April 15, 2011

FCPA Sanctions: Too Big to Debar?

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FCPA SANCTIONS: TOO BIG TO DEBAR?
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∗ The authors would like to thank Professor Mike Koehler for lending his thoughtful feedback and expertise.
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ABSTRACT: The Foreign Corrupt Practices Act (FCPA) criminalizes bribery of foreign government officials; enforcement actions against corporations under the FCPA have been increasingly significantly in the last few years. There is an ongoing problem, however, with the sanctions for FCPA violations: enforcement agencies (DOJ and SEC) have limited themselves to fines, civil penalties, and occasional imprisonment of individual violators. Debarment from future federal government contracts, even temporarily, is an unused sanction for FCPA violations, even though Congress provided for this punishment by statute. Debarment would be a far more potent deterrent than fines and penalties, if the government were serious about reducing corruption, and would fit more logically into the policy goal of protecting public funds from misappropriation. It seems both unfair and imprudent for the government to continue awarding lucrative, multibillion-dollar contracts to firms that the government has just prosecuted for fraudulently obtaining such contracts elsewhere.

Enforcement officials shy away from debarment because of the short-term inconvenience it poses for government agencies to lose some of their favorite contractors and to request bids for contracts when the field of potential bidders has thinned. This is the “too big to debar” problem – the federal government is too dependent on a particular set of large, private-sector corporations for equipment and services. These firms enjoy virtual immunity against debarment for FCPA violations. The fines and penalties currently imposed on FCPA violators are a tiny fraction of the potential revenue available from lucrative government contracts. Discounted by the low probability of detection, these sanctions are far too low to deter unlawful activity, especially when firms obtain even larger contracts with the federal government following the sanctions. Debarment would deter potential wrongdoers and incapacitate actual offenders. The deterrent would induce more firms would comply with the law, so in the long term the “too big to debar” problem would diminish.

To help illuminate these concerns, Part III of this Article will examine the third largest FCPA-related enforcement actions to date: the BAE Systems case. On March 1, 2010, BAE Systems paid approximately $400 million in fines for its corrupt practices abroad. In the 365 days that followed however, the federal government awarded BAE contracts in excess of $58 billion dollars. The U.S.’s refusal to debar BAE because of the potential “collateral consequences” provides a case study on the benefits and drawbacks of deterring foreign corruption through suspension and debarment. This Article concludes that the U.S. must begin to diversify its portfolio of federal contractors so that prosecutors may leverage the legitimate threat of suspension and debarment to deter foreign corruption more effectively.
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“A bribe is seen as a charm by the one who gives it; they think success will come at every turn.”

– Proverbs 17:8 (NIV 2011 ed.)

I. INTRODUCTION

Bribery of foreign officials by American businesses is a serious enough problem that Congress criminalized it in 1977 with the passage of the Foreign Corrupt Practices Act (FCPA).\(^1\) Enforcement of the FCPA has been on the rise in recent years, as have the penalties.\(^2\) Despite the dramatic escalation in fines and imprisonment for the violations,\(^3\) a particularly potent sanction to combat overseas bribery remains unused—debarment of the firm from future contracts with the United States government.\(^4\) Many of the firms caught bribing foreign government officials have extensive contracts with a number of domestic federal agencies;\(^5\) meaning debarment would be a particularly devastating punishment. Therefore, the threat of debarment, even for the

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3 See id.

4 The FCPA itself does not mention debarment as a sanction; instead, it is available under the Federal Acquisition Regulation (FAR). See 48 C.F.R. § 9.406-5.

The federal prosecutors maintain that a Foreign Corrupt Practices Act (FCPA) violation may result in, inter alia, a company’s debarment or suspension from future government contracts. See RESPONSE OF THE UNITED STATES, QUESTIONS CONCERNING PHASE 3, OECD WORKING GROUP ON BRIBERY 45 (May 3, 2010). Such a penalty would have a significant impact on a company’s bottom line, particularly if the company deals in national defense (e.g., BAE Systems), oil services (e.g., Halliburton), or any other industry that largely relies on government contracts to stay afloat. From a law and economics perspective, the threat of debarment is perhaps one of the best ways to deter these companies from committing FCPA violations.

standard two-year period, would serve as a singularly effective deterrent against such corruption; firms can recover and rebound from a large fine much more easily than from a loss of all government contracts, even for a limited time.

Even so, the federal agencies enforcing the FCPA—the DOJ and SEC—have avoided exposing certain companies to potential debarment in even the most egregious cases of foreign corruption, citing concern for the “collateral consequences” that might result from a debarred company’s collapse. This begs the question: are certain government contractors too big to debar? As this Article demonstrates, it appears so. As a result, the handful of private entities responsible for satisfying the vast majority of outsourced U.S. contracts have enjoyed bailouts from agency officials who refuse to sanction corrupt practices through suspension or debarment. This situation leads to the jaded viewpoint that paying fines when caught bribing foreign officials “simply become[s] a cost of doing business.”

As discussed in Part II, not only does this practice deepen our nation’s entanglement with those who are undermining fledgling democracies overseas, agencies that continue to award billions of dollars in federal funding to contractors prosecuted for peddling bribes abroad sends mixed messages about the U.S.’s commitment to accountability and transparency in foreign markets. The government’s failure to sever its partnership with a company after exposing egregious acts of foreign corruption undermines our nation’s credibility as a beacon of best practices to the increasingly global marketplace. From a less altruistic perspective, with zero risk of debarment and minimal risk of detection, companies have little incentive to comply with the

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6 Response to Written Questions of Senator D’Amato from John C. Keeney, Business Accounting and Foreign Trade Simplification Act, Joint Hearing Before the Subcommittee on International Finance and Monetary Policy and the Subcommittee on Securities of the Committee on International Finance and Monetary Policy and the Subcommittee on Securities of the Committee on Banking, Housing, and Urban Affairs, United States Senate, 99th Congress, Second Sessions, on S. 430 (June 10, 1986).
FCPA when the fines imposed make up a fraction of the profit generated from foreign business procured through bribery. Without the realistic threat of debarment, companies partnering with the United States have little incentive to withdraw from the black market of foreign bribery.

To help illuminate these concerns, Part III of this Article will examine the third largest FCPA-related enforcement actions to date, the BAE Systems’ case. On March 1, 2010, BAE Systems paid approximately $400 million in fines for its corrupt practices abroad. In the 365 days that followed however, BAE was awarded U.S. contracts in excess of $58 billion dollars. Evidence suggests that this is not an isolated coincidence. Yet, this practice has gone largely unnoticed by the academic literature on the FCPA.

Part V helps frame the debarment debate by first revealing why fines are largely inconsistent with the U.S.’s stated goal of rooting out corruption in foreign markets. This Article then canvasses the law of suspension and debarment, and explains how these potent penalties are often the functional equivalent of sentencing a corporation to death. After explaining the benefits

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7 Siemons holds the number one spot on the top FCPA prosecutions based on fines and penalties. In 2008, it pleaded guilty and paid a fine of roughly $800 million for paying bribes across the world. The second largest FCPA prosecution involved KBR–Halliburton, which paid $579 in connection to bribes paid to undercover agents posing as Nigerian officials.

8 As discussed below, BAE was technically not prosecuted for violating the FCPA, rather, its acts of bribery were instead prosecuted under the more general 18 U.S.C. § 1001 for submitting false statements by misrepresenting the nature of its bribe payments to the government. See infra Part ___.


10 See app. A.

11 See, e.g., Steven L. Schooner, The Paper Tiger Stirs: Rethinking Suspension and Debarment, 13 PUB. PROCUREMENT L. REV. 1, 5 (2004) (“With fewer major critical contractors available to compete for the Government’s most sophisticated requirements, it seems disingenuous to bar a key player from future competition. Such behaviour might be described as cutting off one’s nose to spite one’s face.”); Nigeria: Siemens – Unworthy Causes, allAfrica.com http://allafrica.com/stories/200905060306.html (reporting that the presentation of evidence to a court in Munich, Germany indicating that Siemens’ obtained government contracts by bribing Nigerian prompted Nigerian officials to cancel contracts with Siemens only to announced nine months later “that Siemens had won a major contract in the power sector” to which “[t]he Federal Government greeted the public’s outrage with silence”).
that may flow from an agency’s increased use of discretionary suspension and debarment (namely, its deterrent effect on foreign corruption). Part V considers the collateral consequences of sanctioning FCPA violations in such a manner.

After reviewing the Overseas Contractor Reform Act and teasing out the competing interests at stake—deterring foreign corruption while avoiding the collateral consequences of severely sanctioning on corrupt contractors too big to debar—this Article concludes that the U.S. must begin to diversify its portfolio of federal contractors so that prosecutors may leverage the legitimate threat of debarment to more effectively deter foreign corruption. In short, by rewarding subsequent lucrative contracts to firms fined for engaging in foreign corruption, the U.S. reinforces the perception that bribery brings success, as observed in the quote above from the book of Proverbs. The only way to this perception, and in turn, purify foreign markets polluted by corruption, is with sanctions that discontinues agency subsidization of companies that carry out U.S. business in a corrupt manner.

II. BACKGROUND

A. The Dark Side of Foreign Corruption

“Sunlight is said to be the best of disinfectants.” - Justice Brandeis

The cancerous effect of corruption abroad can quickly spread through the increasingly global marketplace and ultimately wreak havoc on the economy at home. During a 2010

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13 See generally RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 268 (7th ed. 2007) (“How destructive,
speech, Assistant Attorney General Lanny Breuer pointed to the estimated $1 trillion in worldwide bribes paid each year as evidence of just how severely such foreign corruption “undermines the health of international markets [by] stifling competition and repelling foreign investment.” In emerging economies, Breuer further explained that the routine bribery of officials means that “[r]oads are not built, schools lie in ruin, and basic public services go unprovided.”

There are several other toxic side effects of foreign bribery; such as its subsidization of terrorism and brutal tyrants. Companies that routinely engage in corrupt business practices abroad play an active role in helping maintain the “ungoverned states” that “continue to export poverty and serve as havens for all sorts of gangsters, pirates, and terrorists.” For example, investigators revealed that Siemens’ indiscriminate use of its “web of secret bank accounts and shadowy consultants” to secure government contracts resulted in “$1.7 million to Saddam Hussein and his cronies.”

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16 Anti-Corruption Day, supra note 15.


The Executive Branch has similarly identified foreign bribery as a threat to national security. As part of his post-9/11 foreign policy, President Bush acknowledged corruption’s “serious adverse effects on . . . the security of the United States against transnational crime and terrorism.” The Obama Administration has similarly “recogni[zed] that pervasive corruption is a violation of basic human rights and a severe impediment to development and global security.”

In addition to its destructive economic consequences and ties to terrorism, the spread of foreign corruption has produced several other side effects of global proportion worth mentioning. Anecdotal evidence suggests that goods and services procured through corruption are more likely to be, at best, defective, and at worst, deadly. The businesses that resort to bribery abroad are more likely to bring the practice home. For those concerned about nurturing democracy and free markets in developing countries, American companies that bribe foreign officials undermine confidence in open governance and open markets. Attorney General Eric Holder observes that corruption hinders economic development, erodes trust in government and private institutions,


22 Carrington, supra note 17, at 140 (“German observers have also expressed support because of concerns that German firms engaged in corruption abroad may have brought the practices home, i.e., that ‘globalization has become a motor for corruption in Germany.’”).

23 United States v. Castle, 925 F.2d 831, [insert pincite] (5th Cir. 1991).
and undermines confidence in free markets.  

B. Theories of Deterrence

Given the dire consequences associated with the spread of corruption in foreign lands, it is no surprise that central to the DOJ’s mission of “rooting out foreign bribery” is its ability to send “a very strong deterrent message” with each prosecution. In analyzing the deterrent effect of a given law, the traditional law and economics model operates on the basic assumption that people take calculative steps to advance their own self-interest. Working from this assumption, Judge Posner, “a veritable patriarch of deterrence theory,” has stated, “[t]he primary . . . function of law, in an economic perspective, is to alter incentives.”

Within this framework, a corporate executive, manager, or agent has a rational incentive to pay bribes overseas where the anticipated pecuniary benefits exceed the anticipated costs of criminal punishment. The expected pecuniary benefit to a corporation that engages in bribery

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27 See POSNER, supra note 13, at 4 (“[Man is a rational utility maximizer in all areas of life.”); Dru Stevenson, Toward a New Theory of Notice and Deterrence, 26 CARDOZO L. REV. 1535, 1544-1545 (2005) (“The traditional economic model assumes that people maximize their self-interest, . . . .”)

28 Stevenson, supra note 27, at 1552.

29 POSNER, supra note 13, at 266.

30 Id. at 219; see also Name, Title, 30 MICH. J. INT’L L. 471, 506 (YEAR) (“A perfectly deterrent punishment scheme would set the level of punishment at the level of the expected gains of participating in the criminal behavior.”).
is, of course, the profit it generates with the government contracts procured through its corrupt practices. At the individual level, an employee’s willingness to pay an occasional bribe or kickback to grease their supply chain or win a lucrative contract for their company may be quite tempting given the variety of benefits that may result: a promotion, a raise, a bonus, etc.

On the other side of this equation, Posner identifies two key mechanisms for controlling the expected costs of criminal punishment – the amount of law enforcement activity, and the severity of punishment.\(^{31}\) Bribe payers, just like any other class of criminals, respond to incentives and perceived opportunity costs, which include punishments and probability of facing such sanctions.\(^{32}\) The DOJ and SEC have successfully increased their ability to detect foreign bribery,\(^{33}\) and have been equally effective at levying massive fines to punish such corrupt practices.\(^{34}\) Even so, it undermines the government’s ability to deter continued corruption when one of the potential costs of engaging in such corruption – a company suspension or debarment from partnering with the United States – is never at issue.\(^{35}\)

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\(^{31}\) \textit{Id.}

\(^{32}\) \textit{Id.}

\(^{33}\) \textit{See infra Part II.C.2.}

\(^{34}\) \textit{See infra Part II.C.2.}


Deterrence is not achieved . . . when U.S. government agencies continue to award multi-million dollar contracts to companies in the immediate aftermath of bribery scandals. In order for the DOJ’s deterrence message to be completely heard and understood egregious instances of corporate bribery that legitimately satisfy the elements of an FCPA anti-bribery violation involving high-level executives and/or board participation should be followed with debarment proceedings against the offender.

\textit{Id.}
C. Enforcement of the FCPA

The DOJ has maintained that FCPA enforcement helps eliminate foreign corruption where it already exists, and deters it from taking root in new situations.\(^{36}\) Indeed, the DOJ has succeeded impressively in ratcheting up enforcement in recent years.\(^{37}\) Executives reportedly spend sleepless nights wondering if their company will be the next target of an FCPA enforcement action.\(^{38}\) On display in the DOJ’s ever-expanding FCPA trophy case are such blue-chip icons as General Electric, KBR–Halliburton, and Tyson Foods.\(^{39}\)

I. Enforcement Authorities

The DOJ, responsible for prosecuting criminal violations of the FCPA,\(^{40}\) and the SEC, responsible for prosecuting civil violations of the FCPA,\(^{41}\) together with the Federal Bureau of


\(^{37}\) See infra Part II.C.2.

\(^{38}\) See Nathan Vardi, The Bribery Racket, FORBES __, at __ (June 7, 2010) (“[T]he scope of things companies have to worry about is enlarging all the time as the government asserts violations in circumstances where it's unclear if they would prevail in court.” (quoting __)).


\(^{40}\) See DOJ, LAY PERSON’S GUIDE TO FCPA 2, available at http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf (last visited Feb. 26, 2011) (“The Department of Justice is responsible for all criminal enforcement and for civil enforcement of the anti-bribery provisions with respect to domestic concerns and foreign companies and nationals.”); see also Thomas, Note, supra note 15, at 444 n.27 (“Though not precluded by statute, the DOJ does not enforce the accounting provisions often, if ever.”).

\(^{41}\) DOJ, LAY PERSON’S GUIDE TO FCPA, supra note 40, at 2 (“The SEC is responsible for civil enforcement of the anti-bribery provisions with respect to issuers.”); see also Thomas, Note, supra note 15, at 444 n.27 (“The SEC has typically been the safeguard of the accounting provisions, using civil actions such as injunctions to enforce the Act when the DOJ might not be able to bring criminal charges under the anti-bribery provisions.”).
Investigations (FBI) form the trifecta of federal agencies tasked with investigating and enforcing the FCPA. Each agency publicizes its stance on rooting out foreign corruption.\textsuperscript{42}

2. \textit{Growth in FCPA Enforcement}

Congress has poured millions of federal dollars into these agencies to help fund their anticorruption initiatives. Some commentators have observed that in recent years the DOJ has “substantially enlarged its efforts to enforce corrupt practices law”\textsuperscript{43} by initiating “discussions with the Internal Revenue Service’s Criminal Investigation Division about partnering with [the DOJ] on FCPA cases,” and is also “pursuing strategic partnerships with certain U.S. Attorney’s Offices throughout the United States where there are a concentration of FCPA investigations.”\textsuperscript{44}

In 2007, the FBI created a new unit dedicated solely to handling FCPA probes.\textsuperscript{45} The SEC similarly stepped up its enforcement efforts in 2009 by creating a special FCPA unit that “focus[es] on new and proactive approaches to identifying violations” by “being more proactive

\textsuperscript{42} See, \textit{e.g.}, Prepared Remarks of Alice S. Fisher, Assistant Attorney General, U.S. Dep’t of Justice, at the Am. Bar Ass’n Nat’l Institute on the Foreign Corrupt Practices Act (Oct. 16, 2006) (“At the outset, let me address the most basic questions some of you might have about the government’s attitude toward FCPA enforcement. Do we care about the FCPA? Is the FCPA relevant in today’s global business climate? Is enforcing the FCPA a high priority? The answer to all of those questions is yes. Prosecuting corruption of all kinds is a high priority for the Justice Department and for me as head of the Criminal Division.”).

\textsuperscript{43} Carrington, \textit{supra} note 17 at 136.


in investigations, working more closely with [its] foreign counterparts, and taking a more global approach to these violations.

The robust growth of FCPA-focused units within these agencies has unsurprisingly translated into robust enforcement of the FCPA. Following an initial flurry of activity immediately after its enactment in 1977, the FCPA faded into relative obscurity for a quarter century, generating a mere sixty corporate cases and no more than $35.2 million in total fines during that period. The number of FCPA enforcement actions increased modestly from 2004 (5) to 2005 (12), and then again in 2006 (15). Beginning in 2007, however, the DOJ and SEC brought thirty-eight enforcement actions in a single year -- a 153% increase. This trend held steady in 2008 and 2009, with 33 and 40 enforcement actions respectively.

The DOJ’s then-chief FCPA prosecutor, Mark Mendelsohn, stated his intent for the Department to sustain its rapidly increasing enforcement actions. With an estimated $644

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50 Id.

51 Id.

million in FCPA-related sanctions imposed by the United States in 2009,\(^5\) a total of 40 enforcement actions brought by the DOJ and SEC in 2010,\(^4\) and approximately 150 ongoing investigations in 2011,\(^5\) despite leaving the DOJ for private practice, Mr. Mendelsohn has remained true to his word. The explosion of enforcement of the FCPA in recent years has allowed federal prosecutors to squeeze vast sums of wealth out of companies prosecuted under the Act. Congress’s investment in FCPA enforcement appears to have “abundantly reimbursed the national treasury”\(^5\)\(^6\) and produced a significant “return on investment.”\(^5\)\(^7\) With backing from the Obama Administration,\(^5\)\(^8\) the continued climb in the number of FCPA-related investigations and enforcement actions shows no signs of slowing in 2011 and beyond.

3. **Dearth of Case Law**

Although the DOJ and SEC have posted a record-breaking number of FCPA prosecutions in recent years, and have extracted vast sums of wealth from companies across the globe, courts


\(^{56}\) Carrington, *supra* note 17, at 136.

\(^{57}\) *Protecting Taxpayers from Fraud: Hearing on HR ___ Before S. Comm. on the Judiciary*, 112th Cong. ___ (2011) (statement of Sen. Al Franken), available at http://www.youtube.com/watch?v=w4XG85RacqM (“I just want to ask something about return on investment. . . . For every dollar invested in [healthcare procurement fraud] investigations, we get back $17, what I’m wondering is, would you like more resources? And can they be used . . . to reduc[e] our investment so that we are saving more money.”).

have played a very small role in the FCPA’s substantive expansion. Although individuals faced with incarceration have been less reluctant to challenge FCPA enforcement actions in court, fearing the negative publicity that might result from an FCPA trial, most companies have chosen to sweep the charges under the rug by entering a plea agreement. Prosecutors have been more than willing to plea bargain with multinational firms willing to accept massive fines to move on. As a result, “no business entity has publicly challenged either enforcement agency in an FCPA case in the last twenty years.”

4. Trends

The combination of robust enforcement and little judicial oversight have produced a number of trends unique to the FCPA. The first major trend to emerge in recent years is the DOJ’s increased criminal prosecution of individuals. Prosecutors have focused particular attention on corporate executives and high-level managers who fail to set an adequate “tone from the top” by instilling a culture that encourages transparency and compliance. Moreover, although the FCPA has not typically reached individuals on the receiving end of a bribe, the DOJ has nevertheless deployed a variety of untested tactics to “target ‘foreign official’ recipients of bribe payments.”


60 See id.


62 Decade of Resurgence, supra note 59, at 405.
Several distinct trends have emerged in the prosecution of commercial entities as well. Prosecutors have imposed vicarious liability on parent companies for the corrupt practices of its subsidiary.63 The DOJ has also stepped up its prosecution of foreign entities,64 which conveniently avoids the political backlash that might accompany corruption charges brought against domestic employers.

Domestic corporations have certainly not been immune from prosecution under the FCPA however, as the DOJ, SEC, and FBI have increasingly focused on using “industry-wide sweeps” to efficiently prosecute FCPA violations; a practice in which “no industry is immune from investigation.”65 Specifically, prosecutors have targeted the tobacco, telecommunications, healthcare, and defense industries. A related development in recent FCPA enforcement involved the “landmark SHOT Show sting operation” in which hundreds of federal agents descended on a Las Vegas trade convention to serve warrants to industry participants suspected of paying bribes to “FBI agents posing as the Gabonese Ministry of Defense.”66

In addition to the increased criminal prosecution of individuals, aggressive enforcement against entities, and industry-wide investigations, much of the FCPA’s success is attributable to the growing number of companies that voluntarily disclose potential violations. The DOJ and SEC, realizing the incentive-altering force of massive sanctions, have parlayed a handful of


64 See Thomas, Note, supra note 15, at 460.


highly publicized multi-million dollar prosecutions into many more self-disclosures by companies hoping for more lenient sentencing.\textsuperscript{67} As one author pointed out, “The best evidence that the DOJ’s current enforcement of the FCPA deters bribery is in the sheer numbers of self-disclosers in recent years.”\textsuperscript{68}

\textit{D. Legislative History}

The FCPA has a rather peculiar genesis. Ironically, the issue of international corruption was first thrust into the spotlight not because of events abroad, but rather, events at home—the Watergate Scandal. The year was 1973 and Watergate Special Prosecutor Archibald Cox had requested that companies involved in President Nixon’s reelection campaign come forward and admit their illicit dealings.\textsuperscript{69} The response from Corporate America not only exposed the rampant corruption that led to President Nixon’s resignation, but also first exposed the international market for black money.\textsuperscript{70}

Understandably concerned about the pervasive international corruption brought to light during Watergate, the SEC initiated what was perhaps the first action against foreign corrupt

\textsuperscript{67} See Bixby, supra note 48, at 115.


\textsuperscript{69} See Multinational Corporations and United States Foreign Policy, Hearings Before the Subcomm. on Multinational Corporations of the Senate Comm. of Foreign Relations, 94th Cong. 5 (1975), microformed on CIS No. 76-S381-6 (Congress. Info. Serv.).

practices in 1975, in addition to what was perhaps the first voluntary disclosure program for unreported foreign bribes. Shortly thereafter, Congress set out to assess the seriousness of foreign corruption. What it uncovered has been described as “the most extensive documentation of business-government corruption ever produced in history.”

In 1976, Senator Proxmire introduced Senate Bill 3313 and persuaded Congress of the need to enact what would become a “pioneering statute at the time” because it was “the first ever domestic statute governing the conduct of domestic companies in their interactions . . . with foreign officials in foreign markets.” In rejecting President Ford’s more lenient proposal in favor of legislation that criminalized both the failure to report bribery and the act itself, Congress expressed its belief that the cost of getting caught bribing foreign officials must be

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71 See Alejandro Posadas, Combating Corruption Under International Law, 10 DUKE J. COMP. & INT’L L. 345, 349 (2000). One historical account describes these actions as follows:

[T]he Securities and Exchange Commission . . . initiated its own investigations, and in 1975 it moved against four major companies: Gulf Oil Corporation, Phillips Petroleum Company, Northrop Corporation, and Ashland Oil, Inc. The SEC alleged that the establishment of secret slush funds for unaccountable distribution of moneys abroad violated U.S. securities law requiring that public companies file accurate financial statements.

Id.

72 Id. at 350.

73 See Multinational Corporations and United States Foreign Policy, Hearings Before the Subcomm. on Multinational Corporations of the Senate Comm. of Foreign Relations, 94th Cong. 5 (1975), microformed on CIS No. 76-S381-6 (Congress. Info. Serv.).

74 Posadas, supra note 71, at 350. Posadas’ article provides a comprehensive list of sources that report the FCPA’s legislative history from 1975 through 1977. See id. at 350 n.10.


76 See President Ford on March 31, 1976. See H.R. Doc. No. 94-572, at 1 (1974). The Ford Administration’s proposed bill required that companies report “certain classes of foreign payments made by U.S. corporations (only significantly large payments), but would not make these payments unlawful as they complied with other existing applicable law. This was a conservative approach.” Posadas, supra note 71, at 356 (footnotes omitted).

77 See S. 3664 94th Cong. (1975).
high, otherwise, “many companies will continue paying bribes if they can get away with it, because the potential rewards are so great and the risks are minimal.”

In drafting the FCPA, Congress wrestled with several difficult questions concerning the scope of its new statute. Three questions garnered vigorous debate. The first was whether a requirement that companies fully disclose their corrupt dealings with foreign officials could backfire and hurt the United States’ diplomatic relations (Congress decided full disclosure was more important). The second was whether stopping the flow of bribe money abroad would hurt the United States’ ties with where bribery was customary (Congress dismissed this concern by pointing out that most foreign countries prohibit bribery despite local customs). Finally, debate swirled around whether the FCPA would place American businesses at a serious disadvantage by prohibiting a practice that foreign companies were still free to engage in (Congress rejected this too, opting to force American companies to take the high road instead).

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78 Foreign and Corporate Bribes, Hearings on S. 3133 Before the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong. (1976), microformed on CIS No. 76-S241-38, at 1 (Congressional Info. Serv.) (statement by Senator William Proxmire).


80 See The Activities of American Multinational Corporations Abroad, Hearings Before the Subcomm. on International Economic Policy of the House Comm. on International Relations, 94th Cong. 24 (1975); see also Posadas, supra note 71, at 358.

81 See Posadas, supra note 71, at 358. Congress did in fact make some concessions however, carving out an exception for “so-called ‘grease’ payments such as payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties.” S. Rep. No. 95-114 (May 2, 1977); see also H.R. Rep. No. 95-640 (Sept. 28, 1977).

82 See Posadas, supra note 71, at 358 (“[I]t appears that Congress ultimately adopted sanctions because it simply considered the practice to be wrong.”).
After resolving the remaining points of contention and carving out an exception for “grease payments,” Senate Bill 305 passed in both houses and President Carter signed it into law on December 19, 1977. This was the birth of the Foreign Corrupt Practices Act. With the exception of a proposed amendment to quell concerns that the FCPA was overburdening American businesses, the decade that followed was uneventful.

In 1988, concern over the FCPA’s chilling effect on American companies’ willingness to pursue opportunities abroad resurfaced, ultimately leading to the first of two amendments to the FCPA. Although the amendment left FCPA’s two-prong structure intact, it created two affirmative defenses and elevated the grease payment exception from the accounting prong to its present position as a standalone exception. The amendment created one affirmative defense for

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83 See S. Rep. No. 95-114; see also H.R. Rep. No. 95-640 (discussing the legislative history behind the “grease payments” exception).


86 See “Business Accounting and Foreign Trade Simplification Act,” Joint Hearings Before the Subcommittee on Securities and the Subcommittee on International Finance and Monetary Policy of the Committee on Banking, Housing, and Urban Affairs, United States Senate, 97th Congress, First Session, on S. 708 (May 20 and 21, June 16, July 23 and 24, 1981). The Senate joint hearings on the proposed amendment focused on “whether the [FCPA], including both its antibribery and accounting provisions, [was] the best approach [to deterring foreign corruption], or whether it has created unnecessary costs and burdens out of proportion to the purposes for which it was enacted, and whether it serves our natural interest.” Id. (statement by Sen. Alfonse D’Amato). Senator John Chafee echoed these concerns: “We’ve learned that the best of intentions can go awry and create confusion and great cost to our economy.” Id.


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promotion or hospitality expenses, and a second affirmative defense for bribes made pursuant to written law of the country in which the bribe was paid.

As globalization spread, 1988 was also an important year because it marked a “renewed awareness of international criminal activity” that would ultimately allow international “anti-corruption initiatives [to] flourish.” In the years that followed, countries around the world joined (or at least claimed to join) the United States in its global war on corruption. In 1997, thirty-two other nations joined the United States in signing the Organization for Economic Cooperation and Development Convention on Combating Bribery (OECD Convention) whereby they pledged to criminalize foreign bribery in their home country.

One year later, in satisfaction of one of the United States’ obligations under the OECD Convention, President Bill Clinton amended the FCPA for a second time by signing into law the International Anti-Bribery and Fair Competition Act of 1998 (International Anti-Bribery Act). This amendment significantly expanded both the substantive and jurisdictional scope of the ever-growing statute. Although the DOJ has subsequently stretched the scope of the FCPA through

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90 See infra Part II.E.3.a.

91 See infra Part II.E.3.b.

92 Posadas, supra note 71, at 370.


96 See Thomas, supra note 15, at 447–48. Thomas summarizes the substantive expansion as follows:

The 1998 amendment greatly expanded the Act's substantive scope and jurisdiction. It widened the scope of the Act in two ways. First, it reframed the anti-bribery provisions’ sixth
number of novel, untested theories of prosecution, the International Anti-Bribery Act marks the last time legislative expansion of the FCPA to date.

E. The Provisions of the FCPA

The FCPA has two main prongs: an anti-bribery prong and an accounting prong. The FCPA’s anti-bribery prong prohibits employees and agents of a company from giving or offering cash, or anything else of value, to a foreign official in order to obtain or retain business. The FCPA’s accounting prong applies to a company (and its employees and agents) element by providing that, “For purposes of [either] influencing any act or decision of such foreign official in his official capacity [or] inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official [or] securing any improper advantage” Compared to the original wording of the provision (“to affect or influence any act or decision of such government or instrumentality”), this language is much broader, focusing on what the bribing party sought to achieve, not how they intended to affect or influence the official. The second way in which the 1998 amendment broadened the scope of the Act was the inclusion of “persons employed by international organizations” to the definition of “foreign official” in the definitions section of the Act. This addition also potentially brings more violations within the FCPA’s realm, for additional individuals and their culpable conduct are punishable under the Act.


See 15 U.S.C. §§ 78m(b), 78dd-2, 78dd-3 (2006). “Companies” subject to the FCPA’s jurisdiction include “U.S. companies (whether public or private) and its personnel; U.S. citizens; foreign companies with shares listed on a U.S. stock exchange or otherwise required to file reports with the SEC; or any person while in U.S. territory.” Koehler, supra note 97, at 907 (citing 15 U.S.C. §§ 78m(b), 78dd-2, 78dd-3).


for any domestic concern . . . or for any officer, director, employee, or agent of such domestic concern . . . to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, [or] promise to pay . . . anything of value to . . . any person, while knowing that all or a portion of such money . . . will be offered, given, or promised, directly or indirectly, to any foreign official . . . for purposes of (A)(i) influencing any act or decision of such foreign official . . . in his . . . official capacity.

Id.
only if it fits within the definition of an “issuer.”¹⁰⁰ In the context of foreign bribery, the record-keeping provisions require issuers to maintain detailed, accurate records of all transactions overseas.¹⁰¹ The internal-control provisions supplement the record-keeping provisions by requiring that issuers instill a corporate culture of transparency through various anti-bribery policies and procedures, and holds managers accountable for the transactions that occur under their supervision.¹⁰² The broadly worded provisions of the FCPA reach all (1) “issuers,”¹⁰³ (2) “domestic concerns,”¹⁰⁴ and (3) any “person” who otherwise commits an act in furtherance of bribery while physically present in the United States or a United States territory.¹⁰⁵

¹⁰⁰ 15 U.S.C. § 78c(a)(8). The FCPA defines a issuer as

any person who issues or proposes to issue any security; except that with respect to certificates of deposit for securities, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or of the fixed, restricted management, or unit type, the term “issuer” means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; and except that with respect to equipment-trust certificates or like securities, the term “issuer” means the person by whom the equipment or property is, or is to be, used.


¹⁰² See id. § 78m(b)(2)(B).


¹⁰⁵ [Insert citation to FCPA provision]. The Government has argued that presence in the U.S. is sufficiently established by e-mails, telephone calls, and transfers through correspondent bank accounts in U.S. intermediary banks. [Insert citation to case]
The more potent of the two affirmative defenses available under the FCPA places reasonable hospitality and promotional expenditures outside the ambit of “bribes” considered to violate the FCPA. This includes

the payment, gift, offer, or promise of anything of value that is . . . a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, . . . and was directly related to the promotion, demonstration, or explanation of products or services; or the execution or performance of a contract with a foreign government or agency thereof. 106

Hospitality and promotional expenditures that may fall within the scope of this affirmative defense include: (1) the cost of the foreign official’s air fare to the United States, 107 (2) seminar fees, 108 (3) meals, 109 (4) reasonable lodging, 110 (5) ground transportation, 111 (6) product samples of minimal value, 112 (7) entertainment of minimal value, 113 (8) free FCPA-avoidance training for foreign directors of overseas business partner, 114 (9) expenses related to

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109 See, e.g., id.


111 See, e.g., id.


113 See, e.g., id.

six-week long internship program, and (10) costs related to an “education and promotional tour” of U.S. facilities.

The second of the two affirmative defenses under the FCPA excludes bribery that would otherwise be prohibited but for its legalization in the country in which the bribe was made. This affirmative defense does not cover bribes paid in countries where such corruption is customary, rather, the provision require that “the payment, gift, offer, or promise of anything of value” be “lawful under the written laws” of the bribe recipients country. Critics claim that this affirmative defense offers nothing more than “hollow” hail-married defense however, since the large majority of countries where corruption is prevalent and bribery customary nevertheless outlaw the practice. In 2008, the defense was rejected in federal court.

Often referred to as “grease” payments, the FCPA provides a single exception for bribe-esque payments to foreign officials, “the purpose of which is to expedite or to secure the performance of a routine governmental action for routine governmental action.” The exception allows grease payments to be made for such routine governmental actions as

(i) obtaining permits, licenses, or other official documents to qualify a person to

119 See United States v. Kozeny, 582 F. Supp. 2d 535, 541 (S.D.N.Y. 2008) (rejecting the defendant’s argument that his bribes were legal under foreign law because the statute of limitations period had run on such an offense in the foreign country in which they were paid).
120 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).
do business in a foreign country; (ii) processing governmental papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature.\textsuperscript{121}

However, this exception does not cover payments related to discretionary decisions made by foreign officials such as whether to award new business, continue existing business, or incorporate particular terms of agreement.

\textit{F. Sanctions}

Federal prosecutors have a wide array of weaponry with which to wage war on corruption. The arsenal of criminal and civil penalties at the DOJ and SEC’s disposal in FCPA cases allow prosecutors to apply varying levels of force to deter future violations and extract plea agreements for past violations.\textsuperscript{122} Historically, penalties for violating the FCPA generally fall into one of two categories: economic sanctions or imprisonment. When viewed through a law-and-economic lens, “fines and imprisonment are simply different ways of imposing disutility on violators.”\textsuperscript{123} Under this view, “[c]ommercial bribery is a deliberate tort and one way to deter it is to make it worthless to the tortfeasor by stripping away all of his gain”\textsuperscript{124} either by imprisoning corrupt individuals or imposing sanctions on the tortfeasor that make the conduct too costly to engage in.


\textsuperscript{122} POSNER, \textit{supra} note 13, at 220 ("[T]he criminal sanction ought to be calibrated to make the criminal worse off by committing the crime.").

\textsuperscript{123} \textit{Id.} at 223.

1. Criminal Sanctions

Individuals criminally prosecuted under the FCPA for willfully bribing foreign officials face up to five years in prison and/or fines of up to $100,000 per violation.\(^\text{125}\) Under the FCPA’s accounting and record-keeping provisions, defendants face even stiffer penalties, which include up to twenty years in prison and/or fines not to exceed $5 million.\(^\text{126}\)

As business shifts to various emerging foreign markets, prosecutors have increasingly relied on the threat of imprisonment to deter corporate executives from engaging in corrupt practices overseas.\(^\text{127}\) This is due in large part to the failure of civil remedies during the 2000s to deter the corporate greed and corruption that ultimately led to the collapse of Enron in 2001 and the banking industry in 2008.\(^\text{128}\) Prior to 1994, there were no incarcerations for violations of the FCPA.\(^\text{129}\) Following the financial scandals that exposed corporate corruption in the U.S., incarcerating individuals tendering bribes abroad became rather common.\(^\text{130}\) Consequently,


\(^{127}\) Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007, 22 Corp. Crime Rep. 36(1) (2008), available at http://www.corporatecrimereporter.com/mendelsohn091608.htm (“‘The number of individual prosecutions has risen – and that’s not an accident,’ Mendelsohn said. ‘That is quite intentional on the part of the Department. It is our view that to have a credible deterrent effect, people have to go to jail.’”).

\(^{128}\) See generally Nicholas J. Wagoner, Note, 51 S. Tex. L. Rev. 1087, 1134–35 (2010) (“A more recent trend, which emerged during the 2000s, involved the endless string of highly publicized corporate scandals. Most notably, scandals involving Enron, WorldCom, Martha Stewart, options backdating, lobbyist Jack Abramoff, the mortgage crisis and subsequent bailout, Bernie Madoff, and Goldman Sachs each left their mark on what Time Magazine characterized as the ‘Decade from Hell.’”).

\(^{129}\) STUART H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 77 (ABA Publ’g, 2d ed. 2010).

\(^{130}\) Id.

All sanctions impose some costs on the government that imposes them. Imprisonment involves costs of facilities, guards, feeding and clothing the inmates, etc.; imposing fines involves other costs, like the efforts to extract the funds, but the revenue from the fines can outweigh the costs of extracting them.\footnote{POSNER, supra note 13, at 223.} Imprisonment in the white-collar context would seem to be especially costly for the state (usually with nicer facilities), making such a sanction even less appealing to the state when compared to hefty fines and disgorgement for white-collar offenses. Of course, debarment imposes significant short-term costs on the government as well – perhaps losing a favorite contractor or vendor – but the benefits debarment offers help offset these costs in the long term.

When sanctioning entities rather than individuals, organizations charged with criminal violation of the antibribery provisions may face fines of up to $2 million per violation.\footnote{15 U.S.C. §§ 78dd-2(g), -3(e); 78ff(c)(1)(A)–(2)(A) (2006).} Moreover, an entity’s criminal violation of the FCPA’s accounting and record-keeping provisions can lead to a fine of up to $25 million.\footnote{15 U.S.C. § 78ff(a) (2006).}

2. Civil Sanctions
The DOJ has the power to pursue civil penalties for FCPA violations instead; civil actions provide the government with the benefit of a lower burden of proof, and penalties that have somewhat fewer legal restrictions than do fines. Nevertheless, the DOJ has traditionally deferred to the SEC on civil matters.\footnote{See \textit{Deming}, supra note 129, at 75. There are however, a few instances in which the DOJ has pursued FCPA violations civilly. \textit{See}, e.g., United States v. Metcalf & Eddy, In., No. 99CV12566NG, Consent and Undertaking (D. Mass. Dec. 14, 1999), \textit{reprinted in 5 FCPA REP.} 699.749 (2d ed. 2009); United States v. Am. Totalisator Co. Inc. (D. Md. 1993); United States v. Dornier GmbH (D. Minn., filed Jan. 12, 1990), \textit{reprinted in 3 FCPA REP.} 697.74; United States v. Carver (S.D. Fla. Apr. 9, 1979), \textit{reprinted in 2 FCPA REP.} 645.} The discretion given to SEC officials to determine the nature of its enforcement action, the type of redress it will seek, and the severity of sanctions it will impose rivals that of the DOJ.\footnote{See \textit{Thomas}, supra note 15, at 478 (“[T]he SEC retains a great deal of discretion in deciding which civil enforcement actions to bring against issuers as well as the appropriate type of penalties—fines, injunctions, or both—to seek in an action.”).} As one might expect, the civil fine settlements obtained by the SEC in disgorgement and penalties appears to be close to the figure for the fines that the DOJ obtains in criminal cases.\footnote{Robert W. Tarun & Peter P. Tomczak, \textit{Introductory Essay, A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy}, 47 AM. CRIM. L. REV. 153, 165–66 (2010). SEC officials tasked with prosecuting foreign corruption consider the following factors: egregiousness of conduct, isolated or systematic nature of violations; widespread or systematic nature of conduct; degree of self-policing; remedial efforts; and the extent of cooperation with investigation. Additional factors include the degree of benefit to the company and the harm to others; the level of intent; the need for deterrence; and whether conduct was difficult to detect. \textit{Response of the United States, Questions Concerning Phase 3 OECD Working Group on Bribery} 32 (May 3, 2010).} For criminal FCPA prosecutions, the DOJ considers

3. \textit{U.S. Sentencing Guidelines}

The nature and severity a penalties sought by federal prosecutors in cases of foreign corruption are largely determined through balancing factors under the federal sentencing guidelines.\footnote{\textit{See generally U.S.S.G. §§ 2C1.1, 2B1.1 (2010).} But see \textit{generally} United States v. Booker, 543 U.S. 220 (2005) (holding that sentencing ranges must be advisory in nature rather than mandatory, preserving federal judges’ sentencing discretion).}
factors particular to natural persons under U.S.S.G. Chapters 3 and 4 to determine the length of any prison term and the appropriate amount of the fine, as described in Chapter 5; and the factors particular to legal persons under U.S.S.G. Chapter 8, including cooperation, to determine a corporate fine. Fines are determined in accordance with the U.S. Sentencing Guidelines whether the resolution is a guilty plea, a deferred prosecution agreement (DPA), or non-prosecution agreement (NPA), although fines pursuant to DPAs and NPAs can be reduced below the bottom of the guidelines range to reflect voluntary reporting, extensive internal investigation, cooperation, remediation, and similar mitigating factors.\textsuperscript{139}

The U.S. Sentencing Guidelines provide an interlinked matrix of provisions that dictate the severity of fine imposed on an entity for violating the FCPA. The following five steps provide an overview of the “corporate sentencing calculus” used to determine the appropriate level of fines for criminal violations of the FCPA.

a. Step 1: Determining the Base Fine

The base fine is said to reflect the seriousness generally attributed to foreign corruption:

Base Fine\textsuperscript{140} = Greatest of:

- Offense Level of 12 or higher\textsuperscript{141} located in the Base Fine Table\textsuperscript{142} = +$40,000 for FCPA violation; or
- “the pecuniary gain to the organization from the offense”;\textsuperscript{143}
- “the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly”;\textsuperscript{144}

\textsuperscript{139} \textit{Response of the United States, Questions Concerning Phase 3 OECD Working Group on Bribery 31} (May 3, 2010).

\textsuperscript{140} U.S.S.G. § 8C2.4(a).


\textsuperscript{142} U.S.S.G. § 8C2.4(d).

\textsuperscript{143} USSG § 8C2.4(a)(2). See \textit{e.g.}, F. Joseph Warin & Patrick F. Speice, Jr., \textit{supra} note 141, at 5 (“[C]ourts calculate the benefit of a bribe in terms of the value of the favor obtained as a result of the bribe. For example, if an individual offered a $10,000 bribe to a foreign government official to win a contract that results in $75,000 worth of profits for his or her company, the benefit of the bribe is $75,000.”).
b. Step 2: Calculating the Culpability Score

The culpability score is a product of the entity’s culpability in violating the FCPA. The score factors in whether the “tone from the top” was the cause of corruption or rather the entity was merely careless in watching over its subsidiaries in distant lands.

Initial Culpability Score = five points

- Culpability score increased for:
  - “the size of the corporation;”
  - “the level and degree of discretionary authority of individuals who participated in or tolerated the criminal activity;”
  - “whether the corporation had a fairly recent history of similar misconduct;”
  - “whether the offense violated a judicial order, injunction, or condition of probation;” and
  - “whether the corporation willfully obstructed or attempted to obstruct justice during the investigation, prosecution or sentencing of the offense.”

- Culpability score reduced by:
  - “the offense occurred even though the corporation had in place a compliance and ethics program;”
  - “the corporation self-reports, cooperates, and accepts responsibility.”
  - the degree to which a prosecuted entity self reports, cooperates with prosecutors, and accepts responsibility in a timely manner
  - the degree to which a prosecuted entity cooperates

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144 U.S.S.G. § 8C2.4(a)(3).

145 JULIE O’SULLIVAN, FEDERAL WHITE COLLAR CRIME 210 (3d ed. 2007).

146 Id. (citing § 8C2.5(f)(1)). An entity penalized under the FCPA may reduce its culpability score based on the extent to which its compliance program adheres to the standards in U.S.S.G. § 8B2.1(b)(1)(A-C), assessing whether the organization has reasonable internal standards and procedures “to prevent and detect criminal conduct.” These include, rather predictably, ethics training for management, screening of managers for criminal background, internal monitoring and enforcement, and incentives for compliance.

147 Id. (citing § 8C2.5(f)(1)). An entity penalized under the FCPA may reduce its culpability score based on the extent to which its compliance program adheres to the standards in U.S.S.G. § 8B2.1(b)(1)(A-C), assessing whether the organization has reasonable internal standards and procedures “to prevent and detect criminal conduct.” These include, rather predictably, ethics training for management, screening of managers for criminal background, internal monitoring and enforcement, and incentives for compliance.

148 Tarun & Tomczak, supra note 137, at 162 (citing U.S.S.G. § 8C2.5(f)(g)).

149 U.S.S.G. § 8C2.5, Note 12. Note 12 provides that

[C]ooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. A prime test of whether the organization has disclosed all pertinent information is whether the
c. Step 3: Determining the Culpability Range

Next, a culpability range is determined by taking the culpability score calculated in the first two steps and cross referencing it with the table in U.S.S.G. § 8C2.6 to determine the “minimum multiplier” and the “maximum multiplier.” Then determining the minimum–maximum fine range as follows:

\[
\text{Base Fine} \times \text{minimum multiplier} = \text{fine floor} \\
\text{Base Fine} \times \text{maximum multiplier} = \text{fine ceiling}
\]

The fine floor and fine ceiling create a range from which the court will ultimately select the fine for the sentenced organization. This is typically the final step however, as prosecutors typically enter into plea agreements with the prosecuted entities before turning the decision over to a sentencing judge.¹⁵¹

d. Step 4: Determining the Fine

Sentencing judges then select the applicable fine from within the range created by the fine floor and ceiling. Courts will consider a number of factors in determining where the fine falls inside this range, which includes

- “[T]he corporation's ‘role in the offense, any nonpecuniary loss caused or threatened by information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct.

*Id.*

¹⁵⁰ See O’SULLIVAN, *supra* note 145, at 213.

¹⁵¹ Tarun & Tomczak, *supra* note 137, at 165 (“In practice, the[ ] fourth and fifth steps are rarely applicable to either Antitrust Division or Fraud Section corporate pleas, as those final fines are usually numbers negotiated between the United States and the corporate pleas, as those final fines are usually numbers negotiated between the United States and the corporate defendants, e.g., the aggravating or mitigating factors in steps 4 and 5.”).
the offense’’;\textsuperscript{152} and
- “prior [corporate] misconduct . . . not previously counted’’;\textsuperscript{153} and
- “‘any prior criminal record of high-level personnel in the’ corporation’’;\textsuperscript{154} and
- “whether it failed to have, at the time of the offense, an effective compliance and ethics program.’’\textsuperscript{155}

\textbf{e. Step 5: Sentencing Court Final Adjustments}

Once the fine has been selected from within the range, the sentencing court has the discretion to make final adjustments based on a variety of aggravating and mitigating factors, which include:

- “substantial assistance to the authorities in the investigation or prosecution ‘of another organization that has committed an offense, or in the investigation and prosecution of an individual not directly affiliated with the defendant who has committed an offense’’;\textsuperscript{156}
- “‘threats to national security’’\textsuperscript{157} or “‘to a market flowing from the offense’’;\textsuperscript{158} and
- “remedial costs that greatly exceed the gain from the offense.’’\textsuperscript{159}

\textit{4. Alternative Fines Act}

Next, prosecutors may strap additional penalties onto the fines calculated under the federal sentencing guidelines for FCPA violations, which frequently “‘in aggregate, exceed the statutory maximums.’’\textsuperscript{160} In theory, by increasing the severity of possible fines under the FCPA, prosecutors similarly enhance the deterrent force of the law. Under the Alternative Fines Act

\textsuperscript{152} Id. at 164 (citing U.S.S.G. § 8C2.8) (alterations in original).
\textsuperscript{153} U.S.S.G. § 8C2.8.
\textsuperscript{154} Tarun & Tomczak, \textit{supra} note 137, at 164 (citing U.S.S.G. § 8C2.8).
\textsuperscript{155} Id.
\textsuperscript{156} O’SULLIVAN, \textit{supra} note 145, at 215 (quoting U.S.S.G. § 8C4.1).
\textsuperscript{157} U.S.S.G. § 8C4.3.
\textsuperscript{158} U.S.S.G. § 8C4.5.
\textsuperscript{159} U.S.S.G. § 8C4.9.
\textsuperscript{160} Tarun & Tomczak, \textit{supra} note 137, at 161.
(AFA), an entity may fined up to twice the gross gain resulting from its corrupt practices.\textsuperscript{161} Conversely, when a prosecuted entity’s corruption results in pecuniary loss to a third party (e.g., where a defendant procures a contract in exchange for bribes, which would have otherwise been granted to a competitor), the contractor may face fines of up to twice the gross amount of the loss.\textsuperscript{162} Individuals may similarly face additional fines of up to $250,000, or up to twice the gross gain or loss under the AFA.\textsuperscript{163}

5. Confiscation of Bribery and Proceeds of Bribery

a. Civil Disgorgement

The government tries to mulct the accrued benefits of bribery either through criminal forfeiture (DOJ) or civil disgorgement of profits (SEC).\textsuperscript{164} The SEC has increasingly sought to disgorge profits from companies that obtained them by corrupt means.\textsuperscript{165} Commentators have questioned the SEC’s disgorgement authority\textsuperscript{166} because the relevant statute does not expressly authorize this penalty, nor is there support in the FCPA’s legislative history,\textsuperscript{167} and courts have

\textsuperscript{161} See 18 U.S.C. § 3571(a), (d) (2006).
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} RESPONSE OF THE UNITED STATES, QUESTIONS CONCERNING PHASE 3 OECD WORKING GROUP ON BRIBERY 33 (May 3, 2010).
\textsuperscript{165} See 30 MICH. J. INT’L L. 471, 478. Furthermore, “The SEC will often follow a ‘zero tolerance’ policy in the case of companies that violate both the bribery and record-keeping provisions, but it has shown more willingness to work with companies that implement prompt and effective remedial measures.” Id.
\textsuperscript{166} See e.g., Weiss, Note, supra note 68, at 486, 497; Tarun & Tomczak, supra note 137, at 165–166.
not yet had the opportunity to review it.\textsuperscript{168} Critics of disgorgement argue that, although the penalty theoretically “can provide perfect deterrence by depriving corporations of the entirety of the incentive for engaging in illegal bribing,” this is “not necessarily [what occurs] in practice”\textsuperscript{169} given the costly, time-consuming, and politically delicate nature of following the money trail of profits stashed away in banks across the world.

b. Civil Forfeiture

The DOJ and SEC have several means by which they may force companies to forfeit assets linked to the investigation or prosecution of foreign corruption. For instance, under the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), any offense listed as an “unlawful activity” in the Money Laundering Control Act (MLCA), which includes FCPA violations, may be civilly forfeited.\textsuperscript{170} Similarly, although it rarely exercises its authority to do so, the DOJ may seize the assets of a company under investigation for foreign corruption. It has only done so on at least two occasions in recent years.\textsuperscript{171}

6. \textit{Prohibition from Participating in Public Contracts/Advantages}

When deciding which federal contractors to retain, federal agencies must conduct extensive audits to determine whether a potential private-sector partner will likely comply with foreign

\textsuperscript{168} Tarun & Tomczak, \textit{supra} note 137, at 166.

\textsuperscript{169} Weiss, Note, \textit{supra} note 68, at 506.

\textsuperscript{170} \textit{See} DEMING, \textit{supra} note 129, at 82

\textsuperscript{171} \textit{See} RESPONSE OF THE UNITED STATES, QUESTIONS CONCERNING PHASE 3 OECD WORKING GROUP ON BRIBERY 18 (May 3, 2010).
corruption laws like the FCPA. To qualify for public advantages, companies must have appropriate internal controls to ensure compliance with federal law and regulation. Federal contractors can face suspension or debarment for knowingly withholding disclosure to the government of other contracts it obtained via “fraud, conflict of interest, bribery, or gratuity.”

III. BAE SYSTEMS: A CASE STUDY OF CORRUPTION

The unlikely facts that ultimately led to the prosecution of BAE began to unfold more than twenty years ago, when Saudi Arabia, a vital ally to the western world’s fight against terrorism in the Middle East, placed an order for 14,000 Tornado Fighter jets manufactured by BAE. With approximately 100,000 employees serving more than 100 countries, BAE Systems is the second largest global defense company. In 2010 alone, it reported sales of over $35 billion. With enough capacity and firepower to meet the Royal Saudi Air Force’s needs, BAE seemed like an obvious choice for the “Al-Yamamah” arms deal.

Whispers of corruption swirled around the deal from day one. There were rumors that BAE agents handed wads of cash to Saudi representatives, and of extravagant “gifts” like a

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172 See Office of Management and Budget (OMB) Circular A-133.

173 Id. at 45.

174 RESPONSE OF THE UNITED STATES, QUESTIONS CONCERNING PHASE 3 OECD WORKING GROUP ON BRIBERY 45 (May 3, 2010).


mansion in the U.S. and a personal Airbus 340 in customized colors in pursuit of the Saudi arms contract. To conceal the illicit expenses, accountants at BAE recorded invoiced them using cryptic language such as “support and accommodation services.”

The allegations of bribery ultimately prompted the prosecuting arm of the UK, the Serious Fraud Office (SFO), to begin investigating BAE in 2006. The SFO suspected that BAE had used shell companies to funnel money through Swiss bank accounts to Saudi officials. When the Saudi prince who was brokering the deal learned of the investigation, he threatened to take the Al-Yamamah deal to a competing country if the investigation continued. When this did not work, Saudi officials and their political allies pressured the director of the SFO with threats of cutting off the steady stream of military intelligence it was supplying to the UK, placing “British lives on British streets . . . at risk.”

London’s 7/7 bombings were still fresh in people’s memories when Prime Minister Blair convinced the SFO to drop its investigation of BAE, citing concerns for national security. Following this announcement, the UK “won” a contract from the Saudi Arabian government for

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179 Complaint at P 41, United States v. BAE Sys., No. 1:10-cr-00035-JDB (D.D.C. Feb. 4, 2010), available at


183 Id.
seventy-two Typhoon jet fighters worth $8 billion. When questioned at the G8 Summit about his decision to suspend the investigation of BAE, Prime Minister Blair asserted,

[L]et me make one thing very clear to you, I don’t believe the investigation would have certainly would have led anywhere, except to the complete wreckage of a vital strategic relationship for our country in terms of fighting terrorism, in terms of the middle east, in terms of British interests there; quite apart from the fact, that we would have lost thousands and thousands of British jobs.

In 2001, when questioned about his role in Saudi corruption, Prince Bandar was equally unapologetic.

BAE’s troubles were not over. When the CEO of BAE Systems’ plane touched down in Houston, Texas on May 13, 2008, federal agents were there to greet him. In the two years that followed, federal officials unraveled a global network of bribes and kickbacks, which BAE fed with its multimillion-dollar slush fund that helped it pay off the highest echelons of governments in return for defense contracts. In February 2010, the DOJ informed the court that it had discovered that “BAE provided substantial benefits to one [Kingdom of Saudi Arabia] public official, who was in a position of influence regarding the KSA Fighter Deals.”

In court filings, the DOJ describes BAE’s marketing strategy, in which it used intermediaries to “purchase of travel and accommodations, security services, real estate, automobiles and personal items” as they courted Saudi officials who held the purse strings to

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186 Id. (“The way I answer the corruption charges is this, . . . . so what. We didn’t invent corruption, it has happened since Adam and Even . . . . This is human nature.”).
188 Id. at ¶ 44.
the Al-Yamamah contract. A travel agent involved would later explain the lavish lifestyles that BAE afforded Saudi officials as being “one beyond that of a film star, because they have the diplomatic passport.”

The factual description and charging language used by the government to describe BAE’s illicit activity “is frequently used by the DOJ in charging companies with FCPA violations.” Despite the seeming applicability of the FCPA’s antibribery and reporting provisions, the DOJ instead charged BAE with conspiracy to make false statements to the United States government about the nature of its payments—a charge that, unlike the FCPA, does not trigger an agency’s discretionary debarment authority. The United States was able to assert jurisdiction over the British company because BAE facilitated its crooked operations abroad through agents working within the borders of the U.S.

A month later, the DOJ announced BAE’s guilty plea to “mak[ing] false statements about its Foreign Corrupt Practices (FCPA) compliance program,” in which it agreed to pay a $400

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190 Façade of FCPA Enforcement, supra note 97, at 995.


[...] from at least in or about 2000, BAE Systems plc knowingly and willfully conspired and agreed, with others known and unknown to the United States, to: (a) knowingly and willfully impeded and impair the lawful government function of the United States government, . . . by making certain false, inaccurate statements to the U.S. government . . . thereby defrauding the United States in violation of Title 18 United States Code, Section 371; and (b) . . . knowingly and willfully make materially false, fictitious, or fraudulent statements or presentations; in violation of Title 18, United State Code, Section 1001.

Id. According to the government, the fruits of BAE’s illicit payments included “gains” in excess of $ 200 million. Id. ¶ 48.

192 Id. ¶ 44.
million criminal fine.”193 Though the fine was touted as “one of the largest criminal fines in the history of DOJ’s ongoing effort to combat overseas corruption,” the absence of an FCPA charge meant that debarment was not an option. The Government officials took the opportunity to reaffirm their stated commitment to “hold[ing] accountable companies that impair the operations of the U.S. government by lying about their conduct and operations.”194 The Assistant Director of the FBI’s Washington Field Office echoed these concerns: “Corporations and individuals who conspire to defeat this basic economic principle not only cause harm but ultimately shake the public’s confidence in the entire system.”195

It appears however, that the inconvenience of FCPA-based debarment for the government itself associated with FCPA charges outweighs the government’s concern for maintaining the public’s confidence in the democratic system.196 BAE’s indispensible partnership with American agencies as the “fifth largest provider of defense materials to the United States government”197 may have helped it dodge a bullet.

If companies in which “bribery was nothing less than standard operating procedure,”198


194 Id. (statement by Acting Deputy Attorney General Gary G. Grindler).

195 Id.


continue to receive preferential treatment because of partnerships with key U.S. officials, the
deterrent effect of “holding accountable companies” that spread lies and corruption across the
globe is stripped away. When companies weigh the benefits against the costs associated with
paying bribes to receive contracts abroad, the government’s refusal to bring FCPA charges in
cases like BAE places a heavy thumb on the benefits-side of the scale. This becomes even more
concerning when the government actually endorses the practices through continued partnership
with untrustworthy contractors that take money out of the pocket of the American taxpayer and
into the foreign market for black money.

IV. BAE SYSTEMS’ PROFITABLE PARTNERSHIP WITH THE U.S.

As pointed out by Professor Mike Koehler, the FCPA’s ability to accomplish its stated
goal—to deter foreign corruption—is severely diminished when the message sent by prosecutors
in cases like BAE “is that certain companies in certain industries, particularly those that sell
certain products to certain customers, are essentially immune from FCPA.”199 Perhaps most
concerning however, is the U.S.’s continued partnership with companies that recently admitted
to engaging in foreign corruption. In categorically refusing to seriously consider suspending or
debarring companies that undermine confidence in free markets overseas, our nation risks
eroding the public’s trust in government institutions at home.

Less than a year after the FBI and DOJ had uncovered BAE’s lies and corruption, the
United States entered into no fewer than fifty contracts with BAE totaling over $58 billion.
When compared side-by-side, the $58 billion200 promised to BAE in the 365 days that followed

199 Façade of FCPA Enforcement, supra note 97, at 996.

200 See infra app. A.
its plea of guilt make the $400 million fine imposed on BAE look less like a serious effort to root out corruption, and more like a cost of doing business.

Perhaps even more shocking than the staggering sums of U.S. tax dollars shelled out to BAE after admitting to bribery and fraud are the government entities that may be bankrolling such foreign corruption. For example, just seven months after the FBI lambasted BAE for its crooked business practices, observing that it could “shake the public confidence in the entire system,” the FBI entrusted BAE with a $40 million contract to “provide critical information security safeguards . . . to ensure the confidentiality and privacy of FBI computer networks in the United States and around the world.” One need not understand the intricacies of law and economics to how the FBI’s decision to invite BAE to serve as the “gatekeeper” for the FBI “in the cyber world” sends the exact opposite message about the government’s tolerance for foreign corruption.

V. DEBARMENT AS A METHOD OF DETERRING FOREIGN CORRUPTION

A. The Fallacy of Corporate Fines as a Deterrent

Prosecutors at the DOJ and SEC frequently boast of the massive fines imposed on companies that violate the FCPA as a sign of success. Similarly, scholars often point to the

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201 See supra note 195.


203 Id. (statement by BAE Systems’ Vice President and General Manager of Intelligence and Security Tom Sechler).

204 See, e.g., See Comments of Assistant Attorney General Breuer at the 24th National Conference on the Foreign Corrupt Practices Act (November 16, 2010) (stating that the DOJ “has imposed the most criminal penalties in FCPA-related cases in any single 12-month period—well over $1 billion”).
increasingly large FCPA-related fines imposed on companies as evidence of the Act’s “resurgence.”\textsuperscript{205} Almost no attention has been given to the deterrent capability of alternative forms of punishment however, such as suspension and debarment.

Despite this seemingly singular focus on corporate sanctions, fines offer little deterrent value in the corporate setting, and in some cases actually work against the FCPA’s goal of deterring foreign corruption. Fines provide an ineffective mechanism for deterring white-collar crime committed by corporations because corporations, in essence, have “no soul to damn, [and] no body to kick.”\textsuperscript{206}

1. Corruption as a Cost of Doing Business

The first popular fallacy is that the threat of a hefty fine deters corporations from engaging in misconduct much in the same manner as it would a person. This misses the reality that corporations are nothing more than a legal fiction; humans on the other hand, are living, breathing, feeling, and thinking beings. Whereas a human may experience the painful, agonizing toll that steep fines have on their quality of life, corporations cannot be coerced in this manner. Moreover, “deterrence via corporate sanctions does not halt the individual behaviors of agents and officers within the corporation, who feel peer pressure for profits or sales results that is greater than their expected norm of ethical and compliant behavior.”\textsuperscript{207}

As rational calculators of the costs and benefits, “a corporation might employ a simple

\footnotesize{\textsuperscript{205} See generally Koehler, supra note 59.}

\footnotesize{\textsuperscript{206} See generally John Coffee, “No Soul to Damn, No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386 (1981).}

cost–benefit analysis in whether to engage in bribery and merely suffer a large fine.”

When viewed from a law-and-economics perspective, it is not surprising that less than a decade after its enactment, debate in Congress centered on whether sanctions for violating the FCPA would merely be treated as a “cost of doing business.”

Under this critique, FCPA fines have little, if any, deterrent effect when the benefits derived from the sanctionable conduct—landing massive overseas contracts by paying off foreign officials without risking the loss of equally profitable business with the United States—largely outweigh the cost of getting caught. As one author observed, “Even if it makes sense to threaten profits, legal sanctions have to be sensitive to the fact that, comparatively, they are of very little significance to a large corporation. Profits can be increased or undermined from many more sources: through personnel policies, competitors’ moves, investment or not in production and so on.” As a result, for corporate actors the question is not “to bribe or not to bribe?” rather, it is “how much could this bribe cost the company?” Unfortunately fines present a corporation with the opportunity to pay its way out of an FCPA violation.

2. Mixed Messages Sent by Monetary Sanctions

That FCPA-related fines are perceived merely as costs of doing business rather than punishment for morally repugnant corruption undermines the moral message embodied in the

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208 Thomas, Note, supra note 15, at 467.

209 Response to Written Questions of Senator D’Amato from John C. Keeney, Business Accounting and Foreign Trade Simplification Act, Joint Hearing Before the Subcommittee on International Finance and Monetary Policy and the Subcommittee on Securities of the Committee on International Finance and Monetary Policy and the Subcommittee on Securities of the Committee on Banking, Housing, and Urban Affairs, United States Senate, 99th Congress, Second Sessions, on S. 430 (June 10, 1986).

legislation. This, in turn, “undercuts the [FCPA’s] deterrent force.” In his book *Punishment and Modern Society: A Study in Social Theory*, David Garland explains how “penalty communicates meaning not just about crime and punishment but about power, authority, legitimacy, normality, personhood, social relations, and a host of other tangential matters.”

Thus, “Fines do not emphatically convey the message that serious corporate offences are socially intolerable. Rather they create the impression that corporate crime is permissible provided the offender merely pays the going price.”

By tolerating contractors’ corruption through continued patronage, domestic agencies send the message to contractors that paying bribes and falsifying reports is an excusable offense so long as a company that gets caught “can buy [its] way out of criminal liability.” And when those who get caught are making exponentially greater sums of money from government contracts, including U.S. contracts, the risk of getting caught tendering a bribe overseas (especially when discounted by the low probability of detection) becomes significantly diminished. And with the flow of new U.S. contracts on a regular basis, “paying of bribes . . .

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211 *See Eliason Says Shift to Deferred Prosecution Agreements Unduly Favors Corporations*, 22 CORP. CRIME REP. 38(12) (2008), available at http://www.corporatecrimereporter.com/eliason100608.htm; *see also* Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1215 (1983) (“Another inadequacy of fines is that they convey the impression that permission to commit a crime may be bought for a price. This impression conflicts with the goals of both deterrence and retribution, which are partly to express the notion that offenses are socially unwanted and that money alone cannot adequately compensate.” (footnote omitted)).


213 Brent Fisse *Sentencing Options Against Corporations*, 1 CRIM. L.F. 211 (1990). In her book, *Corporations and Criminal Responsibility*, author Celia Wells observes, “It is interesting that the word ‘punishment’ is replaced when corporations are the object of criminal enforcement by the altogether less emotive ‘sanction.’” CELIA WELLS, *CORPORATIONS AND CRIMINAL RESPONSIBILITY* 31 (Oxford Univ. Press, 2d ed. 2001).

214 CORP. CRIME REP., *supra* note 52; *see also* Fisse, *supra* note 211, at 1215 (“Another inadequacy of fines is that they convey the impression that permission to commit a crime may be bought for a price.”).
will not be tolerated” becomes “Don’t worry about it, we’ll deduct it from your next paycheck.” This approach to FCPA enforcement “conflicts with the goals of both deterrence and retribution, which are partly to express the notion that offenses are socially unwanted and that money alone cannot adequately compensate. Whatever compensation victims receive after a harm has occurred, in many cases they would have been unwilling to prebargain for the harm for monetary compensation.”

3. Abusive Monetary Sanctions

Controversy surrounds the use of sanctions to punish companies for unethical behavior, due to the potential for inviting prosecutorial abuse. Prosecutorial abuse through monetary sanctions in the FCPA context typically takes one of two forms. First, critics contend that prosecutors threaten companies with massive, unwarranted fines to coerce them into plea agreements. Other critics take this concern a step further by pointing out that threats of large fines have helped extract plea agreements even in cases where the government’s legal theories were questionable. The massive fines and disgorgement of profits imposed under the FCPA may stand on similarly shaky ground.


216 Fisse, supra note 211, at 1215.

217 See, e.g., DEMING, supra note 129, at 77 (“Given the severity of the criminal penalty for a violation of the accounting and record-keeping provisions, and a greater ability to prove a violation, a prosecutor has an enhanced ability to negotiate a plea.”).

218 See Façade of FCPA Enforcement, supra note 97, at 946–55.

219 See id. at 963–84.
As discussed throughout this Article, although suspension or debarment can be far more crippling to a company’s bottom line than the imposition of a fine, debarment offers an alternative to fines that is less susceptible to abuse. Whereas federal prosecutors have the discretion to settle cases of corruption and can use the threat of large fines to coerce risk-averse companies into plea-bargaining despite little or no evidence of corruption, suspension and debarment decisions are within the discretion of the separate and detached agencies.

Second, some claim that the typical FCPA-related penalties imposed on companies facilitate prosecutorial cronyism. Those who endorse this perspective claim that a look behind the curtain reveals “Bribery Inc.,” in which a booming industry largely benefiting ex-prosecutors who parlay their connections gained at the DOJ to obtain lucrative gigs as DOJ-appointed monitors and compliance officers at private corporations being investigated for foreign corruption. Critics point to the fact that the majority of these monitors are former DOJ prosecutors.

Given the DOJ and SEC’s practically unfettered discretion over the terms of a company’s plea agreement, federal prosecutors may engage in political patronage by levying massive fines and monitoring fees on a company, requiring legal fees “to the tune of billions of dollars,” which trickle down to lawyers, “many with past ties to the Justice Department.” The argument continues, “there is nothing to stop prosecutors from ginning up cases that will feed the lawyers


221 See 48 C.F.R. § 9.406-1(a) (“It is the debarring official’s responsibility to determine whether debarment is in the Government’s interest.”).

222 See Nathan Vardi, The Bribery Law Racket, FORBES, May 24, 2010, at 70, 74 (“It seems that an important qualification for these gigs is having previously worked at the Justice Department—as 7 of the 13 FCPA monitors have done.”).

223 Id. at 72.
who used to have their jobs or from looking forward to a payday in the private sector that will be made possible by their busy successors at Justice.”

Expressing her “outrage that people get $50 million to be a monitor,” U.S. District Court Judge Ellen Segal Huvelle declared the fines, fees, and other expenses generated by FCPA-related monetary sanctions as having created a “boondoggle.”

B. The Law of Suspension and Debarment

The Reagan Administration was the first major proponent of using debarment to deter “government waste, fraud, and exploitation of public funds in federal programs” and enhance “governmental accountability.”

Although companies are mandatorily debarred from contracting with the U.S. and European Union (EU) for violating certain statutes, 31 U.S.C. § 6101 leaves the decision up to each agency’s discretion when contractors violate the FCPA.

Companies that solicit, procure, or carry out a government contract by paying bribes, making false statements, or destroying evidence—conduct that obviously falls within the purview of the FCPA’s antibribery and accounting provisions—trigger an agency’s discretionary

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224 Id.

226 See O’REILLY ET AL., supra note 207, at 252 (citing Exec. Order No. 12549 (applying debarment to abuses of federal “grants, cooperative agreements, contracts of assistance, loans, and loan guarantees,” but not “procurement programs”)). In 1989, President George H.W. Bush subsequently expanded the utility of debarment through Executive Order 12689 by making an agency’s debarment of a company apply to all agencies, government-wide.


debarment provision. This power to suspend or debar federal contractors during criminal FCPA prosecution arises under FAR, which calls for a company’s suspension or debarment for up to three years, “commensurate with the seriousness of the cause.”

When agency officials assess the seriousness of the cause, “the contractor has the burden of demonstrating to the satisfaction of the debarring official, its present responsibility, and that debarment is not necessary.” In reviewing suspension and debarment decisions, courts have similarly taken into consideration the “mitigating circumstances in order to sustain a debarment or suspension.”

The resulting harm that may occur to a contractor following its suspension or debarment is magnified by the fact that such decisions are said to “flow down” to all other contracting executive agencies. In other words, each agency has the power to blacklist a contractor from conducting business with any other agency of the United States. This is not without exception however, as agencies may still pursue business with a blacklisted contractor so long as the agency produces a written statement from the agency’s debarment official providing “the compelling reasons for renewal or extension” of its business with the contractor.

230 Id. § 9.406-4.
231 Id. § 9.401-(a)(10).
234 48 C.F.R. § 9.405-1(c).
C. Suspension and Debarment as a “Corporate Death Sentence”

Commentators have described the severity of a company’s preclusion from contracting with the government as being a “drastic penalty,”\(^235\) a “virtual ‘death sentence,’”\(^236\) and as effectively “sound[ing] the death knell”\(^237\) for many companies. This is particularly true when a company’s bread and butter are bullets and bombs,\(^238\) healthcare,\(^239\) oil and gas, or any other industry heavily regulated by the United States. Although the APA’s purpose was to protect the government rather than punish criminal contractors,\(^240\) officials resort to it only for the most egregious criminal violations.\(^241\)

D. Benefits of Debarment

1. Increased Compliance Without Increased Enforcement Costs

\(^{235}\) O’Reilly et al., supra note 207, at 251.

\(^{236}\) Christopher A. Wray & Robert K. Hur, Corporate Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice, 43 Am. Crim. L. Rev. 1095, 1134 (2006); see also O’Reilly et al., supra note 207 at 251 (“The result is the corporate ‘death penalty’ because the pipeline of new product approvals is closed for that entity or that person, and no further approvals can be made—effectively ending the ability of the company to remain in that regulated field.”).


\(^{238}\) See Part IIIA.

\(^{239}\) See Conry, supra note 61, at 1.

\(^{240}\) O’Reilly et al., supra note 207, at 254.

\(^{241}\) See id. (“Debarment from contracting with the government is an exceptional remedy.”); see also 48 C.F.R. § 9.406-4(a)(1) (“Debarment shall be for a period commensurate with the seriousness of the cause(s).”).
Given its potency as a penalty, “[f]or large defense contractors, disbarment from U.S. government contracts could well be the most significant deterrent to engaging in conduct proscribed under the FCPA.”\(^{242}\) Thus, the heightened degree of severity associated with the risk of debarment, even when the risk of detection is minimal, will increase compliance with the FCPA. Penalizing corrupt contractors by suspending federal funding would more effectively dry up the market for bribe money than mere fines, which merely become costs of doing business to firms that continue to make multiples more through subsequent government contracts.

2. *Increased Self Disclosure Without Increased Enforcement Costs*

Investigating foreign corruption can be time consuming and extremely expensive for the FBI, DOJ, and SEC. With limited resources at their disposal, federal prosecutors encourage companies to disclose cases in which the company believes it may have violated the FCPA. Doing so allows prosecutors to devote more of their time and energy towards prosecuting cases in which a suspected corporate wrongdoer has taken steps to conceal its corrupt practices. Seeking to avoid this, the DOJ would likely reserve debarment for cases that eat up public resources due to prolonged discovery that could have been avoided through voluntary disclosure.

To incentivize self-disclosure, the DOJ has promised that it will “meaningfully reward” voluntary disclosures with lesser penalties.\(^{243}\) The “reward” for voluntary disclosure is a lighter


sentence. Professor Koehler identifies a variety of means through which prosecutors entice
companies to voluntarily disclose potential violations, which include a “corporation’s timely and
voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its
agents” as well as its “cooperation with relevant government agencies.”

Professor Koehler notes that “[a] key factor motivating th[e] risk-based decision” to self-disclose “is that such a
course of conduct is more efficient and certain compared to the DOJ independently finding out
about the conduct (however slight the possibility) and harshly penalizing the company for failing
to voluntarily disclose.” Given the dire consequences associated with debarment, the
consequence of which is viewed by most companies as being more severe than the consequences
of being fined, companies will be even more inclined to dispose of such risk through voluntary
disclosure.

The relevant debarment provisions of FAR similarly call for agencies to consider
leniency when companies (1) conducted a thorough internal investigation of the matter, (2)
reported the findings of its investigation to the government, (3) whether the agency believes the
corrupt employee or employees were adequately disciplined, (4) whether measures were
implemented to ensure future compliance with the FCPA, and (5) whether adequate deterrent
measures were in place when the violation occurred.

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245 The Façade of FCPA Enforcement, supra note 97, at 926.

Seeking to curry favor with prosecutors and agencies, the heightened severity associated with suspension or debarment may compel a greater number of companies to self-disclose their corrupt dealings in hopes of avoiding the FCPA’s harshest of penalties.\textsuperscript{247}

By debarring companies in egregious, highly public cases of foreign corruption, federal prosecutors can leverage the escalated level of risk associated with debarment to incentivize more companies to come forward in exchange for leniency.\textsuperscript{248}

\textit{E. The Discretionary Debarment Decision}

Prosecutors exercise a significant degree of charging discretion.\textsuperscript{249} A prosecutor’s decision to pursue claims of bribery under the FCPA (thereby triggering an agency’s discretionary debarment power) rather than charging the contractor under an alternative applicable statute, directly affects whether the company is subject to mandatory debarment, discretionary debarment, or is immune from the risk suspension or debarment. Prosecutors also indirectly influence debarment officials’ through frequent meetings and intra-agency cooperation.

\textsuperscript{247}See Wray & Hur, supra note 236, at 1115.

\textsuperscript{248}See, e.g., id at 1115 “[The Department of Defense (DoD)] adopted a voluntary disclosure program that provides for the possibility of more lenient treatment for contractors that self-report. In order to encourage companies to self-report potential violations and agree to cooperate with the ensuing audits and investigations, DoD offers companies the increased likelihood of avoiding suspension and debarment -- sanctions that are, for defense contractors, even more deathly than corporate criminal charges themselves.” (footnotes omitted)).

1. Are Corrupt Government Contractors “Too Big to Debar”?

Although prosecutors exercise a significant degree of influence over an agency’s discretionary debarment decision as discussed below, the ultimate decision rests with the agencies that do business with corrupt contractors. By the late 1980s, the Department of Defense (DoD) suspended or debarred, on average, approximately 1,000 contractors per year.\(^{250}\) Yet, despite “[m]any of the U.S. government’s largest contractors hav[ing] been found to have repeatedly broken the law or engaged in misconduct” between 1990 and 2002, only one of the top forty-three government contractors were suspended or debarred during this period.\(^{251}\) These figures lend support to the Project on Government Oversight’s conclusion “that large contractors enjoy an unfair advantage over smaller contractors in navigating the federal government’s suspension and debarment system.”\(^{252}\)

Admittedly, debarment differs from other FCPA sanctions in the collateral costs it imposes on the government, besides its particular burdens on the sanctioned violator. Other agencies, which have no input in the decision about sanctioning FCPA violators, may have long-running contractual relationships with the same company,\(^{253}\) especially for large corporations like Lockheed Martin, Boeing, and Halliburton.\(^{254}\) When such contracts come up for renewal


\(^{252}\) Id.


(presumably debarment would not terminate all other existing contracts), the government has the inconvenience and costs of finding a suitable replacement.\(^{255}\) In some cases, this is virtually impossible due to the scale of some federal projects and the enormous set-up costs for providers.\(^{256}\)

The DOJ echoed these concerns in its response to a several questions about its stance on drafting legislation compelling mandatory debarment for FCPA violations: “If every criminal FCPA resolution were to carry with it mandatory debarment consequences, then prosecutors would lose the necessary flexibility to tailor an appropriate resolution given the facts and circumstances of each individual case.”\(^{257}\) The real reason for the DOJ’s rejection of the Senator’s mandatory debarment proposal appears to be evident in the preceding sentence of its response—that sanctioning those perceived as being too big to debar despite egregious FCPA violations “would likely lead to the cessation of revenues for a government contractor – a virtual death knell for the contractor-company.”\(^{258}\)

\(^{255}\) See Pachter, \textit{supra} note 253, at 247-49.


\(^{258}\) \textit{Id.}
2. Prosecutorial Finger Pointing

In January 2011, there were inquiries into the DOJ’s role in ensuring that other federal agencies were upholding suspensions and debarments when they outsourced to contractors. Assistant Attorney General Lanny Breuer, declared, “I don’t think Department of Justice believes that it’s our role to determine whether someone should be debarred or not because we don’t have the expertise of the department or agency who has to decide how valuable this particular contractor is.” Yet several key private-sector vendors to the federal government are corporations with a documented history of corruption. Given that “over the past fifteen years there have been only give suspension actions and zero actions of the government’s top one hundred contractors,” Senator Franken worried “that federal agencies are giving a free pass to large contactors.”

Alluding to the DOJ’s prosecution of BAE Systems, as discussed above, Senator Franken concluded, “Part of the problem is that we’re too dependent on a handful of contractors, particularly when it comes to the wars in Iraq Afghanistan, and that too many contracts . . . are too big to fail.”

259 http://www.youtube.com/watch?v=w4XG85RacqM.

260 Id.


262 http://www.youtube.com/watch?v=w4XG85RacqM.

263 See supra Part III.

3. *Prosecutors’ Influence Over Debarment Decisions*

An agency’s decision to suspend or debar a contractor from future business with the U.S. is a direct effect of whatever charges federal prosecutors brought against the firm. For example, BAE’s misrepresentation of $5 million in bribes and kickbacks paid to a Saudi official fell squarely within the language of both the FCPA’s accounting provision. A more general statute criminalizing the submission of false statements to the U.S. Yet, because BAE was prosecuted under the latter statute (which does not trigger an agency’s discretionary debarment authority) rather than the former (which triggers an agency’s discretionary debarment authority), BAE was insulated from suspension or debarment from its contracts with the U.S.

The DOJ denies ever using specific language in settlements that would prevent debarments and suspensions. Breuer insisted at the Senate hearings, “I don’t think we ever do Senator.” As one commentator pointed out, however, this position is inconsistent given that DOJ sentencing memoranda in its Siemens prosecution explicitly stated that it selected sanctions that would avoid “collateral consequences” that would result from criminal FCPA anti-bribery charges. This included the “risk of debarment and exclusion from government contracts.”

BAE is another major U.S. government contractor; DOJ pleadings against it aver that in “2008,

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265 *See Façade of FCPA Enforcement, supra* note 97, at 995.


268 *Façade of FCPA Enforcement, supra* note 97, at 996 (footnotes omitted).

269 *Id.*
BAE was the largest defense contractor in Europe and the fifth largest in [America] as measured by sales.”

The DOJ faced a series of follow-up questions after a November 2010 hearing on FCPA enforcement held by the Senate Judiciary Committee. When asked whether “a mandatory, conduct-based, debarment remedy for companies that engage in egregious bribery [would] further the deterrent effect of the FCPA,” the DOJ conceded the possibility, but stated that deterrent effect of mandatory debarment “would likely be outweighed by the accompanying decrease in incentives for companies to make voluntary disclosures, remediate problems, and improve their compliance systems.”

F. H.R. 5366: Overseas Contractor Reform Act

The infamous phrase too big to fail (sometimes referred to by its moniker “T.B.T.F”) became part of our national lexicon following the collapse of the U.S. economy in 2008. Initially used by government officials to describe the dire economic consequences that would follow the failure of one of the nation’s bedrock banks. Following the government’s “bailout” of banks that were seen as being “too big to fail” however, enraged voters increasingly used the phrase to criticize the conflict of interest that resulted from the government’s overreliance on a

270 Id.


272 See generally ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM—AND THEMSELVES (Penguin Group 2009).
handful of private-sector entities. Thus, the phrase highlights the dangers of placing too many matters of public concern in the hands of too few companies.

Cognizant of this emerging concern among its constituents, on September 15, 2010, the House of Representatives passed the Overseas Contractor Reform Act (OCRA).\textsuperscript{273} The initial success of the OCRA, which would have required that federal agencies consider debarring government contractors that violate the FCPA, was likely due to the escalating concern that government contractors that engage in egregious acts of foreign corruption might similarly be viewed as “too big to debar.” In 2011, Senator Al Franken expressed this concern to AAG Breuer: “I think part of the problems is that we are too dependent on a handful of very large contractors, particularly when it comes to the wars in Iraq and Afghanistan and that too many contractors maybe now are too big to fail.”\textsuperscript{274} The bill never came to a vote in the Senate.

Senator Franken’s follow-up question to Breuer called attention to the fundamental weakness of the OCRA’s proposed language, when he asked, “How frequently is DOJ putting in settlements specific language that can be used to prevent debarments and suspensions?” Mr. Breuer assured the Senator that the DOJ never considers the possibility of debarment when deciding whether to prosecute a large government contractor’s foreign bribery and subsequent cover-up under the FCPA (thereby triggering discretionary debarment) or a similar law (e.g., false statements – 18 U.S.C. § 1001) that avoids triggering discretionary debarment.

\textsuperscript{273} H.R. 5366, 111th Cong. 2d (2010), available at http://www.gpo.gov/fdsys/pkg/BILLS-111hr5366eh/pdf/BILLS-111hr5366eh.pdf. The proposed language would require “any person found to be in violation of the Foreign Corrupt Practices Act of 1977 shall be proposed for debarment from any contract or grant awarded by the Federal Government within 30 days after a final judgment of such violation” unless waived by the agency.” Id.

\textsuperscript{274} Protecting Taxpayers from Fraud: Hearing on HR \textemdash\ Before S. Comm. on the Judiciary, 112th Cong. \textemdash\ (2011) (statement of Sen. Al Franken), available at http://www.youtube.com/watch?v=w4XG85RacqM.
The DOJ and SEC have admitted to considering the “collateral consequences” of prosecuting foreign corruption under the FCPA on a number of occasions, and in fact, have official instructions to do so. In prosecuting BAE for falsely recording bribe payments, the DOJ used non-FCPA charges to avoid exposing one of the U.S.’s key defense suppliers to the EU’s mandatory debarment provisions triggered by the FCPA. Prosecutors similarly structured settlement language to avoid debarment in the Siemens and Daimler cases. Finally, when directly questioned about its stance on imposing mandatory debarment on contractors that engage in particularly egregious acts of corruption, the DOJ asserted that “a mandatory conduct-based debarment remedy for companies could well have a negative impact on the Government’s ability to investigate and prosecute transnational occupation effectively.”

These examples illustrate the fatal flaw of the OCRA’s requirement that agency heads consider suspending or debarring contractors that violate the FCPA—that is, the prosecutors still have the ability to avoid triggering such proceedings simply by refusing to prosecute foreign

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275 See U.S. Attorneys Manual § 9-28.300. In determining whether and what to charge a corporation with in connection to foreign corruption, the Principles of Federal Prosecution of Business Organizations instructs prosecutors to consider the “collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution” in bringing charges. Id. § 9-28.300-A.7.

276 BAE Sentencing Memorandum, supra note 196. BAE’s sentencing memorandum explained, “BAE’s business is primarily from government contracts, including with several EU customers.” Id. at 15.


corruption under the FCPA. Prosecutors are not solely to blame, though. Even in cases outside
the ambit of the FCPA, FAR provides agencies with the discretion to suspend or debar contractors that engage in bribery wholly apart from prosecutions conducted by the SEC and DOJ.280 As Mr. Breuer pointed out to Senator Franken, federal prosecutors “don’t have the expertise of the department or agency that has to decide how valuable [a] particular contract is,”281 nor do they have statutory authority to do so.

As a result, the responsibility to deter foreign corruption through suspension and debarment largely falls on each federal agency that transacts business with private contractors. The leaders within these agencies should regularly consult with the DOJ, Congress, and other policy makers to determine whether avoiding the collateral consequences that may result from debarring contractors viewed as “too big to debar” justifies the mixed messages and the toxic side effects that result from the U.S.’s complacency in preventing the spread of corruption.

G. The “Collateral Consequences” of Debarment

All too often, corruption functions as a buffer against policy based regulations.282 Federal prosecutors play an important role as “vehicle[s] effecting widespread structural reform within corrupt corporate cultures,” and therefore must balance a number of competing interests when

280 Under 48 C.F.R. § 9.406-2, an agency may, at its discretion, debar a contractor for “Commission of ... bribery, falsification, or destruction of records, making false statements ... or commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.” Id. §§ 9.406-2(c), (e) (emphasis added).


282 See, e.g., Weiss, Note, supra note 68, at 472 (describing the view that laws do not sufficiently deter multinationals from “vigorously pursue corruptly influenced contracts,” as well as the opposite view, which asserts that “moral signals from the countries that have prohibited corruption by statute” sufficiently deter foreign corruption).
deciding how best to punish and deter foreign corruption.\textsuperscript{283} In exercising their discretion over such matters, prosecutors must consider the broad-ranging implications that economic sanctions may have on companies with thousands of employees working in hundreds of countries.

With so many moving parts, prosecutors have the unenviable task of considering the seemingly infinite number scenarios that might unfold following charges of corruption. Thus, “[t]he FCPA ultimately proves to be a large-scale study in the law of unintended consequences.”\textsuperscript{284} The global scale of most FCPA prosecutions makes balancing the United States’ desire “to aggressively root out corporate fraud” with its competing interest of “remaining sensitive to the considerable collateral consequences of moving criminally against an entire entity” a difficult task indeed.\textsuperscript{285} The risk of negative “collateral consequences” is particularly high when an FCPA prosecution may lead to a company’s suspension or debarment from government contracts.

As a result, in determining whether to prosecute a company under the FCPA, the DOJ and SEC “does consider collateral consequences” of suspension and debarment when determining whether to charges companies under the FCPA, or alternative statutes that do not trigger discretionary suspension and debarment.\textsuperscript{286}

\begin{itemize}
\item \textsuperscript{283} Thomas, Note, supra note 15, at 454.
\item \textsuperscript{286} Christopher M. Matthews, \textit{Mendelsohn and Scarboro Spread the FCPA Gospel}, MAIN JUSTICE (Mar. 23, 2010 1:27 PM), http://www.mainjustice.com/2010/03/23/mendelsohn-and-scarboro-spread-the-fcpa-gospel/ (reporting that Mendelsohn admitted that the DOJ does consider the collateral consequences of suspension and debarment when structuring settlement agreements “[i]n response to a question about the DOJ’s recent settlement with BAE Systems”).
\end{itemize}
Potential collateral consequences that may result from a government contract’s suspension or debarment may include: (1) a monopoly on government contracts by the remaining few contractors with enough capacity to satisfy government orders, (2) injured diplomatic relations with foreign allies, (3) the threat to national security that may occur if the U.S. severs ties with key suppliers in the areas of national defense and energy, (4) the risks that U.S. businesses may miss out on lucrative economic opportunities in emerging markets due to the overdeterrent effect of suspension and debarment, and (5) the risk of “disproportionate harm to shareholders and others who are not personally culpable,”\footnote{RESPONSE OF THE UNITED STATES, QUESTIONS CONCERNING PHASE 3, OECD WORKING GROUP ON BRIBERY 16 (May 21, 2010) (citing U.S. Attorneys Manual § 9-28.100).} not to mention (6) the political risk associated with pursuing agency allies in the private sector.

Federal prosecutors have used these considerations in at least three cases to justify relatively generous plea agreements\footnote{That is, plea agreements that did not implicate potential suspension and debarment despite strong evidence of egregious acts of foreign corruption that likely otherwise justify such severe penalties.} that avoided exposing the prosecuted companies to potential suspension or debarment from U.S. contracts, and avoided exposing the U.S. to the collateral risks associated with such penalties. In response to OECD questions about the U.S. government’s self-interest in shirking debarment sanctions, U.S. officials cited the DOJ’s handling of the matters involving BAE Systems,\footnote{BAE Sentencing Memorandum, supra note 196 (“European Union Directive 2004/18/EC, which has recently been enacted in all EU countries through implementing legislation, provides that companies convicted of corruption offenses \textit{shall} (emphasis in original) be mandatorily excluded from government contracts.”). BAE’s sentencing memorandum further noted the risk that debarment posed to BAE by stating “BAES’s business is primarily from government contracts, including with several EU customers.” \textit{Id.}} Siemens,\footnote{See Sentencing Memorandum at 11, United States v. Siemens Aktiengesellschaft (D.D.C. Dec. 12, 2008) available at http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf. In declining to bring anti-bribery charges against Siemens, prosecutors cited “[t]he Department's analysis of collateral consequences [which] included the consideration of the risk of debarment and exclusion from government contracts” as influencing its decision not to charge Siemens under the FCPA. \textit{Id.}} and Daimler\footnote{See Sentencing Memorandum at 11, United States v. Siemens Aktiengesellschaft (D.D.C. Dec. 12, 2008) available at http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf. In declining to bring anti-bribery charges against Siemens, prosecutors cited “[t]he Department's analysis of collateral consequences [which] included the consideration of the risk of debarment and exclusion from government contracts” as influencing its decision not to charge Siemens under the FCPA. \textit{Id.}} as examples of
when “the harm [that] potential debarment would cause to the public, both in the U.S. and abroad . . . was taken into consideration in prosecution and sentencing.”

1. Concerns over Diplomatic Consequences

Federal agencies are aware that the decision to suspend or debar a multinational company that services foreign allies may lead “to the complete wreckage of a vital strategic relationship” for the U.S. For instance, had federal agencies debarred BAE from continuing to transact business with the U.S., BAE would not have received its $58 billion in subsequent contracts

In accordance with the Department’s Principles of Federal Prosecution of Business Organizations, the Debarment considered a number of factors in its decisions regarding the overall disposition. Those factors included, but were not limited to, Daimler’s cooperation and remediation effort, as well as any collateral consequences, including whether there would be disproportionate harm to the shareholders, pension holders, employees, and other persons not proven personally culpable, and the impact on the public, arising from the prosecution. The Debarment’s analysis of collateral consequences included the consideration of the risk of debarment and exclusion from government contracts, and in particular included European Union Directive 2004/18/EC, which provides that companies convicted of corruption offenses shall be mandatorily excluded from government contracts in all EU countries.

Id. at 12.

RESPONSE OF THE UNITED STATES, QUESTIONS CONCERNING PHASE 3, OECD WORKING GROUP ON BRIBERY 16–17 (May 21, 2010). The U.S.’s response elaborated,

[T]he potential for collateral consequences is severe and the threat of disproportionate harm is great, prosecutors must determine if certain charges will result in unfair or unjust consequences to the company, its shareholders, its employees, and the general public, among others. Where the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. Because of the range of charging options and mechanisms available to prosecutors, including DPAs and NPAs and the ability to proceed on alternate charges that might carry different risks, such unfair or unjust results can be mitigated while still permitting prosecution.

Id.

from the U.S., which, in turn, would have resulted in massive layoffs in BAE’s offices across the
globe, including the U.K., India, Canada, and in other key ally nations.

The U.K. government’s decision to snuff out prosecutors’ inquiry into the corrupt
dealings of key middle-eastern allies highlights the tension between the government’s desire to
uphold its pledge to root out foreign corruption and its desire to preserve vital strategic alliances
“in critical and volatile areas of the world.” This may explain why “[t]he DOJ enforced the
[FCPA] with great trepidation” during the first two decades of its existence, “fearing the Act’s
enforcement would damage relations with allies” because debarring companies that pay
kickbacks to “allied government officials would be far from diplomatic.”

2. Concerns over Monopoly

In addition to the problem of existing interdependent relationships, where the government
actually needs that vendor, there is the problem of reduced competition for future bidding on
new projects. One in four federal RFP’s currently receive only one bid, and are essentially
uncompetitive, so there is no competitive savings for the government. This percentage is likely to
increase substantially if major federal contractors face debarment. The result is higher costs for
the government and the taxpayers on future projects.

294 Spalding, supra note 284, at 399.
295 Thomas, Note, supra note 15 at 448–49.
296 See, e.g., Zucker, supra note 254, at 264–70.
297 See Brian, supra note 256, at 236–38.
298 For more on the problem of monopoly power of certain government contractors, see John Donahue, The
Transformation of Government Work: Causes, Consequences, and Distortions, in GOVERNMENT BY CONTRACT 58–
61 (Jody Freeman & Martha Minow eds., 2009); Martha Minow, Outsourcing Power: Privatizing Military Efforts
Yet this picture is incomplete, and the cost increases hard to quantify. The sanction under consideration is for bribing foreign government officials in order to obtain lucrative contracts. The purpose of these bribes is to secure a contract for an inflated price – to win against lower-cost bidders – or to induce the foreign government to procure goods and services that it otherwise would not. Inflated costs and superfluous procurements drain the public resources in the countries where the FCPA violations occur; if the local government is financing the projects through American foreign aid, the corruption misappropriates American government resources indirectly. When the same firm is obtaining myriad contracts domestically, there can be no confidence that it won these contracts fairly and competitively, at the lowest cost to the American taxpayers. Even where a firm had no prior history of bribery, its success with the foreign bribe (which became the predicate for FCPA charges) can give the corporation a taste for the convenience of ill-gotten gains. We should not underestimate the corrupting influence of the bribe on the firm that makes it.

and the Risks to Accountability, Professionalism, and Democracy, in GOVERNMENT BY CONTRACT 118. A similar market failure can also occur when the market is highly localized. See ELLIOT D. SCLAR, YOU DON’T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION 83–90 (2000).

299 Charles E. Hyde & Jeffrey M. Perloff, Can Monopsony Power Be Estimated?, 76 AM. J. AGRIC. ECON. 1151 (1994) (discussing monopsony effects on prices and problems with speculating about the effects, outside the context of debarment).

300 See Brian, supra note 256, at 235-38.


302 See Brian, supra note 256, at 236–38 (“While there is nothing wrong per se with having such a program [for waiving debarment if a contractor creates an internal ethics compliance program], there is no empirical evidence that the mere existence of these programs truly alter the culture of the company. All the most recidivist companies in the POGO database have been members of the Defense Industry Initiative and have had internal ethics programs in operation for years.”).

303 See id.
Moreover, when large firms elude debarment due to the federal government’s dependence on them, it contributes to the consolidation of the market (oligopoly trends), which further undermines competitive bidding and potential cost-savings from federal outsourcing. In other words, existing monopsony problems are the biggest obstacle to using debarment, but preventing monopsony problems is an argument in favor of using debarment. The “too big to debar” problem is actually an outgrowth of the inherent monopsony problems with government outsourcing. In this sense, however, debarment serves an incapacitation purpose more than it provides deterrence.

304 See id. at 236-38.

305 See James J. McCullough and Abram J. Pafford, Government Contract Suspension and Debarment: What Every Contractor Needs to Know, 13 PUBLIC PROCUREMENT L. REV. 240 (2004)(explaining that some firms ask the government to debar their competitors so that they can win the bids on future contracts, eliminating the competition).


308 See Brian, supra note 256, at 235-36: “[Until 2004], it appeared that large federal contractors had been immune to being suspended or debarred from obtaining additional government contracts . . . not one major contractor had been suspended or debarred in a decade – despite all the misconduct that populates [the Project on Government Oversight] database.”

Monopsony is a dysfunctional market situation where there is a single buyer of the goods or services.310 The monopsony features inherent in government contracting allow service providers to manipulate the officials into funding unnecessary services and to stick with familiar entities rather than newcomers.311 Edward Rubin observes that ultimately, “government monopsony breeds contractor monopoly,”312 and the monopsony and monopoly effects “reinforce each other.”313 The state agencies contracting with private firms are “subject to concerted efforts from each potential contractor interested in persuading it to adopt a program design that only the contractor can fulfill.”314

3. Concerns over Economic Consequences of Overdeterrence

One of the central tenants of law and economics holds that punishing borderline corporate misconduct with severe penalties may unintentionally lead to overdeterrence. In other words, “salutary . . . conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment.”315

No doubt, the legitimate, real threat of suspension and debarment would significantly decrease American companies’ willingness to engage in corrupt practices to bolster their bottom

310 See Rubin, supra note 306, at 920-21.

311 Id. at 921.

312 Id.

313 Id.

314 See id. at 923.

line. That said, such a sword of Damocles\textsuperscript{316} might deter U.S. companies from pursuing otherwise profitable business opportunities in emerging markets because of the company’s increased exposure to corrupt foreign officials.\textsuperscript{317} As prosperity shifts to emerging markets overseas, U.S. companies may forego likely opportunities for chance to void the unlikely, but highly severe, risk of FCPA debarment.\textsuperscript{318}

In addition to its chilling effect on commerce, penalizing FCPA violations with suspension and debarment may result in two other negative unintended side effects. First, such severe penalties may “breed[] overcompliance by risk-averse companies mindful of the consequences of a DOJ inquiry—even if that inquiry is not based on viable legal theories.”\textsuperscript{319} By threatening to cut off a contractor’s primary revenue stream (i.e., government contracts) if one of its employees gets caught tendering bribes in a foreign country, suspension and debarment shift a company’s incentive away from making desirable capital outlays (streamlining supply chain, R&D, increasing capacity, etc.) to investing in extensive compliance programs.

On the other hand, perhaps the threat of suspension and debarment provide the necessary incentive for companies that might not otherwise implement adequate ethics and compliance programs. Similarly, although the deterrent potency of the increased use of suspension and debarment may lead to an overinvestment in unnecessary corporate compliance, tendering


\textsuperscript{317} See Spalding, \textit{supra} note 284, at 355–356; Bixby, \textit{supra} note 48, at 103.

\textsuperscript{318} Kathleen A. Lacey et al., \textit{Assessing the Deterrent Effect of the Sarbanse-Oxley Act’s Certification Decisions: A Comparative Analysis Using the Foreign Corrupt Practices Act}, 38 Vand. J. Transnat’l L. 397, 440 (2005) (“The long-term effect of increasing corporate regulation during the past three decades and the worldwide interest in preventing business corruption should reduce the number of executives willing to risk the penalties and the public censure.”).

\textsuperscript{319} FCPA Enforcement, \textit{supra} note 97.
briefcases full of cash to low-level officials, showering foreign royalty with lavish gifts, and hording millions of dollars in cash in secret corporate slush funds can hardly be viewed as sound investments.

The use of suspension and debarment as an FCPA sanction may also raise concerns that the increased possibility of such a severe penalty may have a chilling effect on a company’s voluntary disclosure of bribery. Although legitimate, the chilling effect is easy to avoid for the same reasons that self-reporting has actually increased in recent years alongside the size of fines imposed under the FCPA. Prosecutors have successfully incentivized self-disclosure with promises of lenient sentencing in the form of lesser fines.

“Even when the Government impose[s] neither suspension nor debarment, the threat of a corporate death penalty provides [an even greater] incentive for firms to enter into less draconian compliance agreements, and then comply with the terms of those agreements.” As a result, the perception that suspension and debarment are more severe than potential fines may actually result in a greater number of voluntary disclosures. As one commentator points out:

VI. CONCLUSION

The FCPA is an important statute for combatting corruption globally, and for maintaining the integrity of federal outsourcing relationships at home. It has taken on increasing significance in recent years as FCPA enforcement has grown and penalties have spiraled upward. The sanctions, however, are still too thin. The restricted set of sanctions the government has been

320 See Tarun & Tomczak, supra note 137, at 154.

321 Schooner, supra note 316, at 4.

322 See Tarun & Tomczak, supra note 137, at 154–55.
using against violators is hampering the effectiveness of the FCPA in achieving Congress’ purposes of deterring bribery and fraud in government contracting.

Despite the magnitude of recent fines and penalties for FCPA violators, these sanctions represent a tiny fraction of the potential revenue available from lucrative government contracts. Discounted by the low probability of detection, the fines and penalties are far too low to deter unlawful activity, especially when firms obtain even larger contracts with the federal government following the sanctions. There is also an inherent unfairness, or at least imprudence, in awarding enormous government contracts to firms that the government has just prosecuted for fraudulently obtaining such contracts. Worse, the largest firms with the most government contracts have the least incentive to comply with the law.

Debarment would be a far more potent deterrent, if the government were serious about reducing corruption, and would fit more logically into the policy goal of protecting public funds from misappropriation. Debarment would deter potential wrongdoers and incapacitate previous offenders. It is unfortunate, therefore, that the enforcement agencies consistently refuse to seek suspension or debarment of firms that flout the FCPA. Of course, it would not be painless for the government to lose certain established contractors, but given that debarments typically last only two years, this is more of a temporary inconvenience for the government. For the firms caught bribing foreign officials, however, a two-year hiatus from any government contracts presents remarkable opportunity costs. The deterrent would induce more firms would comply with the law, so in the long term the “too big to debar” problem would diminish. This would foster greater confidence in the federal government at home and abroad, and would help fledgling governments in developing countries to mature into effective political systems.
## APPENDIX A

<table>
<thead>
<tr>
<th>DATE</th>
<th>CONTRACT VALUE</th>
<th>DESCRIPTION</th>
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<tbody>
<tr>
<td>26-Mar-10</td>
<td>45</td>
<td>BAE Systems will provide Oshkosh Corp. with thermal</td>
</tr>
<tr>
<td>30-Mar-10</td>
<td>28</td>
<td>BAE Systems has been awarded a $28 million</td>
</tr>
<tr>
<td>11-May-10</td>
<td>10</td>
<td>BAE Systems has received a $10 million contract from the</td>
</tr>
<tr>
<td>12-May-10</td>
<td>5.5</td>
<td>BAE Systems today announced the award of a $5.5</td>
</tr>
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<td>17-May-10</td>
<td>11</td>
<td>BAE Systems has received a $10.7 million order from the</td>
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<tr>
<td>20-May-10</td>
<td>6,600</td>
<td>BAE Systems was one of six major defense contractors</td>
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<tr>
<td>25-May-10</td>
<td>95</td>
<td>BAE Systems has received a U.S. Army contract worth up</td>
</tr>
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<td>22 Jun 2010</td>
<td>71.1</td>
<td>BAE Systems has received a $44 million contract</td>
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<tr>
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<tr>
<td>6-Jul-10</td>
<td>17</td>
<td>BAE Systems has received an initial order of $17 million.</td>
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<tr>
<td>7-Jul-10</td>
<td>70</td>
<td>BAE Systems was recently awarded a contract for $70 million.</td>
</tr>
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<td>27-Jul-10</td>
<td>365</td>
<td>BAE Systems, Inc., a leading U.S. non-nuclear ship repair,</td>
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<td>2-Aug-10</td>
<td>9.6</td>
<td>BAE Systems has been awarded a $9.6 million contract.</td>
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<td>2-Aug-10</td>
<td>170</td>
<td>BAE Systems has received delivery orders from the U.S.</td>
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<td>3-Aug-10</td>
<td>31.5</td>
<td>BAE Systems has been awarded a $21 million order.</td>
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<td>5-Aug-10</td>
<td>23</td>
<td>BAE Systems has been awarded $23 million in contracts.</td>
</tr>
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<td>18-Aug-10</td>
<td>30</td>
<td>BAE . . . will provide engineering and technical services.</td>
</tr>
<tr>
<td>25-Aug-10</td>
<td>16,400</td>
<td>BAE Systems has been approved to provide services.</td>
</tr>
<tr>
<td>1-Sep-10</td>
<td>629</td>
<td>BAE Systems has been awarded a $629 million contract.</td>
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[331](http://www.baesystems.com/Newsroom/NewsReleases/2010/autoGen_1106615531.html)


[335](http://www.baesystems.com/Newsroom/NewsReleases/2010/autoGen_1107316024.html)


[338](http://www.baesystems.com/Newsroom/NewsReleases/2010/autoGen_110725134857.html)

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<tr>
<td>2-Sep-10</td>
<td>49.9</td>
<td>After successful development of the Defense Advanced</td>
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<td>41.7</td>
<td>BAE Systems was recently awarded a $41.7 million</td>
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<td>70</td>
<td>BAE Systems received a contract modification for up to</td>
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<td>21-Sep-10</td>
<td>40</td>
<td>ARLINGTON, Virginia -</td>
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<td>28-Sep-10</td>
<td>14.8</td>
<td>BAE Systems will provide technical services to maintain</td>
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<td>29-Sep-10</td>
<td>3.9</td>
<td>BAE Systems has received a U.S. Air Force contract of</td>
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<td>6-Oct-10</td>
<td>7</td>
<td>BAE Systems announced today that it has received a $7</td>
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<tr>
<td>11-Oct-10</td>
<td>17.2</td>
<td>BAE Systems will provide identification-friend-or-foe</td>
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<td>11-Oct-10</td>
<td>15</td>
<td>BAE Systems has received a $15 million contract from the</td>
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<td>13-Oct-10</td>
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<td>BAE Systems announces the award of an indefinite-</td>
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<tr>
<th>Date</th>
<th>Number</th>
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<td>20-Oct-10</td>
<td>20</td>
<td>BAE Systems recently dedicated the new</td>
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<td>22-Oct-10</td>
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<td>BAE Systems has received an $11 million U.S. Army</td>
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<td>25-Oct-10</td>
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<td>BAE Systems will extend the lives of 552 Bradley Fighting</td>
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<td>1-Nov-10</td>
<td>30,000</td>
<td>BAE Systems has been selected as one of the prime</td>
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<td>1-Nov-10</td>
<td>8</td>
<td>BAE Systems has been awarded an $8 million order</td>
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<td>4-Nov-10</td>
<td>1,000</td>
<td>Under TASER, NGA will similarly transition other</td>
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<td>9-Nov-10</td>
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<td>BAE Systems has been awarded two contracts valued</td>
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<td>15-Nov-10</td>
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<td>BAE Systems will manufacture an additional 44</td>
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<td>60</td>
<td>BAE Systems has received a $60 million readiness and</td>
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<td>30-Nov-10</td>
<td>250</td>
<td>BAE Systems was awarded a contract for $250 million to</td>
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<table>
<thead>
<tr>
<th>Date</th>
<th>Value</th>
<th>Description</th>
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<tbody>
<tr>
<td>1-Dec-10</td>
<td>17.7</td>
<td>BAE Systems will provide laser warning sensor sets to</td>
</tr>
<tr>
<td>6-Dec-10</td>
<td>38</td>
<td>BAE Systems has received multiple contracts totaling $38</td>
</tr>
<tr>
<td>15-Dec-10</td>
<td>6.3</td>
<td>BAE Systems will inspect and repair Enhanced Small Arms</td>
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<tr>
<td>16-Dec-10</td>
<td>35</td>
<td>BAE Systems has received a $35 million contract from the</td>
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<tr>
<td>16-Dec-10</td>
<td>60</td>
<td>BAE Systems will provide an additional 5,286 Check-6®</td>
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<tr>
<td>21-Dec-10</td>
<td>14</td>
<td>BAE Systems will deliver an upgraded minehunting sonar</td>
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<tr>
<td>4-Jan-11</td>
<td>34</td>
<td>BAE Systems has received a $34 million contract</td>
</tr>
<tr>
<td>18-Jan-11</td>
<td>3.8</td>
<td>BAE Systems has signed a $3.8 million contract to</td>
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<tr>
<td>2-Feb-11</td>
<td>47</td>
<td>BAE Systems recently received a $47 million contract</td>
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<tr>
<td>22-Feb-11</td>
<td>24.5</td>
<td>BAE Systems has been awarded three contract</td>
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<table>
<thead>
<tr>
<th>Date</th>
<th>Amount</th>
<th>Description</th>
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<tbody>
<tr>
<td>22-Feb-11</td>
<td>350</td>
<td>The Defense Intelligence Agency (DIA) announced the</td>
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<td></td>
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<td>$41 million contract</td>
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<tr>
<td>23-Feb-11</td>
<td>41</td>
<td>BAE Systems was awarded a</td>
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<tr>
<td></td>
<td></td>
<td>$41 million contract</td>
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<tr>
<td>23-Feb-11</td>
<td>650</td>
<td>BAE Systems is extending its security services to the U.S.</td>
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<tr>
<td>28-Feb-11</td>
<td>8.4</td>
<td>BAE Systems has received an $8.4 million U.S. Air Force</td>
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<tr>
<td>1-Mar-11</td>
<td>26</td>
<td>BAE Systems will provide the U.S. Naval Air Systems</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>$58,027,900,000</strong></td>
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