

## **Keeping Corruption at 'Arms' Length: The scope of the Foreign Corruption Practice Act in Combatting Corruption in the Arms Trade Industry**

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### **Abstract**

*We live in an era dominated by global conflict, terrorism and the increasing need for defence. It is therefore unsurprising that the global arms trade is thriving. However, it is alarming that the arms trade accounts for roughly 40% of all corruption in global transactions. It is also troubling that there is little literature regarding the extent to which existing anti-corruption regimes can or have combatted arms trade corruption. With the aim of contributing to the discourse on arms corruption, this paper critically evaluates the scope of the United States (US) Foreign Corruption Practice Act (FCPA) in combatting corruption, in particular bribery, within the arms industry. Whilst the paper acknowledges the FCPA's role in helping combat arms corruption, it emphasises the FCPA's limitation and calls for FCPA reform. This paper first discusses the FCPA's origins, functions and extraterritorial jurisdiction to then examine corruption within the arms trade industry. It finds that within arms trade, defence offset transactions greatly facilitate corruption and the FCPA has failed to effectively regulate these transactions. Next, the FCPA's enforcement power is explored through its fines system. Though fear of hefty fines appears to have incentivised FCPA compliance, the US government remains silent on how these proceedings are utilised to combat corruption. Analysis on the FCPA's implementation within the US and its global impact further reveals the act's limitations: its non-criminalisation of bribe-recipients, its exclusion of grease payments, and most notably its vagueness and poor guidance on its terms and regulations.*

**Key words:** FCPA, Arms Trade, Corruption, Bribery, US, International Business Transactions

## Introduction

In an era dominated by global conflict, terrorism and the increasing need for defence, it is unsurprising that global arms trade is thriving. According to the Stockholm International Peace Research Institute, arms trade accounts for roughly 40% of all corruption in global transactions.<sup>1</sup> However, there is little literature regarding the extent to which existing anti-corruption regimes can or have combatted arms trade corruption. This paper aims to contribute to the discourse on arms trade corruption.

Though there are various regimes that tackle arms corruption, this paper is limited to critically evaluating the scope of the FCPA and whether it is a commendable instrument for combatting corruption. More specifically, the discussion centres on bribery, as this is the most widespread form of corruption within the arms industry.

The discussion commences with an introduction of the FCPA, its functions and its extraterritorial jurisdiction. This will be followed by an examination of corruption within the arms trade industry and the role that defence offset plays in contributing to bribery. Attention will be paid to the FCPA's method (or lack thereof) of tackling defence-offset corruption. Subsequently, the paper will draw on the FCPA's enforcement power and its fines system to explore its effectiveness in incentivising compliance. This section will also analyse the FCPA's implementation within the US and whether the act has succeeded in its primary aim to safeguard US business against corruption, particularly in the arms industry.

Through a discussion on the FCPA's vagueness and exclusion of grease payments, the final section will critically evaluate the FCPA's limitations in combatting arms bribery and corruption. Whilst the paper acknowledges the FCPA's role in helping combat arms corruption, it emphasises the FCPA's limitations and calls for reform in order to combat arms corruption.

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<sup>1</sup> Peter Platzgummer, 'Arms Trade Offsets and Cases of Corruption: The Usage of Anti-Corruption Tools in Special Forms of Arms Acquisitions' (2013) 14(2) *International Public Management Review*, 19.

## Genesis and Function of the FCPA

Transparency International defines corruption as the ‘abuse of entrusted power for private gain.’<sup>2</sup> A 1976 investigation by the US Securities and Exchange Commission (SEC) exposed rampant corruption within all major US industries, finding that more than 400 US companies invested at least \$300 million in illegal payments and bribery to political parties and foreign governments in order to facilitate trade.<sup>3</sup> American companies were found to have falsified their financial records and used ‘slush funds’ to facilitate these corrupt payments.<sup>4</sup> The US government, which prides itself on free trade and business transparency, immediately passed the FCPA in 1977, to tighten prohibitions on corruption within American businesses.<sup>5</sup>

The FCPA, implemented by the SEC and the US Department of Justice (DOJ), serves two main functions. Firstly, the FCPA prohibits the use of bribes to foreign officials in order to obtain or secure business.<sup>6</sup> The act defines bribery as offering, paying, promising to pay or giving money/gifts or any ‘authorization of the giving of anything’ to ‘any foreign officer’ to influence business decisions.<sup>7</sup> Secondly, the act requires companies/issuers that are affiliated with US companies/bodies to comply with its provisions on books and record-keeping whereby the record-keeping must ‘accurately and fairly reflect’ all payments and transactions made by the company/issuer.<sup>8</sup>

The FCPA addresses three categories: issuers, domestic concerns and entities under territorial jurisdiction.<sup>9</sup> This means that the FCPA applies to issuers who are required to file reports with the SEC, US persons and businesses as well as non-US persons and businesses that are *affiliated* with US business in *any* way (e.g. through US agents, subsidiaries, employees).<sup>10</sup>

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<sup>2</sup> Transparency International, ‘What is corruption?’ (TI, 2018) <<https://www.transparency.org/what-is-corruption#define>>accessed 22/12/18.

<sup>3</sup> The U.S Department of Justice and the U.S Securities and Exchanges Commission, ‘A Resource Guide to the U.S Foreign Corrupt Practice Act’ (2012) U.S Securities and Exchanges Commission, 3.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> FCPA, 15 USC §78dd-1a (1998) amended.

<sup>8</sup> Ibid.

<sup>9</sup> Christopher Garrertt, ‘Combatting Official Corruption in International Business Transactions’ (2012) Journal of Contract Management, 90.

<sup>10</sup> Ibid.

## The Extraterritorial Application of the FCPA

Following FCPA's amendment in 1998 (to ensure its alignment to the 1997 Organization of Economic Co-operation and Development (OECD) Anti-bribery convention) the FCPA's definition of American business went global.

Now, the FCPA applies to all foreign individuals and companies listed on the US stock exchange regardless of any territorial nexus to the US.<sup>11</sup> If non-US persons/companies use forms of US communication or undertake any action of corruption in payment to foreign officials whilst in the US, the FCPA will also apply to them.<sup>12</sup>

Furthermore, since modern commerce thrives on worldwide electronic communication and transactions, the FCPA's reach extends far.<sup>13</sup> The fact that even non-US companies may be subject to the FCPA given *any* US connection, is perhaps what makes the FCPA an effective tool in combatting arms corruption globally.

## Corruption within the Arms Trade Industry

The arms trade industry is secretive in nature. Those who engage in it defend this secrecy by claiming that their acts are a matter of 'national security' or 'off limits.'<sup>14</sup> However, this defence fosters further corruption in the arms industry as it allows bribery and other forms of corruption to go untraced. The industry is also vulnerable where arms companies are unfamiliar with their trading partners and are thus compelled to employ representatives who are familiar with the defence market and consumers.<sup>15</sup> This therefore makes companies 'reliant on the ethics of the agent' who may enter into corrupt deals without the company's knowledge.<sup>16</sup>

Evidencing bribery is also exceptionally challenging in arms deals as they usually 'invoke a complex web of intermediaries and shell companies' that obscures

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<sup>11</sup> Andrew Kaizer and Kate Learoyd, 'The Global Impact of the FCPA' (2007) 3 McDermott Will and Emery, 6.

<sup>12</sup> US DOJ and SEC (n3).

<sup>13</sup> *Ibid.*

<sup>14</sup> Frank Vogl, 'Bribery and Corruption Still Rampant' (Global Policy Forum, March 2001) <<https://www.globalpolicy.org/component/content/article/204/42537.html>> accessed 31/12/18.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

the transfer of payments and funds.<sup>17</sup> Therefore, it is difficult to identify the source and recipient of illicit payments.<sup>18</sup> This may also problematise the scope of the FCPA where unknown agents carry out transactions, and it is unclear whether US citizens have been involved in the corruption.

### **Arms Trade Offset: A Driver of Corruption**

Arms trade offset (or defence offset) is widely acknowledged as the main contributor to arms corruption.<sup>19</sup> Offset is a type of counter-trade whereby an offset agreement creates a deal between a government (importer) and a company (exporter), which is often a defence/arms company.<sup>20</sup> In the offset contract, the exporter makes additional deals to buy from or provide goods and services to the importer's state. Often, companies provide additional benefits to the government by establishing factories and facilitating job creation in their country.<sup>21</sup> By helping governments meet their socio-economic objectives through these transactions, offsets are dominated by government procurement.<sup>22</sup>

The alarming issue however is that offsets often result in bribery. Defence offsets are said to induce states to enter into arms deals solely for the benefits that come with the agreements.<sup>23</sup> More importantly, companies rarely disclose information regarding their offset agreements, thereby opening their doors to corruption.<sup>24</sup> According to FCPA advisor Howard Weissman, offset transactions facilitated by 'foreign government customers' and 'offset authorities', who choose or approve offset projects, 'give rise to FCPA compliance risk.'<sup>25</sup> From the FCPA's perspective, when these actors purposefully select offset projects, it allows them to direct the work (especially the funds) to projects that benefit these actors 'directly or indirectly.'<sup>26</sup>

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<sup>17</sup> Samuel Perlo-Freeman, 'Arms trade corruption—what do we know?' (World Peace Foundation, 11/12/128) <<https://sites.tufts.edu/reinventingpeace/2018/12/11/arms-trade-corruption-what-do-we-know/>> accessed 31/12/18.

<sup>18</sup> Ibid.

<sup>19</sup> Ben Magahy et al, 'Defence offsets: Addressing the risks of corruption and raising transparency' (2010) Transparency International; Also see: Ryan Jay-Lambrech, 'The Big Payback: How Corruption Taints Offset Agreements in International Defence Trade' (2012) ProQuest LLC.

<sup>20</sup> Peter (n1), 21.

<sup>21</sup> Ibid and Ryan (n19).

<sup>22</sup> Ibid.

<sup>23</sup> Carola Hoyos et al 'What are Offsets' (The Financial times, 9/10/13) <<https://www.ft.com/content/87728d1e-197a-11e3-afc2-00144feab7de>> accessed 1/1/19.

<sup>24</sup> Ibid.

<sup>25</sup> Howard Weissman, 'Offset Deals Can Pose High FCPA Risks for Defence Industry' (2014) Law360.

<sup>26</sup> Ibid.

## Incentivising FCPA Compliance

One way in which the FCPA attempts to combat such corruption is by incentivising FCAPA compliance. In particular, by ‘incentivizing companies to voluntarily disclose potential violations’<sup>27</sup> the FCPA appears to have encouraged risk-based due diligence and transparency in offset transactions—an effective remedy for FCPA compliance risk.<sup>28</sup> If companies voluntarily disclose their wrongdoings or proactively cooperate with the FCPA prior to government investigations then the DOJ promises to recommend a 50% reduction on their fines to US courts.<sup>29</sup> However, it remains unclear how the DOJ plans to deal with self-reported cases.<sup>30</sup>

Furthermore, FCPA incentives have led to confusing results as arms companies such as Lockheed Martin and Raytheon are clearly stating their offset obligations in their annual reports.<sup>31</sup> In contrast, BAE Systems – one of the world’s largest and arguably most corrupt weaponry manufacturers – refuses to publish their offset report, arguing it ‘gives too much away to competitors.’<sup>32</sup> US arms giant Northrop Grumman has even established company policies restricting any ‘talk about offset.’<sup>33</sup>

Although the FCPA appears to provide a checks and balance system for governments, who dominate arms offsets, by allowing companies to choose whether they wish to practice due diligence and transparency with offset transactions, the FCPA does not do enough to regulate offsets. Instead of solely relying on anti-bribery regulations, emphasis should also be placed on governments who bear an affirmative duty to ensure that offsets are acquired in a fair and transparent manner.<sup>34</sup> Moreover, considering offset’s monumental contribution to arms corruption, and that arms corruption dominates global corruption, it is alarming that the FCPA has no provision that explicitly prevents bribery within offset transitions, or any countertrade forms in

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<sup>27</sup> Covington Advisory, ‘Trends and Development in Anti-Corruption Enforcement’ (2018) Covington Advisory, 2.

<sup>28</sup> *Ibid*; Peter (n3); Ben (n18).

<sup>29</sup> The US Department of Justice, ‘Justice Manual on the FCPA of 1977, title 9’ (The US DOJ, August 2013) <<https://www.justice.gov/criminal-fraud/file/838416/download>> accessed 1/1/19.

<sup>30</sup> Covington (n27).

<sup>31</sup> *Ibid*.

<sup>32</sup> *Ibid*.

<sup>33</sup> *Ibid*.

<sup>34</sup> Ryan (n19).

general. It would therefore be advisable for the FCPA to consider the role of countertrade, in particular offsets, in combatting arms bribery and corruption.

### **The FCPA in Action**

Considering the aforementioned difficulties in getting conviction for arms bribery, why might the FCPA still be effective in combatting arms corruption?

### **The FCPA has teeth**

The FCPA has heavily influenced anti-bribery legislation and ISL globally. Most notably, it is credited for shaping and influencing the OECD's Anti-bribery Convention, which today has 44 signatories.<sup>35</sup> Furthermore, the FCPA has also received recognition by the Organization of American States (OAS)—a part of the Inter-American Convention against Corruption, with 35 members.<sup>36</sup>

Instilling itself amongst international treaties has allowed the FCPA to expand its extraterritorial reach by influencing members of the OECD and OAS, amongst others, to inculcate anti-corruption legislations like its own, in their respective member countries.<sup>37</sup> However, what differentiates the FCPA from international soft law (ISL) and makes its arguably more effective in combatting arms corruption is that the FCPA has teeth. Unlike the FCPA, anti-corruption conventions like the OECD convention lack 'direct enforcement power' as only its signatory members are obliged to create and adopt *their own* anti-bribery/corruption legislations.<sup>38</sup> So, if member states refuse to comply with international law, there may be little that international bodies can do to enforce compliance.

In contrast, the FCPA directly punishes violators of the act with sanctions, criminal penalties, disgorgements, imprisonment and hefty fines extending to a staggering \$800 million.<sup>39</sup> Examples are arms companies like BAE and Embraer,

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<sup>35</sup> Kathleen Thompson and Charlotte Medina, 'Bribery and Controversy in the US and Global Market' (2012) 8(23) Undergraduate Review, 131; OECD, 'OECD Anti-Corruption Convention' (OECD, 2018) <<http://www.oecd.org/corruption/oecdantibriberyconvention.htm>> accessed 1/1/19.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> DOJ and SEC (n3); Also see: Siemens, the German engineering company was set to pay \$800 million to the DOJ and SEC, See: Eric Lichtblau and Carter Dougherty, 'Siemens to Pay \$1.34 Billion in Fines' (The New York Times, 15/12/08) <<https://www.nytimes.com/2008/12/16/business/worldbusiness/16siemens.html>> accessed 3/1/19.

which experienced the severity of FCPA fines,<sup>40</sup> demonstrating that actors conducting international business cannot afford to ignore FCPA compliance. Indeed, the FCPA is best known for imposing hefty fines.<sup>41</sup> In 2010 BAE was found guilty of conspiring and tactfully failing to create compliance mechanisms to prevent violations of the FCPA's anti-bribery provisions.<sup>42</sup> Despite assuring the US government, companies and the DOJ on its anti-bribery policies, BAE made series of payments to shell companies and third parties (which as discussed earlier, are often used to facilitate money laundering), and failed to subject these actors to the level of scrutiny it promised.<sup>43</sup> BAE ultimately paid \$400 million in fine for its criminal conduct—one of the largest fines imposed by the US for FCPA violations.<sup>44</sup> Similarly, Embraer, a Brazilian aircraft manufacturer, had to pay \$205 million to resolve its FCPA violations as it had bribed officials in several countries.<sup>45</sup> The bribes were paid by a US-based subsidiary through third-party agents.<sup>46</sup>

The FCPA's heavy (and common) fines can make it unaffordable for actors conducting international business to ignore FCPA compliance. In doing so, the FCPA's penalties and punishment can effectively incentivise companies and governments to avoid bribery whilst dealing arms, thereby aiding the FCPA in its fight against corruption.

Still, FCPA critics remain vocal as the DOJ and SEC provide no information as to how the money generated from these fines is being used to fight corruption, if at all.<sup>47</sup> US authorities also remain silent on requests made by organizations and NGO's

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<sup>40</sup> The US Department of Justice, 'BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 million Criminal Fine' (US DOJ, 1/3/10) <<https://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine>>; Also see: Richard L. Cassin, 'Embraer pays \$205 million to settle FCPA charges' (The FCPA Blog, 24/10/16) <<http://www.fcpablog.com/blog/2016/10/24/embraer-pays-205-million-to-settle-fcpa-charges.html>> accessed 3/1/19.

<sup>41</sup> Siemens (n39).

<sup>42</sup> Richard L. Cassin, 'BAE Pleads Guilty' (The FCPA Blog, 1/3/10) <<http://www.fcpablog.com/blog/2010/3/1/bae-pleads-guilty.html>> accessed 3/1/19.

<sup>43</sup> Ibid.

<sup>44</sup> The US Department of Justice, 'BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 million Criminal Fine,' (US DOJ, 1/3/10) <<https://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine>> accessed 4/1/19.

<sup>45</sup> Richard L. Cassin, 'Embraer pays \$205 million to settle FCPA charges,' (The FCPA Blog, 24/10/16) <<http://www.fcpablog.com/blog/2016/10/24/embraer-pays-205-million-to-settle-fcpa-charges.html>> accessed 4/1/19.

<sup>46</sup> Ibid.

<sup>47</sup> Luke Balleny, 'Foreign bribery fines and settlements: who should get the money?' (Reuters, 9/5/12) <<http://blogs.reuters.com/financial-regulatory-forum/2012/05/09/foreign-bribery-fines-and-settlements-who-should-get-the-money/>> accessed 4/1/19.



in developing countries to stop its retention of 'all proceeds from fines and settlement.'<sup>48</sup> The FCPA's silence speaks volumes to its self-interest, as the money remains purposeless in combatting arms corruption.

### **FCPA's Implementation in the US Arms Market**

Although initially established to reduce corruption within US companies, the FCPA appears to be unsuccessful in fulfilling its primary aim.

Transparency International's 2012 report on anti-corruption revealed that almost two thirds of defence companies lack adequate systems to combat corruption.<sup>49</sup> Leah Wawro, lead IT researcher at Transparency International's Defence and Security Unit, highlights that 'the lack of transparency amongst US companies' was particularly concerning as America's 4 major arms companies: Fluor, Lockheed Martin, Bechtel and Raytheon dominated the list of corrupt arms companies.<sup>50</sup>

Despite this, Dr. Sam Freeman, head of Global Arms Trade and Corruption Project at the World Peace Foundation, argues that US companies 'bribe less' in the arms industry, not because the companies are inherently 'cleaner or more moral' but because the FCPA is strict, robust and has been implemented for longer than other European or International legislations.<sup>51</sup> Dr. Freeman further highlights that the majority of arms corruption cases US authorities deal with, such as that concerning BAE Systems, are non-American.<sup>52</sup>

However, the decrease in significant arms cases is not necessarily attributable to the FCPA, nor does it demonstrate that the FCPA was able to dramatically reduce bribery amongst US arms companies. In fact, recent academic literature reveals that the FCPA has failed to deter global bribery by US companies, despite the DOJ's aim to 'increase prosecutions' and 'tighten enforcement.'<sup>53</sup> Even worse, Global Policy Forum reports that non-US businessmen and government officials claim that the 'US

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<sup>48</sup> Ibid.

<sup>49</sup> Transparency International UK, 'Defence Companies Fail Anti-Corruption Test' (TI UK, 4/10/12) <[https://www.transparency.org/news/pressrelease/defence\\_companies\\_fail\\_anti\\_corruption\\_test](https://www.transparency.org/news/pressrelease/defence_companies_fail_anti_corruption_test)> accessed 2/1/19.

<sup>50</sup> Tamsin Walker, 'The dangerous reality of corruption in the arms sector' (DW, 27/4/15) <<https://www.dw.com/en/the-dangerous-reality-of-corruption-in-the-arms-sector/a-18411848>> accessed 2/1/19.

<sup>51</sup> Samuel (n17).

<sup>52</sup> Ibid.

<sup>53</sup> See: Various studies conducted in Miriam F. Weismann, 'The FCPA Act: Why It Fails to Deter Bribery as a Global Market Entry Strategy' (2014) 123(4) Journal of Business Ethics.

uses other unfair practices' avoiding FCPA violation and compelling their foreign rivals 'to either bribe or die.'<sup>54</sup>

Even if it is to be accepted that the FCPA's strict implementation has reduced bribery within US arms companies, it is certain that US agents and subsidiaries are heavily involved in arms corruption. A significant example is the 2004 Boeing Tanker Case where Boeing agreed to a \$23 billion contract for the 'lease of 100 tanker aircraft' in exchange for a job position for senior US Air Force officer, Darleen Druyuna.<sup>55</sup> US companies have also faced fines for bribing United Nations officials with arms.<sup>56</sup> Whilst academics have credited the FCPA's strict implementation for a decrease in US arms corruption,<sup>57</sup> US agents continue to bribe. So how can we *really* claim the FCPA has been successful in combatting US arms corruption when US companies still engage in corruption, even with the UN?

Furthermore, even when US companies do not participate in bribery, the US still heavily accepts, receives and benefits from bribes. For instance, in the Glenn Defence Marine Asia (GDMA) and US 7<sup>th</sup> fleet case, the US Navy accepted Singapore based company, GDMA's bribe of \$500,000 and millions in luxury travels, gifts and entertainment in exchange for confidential information.<sup>58</sup>

While those initiating bribery remain the main perpetrators of corruption, the FCPA is flawed in its failure to criminalise bribe-recipients. This is because although the FCPA's reasoning for exempting bribe-recipients may rely on its concentration on perpetrators who start the act, corruption is a two-way street. Bribe-recipients who can prevent corruption by reporting bribe incidents or refusing to accept bribes should not be ignored. The FCPA, in this context, should follow in the footsteps of the 2010 UK Bribery Act, which criminalises bribe-recipients.<sup>59</sup>

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<sup>54</sup> Frank (n14).

<sup>55</sup> World Peace Foundation, 'The Boeing Tanker Case' (Compendium of Arms Trade Corruption, 2019) <<https://sites.tufts.edu/corruptarmsdeals/the-boeing-tanker-case/>> accessed 4/1/19.

<sup>56</sup> *Securities and Exchange Commission v Armor Holding Inc* [2011] 11-cv-01271.

<sup>57</sup> Samuel (n18).

<sup>58</sup> *United States of America v Glenn Defense Marine Asia* [2014] 13cr3781, 13cr3782, 13cr4287.

<sup>59</sup> Bribery Act 2010, section 6.

## Limitations of the FCPA

Besides weak defence offsets regulations, idle containment of FCPA violation proceedings and non-criminalisation of bribe-recipients, FCPA has other blind spots.

### The FCPA's Vagueness

Despite its 1998 amendment, the FCPA fails to define the term 'foreign official.' The issue of whether both public officials and private company officials are considered foreign officials is only magnified in developing countries where 'lines between private enterprise and the state are blurry.'<sup>60</sup> For instance, in China where the Communist Party 'inextricably intertwines with all levels of the economy,' distinguishing between state and private owned business is nearly impossible.<sup>61</sup> The FCPA's vagueness vis-à-vis foreign officials may create a chaotic business environment.<sup>62</sup>

Worse, companies may be encouraged to abuse the FCPA's vagueness in the hope that it may decrease their chances of prosecution.<sup>63</sup> By helping companies to defend their illegal transactions during litigation, the FCPA's vagueness obstructs the fight against global arms corruption.

The FCPA also provides poor guidance on its terms and requirements.<sup>64</sup> This has often led to companies withdrawing from contracts that may have included 'questionable payments,' as they believe that engaging in these contracts may give rise to liability under the FCPA, when it may not.<sup>65</sup> The FCPA thus continues to gather strong opposition from the very people (and businesses) it is trying to protect because in aiming to combat corruption it also prevents the smooth operation of international business transactions.<sup>66</sup>

### What about Grease Payments?

Grease payments are payments made to 'expedite or secure the performance of a routine governmental action' such as processing governmental visas or providing

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<sup>60</sup> Matthew Muma, 'Towards Greater Guidance: Reforming the definition of the FCPA' (2014) 112(7) Michigan Law Review, 1342.

<sup>61</sup> *Ibid*, 1343.

<sup>62</sup> Christopher (n8).

<sup>63</sup> *Ibid*, 196.

<sup>64</sup> Daniel Pines, 'Amending the FCPA to Include a Private Right of Action' (1994) 82(1) California Law Review, 195.

<sup>65</sup> Matthew (n50).

<sup>66</sup> Kathleen and Charlotte (n39).

police protection to foreign officials.<sup>67</sup> The arms sector particularly benefits from grease payments.<sup>68</sup> The FCPA excludes grease payments from its anti-bribery.<sup>69</sup> This may be problematic because much like offsets, it is difficult to distinguish grease payments from bribery. This is because there is no threshold, monetary or otherwise, by which to distinguish between the two. Typically, bribery denotes that the payment is 'intended without a corrupt motive.'<sup>70</sup> However, such intent is incredibly difficult to evidence in litigation.

This being said, the FCPA's accounting provision does require companies/issuers to record all payments, even if the payments are permissible under the FCPA.<sup>71</sup> Even if grease payments are exempt from FCPA provisions, if facilitation payments are not recorded accurately then companies can still be liable for FCPA violations.<sup>72</sup> Furthermore, US authorities may argue that grease payments pose less of a threat than bribery.

Nevertheless, grease payments can still be considered a risk. In fact, some believe that they are 'bribes in disguise.'<sup>73</sup> The FCPA continues to exclude grease payment despite the OECD community's 'call for an end to corrosive facilitation payments' and that the UK Bribery Act does not exclude grease payments.<sup>74</sup> Here, once again, the FCPA should perhaps take inspiration from the UK Bribery. It also greatly undermines the US government's 'moral leverage' when encouraging other countries to join the fight against foreign bribery.<sup>75</sup>

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<sup>67</sup> FCPA, 15 USC §§ 78dd-l(b), -2(b) (1998).

<sup>68</sup> Jon Jordan, 'The OECD Calls for An End to Corrosive Facilitation Payments and the International Focus on Facilitation Payments Exception Under FCPA' (2011) 13(4) University of Pennsylvania Journal of Business Law, 888.

<sup>69</sup> Thomas Fox, 'The End of the FCPA Facilitation Payment Exception,' (LexisNexis, 12/11/10) <<https://www.lexisnexis.com/legalnewsroom/securities/b/securities/posts/the-end-of-the-fcpa-facilitation-payment-exception>> accessed 2/1/19.

<sup>70</sup> Isabella Soehn, 'The Shortcomings of the FCPA' (Glimpse from the Globe) <<http://www.glimpsefromtheglobe.com/topics/economics/shortcomings-fcpa/>> accessed 2/1/19.

<sup>71</sup> Jon (n56).

<sup>72</sup> Matthew Stephenson, 'The FCPA's 'Facilitation Payments' Exception: Mostly Harmless' (The Global Anti-corruption Blog, 17/5/14) <<https://globalanticorruptionblog.com/2014/06/17/the-fcpas-facilitating-payments-exception-mostly-harmless/>> accessed 3/1/19.

<sup>73</sup> Whistleblower Justice Network (WJN), 'The FCPA & Facilitating Payments' (WJN, 2019) <<https://whistleblowerjustice.net/the-fcpa-facilitating-payments/>> accessed 8/1/19.

<sup>74</sup> Jon (n56), 881; Matthew (n72).

<sup>75</sup> Thomas (n61).

## Conclusion

Although the FCPA set out to prevent corruption, especially within the arms trade, it appears to merely scrape the surface. In exerting its enforcement power whilst criminalising FCPA violators, the act appears to effectively discourage bribery and corruption. However, analysis of FCPA's lack of authority in offset transactions, exclusion of liability for briber-takers, vagueness and acceptance of grease payments prevent it from becoming the commendable corruption-combating regime it set out to be.

It would be recommendable for the FCPA to use the violation penalties that it has accumulated to invest in developing countries to safeguard their anti-corruption regimes and ensure or monitor due-diligence and transparency within defence offset transactions. The FCPA may also want to consider following in the footsteps of the UK Bribery Act to criminalise bribe-recipients. Perhaps most urgently however, the FCPA must amend its terms and regulations for clarity, to not only ensure that the act does not disrupt potential business contracts but to also prevent vague provisions from allowing companies to escape liability. Considering the FCPA's noteworthy self-executing power, extraterritorial jurisdiction and manifestation in ISL, its contribution to these changes *may* bolster its ability to combat bribery and corruption within the arms industry.

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