

# Choosing Between Saw and Scalpel: FCPA Reform and the Compliance Defense

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*The Foreign Corrupt Practices Act (“FCPA”) is an essential anti-corruption tool used to prosecute corporations that engage in the bribery of foreign officials overseas. Once a mere rubber stamp, over the past five years the statute has been used aggressively to prosecute wrongdoing abroad leaving many companies nervous that they may be next. Seeking to return predictability to corporations exposed to FCPA-related liability, the United States Chamber of Commerce has sought to introduce a statutory “Compliance Defense” which would serve to inoculate corporations from liability if they have implemented, at the time of wrongdoing, adequate compliance programs. This Note will argue that codifying this defense would be detrimental to the FCPA’s efficacy and to global efforts towards preventing corruption. It will utilize and expand upon an existing framework for appraising corporate liability schemes in order to demonstrate the various ways in which a Compliance Defense would damage the FCPA’s statutory machinery. Finally, it will consider alternative reforms that may address the valid concerns of FCPA critics.*

## I. INTRODUCTION

The effects of corruption in the public sector are far reaching; it is a quicksand for capital that could otherwise be put towards economically productive purposes. According to a study conducted by the World Bank Institute, about \$1 trillion per year are spent on bribes to public sector employees.<sup>1</sup> That number —

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which does not account for embezzlement, theft, and private sector bribery — represents only a fraction of money spent on “corruption” worldwide annually.<sup>2</sup> Every year, politicians and officials in developing countries receive bribes of \$20 to \$40 billion, “which is a figure equivalent to forty percent of official development assistance.”<sup>3</sup> More than just dollars, this number represents the diversion of resources from economically productive uses to nefarious ones.

The United States has been a leader in combatting corporate corruption overseas. Within its arsenal is the Foreign Corrupt Practices Act (“FCPA”), passed by Congress in 1977 in response to the growing awareness of previously undisclosed corporate payments to public officials abroad.<sup>4</sup> Shortly before Congress enacted the FCPA, a congressional investigation had identified more than three hundred corporations that had engaged in the bribery of foreign officials to procure beneficial treatment.<sup>5</sup> According to the investigation, American companies had spent more than three hundred million dollars on these corrupt payments.<sup>6</sup> The legislative record shows that Congress, embarrassed by this discovery, was apprehensive that such widespread abuse of public systems overseas would tarnish the image of American democracy, impair confidence in the financial integrity of American corporations, and hamper the efficiency of capital markets.<sup>7</sup> Additionally, the millions of dollars in bribes were left unaccounted for in corporate financial statements and audit materials, leading to various financial disclosure problems and transparency concerns.<sup>8</sup> Thus, the Act was engineered to serve at least two goals. First, to restore and maintain America’s image abroad, the FCPA

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1. *Six Questions on the Cost of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann (2001)*, WORLD BANK MEDIA MENTIONS (Feb. 14, 2013, 7:47 PM), <http://go.worldbank.org/KQH743GKF1>.

2. The Open Society Institute, *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act 18* (2011).

3. *Id.* at 19.

4. See S. REP. NO. 95-114, at 3–4 (1977), reprinted in 1977 U.S.C.C.A.N. 4098, 4101.

5. *Id.*

6. Robin Miller, *Constructions and Application of Foreign Corrupt Practices Act of 1977*, 6 A.L.R. FED. 2D 351 (2005).

7. S. REP. NO. 95-114, at 3–4, reprinted in 1977 U.S.C.C.A.N. 4098, 4101.

8. *Id.*

disallows the bribery of and corrupt payments to foreign officials.<sup>9</sup> Second, to assure proper financial disclosure, the Act refines legally prescribed accounting requirements for companies doing business overseas and their subsidiaries.<sup>10</sup> Since it was first enacted, Congress has amended the FCPA twice.<sup>11</sup> In 1988, Congress narrowed the FCPA's "knowledge" requirement for imposing criminal liability.<sup>12</sup> Since the amendment, the defendant must have "actual knowledge," "firm belief," or be "substantially certain" of the corrupt conduct to be convicted of criminal charges rather than just merely "reason to know" that the conduct took place. In 1998, Congress amended the Act in order to incorporate the International Anti-Bribery Act, which embodies various prescriptions from the Convention on Combating Bribery of Foreign Officials put forth by the Organization for Economic Cooperation and Development ("OECD").<sup>13</sup>

In recent years, the Obama Administration's Department of Justice has taken an aggressive approach towards prosecuting international bribery, harnessing the momentum of increased FCPA prosecution in the late Bush era. Between 2004 and 2010, criminal enforcement of the FCPA increased tremendously, from two enforcement actions in 2004 to forty-eight enforcement actions in 2010.<sup>14</sup> The magnitude of the fines imposed by the Justice Department and the Securities and Exchange Commission ("SEC") increased even more over this period, "including a record-setting \$800 million paid by Siemens in 2008 — \$450 million in criminal penalties and \$350 million in disgorgement."<sup>15</sup> In April 2012, specialists estimate that there were "at least 100 open in-

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9. *Id.*

10. Miller, *supra* note 6.

11. *See generally* Pub. L. No. 100-418, 102 Stat. 1107 (1988); Pub. L. No. 105-366, 112 Stat. 3302 (1998).

12. Pub. L. No. 100-418, 102 Stat. 1107 (1988). "Knowing" under the FCPA is either the (a) awareness that the third party is engaging in prohibited conduct, or that a prohibited circumstance exists or that a prohibited result is substantially certain to occur; (b) belief that the prohibited circumstance exists or is substantially certain to occur; or (c) awareness of a high probability that a prohibited circumstance exists, unless the person actually believes that the circumstance does not exist. Pub. L. No. 105-366, 112 Stat. 3302 (1998) (citing 1998 statute to describe changes made in 1988).

13. Miller, *supra* note 6; *see also* Pub. L. No. 105-366, 112 Stat. 3302 (1998).

14. Charlie Savage, *With Walmart Claims, Greater Attention on a Law*, N.Y. TIMES, Apr. 26, 2012, at B1.

15. *Id.*

vestigations” for FCPA violations.<sup>16</sup> Paul Pelletier, a former Principal Deputy Chief of the Department of Justice’s Fraud Unit — the section that enforces FCPA violations — said that the division “now had about fifteen people dedicated to [FCPA] matters, up from two in 2004.”<sup>17</sup>

Many of the world’s most prominent companies have been found to be engaging in corrupt corporate practices. In 2008, Siemens was accused of paying millions of dollars in bribes to various foreign officials, including former Argentine President Carlos Menem, in exchange for securing business contracts.<sup>18</sup> Siemens has since settled with both U.S. and German regulators by paying each country’s regulatory agency \$800 million.<sup>19</sup> In 2010, BAE systems settled with the DOJ by admitting to FCPA violations connected to billions of dollars in questionable payments to Saudi officials relating to various military supply contracts.<sup>20</sup> Daimler, Inc. paid out a total of \$185 million in civil and criminal penalties in a settlement with the DOJ, admitting to bribing officials to contract to buy cars from Daimler subsidiary Mercedes-Benz.<sup>21</sup> As a consequence of the newfound zeal in FCPA prosecution, the Act has gotten significantly more attention — from both supporters and critics.

The American anti-corruption community takes pride in the U.S.’s role in the movement to prevent bribery and encourage transparency worldwide.<sup>22</sup> When the OECD passed its Convention on Combating Bribery of Foreign Officials, the FCPA was its model.<sup>23</sup> Legislation like the FCPA encourages companies to be vigilant in ensuring that their agents take the high road, preventing a race to fill official pockets with corrupt payments. Liability

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16. Savage, *supra* note 14.

17. *Id.*

18. Leslie Wayne, *Hits and Misses in a War on Bribery*, N.Y. TIMES, Mar. 10, 2012, at BU1.

19. *Id.*

20. Nelson D. Schwartz & Lowell Bergman, *Payload: Taking Aim at Corporate Bribery*, N.Y. TIMES (Nov. 15, 2007), <http://www.nytimes.com/2007/11/25/business/25bae.html?pagewanted=all>.

21. Press Release, U.S. Dep’t of Justice, *Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay \$93.6 Million in Criminal Penalties* (APRIL 1, 2010).

22. THE OPEN SOCIETY INSTITUTE, *supra* note 2, at 19–20.

23. *Id.* at 20.

for bribery forces companies to internalize a cost that the public would otherwise bear.

Critics, on the other hand, view the FCPA as unfair to corporate interests and resulting in negative economic externalities (e.g., that the FCPA makes it difficult for companies trading on American exchanges to compete with companies abroad). Moreover, companies may face FCPA-related liability even when investing heavily in avoiding violations.

Heeding these concerns, in October 2010, the United States Chamber of Commerce (the “Chamber”), with support from industry officials and some academics, proposed a statutory amendment to the FCPA that contains a compliance defense to corporate criminal liability (“Compliance Defense”).<sup>24</sup> The Chamber posits that if a company has established a bona-fide compliance program, it should be inoculated from liability when an employee engages in an illicit payment of a government official.<sup>25</sup>

This Note will argue that the Compliance Defense urged the by the Chamber would undermine the FCPA’s objectives and should not be codified by Congress. Introducing such a defense would frustrate the FCPA’s purpose, decrease attentiveness in monitoring bribery, and impair important statutory features. A statutory compliance defense would risk neutralizing thirty-five years of progress in anti-corruption efforts worldwide. Part II will provide a primer on the FCPA, including a description of statutory sanctions, and summarize the controversy surrounding the Compliance Defense. Part III will utilize a pre-existing framework for analyzing corporate liability regimes to demonstrate why the proposed Compliance Defense would undermine important FCPA enforcement mechanisms. Part IV will discuss alternatives to the Compliance Defense that would serve similar aims while preserving effective facets of the FCPA.

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24. ANDREW WEISSMAN & ALIXANDRA SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 11–12 (2010).

25. *Id.*

## II. THE FOREIGN CORRUPT PRACTICES ACT AND “COMPLIANCE” AS A FACTOR IN DETERMINING LIABILITY

### A. BACKGROUND: THE FOREIGN CORRUPT PRACTICES ACT

The FCPA has two aims: to prevent bribery and to mandate proper financial disclosure.<sup>26</sup> The Act’s bribery provisions make it a crime for any principal or agent of an issuer of securities or entity which must make 15(d) reports,<sup>27</sup> any domestic concern, or certain persons “acting while in the territory of the United States”<sup>28</sup> to corruptly make use of the

mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to a foreign official . . . foreign political party . . . or candidate for foreign political office . . .

if the transfer of value is done for a corrupt purpose.<sup>29</sup> Similar provisions regulate conduct by U.S. citizens and corporations outside the United States.<sup>30</sup> A business entity found to violate these bribery provisions is subject to “a potential fine of \$2 million and a potential civil penalty of \$10,000, while a natural person can be subject to the same civil penalty, or fined not more than \$100,000 or imprisoned for no more than five years, or both.”<sup>31</sup>

The accounting requirements of the FCPA apply to a truncated set of businesses relative to the bribery provisions. Only issuers that have a class of securities registered pursuant to 15 U.S.C. § 781 or that are required to file reports under 15 U.S.C.

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26. The Securities and Exchange Commission, the Department of Justice and the Federal Bureau of Investigation have authority to investigate and prosecute under the FCPA. U.S. DEP’T OF JUSTICE, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 5 (Nov. 2012).

27. Section 15(d) of the Securities Act requires that issuers of securities under the act must file periodic Exchange Act reports under Section 13 of the Exchange Act. This requirement applies to both debt and equity securities. 14 U.S. SEC. LAW FOR FINANCIAL TRANS. § 6:18 (2d ed.); *see also* 15 U.S.C.A. § 78o (West 2006).

28. 15 U.S.C. §§ 78dd-1–3 (2012).

29. 15 U.S.C. § 78dd-1 (2012).

30. Miller, *supra* note 6, at 8.

31. *Id.*

§ 78o are subject to the FCPA's accounting provisions.<sup>32</sup> Such issuers must make and keep "books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of this issuer" and "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances" as specified in the statute.<sup>33</sup> "A natural person who willfully violates these provisions may be subject to criminal penalties consisting of a fine of not more than \$5 million, or imprisonment for not more than 20 years, or both, while a business entity may be subject to fine of no more than \$25 million."<sup>34</sup> For criminal liability to attach to an FCPA violation, the violation must be a "knowing one."<sup>35</sup>

Encompassing any entity that issues or proposes to issue a security, the FCPA has a very broad jurisdictional hook.<sup>36</sup> Since 1977, over 200 cases of companies in over eighty countries have been prosecuted for violations of the FCPA.<sup>37</sup> In recent years, prominent companies such as Siemens (Germany), Daimler (Germany), Alcatel Lucent (France), Kellogg Brown & Root (U.S.), have been targets of FCPA investigations. As a group, the top ten FCPA settlements in history total \$3.2 billion in penalties.<sup>38</sup>

## B. CALCULATING A CORPORATE SENTENCE

The FCPA establishes maximum fines that can be levied against a company that violates its accounting and anti-bribery provisions.<sup>39</sup> However, pursuant to the Alternative Fines Act ("AFA"), the government may charge whichever is greatest between a fine equal to twice the gross gain or gross loss from the offense, or the maximum penalty.<sup>40</sup> Through the coupling of the

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32. *Id.*; 15 U.S.C. § 78o (2012).

33. 15 U.S.C. §§ 78m(b)(2)(A)–(B) (2012).

34. Miller, *supra* note 6, at 9.

35. 15 U.S.C. § 78dd-2(a)(3) (2012).

36. 15 U.S.C. §§ 78dd-1–3 (2012); 15 U.S.C. § 78c(a)(8) (2012).

37. Ann Hollingshead, *The Cost of Bribery*, FIN. TRANSPARENCY COAL. (Nov. 23, 2011, 2:56 AM), <http://www.financialtaskforce.org/2011/11/23/the-cost-of-bribery/>.

38. Only one of the ten recent settlements in the "Top Ten" is an American company. Because all entities with securities traded on American exchanges can be prosecuted under this act, the FCPA forces its standards on foreign companies just as much as on American ones. Leslie Wayne, *Foreign Firms Most Affected by a U.S. Law Barring Bribes*, N.Y. TIMES, Sept. 3, 2012, at B1.

39. 15 U.S.C. § 78dd-2(g) (2012).

40. *Id.*; 18 U.S.C. §§ 3571(a), (d) (2012).

FCPA itself and the AFA, government enforcement agencies impose penalties and sanctions that can exceed the statutory maximums.<sup>41</sup> The fines that can be imposed on a company are far from boilerplate. Rather, the process of sanctioning an entity incorporates many factors, including those discussed in Chapter Eight of the Federal Sentencing Guidelines, which involve the sanctioning of “organizations.”<sup>42</sup>

Typically, the range of a given fine is determined by a combination of the magnitude of the offense and the blameworthiness of the defendant company.<sup>43</sup> Fines are identified through a five-step process: determining the “Base Fine,” calculating a “Culpability Score,” using the Culpability Score and the Base Fine to calculate the prospective fine range, considering certain specified characteristics of the offense which the government may deem relevant to modifying the fine range, and lastly, considering external consequences of the offense and investigation thereof.<sup>44</sup>

Looking more closely at these five steps is helpful in understanding the role of compliance. First, the gravity of the offense is computed and translated into the Base Fine,<sup>45</sup> that is, “the greatest of: (1) the amount from a table corresponding to a calculation under the individual guidelines; (2) the pecuniary gain to the [corporation] from the offense; or (3) the pecuniary loss from the offense caused by the [corporation], to the extent” that the offense was caused intentionally, knowingly or recklessly.<sup>46</sup>

Second, the culpability of the corporation is determined by considering various factors which yield a “Culpability Score.”<sup>47</sup> The computation begins with a score of five,<sup>48</sup> but may be increased depending on: “the size of the corporation, the level and

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41. David E. Dworsky, *Foreign Corrupt Practices Act*, 46 AM. CRIM. L. REV. 671, 689 (2009).

42. Jay G. Martin & Ryan D. McConnell, *How Revised Sentencing Guidelines Impact CCOs*, COMPLIANCE WEEK (May 4, 2010), available at <http://www.complianceweek.com/how-revised-sentencing-guidelines-impact-ccos/article/186734/>. See also Robert W. Tarun & Peter P. Tomczak, *A Proposal for A United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 161–65 (2010) (discussing how the Alternative Fines Act has allowed fines to exceed statutory maximums).

43. Tarun & Tomczak, *supra* note 42, at 161–65.

44. *Id.* at 161; see also JULIE O’SULLIVAN, *FEDERAL WHITE COLLAR CRIME* 209–16 (3d ed. 2007).

45. Tarun & Tomczak, *supra* note 42, at 161–65.

46. *Id.* at 161.

47. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 8C2.4 (2009)).

48. *Id.*

degree of discretionary authority of individuals who participated in or tolerated the criminal activity; whether the corporation had a fairly recent history of similar misconduct; whether the offense violated a judicial order, injunction, or condition of probation; or whether the corporation willfully obstructed or attempted to obstruct justice during the investigation, prosecution or sentencing of the offense.”<sup>49</sup> The Culpability Score may be decreased if “the offense occurred even though the corporation had in place a compliance and ethics program; or . . . the corporation self-reports, cooperates, and accepts responsibility.”<sup>50</sup> The Sentencing Guidelines provide guidance to companies with regard to the types of features that constitute a successful compliance program such that its existence would lower the company’s Culpability Score.<sup>51</sup>

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49. *Id.* at 162; *see also* U.S. SENTENCING GUIDELINES MANUAL §§ 8C2.5(b)–(e) (2009).

50. Tarun & Tomczak, *supra* note 42, at 162; *see also* U.S. SENTENCING GUIDELINES MANUAL, §§ 8C2.5(f)–(g) (2009). Opponents of a codified Compliance Defense emphasize that compliance is taken into account at all stages of the sentencing process, and thus, does not need to be codified as a sweeping defense.

51. Tarun & Tomczak, *supra* note 42, at 162. Professors Robert W. Tarun and Peter P. Tomczak highlight a few of the important criteria found in the Sentencing Guidelines:

(1) The organization shall establish standards and procedures to prevent and detect criminal conduct. (2) (A) The organization’s governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program. (B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in [the] guideline[s] . . . (3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program. (4) (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, [throughout the organization and as appropriate, the organization’s agents] by conducting effective training programs and otherwise disseminating information appropriate to such individuals’ respective roles and responsibilities . . . (5) The organization shall take reasonable steps--(A) to ensure that the organization’s compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct; (B) to evaluate periodically the effectiveness of the organization’s compliance and ethics program; and (C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization’s employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation. (6) The organization’s compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct. (7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent

There are certain considerations that would foreclose a company's opportunity to secure a lowered culpability score. In particular, "if, after becoming aware of an offense, the [corporation] unreasonably delayed reporting the offense to appropriate governmental authorities," or if high-level officials "participated in, condoned, or [were] willfully ignorant of the offense."<sup>52</sup> In effect, culpability scores can also be lowered by one, two or five points depending on a company's "degree[] of self-reporting, cooperation, and acceptance of responsibility by the corporation."<sup>53</sup> A report must be made "under the direction of" the corporation.<sup>54</sup> To lower their scores through reporting, "cooperating corporation[s] must be 'both timely and thorough' and 'disclose all pertinent information known by the' corporation to receive a downward departure under the Sentencing Guidelines."<sup>55</sup>

Once a Culpability Score is calculated, the third step is to pair it with both a minimum multiplier and a maximum multiplier, which, when "applied to the Base Fine amount[,] . . . result in a fine range."<sup>56</sup> The multipliers vary depending on the culpability score.<sup>57</sup>

Fourth, the sentencing court incorporates such factors as the company's "role in the offense, any nonpecuniary loss caused or threatened by the offense, prior [corporate] misconduct . . . not previously counted, any prior criminal record of high-level personnel in the" company, and, again, the existence of an effective compliance program.<sup>58</sup>

Lastly, in the fifth step, the sentencing court may also consider "substantial assistance to the authorities in the investigation or prosecution 'of another organization that has committed an offense, or in the investigation and prosecution of an individual not directly affiliated with the defendant who has committed an

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further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.  
U.S.S.G. § 8C2.5 (2012).

52. Tarun & Tomczak, *supra* note 42, at 163; U.S. SENTENCING GUIDELINES MANUAL §§ 8C2.5(f)(2)-(3) (2013).

53. Tarun & Tomczak, *supra* note 42, at 163; U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) (2013).

54. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 cmt. 11 (2013).

55. Tarun & Tomczak, *supra* note 42, at 164.

56. *Id.* See also U.S. SENTENCING GUIDELINES MANUAL § 8C2.6 (2013).

57. U.S. SENTENCING GUIDELINES MANUAL § 8C2.6 (2013).

58. Tarun & Tomczak, *supra* note 42, at 164; O'SULLIVAN, *supra* note 44, at 213.

offense,” “threats to national security or to a market flowing from the offense,” and “remedial costs that greatly exceed the gain from the offense.”<sup>59</sup> Thus, the fine a corporation is ultimately asked to pay reflects an analysis of the idiosyncratic characteristics of a violation, its consequences, and a company’s attempts at compliance.

### C. CRIMINAL LIABILITY

The FCPA’s criminal liability, like corporate criminal liability more generally, has been a target for many critics. At the time of the FCPA’s drafting, the relevant congressional committees concluded that the criminalization approach was preferred over a civil penalty approach because “[d]irect criminalization entails no reporting burden on corporations and less of an enforcement burden on the Government.”<sup>60</sup> The 95th Congress rooted this decision in the belief that “[t]he criminalization of foreign corporate bribery [would] to a significant extent[,] act as a self-enforcing, preventative mechanism.”<sup>61</sup>

The criminal liability associated with the FCPA leads some to be concerned that it is overbroad. Specifically, critics point to the fact that a corporation can be held criminally liable when an officer at a subsidiary engages in bribery, even if they did so in direct violation of company orders or official company policy.<sup>62</sup> As explained in the above discussion of the Federal Sentencing Guidelines, while company efforts at compliance are certainly considered by enforcement agencies, those efforts may not entirely prevent prosecution and sanction under the FCPA. Thus, regardless of the corrective protocols a company may implement, there is no legal bar to it being held criminally liable for the acts of a subsidiary’s employee. Critics desire to modify the FCPA to confront this alleged problem.

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59. O’SULLIVAN, *supra* note 44, at 215 (citing U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) (2009)).

60. S. REP. NO. 95-114 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4101.

61. *Id.*

62. Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 626–27 (2012).

#### D. THE COMPLIANCE DEFENSE AND SURROUNDING CONTROVERSY

In response to criticism that the criminal penalty is overly harsh, the United States Chamber of Commerce, among others, proposed a statutory amendment which would embody a “Compliance Defense.”<sup>63</sup> This defense would allow a company to shield itself from liability if it can demonstrate that it has a pre-established compliance program.<sup>64</sup> As a prototype of such a defense, the Chamber and others point to FCPA-like legislation in the United Kingdom and Italy that allows commercial organizations to avoid liability if those organizations have internal anti-bribery programs that contain “adequate procedures.”<sup>65</sup> The standards for such programs are defined by sets of guidelines set forth in the relevant laws.<sup>66</sup>

Before analyzing the potential consequences of a Compliance Defense, it is helpful to consider the longstanding controversy surrounding the defense. The proposed Compliance Defense is not a new idea; it has been suggested by various policy-makers and pundits since the FCPA was first enacted. Attempts at codifying the Compliance Defense started with the Export Enhancement Act of 1986, followed by the Omnibus Trade and Competitiveness Act of 1988, as well as having been advocated by numerous former DOJ and SEC officials.<sup>67</sup>

Proponents argue for a statutory Compliance Defense as a necessary amendment to the FCPA that would apply to all business organizations subject to the legislation.<sup>68</sup> Michael Koehler, an advocate for the defense, asserts that “such an amendment is best incorporated into the FCPA as an element of the bribery offense as has been done in the FCPA-like laws of certain other peer nations.”<sup>69</sup> In other words, to charge a business organization with a substantive bribery offense, the DOJ would have “the burden of establishing, as an additional element, that the company failed to have policies and procedures reasonably designed to de-

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63. WEISSMAN & SMITH, *supra* note 24, at 11–12.

64. *Id.*

65. THE OPEN SOCIETY INSTITUTE, *supra* note 2, at 31.

66. *Id.*

67. Koehler, *supra* note 62, at 632–33.

68. *Id.* at 610–11.

69. *Id.*

tect and prevent the improper conduct by non-executive employees or agents.”<sup>70</sup> Koehler and the Chamber point to the U.K. Bribery act as an example of a statutory scheme targeting corruption that includes a Compliance Defense.<sup>71</sup>

However, there are important differences between the U.K. Bribery Act and the FCPA. The U.K. version of the Compliance Defense applies to a different, broader crime than does the FCPA.<sup>72</sup> In the U.K., criminal liability can be attached to a “commercial organization” “for failure to prevent prohibited bribery by any person ‘who performs services’ for such organization.”<sup>73</sup> This means that under the U.K. act, a company can be in violation if any person with whom the company works, not only an employee, engaged in bribery.<sup>74</sup> Additionally, the crime to which the U.K.’s Compliance Defense applies contains no mens rea requirement.<sup>75</sup> Appropriately, “the U.K. Act . . . does not provide any affirmative defense of compliance for those offenses which include a mens rea requirement equivalent to the FCPA.”<sup>76</sup> Criminal penalties that accompany the U.K. act are also more extreme than those that accompany FCPA violations, including greater prison time for violators and fewer statutory constraints on fines.<sup>77</sup>

Professors David Kennedy and Dan Danielson argue that “the creation of an affirmative defense of compliance to FCPA corporate criminal liability is actually potentially very dangerous” and that an FCPA Compliance Defense “makes no sense when, as under the current FCPA, corporate criminal liability requires proof

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70. *Id.* at 630.

71. *Id.*

72. Jacqueline Bonneau, *Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement*, 49 COLUM. J. TRANSNAT’L L. 365, 389 (2011).

73. THE OPEN SOCIETY INSTITUTE, *supra* note 2, at 31.

74. Bonneau, *supra* note 72, at 390–91. The U.K. does indeed offer an affirmative defense to violators of the U.K. bribery act with adequate internal compliance regimes, but this defense is in tandem with a much more expansive strict liability statute. *Id.*

75. THE OPEN SOCIETY INSTITUTE, *supra* note 2, at 31.

76. *Id.*

77. Bonneau, *supra* note 72, at 389 (discussing how the “FCPA provides for a fine of not more than \$100,000 and a prison term of not more than five years for directors and officers,” while the U.K. Bribery Act seeks a prison term of not more than ten years and an unlimited fine for commercial organizations); *see also The United Kingdom Bribery Act 2010 — Anti-corruption Legislation with Significant Jurisdictional Reach*, LIBRARY OF CONGRESS, available at <http://www.loc.gov/law/help/uk-bribery-act.php> (last updated Aug. 3, 2012) (discussing the U.K. Bribery Act’s statutory penalties).

beyond a reasonable doubt that the company acted with actual knowledge and corrupt intent to influence a foreign government to gain an improper business advantage.”<sup>78</sup> When comparing the FCPA to the U.K. Bribery Act, they argue, it is necessary to examine each piece of legislation in its entirety rather than the treatment of “compliance” in isolation.<sup>79</sup> By requiring “knowledge” and “corrupt intent,” the FCPA represents a narrower crime than the United Kingdom’s strict liability analog.<sup>80</sup> Consequently, adding a Compliance Defense without broadening liability would leave the FCPA far less effective than the U.K. Bribery Act and less effective than it is currently.<sup>81</sup>

Some practitioners have proposed alternatives to a Compliance Defense that would not provide such expansive immunity from FCPA liability. James Doty, Chairman of the Public Company Accounting Oversight Board, asserted that FCPA “enforcement trends indicate a need for an administrative regime that would enable public companies to achieve a measure of regulatory certainty regarding compliance” given that “case-by-case enforcement is not a satisfactory substitute for a rule enabling the board and senior management to protect the corporation from vicarious liability for the actions of officers and employees.”<sup>82</sup> Doty proposed that public companies be afforded a “safe harbor,” which he calls “Reg. FCPA,” wherein it would be presumed that qualifying corporate entities have not violated the FCPA if they had established “an FCPA Compliance Program designed to prevent and detect, insofar as practicable, any violations.”<sup>83</sup> Doty envisions a mechanism by which “a company could avail itself of

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78. See generally THE OPEN SOCIETY INSTITUTE, *supra* note 2, at 31–32.

79. *Id.*

80. *Id.*

81. See *id.* Kennedy and Danielson also argue that adopting the Chamber’s proposal to amend the FCPA to include an affirmative defense for corporate compliance in the face of knowing and intentional bribery would signal to our OECD partners a significant loosening of the applicable standards of conduct for corporations under the Act as well as a major shift in policy regarding the U.S. commitment to fighting global corruption. *Id.* at 32. Koehler has responded to this argument by pointing out that “the corrupt intent element can simply be satisfied by a singular and isolated act by any employee, even if the employee’s conduct is contrary to pre-existing compliance policies and procedures.” Koehler, *supra* note 62, at 627.

82. James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233, 1234 (2007). See generally Koehler, *supra* note 62.

83. Koehler, *supra* note 62, at 629.

Reg. FCPA's safe harbor provisions by making a permissive filing with the SEC that would include the following: the company's code of conduct; joint venture and agency representations and covenants; a description of the company's communication efforts regarding the code to employees, third parties and others; and procedures for monitoring and testing the code's effectiveness."<sup>84</sup> Unlike the Compliance Defense, this safe harbor would not apply to private companies, but only to issuers.

Another approach has been advocated by Stanley Sporkin, a former Director of the SEC's Division of Enforcement in the mid-1970s and an integral player in the investigations and discoveries that led Congress to pass the FCPA in 1977. He has addressed some of the concerns about the FCPA in a 2004 speech where he argued for greater global coordination in the effort to combat corruption. The U.S., he explained, "need[s] a comprehensive assault on the problem . . . including the assistance of [the] government and indeed all the countries of the world along with the world business community, to provide a climate which enables our corporations to compete honestly and fairly throughout the world."<sup>85</sup> Sporkin proposed "the establishment of a country-by-country list of agents that have been properly vetted and have agreed to be examined and audited by an independent international auditing group."<sup>86</sup> These agents, firms performing corporate services abroad, would be required by the countries in which they operate to "perform only real and necessary services" when transacting business ensuring that "payments being made are consistent with the work performed" and "[c]ertify under oath that [the agent] has not bribed government officials to obtain the contract[.]" among other conditions.<sup>87</sup>

Koehler has identified challenges to both Sporkin and Doty's solutions.<sup>88</sup> For example, Sporkin's proposal would only be triggered after expansive and lengthy engagements of accounting firms and law firms and disclosure of accounting-legal audit re-

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84. *Id.*

85. Stanley Sporkin, The Foreign Corrupt Practices Act — Then and Now, Address at 12th National Foreign Corrupt Practices Act Conference 11 (Nov. 15–16, 2004), *available at* <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=21765&libID>.

86. *Id.*

87. *Id.* at 12. Sporkin's proposal asks that the United States seek cooperation with other governments on the issue of corruption. *Id.* at 11.

88. *Id.* at 630.

sults to government agencies.<sup>89</sup> Doty's proposal may be too narrow as it focuses only on public companies and would not apply to private corporations within the FCPA's purview.<sup>90</sup>

Though the iteration of the Compliance Defense proposed by the Chamber of Commerce has yet to be taken up by Congress, it has received considerable support from industry representatives who are increasingly nervous about FCPA liability in the age of a bullish Department of Justice. Eager for regulatory certainty, these industry representatives are pushing for compliance programs to inoculate, as a matter of law, businesses from liability violations on the parts of agents. At the same time, concerns that the creation of such a defense would chill the statute's efficacy echo the concerns of the 95th Congress, which decided, very deliberately, to infuse the FCPA with criminal liability. Opponents of the defense highlight that the SEC and the DOJ consider compliance programs as relevant factors in "every stage of the enforcement process" when engaging in settlement negotiations with FCPA violators.<sup>91</sup> They argue that agency discretion is necessary in considering compliance program adequacy. Bribery and corruption can exist in varying incarnations, and, thus, require a case-by-case approach guided by prosecutorial discretion. Defense opponents argue that some degree of regulatory uncertainty actually helps to encourage compliance.

#### E. CONSIDERING COMPLIANCE IN PRACTICE

In considering whether or not to adopt the Compliance Defense it is important to examine how the defense would function in actual FCPA enforcement actions. In 2008, Aluminum Bahrain B.S.C. ("Alba"), one of the world's largest aluminum smelters, filed suit against Alcoa, one of its aluminum suppliers, alleging a fifteen-year bribery and fraud campaign.<sup>92</sup> Alcoa was ac-

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89. *Id.*

90. *Id.*

91. THE OPEN SOCIETY INSTITUTE, *supra* note 2, at 29.

92. *Alcoa Reports a \$143 Million-dollar-loss, but Beats Analyst Expectations*, N.Y. TIMES (Oct. 9, 2012), <http://www.nytimes.com/2012/10/10/business/alcoa-reports-a-143-million-loss-but-beats-analysts-expectations.html>. There is no private right of action under FCPA, so Alba sued under RICO. Richard Cassin, *Alba Fights Alcoa's 'Home-Cooked' Scheme*, FCPA BLOG (Mar. 5, 2012, 8:28 AM), <http://www.fcpablog.com/blog/2012/3/5/alba-fights-alcoas-home-cooked-scheme.html>.

cused of spending over nine million dollars to bribe top-level officials at Alba and members of the government of Bahrain in a conspiracy to induce Alba to overpay for aluminum. This fraud was allegedly perpetrated through an Alcoa “agent”— a non-executive employee of the corporation<sup>93</sup>— in direct contradiction to Alcoa’s existing compliance program.<sup>94</sup> The DOJ, in its motion to stay the civil case for the duration of the pending criminal investigation, described Alcoa’s fraud as “outrageous.”<sup>95</sup> In 2012, Alcoa finally reached a settlement agreeing to pay Alba eighty-five million dollars in two installments.<sup>96</sup> In January 2014, Alcoa settled charges with the Department of Justice and the Securities Exchange Commission for a total of \$384 million in criminal fines, forfeiture and disgorgement.<sup>97</sup> Since this incident of bribery has come to light, the United Kingdom’s Serious Fraud Office has charged two individuals with violations of various fraud and corruption statutes, but Alcoa, the company, has been left alone.<sup>98</sup>

At the time of this conspiracy, Alcoa had had in place an aggressive compliance program. In a 2007 interview, Alcoa’s Director of Ethics and Compliance highlighted FCPA compliance as a focus of that program.<sup>99</sup> Various industry experts considered Alcoa’s compliance program to be exemplary.<sup>100</sup> If Alcoa could have taken advantage of a Compliance Defense like the one proposed by the Chamber, it is likely that Alcoa would have argued that the Defense should have protected the company from FCPA liability despite blatant violations. Proponents of the defense might argue that rare incidents of bribery are unavoidable; unbridled

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93. James Bandler & Doris Burke, *Can Alcoa Fight off the Feds?*, FORTUNE (June 31, 2012), <http://management.fortune.cnn.com/tag/victor-dahdaleh/>.

94. Dick Carozza, *An Interview with Perry A. Minnis, Alcoa’s Director of Ethics and Compliance: A Question of Ethics*, FRAUD MAGAZINE, Mar.–Apr. 2007, available at <http://www.fraud-magazine.com/article.aspx?id=522>.

95. Dep’t of Justice Mot. to Intervene or to Stay, *Aluminum Bahrain B.S.C. v. Alcoa Inc.*, 866 F. Supp. 2d 525 (W.D. Pa. 2012) (No. 08 Civ. 299).

96. *Id.* Alcoa’s settlement agreement did not include an admission of liability, despite the large settlement price. Richard Cassin, *Alcoa, Alba Settle Bribes Suit*, FCPA BLOG (Oct. 10, 2012), <http://www.fcpablog.com/blog/2012/10/10/alcoa-alba-settle-bribes-suit.html>; Dionne Searcey & John W. Miller, *Alcoa Tops Estimates, Settles Case with Bahrain Firm*, WALL ST. J. (Oct. 9, 2012), <http://online.wsj.com/article/SB10000872396390444024204578046510071860132.html>.

97. Press Release, Dep’t of Justice, *Alcoa World Alumina Agrees to Plead Guilty to Foreign Bribery and Pay \$223 Million in Fines and Forfeiture* (Jan. 9, 2014).

98. *Id.*

99. Carozza, *supra* note 94.

100. *Id.*

criminal liability will do nothing to prevent those incidents, but will nonetheless compel inefficient over-investment in compliance efforts. After all, Alcoa had already developed a model compliance program — what more could the company have done?<sup>101</sup> Moreover, burdensome prosecutions could potentially endanger whole companies as a result of misconduct by a single agent. On the other hand, the Alcoa example demonstrates that compliance programs can still be inadequate at preventing egregious bribery. To allow an affirmative defense based on their existence would grant companies repose when, instead, society should demand that they be especially vigilant.<sup>102</sup>

The Alcoa case does not yield many answers, but it does help to identify the question which any discussion of FCPA reform must address: how can liability be used to incentivize desirable conduct without sweeping up responsible companies in an enforcement dragnet? Part III will use a framework for analyzing corporate liability regimes to grapple with this question. It will demonstrate the ways in which a Compliance Defense would damage the FCPA's statutory machinery and undercut anti-

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101. *Id.*

102. In April 2012, another now notorious incident of alleged bribery came into the public eye: Walmart, the world's largest retailer, was reported by the *New York Times* to have, through its Mexican subsidiary, spent potentially over twenty-four million dollars to bribe Mexican officials over the course of several years. David Barstow, *Vast Mexico Bribery Case Hushed Up by Walmart after Top Level Struggle*, N.Y. TIMES, Apr. 22, 2012, at A1. Over a year before the discovery and publication of this bribery in the newspaper, in spring of 2011, Walmart had established a compliance program aimed at ensuring that its employees were not participating in corrupt activity. *Id.* Walmart did not self-report any discovered fraud, despite the fact that corruption permeated Wal-Mart's Mexican subsidiary. *Id.* An email produced to the DOJ and the SEC demonstrates that senior managers, including the chief operating officer of Wal-Mart's Mexican unit, had been informed of the fraud as early as 2005, but nevertheless turned a blind eye. *Id.* The bribery became more obvious after subsequent audits by KPMG, Greenberg Taurig, and later Jones Day. Stephanie Clifford & David Barstow, *Walmart Inquiry Reflects Alarm on Corruption*, N.Y. TIMES, Nov. 16, 2012, at A1. These audits located wrongdoing, but Walmart executives nevertheless made the choice not to report despite the obvious risk of not doing so. *Id.* Proponents of the Compliance Defense may point to Walmart's act of non-reporting as an example of the disincentive to report absent a guarantee of protection from liability. And yet, had Wal-Mart's compliance program been in existence at the time of the wrongdoing and detected the bribery four years earlier, would it have served the aims of the FCPA to leave Walmart's conduct immune from liability? Interestingly, Walmart has been one of the primary lobbying entities supporting the Chamber of Commerce in its push for a statutory Compliance Defense. Tom Hamburger et al., *Walmart Took Part in Lobbying Campaign to Amend Anti-Bribery Law*, WASH. POST, Apr. 25, 2012, at A1.

corruption efforts. At the same time, it will locate weaknesses in the current statutory regime.

### III. A COMPLIANCE DEFENSE WOULD ENDANGER IMPORTANT FCPA ENFORCEMENT MECHANISMS

Corporate liability is premised on the notion that entities that benefit from a given form of misconduct, be it the act of one individual or a result of corporate policy, should be liable when the practice harms the public. This notion is rooted in the age-old doctrine of *respondeat superior* wherein an employer is held vicariously liable for the acts of his/her agents. Corporate liability serves an important role in our society and should not be deployed recklessly; it is meant to place liability on the beneficiaries of misconduct and oftentimes, those best positioned to take precautionary action.

The Compliance Defense would modify the corporate liability regime embodied in the current FCPA statute. To consider the consequences of a hypothetical FCPA Compliance Defense, this Note will (1) describe a framework for analyzing corporate liability generated by Professors Jennifer Arlen and Renier Kraakman; (2) apply the Arlen-Kraakman framework to a hypothetical Compliance Defense; and (3) augment the Arlen-Kraakman framework to recognize another metric for testing the efficacy of corporate liability regimes. Application of the Arlen-Kraakman framework demonstrates that a statutory Compliance Defense to FCPA liability, such as the one proposed by the Chamber, would have detrimental effects both on the statute's anti-bribery and investor-protection goals by discouraging preventive measures, deterrence, and vigilance in monitoring.

#### A. THE ARLEN-KRAAKMAN FRAMEWORK

In 1997, Arlen and Kraakman offered a rubric to appraise various corporate liability regimes using specific enforcement mechanisms as barometers for efficacy.<sup>103</sup> Their examination compares and contrasts two fundamental types of entity liability, *strict liability* with *duty-based liability*, identifying how each type

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103. Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997).

of liability performs with regard to the identified metrics and discussing different ways to structure hybrid liability schemes. *Strict liability* describes a scheme in which a corporation or business is held liable for employee wrongdoing regardless of fault or negligence.<sup>104</sup> *Duty-based liability*, on the contrary, is liability that is based on the violation of a specifically mandated duty (for example, the duty to audit financial statements).<sup>105</sup>

The basic objective of imposing corporate liability, Arlen and Kraakman explain, is to “enhance[e] . . . social welfare by minimizing the net social costs of wrongdoing and its prevention.”<sup>106</sup> Corporate blameworthiness alone is not, and should not be, the fundamental source of liability. Often in the corporate context the true beneficiary of the employee misconduct is the corporation itself, the wrongdoer is either judgment proof or located abroad, or the corporation is in the best position to protect against wrongdoing.<sup>107</sup> Such situations make it difficult to transpose theories of liability from individual misconduct to corporate misconduct. If liability were placed solely on the agent-wrongdoer, a corporation would be incentivized to take a passive stance towards preventing undesirable behavior. For example, if the employee’s wrongdoing is detected, only the employee is punished; if, however, the employee’s wrongdoing goes unnoticed, both the employee and corporation may reap the rewards of the misconduct. Thus, the corporation would share none of the risk, but could easily be the primary beneficiary of the corrupt payment. At the same time, because corporate entities are essential players in the global economy, liability should not distort the ability of corporations to function across borders and contribute to overall economic growth.

For these reasons, corporate liability needs to be engineered carefully to ensure the creation of desired incentives and avoid incidental negative corollaries. As Arlen and Kraakman suggest, unlike individual liability, corporate liability should induce firms to both “select efficient levels of productive activity *and* to implement enforcement measures that can minimize the joint costs of

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104. *Id.* at 689. Before the 1991 Federal Sentencing Guidelines were established, strict-liability had historically been the standard sort of entity liability in the United States. *Id.* at 689–90.

105. *Id.* at 690.

106. *Id.* at 691.

107. *Id.* at 695–96.

misconduct and enforcement.”<sup>108</sup> Their framework is uniquely helpful because it deconstructs liability regimes and locates the avenues through which such regimes motivate certain behaviors.

### 1. *The Arlen-Kraakman Metrics*

Specifically, Arlen and Kraakman identify four enforcement mechanisms through which corporate liability effectuates the two aforementioned goals: *internal sanctioning*, *prevention measures*, *policing measures*, and *credibility*.<sup>109</sup>

First, corporate liability encourages companies to punish misconduct internally.<sup>110</sup> Enforcement costs for the government are typically lower if firm-level sanctioning procedures are in place because, *inter alia*, they provide an equivalent deterrent effect on employees as do government-level sanctions (if not more so).<sup>111</sup> The company is better positioned to effectuate punishment for misconduct as compared to a regulatory agency which would have to conduct a cumbersome investigation to do so.

Second, companies can implement “preventive measures” making it more “difficult or expensive” for potential wrongdoers to commit misconduct. Such preventive measures can “rang[e] . . . from personnel policies — for example, firing price fixers and raising the salaries of law-abiding managers — to sophisticated financial controls, screening procedures, and similar mechanisms for limiting agents’ opportunities to commit misconduct.”<sup>112</sup> These restraints can make misconduct less appealing to wrongdoers, as they signal that authorities within the company will not view that conduct favorably.<sup>113</sup> Preventative strategies have the common effect of “reduc[ing] the returns or increas[ing] the costs of misconduct to culpable agents — and so enhance deterrence — without affecting the probability that the firm is sanctioned.”<sup>114</sup>

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108. *Id.* at 697. (emphasis added).

109. *Id.* at 699.

110. *Id.* at 700–01.

111. A. Mitchell Polinsky & Steven Shavell, *Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?*, 13 INT’L REV. L. & ECON. 239, 240 (1993).

112. *Id.*

113. Arlen & Kraakman, *supra* note 103, at 692–93.

114. *Id.* at 693.

Third, corporate liability may increase the chances that individuals guilty of misconduct will be discovered and sanctioned through increased “policing measures.”<sup>115</sup> Monitoring, auditing, identifying, and investigating misconduct may be much easier for firms than for government officials.<sup>116</sup> With the prospect of being held accountable for the actions of their agents, companies are likely to be vigilant in sniffing out and even reporting that misconduct.<sup>117</sup> In this way, policing measures are able to “serve as a deterrent by ensuring that culpable agents will be officially prosecuted once misconduct is detected.”<sup>118</sup>

Lastly, corporate liability can be perceived as an “enforcement bond,” ensuring the credibility of monitoring and policing in the eyes of agents, who presumably understand that their company has an incentive to follow through with the self-regulatory mechanisms in an effort to avoid the more costly government sanctions.<sup>119</sup>

## 2. *Comparing Strict and Duty-Based Liability Through The Arlen-Kraakman Framework*

Arlen and Kraakman claim that these four enforcement metrics — encouraging private sanctioning, inducing prevention measures, inducing policing measures, and enhancing credibility — “can be arrayed on a spectrum according to whether they favor strict or duty-based corporate liability.”<sup>120</sup> To encourage internal corporate sanctioning, strict liability is the most effective liability regime.<sup>121</sup> In a duty-based regime, corporations will only sanction to the extent that such action is mandated by statute.<sup>122</sup> Given the aforementioned incentives for companies to be passive towards employee wrongdoing absent the prospect of liability, a firm likewise has no incentive to aggressively punish wrongdoing if not directed to do so by law.

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115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 694.

121. *Id.* at 699–700.

122. *Id.*

Strict liability “ordinarily dominates duty-based liability as a means of inducing preventive measures.”<sup>123</sup> Finding the correct mixture of preventive and punitive measures requires a detailed understanding of a company,<sup>124</sup> so it would be challenging for the government to effectively prescribe a duty befitting of each individual corporate context. Arlen and Kraakman also found that strict liability is better than duty-based liability as a strategy to encourage companies to use “carrots and sticks.”<sup>125</sup> Company policy regarding compensation, promotion and discharge can be customized to ensure appropriate conduct.<sup>126</sup> Because strict liability prevents a firm from benefiting or profiting from *any* wrongdoing, it extinguishes any firm-level incentives to let misconduct go unpunished.<sup>127</sup>

By contrast, a duty-based regime would only be able to encourage the sort of preventative mechanisms which would fall within the ambit of an explicit duty.<sup>128</sup> This type of prevention would naturally be narrower than the broad sort offered through a strict liability regime. Arlen and Kraakman note that any specific duty “would inevitably miss other inducements too subtle to be identified or too diffuse to be barred.”<sup>129</sup> They explain that “[d]uty-based liability could hardly eliminate all incentives to commit misconduct arising from diffuse pressures to increase corporate profits.”<sup>130</sup> A duty-based liability regime would have to be sufficiently complex and granular to apply to a diverse set of corporate circumstances to achieve results comparable to those achieved by a strict liability regime — a difficult if not impossible mission. Additionally, appraisals of duty-based regimes by courts may be prone to judicial error.<sup>131</sup> Compensation and promotion schemes are complicated and even legitimate ones may inci-

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123. *Id.* at 701–03.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 704 (“This will be the case, for example, if an agent’s compensation is tied to long-run firm profits and his only motivation for committing a particular wrong is to increase his salary by increasing long-run profits. In this situation, holding the firm strictly liable for the agent’s wrongdoing—with an expected sanction equal to the social cost of the wrong to others—will deter the agent by ensuring that the firm, and thus the agent, does not benefit from the wrongdoing.”).

128. *Id.* at 705.

129. *Id.*

130. *Id.*

131. *Id.*

dentally reward misconduct that has generated profits.<sup>132</sup> Arlen and Kraakman point out that by contrast, “strict liability does not require courts to distinguish legitimate from illegitimate firm behavior.” Strict liability is preferable in some cases because it ensures that the firm does not receive a net benefit from wrongdoing (provided the firm is solvent), it taps the firm’s own information about preventive strategies, and it minimizes the informational burden on courts and regulators.<sup>133</sup>

With regards to the “policing” mechanism of enforcement, however, strict liability is not optimal. For the purposes of policing, duty-based liability is most effective because strict liability can trigger “perverse effects.”<sup>134</sup> Strict liability “only encourages policing measures insofar as they reduce the incidence of misconduct, but it . . . discourages them insofar as they increase the firm’s expected liability for undeterred misconduct.”<sup>135</sup> That is, companies will be reluctant to be proactive in monitoring and reporting if these activities will enhance their exposure to liability. The corporation may wager that unless it detects its own misconduct, no external entity will do so independently. This phenomenon results from the fact that no matter how zealously a company polices its employees, it will likely be unable to avoid, with certainty, all misconduct by its agents.<sup>136</sup> Assuming that some misconduct will occur in spite of company efforts at compliance, Arlen and Kraakman argue that policing measures can affect the firm’s expected liability in two ways.<sup>137</sup>

On one hand, they can deter some misconduct by increasing the expected liability of culpable agents, thereby reducing the firm’s expected liability (the deterrent effect). On the other hand, they can increase the probability that the government will detect and sanction the residual offenses that occur in spite of a corporation’s efforts, thereby increasing the firm’s expected liability (the

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132. Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1539 (1984).

133. Arlen & Kraakman, *supra* note 103, at 705. Arlen and Kraakman note that in some cases “duty-based liability can be the equal of strict liability as a method for inducing firms to adopt preventive measures when courts and enforcement officials can cheaply and accurately identify the appropriate measures (which are presumably related to the firm’s compensation policies)”; see also Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 886 (1994).

134. Arlen & Kraakman, *supra* note 103, at 707.

135. *Id.*

136. *Id.* at 707–08.

137. *Id.* at 708.

liability enhancement effect). For example, policing measures increase the firm's expected liability if either the firm or its agents report detected wrongdoing to the government or if the government independently suspects a wrong and uses its broad search and subpoena powers to obtain the firm-gathered information for use against it. If the liability enhancement effect exceeds the deterrent effect, then a firm subject to strict liability will not undertake policing measures, regardless how large a fine is imposed, because policing measures only increase its expected liability. In this situation, increasing the sanction only decreases the firm's incentives to police.<sup>138</sup>

For policing, duty-based liability is preferable to strict liability because it permits companies that monitor and report to mitigate their own liability. Such a regime does not generate the perverse effects of a strict liability regime because duty-based liability creates an escape hatch for companies who have detected agent misconduct.<sup>139</sup> By blowing the whistle on themselves, companies can reduce the risk of a large sanction so long as they have fulfilled their legal duty. However, Arlen and Kraakman warn that duty-based systems are only as effective as the contours of the duty set by enforcement agencies and courts: "if the standard of care is set too low, firms will monitor or investigate too little; if it is too high, they will police too much."<sup>140</sup>

Nevertheless, there are circumstances where traditional strict liability *can* yield desirable policing effects. Arlen and Kraakman believe this is possible when "the deterrent effect exceeds the liability enhancement effect."<sup>141</sup> However, attempts to create the appropriate balance of these two effects may undermine other enforcement mechanisms. For example, reducing a sanction in order to dampen the "liability enhancement" effect may undercut economic incentives for the company to sanction internally or to implement preventative mechanisms.<sup>142</sup> Thus, by creating a strict liability regime which optimizes policing effects, a statute's efficacy in other areas can be compromised.<sup>143</sup>

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138. *Id.* at 707–08.

139. *Id.* at 710; *see also* Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279 (1986).

140. Arlen & Kraakman, *supra* note 103, at 711.

141. *Id.* at 709.

142. *Id.* at 710.

143. Arlen and Kraakman explain:

Due to the diverse goals of most public protection statutes, and the need to optimize all four enforcement mechanisms, Arlen and Kraakman conclude that features of both duty-based and strict liability regimes should be incorporated into a statutory scheme. They find that to promote the sanctioning of agents or to adopt preventive measures, strict liability is best.<sup>144</sup> On the other hand, duty-based regimes — under which a firm is liable only if it failed to take appropriate actions to discourage wrongdoing — is more effective where liability is used to encourage company policing, monitoring, investigating, and reporting.<sup>145</sup> That said, a duty-based liability scheme allows a “firm to avoid liability for the full [social costs] of their employees’ actions simply by acting reasonably or taking ‘due care.’”<sup>146</sup> Nevertheless, given that both of these types of entity liability are useful in achieving the goals of this legislation, a truly optimal regime is a “composite liability” regime that hybridizes both classes of liability and harnesses their relative strengths.

To be efficient, Arlen and Kraakman explain that a composite regime necessitates at least two liability levels: “a default [(strict liability)] and a residual liability level.” If a corporation has made sufficient efforts to avoid malfeasance, they will also avoid the default liability and be exposed only to residual liability. Essentially, they will still be sanctioned, but that sanction will be reduced. A composite regime could also be constructed to have several intermediate levels of liability that allows for particularized systems of rewards for various policing duties such as reporting or punishing wrongdoing.<sup>147</sup>

The Federal Sentencing Guidelines used to calibrate sanctions for FCPA violations, described in Part I *supra*, are an example of

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[W]hen firms police optimally, the sanction must equal the social cost of wrongdoing,  $h$ , divided by the optimal probability of detection,  $p^*$ :  $h/p^*$ . In order to induce optimal policing, however, the sanction imposed must exceed  $h/p^*$  in order to ensure that the net benefit to the firm of additional policing — net of the liability enhancement effect — equals the social cost of the wrongs deterred. The actual expected liability per wrong thus must exceed the expected social cost of these wrongs in order to adjust for the liability enhancement effect. Yet employing such a sanction undermines other liability goals by inducing the firm to invest excessively in prevention measures and reducing the firm’s output to suboptimal levels.

*Id.* at 709–10 (internal citations omitted).

144. *Id.*

145. *Id.*

146. *Id.* at 692.

147. *Id.* at 735.

a composite regime because they dictate that a company will still remain subject to a degree of “residual criminal liability” even if it qualifies for full mitigation.<sup>148</sup> At the same time, the Federal Sentencing Guidelines do not prevent law enforcement agencies such as the Department of Justice from adopting policies that approach — though do not quite reach — “insulating firms from criminal prosecution when they report wrongs before the government discovers them, take prompt remedial action, and . . . institute an intensive and comprehensive compliance program.”<sup>149</sup>

### 3. *Applying the Arlen-Kraakman Framework to a Hypothetical FCPA Compliance Defense*

A Compliance Defense would effectively transform the FCPA’s current composite regime to a duty-based regime. Permitting FCPA liability only when a company lacks an effective compliance program would, in essence, create a legislative “duty” to have such a program. Consequently, a Compliance Defense would import all of the negative consequences generated by a duty-based regime.

Internal corporate sanctioning would not be encouraged through a Compliance Defense. If a corporation is inoculated from liability through the existence of a compliance program, there is no incentive for the firm to undertake any additional potentially costly measures to penalize its employees. The government would be left to mandate any desired sanction in the text of the statute.

The Compliance Defense eliminates financial motivations for a company to prize employees who do not engage in bribery. If a company’s compliance program meets the legislated standard, that company will not face a risk of sanctioning. And, without the prospect of government sanctioning, an employer is unlikely to see the benefit in rewarding the law-abiding activities of their employees through promotion or enhanced compensation. Companies would be able to shirk liability for agent misconduct even if that misconduct could have been avoided with a greater effort.

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148. *Id.* at 745–46.

149. *Id.*; Laurence A. Urgenson, *Voluntary Disclosure: Opportunities and Issues for the Mid-1980s*, 943 PLI/CORP 225 (June 1996).

It is precisely this reasoning that supported the introduction of criminal liability to the original legislation.<sup>150</sup>

The credibility of a corporation's attempts at self regulation would also likely be compromised. Employees would presumably know and understand that their company would not be penalized for agent misconduct in the presence of a satisfactory compliance program. Effectively, employees of a company would realize that the government had laid down its "stick." This would encourage risk taking on the part of employees if they perceive certain misconduct to be potentially profitable and unlikely to be detected. Thus, for the purposes of private sanctioning, preventive measures, and maintaining the credibility of company policy regarding bribery, a Compliance Defense would neutralize the relevant incentives, leaving the FCPA impotent in using those mechanisms to prevent bribery abroad.

As discussed previously, one mechanism could ostensibly be enhanced through the Compliance Defense: improved policing. As advocates of the Compliance Defense claim, the defense would mitigate the "perverse effects" of strict or composite liability on an enforcement regime. That is, it would allow duty-abiding companies to self-report and monitor without the fear of enhancing their own liability.<sup>151</sup> However, the Compliance Defense may not be the most effective strategy at encouraging either self-reporting or monitoring. There are other strategies such as reporting incentives, whistleblower incentives, or a private right of action discussed in Part IV *infra*, that achieve the same results without throwing a wrench in the rest of the FCPA machinery. Additionally, while self-reporting is traditionally an important way that the government learns of misconduct, it is increasingly less important because the government has been cooperating more with foreign enforcement agencies and has been increasingly successful at encouraging whistleblowers to come forward by

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150. See S. REP. NO. 95-114, at 3-4, reprinted in 1977 U.S.C.C.A.N. 4098, 4101.

151. But see THE OPEN SOCIETY INSTITUTE, *supra* note 2, at 32 (arguing that the duty to ensure appropriate mechanisms guaranteeing "adequate reporting up the chain of command and compliance with applicable law has its roots in the most basic requirements of corporate law — the fiduciary duty of managers to act in good faith and in the best interests of the corporation in the oversight of a company's operations. The fundamental fiduciary duty of due care and oversight requires company management to adopt appropriate reporting mechanisms reasonably designed to bring malfeasance by employees and representatives to light as well as compliance mechanisms designed to ensure compliance with the company's legal obligations under applicable law").

offering protections and compensation.<sup>152</sup> Discussing FCPA prosecutions, Lanny Breuer, former Assistant Attorney General of the DOJ's Criminal Division, recently explained that

the majority of [the DOJ's FCPA] cases do not come from voluntary disclosures. They are the result of pro-active investigations, whistleblower tips, newspaper stories, referrals from our law enforcement counterparts in foreign countries, and our Embassy personnel abroad, among other sources.<sup>153</sup>

In fact, a recent case, Avon's bribery of officials in China and elsewhere, first came to the attention of the DOJ through a whistleblower.<sup>154</sup> Therefore, the importance of "self-reporting" to the FCPA enforcement machinery may decrease over time.

In sum, of the four enforcement metrics analyzed by Arlen and Kraakman — encouraging private sanctioning, inducing prevention, inducing policing measures, and enhancing credibility — only inducing certain policing measures would be enhanced by the Compliance Defense. The other mechanisms of private sanctioning, inducing prevention measures, and credibility would suffer under the proposed Compliance Defense.

#### B. AUGMENTING THE ARLEN-KRAAKMAN FRAMEWORK

While the Arlen-Kraakman framework provides useful guidance in analyzing corporate liability, there is at least one other mechanism through which corporate liability effectuates its goals. "Signaling," whereby the publicity attached to a given corporate investigation generates caution and prudence among other similarly exposed corporations, is another mechanism through which the "enforcement goal" of corporate liability is achieved. Many scholars have demonstrated how public shaming of corporations

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152. Lanny A. Breuer, Assistant Attorney Gen., DOJ Criminal Div., Prepared Address to the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009) [hereinafter Breuer, FCPA Address] at 4, available at <http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf>.

153. *Id.* at 3.

154. Joe Palazzolo, *FCPA INC.: The Business of Bribery*, WALL ST. J. (Oct. 2, 2012), available at <http://online.wsj.com/article/SB10000872396390443862604578028462294611352.html>.

guilty of misconduct can be an effective deterrent for the corporations themselves.<sup>155</sup> But the publicity surrounding large penalties and painful investigations can also have a deterrent value for *other* would-be wrongdoers.<sup>156</sup> For example, Peter Solmssen, General Counsel at Siemens — the company which has paid the largest FCPA settlement to date — has explained to the press that other European companies are opening their eyes to the prospect of being charged in FCPA matters because of the widespread media coverage of the Siemens case.<sup>157</sup> In the context of the FCPA, a duty-based liability like the regime that would result from a hypothetical Compliance Defense would serve a limited signaling function because each individual corporation would present an idiosyncratic case of duty-violation and would not therefore result in broad-scale deterrence. Strict liability, or at least composite liability, would be much more effective in signaling to other corporations with operations abroad that they should take precautions to avoid employee-level bribery and avoid damaging investigations in the United States.

#### IV. ALTERNATIVES TO A COMPLIANCE DEFENSE

Despite the aforementioned criticisms of the Compliance Defense, its advocates are correct in drawing attention to some of the drawbacks of the current regime. Currently, companies may be reluctant to report discovered wrongdoing if the prospective sanction is great and the likelihood of independent government detection is small.<sup>158</sup> In an era of “heightened regulatory scrutiny, in-house counsel often grapple with the very difficult question of if or when they must self-report an issue to the government.”<sup>159</sup> According to the Arlen-Kraakman model summarized above, a company will disclose wrongdoing to an enforcement agency when

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155. See generally Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 371 (1999) (arguing that shaming plays an important enforcement function as a result of, among other things, damage to reputation); see also David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811(2001) (discussing the ways in which shaming can be harnessed to produce desired enforcement effects).

156. Skeel, *supra* note 155, at 1816.

157. Wayne, *supra* note 18.

158. Tarun & Tomczak, *supra* note 42, at 154.

159. Richard Marshall, *Uuuhhh, Look, We Messed Up Here: When It's Time for GCs to Just "Fess Up"*, CORP. COUNSEL, Jan. 28, 2010.

the expected fine imposed upon the corporation if it fails to self-report equals or exceeds the expected the fine if it does.<sup>160</sup> Tarun and Tomczak point out that “[i]n light of the mega-fines increasingly being imposed on corporations for serious violations of the FCPA, the decision on whether to self-report detected FCPA misconduct remains complex, and not necessarily answered in the affirmative.”<sup>161</sup> Although companies certainly receive some benefits for self-reporting FCPA violations, the real inquiry is “whether the company considering a voluntary disclosure is better off for having made the disclosure, which is not necessar[ily] one-and-the-same.”<sup>162</sup> While self-reporting corrupt payment activities results in nebulous benefits, it “does assure that law enforcement will know of the misconduct and, thus, in many instances, some sanction will be imposed.”<sup>163</sup>

Another potential obstacle to increased self-reporting are the occasionally conflicting interests of corporate decision makers and the corporation as a whole. Absent a government guarantee to the contrary, when individual directors and officers self-report on behalf of their companies, they run the risk of exposing themselves and/or their coworkers to criminal liability for the acts of their agents. On one hand, the specter of individual liability may not seem so threatening: the DOJ has prosecuted few individuals for FCPA violations.<sup>164</sup> Additionally, in its recently published FCPA guide, the DOJ asserts that, if it chooses to prosecute at all, it will reward cooperation by individuals and corporations by seeking lower sentences and potentially offering plea agreements.<sup>165</sup> Nevertheless, recent cases may give some directors pause. In *United States v. Kozeny*, the United States Court of Appeals for the Second Circuit affirmed a conviction of Frederic Bourke, co-founder of the luxury brand Dooney & Bourke, explaining that Bourke could be held liable on a theory of “conscious avoidance.”<sup>166</sup> Moreover, the court commented that “[i]t is not

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160. Arlen & Kraakman, *supra* note 103, at 728.

161. Tarun & Tomczak, *supra* note 42, at 194.

162. American College of Trial Lawyers, *Recommended Practices for Companies and their Counsel in Conducting Internal Investigations*, 46 AM. CRIM. L. REV. 73, 81 (2009).

163. Tarun & Tomczak, *supra* note 42, at 154.

164. Mike Koehler, *The Foreign Corrupt Practices Act Under the Microscope*, 15 U. PA. J. BUS. L. 1, 21 (2012).

165. U.S. DEP'T OF JUSTICE, *supra* note 26, at 54.

166. 667 F.3d 122, 134 (2d Cir. 2011), *cert. denied*, 12-531, 2013 WL 1500234 (U.S. Apr. 15, 2013) (citing *United States v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000)) (“con-

uncommon for a finding of conscious avoidance to be supported primarily by circumstantial evidence.”<sup>167</sup> Ultimately, Bourke was sentenced to one year and a day in prison. The prospect of such individual liability may generate a tension between a director’s desire not to self-incriminate and the corporate interest in securing the benefits of self-reporting.

There are circumstances, then, when a company acting “rationally” with regards to its economic interests, or a director fearful of criminal liability, may attempt to remedy bribery internally rather than inform the government of discovered misconduct. However, self-reporting is undeniably valuable because it helps lower the cost of FCPA enforcement and ensures that misconduct is punished.<sup>168</sup> As Tarun and Tomczak emphasize, “[t]hese savings are considerable in regards to FCPA investigations, which ‘are the most challenging of all corporate investigations because the potential misconduct is serious, many countries in which most misconduct may have occurred are distant and tolerant of corruption, interviewees are frequently hostile and indifferent to U.S. laws, and, in limited cases, there is personal risk to investigating counsel.’”<sup>169</sup> Still, there are at least three other ways to encourage or replace the need for self-reporting which do not have the same deleterious effects as a Compliance Defense: reward the act of reporting, not the act of compliance; provide greater protections to whistleblowers; or incorporate a private right of action into the FCPA statute.

#### A. TO ENCOURAGE REPORTING, REWARD REPORTING AND NOT COMPLIANCE

To encourage self-reporting, the DOJ uses a variety of plea incentives in dealing with cooperators including: “deferred prosecution agreements; non-prosecution agreements; felony conviction of a subsidiary in lieu of the parent company; periodic payments;

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scious avoidance instruction permits a jury to find that a defendant had culpable knowledge of a fact when the evidence shows that the defendant intentionally avoided confirming the fact.”).

167. *Kozeny*, 667 F.3d at 134.

168. Tarun & Tomczak, *supra* note 42, at 155–56.

169. *Id.*; ROBERT W. TARUN, THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK: A PRACTICAL GUIDE FOR MULTINATIONAL GENERAL COUNSEL, TRANSACTIONAL LAWYERS & WHITE COLLAR CRIMINAL PRACTITIONERS 161 (2010).

and books and records and internal controls violations instead of bribery violations.”<sup>170</sup> Nevertheless, it is not clear how the government determines which sets of incentives to provide a cooperating company. After all, this is a process that is subject to prosecutorial discretion. Additionally, the determinations to use plea incentives are generally made after long and extensive investigations, making the benefits of reporting unclear *ex ante*.<sup>171</sup>

Deputy Assistant Attorney General Scott D. Hammond, head of the Department of Justice’s Antitrust Division’s enforcement program and contributor to the development of the Antitrust Corporate Leniency Program, writes that: “[a] key component in the success of the [Antitrust] Division’s cartel enforcement program, particularly the Corporate Leniency Program, is transparency and predictability.”<sup>172</sup> Mr. Hammond has further observed that “[i]f companies cannot confidently predict how an enforcement authority will apply its leniency program, [they] may ultimately decide against self-reporting and cooperation.”<sup>173</sup>

For all of these reasons, Tarun and Tomczak propose that the Department of Justice create a program for FCPA that mirrors the antitrust division’s Corporate Leniency Program. Their proposal asks that companies be given clear and obvious rewards for self-reporting. Such a scheme incentivizes policing, investigating and reporting much as a Compliance Defense would, but it does not neutralize the benefits of a strict or composite liability system with regard to private sanctioning, preventive measures, and credibility.

Additionally, self-reporting could be incentivized by providing a “safe harbor” that excuses directors and executives from *criminal* liability if they self-report and have not *themselves* partici-

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170. Tarun & Tomczak, *supra* note 42, at 214; *see, e.g.*, Deferred Prosecution Agreement, United States v. Willbros Grp. Inc., No. H-08-287 (S.D. Tex. May 14, 2008); United States v. Diagnostic Prods. Corp., No. 05-cr-482 (C.D. Cal. 2005).

171. Tarun & Tomczak, *supra* note 42, at 214.

172. Scott D. Hammond, Deputy Assistant Attorney Gen. for Criminal Enforcement, DOJ Antitrust Div., Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Address at the 54th Annual ABA Section of Antitrust Law Spring Meeting (Mar. 29, 2006), *available at* <http://www.justice.gov/atr/public/speeches/215514.pdf>.

173. Tarun & Tomczak, *supra* note 42, at 190–91; Scott D. Hammond, Director of Criminal Enforcement, DOJ Antitrust Division, Cornerstones of an Effective Leniency Program, Presented at the ICN Workshop on Leniency Programs (Nov. 22–23, 2004) [hereinafter Hammond, Cornerstones], *available at* <http://www.justice.gov/atr/public/speeches/206611.pdf>.

pated in the misconduct.<sup>174</sup> Such a strategy may correct for the current tension between corporate and directors' individual interest in making the decision to self-report. Moreover, such a "safe harbor" aligns enforcement goals with director interests, *even* in a context when an economically "rational" corporation might be incentivized not to report. That being said, any reporting incentive will walk a fine line between promoting proper conduct and providing too much protection to individuals associated with wrongdoing. Only a carefully designed and highly nuanced program will be able to succeed at both preventing widespread corruption and rewarding desirable conduct upon discovery of incidents of bribery.

#### B. PROVIDE GREATER PROTECTION TO WHISTLEBLOWERS

The Sarbanes-Oxley ("SOX") act has been credited with increased FCPA enforcement efforts.<sup>175</sup> Among the Act's many mandates to tighten internal controls and improve corporate governance, SOX also provides whistleblowers with increased protection.<sup>176</sup> In particular, Section 806 of SOX incentivizes FCPA whistleblowing: it creates a right of action for employees who are retaliated against for reporting misconduct.<sup>177</sup> However, in a case of first impression, the United States Court of Appeals for the First Circuit held that Section 806 of SOX did not have extraterritorial reach and thus did not protect whistleblowers overseas.<sup>178</sup> If enforcement agencies and Congress want to encourage whistleblowing by foreign employees working for publicly held companies, they should extend whistleblower protections, such as Section 806, to such employees.<sup>179</sup> Doing so would help regulators in identifying corporate misconduct, but would also encourage self-reporting by companies fearful of protected whistleblowing.

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174. This "safe harbor" is not to be confused with that discussed in Part I which focuses on corporate liability generally, rather than criminal liability for individuals.

175. Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 438 (2009).

176. *Id.* at 478–79.

177. *Id.*

178. *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2006); *see also* Vega, *supra* note 175, at 487–88 (arguing for extraterritorial application of Section 806 of the Sarbanes-Oxley act).

179. Vega, *supra* note 175, at 487–88.

### C. INCORPORATE A PRIVATE RIGHT OF ACTION INTO THE FCPA STATUTE

Courts have determined that the FCPA does not include an implied private right of action.<sup>180</sup> However, a private right of action under the FCPA would allow regulators to outsource some investigative functions, and consequently not rely as heavily on self-reporting. Additionally, as with whistleblowing, private rights of action could actually *encourage* self-reporting because companies would want to hedge against the chance that regulators would learn of misconduct through private litigation. An example of this is described mentioned in Part II, *supra*. Alcoa, an Aluminum supplier was first sued for corruption and bribery by Alba, a Bahraini aluminum smelter — in violation of Racketeer Influenced and Corrupt Organizations Act, not the FCPA — before the DOJ investigation of Alcoa's FCPA violations began.<sup>181</sup> It is certainly likely that those with greater information, such as individuals and companies harmed by bribery, are in a better position to initiate FCPA lawsuits. An unfortunate consequence of this approach would be to open the floodgates of litigation to all sorts of FCPA suits, both frivolous and not. For this reason, the two aforementioned alternatives may present better solutions to problems with the current FCPA regime.

## IV. CONCLUSION

Recent zeal in FCPA enforcement has made American companies and all publicly traded corporations anxious as they audit their ever-increasing overseas subsidiaries. As a result, the business community has advocated numerous strategies in making FCPA investigation and enforcement more coherent and thus more predictable to corporate boards and executives. Currently, corporate decision makers may sometimes face perverse incentives not to report themselves to regulators, as the choice to re-

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180. Scientific Drilling Int'l, Inc. v. Gyrodata Corp., Nos. 99-1077, 99-1084, 1999 WL 674511 (Fed. Cir. Aug. 30, 1999); Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1025 (6th Cir. 1990); McLean v. Int'l Harvester Co., 817 F.2d 1214, 1219 (5th Cir. 1987); Castellanos v. Pfizer, Inc., No. 07-60646-CIV, 2008 WL 2323876 (S.D. Fla. May 29, 2008); J.S. Serv. Ctr. Corp. v. Gen. Elec. Technical Serv. Co., 937 F. Supp. 216 (S.D.N.Y. 1996); Citicorp Int'l Trading Co. v. W. Oil & Refining Co., 771 F. Supp. 600 (S.D.N.Y. 1991).

181. Cassin, *supra* note 96.

port can be a gamble. While the desire for clarity in the FCPA enforcement process is legitimate, the Compliance Defense is not a suitable strategy. Creating a statutory Compliance Defense would cripple important enforcement mechanisms such as internal sanctioning, preventive measures and credibility. Alternative strategies that focus either on rewarding reporting or eliminating regulator reliance on self-reporting are superior reforms and should be considered by Congress.