of "corruptly" in the FCPA to align with the definition in the domestic bribery statute, 18 U.S.C. § 201(b), where "the word 'corruptly' indicates an intent or desire wrongfully to influence the recipient." *Id.*

⁶⁸ 15 U.S.C. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A) (2012).

⁶⁹ See *United States v. Kay*, 513 F.3d 432, 451 (5th Cir. 2007) ("[C]riminal willfulness requires only that criminal defendants have knowledge that they are acting unlawfully or 'knowledge of the facts that constitute the offense'"); see also DOJ & SEC RESOURCE GUIDE, *supra* note 47, at 14 ("The term 'willfully' is not defined in the FCPA, but it has generally been construed by courts to connote an act committed voluntarily and purposefully, and with a bad purpose").

⁷⁰ 15 U.S.C. § 78dd-1(a) (2012).

⁷¹ See *id.*; see also *American Multinational Corporations Abroad*, *supra* note 18, at 6 (statement of Michael F. Butler, Vice President and General Counsel, Overseas Private Investment Corporation) (highlighting the blurry line between bribery and "tips, commissions, consulting fees, campaign contributions, [or] contributions for charitable projects favored by important foreign officials").

another.⁷² In a Senate hearing, U.S. Treasury Secretary W. Michael Blumenthal emphasized:

In some countries, for example, it is proper and acceptable, as it clearly would not be in our country, for a government official also to be engaged in some business enterprise. However, what might be considered a legal transaction with that official in his country could be construed as a bribe, an illegal payment here. That's why the question of how we define it is so important. In that country a transaction may be perfectly proper, but then the moment an American is accused here of paying a bribe to such an individual under our definition, an aspersion is cast immediately on him.⁷³

Evidently, Congress did not intend for the term "anything of value" to encompass every type of exchange between a U.S. business and a foreign public official, because it recognized that perceptions of these exchanges varied substantially by country. The legislative history on this particular phrase, however, is sparse, and it is difficult to identify what limits Congress intended when adopting the language.

Federal agencies have generally relied on a broad interpretation of "anything of value," using the term to justify the criminalization of a variety of foreign corporate transactions, including gifts,⁷⁴ travel arrangements,⁷⁵ and charitable contributions.⁷⁶ DOJ has also issued a number of opinions offering guidance on how to define the term,⁷⁷ but none of these opinions

⁷² *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearing on S. 305 Before the S. Comm. on Banking, Hous., & Urban Affairs*, 95th Cong. 97-98 (1977) (statement of W. Michael Blumenthal, U.S. Secretary of the Treasury).

⁷³ *Id.*

⁷⁴ See, e.g., Complaint at 8-9, SEC v. RAE Sys. Inc., No. 10-2093 (D.D.C. Dec. 10, 2010), ECF No. 1 (alleging that the defendant corporation made unlawful cash payments to Chinese government officials); Complaint at 9-10, SEC v. ABB LTD, No. 04-1141 (D.D.C. July 6, 2004), ECF No. 1 (alleging that defendant corporation made illicit payments to foreign government officials).

⁷⁵ See Complaint at 13-14, SEC v. Lucent Techs. Inc., No. 07-2301 (D.D.C. Dec. 21, 2007), ECF No. 1 (alleging that defendant corporation provided over \$10 million to Chinese officials so that these officials could visit the United States as tourists).

⁷⁶ See Complaint at 5, SEC v. Schering-Plough Corp., No. 04-945 (D.D.C. June 9, 2004), ECF No. 1 (alleging that defendant corporation made payments to a Polish charity whose president was a government official).

⁷⁷ DOJ's Opinion Release Index contains a series of opinions that offer guidance on how to interpret FCPA language, particularly the "anything of value" provision. See generally U.S. DEP'T OF JUSTICE, CRIMINAL DIV., FRAUD SECTION, *Index to Releases*, <http://www.justice.gov/criminal/fraud/fcpa/index/> (last visited on Apr. 24, 2015), archived at <http://perma.cc/PV58-NEGA>.

attempt to establish a substantive standard.⁷⁸ The absence of this information, coupled with the fact that very few courts have grappled with this language, has hindered the development of a clear governing standard. Consequently, many individuals and businesses subject to the FCPA's jurisdiction remain unsure of what types of transactions could be considered bribes.⁷⁹ Meanwhile, DOJ and the SEC are able to revise frequently their understanding of the term and use its ambiguity to broaden the scope of enforcement.

C. *Recent Trends in FCPA Enforcement*

1. Number of Enforcement Actions

FCPA enforcement has evolved dramatically since the law was enacted in 1977. Despite the publicity surrounding Watergate and the corporate bribery scandals of the 1970s, the Act was widely considered a "dormant" regulation for many years after it was enacted.⁸⁰ In fact, in the first three decades after its passage, federal agencies made little concerted effort to enforce any of its provisions.⁸¹ From the late 1970s to 2001, DOJ pursued at most five FCPA enforcement actions each year—reporting zero FCPA actions some years.⁸² The SEC also averaged only a few FCPA actions per year.⁸³ These numbers bear little resemblance to the state of FCPA enforcement today.⁸⁴ Now, at any given moment, federal agencies are

⁷⁸ See Mike Koehler, *Grading the Foreign Corrupt Practices Act Guidance*, 7 White Collar Rep. (BNA) 961, 961 (Dec. 14, 2012) (arguing that the FCPA guidance serves better as an "advocacy piece" for DOJ than a substantive interpretation of the Act's provisions).

⁷⁹ See, e.g., Joe Palazzolo, *Business Slams Bribery Act*, WALL ST. J., Nov. 28, 2011, at B1 (reporting that the U.S. Chamber of Commerce and some FCPA lawyers "say there is still confusion over what is legal and what isn't"); see also Shawn M. Wright & Henry F. Schuelke III, *DOJ Casts Considerable Confusion Over Key Aspects of the Foreign Corrupt Practices Act Even As It Prepares to Publish Official FCPA Guidance*, FOR THE DEFENSE (Blank Rome LLP, Washington, D.C.), Sept. 2012, at 1-2 (expressing concerns that there is a lack of "meaningful clarity over key aspects of the FCPA").

⁸⁰ Dionne Searcey, *U.S. Cracks Down on Corporate Bribes*, WALL ST. J., May 26, 2009, at A1.

⁸¹ See Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 103 (2010) ("During the first quarter century of the FCPA's history, enforcement of the law appears to have been minimal, at best.").

⁸² See Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Economics of Foreign Bribery: Evidence from FCPA Enforcement Actions* 42 fig.1 (Mar. 21, 2014) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1573222.

⁸³ See *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCHANGE COMM'N, <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last visited Apr. 24, 2015), archived at <http://perma.cc/M9FM-TQ44>.

⁸⁴ See Bixby, *supra* note 81, at 104 ("In the current post-Enron, Sarbanes-Oxley Act (SOX) era, the SEC and the DOJ have dramatically increased civil and criminal enforcement of the

reportedly investigating over one hundred FCPA-related actions.⁸⁵ In the last six years alone, the SEC has pursued an average of eleven FCPA enforcement actions per year,⁸⁶ while DOJ brought more than twenty FCPA enforcement actions last year alone.⁸⁷ Both agencies have created FCPA units within their enforcement divisions and have publicly identified FCPA enforcement as a top priority.⁸⁸

2. Aggressive Investigative Tactics

The U.S. government has also started relying on increasingly more aggressive methods to enforce provisions of the Act. While investigations in the early 2000s were limited to reviewing companies' books and records, DOJ and the SEC now frequently conduct industry-wide sweeps and undercover stings to identify FCPA violations. In 2010, DOJ announced it had arrested twenty-two executives in the military and law enforcement-supply industries for FCPA violations after conducting an extensive undercover operation.⁸⁹ According to the indictments, undercover FBI agents posing as representatives of a public official in an African country persuaded the executives to make a "commission" payment to the official in exchange for contracts to sell weapons in the country.⁹⁰ The arrests highlighted a new era of enforcement and demonstrated DOJ's willingness to "aggressively ramp[] up its proactive investigation and prosecution" of FCPA violators.⁹¹

FCPA, compared with the previous twenty-five years."); *see also* Courtney C. Thomas, Note, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 450 (2010) (describing the increase in FCPA enforcement actions as "exponential").

⁸⁵ *See Cross-Border Enforcement Trends*, CROSS-BORDER INVESTIGATIONS UPDATE (Skadden, Arps, Slate, Meagher & Flom LLP, New York, N.Y.), Oct. 2014, at 4.

⁸⁶ *See SEC Enforcement Actions*, *supra* note 83.

⁸⁷ *See* U.S. Dep't of Justice, *supra* note 5. DOJ maintains a list of all of its FCPA enforcement actions from 1977 to 2014. *See id.*

⁸⁸ *See e.g.*, Carolina Bolado, *FCPA Enforcement Won't Slow Anytime Soon, DOJ Says*, LAW 360 (Mar. 6, 2014, 7:29 PM), <http://www.law360.com/articles/515865/fcpa-enforcement-won-t-slow-anytime-soon-doj-says>, *archived at* <http://perma.cc/W2NK-NRVV> (reporting that Patrick Stokes, chief of DOJ's FCPA unit, indicated that the "the agency intended to speed up its investigations" in 2014); *see also, e.g.*, *SEC Enforcement Actions*, *supra* note 83 (highlighting the work of the SEC's FCPA unit).

⁸⁹ *See* Press Release, U.S. Dep't of Justice, *Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme* (Jan. 19, 2010), *available at* <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html>.

⁹⁰ *Id.*

⁹¹ *See* Howard W. Goldstein et al., *Undercover DOJ Sting Operations for FCPA Violations: A New Level of Enforcement*, MEMORANDUM TO OUR FRIENDS & CLIENTS (Fried, Frank, Harris, Shriver & Jacobson LLP, New York, N.Y.), Jan. 21, 2010, at 1-2.

In line with this new era of enforcement, the government has also started conducting industry-wide sweeps. Over the last five years, federal agencies have targeted multiple corporations in the oil services, tobacco, and telecommunications industries.⁹² In a typical sweep, DOJ or the SEC will identify suspected misconduct that may reflect an industry pattern.⁹³ The government will investigate the conduct in one corporation, before broadening the scope of investigation to other companies in the same industry.⁹⁴ The expansion is justified on the theory that "competitors operating in the same country likely were engaging in similar misconduct."⁹⁵

Industry-wide sweeps have proven to be a successful enforcement technique for the government. For example, in 2013, DOJ and the SEC collected tens of millions of dollars in fines and disgorgement fees from agribusinesses after conducting a sweep of the industry.⁹⁶ Similarly, in 2010, DOJ and the SEC reached settlements with six global oil and oil services companies, each of which paid between \$6 million and \$80 million in penalties, following an industry sweep.⁹⁷ Based on recent news reports, it appears likely that DOJ and the SEC are currently using an industry-sweep method as they conduct investigations into corporate hiring practices overseas.⁹⁸

3. Severity of Penalties and Sanctions

Along with increasing enforcement, federal agencies have intensified the severity of penalties and costs associated with FCPA violations. Fines for FCPA violations increased from \$0 in 2000 to \$1 billion in 2010.⁹⁹ According

⁹² See, e.g., *2010 Year-End FCPA Update* (Gibson, Dunn & Crutcher LLP, Los Angeles, Cal.), Jan. 3, 2011, at 3-15 (describing federal industry-wide FCPA sweeps).

⁹³ *Id.* at 3-4 (summarizing the steps of a typical sweep).

⁹⁴ *Id.* at 4.

⁹⁵ *Id.*

⁹⁶ *2013 Year-End FCPA Update* (Gibson, Dunn & Crutcher LLP, Los Angeles, Cal.), Jan. 6, 2014, at 6-8 (detailing the outcomes of DOJ and the SEC's joint enforcement action against multinational agribusiness firms).

⁹⁷ See *2010 Year-End FCPA Update*, *supra* note 92, at 3-7 (setting out DOJ and the SEC's key allegations and terms of settlement).

⁹⁸ See Curran & Eaglesham, *supra* note 11 ("U.S. regulators have expanded their investigation into large banks' hiring practices in Asia, seeking more information from at least five U.S. and European firms . . ."); cf. *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCHANGE COMM'N, <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last visited May 11, 2015), *archived at* <http://perma.cc/68PG-WXL6> (showing the low level of FCPA enforcement in 2000).

⁹⁹ See Press Release, U.S. Dep't of Justice, Department of Justice Secures More Than \$2 Billion in Judgments and Settlements as a Result of Enforcement Actions Led by the Criminal

to a recent analysis, the average amount of an FCPA sanction is approximately \$33.8 million,¹⁰⁰ and the average corporate penalty is around \$74 million.¹⁰¹ Corporations charged with FCPA violations will typically incur both criminal and civil liability, which makes the penalties even more striking. A recent report indicated that the average closing price for an FCPA action, including DOJ and SEC fines, penalties, disgorgement, and interest, was more than \$80 million in 2013, “a nearly fourfold increase over 2012.”¹⁰² Corporations such as Siemens AG, KBR/Halliburton, and BAE Systems have paid approximately \$800 million, \$600 million, and \$400 million, respectively, in recent FCPA resolutions.¹⁰³ These contrast with FCPA resolutions in earlier years, “where it was common for multiple cases in any given year to settle south of \$1 million—even in years where the average settlement value was slightly higher than the \$80 million of 2013.”¹⁰⁴

4. Deferred Prosecution and Non-Prosecution Agreements

Finally, one of the most prominent enforcement trends is the rapid rise of deferred prosecution and non-prosecution agreements in FCPA resolutions. With these arrangements, the government usually agrees to drop charges against FCPA defendants if they comply with certain governmental requests, which can range from ending a particular activity to creating a compliance program.¹⁰⁵ Since 2000, DOJ has entered into at least twenty of these agreements every year, twice reaching its “high-water mark of thirty-nine agreements—in 2007 and 2010.”¹⁰⁶ In 2013, nearly all of DOJ’s FCPA actions concluded in either a non-prosecution agreement or deferred prosecution agreement.¹⁰⁷

Division (Jan. 21, 2011), available at <http://www.justice.gov/opa/pr/departments-justice-secures-more-2-billion-judgments-and-settlements-result-enforcement>.

¹⁰⁰ See, e.g., SHEARMAN & STERLING LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 4 (2012), available at <http://www.shearman.com/~media/Files/Services/FCPA/FCPADigestTrendsandPatternsJan2012.pdf> (listing the costs and penalties for FCPA violations in 2012).

¹⁰¹ See *Foreign Corrupt Practices Act Enforcement Activity: 2013 Year in Review and 2014 Preview*, ROPES & GRAY ALERT (Ropes & Gray LLP, Boston, Mass.), Mar. 28, 2014, at 2.

¹⁰² See *2013 Year-End FCPA Update*, *supra* note 96, at 3.

¹⁰³ *Id.* at 4.

¹⁰⁴ *Id.*

¹⁰⁵ Cf. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL ch. 9-16.325 (2010), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/16mcrim.htm#9-16.325.

¹⁰⁶ *2013 Mid-Year Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs)* (Gibson, Dunn & Crutcher LLP, Los Angeles, Cal.), July 9, 2013, at 1 [hereinafter *2013 Mid-Year Update*].

¹⁰⁷ See Mike Koehler, *DOJ Enforcement of the FCPA—Year In Review*, FCPA PROFESSOR (Jan. 8, 2014), <http://www.fcprofessor.com/doj-enforcement-of-the-fcpa-year-in-review-4>, archived at

The efficiency and merits of these agreements are subject to debate. Some FCPA scholars have applauded the government's use of these agreements because "they can bring certainty to the conclusion of an enforcement action and allow [a would-be defendant] to make remedial changes and move forward."¹⁰⁸ These agreements, however, also allow the government to monopolize the terms of enforcement. And corporations accused of questionable FCPA violations may be more likely to settle for deferred prosecution agreements or non-prosecution agreements to reduce litigation costs and risks.¹⁰⁹ There are also few uniform legal standards guiding the consistent application of these agreements.¹¹⁰ Consequently, the terms of a deferred or non-prosecution agreement may depend entirely on particular prosecutors rather than standardized guidelines, which complicates any judicial effort to evaluate the legality of a particular agreement.

II. "RELATIONSHIP HIRE" INVESTIGATIONS: THE NEW FRONTIER OF FCPA ENFORCEMENT

The FCPA's controversial legacy continues to evolve. Most recently, the statute was the subject of considerable media attention because of the SEC's decision to investigate the hiring practices of several global banks, including

<http://perma.cc/6L3F-C2VQ>; see also 2013 *Mid-Year Update*, *supra* note 106, at 1 (noting that deferred prosecution agreements and non-prosecution agreements "continue to be a consistent vehicle for prosecutors and companies alike in resolving allegations of corporate wrongdoing").

¹⁰⁸ Thomas R. Fox, *The Destruction of Arthur Andersen and the Use of DPAs in FCPA Enforcement*, FCPA COMPLIANCE & ETHICS BLOG (Mar. 21, 2014, 8:34 AM), <https://tfoxlaw.wordpress.com/2014/03/21/the-destruction-of-arthur-andersen-and-the-use-of-dpas-in-fcpa-enforcement>, archived at <http://perma.cc/7KFW-48Gx>.

¹⁰⁹ See Joel Androphy, Ashley Gargour & Kathryn E. Nelson, *The Intersection of the Dodd-Frank Act and the Foreign Corrupt Practices Act: What All Practitioners, Whistleblowers, Defendants, and Corporations Need to Know*, ADVOC. (Tex.), Summer 2012, at 19, 22 (Westlaw) ("Rather than endure a lengthy, expensive trial and potentially suffer harm to their business and goodwill, many companies prefer to enter plea agreements, DPAs, and NPAs."). Recent trends, however, indicate that DOJ is now permitting corporations to set the terms of deferred and non-prosecution agreements. Just recently, in the SEC's agreement with Stryker, the company was able to "negotiate language specifically and affirmatively denying any wrongdoing." Peter Spivack & Sujit Raman, Essay, *Regulating the "New Regulators": Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 178 (2008).

¹¹⁰ See F. Joseph Warin & Peter E. Jaffe, *The Deferred-Prosecution Jigsaw Puzzle: A Modest Proposal for Reform*, 19 *Andrews Litig. Rep.* (West), No. 12, at 2-3 (Sept. 2005) (arguing that "the exercise of substantial individual discretion by federal prosecutors is undesirable in complex corporate investigations" and could be improved by creating uniform guidelines for these agreements).

Goldman Sachs, Deutsche Bank, and JPMorgan.¹¹¹ These investigations have given rise to the “relationship hire” issue, which addresses whether the FCPA’s antibribery provision encompasses hiring individuals connected with foreign officials for the purpose of obtaining or securing business overseas.

Based on recent investigations, it is clear that federal agencies are particularly interested in reviewing corporate decisions to hire children or other close relatives of foreign officials in overseas branches.¹¹² This move has sparked controversy in several places, such as China, where the practice of hiring well-connected children is commonplace.¹¹³ Until recently, banks in this region routinely engaged in “elephant hunting”—“a term used to describe the chasing of mandates to manage the multi-billion dollar stock offerings of the country’s big state-owned enterprises.”¹¹⁴ The recent investigations have cast doubt on whether this practice is legal under the FCPA.

A. JPMorgan’s “Sons and Daughters Program” Scandal

To date, the most well-known example of the relationship hire issue is DOJ and the SEC’s probe into JPMorgan’s hiring practices in China. In 2006, JPMorgan launched a hiring program in China called “Sons and Daughters,” which separated the employment applications of “well-

¹¹¹ See Ben Protess & Jessica Silver-Greenberg, *JPMorgan Tracked Business Linked to China Hiring*, N.Y. TIMES (Dec. 7, 2013, 1:24 PM), <http://dealbook.nytimes.com/2013/12/07/bank-tabulated-business-linked-to-china-hiring>, archived at <http://perma.cc/V9NC-NL6B>.

¹¹² See *Hiring a Problem: Avoiding the Pitfalls of Employing Relatives of Government Officials*, BUS. ETHICS & ANTI-CORRUPTION (Norton Rose Fulbright, London), Feb. 2014, at 1 (“[R]ecent investigations by US enforcement authorities . . . have increased the focus on hiring relatives of government officials, which the US authorities may consider to be an attempt to provide improper benefits to government officials.”).

¹¹³ Hiring of college-educated children of prominent politicians and business leaders in China is so pervasive that a special term—“princelings”—exists that refers to these children. See, e.g., David Barboza & Sharon LaFraniere, *China “Princelings” Using Family Ties to Gain Riches*, N.Y. TIMES, May 18, 2012, at A1 (describing the elite Chinese youth as “princelings” who frequently “serve as middlemen to a host of global companies and wealthy tycoons eager to do business in China”); Ben Protess & Jessica Silver-Greenberg, *On Defensive, Bank Hired China’s Elite*, N.Y. TIMES, Dec. 30 2013, at A1 [hereinafter Protess & Silver-Greenberg, *Bank Hired China’s Elite*] (“The hiring became so widespread over the last two decades that banks competed over the most politically connected recent college graduates, known in China as princelings.”).

¹¹⁴ See *JPMorgan Hit by U.S. Bribery Probe into Chinese Hiring: Report*, REUTERS, Aug. 18, 2013, available at <http://www.reuters.com/article/2013/08/18/us-jpmorgan-investigation-china-idUSBRE97H0oP20130818>; see also David Barboza, *Many Wall St. Banks Woo Children of Chinese Leaders*, N.Y. TIMES, Aug 21, 2013, at B1 (characterizing Wall Street banks’ hiring of the sons and daughters of senior Chinese government officials as “no secret”).

connected candidates" from those of ordinary candidates.¹¹⁵ The original purpose of this separation, and the program at large, was to heighten review of applications from well-connected candidates to ensure that the bank's hiring did not violate nepotism or bribery laws.¹¹⁶

Despite the alleged purpose of the Sons and Daughters program, allegations emerged that the program in fact relaxed hiring standards for well-connected candidates and expedited their applications.¹¹⁷ News reports, for example, have suggested a link between Tang Xiaoning, a recently-hired JPMorgan employee and son of the chairman of the China Everbright Group, and JPMorgan's role in Everbright's initial public offering.¹¹⁸ The SEC soon began investigating the hire.¹¹⁹ By August 2013, the SEC had requested JPMorgan to produce "all documents" related to the bank's decision to hire Tang Xiaoning.¹²⁰ JPMorgan reportedly cooperated with the agency and disclosed documents with information on its hiring in China.¹²¹ These documents included emails that linked employees to "potential business opportunities" in Chinese state-owned entities and revealed internal discussion on the strategic advantage of having government contacts at the firm.¹²² The bank also turned over several "track

¹¹⁵ See Silver-Greenberg & Protes, *China Elite*, *supra* note 7.

¹¹⁶ See *id.*

¹¹⁷ See Ben Protes & Jessica Silver-Greenberg, *Bank Tracked Business Linked to China Hiring*, N.Y. TIMES, Dec. 8, 2013, § 1, at 1 [hereinafter Protes & Silver-Greenberg, *Business Linked to China Hiring*] ("[B]y 2009, the 'Sons and Daughters' program was putting the job candidates on the fast track to employment."). Media reports on the investigation indicate that changes in the program's effect on hiring occurred because JPMorgan management believed the program was preventing the bank from capturing lucrative business opportunities. See, e.g., Protes & Silver-Greenberg, *Bank Hired China's Elite*, *supra* note 113. In the wake of the 2008 financial crisis, multi-billion dollar stock and debt offerings by Chinese state-owned enterprises provided important growth opportunities for global investment banks. See *id.* In emails, JPMorgan officials worried that the bank's failure to capture some of this business was due to the lack of government connections with the bank's China office. *Id.*; see also Minxin Pei, *J.P. Morgan and the Pitfalls of Hiring China's Elite Offspring*, FORTUNE (Aug. 19, 2013, 5:23 PM), <http://fortune.com/2013/08/19/j-p-morgan-and-the-pitfalls-of-hiring-chinas-elite-offspring/>, archived at <http://perma.cc/R8TW-K6K7> (noting that firms like JPMorgan are "stuck between a rock and a hard place in China" because "[t]he country is run by a one-party regime that has created a hereditary political aristocracy well-versed in the art of turning power into personal profits").

¹¹⁸ See Silver-Greenberg & Protes, *China Elite*, *supra* note 7.

¹¹⁹ *Id.*

¹²⁰ *Id.* The bank included a reference to the probe in its quarterly 10-Q filing submitted on August 7, 2013. See JPMorgan Chase & Co., Quarterly Report (Form 10-Q), at 11 (Aug. 7, 2013) (noting "[a] request from the SEC Division of Enforcement seeking information and documents relating to, among other matters, the Firm's employment of certain former employees in Hong Kong and its business relationships with certain clients").

¹²¹ See Silver-Greenberg & Protes, *China Elite*, *supra* note 7; see also Silver-Greenberg & Protes, *Business Linked to China Hiring*, *supra* note 117.

¹²² See Silver-Greenberg & Protes, *Business Linked to China Hiring*, *supra* note 117.

record” spreadsheets, which matched these hires to successful business deals.¹²³

Not surprisingly, these revelations helped broaden investigation into the bank’s hiring practices. According to news reports, federal investigators are examining JPMorgan’s decision to hire other politically connected individuals, such as Zhang Xixi, the daughter of a Chinese railway official.¹²⁴ Many of the individuals under scrutiny had advanced degrees in business and work experience in similar financial institutions, and no evidence appears to show conclusively that they were not qualified to work at the bank.¹²⁵ Several bankers, however, noted that regardless of whether the individuals were qualified to be at JPMorgan, the presence of politically connected employees in China correlates with successful business in the region.¹²⁶ Based on the information in the disclosed emails, JPMorgan officials were well aware of the importance of these connections.¹²⁷

The theory underlying DOJ and the SEC’s investigation is not limited to JPMorgan’s practice of hiring children of foreign officials. After all, employing relatives of foreign officials is not itself a violation of the law. Rather, at the core of the investigation is a search for evidence showing that JPMorgan offered jobs to relatives of Chinese officials in exchange for lucrative business deals in China. For example, the investigation relating to Zhang Xixi will presumably focus on the relations between JPMorgan and her father’s company, which hired the JPMorgan to advise on the company’s initial public offering shortly after Ms. Zhang joined the bank.¹²⁸ Similarly, the investigation relating to Tang Xiaoning will likely examine China Everbright Group’s decision to hire JPMorgan as its advisor, even

¹²³ *Id.*

¹²⁴ See Lawrence White & Michael Flaherty, *JPMorgan China Probe Sends Chill Through Investment Banks*, REUTERS, Aug. 19, 2013, available at <http://www.reuters.com/article/2013/08/19/china-jpmorgan-hiring-idUSL4NoGK1A520130819>; see also Dan Fitzpatrick, Enda Curran & Justin Baer, *Bank Emails Note Hire’s Family Tie*, WALL ST. J., Dec. 9, 2013, at C3.

¹²⁵ For example, Zhang Xixi reportedly attended Stanford University before joining JPMorgan. See Silver-Greenberg, Protess & Barboza, *Hiring in China by JPMorgan*, *supra* note 1.

¹²⁶ See Silver-Greenberg & Protess, *China Elite*, *supra* note 7.

¹²⁷ See *id.*; see also Protess & Silver-Greenberg, *Bank Hired China’s Elite*, *supra* note 113 (reporting emails from JPMorgan managers showing company officials were aware of political connections of employees in the Hong Kong office, such as the “son of #2 at SinoTruk,” a state-owned trucking venture).

¹²⁸ See Silver-Greenberg, Protess & Barboza, *JPMorgan Under Scrutiny*, *supra* note 1; Sue Chang, *SEC Probes J.P. Morgan’s China Hiring Practice*, MARKETWATCH (Aug. 18, 2013, 1:53 PM), <http://www.marketwatch.com/story/sec-probes-jp-morgans-china-hiring-practice-2013-08-18>, archived at <http://perma.cc/XQT9-CAQP> (“J.P. Morgan’s Hong Kong office . . . hired the daughter of a Chinese railway official while the state-controlled China Railway Group was in the process of picking the investment bank as an adviser for a planned initial public offering . . .”).

though the company had relied on Morgan Stanley in previous years.¹²⁹ In addition, the probe will likely examine JPMorgan’s decision to employ Fullmark Consultants, a consulting firm controlled by Wen Rachun, daughter of then-Premier Wen Jiabao, and whether the deal secured the bank special access to Chinese state-owned entities.¹³⁰

B. *The Government’s Previous Relationship Hire Investigations*

The JPMorgan scandal reflects a notable shift in the government’s approach to relationship hire investigations. While the government has scrutinized hiring practices under the FCPA in the past, most of these investigations have focused on sham or “no-show” employment agreements. For example, in *SEC v. UTStarcom, Inc.*, the SEC accused UTStarcom of making at least ten full-time offers of employment to relatives of government officials in China and Thailand.¹³¹ The SEC claimed that these offers were intentionally made to secure improper business advantages in the region.¹³² Significantly, however, the SEC alleged that the employees in question did not actually perform work for the company, but received salaries and other employment-related benefits.¹³³

Similarly, in *United States v. DaimlerChrysler China Ltd.*, federal prosecutors targeted DaimlerChrysler’s payments to the son of a prominent China National Petroleum Corporation official and the wife of a Sinopec Corporation official when neither was actually working for the company.¹³⁴ DaimlerChrysler’s records allegedly indicated that money paid to the wife of the Sinopec official resulted from a consulting agreement, but the wife never performed any services for the firm.¹³⁵ The company’s payments to the son of the CNPC official were equally dubious. He received internships for himself and his girlfriend, a car, €30,000 for “market research,” student

¹²⁹ See Protess & Silver-Greenberg, *Bank Hired China’s Elite*, *supra* note 113 (“[S]ince the younger Mr. Tang was hired, China Everbright and its subsidiaries hired JPMorgan at least three times . . .”). Later, though, JPMorgan walked away from a deal involving Everbright. See *JPMorgan Withdraws from \$2 Billion China Everbright Bank HK Listing: Source*, REUTERS, Nov. 19, 2013, available at <http://www.reuters.com/article/2013/11/19/us-jpmorgan-everbright-idUSBRE9AI09620131119>.

¹³⁰ See David Barboza, Jessica Silver-Greenberg & Ben Protess, *Bank’s Fruitful Ties to a Member of China’s Elite*, N.Y. TIMES, Nov. 14, 2013, at A1.

¹³¹ See Complaint at 4, *SEC v. UTStarcom, Inc.*, No. 09-6094 (N.D. Cal. Dec. 31, 2009), ECF No. 1.

¹³² *Id.* at 6-7.

¹³³ *Id.* at 4.

¹³⁴ Complaint at 9-10, *United States v. DaimlerChrysler China Ltd.*, No. 10-66 (D.D.C. Mar. 22, 2010), ECF No. 1.

¹³⁵ See *id.* at 10.

visa processing assistance, and a monthly salary.¹³⁶ In these cases, the government alleged that the employment agreement at issue was a sham or “no show” arrangement, used to facilitate an illicit exchange between businesses and public officials.

III. EXPANDING THE CRIMINALIZATION OF RELATIONSHIP HIRES: LEGAL AND POLICY RAMIFICATIONS

Relationship hires often present a gray area of bribery that does not align neatly with traditional FCPA enforcement. As discussed in the previous Part, an offer of employment to a relative of a public official can serve the same purpose as a traditional cash bribe. In many ways, there is no meaningful difference between making a sham employment agreement and providing a suitcase stuffed with cash. The government’s recent decision to target hiring practices in the absence of evidence of sham employment, however, is troubling. Indeed, several prominent FCPA scholars have already publicly decried the investigations as hypocritical,¹³⁷ “aggressive,”¹³⁸ and “dicey.”¹³⁹

The federal investigation into hiring practices in the absence of evidence of a sham employment agreement suggests that relationship hires are a corrupt practice per se. This presumption relies on an interpretation of the Act that contradicts its legislative intent and purpose. In addition, there are compelling policy reasons not to target relationship hires when companies are offering bona fide employment. Criminalizing relationship hires will produce a chilling effect on business overseas, allow prosecutors to

¹³⁶ See *id.*

¹³⁷ See Robert Reich, *JP Morgan Chase, the Foreign Corrupt Practice Act, and the Corruption of America*, HUFFINGTON POST (Dec. 8, 2013, 10:32 PM), http://www.huffingtonpost.com/robert-reich/jp-morgan-corrupt-practice-act_b_4410253.html, archived at <http://perma.cc/3K4D-3P5Q> (suggesting that the government’s focus on corruption in China is misplaced given the significant role of money in U.S. politics); see also Mike Koehler, *Friday Roundup*, FCPA PROFESSOR (Dec. 27, 2013), <http://www.fcprofessor.com/friday-roundup-103>, archived at <http://perma.cc/HA72-5MMS> (“[T]here is a double standard concerning corporate interaction with ‘foreign officials’ under the FCPA and corporate interaction with U.S. officials under other U.S. laws . . .”); Jonathan Weil, *What’s the Difference Between U.S., Chinese Corruption?*, BLOOMBERGVIEW (Aug. 30, 2013, 12:36 PM), <http://www.bloombergvie.com/articles/2013-08-30/what-s-the-difference-between-u-s-chinese-corruption->, archived at <http://perma.cc/NF3H-QRQP> (suggesting that the trend of hiring relatives of powerful people is also common in the United States).

¹³⁸ Cf. Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907, 984 (2010) (critiquing the government’s interpretations of the FCPA).

¹³⁹ Matt Levine, *Sometimes JPMorgan Hired the Children of Its Clients*, DEALBREAKER (Aug. 19, 2013, 11:05 AM), <http://dealbreaker.com/2013/08/sometimes-jpmorgan-hired-the-children-of-its-clients>, archived at <http://perma.cc/HDH2-2SMD> (highlighting the difficulty of distinguishing between different reasons for making a hire).

monopolize the theory of the Act’s application, and provoke international criticism contrary the Act’s goal of improving foreign relations.

A. *The Government’s Expansive Reading of the FCPA Contradicts Legislative Intent*

DOJ and the SEC have expanded probes into relationship hires by relying on the FCPA’s statutory language.¹⁴⁰ In particular, the agencies emphasize the Act’s prohibition of the exchange of “anything of value” for improper business advantages.¹⁴¹ The language is broad, and it can be interpreted to include offers of employment. Employment offers are often inherently valuable and are tied to a number of additional benefits, including work visas, club memberships, reputational prestige, and networking opportunities. Domestic case law also supports the view that “future employment promised” to a defendant by a third party is a “thing of value” in the bribery context.¹⁴²

While the government’s interpretation of the statute certainly justifies its investigation into sham or “no show” employment agreements, it does not support broad investigations into all types of hiring practices. There was no evidence in the JPMorgan investigation that the firm’s employment contracts with the children of Chinese business leaders were sham agreements or that the children rendered no services for the firm. The government’s decision to pursue the investigation, notwithstanding, rests on an overly expansive understanding of the FCPA. Indeed, the expansive reading suggests that the FCPA may serve as a catch-all law, potentially authorizing a vast range of governmental investigations into corporations on the basis of corporate ethics.

A fundamental problem with the government’s broad reading of the FCPA is that this reading contradicts the Act’s legislative history. As discussed in detail in Part I, the Act was intended to be a “limited statute.”¹⁴³ Congress did not intend to criminalize all corrupt payments but rather to prohibit payments that facilitate public corruption, such as corporate gifts to corrupt foreign leaders.¹⁴⁴ Investigations—which can be as

¹⁴⁰ See, e.g., Complaint, *supra* note 134, at 9-12.

¹⁴¹ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2012).

¹⁴² *United States v. Gorman*, 807 F.2d 1299, 1305 (6th Cir. 1986).

¹⁴³ Koehler, *supra* note 16, at 1003.

¹⁴⁴ See *supra* Section I.A (discussing the Act’s legislative history); see also *Protecting the Ability of the United States to Trade Abroad*, *supra* note 36, at 7 (statement of Sen. Frank Church) (indicating that the architects of the FCPA were concerned about the “massive and widespread perversion of the free enterprise system”).

onerous as sanctions—into hiring practices that do not reflect sham agreements or widespread public corruption are inconsistent with Congress’s intent. The JPMorgan employees that are the target of the government’s investigation are not political figures, and most of them are not even related to government officials.

In addition, the hearings devoted to the drafting of the Act show that Congress’s primary goal was to regulate corporate transactions with public officials or political leaders, not owners of state-owned enterprises or government-controlled businesses.¹⁴⁵ Congress did not include these hybrid entities in the definition of a “foreign official,” even though legislators were aware of the presence and power of hybrid entities in foreign countries.¹⁴⁶ In the JPMorgan investigation, the government is targeting not only state-owned enterprises, but also focusing its investigation on the children of state-owned enterprise managers. Given that Congress did not even mention family members in any of the legislative bills or hearings that served as the basis for the FCPA, and that Congress did not include regulation of state-owned enterprises, the current federal probes appear to be an impermissibly broad interpretation of the Act.

This broad reading of the statute also fails to acknowledge the nuances of hiring practices in the FCPA context. In a sham employment agreement, the offer of employment is analogous to the offer of a financial bribe because it is obvious that the sole purpose of the offer is to influence the conduct of the receiving side. In the relationship-hire context, a company may choose to hire employees for a host of reasons in conjunction with, or irrespective of, their political affiliations.¹⁴⁷ The statutory language of the FCPA presupposes a fairly straightforward exchange—an offer, a payment, or an authorization of “anything of value” in exchange for business.¹⁴⁸ The relationship-hire context does not easily map onto the exchange contemplated by the statutory language because there are often several

¹⁴⁵ See *supra* Section I.A.

¹⁴⁶ See *supra* Section I.A.

¹⁴⁷ Some commentators have dismissed this critique. For example, a *New York Times* blog post defending the government’s reading of the FCPA recently suggested that the U.S. government “is unlikely to care much about a few questionable hires, even if those people were less qualified than other applicants.” Peter J. Henning, *JPMorgan Case Tests U.S. Law on Buying Influence Abroad*, N.Y. TIMES (Sept. 3, 2013, 2:05 PM), http://dealbook.nytimes.com/2013/09/03/jp-morgan-case-tests-u-s-law-on-buying-influence-abroad/?_php=true&_type=blogs&_r=0, archived at <http://perma.cc/Y5G2-DDGV>. Many of the relationship hire investigations, however, focus precisely on these “questionable hires.” Cf. *id.* Further, the government has not elaborated on distinctions based on a candidate’s qualifications or credentials, making it difficult to understand how the FCPA applies to these types of cases.

¹⁴⁸ Cf. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2012).

explanations for an employment offer or hiring decision.¹⁴⁹ In addition, the value of an employment offer is far more subjective where an employee actually offers valuable services in exchange for a paycheck. The quid-pro-quo aspect of a relationship hire is more complex than in a sham employment agreement, in which it is clear that the recipient has no intention of performing any services.

That the offer is extended to a relative also poses additional line-drawing problems that the statute itself does not begin to address. For example, does it matter whether the hired relative of a foreign official retains his salary (or other benefits from employment) and does not transfer money to the official? Is there an assumption that the foreign official experiences some psychological benefit from securing employment for his son or daughter? Or does the benefit derive from the "elimination of an economic opportunity cost?"¹⁵⁰

DOJ's response to these questions has only added to the confusion.¹⁵¹ In one FCPA review procedure release that is now over thirty years old, for example, DOJ indicated that the government would not pursue an enforcement action against a machinery company that employed a foreign official's relative under a contract that provided sales commissions when the company obtained assurances from both the relative and the official that they would adhere to the FCPA.¹⁵² The employee-relative had been hired to sell a generator to a foreign government, and the employee's brother was an employee of the foreign government.¹⁵³ In its response, DOJ indicated that the hire was permissible under the FCPA when the employee's contract in effect prohibited him from relaying any part of his commission

¹⁴⁹ While the employment offer must be made "corruptly" to create FCPA liability, the meaning of this term is not clearly defined in the statute, and case law has not shed much light on the bounds of this state-of-mind requirement.

¹⁵⁰ Michael Volkov, *Focus on Hiring Relatives of Foreign Officials: A Serious Bribery Risk?*, CORRUPTION, CRIME & COMPLIANCE (Sept. 22, 2013), <http://corruptioncrimecompliance.com/2013/09/focus-on-hiring-relatives-of-foreign-officials-a-serious-bribery-risk>, archived at <http://perma.cc/KW88-N4SM>.

¹⁵¹ DOJ has published several advisory opinions in an attempt to offer guidance on the appropriate interpretation of the Act's language. These include opinion procedure releases and review procedure releases. Both publications typically offer DOJ's opinion on a question or hypothetical submitted by a party concerned that its actions might violate the FCPA. For example, if a corporation is concerned that its decision to hire a particular employee might lead to FCPA liability, it can ask DOJ to review the hiring decision in advance to ensure that it does not constitute a violation. DOJ makes the releases available at <http://www.justice.gov/criminal/fraud/fcpa/>.

¹⁵² See DOJ FCPA Review Procedure Release No. 82-04 (Nov. 11, 1982).

¹⁵³ *Id.*

to his brother and when both the employee and his brother signed affidavits swearing to comply with the antibribery provisions of the FCPA.¹⁵⁴

Twenty-five years after issuing the opinion, DOJ appeared to take a different position. In 2007, DOJ obtained a nonprosecution agreement from Paradigm B.V., stemming in part from Paradigm's decision to hire the brother of an official responsible for awarding contracts for Pemex, the Mexican state-owned oil company.¹⁵⁵ DOJ penalized Paradigm for this hiring decision, even though apparently none of the brother's earnings were shared with officials at Pemex.¹⁵⁶ These contrasting positions by DOJ underscore some of the ambiguous and contradictory implications of the Act's language.

B. Policy Arguments Against the Government's Interpretation of the FCPA

1. Chilling Effect on Business in Foreign Markets

The government's broad interpretation of the FCPA in the context of relationship hires is also troublesome from a policy perspective. Bribery is socially costly, but investigating the hiring practices of banks is unlikely to reduce public corruption substantially. The more likely outcome of hiring investigations is an adverse effect on U.S. business relations overseas, because the reality remains that in several countries, particularly China, relationship hires help U.S. corporations enter into and participate in the market.¹⁵⁷ Given this reality, expanding FCPA probes into hiring practices

¹⁵⁴ *Id.*

¹⁵⁵ See Letter from Steven A. Tyrrell, Chief, Fraud Section, U.S. Dep't of Justice, to Saul M. Pilchen, Partner, Skadden, Arps, Slate, Meagher & Flom LLP app. A (Sept. 21, 2007), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/paradigm/09-21-07paradigm-agree.pdf> (describing the arrangement); see also Richard L. Cassin, *Paradigm's Pre-IPO Due Diligence Reveals FCPA Violations*, FCPA BLOG (Sept. 24, 2007, 7:05 PM), <http://www.fcpablog.com/blog/2007/9/24/paradigms-pre-ipo-due-diligence-reveals-fcpa-violations.html>, archived at <http://perma.cc/3UFC-7DWX> (reporting the nonprosecution agreement).

¹⁵⁶ *Cf.* Letter from Steven A. Tyrrell to Saul M. Pilchen, *supra* note 155, app. A (describing the employment arrangement but not suggesting that the official received any portion of his brother's salary).

¹⁵⁷ Some scholars have argued that even the most prudently constructed antibribery provisions may not reduce corruption in countries where bribery transactions represent routine ways of conducting business. See generally Steven R. Salbu, Colloquy, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223, 226 (1999) ("[A]ny form of extraterritorial anti-bribery legislation, even the most perfectly conceived, must be considered imprudent under the global conditions of the late twentieth century."). Professor Salbu's argument is built on the propositions that perceptions of bribery vary by culture and that U.S. law is incapable of transforming culturally constructed practices. See *id.* at 232 ("[V]arying attitudes . . . exist in regard to bribery and corruption across the globe."); see also Steven R.

will likely have one of two effects. Companies may continue to rely on relationship hires but change how they track and report their hiring decisions to reduce FCPA scrutiny.¹⁵⁸ Corporations may continue to cooperate with the government but rely on selective disclosure rather than frank dialogue.¹⁵⁹ Alternatively, companies may stop relying on these hires altogether and may be discouraged from investing in foreign markets. Indeed, some suggest that increased FCPA enforcement has had a chilling effect on U.S. corporations' investments overseas.¹⁶⁰ Several empirical studies have produced findings to this effect.¹⁶¹ Investigating companies'

Salbu, *A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery*, 33 CORNELL INT'L L.J. 657, 678 (2000) ("If corruption is firmly rooted in institutional foundations, fighting it by legal decree is naive.").

¹⁵⁸ See Matt Levine, *JPMorgan's Mistake Was Not Hiring Chinese Princelings Fast Enough*, BLOOMBERGVIEW (Dec. 30, 2013, 1:16 PM), <http://www.bloombergview.com/articles/2013-12-30/jpmorgan-s-mistake-was-not-hiring-chinese-princlings-fast-enough>, archived at <http://perma.cc/P9CH-FVX9> (arguing that a lesson of the JPMorgan scandal is that "[t]he most effective compliance program of all might just be 'do whatever you want but never say anything in writing'").

¹⁵⁹ See *id.* The effect of this selective disclosure may be compounded because voluntary disclosures, in many cases, increase a corporation's monitoring costs and do not yield any sentencing leniency. Cf. Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARV. J. ON LEGIS. 303, 338-39 (2012) ("[E]ven when companies do voluntarily disclose, a vast majority are nonetheless subjected to substantial sanctions.").

¹⁶⁰ On February 21, 2012, the U.S. Chamber of Commerce published a letter that it sent along with thirty-three other business organizations to DOJ, arguing that the result of the FCPA's current enforcement regime has "been a chilling effect on legitimate business activity (as companies perceive a real risk of prosecution even in scenarios involving only the most remote and attenuated connection to foreign governments) and a costly misallocation of compliance resources." Letter from US Chamber of Commerce et al. to Lanny A. Breuer, Assistant Attorney Gen., Criminal Div., U.S. Dep't of Justice, and Robert Khuzami, Dir. of Enforcement, U.S. Sec. & Exch. Comm'n 2 (Feb. 21, 2012); see also Paul J. Beck, Michael W. Maher & Adrian E. Tschoegl, *The Impact of the Foreign Corrupt Practices Act on US Exports*, 12 MANAGERIAL & DECISION ECON. 295, 300-01 (1991) (finding that the FCPA "has negatively affected exports to non-Latin American bribery countries"); Peter Jeydel, Comment, *Yoking the Bull: How to Make the FCPA Work for U.S. Business*, 43 GEO. J. INT'L L. 523, 527-29 (2012) ("It is th[e] noxious combination of extremely harsh penalties and an ambiguous set of rules that makes the FCPA so disruptive to commercial activity.").

¹⁶¹ See, e.g., Beck, Maher & Tschoegl, *supra* note 160, at 295 (discussing a survey of American diplomatic posts in which twenty-one claimed that the FCPA acted as an "export disincentive" in their countries); see also COMM. ON INT'L BUS. TRANSACTIONS, N.Y.C. BAR ASS'N, *THE FCPA AND ITS IMPACT ON INTERNATIONAL BUSINESS TRANSACTIONS—SHOULD ANYTHING BE DONE TO MINIMIZE THE CONSEQUENCES OF THE U.S.'S UNIQUE POSITION ON COMBATING OFFSHORE CORRUPTION?* 23 (2011), available at <http://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf> ("[T]he current anti-bribery regime—which tends to place disproportionate burdens on U.S. regulated companies in international transactions and incentivizes other countries to take a 'lighter touch'—is causing lasting harm to the competitiveness of U.S. regulated companies and the U.S. capital markets . . ."); Jon

hiring practices even when the practices do not appear to involve sham employment will only intensify this chilling effect, particularly in countries where relationship hires allow U.S. corporations to enter markets dominated by state-owned enterprises.¹⁶² JPMorgan, for example, has reportedly walked away from multiple deals in China as a result of the investigation.¹⁶³ The FCPA's chilling effect not only restricts market participation, but also places U.S. companies at a disadvantage with respect to their foreign competitors.¹⁶⁴ Foreign businesses that lack a connection to the United States do not have to bear the costs of additional due diligence and FCPA scrutiny and can continue to rely on relationship hires without issue. These asymmetrical market opportunities limit the ability of American businesses to compete overseas.

Furthermore, the FCPA's chilling effect may have a greater impact on smaller businesses than on larger corporations. Larger corporations have the capacity to expand compliance systems, while smaller businesses may not be able to finance the due diligence needed to avoid FCPA scrutiny.¹⁶⁵ Smaller entities may eventually benefit from a more transparent economy, but until then, smaller businesses may be deterred from expanding overseas.

2. Risk of "Prosecutorial Common Law"

A second major policy concern raised by DOJ and the SEC's probe into relationship hires is the lack of judicial scrutiny over the government's

Moran, *Bribery and Corruption: The OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions*, 8 BUS. ETHICS EUR. REV. 141, 142 (1999) (suggesting that the FCPA constrains American firms relative to foreign competitors). *But see* Wesley Cragg & William Woof, *The U.S. Foreign Corrupt Practices Act: A Study of Its Effectiveness*, 107 BUS. & SOC'Y REV. 98, 99 (2002) (suggesting that the U.S. share of the export trade in corrupt countries may have increased despite the FCPA).

¹⁶² See Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 366 (2010) (arguing that the "FCPA, as enforced, operates as de facto economic sanctions against countries where substantial foreign direct investment is occurring and yet which have substantial levels of corruption").

¹⁶³ See Prudence Ho, *J.P. Morgan Exits from China IPOs*, WALL ST. J., Jan. 22, 2014, at C3 (reporting that JPMorgan has pulled out of various initial public offerings by Chinese companies, including China Everbright Bank, Tianhe Chemicals, and China CNR Corp.).

¹⁶⁴ Cf. Jennifer Dawn Taylor, Comment, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 LA. L. REV. 861, 868-69 (2001) ("The competitive disadvantage argument takes the position that bribery is a reality in many countries and that prohibitions against payments by United States companies abroad cause harm to American businesses." (footnote omitted)).

¹⁶⁵ See Noam B. Fischman, *FCPA Compliance Trends in an Era of Ambiguous Enforcement, in INTERNATIONAL WHITE COLLAR ENFORCEMENT* (Aspatore 2014), available at 2014 WL 10499, at *6 (asserting that that small businesses, "unlike larger entities, . . . may not have the resources to design, implement, and police an anti-corruption program").

interpretation of the FCPA. FCPA investigations tend to be settled early, so the government’s interpretation of the Act’s provisions is rarely scrutinized in a judicial setting. As a result, it remains unlikely that defendants, the vast majority of which are large corporations, will offer an alternative interpretation of the statute. Challenging the government’s interpretation would require a long, drawn-out, expensive proceeding. Most large corporations prefer to pay the costs of early resolution rather than risk litigation.¹⁶⁶

The absence of judicial oversight or pushback against DOJ and the SEC’s reading of the statute allows “prosecutorial common law” to govern the outcomes of FCPA disputes.¹⁶⁷ The government has an “institutional interest in pushing ever more aggressive interpretations” of the FCPA, because it wants to develop the law to enforce it against other parties in the future.¹⁶⁸ Meanwhile, FCPA defendants are primarily concerned with disposing of the suit and have no interest in shaping the law for other defendants.¹⁶⁹ Federal prosecutors thus possess the ability to “effectively control the disposition of the FCPA cases they initiate and impose their

¹⁶⁶ See Richard L. Cassin, *A Gesture of Justice*, FCPA BLOG (Feb. 9, 2010, 5:27 PM), <http://www.fcpablog.com/blog/2010/2/10/a-gesture-of-justice.html>, archived at <http://perma.cc/3UYU-PFBZ> (“Not a single corporate defendant, big or small, has fought Foreign Corrupt Practices Act charges in court for the past two decades Because *respondeat superior* leaves companies defenseless, their only choice when threatened with prosecution is to cop a plea. That gives the DOJ and other enforcement agencies enormous power to force settlements on their corporate targets.”). Corporations are also likely to invest considerable resources in their compliance programs without ever questioning the need for this compliance. See Miriam Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035, 1036 (2008) (explaining that because the “corporate criminal liability standard is so broad and the collateral consequences of a criminal indictment are so devastating, entities will attempt to avoid formal charges *ex ante* by investing in ‘compliance’ products intended to impress prosecutors in the future, even if these programs are more costly than effective”). The government has also strengthened incentives for FCPA defendants to cooperate and participate in voluntary, early reporting by claiming that disclosure could lead to lower fines and relaxed sentencing. See Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1833 (2011) (attributing the increase in enforcement to voluntary self-reporting); Koehler, *supra* note 138, at 924-29 (arguing that self-reporting incentives propel enforcement); Irina Sivachenko, Note, *Corporate Victims of “Victimless Crime”: How the FCPA’s Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance*, 54 B.C. L. REV. 393, 413 (2013) (“Lacking concrete guidance from the DOJ, other than broad recommendations of ‘best practices,’ and judicial interpretation of the statute, the companies that are trying to follow the rules in good faith are forced to take unsubstantiated guesses as to what is proper.”); Emily Willborn, Note, *Extraterritorial Enforcement and Prosecutorial Discretion in the FCPA: A Call for International Prosecutorial Factors*, 22 MINN. J. INT’L L. 422, 433-34 (2013) (noting that “broad prosecutorial discretion has the potential to lead to prosecutorial abuse”).

¹⁶⁷ See Michael Levy, *Prosecutorial Common Law*, FCPA PROFESSOR (Mar. 16, 2011), <http://www.fcpaprofessor.com/prosecutorial-common-law>, archived at <http://perma.cc/G2XK-WASC>.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

own extremely broad interpretation of the FCPA's key provisions."¹⁷⁰ This state of circumstances may benefit the government and some FCPA defendants, but it also "erodes the ability of the judiciary to do its job and skews the balance of power in the criminal justice system heavily in favor of prosecutors and away from defendants and the courts."¹⁷¹ It also allows the government to continue adopting "dubious," "untested," and ambiguous readings of the Act to develop new frontiers for enforcement, thereby undermining the purpose of the statute and the integrity of the judicial system.¹⁷²

3. Foreign Policy Ramifications

Finally, applying the FCPA to relationship hires has foreign policy implications because it regulates practices in foreign countries using American standards. Ironically, a law originally passed to remedy negative international perceptions of American companies abroad¹⁷³ has now emerged as a source of tension between the United States and foreign countries. Several foreign newspapers and FCPA scholars have criticized FCPA regulation of foreign entities, describing the intervention as a contemporary form of moralizing and "American imperialism."¹⁷⁴ Even though members of Congress specifically identified the need to limit the FCPA's scope to avoid regulating practices that are "normal and accepted" in other countries,¹⁷⁵ federal agencies have continued to expand and enforce the Act's provisions roughshod in foreign countries. Aggressive enforcement of the FCPA has caused foreign citizens and governments to "view the [U.S.] regulators not as policemen but as biased referees" who are using the FCPA to fulfill their own regulatory interests at the expense of

¹⁷⁰ *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 22 (2011) (statement of Michael Mukasey, former Att'y Gen. of the United States; Partner, Debevoise & Plimpton LLP).

¹⁷¹ Levy, *supra* note 167.

¹⁷² See Koehler, *supra* note 138, at 929; see also Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 530 (2011) (suggesting that the SEC is in a "hyper-aggressive phase," in which the agency "uses a broad understanding of its legal authority, correspondingly broadening the scope of liability for the regulated community").

¹⁷³ See H.R. REP. NO. 95-640, at 5 (1977) (indicating that one of the goals of the FCPA was to improve "the esteem for the United States among the citizens of foreign nations").

¹⁷⁴ See, e.g., Charles F. Smith & Brittany D. Parling, *"American Imperialism": A Practitioner's Experience with Extraterritorial Enforcement of the FCPA*, 2012 U. CHI. LEGAL F. 237, 249.

¹⁷⁵ Cf. *American Multinational Corporations Abroad*, *supra* note 18, at 6 (statement of Michael F. Butler, Vice President and General Counsel, Overseas Private Investment Corporation) (highlighting the differences in customs worldwide).

foreign business.¹⁷⁶ This criticism is particularly relevant in cases in which the U.S. government’s investigations in foreign countries are inconsistent with the domestic enforcement of similar laws or regulations.¹⁷⁷ For instance, neither DOJ nor the SEC has pursued any relationship hire investigations in domestic offices of American companies—even though nepotism remains a common practice in the United States, in both financial institutions¹⁷⁸ and government.¹⁷⁹ In Arthur Levitt’s scathing critique of the JPMorgan investigation, he remarks that “if you walk the halls of any institution in the United States—Congress, federal courthouses, large corporations, the White House, American embassies and even the offices of the SEC—you are likely to run into friends and family members of powerful and wealthy people.”¹⁸⁰ The widespread nature of nepotism in U.S. institutions makes the government’s accusations against JPMorgan seem hypocritical and imperialistic.

4. The Waning Benefits of Cooperation

To be sure, the wide application of the FCPA encourages communication between the government and corporations. The current rise in voluntary disclosures, review requests, and opinion releases demonstrates what may be seen as a collaborative approach to interpreting the Act’s provisions.¹⁸¹ This frequent communication allows the government to

¹⁷⁶ See Smith & Parling, *supra* note 174, at 254.

¹⁷⁷ Cf. Levitt, *supra* note 14 (criticizing the expansion of FCPA enforcement to relationship hires).

¹⁷⁸ See Andrew Ross Sorkin, *Hiring the Connected Isn’t Always a Scandal*, N.Y. TIMES, Aug. 20, 2013, at B1 (providing examples of several prominent U.S. business leaders who may at some point have been hired because of their family connections, including the sons of Stephen Schwarzman, Jeff Kindler, and Martin Sorrell, to show that “by and large, financial firms in particular commonly hire people who have certain connections”).

¹⁷⁹ *Id.*; cf. U.S. DEPT OF JUSTICE, OFFICE OF THE INSPECTOR GEN., REPORT REGARDING INVESTIGATION OF IMPROPER HIRING PRACTICES IN THE JUSTICE MANAGEMENT DIVISION 2-5 (2012), available at <http://www.justice.gov/oig/reports/2012/s1207.pdf> (noting that at least eight employees in DOJ’s management division improperly sought positions for relatives or otherwise violated anti-nepotism policies); Terry Frieden, *Inspector General Probe Finds Nepotism in Justice Department Unit*, CNN (July 26, 2012, 5:07 PM), <http://www.cnn.com/2012/07/26/us/justice-department-nepotism>, archived at <http://perma.cc/MJB5-ZJ4E> (noting that the DOJ Inspector General found nepotism in 2004 and 2008 investigations).

¹⁸⁰ Levitt, *supra* note 14.

¹⁸¹ See Lucinda A. Low, Owen Bonheimer & David S. Lorello, *The Uncertain Calculus of FCPA Voluntary Disclosures* 2-6 (Mar. 27, 2007) (unpublished manuscript), available at <http://apps.americanbar.org/intlaw/spring07/World%20Bank%20Anticorruption%20Programs/Low%20-%20The%20Uncertain%20Calculus%20of%20FCPA%20Voluntary%20Disclosures.pdf> (discussing factors contributing to increased voluntary compliance). *But see* Stephen J. Choi &

capitalize on the informational advantage of corporations and develop more effective regulation of corporate behavior. The fruits of this communication, however, will be realized only if companies continue to cooperate with the government. A recent study examining FCPA actions from 2004 to 2011 concluded that while “[m]ore egregious and extensive FCPA violations correlate with greater penalties, as does involvement of a foreign regulator . . . [,] voluntary disclosure, as well as cooperation and remediation, are not correlated with lower FCPA penalties.”¹⁸² If additional studies or investigations report similar findings, then corporations may be less willing to continue cooperating with the government in the future, particularly if they believe that they have actually committed FCPA violations. Such a system would be inefficient because the government’s sources for information about potential violations will be limited to its own investigations and whistleblower complaints—neither of which is commensurate with corporations’ informational advantage.

CONCLUSION

DOJ and SEC investigations into the hiring practices of banks are still ongoing, and both agencies have been reluctant to share information on these investigations with the public. Regardless of the outcomes of these probes, the government’s decision to pursue these investigations without evidence of sham employment is troubling. The rationale for “relationship hire” investigations calls for an interpretation of the FCPA that exceeds the intended scope and purpose of the legislation. More importantly, this expansive reading of the Act’s provisions, coupled with rigorous enforcement, will likely impair business relations overseas, allow prosecutors to control the manner and disposition of all FCPA resolutions, and yield undesirable foreign policy consequences. The government should confront these legal and policy arguments if it intends to continue broad FCPA investigation and enforcement. In the absence of a meaningful discussion, the FCPA will less effectively eliminate public corruption and improve foreign perceptions of U.S. corporations.

Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act 20* (N.Y.U. Sch. of Law, Law & Econ. Research Paper Series, Working Paper No. 12-15, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116487 (finding no evidence showing that voluntary disclosures correlate with lower FCPA penalties).

¹⁸² Choi & Davis, *supra* note 181, at 25.