FALLACIES IN THE CURRENT METHODS OF PROSECUTING INTERNATIONAL COMMERCIAL BRIBERY

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TABLE OF CONTENTS

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INTRODUCTION

In the mid-1970s, investigations by the Office of the Watergate Special Prosecutor, Securities and Exchange Commission (SEC), and Senator Frank Church's Subcommittee on Multinational Corporations (Church Committee), led to the discovery of several illegal foreign

payments by U.S. corporations.[1] These payments included bribery of foreign government officials or foreign political parties in connection with a business purpose.[2] At the time, the focus of the investigations was not the illegality of the payments but whether their non-disclosure to shareholders resulted in the violation of the securities laws of the United States.[3] In reaction to the investigations, Congress enacted the Foreign Corrupt Practices Act (FCPA)[4] to combat and prohibit the payment of bribes to foreign public officials by U.S. businesses.[5]

Today, FCPA compliance is one of the primary features of any corporate compliance program.[6] Corporations allocate a huge amount of resources and internal compliance checks to ensure that the FCPA is not violated.[7] However, the FCPA was a reactive legislation and Congress did not take private bribery (i.e., bribery of non-public officials) into account when it was drafted.[8] While the FCPA addresses bribery of public officials internationally, the United States does not have a comprehensive statute that specifically addresses commercial bribery internationally.[9]

Commercial bribery shares various characteristics with public bribery, including payments intended to influence the judgment of an individual for personal gain or benefit.[10] However, a key distinction is that the recipient of the payment in public bribery is a government official and the recipient of a private bribe is an individual who is not related to the government. As discussed in Part I of this Note, this distinction between the recipients is insufficient to warrant different treatments of public and private international bribery.

Part II of this Note highlights the inadequacies in the current legislative regime in tackling international commercial bribery as contrasted against the prosecution of international public bribery under the FCPA. In the absence of a specific federal statute, a number of other

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1 Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 932 (2012).

2 *Id.* at 934–35.

3 *Id.* at 932–33.

4 15 U.S.C. §§ 78dd-1 to -3 (2012).

5 CRIMINAL DIV. OF THE U.S. DEP'T OF JUSTICE & THE ENF'T DIV. OF THE U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 3 (2012).

6 SALEN CHURI ET AL., COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT: A PRACTICAL PRIMER 3 (2012).

7 *Id.*

8 Dominic Saglibene, Note, *The U.K. Bribery Act: A Benchmark for Anti-Corruption Reform in the United States*, 23 TRANSNAT'L L. & CONTEMP. PROBS. 119, 121 (2014). The terms "private bribery" and "commercial bribery" have been used interchangeably in this Note.

9 Sarah Clark, Note, *New Solutions to the Age-Old Problem of Private-Sector Bribery*, 97 MINN. L. REV. 2285, 2286–87 (2013).

10 *See* TRANSPARENCY INT'L, GLOBAL CORRUPTION REPORT 2009: CORRUPTION AND THE PRIVATE SECTOR 7 (Dieter Zinnbauer et al. eds., 2009).

federal statutes have been enlisted to prosecute instances of international commercial bribery.[11] The statute that is most often used to prosecute instances of international commercial bribery is the Travel Act.[12] The Travel Act prohibits traveling or using mail or any facility in interstate or foreign commerce to further any "unlawful activity."[13] Under the Travel Act, "unlawful activity" includes bribery in violation of federal law or state law.[14] Therefore, the Travel Act does not criminalize bribery per se but penalizes international travel, or use of mail or any facility of foreign commerce, such as a telephone call or wire transfer, used to carry out any bribe that is illegal under state or federal law.[15]

On the other hand, the FCPA bypasses the need to rely on state law definitions of bribery.[16] Therefore, the Travel Act has additional requirements that make it harder to prosecute instances of international commercial bribery when compared to international public bribery under the FCPA. Other statutes such as the FCPA,[17] Mail Fraud Act,[18] Wire Fraud Act,[19] Racketeer Influenced and Corrupt Organizations Act (RICO),[20] and Robinson-Patman Act (RPA)[21] have also been used to prosecute instances of commercial bribery.[22] Like the Travel Act, these statutes have limitations that prevent them from comprehensively addressing international commercial bribery.[23]

Part III of this Note highlights certain provisions that exist in the arena of international public bribery but are absent in the prosecution of

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11 *See* John P. Rupp & David Fink, *Foreign Commercial Bribery and the Long Reach of U.S. Law*, BLOOMBERG BNA (Jan. 12, 2012), http://www.bna.com/foreign-commercial-bribery-and-the-long-reach-of-u-s-law (giving an overview of some of the statutes used to prosecute international commercial bribery).

12 18 U.S.C. § 1952 (2012); *see* Michael W. Emmick, *The Travel Act—The FCPA's Red-Haired Stepchild*, LEXOLOGY (Feb. 2, 2012), http://www.lexology.com/library/detail.aspx?g=8be05642-2718-4baf-9be7-a6be6814e4d0 ("While the FCPA's anti-bribery provisions may not apply, DOJ can still charge foreign commercial bribes under an alternative, non-FCPA theory. Most prominent of these is the Travel Act, which DOJ has occasionally used to charge foreign bribes.").

13 § 1952(a)(1).

14 § 1952(b).

15 Emmick, *supra* note 12.

16 15 U.S.C. §§ 78dd-1 to -3 (2012) (prohibiting the use of mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of the giving of anything of value to a foreign official, foreign party, or to any other person knowing that the payment or promise will be passed on to a foreign official).

17 *Id.*

18 18 U.S.C. § 1341 (2012) (mail fraud statute).

19 § 1343 (wire fraud statute).

20 §§ 1961–1968.

21 15 U.S.C. §§ 13–13b (2012).

22 *See infra* Section II.B.

23 *See infra* Part II.

international commercial bribery. These include liability for bribes paid by a subsidiary, due diligence and disclosure obligations of the acquiring organizations in M&A transactions, and whistleblower protections.[24] These provisions are likely to induce corporations to step up their due diligence and compliance efforts due to fear of liability. Since these provisions do not apply to international commercial bribery, corporations do not have incentives to take steps to prevent private kickbacks.

Part IV of this Note reiterates the need for a uniform law for international commercial bribery. Perhaps counter-intuitively, this Note explains that expanding the FCPA to combat international commercial bribery may be an obvious solution, but it is not the best approach. This is because the FCPA is tailored to target public bribery and the differences between the nature of public and private bribery are sufficient to warrant differential treatment.[25] Moreover, the FCPA has its own unique problems.[26] The blanket application of the FCPA to international commercial bribery will result in a situation where the FCPA's existing problems are extended to cover commercial bribery, resulting in legislation that covers a wide range of activities but gives little direction to compliance departments to protect businesses from liability.[27] Thus, this Note stresses the importance of comprehensive legislation dealing with international commercial bribery.

I. BACKGROUND

A. *Definition of Commercial Bribery*

Traditionally, bribery was solely identified as a payment to government or public officials, and it was believed that payments to private individuals could not constitute bribery.[28] Later, the United States Supreme Court ruled that activities beyond the traditional common law definition of bribery, such as commercial bribery, are included within the generic definition of bribery.[29] In *Perrin v. United States*,[30] the United States Supreme Court traced the development of bribery under common law.[31] The Court stated that bribery as an

24 § 78u-6; *see also infra* Part III.

25 *See infra* Section IV.A.

26 *See infra* text accompanying notes 222–25.

27 *See infra* Section IV.B.

28 United States v. Bowling, No. 6:09-16-DCR, 2010 WL 5067698, at *7 (E.D. Ky. Dec. 7, 2010).

29 Perrin v. United States, 444 U.S. 37 (1979).

30 *Id.*

31 *Id.* at 43.

offense was initially limited to the corruption of judges and gradually expanded to other forms of corruption including public officials, voters, and witnesses.[32] By the 1960s, the Court concluded that commercial bribery itself was included in the common law definition of bribery.[33]

Commercial bribery can be defined as conferring, or offering, or agreeing to confer, any benefit upon any employee, agent, or fiduciary without the consent of the recipient's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.[34] In *JSG Trading Corp. v. U.S. Department of Agriculture*,[35] the court stated that commercial bribery statutes share at least two common elements—intent to induce and secrecy.[36] The intent element of commercial bribery statutes require that the party have knowledge of the likelihood that its actions will produce the necessary effect irrespective of the actual motive.[37] Under the secrecy element, it is essential that the benefit conferred to influence the payee's conduct is without the consent of the payee's employer or principal.[38] This is because a payee has a fiduciary obligation to his employer, and retaining any secret profits or gains harms his employer or principal as a "matter of law."[39] Thus, courts have refused to recognize payments as commercial bribes where the principal was aware that its agent was accepting payments from a third party.[40] Moreover, the person receiving the commercial bribe is also guilty of bribery.[41]

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32 *Id.*

33 *Id.* at 45.

34 N.Y. PENAL LAW § 180.00 (McKinney 2010); *see also* Augusta News Co. v. Hudson News Co., No. CIV.99-CV-166-B, 2000 WL 1772466, at *7 (D. Me. Nov. 29, 2000) ("Commercial bribery is a term of art that is frequently used, but seldom defined. Commercial bribery describes a situation in which a seller bribes an agent or employee of a buyer, to induce the buyer's agent to encourage purchases of the seller's product.").

35 176 F.3d 536 (D.C. Cir. 1999) (illustrating New York and Illinois Law).

36 *Id.* at 542.

37 CORPORATE COUNSEL'S GUIDE TO ROBINSON-PATMAN ACT § 3:6, Westlaw (database updated Sept. 2016) ("[A] salesperson's attempt to influence others by means of money or other valuable items may constitute bribery, even though the seller may be acting out of supposedly altruistic motives."); *see also* United States v. Barash, 412 F.2d 26 (2d Cir. 1969) (holding that payments made in personal regard by an accountant to IRS constituted bribes).

38 *See JSG Trading Corp.*, 176 F.3d at 542.

39 Kewaunee Sci. Corp. v. Pegram, 503 S.E.2d 417, 419–20 (N.C. Ct. App. 1998).

40 *See, e.g.*, Dayton Superior Corp. v. Marjam Supply Co., No. 07 CV 5215(DRH)(WDW), 2011 WL 710450, at *15–16 (E.D.N.Y. Feb. 22. 2011); Stephen Jay Photography, Ltd. v. Olan Mills, Inc., 713 F. Supp. 937, 941 (E.D. Va. 1989).

41 *See, e.g.*, Blue Tree Hotels Inv. (Can.), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 222 (2d Cir. 2004) ("But commercial bribery cannot be committed unilaterally by an alleged bribe receiver: one cannot be guilty of receiving a commercial bribe unless someone else is guilty of paying it.").

B. *Impact of Commercial Bribery*

In *Sid Goodman & Co.*,[42] the court noted that commercial bribery imposes an obstacle to the competition and meritocracy in the marketplace by impeding the ability of competitors to sell goods based on their price or quality.[43] Commercial bribery is essentially a fraudulent act upon the employer of the payee, who is for the most part unaware of the commercial bribery transaction.[44] Moreover, commercial bribery increases the transaction costs of conducting a business where, typically, the payee's company ends up paying more for the payor's products than it would have in the absence of the bribe.[45]

The culture of payment of kickbacks by top management trickles down to lower levels in the corporate hierarchy, where lower level managers may be encouraged and pressured to close important deals.[46] This results in fostering a culture that undermines the business's commitment to integrity and opens the door for other corrupt acts.[47] Companies face huge damages as a result of their agents' accepting bribes and businesses may be forced out of the marketplace due to private bribery's anti-competitive effects.[48]

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42 49 Agric. Dec. 1169 (U.S.D.A. 1990).

43 *Id.* at 1185. The court noted that:

> Commercial bribery offends both morality and the law. It is an evil which destroys the integrity of competition, the heart of commerce, by poisoning the judgment of the people who make business decisions. Bribed purchasing agents do not make their decisions based solely on the comparative merits of competing products available in the marketplace. Their distorted judgment inevitably disadvantages competing products untainted by bribes. The only way the disadvantaged can compete is to offer a bigger bribe, since it becomes difficult, if not impossible, to compete on the basis of price, quality or service. Unchecked, the practice can spread through the market, destroying fair competition everywhere.

Id. at 1186 (quoting Holiday Food Servs. Inc., 45 Agric. Dec. 1034, 1043 (U.S.D.A. 1986)).

44 Jeffrey Boles, *Examining the Lax Treatment of Commercial Bribery in the United States: A Prescription for Reform*, 51 AM. BUS. L.J. 119, 144–45 (2014).

45 *Id.* at 150–51.

46 TRANSPARENCY INT'L, *supra* note 10, at 7.

47 *Id.* at 7–8.

48 Jeffrey R. Boles, *The Two Faces of Bribery: International Corruption Pathways Meet Conflicting Legislative Regimes*, 35 MICH. J. INT'L L. 673, 683 (2014) ("These principals also face substantial economic losses when their agents accept bribes. In the normal transactional course, the bribers surreptitiously add the cost of the bribes into the business contracts that they enter into with the bribed agents' principals." (footnote omitted)); *see also* HBS Working Knowledge, *The Real Cost of Bribery*, FORBES (Nov. 5, 2013, 10:29 AM), http://www.forbes.com/sites/hbsworkingknowledge/2013/11/05/the-real-cost-of-bribery/#74650ed67dce (discussing how bribery hurts employee morale and the firm even when no one outside the organization knows about it).

The effects of bribery extend beyond the corporation and impact society at large.[49] They impact the stability of companies, markets, and the investments people make in the companies.[50] In international transactions, the impact of commercial bribery can be more global in nature, as shown by studies with data indicating bribery has a negative and disproportionate impact on the economies of poor countries.[51]

Multiple surveys reveal that the perceived frequency of commercial bribes is usually as high, if not higher, than bribery of public officials.[52] While public bribery weakens governmental integrity and effectiveness, which commercial bribery does not do directly,[53] private bribery has far reaching effects within the corporation and beyond.[54] People's faith in their governments is parallel to the trust shareholders place in their corporations. Principles of governance, both public and private, require governments and corporations to act in the best interest of the citizenry and shareholders respectively.[55] Moreover, any differences between public and private bribery are decreasing in light of the increased privatization of economies, resulting in the private sector taking over public functions.[56]

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49 Sid Goodman & Co., 49 Agric. Dec. 1169, 1186 (U.S.D.A. 1990) ("The only way the disadvantaged can compete is to offer a bigger bribe, since it becomes difficult, if not impossible, to compete on the basis of price, quality or service. Unchecked, the practice can spread through the market, destroying fair competition everywhere.").

50 TRANSPARENCY INT'L, *supra* note 10, at 7–8 ("The very strategies and mechanisms used to circumvent internal or external controls and cover up a specific corrupt activity can also provide the infrastructure for other corrupt acts. For example, slush funds set up to bribe purchasing managers can be retooled to pay off politicians. Likewise, financial structures that leverage secrecy and weak regulation to win business, such as tax avoidance at the borderline of legality, can be abused to launder the proceeds of corruption, conceal financial risks or manipulate earnings. All this puts the stability of companies, investments and even markets generally more at risk.").

51 *See id.* at 21 ("If a corporation expands internationally, the risks of corruption in relationships with suppliers, customers and service providers can increase dramatically. Companies without local market knowledge or business contacts often have to hire local agents or form joint ventures with local companies. Unless carefully selected and monitored, however, these local actors may go on to pay bribes to get the results they were hired to achieve, in effect leading to an outsourcing of corruption.").

52 *See* Clark, *supra* note 9, at 2291; *see also* Stuart P. Green & Matthew B. Kugler, *Public Perceptions of White Collar Crime Culpability: Bribery, Perjury, and Fraud*, 75 L. & CONTEMP. PROBS. 33, 47 tbl.2 (2012) (reporting that almost eighty percent of respondents thought that corrupt conduct of corporate employees should be treated as a crime).

53 *See* Boles, *supra* note 48, at 698 (stating that the traditional view that private bribery impacts only business and not the public sector is wrong and outlining the several ways through which private bribery impacts the public sector).

54 *See supra* text accompanying notes 44–51.

55 TRANSPARENCY INT'L, *supra* note 10, at 8.

56 Boles, *supra* note 48, at 698 ("Conceptual similarities aside, the boundaries of public and private bribery are merging as a result of the international privatization movement. The movement involves the transfer of functions from the public to the private sectors, and is reconfiguring government at all levels.").

Many countries have outlawed the bribery of domestic public officials, and there is a growing trend towards combatting international public bribery.[57] However, there has been no such momentum in the area of international commercial bribery.[58] In the United States, there are federal laws for domestic public bribery (e.g., Hobbs Act[59]) and specific laws relating to bribery of public officials and witnesses.[60] There is also a specific federal law for international public bribery (e.g., FCPA[61]). In the domestic private bribery sphere, some states have passed legislation outlawing commercial bribery.[62] Out of these states, quite a few treat commercial bribery as misdemeanors, which may indicate the lack of importance attached to private sector bribery.[63] At the federal level, there are a myriad of laws, such as the Travel Act,[64] Mail and Wire Fraud Acts,[65] RICO,[66] and the Robinson-Patman Act[67] that can be used to prosecute international commercial bribery, but there is no specific law that directly prosecutes, prohibits, or even prevents international commercial bribery.[68] Considering the negative consequences of both forms of bribery, the difference in treatment is unwarranted and ineffective in combating the harms that result from bribery in either form.

II. INADEQUACY OF CURRENT APPROACHES TO THE PROSECUTION OF FOREIGN COMMERCIAL BRIBERY

This Part details the application of various statutes that have been used to prosecute international commercial bribery. It analyzes the shortcomings of the statutes and highlights the disparities that exist in using the statutes as compared to prosecuting international public bribery under the FCPA.

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57 *Id.* at 680 ("Virtually all countries outlaw the bribery of domestic public officials, and a growing subset criminalizes the bribery of foreign public officials." (footnote omitted)).

58 *Id.* at 684 ("While virtually all jurisdictions criminalize some form of public bribery, many ignore formally addressing bribery in the private sector." (footnote omitted)).

59 18 U.S.C. § 1951 (2012).

60 *See, e.g.*, § 201.

61 15 U.S.C. §§ 78dd-1 to -3 (2012).

62 Boles, *supra* note 44, app. at 173 (summarizing commercial bribery laws of each state).

63 *Id.* (listing the states that treat commercial bribery as misdemeanors (e.g., Delaware, Mississippi, Missouri, and Nevada)).

64 18 U.S.C. § 1952(a) (2012).

65 §§ 1341, 1343.

66 §§ 1961–1968.

67 15 U.S.C. § 13 (2012).

68 *See infra* Part II.

A. *Travel Act*

1. Background

The Travel Act was passed in response to the determination by the Department of Justice (DOJ) that local law enforcement authorities were burdened by incidents of organized crime, including bribery, and found it difficult to target "kingpins" located far away from the scene of the operations, beyond the reach of the local authorities.[69] The Travel Act expressly penalizes violations of both federal and state bribery bribery laws, with a clear nexus to corruption to a degree not previously found in any federal criminal statute.[70] Thus, the Travel Act was a novel step in enabling the federal government to prosecute local political corruption.[71]

As enacted, the statute requires three elements for a conviction: (1) interstate or foreign travel or use of any facility in interstate or foreign commerce, (2) with an intent to engage in conduct that furthers an "unlawful activity," and (3) followed by the commission or attempt to commit one of the enumerated acts, which constitute the furtherance of an "unlawful activity."[72] As per § 1952(b), "unlawful activity" includes "bribery . . . in violation of the laws of the State in which committed or of the United States."[73] While the Travel Act itself does not specify whether bribery includes commercial bribery, the Supreme Court clarified in *Perrin v. United States*[74] that bribery under the Travel Act included commercial bribery.[75]

Since no federal law explicitly prohibits international commercial bribery, the only option available to prosecute it under the Travel Act is if the bribe violates a state law.[76] To secure a conviction under the Travel Act, it is unnecessary to actually prove bribery, rather it is sufficient to prove intention to promote or facilitate the promotion of bribery.[77] The Travel Act carries a maximum sentence of five years in prison and

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69 Herbert J. Miller, Jr., *The "Travel Act": A New Statutory Approach to Organized Crime in the United States*, 1 DUQ. U. L. REV. 181, 184–85 (1963); *see also* Adam Harris Kurland, *The Travel Act at Fifty: Reflections on the Robert F. Kennedy Justice Department and Modern Federal Criminal Law Enforcement at Middle Age*, 63 CATH. U. L. REV. 1, 26 (2013).

70 Kurland, *supra* note 69, at 28.

71 *Id.*

72 18 U.S.C. § 1952(a) (2012); *see also* United States v. Kozeny, 493 F. Supp. 2d 693, 705–06 (S.D.N.Y. 2007), *aff'd*, F.3d 166 (2d Cir. 2008).

73 § 1952(b).

74 444 U.S. 37 (1979).

75 *Id.* at 49.

76 Clark, *supra* note 9, at 2295.

77 United States v. Welch, 327 F.3d 1081, 1092 (10th Cir. 2003).

fines.[78] Since the Travel Act is a criminal statute, only the DOJ has authority to enforce it.[79] When the DOJ prosecutes a corporation and its employees for violations of the Travel Act, the DOJ mostly looks to a corporation's principal place of business to ascertain under which state law to charge the corporation for unlawful activity.[80]

In the international context, the Travel Act applies when the target of the bribe is located abroad. In such a case, if there is travel involved or use of any cross-border transmissions, such as mail or wire transfers, and the act of bribery has some significant contact with the United States, the DOJ can make a case under the Travel Act.[81] However, there are various hurdles in prosecuting instances of commercial bribery.

2. Problems with the Use of the Travel Act for International Commercial Bribery

a. Using State Law to Define Predicate Offenses Means Bribery that Occurs in Some States Will Not Be Criminal

As described above, prosecutions for commercial bribery under the Travel Act are based on state law definitions of commercial bribery.[82] There are thirty-eight states that have laws prohibiting commercial bribery, and of those thirty-eight, twenty-four states treat commercial bribery as a misdemeanor, with only fourteen states treating it as a felony.[83]

Thus, if the commercial bribe originates in a state where it is not an offense, or, in the case of a corporation, in a state that is not its principal place of business, it will essentially escape prosecution.[84] However, if the

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78 § 1952(a)(3)(A).

79 *See* Anne O'Donnell, *SEC and DOJ Issue Guidelines on Foreign Corrupt Practices Act (FCPA)*, FINDLAW, http://corporate.findlaw.com/business-operations/sec-and-doj-issue-guidelines-on-foreign-corrupt-practices-act-fc.html (last visited Sept. 7, 2016) ("The DOJ is responsible for criminal enforcement of the FCPA, and the SEC is responsible for civil enforcement.").

80 D. Anthony Rodriguez & Michael P. Kniffen, Commentary, *Liability Under the Travel Act for Commercial Bribery*, WESTLAW J. CORP. OFFICERS & DIRECTORS LIABILITY, Oct. 8, 2012, at 1, 1. *But see infra* text accompanying notes 111–17.

81 Adele Nicholas, *DOJ Dusts Off Little-Used Travel Act to Strengthen FCPA Prosecutions*, INSIDE COUNSEL (July 1, 2013), http://www.insidecounsel.com/2013/07/01/doj-dusts-off-little-used-travel-act-to-strengthen.

82 *See supra* text accompanying notes 76–78.

83 Boles, *supra* note 44, app. at 173 (survey of commercial bribery laws of each state).

84 *See* Clark, *supra* note 9, at 2305 ("[I]f the private commercial bribery is committed in Idaho, where there is no predicate state private bribery law, there could be no Travel Act action and the potential defendant seemingly gets away (at least regarding a federal prosecution) 'scot-free.' However, if the private bribery took place in California . . . a defendant could face a state penalty of imprisonment in the county jail for one year if the bribe is $1000 or less, or

same bribe originates from a state where commercial bribery is outlawed, the same would be prosecuted.[85] Thus, for example, if a person travels from New York to another country to give a kickback to a counter-party, that would be subject to the Travel Act. However, if he travels from Georgia, where commercial bribery is not prohibited, the same would be beyond the purview of the Travel Act. Therefore, one of the results of applying the Travel Act to international commercial bribery is the creation of safe havens where an otherwise illegal activity will go unchecked.

An illustrative example is the recent FIFA scandal. U.S. prosecutors alleged that FIFA officials received millions in bribes and kickbacks.[86] One of the reasons that no foreign bribery charges could be brought against them was because FIFA officials are not foreign government officials subject to the FCPA.[87] The basis for initiating charges for bribery was the Travel Act, primarily because certain emails were sent from New York, which is one of the states where commercial bribery is prohibited.[88] The FIFA officials could have escaped prosecution if the emails had been sent from a state that does not prohibit commercial bribery.

As previously discussed, the Travel Act is primarily a tool to protect state interests.[89] However, a typical international commercial bribery situation is different as it involves people or businesses that are located instate, but the scope of their activities is international. This international scope directly implicates foreign commerce, which falls under the exclusive powers granted to Congress by the Constitution.[90] As seen from the illustrations above, a blanket application of the Travel Act to international bribery results in uneven prosecution of transactions involving kickbacks, leading to unchecked bribery.

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imprisonment in a county jail or state prison for sixteen months to three years for bribes over $1000. In Minnesota, if the bribe is for $500 or more, the convicted defendant would face state sanctions of up to five years in prison and a fine of $10,000." (footnote omitted)).

85 *Id.*

86 Samuel Rubenfeld, *Alleged FIFA Bribes Don't Spell F-C-P-A, Experts Say*, WALL STREET J.: RISK & COMPLIANCE J. (June 2, 2015, 11:59 AM), http://blogs.wsj.com/riskandcompliance/2015/06/02/alleged-fifa-bribes-dont-spell-f-c-p-a-experts-say.

87 *Id.*

88 *Id.*

89 *See* United States v. Nader, 542 F.3d 713, 721–22 (9th Cir. 2008) ("The Travel Act establishes only concurrent federal jurisdiction over what are already state or local crimes . . . . The federal government cannot usurp state authority via the Travel Act because a state must first decide that the conduct at issue is illegal." (citation omitted)).

90 U.S. CONST. art. I, § 8, cl. 3.

b. Even Among States that Criminalize Commercial Bribery, There Are Important Differences in Their Definitions

As part of a Travel Act charge, the government must prove that a defendant violated or had the intent to violate the underlying state law.[91] However, even amongst the thirty-eight states that criminalize commercial bribery, there are differences in the definitions and scope of the offense of commercial bribery.

State legislatures have taken different approaches in defining the offense of bribery.[92] Some state statutes prohibit accepting and paying commercial bribes by criminalizing both the giving and the receiving of a commercial bribe by fiduciaries.[93] In addition to general commercial bribery statutes, various states have adopted the approach of prohibiting corrupt payments between private parties in particular fields.[94] For example, Colorado's commercial bribery statute prohibits enumerated classes of people from knowingly violating or agreeing to violate a duty of fidelity.[95]

Due to the different approaches for defining commercial bribery in different states, the Travel Act is unevenly applied throughout the United States. For example, in *United States v. Manzo*,[96] the court considered whether the defendant's alleged conduct of soliciting, accepting, or agreeing to accept bribes while he was an unsuccessful mayoral candidate came within the traditional definition of bribery for the purpose of the Travel Act.[97] Because the New Jersey bribery statute

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91 United States v. Bertman, 686 F.2d 772, 774 (9th Cir. 1982) ("When the unlawful activity charged in the indictment is the violation of state law, the commission of or the intent to commit such a violation is an element of the federal offense.").

92 Stuart P. Green, *Official and Commercial Bribery: Should They Be Distinguished?*, *in* MODERN BRIBERY LAW: COMPARATIVE PERSPECTIVES 39, 45 (Jeremy Horder & Peter Alldridge eds., 2013).

93 *Id.*; *see, e.g.*, N.Y. PENAL LAW §§ 180.00–180.50 (McKinney 2010) (criminalizing both the giving and the receiving of a commercial bribe, defined as a "benefit [conferred] upon any employee . . . without the consent of [his] employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs."); TEX. PENAL CODE ANN. § 32.43(b)–(c) (West 2011) ("A person who is a fiduciary commits an offense if, without the consent of his beneficiary, he intentionally or knowingly solicits, accepts, or agrees to accept any benefit from another person on agreement or understanding that the benefit will influence the conduct of the fiduciary in relation to the affairs of his beneficiary. . . . A person commits an offense if he offers, confers, or agrees to confer any benefit the acceptance of which is an offense under Subsection (b).").

94 This includes bribery of telegraph company employees and participants in sporting events. Perrin v. United States, 444 U.S. 37, 44 n.10 (1979); *see, e.g.*, ALASKA STAT. ANN. § 42.20.110 (West 2015) (telegraph agents); DEL. CODE ANN. tit. 28, §§ 701–03 (West 2014) (sports); Green, *supra* note 92, at 46.

95 COLO. REV. STAT. ANN. § 18-5-401 (West 2015). The statute was held constitutional in *United States v. Gaudreau*, 860 F.2d 357 (10th Cir. 1988).

96 851 F. Supp. 2d 797 (D.N.J. 2012).

97 *Id.* at 803.

and case law did not incorporate unsuccessful candidates, the act did not constitute unlawful activity under New Jersey law, and, thus, did not qualify as a predicate bribery offense in the defendant's prosecution for violating the Travel Act.[98] Therefore, if the Travel Act is based on a violation of New Jersey law, payment to an unelected official will escape prosecution. But a different result would follow if the Travel Act violation is based on another statute.[99] Therefore, unsurprisingly, defendants often argue that their conduct did not violate the state law.[100]

An additional hurdle in using the Travel Act to prosecute commercial bribery is the difficulty that courts may face in interpreting state law. For example, in *United States v. Tagliaferri*,[101] the court was unclear whether evidence of a corrupt agreement is required to prove violation of the New York state commercial bribery statute as a predicate offense to the Travel Act violation.[102] However, the court held that it lacked the discretion to disturb the defendant's conviction because the application of the statute to defendant's conduct was only "subject to reasonable dispute."[103]

Even when the plain meaning of state laws would appear to extend to the challenged conduct, some courts have refused to extend bribery charges predicated on a state law violation where the state itself did not intend its criminal laws to reach the charged conduct.[104] In *United States v. Ferber*,[105] the court dismissed several Travel Act counts that were

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98 *Id.* at 831.

99 *See* United States v. McGregor, 879 F. Supp. 2d 1308, 1312 (M.D. Ala. 2012) (applying Alabama law and opining that in certain situations private donations to political campaigns can transform into a bribe).

100 Saglibene, *supra* note 8, at 143; *see, e.g.*, United States v. Welch, 327 F.3d 1081, 1091 (10th Cir. 2003) (reversing lower court decision that Utah bribery statute could not serve as Travel Act predicate); United States v. Tonry, 837 F.2d 1281 (5th Cir. 1988) (vacating and acquitting defendant because the Louisiana commercial bribery statute does not reach bribery of non-Louisiana public officials, so the defendant was not guilty of violating the Travel Act for bribing the chairman of the Indian tribe); United States v. Dansker, 537 F.2d 40, 50–51 (3d Cir. 1976) (acquitting defendant because the government failed to prove that defendant's conduct constituted bribery under New Jersey laws); United States v. Harder, 168 F. Supp. 3d 732, 744 (E.D. Pa. 2016) (defendant unsuccessfully argued that his conduct was not prohibited by Pennsylvania bribery laws); United States v. Carson, No. 09-00077-JVS, 2011 WL 7416975, at *8–9 (C.D. Cal. Sept. 20, 2011) (where defendant argued that California law did not extend to foreign commercial bribery); United States v. Parlavecchio, 903 F. Supp. 788, 792 (D.N.J. 1995) ("[T]he traditional, popular definition of bribery does not encompass defendants' alleged conduct.").

101 648 F. App'x 99 (2d Cir. 2016).

102 *Id.* at 101.

103 *Id.* at 102.

104 *See* United States v. Genova, 333 F.3d 750, 759 (7th Cir. 2003) (overturning RICO conviction where government conceded that no Illinois decision supported its view that defendant's conduct fell within that state's bribery statute).

105 966 F. Supp. 90 (D. Mass. 1997).

based on the violation of Massachusetts's gratuity statute.[106] The court reasoned that, despite the fact that the statute technically covered the conduct, Massachusetts had never criminally prosecuted the predicate offense of illegal gratuity paid to a financial advisor for public entities and, therefore, the conduct could not serve as a predicate for the Travel Act.[107]

Additionally, the defendant may assert any relevant substantive state law defense that may not be available under other state laws.[108] For example, in *United States v. Bertman*,[109] the court in dicta noted that because the Hawaii Penal Code provides coercion as a defense to prosecution for bribery, the defendant could assert it as a defense to the Travel Act charge.[110]

c. Choice of Law Issues Arise

Another hurdle to using the Travel Act's approach of basing the prosecution on the violation of a state law is that sometimes it is difficult to ascertain which state law should be used as the underlying law. The issue that comes before the courts is whether the predicate state law should be of the state where the bribe is offered, where the bribe is received, or where the effects of the bribe took place. In *United States v. Woodward*,[111] the bribe was paid in Florida to the defendant who was a Massachusetts legislator.[112] Defendant argued that the court should not use Massachusetts law as a predicate for the Travel Act violations.[113] The First Circuit held that the Travel Act does not obligate the court to apply the law of the state where the money exchanged hands.[114] The court reasoned that it would apply Massachusetts law because the bribe was paid for the purpose of influencing activities in Massachusetts.[115]

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106 *Id.* at 107; *see* MASS. GEN. LAWS ANN. ch. 268A, § 2 (West 2008).

107 The court noted that "it would be contrary to [the Travel Act's] purpose for the federal government to attempt to aid Massachusetts in the enforcement of a law which Massachusetts has chosen not to enforce." *Ferber*, 966 F. Supp. at 106.

108 *See* United States v. Bertman, 686 F.2d 772, 774 (9th Cir. 1982); *see also* United States v. Hiatt, 527 F.2d 1048, 1051 (9th Cir. 1975) (per curiam); United States v. Kahn, 472 F.2d 272, 277–78 (2d Cir. 1973). *But see Bertman*, 686 F.2d at 774 n.2 (opining that non-substantive state law defenses, such as the running of the statute of limitations, are not cognizable in a Travel Act prosecution); United States v. Cerone, 452 F.2d 274, 286 (7th Cir. 1971).

109 686 F.2d 772.

110 *Id.* at 774.

111 149 F.3d 46 (1st Cir. 1998).

112 *Id.* at 51.

113 *Id.* at 66.

114 *Id.*

115 *Id.* at 67 (holding that the Travel Act did not require the government to prove that the alleged activity violated the laws of the state ultimately traveled to, or of the state where money was exchanged and a conviction could be sustained based on the violation of the laws of the state where the effects of the fraudulent scheme are felt); *see also* United States v. Walsh, 700

The Puerto Rico District Court used the same reasoning in *United States v. Bravo-Fernandez*.[116] There the court held that, even though various acts relating to the bribery took place in Nevada and Florida, Puerto Rico law could be applied because the bribe was initially offered in Puerto Rico and was paid for the purpose of influencing activities in Puerto Rico.[117]

However, *Bravo-Fernandez* and *Woodward* pertained to bribery of public officials, which makes it easier to ascertain the state where the effects of the bribe take place—usually the place where the public official holds office. This may not be so simple in the case of commercial bribery, where the effects may take place in more than one state at different times.

d. The Extraterritorial Application of the Travel Act Is Unsettled

The Travel Act's jurisdictional reach over offshore bribery is an unsettled area of the law.[118] With respect to bribery, the Travel Act applies to travel in foreign commerce or use of mail or any facility in foreign commerce with intent to further the bribery.[119] The Supreme Court has held that a statute does not have extraterritorial reach unless Congress clearly expressed its affirmative intention to give the statute extraterritorial effect.[120] The Court clarified that general references to "foreign commerce" do not defeat the presumption against extraterritoriality.[121]

There is a circuit split regarding whether the Travel Act's express and repeated references to "foreign commerce" are sufficient to confer extraterritorial jurisdiction. In *United States v. Carson*,[122] the Eleventh Circuit held that *Morrison v. National Australia Bank*[123] did not apply to Travel Act violations.[124] The court relied on *United States v. Bowman*,[125] and reasoned that the Travel Act was a criminal statute and could be

F.2d 846, 854–55 (2d Cir. 1983) (Mayor of a city in New Jersey agreed in New Jersey to accept a bribe and traveled to New York to collect it); United States v. Jones, 642 F.2d 909, 913 (5th Cir. 1981).

116 756 F. Supp. 2d 184 (D.P.R. 2010).

117 *Id.* at 207–08.

118 Rodriguez et al., *supra* note 80, at 3.

119 18 U.S.C. § 1952(a) (2012).

120 Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 253–55 (2010).

121 *Id.* at 263; *see also* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016) (discussing the canon of presumption against extraterritoriality).

122 No. SACR 09-00077–JVS, 2011 WL 7416975 (C.D. Cal. Sept. 20, 2011).

123 561 U.S. 247.

124 *Carson*, 2011 WL 7416975, at *7.

125 260 U.S. 94 (1922).

applied extraterritorially.[126] Because *Morrison* did not address a criminal statute or expressly overrule *Bowman*, the *Carson* court held that the Travel Act could be applied to conduct outside the United States.[127] In the second part of its analysis, the court ruled that because the alleged bribe was completed in California, there was no need to consider extraterritoriality issues.[128]

On the other hand, the Second Circuit has held that the Travel Act does not apply extraterritorially. In *European Community v. RJR Nabisco, Inc.*,[129] the Second Circuit ruled that the Supreme Court's decision in *Morrison* meant that the mere reference to "foreign commerce" in the Travel Act did not defeat the presumption against extraterritoriality.[130] However, similar to *Carson*, the Second Circuit ruled that there was sufficient conduct within the United States, including repatriation of profits to the United States and filing of false documents with authorities in the United States, for the case to proceed.[131]

In *Kiobel v. Royal Dutch Petroleum Co.*,[132] the Supreme Court interpreted the Alien Torts Statute and underscored the importance of not applying a statute extraterritorially if there was no clear indication given in the statute itself.[133] Since *Carson* was decided before *Kiobel* and

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126 *Carson*, 2011 WL 7416975, at *6; *see also Bowman*, 260 U.S. at 98 ("[The presumption against extraterritoriality] should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents.").

127 *Carson*, 2011 WL 7416975, at *6–8 (expressly stating that the plain language of the Travel Act demonstrated Congress's desire to reach conduct overseas).

128 *Id.* at *3–5.

129 764 F.3d 129 (2d Cir. 2014), *rev'd*, 136 S. Ct. 2090 (2016). On appeal, the Supreme Court did not discuss the extraterritorial application of the Travel Act. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090 (2016).

130 *RJR Nabisco, Inc.*, 764 F.3d at 141 ("We conclude that the references to foreign commerce in these statutes, deriving from the Commerce Clause's specification of Congress's authority to regulate, do not indicate a congressional intent that the statutes apply extraterritorially."); *see also* Reich v. Lopez, 38 F. Supp. 3d 436 (S.D.N.Y. 2014) (holding that because the Travel Act and the federal wire fraud statute did not apply extraterritorially, a plaintiff claiming international violations of these statutes as predicate acts for purposes of Racketeer Influenced and Corrupt Organizations Act (RICO) claim must allege sufficient domestic conduct in order to sustain an application under RICO).

131 *RJR Nabsico, Inc.*, 764 F.3d at 142 ("We need not now decide precisely how to draw the line between domestic and extraterritorial applications of the wire fraud statute, mail fraud statute, and Travel Act, because wherever that line should be drawn, the conduct alleged here clearly states a domestic cause of action.").

132 133 S. Ct. 1659 (2013).

133 The Court opined that, unless clearly intended, United States law should govern domestically to prevent unintended clashes between laws of United States and those of other nations and to ensure that the judiciary does not erroneously adopt an interpretation of United States law that carries foreign policy. *Id.* at 1664–66.

RJR Nabisco was decided after *Kiobel*, courts may not be inclined to apply the Travel Act to conduct taking place wholly outside of the United States.[134] Thus, the government would have to produce evidence establishing that the conduct prohibited by the state law took place domestically. This raises the question about how much conduct would be sufficient to state a domestic cause of action to fulfill the statutory requirement. The Travel Act also requires that there be a subsequent overt act in furtherance of the bribery.[135] The government need not prove that the defendant committed an illegal act after the travel,[136] but it has to establish post-travel conduct in furtherance of the unlawful activity.[137]

As stated above, one of the elements required under the Travel Act is travel, or the use of mail or another facility, in foreign commerce. There have been cases in which this travel, or use of facilities, occurred between two foreign countries.[138] For example, in *Carson*, the defendants argued that the foreign commerce jurisdictional element of the Travel Act remained unsatisfied because the case involved wire transfers between two foreign countries.[139] The court relied on its previous decisions and ruled that "foreign commerce" requires some sort of a contact with a foreign state.[140] This contact or territorial nexus was present in *Carson* because the defendants, who were based in California, used some instrumentality in interstate or foreign commerce to set wire payments between two foreign countries in motion.[141] Otherwise, the defendants could escape liability by making sure that payments were made from foreign countries.

Thus, cases involving travel or use of any facility between two foreign countries unrelated to the United States falls beyond the purview of the Travel Act.[142] On the other hand, the FCPA can impose

134 *But see* United States v. Harder, 168 F. Supp. 3d 732, 744 (E.D. Pa. 2016) (holding that the Travel Act applied extraterritorially to defendant's alleged wire transfers from Germany to the Chanel Islands).

135 *See* United States v. Zolicoffer, 869 F.2d 771, 774 (3d Cir. 1989).

136 *See* United States v. Griffin, 699 F.2d 1102, 1106 (11th Cir.1983).

137 *Zolicoffer*, 869 F.2d at 775.

138 *See, e.g.*, United States v. Carson, No. SACR 09-00077-JVS, 2011 WL 7416975 (C.D. Cal. Sept. 20, 2011).

139 *Id.* at *4.

140 *Id.* at *12; *see also* United States v. Weingarten, 632 F.3d 60, 70 (2d Cir. 2011); United States v. Montford, 27 F.3d 137, 139–40 (5th Cir. 1994).

141 *Carson*, 2011 WL 7416975, at *4.

142 *See* Rodriguez et al., *supra* note 80, at 2–3 (illustrating the application of the Travel Act through several examples). *But see* United States v. Harder, 168 F. Supp. 3d 732, 744 (E.D. Pa. 2016) (holding that the Travel Act applied to defendant's alleged wire transfers from Germany to the Channel Islands).

liability for acts outside of the United States.[143] This is another area that underscores the difficulty in prosecuting international commercial bribery as compared to international public bribery.

B. *Other Legislation Used to Prosecute International Commercial Bribery*

Apart from the Travel Act, there is other legislation that can, or has been, used to prosecute international commercial bribery. However, as described in the subsequent paragraphs, each statute has limitations and does not provide an adequate tool for prosecutors to reach commercial bribery involving a foreign country.

1. Foreign Corrupt Practices Act (FCPA)

The two main provisions of the FCPA are the anti-bribery and the accounting provisions. As the name suggests, the anti-bribery provisions of the FCPA prohibit bribery of foreign public officials.[144] The accounting provisions of the FCPA apply to issuers whose securities are registered with the SEC or who are required to file reports with the SEC pursuant to the Securities Exchange Act of 1934, regardless of whether they have any foreign operations.[145] The accounting provisions require issuers to maintain adequate records and internal audit systems.[146] Such issuers must "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions . . . of the issuer,"[147] and "devise and maintain a system of internal accounting controls" specified in the statute.[148]

The rationale behind the accounting provisions was to prevent companies from falsely recording illicit payments as other transactions, and the mandatory obligation to disclose bribes paid would in effect foreclose such activity.[149] The accounting provisions of the FCPA have

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143 *See generally The Extraterritorial Reach of the FCPA and the UK Bribery Act: Implications for International Business*, ARNOLD & PORTER L.L.P. 2 (2012), http://www.arnoldporter.com/resources/documents/Advisory%20Extraterritorial_Reach_FCPA_and_UK_Bribery%20Act_Implications_International_Business.pdf (discussing the application of the FCPA to entities located outside of the United States).

144 15 U.S.C. § 78dd-1(a) (2012).

145 § 78m(a).

146 § 78m(b)(2).

147 § 78m(b)(2)(A).

148 § 78m(b)(2)(B).

149 *See* Robert W. Tarun, *Basics of the Foreign Corrupt Practices Act*, LATHAM & WATKINS 7–8 (2006), https://www.lw.com/upload/pubContent/_pdf/pub1287_1.pdf.

been used to reach international commercial bribery.[150] For example, the SEC reached an agreement with Goodyear Tire & Rubber Co. (Goodyear) under which Goodyear paid approximately sixteen million dollars to settle charges of the FCPA accounting violations stemming both from instances of commercial bribery and official corruption by Goodyear's subsidiaries in Kenya and Angola.[151]

However, this is not a comprehensive piece of legislation that can combat international commercial bribery for two reasons. First, the accounting provisions apply only to reporting issuers and not to numerous other individuals and companies that may be doing business in other countries.[152] In fact, less than one percent of all U.S. businesses are listed on the stock exchange.[153] Second, the accounting provisions do not prohibit or penalize the payment of commercial bribes per se, but only require that any such payments be properly recorded.[154] There is no direct legislation that targets or penalizes the act of payment itself, and that is why the authorities have used other legislation such as the Travel Act, Mail and Wire Fraud Acts, and RICO.[155]

The anti-bribery provisions of the FCPA prohibit payments to a foreign official for the purpose of obtaining or retaining business for, or with, or directing business to, any person.[156] The statute defines a foreign official as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of . . . any such public international organization."[157] As the term "instrumentality" has not been defined, even payments to state-owned enterprises providing commercial services have been prosecuted under the FCPA.[158] Therefore, the anti-bribery provisions of

150 John P. Cunningham & Geoff Martin, *SEC Sets Sights on Commercial Bribery Using FCPA Accounting Provisions*, BAKER & MCKENZIE 1 (2015), http://www.bakermckenzie.com/-/media/files/insight/publications/2015/03/sec-sets-sights-on-commercial-bribery-using-fcpa__/files/read-publication/fileattachment/al_na_commercialbriberyfcpa_mar15.pdf ("[C]ommercial bribes can run afoul of the accounting provisions in the same way as bribes paid to foreign officials—i.e., both are likely to be improperly recorded in the paying company's books as, for example, 'legitimate' promotional and sales expenses or 'appropriate' commission payments.").

151 Goodyear Tire & Rubber Co., Securities Act Release No. 3640, Exchange Act Release No. 74356, 2015 WL 758872 (Feb. 24, 2015).

152 Rupp et al., *supra* note 11.

153 Mary Ellen Biery, *4 Things You Don't Know About Private Companies*, FORBES (May 26, 2013, 6:45 AM), http://www.forbes.com/sites/sageworks/2013/05/26/4-things-you-dont-know-about-private-companies.

154 15 U.S.C. § 78m(b)(2) (2012).

155 Rupp et al., *supra* note 11.

156 § 78dd-1.

157 § 78dd-1(f)(1)(A).

158 *See* United States v. Esquenazi, 752 F.3d 912, 922–23 (11th Cir. 2014) (holding that a government-owned entity can qualify as an instrumentality under FCPA).

the FCPA have been used to cover payments to private parties where there is some degree of state involvement or government control. However, these provisions cannot be extended to situations in which the recipient is wholly in the private sector.[159]

2. Mail and Wire Fraud Acts

Unlike the FCPA accounting provisions, the Mail and Wire Fraud Acts are not just restricted to listed companies but apply to anyone who violates the provisions of the statute.[160] The elements required under the statutes are: (1) known participation in a scheme or artifice with intent to defraud, and (2) the use of the mails or wires in carrying out such a scheme or artifice through the use of mail, wire, radio, or television communications.[161] The Mail and Wire Fraud Acts apply to commercial bribery because these statutes make it a crime to devise a scheme to deprive another of the "right of honest services."[162]

In *Skilling v. United States*,[163] the Supreme Court held that the statutes would apply when a fiduciary deprived a person of "honest services" through a bribery or kickback scheme.[164] Thus, at first blush, it would appear that the Mail and Wire Fraud Acts would be ideal to prosecute commercial bribery because they seemingly provide a basis for criminal liability across a broad spectrum of instances.[165] However, the extraterritorial application of the Mail and Wire Fraud Acts has not been settled.[166]

Post-*Skilling* scholarship has stressed how the Acts can be used to fill gaps in the prosecution of international commercial bribery and

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159 *Id.* at 922 (holding that an entity must be under government control to be considered an "instrumentality" for FCPA purposes).

160 Rupp et al., *supra* note 11.

161 18 U.S.C. §§ 1341, 1343 (2012); United States v. Stephens, 421 F.3d 503, 507 (7th Cir. 2005).

162 *See* United States v. Rybicki, 354 F.3d 124, 141–42 (2d Cir. 2003).

163 561 U.S. 358 (2010).

164 *Id.* at 407–08.

165 Clark, *supra* note 9, at 2298–99.

166 *See* Pasquantino v. United States, 544 U.S. 349, 354–55 (2005) (holding that a plot to defraud the government of Canada of tax revenue violated the wire fraud statute). *But see* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 272 (2010) (limiting the extraterritoriality analysis of *Pasquantino* because there the "offense was complete the moment they executed the scheme inside the United States"); European Cmty. v. RJR Nabsico, Inc. 764 F.3d 129, 141 n.11 (2d Cir. 2014) (stating that in *Pasquantino*, the Supreme Court's discussion of the wire fraud statute's extraterritoriality was dicta and the basis of that reasoning was rejected in *Morrison*), *rev'd*, 136 S. Ct. 2090 (2016). On appeal, the Supreme Court did not discuss the extraterritorial application of the Mail and Wire Fraud Acts. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090 (2016).

reach conduct not covered by the Travel Act or the FCPA.[167] However, such conclusions are based on assumptions that the application of the statutes would be based on breach of federal common law, not state law.[168] Hence, if prosecution were based on state law, the inconsistencies in state law would lead to the same difficulties that exist for the prosecution of commercial bribery under the Travel Act.[169] *Skilling* also does not address other forms of self-dealing by private employees.[170]

3. Racketeer Influenced and Corrupt Organizations Act (RICO)

Another statute that can be used for the prosecution of international commercial bribery is RICO. A conviction under RICO requires proof of four essential elements: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity."[171] Racketeering activity can include a variety of predicate acts ranging from murder and arson to bribery.[172]

One hurdle of using RICO to prosecute instances of commercial bribery is the requirement to prove a "pattern," which means that a single incident of bribery may not be enough for a conviction.[173] Additionally, in order to prove a "pattern" under RICO, the predicate acts must be related and pose a threat of continued activity.[174] This

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167 Stephen C. Thompson, Note, *The Application of Honest Services Fraud to International Commercial Bribery*, 47 N.Y.U. J. INT'L L. & POL. 685, 717 (2015).

168 *Id.* ("But the Supreme Court's recent jurisprudence regarding extraterritoriality and the 'focus' of statutes all suggest that § 1346 can reach much of the relevant conduct not covered by the FCPA or the Travel Act so long as U.S. mails or wires are used in furtherance of a scheme to deprive someone of a right to an individual's honest services. However, a number of important questions yet remain, and I have made several assumptions in order to reach a discussion of the 'extraterritorial' application of honest services fraud in the first place. These assumptions have included that (1) honest services fraud, post-*Skilling*, does in fact criminalize the bribery of private individuals, and (2) the source of the duty of honest services is not located in state fiduciary laws but is instead a part of federal common law.").

169 *See supra* Section II.A.2.

170 Pamela Mathy, *Honest Services Fraud After Skilling*, 42 ST. MARY'S L.J. 645, 701 (2011); *see also* Nika A. Antonikova, *Private Sector Corruption in International Trade: The Need for Heightened Reporting and a Private Right of Action in the Foreign Corrupt Practices Act*, 11 BYU INT'L L. & MGMT. REV. 93, 106 (2015) ("The Statutes might yet be effectively used in bribery and kickback foreign trade cases, but they no longer cover other forms of private sector corruption [such as self dealing].").

171 Bolus v. Pa. Office of the Attorney Gen., No. 3:13-CV-1460, 2014 WL 131635, at *2 (M.D. Pa. Jan. 13, 2014).

172 18 U.S.C. § 1961(1) (2012).

173 § 1962(a); Clark v. Time Warner Cable, 523 F.3d 1110, 1116 (9th Cir. 2008) ("To state a RICO claim, one must allege a 'pattern' of racketeering activity, which requires at least two predicate acts.").

174 Yucaipa Am. All. Fund I, L.P. v. Ehrlich, No. 15-373 (SLR), 2016 WL 4582519, at *9 (D. Del. Sept. 2, 2016).

means that isolated instances of bribery cannot be prosecuted under RICO.

Under the statute, "racketeering activity" includes bribery chargeable under state law only when it is punishable by imprisonment of more than one year.[175] It has been held that "bribery" in the RICO statute includes commercial bribery under the state commercial statute as long as it is punishable by more than one year of imprisonment.[176]

RICO's approach to prosecution of commercial bribery is very similar to the Travel Act's approach because both prosecutions are based on predicate acts under state law. However, the scope of prosecution under RICO is more restrictive as the predicate acts for commercial bribery can only be based on the laws of the states where the punishment for commercial bribery exceeds one year.[177] Thus, not only would the number of states whose laws can be used for commercial bribery violations be reduced, but at the same time, the problems that arise from using state violations as predicate acts remain.[178]

Regarding extraterritorial application, the Supreme Court has held that the extraterritorial application of RICO depends on the extraterritorial application of the underlying statute.[179] However, the private right of action under RICO does not apply extraterritorially.[180] Since the extraterritorial application of underlying statutes like the Travel Act remains unclear, RICO is not the ideal medium to prosecute international commercial bribery.

4. Robinson-Patman Act (RPA)

The Robinson-Patman Act (RPA) prohibits certain types of price discrimination by sellers.[181] The RPA aims to protect small businesses from larger businesses because the latter can use their size advantages to

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175 § 1961(1).

176 Boles, *supra* note 44, at 140; *see* United States v. Parise, 159 F.3d 790, 793 (3d Cir. 1998) (upholding RICO conviction predicated on the Pennsylvania commercial bribery statute); United States v. Gaudreau, 860 F.2d 357, 363 (10th Cir. 1988) (holding Colorado's commercial bribery statute served as a predicate for a RICO violation); Johnson Controls, Inc. v. Exide Corp., 132 F. Supp. 2d 654, 658 (N.D. Ill. 2001) ("[A] violation of the Illinois commercial bribery statute that involves an interstate nexus also violates the Travel Act, in turn serving as a RICO predicate act." (citations omitted)).

177 § 1961(1).

178 *See supra* Section II.A.2.

179 RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2102 (2016) ("If a particular statute does not apply extraterritorially, then conduct committed abroad is not 'indictable' under that statute and so cannot qualify as a predicate under RICO's plain terms.").

180 *Id.* at 2106.

181 15 U.S.C. § 13 (2012).

extract more favorable prices and terms from small businesses.[182] The Act prohibits a seller from inducing the purchaser to enter into a transaction with the seller by paying commissions or brokerage fees, or granting discounts to the agents or brokers of a purchaser.[183] Courts have held that the RPA extends to commercial bribery.[184]

One major advantage of using the RPA to prosecute commercial bribery is that it provides for a private right of action.[185] For example, in *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*,[186] the plaintiff alleged that the defendant who was its competitor paid a bribe for the sale of fish food.[187] It contended that it was precluded from competing for an important contract by virtue of the commercial bribe.[188] The court awarded the plaintiff damages consisting of lost profits on the sales that it otherwise would have made, absent the bribery scheme.[189] Even though the government can initiate an action under the RPA through the Federal Trade Commission, it has rarely ever done so and almost all RPA cases in recent decades have been brought by private plaintiffs.[190]

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182 Ross E. Elfand, *The Robinson-Patman Act*, AM. BAR ASS'N, http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/robinson_patman_act.html (last visited Sept. 25, 2016).

183 *See* § 13(c) ("It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.").

184 *See, e.g.*, Harris v. Duty Free Shoppers Ltd. P'ship, 940 F.2d 1272, 1274 (9th Cir. 1991) ("Section 2(c) of the Robinson–Patman amendment to the Clayton Act encompasses cases of commercial bribery tending to undermine the fiduciary relationship between a buyer and its agent, representative, or other intermediary in a transaction involving the sale or purchase of goods."). *But see* Seaboard Supply Co. v. Congoleum Corp., 770 F.2d 367, 371–72 (3d Cir. 1985) (holding that RPA only applied when the illegal payments went from seller to buyer or vice versa, not when the briber was the sales agent and the bribe was paid to an employee of the buyer).

185 SECTION 2(C) OF THE ROBINSON-PATMAN ACT, EXECUTIVE LEGAL SUMMARY 92, Westlaw (database updated June 2016) ("The utility of § 2(c) for commercial bribery cases is that it allows private parties to bring claims for activity that would otherwise be covered exclusively by criminal statutes, for which the state must file charges. Under § 2(c), a private party may be able to obtain treble damages and attorneys' fees.").

186 351 F.2d 851 (9th Cir. 1965), *overruled by* Rotec Indus., Inc. v. Mitsubishi Corp., 348 F.3d 1116 (9th Cir. 2003).

187 *Id.* at 853.

188 *Id.* at 855–56.

189 *Id.* at 862–63.

190 Elfand, *supra* note 182; Melissa Lipman, *FTC May Waste Time Updating Price-Bias Guide, Attys Say*, LAW360 (Nov. 29, 2012), https://www.crowell.com/files/FTC-May-Waste-Time-Updating-Price-Bias-Guide-Attys-Say.pdf (reasoning that FTC has stopped bringing claims under the RPA because of the difficulties faced by plaintiffs in RPA cases and their negative reception in federal courts).

Ideal as it may seem, the RPA cannot be a substitute for comprehensive commercial bribery legislation. One major hurdle in obtaining damages is the standing requirement, which is based on the concept that the RPA is essentially antitrust legislation.[191] Even if the court agrees that there has been a violation of the law, it might conclude that the plaintiff is not within the scope of persons whom the antitrust laws are intended to protect.[192] Thus, unless the plaintiff is able to convince the court that he personally suffered damages due to the anti-competitive nature of the defendant's activities, the plaintiff may not be able to recover damages.

Even though the Second Circuit in *Blue Tree Hotels Investment (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*[193] relaxed this standing requirement, the court still held that the plaintiff is required to establish an antitrust injury.[194] To establish an antitrust injury, the plaintiff has to prove that he suffered an injury that antitrust laws were intended to prevent, and that the commercial bribe was the material cause of that injury.[195] Another major drawback is that the RPA extends only to "goods, wares, or merchandise" and, therefore, completely precludes the payment of a bribe in connection with the sale of services.[196] For example, in *Miyano Machinery USA, Inc. v. Zonar*,[197] kickbacks in relation to distribution rights and business opportunities were not considered subject to the RPA as the court held that the agreements were only tangentially about the sale of goods.[198] There are also concerns about whether the RPA applies extraterritorially.[199] Therefore, even with its advantages, the RPA cannot be used as a

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191 Lipman, *supra* note 190 ("The law amended the Clayton Act in 1936 to target anti-competitive price discrimination, with the goal of protecting small retailers and suppliers from larger rivals.").

192 *See* Hansel 'N Gretel Brand, Inc. v. Savitsky, No. 94 Civ. 4027(CSH), 1997 WL 543088, at *9 (S.D.N.Y. Sept. 3, 1997) ("While the law was also directed at commercial bribery, that practice has no relation to the inhibition of competition, at least as targeted by the Robinson–Patman Act, unless it subjected competitors to discriminatory pricing."), *abrogated by* Blue Tree Hotels Inv. (Can.), Ltd. V. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212 (2d Cir. 2004); *see also* 2660 Woodley Rd. Joint Venture v. ITT Sheraton Corp., 369 F.3d 732, 743 (3d Cir. 2004) (holding that the plaintiff, which claimed no competitive injury, lacked antitrust standing required by the statute).

193 369 F.3d 212.

194 *Id.* at 219–20. The court noted that the right to sue for treble damages under section 2 of the RPA was derived from section 4 of the Clayton Act. *Id.* at 218.

195 *Id.* at 220.

196 15 U.S.C. § 13(c) (2012); *see* Union City Barge Line, Inc. v. Union Carbide Corp., 823 F.2d 129, 140–41 (5th Cir. 1987) (commercial bribery involving services); Freeman v. Chi. Title & Trust Co., 505 F.2d 527, 534 (7th Cir. 1974) (holding that RPA does not apply to intangibles).

197 No. 92 C 2385, 1993 WL 23758 (N.D. Ill. Jan. 29, 1993).

198 *Id.* at *6.

199 Antonikova, *supra* note 170, at 104 nn.100–02; *see* Rotec Indus., Inc. v. Mitsubishi Corp., 348 F.3d 1116, 1120–22 (9th Cir. 2003).

comprehensive legislative solution to tackle international commercial bribery.

Other than the statutes listed above, there are other specific commercial bribery statutes that apply to particular industries, and even these specific statutes are not aimed specifically at international commercial bribery.[200] Therefore, the current statutory regime does not provide an adequate framework to prosecute international commercial bribery.

III. ABSENCE OF PREVENTIVE AND DETECTIVE MECHANISMS IN INTERNATIONAL COMMERCIAL BRIBERY REGIME

This Part analyzes certain mechanisms that exist in the public bribery domain but are absent in the international commercial bribery regime. These legislative provisions play an important role in detecting, preventing, and prosecuting instances of public bribery. If extended to cover commercial bribery, these provisions can play the same role.

A. *Whistleblower Protections Do Not Apply to Individuals Reporting Instances of International Commercial Bribery*

Section 922 of the Dodd-Frank Act (Dodd-Frank),[201] enacted in July 2010, contains whistleblower provisions that reward individuals who assist the SEC in uncovering securities violations, including FCPA violations.[202] Under these provisions, if a whistleblower provides information that leads to a successful enforcement action, the whistleblower is entitled to an award amounting to anywhere between ten percent and thirty percent of the monetary sanctions.[203] Dodd-Frank also prohibits retaliation by employers against whistleblowers who provide the SEC with information, even in cases where there has been no monetary award.[204]

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200 *See, e.g.*, 18 U.S.C. § 212 (2012) (bribery of financial institution examiners); § 215 (financial institution employees); § 224 (bribery in sporting contests); § 666 (bribery involving programs receiving federal funds); § 1954 (bribery involving employee benefit plans); 21 U.S.C. § 622 (2012) (federal meat inspectors); 27 U.S.C. § 205(c) (2012) (bribery involving the sale of alcohol); 29 U.S.C. § 186 (2012) (bribery of labor representatives); 47 U.S.C. § 509 (2012) (quiz show affiliates).

201 15 U.S.C. § 78u-6 (2012).

202 *Id.*

203 § 78u-6(b)(1); *see also* David M. Stuart & Omar K. Madhany, *Preparing for the Increasing Role of Whistleblowers in FCPA Enforcement*, FCPA REP., Jan. 21, 2015, at 1, 2.

204 Joel Androphy & Ashley Gargour, *The Intersection of the Dodd-Frank Act and the Foreign Corrupt Practices Act: What All Practitioners, Whistleblowers, Defendants, and*

There is currently no federal legislation to extend similar protection to someone reporting a kickback by an entity not subject to the FCPA. Moreover, courts are not inclined to extend protection to whistleblowers who disclose private misconduct, such as corporate embezzlement or bribery.[205] This lack of judicial and legislative interest in protecting whistleblowers reporting private misconduct is attributed to the belief that the need for protection is weak when the wrongdoing is limited to the corporation and does not affect the public at large.[206] In such case, there is deference to a corporation's treatment of whistleblowers because the corporation has the incentive to determine how much reporting should be permitted and encouraged.[207]

Therefore, it appears that the different treatment of whistleblowers reporting private and public misconduct can be attributed to the belief that in the case of the former, the effects are limited to the corporation. However, as stated above, private bribery has a substantial impact beyond the corporation.[208] Therefore, if effect on the public is the "sine qua non" of government intervention,[209] then commercial bribery could qualify for the government intervening and providing a whistleblower protection regime. This whistleblower protection program will effectively assist the SEC and DOJ in detecting instances of international commercial bribery. This can be analogized based on the success of the whistleblower program under the FCPA.[210]

Corporations Need to Know, 45 TEX. J. BUS. L. 129, 130 (2013).

205 Richard Moberly, *Protecting Whistleblowers by Contract*, 79 U. COLO. L. REV. 975, 999 (2008) [hereinafter Moberly, *Protecting Whistleblowers*]; *see, e.g.*, Adler v. Am. Standard Corp., 830 F.2d 1303, 1305–07 (4th Cir. 1987) (upholding discharge of employee for preparing to disclose commercial bribery and alteration of records).

206 Moberly, *Protecting Whistleblowers*, *supra* note 205, at 999; *see also* Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 B.Y.U. L. REV. 1107, 1161–62 (2006) [hereinafter Moberly, *Sarbanes-Oxley's Structural Model*].

207 Moberly, *Sarbanes-Oxley's Structural Model*, *supra* note 206, at 1161; *see also* Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943, 1949 (1996) (noting that a corporation can balance the information gained from employees with internal dynamics including disruptions in the chain of command and reduced trust among coworkers).

208 *See supra* text accompanying notes 49–51.

209 Moberly, *Sarbanes-Oxley's Structural Model*, *supra* note 206, at 1165 ("If effect on the public interest is the sine qua non of government intervention, then reducing corporate fraud should satisfy this standard, particularly in light of the significant public impact of the recent corporate scandals.").

210 Stuart & Madhany, *supra* note 203, at 2 ("This past year [2014], the Whistleblower Office reported having received 3,620 tips—a 21% increase from two years prior. During the same period, tips alleging FCPA violations increased by nearly 40%. As SEC Director of Enforcement Andrew Ceresney predicted, FCPA violations have become an 'increasingly fertile ground' for whistleblowers under the Whistleblower Program. This comes as little surprise given that the SEC and DOJ obtain their largest monetary sanctions in FCPA cases, creating the opportunity for massive whistleblower awards to employees and other persons knowledgeable about corrupt business practices. This past year alone, the SEC and DOJ obtained nearly $750 million in

B. *Liabilities for Bribes Paid by Agents or Affiliated Corporations Do Not Extend to Commercial Bribery*

Under the FCPA, businesses can be held vicariously liable for the conduct of third parties like distributors, agents, consultants, and representatives.[211] In any of these cases, the FCPA imposes a "knowledge" requirement that makes companies liable if they have knowledge that "all or a portion" of the payment will go "directly or indirectly" to a foreign official.[212] A company is deemed to "know" of prohibited conduct if it possesses information indicating a high probability of the prohibited conduct.[213] Hence, a company can be liable under the FCPA even without actual knowledge of bribery by its affiliated companies when there is a failure to investigate the affiliates' suspicious activities.[214] Businesses may also be subject to successor liability in a merger if the incumbent's FCPA violations predate the merger's closing date.[215]

The anti-bribery provisions of the FCPA apply to a broader range of businesses than the FCPA's accounting provisions, and unlike the accounting provisions, the anti-bribery provisions do not encompass private bribery or kickbacks.[216] Thus, the vicarious or successor liability will be limited to bribes paid to public officials and will not encompass kickbacks. This highlights another area in which prosecution for international commercial bribery faces a disadvantage as opposed to prosecution for international public bribery.

IV. PROPOSAL

Congress should pass legislation specifically dealing with international commercial bribery. The proposed legislation would apply to bribes made to private parties, similarly to how the FCPA applies to bribes made to public officials. This legislation is within Congress's

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monetary sanctions in joint FCPA enforcement actions based on which the SEC could have awarded almost $225 million in whistleblower awards." (footnote omitted)).

211 Erica L. Reilley & Brian A. Sun, *The Foreign Corrupt Practices Act: Walking the Fine Line of Compliance in China*, JONES DAY (Sept. 2008), http://www.jonesday.com/the-foreign-corrupt-practices-act-walking-the-fine-line-of-compliance-in-china-09-26-2008/#_ednref43.

212 *Id.*

213 15 U.S.C. § 78dd-1(f)(2)(B) (2012).

214 Jason E. Prince, *A Rose by Any Other Name? Foreign Corrupt Practices Act-Inspired Civil Actions*, ADVOC., Mar.–Apr. 2009, at 20, 21.

215 Reilley & Sun, *supra* note 211.

216 *See supra* text accompanying notes 152–59.

Commerce Clause powers.[217] Federal statutes like the Travel Act that prohibit commercial bribery by using state law definitions of bribery may be apt domestically due to federalism concerns.[218] However, the same rationale need not apply to international transactions where Congress has authority to pass a uniform law.

A. *Extending the FCPA to Cover Private International Bribery Is Not an Ideal Solution*

Even though the most obvious solution appears to extend the FCPA to private parties in the international bribery context, this may not be ideal primarily because the FCPA is tailored to combat public bribery. Irrespective of the similarities in the effects of private and public bribery,[219] due to the nature of the parties involved—government officials in cases of public bribery and private parties in cases of commercial bribery—an automatic application of the FCPA to international commercial bribery does not appear to be the best solution for several reasons. First, the current FCPA regime does not have a private right of action.[220] However, in cases of private bribery, it may be easier to localize the injured party who may be given an option to institute a private cause of action. Also, the receipt of the bribe cannot be prosecuted under the FCPA because the person receiving the bribe under FCPA is a public official in a foreign country who is beyond the prosecuting realm of U.S. authorities.[221] However, in private bribery, the person receiving the bribe can and should be prosecuted.

Second, the FCPA has its own unique problems[222] and has been criticized for various reasons including lack of clarity in the text of the

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217 U.S. CONST. art. I, § 8, cl. 3.

218 United States v. Nader, 542 F.3d 713, 722 (9th Cir. 2008) ("The federal government cannot usurp state authority via the Travel Act because a state must first decide that the conduct at issue is illegal.").

219 *See supra* text accompanying notes 52–56.

220 Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 419–20 (2012).

221 *See* United States v. Castle, 925 F.2d 831, 832 (5th Cir. 1991) (per curiam) ("Nor is it disputed that [the defendants] could not be charged with violating the FCPA itself, since the Act does not criminalize the receipt of a bribe by a foreign official."); Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARV. J. LEGIS. 303, 309 (2012) ("Congress appears to have adopted a one-sided approach to bribery largely out of prudential concerns that revealing corrupt payments could 'embarrass friendly governments' and undermine U.S. foreign policy." (footnote omitted)).

222 *See* Ammon Simon, *Wal-Mart and the Foreign Corrupt Practices Act*, NAT'L REV. (Dec. 21, 2012, 4:59 PM), http://www.nationalreview.com/bench-memos/336354/wal-mart-and-foreign-corrupt-practices-act-ammon-simon ("FCPA is just one more example of a troubling number of well-intentioned, but costly federal criminal laws that are poorly written or overly broad.").

statute,[223] the absence of a compliance defense,[224] and no de minimis exception.[225] Thus, extending the FCPA to private sector bribery would not be ideal and would compound the existing problems within the FCPA.

B. *Adoption of a Statute Similar to U.K. Bribery Act Is Not an Appropriate Solution*

Another option is to adopt a statute similar to the U.K. Bribery Act.[226] The U.K. Bribery Act consolidates public and private bribery and makes it an offense to pay a bribe to any person irrespective of whether the person is a government official or not.[227] It also makes it an offense to receive a bribe.[228] It imposes strict liability on businesses for failure to take steps to prevent bribes.[229] However, if the business demonstrates that it has an effective compliance program in place, it can avoid strict liability.[230] Thus, many scholars have suggested that adoption of a similar statute in the United States or an amendment of the FCPA along similar lines will solve the problem of bribery, public and private.[231]

However, the U.K. Bribery Act is not without its limitations.[232] The statute does not distinguish between bribes and hospitality payments,

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223 Amanda Bransford, *US Chamber, Others Seek Clarity on FCPA Enforcement*, LAW360 (Feb. 21, 2012, 5:51 PM), http://www.law360.com/articles/311626/us-chamber-others-seek-clarity-on-fcpa-enforcement ("The U.S. Chamber of Commerce and 33 other business organizations on Tuesday sent a letter to the federal government seeking explanations of various provisions of the Foreign Corrupt Practices Act, saying a lack of clarity is bad for business.").

224 *See generally* Preston Tull Eldridge, Comment, *Without Bounds: Navigating Corporate Compliance Through Enforcement of the Foreign Corrupt Practices Act*, 66 ARK L. Rev. 733 (2013) (commenting on how the current FCPA-enforcement structure produces a lose-lose situation for corporate-compliance programs and suggesting a good-faith compliance defense).

225 Sonila Themeli, Comment, *FCPA Enforcement and the Need for Judicial Intervention*, 56 S. TEX. L. REV. 387, 394 (2014) (highlighting how the government has pursued violations of the FCPA, even where the improper payments consist of relatively insignificant amounts).

226 Bribery Act 2010, c. 23 (U.K.).

227 § 1.

228 § 2.

229 § 7(1).

230 § 7(2).

231 *See* Clark, *supra* note 9, at 2314 ("If both public and private-sector bribery were contained within a single statute, similar to the U.K. Bribery Act, prosecutors could avoid tedious and confusing prosecutions while increasing awareness of the illegality of private-sector bribery."); Saglibene, *supra* note 8, at 145 ("Therefore, it is up to the United States to ratify the COE Convention, update the FCPA with language from the U.K. Act, improve the foreign private bribery prosecutions it has already initiated, and signal to other countries that the harms of bribery are the same whether in the private or public sector.").

232 *See* Gordon Belch, *An Analysis of the Efficacy of the Bribery Act 2010*, 5 ABERDEEN STUDENT L. REV. 134 (2014).

including customary gifts, and, along with the strict liability imposed by the statute, has been termed "draconian" and difficult to enforce.[233] It also prohibits facilitation payments for routine action.[234] The Act has also been criticized for being "vague."[235] Thus, a blanket application of the U.K. Bribery Act in the United States would not be an effective method to combat and prosecute commercial bribery. As discussed below, the proposed legislation should have some characteristics of the Act such as penalization of private sector bribery, prohibition on receiving bribes, and a compliance defense.

C. *Concerns About the Proposed Legislation*

At various times, Congress has considered the adoption of a general federal commercial bribery statute.[236] However, such legislation has never seen the light of day. One reason is that when an employee accepts a bribe, the corporation suffers a personal injury, and the corporation itself is in the best position to protect itself by taking internal disciplinary action.[237] Moreover, there is a lack of public outcry, or even awareness, about the offense, and it often goes undetected by the business sector and the larger community.[238] Given the effects of private

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233 *Id.* at 138–40; *see also* Sean Upton-McLaughlin, *The Importance of Giving Gifts in China*, LEARN CHINESE BUSINESS (Apr. 21, 2013, 5:44 PM), http://learnchinesebusiness.com/2013/04/21/how-to-give-gifts-in-china-礼尚往来 (discussing how gifts are used in China for building business relationships, which could be confused with bribes).

234 Belch, *supra* note 232, at 140.

235 *Bribery Act Guidance Is Too Vague, Says Law Society*, OUT-LAW (Nov. 30, 2010), http://www.out-law.com/page-11629 ("The guidance doesn't actually give any details of procedures—it simply gives six principles which in themselves don't lay out the foundations of what a company should actually be doing in practical terms, so in many ways the guidance doesn't quite step up to the mark.").

236 Boles, *supra* note 44, at 136 n.103 ("The House of Representatives approved a general commercial bribery bill in 1922, but that bill subsequently died in the Senate. Over fifty years later, Congress considered a commercial bribery statute as part of a proposed Federal Commercial Code that would make commercial bribery a federal crime, but Congress never passed this bill." (citation omitted)). These bills differ from the statute proposed by this Note as the latter specifically deals with international commercial bribery. As stated in Part IV of the Note, the proposed statute should be parallel to the FCPA, though tailored to the dynamics involved in private bribery and should also address the pitfalls that continue to plague the FCPA.

237 Christopher R. Yukins, *Integrating Integrity and Procurement: The United Nations Convention Against Corruption and The UNCITRAL Model Procurement Law*, 36 PUB. CONT. L.J. 307, 323–24 (2007) ("'Commercial bribery' generally is not aggressively enforced in the United States outside federal procurement, perhaps in part because it is so difficult to gauge when, in fact, a gift from an outsider has undermined an employee's 'duties' to his employer. More importantly, it is assumed that other enforcement mechanisms—workplace opprobrium, or simply firing the employee—will contain whatever threat 'commercial bribery' may pose." (footnote omitted)).

238 Boles, *supra* note 48, at 706.

bribery on the corporation and the society at large, these reasons do not justify the lack of legislation.[239]

Another potential concern is that the legislation may impede U.S. businesses from competing globally,[240] just as some business leaders may be concerned about the FCPA impacting their ability to compete.[241] However, studies show that the FCPA has not hurt business or U.S. exports.[242] In fact, due to their inability to bribe officials, businesses have had to concentrate on product quality and pricing, which has actually benefitted them.[243] Additionally, adoption of the U.K. Bribery Act, which has been termed as one of the strictest pieces of anti-bribery legislation in the world, has not had a negative impact on U.K. businesses' ability to export.[244] Therefore, the argument that the proposed statute will be disadvantageous to U.S. businesses is not based on reliable empirical evidence.

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239 *See supra* text accompanying notes 42–51.

240 Boles, *supra* note 48, at 684–85 ("Numerous countries with relatively powerful national economies, such as India, Japan, Thailand, Philippines, Saudi Arabia, and Indonesia, do not criminalize private bribery, whether in domestic or international business transactions. Among countries that do criminalize private bribery, the number of prosecutions is generally miniscule." (footnotes omitted)). Therefore, business from countries that do not criminalize private bribery may have an unfair advantage in global business transactions.

241 Daniel Wagner & Dante Disparte, *Walmart, the FCPA, and America's Ability to Compete*, HUFFINGTON POST (June 29, 2012), http://www.huffingtonpost.com/daniel-wagner/walmart-the-fcpa-and-amer_b_1463292.html ("Some U.S. businesses have long questioned whether the FCPA is an appropriate impediment to doing business abroad in a world where acceptable and widely practiced behavior is different in many countries.").

242 Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT'L L. & COM. REG. 83, 89–92 (2007) ("Between 1986 and 1995, the U.S. share of export trade in Asia actually increased from 20% to 31%. In Africa, between 1991 and 1996, the U.S. share grew by 70%. Interestingly, exports appear to have grown faster in markets where corrupt practices are reported to be particularly prevalent—aircraft, construction equipment, oil and gas field machinery, telecommunications equipment, and medical equipment—than in markets less exposed to corruption." (footnote omitted)); *see also* Antonikova, *supra* note 170, at 98–99.

243 Krever, *supra* note 242, at 91.

244 David Connett, *Anti-Corruption Campaigners Furious as Government Considers Softening Bribery Act*, INDEPENDENT (July 29, 2015), http://www.independent.co.uk/news/uk/politics/anti-corruption-campaigners-furious-as-government-considers-softening-bribery-act-10425362.html ("The Coalition boasted it was the world's 'toughest' anti-corruption law. . . . But the anti-corruption campaigner Transparency International said that corporate lobbying [against the U.K. Bribery Act] appeared to be the basis for the review rather than evidence. It said that 89 per cent of companies surveyed in the Government's own research, released earlier this month, reported that the Act . . . had no impact on their ability to export.").

D. *Key Features of the Proposed Legislation*

1. Applicable to All U.S. Businesses

A well-structured statute that applies to all businesses would level the playing field amongst U.S. businesses. Such a statute would be different from the FCPA, as the FCPA imposes stricter requirements on issuers and does not apply to other businesses.[245] The proposed statute should incorporate whistleblower protections; provisions to maintain adequate books and records; vicarious liability for agents, contractors, and affiliated corporations; and extend the applicability of these provisions to all entities doing business abroad.

2. Prohibiting Paying and Receiving Bribes

The definition of commercial bribery can be inspired from any of the state statutes such as New York and Texas, which penalize both the offer and acceptance of a benefit, monetary or otherwise, by agents without consent of their beneficiary.[246] This definition will ensure that both the offer and acceptance of bribes are prohibited. This would allow the authorities in the United States to prosecute U.S. businesses whose employees have accepted bribes and foreign businesses over which long-arm jurisdiction can be established.[247] This is different from the FCPA, as the authorities can only prosecute payment of bribes.[248]

3. Distinguishing Bribes from Legitimate Gifts and Corporate Liability

The definition of commercial bribery will also help in distinguishing legitimate gifts from bribes. To be liable for commercial bribery, there has to be an intention to bribe coupled with secrecy.[249] Thus, commercial bribery occurs only when the employer or principal is unaware of the payment.[250] Methods to determine awareness can be

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245 *See supra* text accompanying notes 144–58.

246 *See* N.Y. PENAL LAW §§ 180.00–180.50 (McKinney 2010); TEX. PENAL CODE ANN. § 32.43 (West 2011).

247 *See generally* Michael G. McKinnon, *Federal Judicial and Legislative Jurisdiction Over Entities Abroad: The Long-Arm of U.S. Antitrust Law and Viable Solutions Beyond the* Timberlane/*Restatement Comity Approach*, 21 PEPP. L. REV. 1219 (1994).

248 *See* 15 U.S.C. § 78dd-1; Simon, *supra* note 222.

249 *See supra* text accompanying notes 35–40.

250 JSG Trading Corp. v. DOA, 235 F.3d 608, 615 (D.C. Cir. 2001); *see also* Boles, *supra* note

ascertained from written gifting policies, requiring written disclosure of all gifts and record keeping of such gifts.[251]

4. Corporate Liability

The secrecy requirement will also open a floodgate of defenses. Each business will try escaping corporate liability by claiming that it was unaware of such activity on behalf of its employee or agent. This is why the proposed legislation should incorporate provisions for corporate liability: so that a business can be held responsible for failure to oversee its employees' unethical practices. Corporate responsibility has a stronger deterrent effect as compared to individual liability because of the fear of reputational damage and monetary sanctions.[252]

5. Private Right of Action

Another unique feature of the proposed legislation should be the private right of action. This could be similar to the structure under the RPA in which the plaintiff is allowed to bring a private suit when it has suffered a particularized injury.[253] However, this can open the floodgates to frivolous litigation by competitors. Even so, a private right of action can be a stronger deterrent than criminal prosecution.[254]

6. Compliance Defense

The proposed statute should also include provisions that are likely to be considered favorable by the business community. Like the U.K. Bribery Act, the proposed statute ought to contain a compliance defense (i.e., a business would be able to escape liability under the proposed statute as long as it has adequate internal checks and balances coupled

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44, at 126 ("Gifts turn into commercial bribes when they are coupled with the intent to induce, along with the employer's lack of knowledge of the gift.").

251 *See* Clark, *supra* note 9, at 2310 (discussing self regulation of private bribery by corporations' gift policies and educating employees about their importance).

252 ORG. FOR ECON. CO-OPERATION & DEV., CRIMINALIZING BRIBERY AND ENSURING ENFORCEMENT 9 (2012), http://www.oecd.org/cleangovbiz/toolkit/48529117.pdf.

253 *See supra* text accompanying notes 185–90.

254 Antonikova, *supra* note 170, at 122–23 ("Many view a private right of action as a more efficient way to combat private corruption. Private citizens would have the same rights as government to compel disclosure, but, unlike in criminal cases, the standard of proof in civil cases will likely be lower than 'beyond a reasonable doubt' standard used in criminal cases." (footnote omitted)).

with a strong compliance system).[255] However, instead of detailing what exactly the compliance program should incorporate, liability should be based on whether the compliance program was sufficient for the industry that the business was a part of or the type of transactions that the business entered into.[256]

7. De Minimis Exception

The proposed statute should incorporate de minimis exceptions (i.e., exceptions for bribes that are of very small amounts). The FCPA and U.K. Bribery Act do not exempt de minimis payments, and bribes of even trivial amounts can be prosecuted.[257] There have been instances where the SEC has prosecuted the payment of minuscule amounts under the FCPA.[258] For example, Veraz Networks was accused of paying a bribe amounting to $40,000, but the settlement with the SEC was $300,000; and the amount incurred in the investigation was $2.5 million.[259] While a zero-tolerance policy to bribery is ideal, it may not be practical due to the prohibitive costs of investigations. One possible solution to this problem is the establishment of a threshold amount that results from either one transaction or a series of transactions.[260] SEC involvement can be warranted only when the threshold has been exceeded. However, the private right of action can be retained for the below threshold amounts where the plaintiff may choose to bear the cost of gathering evidence. Thus, a comprehensive statute that considers the practical implications of commercial bribery can be a powerful tool to combat the offense.

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255 *Id.* at 117–18 (discussing how a compliance program can "sweeten the pill" for corporations).

256 This is similar to the principles laid down in the U.K. Bribery Act, which requires that the compliance program should incorporate adequate procedures in light of the risk involved. Bribery Act 2010, c. 23, § 7(2) (U.K.).

257 *Anti-Bribery and Corruption Law Multi-Jurisdictional Client Guide*, MCDERMOTT WILL & EMERY 4 (Nov. 2012), http://documents.jdsupra.com/c23f5ffd-ecb6-4b26-8685-5e4ba8c11adb.pdf.

258 *See* Veraz Networks, Inc., Litigation Release No. 21581, 2010 WL 2589812 (June 29, 2010).

259 Richard L. Cassin, *Veraz Settles with SEC*, FCPA BLOG (June 29, 2010, 2:41 PM), http://www.fcpablog.com/blog/2010/6/29/veraz-settles-with-sec.html.

260 The determination of the exact amount of this threshold is beyond the scope of this Note.

CONCLUSION

Bribery in the private sector should not be considered a lesser offense than its public sector counterpart. However, private sector bribery has not been given due attention and is tolerated or even encouraged. As analyzed in this Note, the methods of prosecuting international commercial bribery are haphazard and fall short of the extensive legislative provisions that apply to international public bribery. Considering the impact of the offense on society, especially in developing countries, there is a need for Congress to step in and pass a statute for international commercial bribery that is similar to the FCPA, but is also tailored to the private sector and does not replicate the pitfalls that have arisen in FCPA enforcement.