CRACKING DOWN ON BRIBERY WITHOUT CRACKING DOWN ON COMPETITION: IMPLEMENTING A FOREIGN CORRUPT PRACTICES ACT THREE-STRIKE RULE

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I. Introduction

The Foreign Corrupt Practices Act ("FCPA") seeks to provide an efficient and level playing field for business transactions in a global marketplace.[1] The United States paved the way for anti-corruption by enacting the FCPA in 1977, and many countries have followed suit to strive for a common, fair approach to international business dealings.[2] Congress enacted the FCPA because corruption "distort[s] prices" and American companies are expected to conduct business with honesty and integrity in all transactions, even when other foreign businesses are not willing to do the same.[3] Corporate bribery destroys the underlying principles of a free market system: to provide goods and services based on "price, quality, and service."[4]

The government agencies have collected large monetary sanctions from many large companies for violating the FCPA over the past decade.[5] With an increased focus by the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC")[6] to enforce the FCPA, in connection with large monetary incentives created by the Dodd-Frank Wall Street Reform and Consumer Protection Act[7] ("Dodd-Frank Act") Whistleblower Provision ("Whistleblower Provision"), the government agencies must reconcile the differences between the importance of prosecuting bribery and not overburdening companies who are

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[1] U.S. DEP'T OF JUSTICE & SEC, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 2 (2012) [hereinafter FCPA: A RESOURCE GUIDE], *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf ("The Act was intended to halt those corrupt practices, create a level playing field for honest businesses, and restore public confidence in the integrity of the marketplace.").

[2] *See* discussion *infra* Part III.B.

[3] FCPA: A RESOURCE GUIDE, *supra* note 1, at 3.

[4] *Id.* at 1.

[5] *See SEC Enforcement Actions: FCPA Cases*, SEC, http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited Jan. 11, 2014).

[6] *See* FCPA: A RESOURCE GUIDE, *supra* note 1, at 4 (The DOJ and SEC share enforcement authority of the FCPA. The DOJ has criminal enforcement authority and the SEC has civil enforcement authority).

[7] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010) (codified in scattered sections of the U.S. Code).

making the effort to comply and conduct honest and fair business.[8] This paper proposes a three-strike rule for FCPA violations ("Three-Strike Rule" or "Rule") in order to provide multinational corporations with a larger cushion to avoid high costs from overly burdensome monitoring and investigations, while enabling the DOJ and SEC to more effectively prosecute FCPA violations.[9]

A Three-Strike Rule would act as a type of safe harbor for companies that violate the FCPA for a first or second time despite good faith efforts to implement and monitor a strong internal FCPA compliance program.[10] A first or second violation of the FCPA would result in a first or second strike, respectively, towards the cumulative three strikes of the Three-Strike Rule.[11] The first strike would result in a greatly reduced penalty of only one-fourth the amount of the full penalty, while strike two would result in a reduced—yet to a smaller degree than the first strike—penalty of three-fourths the amount of the full penalty.[12] A third strike would result in the SEC and DOJ collecting the full monetary sanctions as currently defined.[13]

Over the past decade, the number of FCPA enforcement actions, as well as the size of the penalties of those actions, has greatly increased.[14] Enforcement actions by both the SEC and the DOJ have increased,[15] and since the Whistleblower Provision's inception in 2011, the number of whistleblower reports has increased each year as well.[16] Yet, it is estimated bribery still costs the global

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[8] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 § 922, Pub. L. No. 111-203, 124 Stat. 1376, 1841–43 (codified at 15 U.S.C. § 78u-6); *see also* discussion *infra* Part VI.

[9] *See* discussion *infra* Part V; *see also* Michael Vitiello, *Reforming Three Strikes' Excesses*, 82 WASH. U. L.Q. 1 (2004) (explaining how to improve California's Three Strikes Laws and balance the benefits of the law with the negative effects).

[10] *See* discussion *infra* Part V.A.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *See* Jerry Kehoe et al., *FCPA Conference Presentation: The FCPA and Sovereign Wealth Funds: Best Practices for Fund Sponsors*, BINGHAM MCCUTCHEN LLP (Oct. 25–26, 2011).

[15] *Id*.

[16] SEC, 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM (2013), *available at* http://www.sec.gov/about/offices/owb/annual-report-2013.pdf.

public nearly a trillion dollars a year.[17] A Three-Strike Rule would provide incentives to international businesses conducting business both in the U.S. and abroad to strengthen internal compliance and monitoring policies as well as increase cooperation with the SEC and the DOJ as they investigate alleged FCPA violations. Because the Three-Strike Rule would allow for reduced financial penalties for strikes one and two, the reward percentage of total recovery should be higher for strike two and much higher for strike one (compared to the reward percentage under current law) in order to ensure that whistleblowers are still adequately rewarded for reporting violations. Creating a Three-Strike Rule protects businesses from being overburdened by an increase in FCPA allegations resulting from the new Whistleblower Provision of the Dodd-Frank Act without undermining the ability of the Whistleblower Provision to eliminate corrupt business transactions.

This article will first discuss the purpose and the history of the FCPA.[18] In connection with the FCPA, this article will then discuss the Dodd-Frank Act Whistleblower Provision, its intended purpose, and the effects of the statute on the FCPA since the provision's implementation in 2011.[19] Next, this article will define the Three-Strike Rule and explain when the SEC and DOJ should apply the Rule instead of regular enforcement.[20] This article then describes how to implement the Three-Strike Rule with a focus on the logistics of and hurdles to effective implementation.[21] Employing a Three-Strike Rule would allow the United States to continue paving the way in ethical international business with strict anti-corruption enforcement without hindering companies competing in the international marketplace.[22] Finally, this article will suggest actions the SEC and the DOJ can take to enhance the effectiveness of the FCPA in connection with the Whistleblower Provision to

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[17] *See, e.g.*, *Six Questions on the Cost of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann*, THE WORLD BANK, http://go.worldbank.org/KQH743GKF1 (last visited Jan. 11, 2014) [hereinafter THE WORLD BANK].

[18] *See* discussion *infra* Parts II and III.

[19] *See* discussion *infra* Part IV.

[20] *See* discussion *infra* Parts V.A–B.

[21] *See* discussion *infra* Parts V and VI.

[22] *See* discussion *infra* Part V.C.

encourage ethical business decisions that will not overly burden international companies.[23]

II. History of the FCPA

In the mid-1970s, the SEC investigated allegations of bribery and decided to survey over 400 U.S. companies to evaluate the prevalence of bribing foreign officials in the international business world.[24] U.S. companies admitted to making questionable payments totaling more than $300 million to foreign government officials during the mid-1970s.[25] As a result of the survey's findings, Congress enacted the FCPA in 1977 to curb that bribery.[26] The FCPA also sought to restore the American public's confidence in the integrity and honesty of American businesses when transacting with foreign officials.[27] Congress enacted the FCPA in such a way as to target many different potential actors in the world of international bribery and to enforce honest dealing through the financial requirements of exchange-listed U.S. companies.[28]

A. The FCPA Prohibits Bribery of Foreign Government Officials

The FCPA attempts to curb bribery using two approaches: anti-bribery provisions and accounting provisions.[29] The FCPA's anti-bribery provisions prohibit individuals from bribing foreign government officials.[30] The anti-bribery provisions prohibit any issuer, person connected to an issuer, or domestic concern to "make use of the mails or any means or instrumentality of interstate commerce corruptly" to facilitate a payment or authorize a payment to a foreign official to influence the acts of that official, to induce the foreign official to violate the duties of the official's position, or to

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[23] *See* discussion *infra* Part V.
[24] *Foreign Corrupt Practices Act Antibribery Provisions*, U.S. DEP'T OF JUSTICE (last visited Jan. 11, 2014), *available at* http://insct.syr.edu/wp-content/uploads/2013/02/lay-persons-guide.pdf.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] FCPA: A RESOURCE GUIDE, *supra* note 1, at 2.
[30] *Id.*

secure an improper advantage.[31] The FCPA prohibits foreign nationals and businesses from promoting any corrupt payment within the United States.[32] Issuers are corporations required to register and file with the SEC.[33] Domestic concerns are any person or business entity in the United States.[34]

1. The FCPA Requires Corrupt Intent that Induces the Recipient to Direct Business Wrongfully

To violate the FCPA, the individual offering or authorizing the bribe must have a corrupt intent to induce the recipient to direct business wrongfully.[35] Corrupt intent entails "the intent to improperly influence [a] government official."[36] The bribe need not succeed in its purpose to direct business wrongfully as long as the intent to do so is present.[37] Moreover, the attempted bribery violates the FCPA even if the would-be recipient does not accept the offer, or the offeror does not deliver the bribe.[38] Rather, a mere offer or promise of payment to a foreign official to conduct business wrongfully violates the FCPA.[39] The violator offering or promising a bribe only needs to intend to induce the recipient to "misuse his official position."[40]

2. The Bribe Must Be Offered or Paid to a Foreign Official

The FCPA only regulates bribes that go to a foreign official, a foreign political party or party official, or any candidate for foreign

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[31] 15 U.S.C. § 78dd-1(a) (2012).
[32] 15 U.S.C. § 78dd-3(a) (2012).
[33] *Foreign Corrupt Practices Act*, *supra* note 24.
[34] *Id.*
[35] *Id.*
[36] FCPA: A RESOURCE GUIDE, *supra* note 1, at 15.
[37] *Foreign Corrupt Practices Act*, *supra* note 24.
[38] *Id.*
[39] *Id.*
[40] United States v. Liebo, 923 F.2d 1308, 1312 (8th Cir. 1991) (holding that a payment or gift "must be intended to induce the recipient to misuse his official position . . ." (citing S. Rep. No. 95-114, at 1 (1977), reprinted in 1977 U.S.C.C.A.N. 4098, 4108)).

political office.[41] Currently, the FCPA does not cover bribes to foreign private entities.[42] While what constitutes a foreign official is not exactly clear, the SEC and the DOJ have interpreted the term broadly to reach a greater number of dishonest business dealings.[43] At a minimum, a foreign official means any officer, employee, or person acting in an official capacity for "a foreign government or any department, agency, or instrumentality thereof, or of a public international organization."[44] For example, a foreign official could include an employee for a banking, healthcare, or telecommunications company when a state-owned or state-controlled entity operates such company.[45] Moreover, the payment does not need to be monetary, but can be anything of value such as travel expenses or expensive gifts.[46]

B. The FCPA Sets Accounting Standards for Exchange-Listed Companies

In connection with the FCPA's anti-bribery provisions, Congress also included accounting provisions in the FCPA to strengthen the FCPA's reach and effectiveness.[47] Companies who benefit from investment by listing their securities on an exchange in the United States must meet certain accounting requirements set forth in the Securities Exchange Act of 1934 ("Exchange Act").[48] By requiring exchange-listed corporations to file audited financial statements, the FCPA attempts to uncover bribes of foreign officials and prevent future bribes by identifying illegal payments in a company's books and records.[49] The FCPA accounting standards require the exchange-listed U.S. companies to "make and keep books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of

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[41] FCPA: A RESOURCE GUIDE, *supra* note 1, at 19.
[42] *See* Howard Sklar, *Who Is It Okay to Bribe?* FORBES (July 6, 2012, 2:38 PM), http://www.forbes.com/sites/howardsklar/2012/07/06/who-is-it-okay-to-bribe/.
[43] FCPA: A RESOURCE GUIDE, *supra* note 1, at 20.
[44] 15 U.S.C. § 78dd-1(a) (2012).
[45] FCPA: A RESOURCE GUIDE, *supra* note 1, at 20.
[46] *Id.* at 15.
[47] *Foreign Corrupt Practices Act*, *supra* note 24.
[48] 15 U.S.C. § 78dd-1(a) (2012).
[49] FCPA: A RESOURCE GUIDE, *supra* note 1, at 39.

internal accounting controls."[50] These accounting provisions complement the anti-bribery provisions discussed in this article and act as a hook to broaden the jurisdictional reach of the SEC, allowing the SEC to prosecute more incidents of bribery among the largest U.S. companies that conduct more international business.[51] Therefore, the FCPA's accounting provisions accompany the anti-bribery provisions to curb bribery in the international marketplace.[52]

III. FCPA Modifications

A. Congress Amended the FCPA to Strengthen Its Effectiveness in Detecting and Eliminating Bribery of Foreign Government Officials

From 1977, when Congress first enacted the FCPA, to 1988, the federal government only brought twenty-three enforcement actions, twenty by the DOJ and three by the SEC.[53] The survey of U.S. companies that drove the passage of the FCPA indicated bribery was far more prevalent than these twenty-three enforcement actions over the course of a decade would suggest.[54] In essence, the bribery continued without prosecution, highlighting the need to revise the statute and jumpstart more widespread and efficient enforcement.[55] In 1988, Congress attempted to clarify and strengthen the FCPA by increasing the penalties for bribes, while creating an exception for payments made "to facilitate or expedite performance of a routine governmental action" such as, but not limited to, obtaining a visa, loading cargo, and protecting perishable products.[56] The 1988 amendment also provided affirmative defenses for payments that were legal in the foreign country, although every country has some type of domestic anti-bribery law,[57] and payments that were

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[50] *Foreign Corrupt Practices Act*, *supra* note 24.
[51] *See supra* notes 24–50 and accompanying text.
[52] *Foreign Corrupt Practices Act*, *supra* note 24.
[53] Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CALIF. L. REV. 185, 192 (1994).
[54] *See* FCPA: A RESOURCE GUIDE, *supra* note 1, at 3 ("SEC discovered that more than 400 U.S. companies had paid hundreds of millions of dollars in bribes to foreign government officials to secure business overseas.").
[55] *Id.*
[56] *Foreign Corrupt Practices Act*, *supra* note 24.
[57] Sklar, *supra* note 42.

reasonable expenses related to product promotion or contract performance.[58] The 1988 amendment, however, failed to encourage those individuals most likely to be aware and report the bribery: co-workers, competitors, friends, and family.[59]

B. The United States Entered into an Anti-Bribery Convention with Thirty-Three Other Countries

Many viewed the 1977 enactment and 1988 amendment of the FCPA as an impediment to U.S. business in international deals.[60] Compliant U.S. companies suffered a competitive disadvantage, compared to foreign companies willing to bribe government officials, as well as U.S. companies that failed to comply with the FCPA.[61] To resolve such issues, the United States engaged in talks with many countries to enter into an international agreement to prohibit bribery.[62] It took more than a decade to gain sufficient support and to reach agreement on which business activities should, and should not, be permitted.[63] Ultimately, in 1998, the United States and other members of the Organisation for Economic Co-Operation and Development ("OECD") signed and ratified the OECD Anti-Bribery Convention.[64] Shortly thereafter, Congress amended the FCPA to align the FCPA with the OECD Anti-Bribery Convention by prohibiting payments "made for purposes of 'securing an improper advantage'" and also made foreign nationals working for American companies liable.[65] These trans-national actions helped

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[58] Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARV. J. ON LEGIS. 303, 313 (2012).

[59] *See infra* notes 60–66 and accompanying text (discussing further amendment of the FCPA, which stemmed from shortcomings in the 1988 Amendment).

[60] MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., RL30079, FOREIGN CORRUPT PRACTICES ACT (1999), *available at* http://www.fas.org/irp/crs/Crsfcpa.htm ("One of the continuing criticisms of the FCPA was that American businesses were at a disadvantage in obtaining business abroad because many of the other industrialized nations do not have severe penalties for bribing foreign officials.").

[61] FCPA: A RESOURCE GUIDE, *supra* note 1, at foreword.

[62] *See* SEITZINGER, *supra* note 60.

[63] Klaw, *supra* note 58, at 314.

[64] *Id.*

[65] *Id.*

shrink the gaps in enforcement and mitigate the competitive disadvantage for companies that complied with the FCPA.[66]

C. Enforcement of the FCPA Increased Since 1998

The FCPA's effectiveness and impact on curtailing bribery started small with only twenty-three enforcement actions during the first decade of its existence.[67] The FCPA's effectiveness and impact, however, have greatly increased within the past decade and a half as the SEC and DOJ have pursued more enforcement actions.[68] From 2004 to 2012 alone, the SEC and DOJ pursued 288 enforcement actions.[69] The large increase in the number of enforcement actions, as well as in the size of the penalties of those actions, has occurred since the 1998 amendment of the FCPA.[70] The existence of international bribery and corruption are now more visible to the public with enforcement actions against large firms producing settlements in the multimillion dollar range.[71] As a result, it has become more politically savvy for politicians and the government as a whole to crack down on dishonest business dealings in order to gain political points.[72]

The United States led the way in prohibiting bribery by passing the FCPA.[73] Yet, it has taken many years and amendments to give teeth to the FCPA.[74] Since 2000, the U.S. "has pursued three

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[66] Kehoe et al., *supra* note 14.
[67] Klaw, *supra* note 58, at 311.
[68] *See* Kehoe et al., *supra* note 14 (stating FCPA enforcement is on a record pace since 2000).
[69] *2012 Year-End FCPA Update*, GIBSON DUNN (Jan. 2, 2013), http://www.gibsondunn.com/publications/pages/2012YearEndFCPAUpdate.aspx.
[70] *Id.*
[71] *See SEC Enforcement Actions: FCPA Cases*, *supra* note 5; Joe Palazzolo, *FCPA Inc.: The Business of Bribery*, WALL ST. J. (Oct. 2, 2012), http://online.wsj.com/article/SB10000872396390443862604578028462294611352.
[72] Helene Cooper, *Obama Sets Ambitious Export Goal*, N.Y. TIMES, Jan. 29, 2010, at B1.
[73] *See* Patrick Hughes and Jeffrey Harfenist, *How the Foreign Corrupt Practices Act Is Changing International Business Practices*, ACC CHAMBER, http://acchamber.org/MediaCenter/businesslibrary/ForeignCorruptPracticesAct.aspx (last visited Jan. 11, 2014).
[74] Kehoe et al., *supra* note 14.

times more bribery enforcement actions than all other countries, combined."[75] At the same time, estimates suggest that bribery still costs the global public nearly a trillion dollars each year.[76] The recently enacted Whistleblower Provision of the Dodd-Frank Act will likely help uncover and eventually prevent the portion of that public cost involving U.S. companies and, eventually, influence the rest of the world to follow suit.[77] As the federal government takes steps to ramp up enforcement, businesses are clamoring for direction and moderation regarding enforcement of alleged FCPA violations.[78] In response to criticism about the lack of guidance, the DOJ and SEC issued a "resource guide" to clarify what activities are permissible or prohibited under the FCPA.[79] Despite this progress, many businesses still believe there is uncertainty with regard to what constitutes a bribe within the meaning of the FCPA.[80] Heavy costs accompany such uncertainty, often in the form of retaining expensive outside counsel to guide the company through the murkiness of monitoring and investigating potential violations of the FCPA.[81] Further steps

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[75] *Id.*

[76] THE WORLD BANK, *supra* note 17.

[77] *Cf.* Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 76 Fed. Reg. 34,300 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240, 249) (stating the goals of the provision are to advance "effective enforcement" of the FCPA).

[78] Peter J. Henning, *Dealing with the Foreign Corrupt Practices Act*, N.Y. TIMES (Mar. 4, 2013, 02:33 PM), *available at* http://dealbook.nytimes.com/2013/03/04/dealing-with-the-foreign-corrupt-practices-act/ (stating the "United States Chamber of Commerce and other business organizations" seek leniency from the DOJ and SEC).

[79] *See* FCPA: A RESOURCE GUIDE, *supra* note 1 ("The Guide is an unprecedented undertaking by DOJ and SEC to provide the public with detailed information about our FCPA enforcement approach and priorities.").

[80] Peter J. Henning, *In Bribery Law, the Watchword is Uncertainty*, N.Y. TIMES (Nov. 15, 2012, 01:29 PM), *available at* http://dealbook.nytimes.com/2012/11/15/in-bribery-law-the-watchword-is-uncertainty/ (claiming the government "resource guide" is "long on information already well-known to those familiar with the topic but short on how to avoid violating the law in new situations.").

[81] *See id.* ("For lawyers, the resource guide leaves plenty of uncertainty about enforcement. One result is that companies will continue to need outside legal counsel to help navigate in this area—at a hefty cost."); Palazzolo, *supra* note 71 (stating Avon Products, Weatherford International,

are necessary to address the steep costs of compliance and make the burden bearable for all companies.[82]

IV. Dodd-Frank Act Whistleblower Provision

In 2010, Congress attempted to utilize the Dodd-Frank Act to expand the reach of the FCPA, but failed to completely resolve the uncertainty existing under the FCPA.[83] The Whistleblower Provision enhances the incentives for whistleblowers by increasing monetary rewards and extending greater protection to whistleblowers from retaliation.[84] By taking advantage of the increased reporting incentives of the Whistleblower Provision, the DOJ and SEC expect to uncover more FCPA violations and expand their prosecutorial reach to the large sums of money estimated to evade detection each year.[85]

A. The Whistleblower Provision Is Part of the Exchange Act

As an amendment to the Exchange Act, the SEC adopted rules to implement the Whistleblower Provision on May 25, 2011, effective August 12, 2011.[86] The Dodd-Frank Act defines a whistleblower as "any individual who provides . . . information relating to a violation of the securities laws to the commission in a manner established, by rule or regulation, by the [SEC]."[87] The SEC will pay an eligible whistleblower an award of at least ten percent and no more than thirty percent of the total monetary sanctions

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and Wal-Mart Stores have spent over $456 million on internal FCPA investigations).

[82] *See* discussion *infra* Part V.

[83] *See supra* notes 53–82 and accompanying text.

[84] *Internal Whistleblower Reports May Trigger Dodd-Frank Act Anti-Retaliation Protection*, BINGHAM MCCUTCHEN LLP (Oct. 4, 2012), http://www.bingham.com/Alerts/2012/10/Internal-Whistleblower-Reports-May-Trigger-Dodd-Frank-Act-Anti-Retaliation-Protection. Note that the Whistleblower Provision applies to reporting of many violations, including this paper's focus on the reporting of FCPA violations.

[85] *See supra* notes 17 and 76 and accompanying text.

[86] Section 21F, *supra* note 77; SEC, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM (2011), *available at* http://www.sec.gov/about/offices/owb/whistleblower-annual-report-2011.pdf.

[87] Section 21F, *supra* note 77.

collected by the authorities.[88] The financial incentive has appeared effective from the start, as numerous whistleblowers took advantage of the new Whistleblower Provision's attractive reward shortly after enactment.[89]

B. A Whistleblower Must Meet Eligibility Requirements to Receive a Reward

Section 21F of the Exchange Act directs the SEC to pay an award to a whistleblower who voluntarily provides the SEC with original information about a violation of the FCPA that leads to a successful enforcement action that results in monetary sanctions exceeding $1,000,000.[90] The whistleblower can report the FCPA violation directly to the SEC using the approved Tips, Complaints, and Referrals ("TCR") Form, or the whistleblower can report the FCPA violation using the company's internal reporting procedures.[91] Many companies have robust FCPA compliance programs and internal reporting procedures to follow if an employee suspects an FCPA violation.[92] On balance, the SEC encourages whistleblowers to first try to utilize a company's internal compliance and reporting procedures to report potential FCPA violations before reporting directly to the SEC.[93] To encourage whistleblowers to use internal compliance and reporting systems, the SEC lengthened the time frame permitted to report a violation and increased the percentage of the award received if the whistleblower utilizes the company's internal compliance and reporting system instead of reporting directly to the SEC.[94] However, the whistleblower is not required to utilize the company's internal compliance and reporting system.[95]

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[88] *See* Kehoe et al., *supra n*ote 14.
[89] ANNUAL REPORT 2011, *supra* note 86.
[90] Section 21F, *supra* note 77.
[91] *Id.*
[92] *See* Scott Seabolt, *Robust FCPA Compliance Program Worth Every Penny*, CORP. MAGAZINE, http://www.corpmagazine.com/executives-entrepreneurs/expert-advice/itemid/9585/pageid/2/robust-fcpa-compliance-program-worth-every-penny (last visited Jan 11, 2014) (discussing the benefits of a company implementing an FCPA compliance program).
[93] *Id.*
[94] Section 21F, *supra* note 77.
[95] *Id.*

C. The Award Amount Varies Depending on Many Factors

Whistleblowers may be more motivated to report alleged FCPA violations when potential for a large monetary award exists.[96] This monetary incentive could greatly increase the number of whistleblowers who report suspected FCPA violations, and consequently, increase the costs for U.S. companies who conduct business with foreign officials.[97] The whistleblower's award does not directly increase costs for the alleged FCPA violator because the award does not increase the penalty the SEC or DOJ collects due to the violation.[98] Rather, the award the SEC or DOJ pays to the whistleblower comes out of the total amount of monetary sanctions the SEC or DOJ collects from the company that violates the FCPA, reducing the amount the federal government retains.[99]

Because the whistleblower's award amount can vary greatly between ten and thirty percent of the monetary sanctions collected, the SEC considers multiple factors in paying out the award.[100] First, the SEC will consider the "significance of the information provided by the whistleblower" to the success of the SEC action."[101] Second, the SEC will consider how much assistance the whistleblower provided.[102] Third, the SEC will consider the SEC's interest in curtailing the type of bribery reported, and whether the enforcement will encourage more whistleblowers to submit quality information regarding violations of the FCPA.[103] Fourth, the SEC will consider the whistleblower's participation in any internal compliance systems.[104]

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[96] *Birkenfeld's Bonanza*, THE ECONOMIST (Sept. 11, 2012, 6:50 PM), http://www.economist.com/blogs/schumpeter/2012/09/whistleblowing.
[97] *See* discussion *infra* Part IV.D.
[98] *Id.*
[99] Section 21F, *supra* note 77.
[100] *The Implications for FCPA Enforcement of the SEC's New Whistleblower Rules*, BRYAN CAVE (June 22, 2011), http://www.bryancave.com/files/Publication/5c6b4b30-ee50-4763-9aca-03701439950a/Presentation/PublicationAttachment/fee14445-6e88-431c-a782-34bc2d612b7e/DC01DOCS-377682.pdf.
[101] Section 21F, *supra* note 77.
[102] *Id.*
[103] *Id.*
[104] *Id.*

The SEC considers three additional factors that may decrease a whistleblower's award.[105] First, the SEC will consider the culpability of the whistleblower.[106] Second, the SEC will consider if the whistleblower unreasonably delayed reporting the violation.[107] Finally, the SEC will consider any "interference with internal compliance and reporting systems by the whistleblower."[108] When the SEC began receiving public comment on the proposed rules enacting the Whistleblower Provision, hundreds of interested parties suggested relevant factors for determining the amount of the award, given that the size of the award influences who will come forward as a whistleblower and how that whistleblower reports the violation.[109] The proposed Three-Strike Rule[110] would build on these factors to ensure the Whistleblower Provision is even more relevant in detecting and prosecuting FCPA violators without unduly harming U.S. companies competing in an international marketplace.[111]

D. The Whistleblower Provision Has Achieved Early Success

Approximately six months after the Whistleblower Provision went into effect, the SEC published a report announcing the widespread response and early success of the new system.[112] Because the final rules of the Whistleblower Provision did not go into effect until August 12, 2011, and the SEC's fiscal year ends on September 30, 2011, only seven weeks of data were reported.[113] Yet, in those seven weeks, the SEC received 334 whistleblower tips.[114] In 2012, the SEC received 3,001 whistleblower tips.[115] Despite its notable success thus far, the Whistleblower Provision is still in the early stages of existence, and its long-term success remains to be

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[105] *Id.*
[106] Section 21F, *supra* note 77.
[107] *Id.*
[108] *Id.*
[109] ANNUAL REPORT 2011, *supra* note 86.
[110] *See* discussion *infra* Part I.
[111] *See* discussion *infra* Part V.
[112] ANNUAL REPORT 2011, *supra* note 86.
[113] *Id.*
[114] *Id.*
[115] SEC, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM (2012), *available at* http://www.sec.gov/about/offices/owb/annual-report-2012.pdf.

proven.[116] Nevertheless, the large number of whistleblower tips indicates that the Whistleblower Provision is helping the DOJ and SEC reach a larger amount of corrupt business dealings and uncover more alleged violations, including activities that fall within the FCPA.[117] Therefore, the proposed Three-Strike Rule must align with the Whistleblower Provision's successful incentives, in order to preserve and grow an effective framework for detecting and prosecuting FCPA violations.

V. The Proposed FCPA Three-Strike Rule

The United States has made the enforcement of the FCPA a "law enforcement priority" and also a "personal priority" of those overseeing enforcement.[118] Both the SEC and the DOJ are working hard to end business corruption and ensure international business deals are about the quality of goods and services and not about the amount of a bribe.[119] With this priority in mind, the number of FCPA investigations and prosecutions has increased.[120] Consequently, businesses are more aware of the consequences and risks associated with corrupt dealings in the international market.[121] Meanwhile, the costs of FCPA compliance have increased,[122] and companies still lack a clear understanding of what constitutes a violation of the

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[116] *Id.*

[117] *Id.*

[118] Lanny A. Breuer, Assistant Att'y Gen., Remarks at the 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011), *available at* http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html.

[119] *Id.*; *see also SEC Enforcement Actions: FCPA Cases*, *supra* note 5 (listing the number of FCPA enforcement actions per annum).

[120] Kehoe et al., *supra* note 14 (detailing the SEC's actions in prosecuting whistleblower cases).

[121] Steven T. Taylor, *Anti-Corruption as a Cottage Industry: Rise in FCPA Enforcement Generates Heavy Workloads for Outside Counsel*, OF COUNSEL, 1 (June 2013), *available at* http://www.cozen.com/Templates/media/files/CO_Miller_Of_Counsel_June%202013.pdf (explaining how companies are taking steps to minimize their risks with regard to FCPA issues).

[122] Ashby Jones, *FCPA: Company Costs Mount for Fighting Corruption*, WALL ST. J., (Oct. 2, 2012), *available at* http://online.wsj.com/article/SB10000872396390444752504578024893988048764.html.

FCPA.[123] This note encourages Congress to implement a Three-Strike Rule to enhance the effectiveness of the FCPA and maintain the success of the Whistleblower Provision, while, at the same time, helping businesses mitigate the expenses of investigating potential bribes and implementing effective compliance programs.

A. The Three-Strike Rule Defined

In baseball, batters have three strikes to hit the ball into play before they are out.[124] Each strike disadvantages the batter, as his chances of getting a hit during that at bat decrease with each strike.[125] Yet, the batter stays at the plate with another chance to get a hit and help the team win the game.[126] Similarly, under the proposed Three-Strike Rule for FCPA enforcement, a qualifying company who commits a violation would receive only partial penalties for its first two strikes.[127] Recalling the baseball analogy, the company would not yet be "out."[128] The Three-Strike Rule would allow companies participating in international business three strikes before they are "out" and the SEC or DOJ penalizes them with the full monetary sanctions as currently in place.[129] A company's first and second FCPA violations, within given parameters, would constitute a first and second strike, respectively, each resulting in reduced monetary sanctions against the company.[130]

1. Threshold Requirements for Discretionary Treatment Under the Rule and the Resulting Incentives

To successfully apply the Three-Strike Rule to the myriad of circumstances surrounding FCPA violations, it is critical to clarify

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[123] *See* Henning, *supra* note 78.
[124] *Baseball Rules: 6.00 The Batter*, BASEBALL ALMANAC, http://www.baseball-almanac.com/rule6.shtml (last visited Jan. 11, 2014).
[125] Craig Burley, *The Importance of Strike One (and Two, and Three…), Part 2*, THE HARDBALL TIMES (Oct. 15, 2004), http://www.hardballtimes.com/main/article/the-importance-of-strike-one-part-two/.
[126] *Id.*
[127] *See infra* notes 128–45 and accompanying text.
[128] *See supra* notes 124–27 and accompanying text.
[129] *See infra* notes 128–45 and accompanying text.
[130] *See infra* notes 128–45 and accompanying text.

standards for the threshold issue of whether to classify an FCPA violation as a strike under the Three-Strike Rule or as a standard FCPA violation outside of the Rule. This issue is frequently raised by a three-strike paradigm. In 1994, for example, California enacted a highly controversial "three strikes" law for criminal convictions, then recently reformed that law to ensure smaller third-strike crimes did not result in extreme punishments.[131] To avoid the same fate of controversy and confusion as the California three-strikes law,[132] how and when to apply the Three-Strike Rule must be clearly defined to improve upon current FCPA enforcements.

Under the proposed Three-Strike Rule, when the DOJ or SEC uncovers a suspected FCPA violation and decides to prosecute or fine the company, it would have two different paths by which to pursue an enforcement action.[133] The DOJ or SEC would have the option to prosecute or fine either within the structure of the Three-Strike Rule or under the current regime (*i.e.*, outside the Three-Strike Rule).[134] In order to qualify for treatment under the Three-Strike Rule, the SEC or DOJ must find that the company used good faith efforts to conduct business with a high level of morality. One problem with the three-strike criminal laws in California was the unduly harsh punishment for a third strike; whatever the third strike crime, the statute required a sentence of life in prison.[135] To avoid this result, the FCPA Three-Strike Rule would mandate the same penalty for the third strike as if the Three-Strike Rule never existed.

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[131] *See* 1994 Cal. Stat. Ch. 12, sec. 1 (AB 971) (enacting Cal. Penal Code § 667); Aaron Sankin, *California Prop 36, Measure Reforming State's Three Strikes Law, Approved by Wide Majority of Voters*, HUFFINGTON POST (Nov. 7, 2012, 03:13 PM), http://www.huffingtonpost.com/2012/11/07/california-prop-36_n_2089179.html (explaining the reform of California's three-strike laws).

[132] *Id*. ("Before [the reform], state law allowed the imposition of a life sentence on an individual's third felony conviction. The revised law would require that the third offense be of a serious or violent nature—not something as minor as writing a bad check or, in a much-cited example, stealing a pair of socks.").

[133] *See infra* notes 134–36 and accompanying text.

[134] FCPA: A RESOURCE GUIDE, *supra* note 1 at 38–41.

[135] *See* Emily Bazelon, *Arguing Three Strikes*, N.Y. TIMES, May 23, 2010, *available at* http://www.nytimes.com/2010/05/23/magazine/23strikes-t.html?pagewanted=all&_r=0 (detailing the story of a man convicted of a life sentence in prison for stealing a floor jack).

Thus, the FCPA Three-Strike Rule would avoid the concerns raised by the California three-strike criminal laws.[136]

In essence, the Three-Strike Rule would create a buffer zone for businesses that violate the FCPA for a first or second time, provided that they meet certain requirements for the lighter treatment. Whether the DOJ or SEC would enforce under the Three-Strike Rule for a given company would depend on the circumstances discussed in Part B of this Section.[137] Thus, the Rule would allow the SEC and the DOJ the necessary discretion to pursue full enforcement of a company violating the FCPA for the first or second time if the company does not use good faith efforts to comply with the FCPA, or to apply the Three-Strike Rule and reduce the penalties for first- or second-time offenders.

The Three-Strike Rule would provide a safe harbor in the form of reduced penalties for companies conducting international business who actively run and monitor an internal FCPA compliance program yet still uncover an FCPA violation.[138] Conversely, a company that gets a first strike, but fails to strengthen its internal FCPA compliance program is more likely to violate the FCPA a second time and third time, resulting in a full penalty. Moreover, the DOJ and SEC can choose to apply the full penalty for such companies for any single violation, if circumstances warrant such an approach.[139] As a result of this regime, companies would not be successful if they attempt to take advantage of the Three-Strike Rule to avoid adequately monitoring corruption within their business because they would not benefit from leniency under the Three-Strike Rule. Moreover, the clear benefits for businesses that qualify for prosecution under the Three-Strike Rule would provide true incentives for companies to make every effort to comply with the

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[136] *See supra* note 135 and accompanying text.

[137] *See infra* notes 146–61 and accompanying text.

[138] *See infra* notes 146–161 and accompanying text; *see also* Drew A. Harker, *Compliance Programs Under the Federal Sentencing Guidelines: An Ounce of Prevention Is Worth a Pound of Cure*, ARNOLD PORTER (May 1, 1993), http://www.arnoldporter.com/publications.cfm?action=view&id=463 (discussing the benefits of effective compliance programs to obtain reduced penalties).

[139] *See infra* notes 148–65 and accompanying text (describing factors that help determine whether to apply the Three-Strike Rule such as the internal compliance program of the accused company, the circumstances of the bribe, and the cooperation of the accused company with the investigation).

FCPA.[140] With improved internal compliance regimes in place, fewer companies would violate the FCPA, thereby achieving the ultimate goal of the Rule.[141] Ultimately, collecting a reduced penalty under the Three-Strike Rule is a small price to pay to move towards this goal of reducing incidence of bribery.

2. Proposed Penalties Under the Three-Strike Rule

A company found guilty of an FCPA violation with no past strikes (*i.e.*, no prior violations of the FCPA prosecuted under the Three-Strike Rule) would receive a seventy-five percent reduction in the penalty based on current sentencing guidelines for FCPA prosecutions.[142] A second strike against the company for violating the FCPA would reduce the standard penalty by twenty-five percent. If a company receives a third strike, they would not be eligible for reduced penalties and must pay the full penalty.[143] This reduction in penalties would serve as a significant and effective incentive for companies to conduct business in a manner that could fall within the Three-Strike Rule.[144] Over the past few years, many large companies have paid millions of dollars in fines for FCPA violations.[145] As a result, the reduced penalties under the Three-Strike Rule could mean millions of dollars in savings to businesses. Such incentives would motivate a company to change its behavior, and thus, improve that

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[140] *See infra* notes 146–61 and accompanying text; *see also* Philip A. Wellner, *Effective Compliance Programs and Corporate Criminal Prosecutions*, 27 CARDOZO L. REV. 497, 507 (2005) (stating a truly effective compliance program will provide an incentive for companies to develop a culture of ethical behavior).

[141] *See supra* notes 1–23 and accompanying text.

[142] *See generally* U.S. SENTENCING GUIDELINES MANUAL (2012) (outlining the appropriate punishment for violations of the law).

[143] *See id.* § 8B (outlining the appropriate fine for an organization that violates a federal law).

[144] *See, e.g.*, EPA, COMPLIANCE INCENTIVES AND AUDITING (2013), *available at* http://www.epa.gov/oecaerth/incentives/ (last visited Jan. 11, 2014) (stating the EPA encourages compliance by also reducing or waiving penalties).

[145] *SEC Enforcement Actions: FCPA Cases*, *supra* note 5 (listing fines in 2012 of $29 Million for Eli Lilly, $26 Million for Tyco, $45 Million for Pfizer, and in 2010, $137 Million for Alcatel-Lucent).

company's odds of eliminating corruption in dealing with foreign officials.

3. Uniform Application of the Rule

The cumulative strikes would apply across a broad array of entities and circumstances relating to FCPA violations to ensure the FCPA and Whistleblower Provision still have teeth. To be effective, the Three-Strike Rule must not provide a mechanism for companies to circumvent full enforcement of the FCPA. Consequently, the Three-Strike Rule would be broad in its application and could be modified if creative structures are employed to exploit the proposed Rule and its intended benefits.

The Three-Strike Rule would apply uniformly to companies of any size. Each enforcement action by the DOJ or the SEC against a given company would count as a strike towards the three-strike total. Furthermore, an enforcement action of any affiliate of such a company—including any entity in which a company owns twenty-five percent[146] or more of the total outstanding shares of the company—would also count as a strike towards the Three-Strike Rule. Businesses that enter into a settlement agreement with the SEC or DOJ for alleged FCPA violations would also receive a strike under the Three-Strike Rule.[147]

Opponents of the Three-Strike Rule may argue that it is unfair for large, Fortune 100 companies to have the same standard as a small company when a small company would more easily be able to monitor all employees. However, the FCPA targets destructive business practices that are equally unethical, no matter the size of the culprit. Accordingly, the same standard of accountability would be applied uniformly to companies of any size under the Three-Strike Rule. The Rule would treat all businesses in the same manner, independent of their size of structure, and the breadth of the Rule would ensure the FCPA's effectiveness.

In summary, the Three-Strike Rule would not be a total replacement for current prosecution under the FCPA. Instead, the Three-Strike Rule would provide an alternative means of enforcement, at the SEC or DOJ's discretion, for qualifying

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[146] 12 U.S.C. § 1841(d) (2012) (defining a subsidiary as "any company 25 per centum or more of whose voting shares . . . is directly or indirectly owned or controlled . . .").

[147] *See* discussion *infra* Part V.B.4.

companies. By providing additional guidance and creating a buffer zone for qualifying companies, the Three-Strike Rule would alleviate some of the concerns and burdens for businesses faced with uncertainty in an international marketplace rife with bribery.

B. Multiple Factors Should Be Considered in the Application of the Three-Strike Rule

Under the proposed Three-Strike Rule, the DOJ or SEC must decide whether to apply one strike towards a three-strike total or to prosecute a company under the FCPA outside of the Three-Strike Rule. As with any law, there are pros and cons to bright line rules compared with fact-specific standards.[148] Rather than defining a bright line rule, this section sets forth the important factors to consider when deciding whether to apply the Three-Strike Rule, as well as what weight to give each factor. This Section will also lay out examples to illustrate how to apply the Three-Strike Rule under certain circumstances. To ensure honesty and integrity in the business world, the SEC and DOJ must consider the multiple factors discussed below when applying the Three-Strike Rule rather than permitting every company to take advantage of the Rule's leniency.

1. Effective Internal Compliance System Is a Factor

Companies will better achieve the purpose of the FCPA when they implement, actively monitor, and strictly enforce a thorough internal compliance program.[149] Companies should also reward employees that consistently comply with internal FCPA compliance programs. Currently, the Sentencing Guidelines take into account whether a company has effective internal controls when the SEC or DOJ are prosecuting a company violating the laws.[150] The SEC and DOJ outlined what constitutes an effective compliance

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[148] *Cf.* Georgia v. Randolph, 547 U.S. 103, 125 (2006) (Breyer J., concurring) ("[N]o single set of legal rules can capture the ever-changing complexity of human life.").

[149] *See* FCPA: A RESOURCE GUIDE, *supra* note 1, at 83.

[150] *See* U.S. SENTENCING GUIDELINES MANUAL §§ 8B2.1(a)(2) & 8C2.5(f) (2012) (stating an effective compliance program that is "reasonably designed, implemented, and enforced" will reduce the penalty).

program in the recently released FCPA Resource Guide.[151] Using similar standards, the Three-Strike Rule would also grant some leniency to a business that has a robust, up-to-date internal FCPA monitoring and reporting system, in the event that the business still violates the FCPA. For example, if Company X implemented an FCPA compliance program twenty years ago that has been improved over time, where employees know about the policies and procedures of the program and senior managers strictly follow and enforce the program, then the good faith efforts of Company X manifested through their internal controls merit a lesser fine in the form of one strike towards the three-strike total of the Three-Strike Rule rather than an enforcement action and larger fine outside of the Rule.

However, developing a strong internal compliance and reporting system alone may not be enough to qualify for treatment under the Three-Strike Rule.[152] The business must also implement and update those procedures. Moreover, if a business with a robust, up-to-date internal FCPA compliance and reporting system does not adequately implement that system, a violation of the FCPA should result in a full penalty and not one strike as part of the Three-Strike Rule. Returning to the example of Company X, if Company X implemented its FCPA compliance program twenty years ago, but instead failed to update the program as needed after its inception or the controls have not resulted in any internal enforcement or rewards, then the DOJ or SEC would likely find that Company X does not qualify for treatment under the Three-Strike Rule.

2. The Circumstances of the Bribe Are a Factor

There are many factors regarding the circumstances of the bribe that will factor into whether to prosecute under the Three-Strike Rule.[153] Such factors include the amount of the bribe, the

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[151] *See* FCPA: A RESOURCE GUIDE, *supra* note 1, at 56–63 (stating factors for an effective internal control system can include upper management support, guidelines, monitoring, education, rewards, enforcement, anonymous reporting, and continuous improvement).

[152] *See id.* at 56 (discussing the importance of implementing an effective compliance program).

[153] *See id.* at 52–54 (listing relevant factors to consider when prosecuting an organization for violating the FCPA including the seriousness of the

extent of the bribe or how widespread the bribery is within the business, who in the company is involved in the bribe, and what benefits the company received because of the bribe.[154] There is no clear matrix that will dictate whether the SEC or DOJ should apply the Three-Strike Rule, but the agencies should consider the incentives created by prosecuting in each situation.[155] The Three-Strike Rule allows the SEC and the DOJ flexibility to ensure businesses are held responsible for their actions, while still minimizing the damage that could be caused by isolated incidents that do not impact the business or the market.

When considering the amount of the bribe itself, it may be difficult to determine what amount is so excessive as to warrant prosecution outside the Three-Strike Rule. One approach to gauge the seriousness of the bribe would be to examine the benefit the company received from the bribe.[156] Another approach would compare the cost of the bribe to aggregate annual expenses of the company's operations.[157] A large bribe, e.g., ten percent of annual expenses, could be of such a magnitude that the culprits do not deserve leniency under the Three-Strike Rule. Likely, senior executives would learn of bribes that make up a large percentage of the company's operations and should have prevented or reported the bribe. In contrast, an insignificant bribe may be an isolated event—not pervasive in the company—that senior executives would not discover, and therefore the SEC or DOJ should probably prosecute under the Three-Strike Rule.

The motive for the corrupt payment should also factor into whether the Three-Strike Rule applies. Bribes accompanied by signs of economic extortion or duress should, if prosecuted, likely fall under the Three-Strike Rule.[158] However, the SEC and DOJ should

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offense, the harm caused, and the organization's history of similar misconduct).

[154] *Id.* at 53–54.

[155] *See id.* (discussing what factors the SEC considers when deciding whether to pursue an enforcement action).

[156] *See* United States v. McNair, 605 F.3d 1152, 1229 (11th Cir. 2010) (describing the level of punishment depends on the "benefit received" from a bribe).

[157] *See id.* (stating an alternative to the "benefit received" calculation for the level of punishment is the "value of the bribe").

[158] *See, e.g.*, United States v. Kozeny, 582 F. Supp. 2d 535, 541 (S.D.N.Y. 2008) (stating that "true extortion" would not even meet the FCPA requirement of corrupt intent).

not grant leniency to companies that allege economic extortion or duress continuing over the course of many years without reporting the situation.[159] In summary, the government agencies must adopt a holistic approach when determining if the Three-Strike Rule should apply and consider all the circumstances of the bribe.

3. The Cooperation of the Accused Business Is a Factor

A company that cooperates with the DOJ and the SEC throughout a proceeding should benefit from treatment under the Three-Strike Rule.[160] This will encourage cooperation and discourage blocking the investigation and causing unnecessary delays and expenses.[161] Both sides will save time and money through the cooperation, which can show a willingness to accept responsibility by the accused company, justifying a lighter punishment under the Three-Strike Rule. If the agencies and the accused businesses work together, the SEC, the DOJ, and the company will more quickly and thoroughly complete investigations.[162]

Cooperation also indicates the company's alleged violation may have been an isolated incident and not a widespread practice that the company sought to cover up. Isolated incidents merit prosecution under the Three-Strike Rule. With regard to this inquiry, the size of the company may affect whether a corrupt payment is

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[159] *See* Veronica Foley & Catina Haynes, *The FCPA and Its Impact in Latin America*, 17 CURRENTS: INT'L TRADE L.J. 27, 35 (2009) (describing the settlement between Chiquita and the SEC and DOJ for making payments to terrorist organizations over the course of more than ten years).

[160] *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2012) ("If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.").

[161] *See* Peter Nickeas, *Prosecutors: Levine Among 'Most Valuable' Witnesses in 3 Decades*, CHI. TRIB. (June 6, 2012), *available at* http://articles.chicagotribune.com/2012-06-16/news/chi-prosecutors-levine-among-most-valuable-witnesses-in-3-decades-20120615_1_blagojevich-fundraiser-william-cellini-star-witness (stating a key witness cooperated in exchange for a reduced sentence).

[162] Mark Friedman, *Wal-Mart Spends $230 Million on Mexican Bribery Investigation*, ARK. BUS. (June 10, 2013, 12:00 AM), http://www.arkansasbusiness.com/article/92905/wal-mart-spends-230-million-on-mexican-bribery-investigation?page=all.

isolated.[163] For example, a Fortune 100 Company with tens of thousands of employees could more understandably have a rogue employee that knows the internal FCPA compliance protocol, understands the strong enforcement within the company, and yet decides to offer a bribe to a foreign government official in violation of the FCPA. The Fortune 100 Company may also have a more difficult time quickly uncovering the incident,[164] which may incidentally encourage further corrupt activity by the employee. Based on this analysis, an isolated incident could be defined as isolated to a certain employee even though multiple violations have occurred. An isolated incident can also be defined as a one-time, small-value payment. Accordingly, the Fortune 100 Company example would be an isolated incident because the corruption did not pervade the company as a whole or even a regional department. Conversely, a smaller multinational company might have a better probability of uncovering the initial corrupt payment and would then have to decide whether to self-report the violation to the government or to conceal the bribery. Should the company conceal the bribe, then the corruption no longer qualifies as isolated. Accordingly, the size of the company could result in either an advantage or a disadvantage for a company that seeks treatment under the Rule.

4. Previous FCPA Allegations and Settlements Are a Factor

Businesses cannot enjoy the reduced penalties under the Three-Strike Rule if they have been party to multiple SEC or DOJ investigations or settlements of FCPA violations. Settlement can be a cost effective approach to resolve FCPA violations.[165] The Three-Strike Rule should maintain the benefits of settlement without allowing companies to evade a strike by settling. Otherwise, a company could keep a strike in their back pocket after multiple FCPA settlements. To manage these concerns, the Three-Strike Rule

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[163] *See* FEDERAL SECURITIES REPORT LETTER 1927, June 14, 2000, *available at* 2000 WL 36108402 (expressing the Commissioner's concern that a large corporation would find it more difficult to monitor all employees).

[164] *See id.*

[165] *See* Janet Stidman Eveleth, *Settling Disputes Without Litigation*, 34 MD. B.J., 2, 4 (Mar.–Apr. 2011) (stating a settlement can save money for all parties).

would not apply if either (a) the company had a prior strike and a prior settlement, or (b) the company has two prior settlements. This paradigm would balance the interests of settling FCPA violations with the intended benefits of the Three-Strike Rule.

C. The Many Benefits of Implementing a Three-Strike Rule

Based upon certain circumstances and cooperation, as outlined in Part B above, the SEC and DOJ should allow businesses two strikes before assessing the full penalty for the third strike.[166] A three-strike approach would provide a cushion for businesses that are genuinely working to create a company culture of honesty and integrity.[167] Although difficulties could arise within a three-strike paradigm, the Rule would enhance the effectiveness of the FCPA and work with the Whistleblower Provision, if clearly explained and properly executed.[168] Ultimately, this integrated paradigm could allow the government to achieve its goals of effectively prosecuting and eliminating corruption in international business deals without overly burdening companies striving to comply with the FCPA.[169] The government and the market would both achieve their desired objectives.[170] Businesses, whistleblowers, and society would benefit more from the FCPA with a Three-Strike Rule in place.[171]

1. The Three-Strike Rule Would Reduce Expenses

With the potential award of millions of dollars for whistleblowers that satisfy the Dodd-Frank Act requirements discussed above, businesses are more vulnerable to investigations by

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[166] *See* discussion *supra* Part V.B.

[167] *See* U.S. SENTENCING GUIDELINES §§ 8B2.1(a)(2) & 8C2.5(f) (2011).

[168] *See* Edward B. Foley, *Compelling Interests and How Best to Achieve Them: A Response to Mr. Bauer's Reply*, 3 ELECTION L.J. 13, 16 (2004) (discussing the importance of clarity in government regulation).

[169] *See* Breuer, *supra* note 118.

[170] *Cf. What Is a Market Economy?*, INFOUSA, http://usinfo.org/enus/economy/overview/mktec8.html (last visited Jan. 11, 2014) (discussing the importance of governments to help a market economy succeed).

[171] *See supra* notes 161–67 and accompanying text.

the DOJ and the SEC.[172] Given an increase in allegations of bribery, businesses must spend large amounts of time and money to do their own investigations.[173] In 2012, Wal-Mart disclosed potential FCPA violations, causing the DOJ and SEC to open an investigation.[174] Wal-Mart's internal investigation has continued to grow beyond the alleged violations in Mexico to include China, Brazil, and India.[175] One source reported that Wal-Mart has spent over $300 million to date on the internal FCPA investigation.[176] Wal-Mart is a large company with sufficient money to pay such large sums in an FCPA investigation.[177] However, the investigation could go on for years with a total cost well above $300 million.[178]

Conducting an internal investigation helps a business to limit any damage to its reputation, to ensure the bribery is not widespread, and to identify areas of vulnerability.[179] For a multinational

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[172] *See* Philip Stamatakos & Ted Chung, *Dodd-Frank's Whistleblower Provisions and the SEC's Rules: Compliance and Ethical Considerations*, THE CORPORATE GOVERNANCE ADVISOR, 1, 13 (Sept./Oct. 2011), http://www.jonesday.com/files/Publication/387f2301-33fa-487e-9ec4-b38651bb1bfc/Presentation/PublicationAttachment/651e5faf-99a5-49b0-a7fc-41c0594c812d/corpgovernance.pdf (stating the potential awards for whistleblowers could cause even the most loyal employees to bypass internal reporting procedures).

[173] Palazzolo, *supra* note 71.

[174] Stephanie Clifford & David Barstow, *Wal-Mart Inquiry Reflects Alarm on Corruption*, N.Y. TIMES (Nov. 15, 2012), *available at* http://www.nytimes.com/2012/11/16/business/wal-mart-expands-foreign-bribery-investigation.html?pagewanted=all&_r=0.

[175] *Id.*

[176] *See* Michael Scher, *Wal-Mart Is No Numbers Game (Part Two)*, THE FCPA BLOG (Aug. 22, 2013, 3:08 AM), http://www.fcpablog.com/blog/2013/8/22/wal-mart-is-no-numbers-game-part-two.html (stating Wal-Mart has already spent over $300 million on FCPA compliance costs); *see also Avon Developments*, FCPA PROFESSOR (Aug. 2, 2012), http://www.fcpaprofessor.com/category/avon (stating Avon has spent around $280 million).

[177] *Id.*

[178] *Id.*

[179] *See* George J. Terwilliger, III, *FCPA Internal Investigations – Worth It?*, WHITE & CASE LLP 2 (Jan. 4, 2010), http://www.whitecase.com/files/Publication/3a89c0cf-20d7-4920-a94c-65b6037c7d0f/Presentation/PublicationAttachment/3632daf8-6c43-4970-bf46-74086a234bf9/article_WC_

corporation, an investigation can take many years and cost hundreds of millions of dollars.[180] The Three-Strike Rule would provide a cushion to these large corporations by reducing this large expenditure of time and money because they would not face as strict a penalty that requires such large-scale investigations. The countervailing concern is to ensure that the cushion does not reduce the incentive for companies to comply with the FCPA or to conduct thorough internal investigations. To avoid this result, the SEC and the DOJ can prosecute outside of the cushion of the Three-Strike Rule if companies do not have a strong FCPA compliance program that is actively monitored and enforced.[181] Companies conducting internal FCPA investigations are likely to uncover any additional weak spots for FCPA violations, to inform employees of the consequences of bribery, and to lower the chances the company will ever again violate the FCPA.

2. The Three-Strike Rule Would Provide a Cushion to Companies that Make Efforts to Curtail Bribery, Yet Make a Mistake

Some believe the best approach to eliminate bad behavior is to create incentives for the participant to avoid the bad behavior, rather than to increase the punishment for violators.[182] Government can achieve success in its authoritative role by holding businesses and citizens accountable for the decisions they make and the actions they take.[183] The Three-Strike Rule can also accomplish this objective. The Rule would provide an incentive for businesses to

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FCPA_Investigation_Byline_Terwilliger_v3.pdf (discussing the costs and benefits of conducting internal investigations).

[180] Weston C. Loegering, Joshua S. Roseman & Samantha Cox, *The Hidden Costs of Bribery*, 59 THE ADVOC. 8, 8 (2012) (describing how companies fail to consider the large costs of internally investigating FCPA violations).

[181] *See* discussion *supra* Part V.B.

[182] *See* Elaine Wilson, *Guiding Your Children Series: Discipline Without Punishment*, Okla. Coop. Extension Serv. 2329-2329-2 http://pods.dasnr.okstate.edu/docushare/dsweb/Get/Document-2420/T-2329web.pdf (explaining that discipline teaches responsibility versus punishment that only "stops bad behavior for the moment").

[183] *See* Ezra Taft Benson, *PROPER ROLE OF GOVERNMENT*, http://www.properroleofgovernment.com/ (last visited Jan. 11, 2014) (discussing the importance of government administering the laws of the land).

implement and enforce FCPA compliance programs because it would provide a true benefit for such companies: a cushion to those that make real efforts to curtail bribery, yet make a mistake. A thorough FCPA compliance program that is consistently monitored and enforced would weigh in favor of applying a strike and reduced penalty instead of a full penalty to such a company.

3. The Three-Strike Rule Would Curb the Incentive for Whistleblowers to Go Outside the Chain of Command Within the Company

The Whistleblower Provision encourages whistleblowers to use internal compliance and reporting systems.[184] Increasing incentives to use internal procedures instead of reporting directly to the SEC would allow businesses to identify potential violations earlier and stem any future violations.[185] The Three-Strike Rule would also encourage whistleblowers to use internal compliance reporting procedures.[186] Nevertheless, a strong incentive will still exist for whistleblowers to bypass their company's internal reporting procedures and report straight to the SEC or DOJ.[187]

The Three-Strike Rule would complement the Whistleblower Provision in providing whistleblowers with the incentive to use internal reporting procedures. Under the Three-Strike Rule, the SEC would be more lenient to businesses when the whistleblower bypasses appropriate internal compliance and reporting systems and reports directly to the SEC, unless the whistleblower would have been in danger if the whistleblower had

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[184] *See* Section 21F, *supra* note 77.

[185] *See id.*

[186] For a discussion of the analogous incentives to report internally under the Whistleblower Provision, see David K. Momborquette, Richard J. Morvillo, Holly H. Weiss & Jeffrey F. Robertson, *SEC Whistleblower Rules Encourage but Do Not Require Internal Reporting*, SCHULTE ROTH & ZABEL, 1 (June 2, 2011), http://www.srz.com/files/News/da981270-edfd-49f9-b5d6-0b42fb77725e/Presentation/NewsAttachment/3a5350a5-4331-4b6f-97b4-11774b3454d9/060211_SEC_Whistleblower_Rules_Encourage_Internal_Reporting.pdf.

[187] *Cf. id.* at 4 (discussing the countervailing incentive to report-out immediately, rather than reporting internally, under the Whistleblower Provision).

utilized the business's internal system.[188] A whistleblower may struggle between using internal reporting procedures and bypassing internal reporting procedures to report directly to the SEC.[189] However, the indirect incentive—leniency to companies when whistleblowers bypass internal reporting procedures—combined with the direct incentive found in the Whistleblower Provision to pay a higher reward to internal whistleblowers[190] tries to reconcile these two competing interests.

Furthermore, the whistleblower reward would be less for strikes one and two,[191] perhaps curbing excessive whistleblowing for purely personal gains that violate the spirit of the FCPA. However, such reduced rewards under the Three-Strike Rule could also deter useful whistleblowers, thus interfering with the benefits of the Whistleblower Provision. Therefore, to ensure roughly equivalent incentives for whistleblowers to report corrupt payments, the reward percentages should be higher to adjust for the lower penalties.[192] Instead of the standard range of ten to thirty percent,[193] the reward percentages for the first strike should range between forty and fifty percent of the total penalty. For a second strike report, a whistleblower should receive between thirty and forty percent of the penalty as a reward. For third strike violations, the whistleblower award should follow the current structure. These adjusted reward percentages for first and second strikes should result in comparable whistleblower compensation as if the Three-Strike Rule did not exist. Thus, the Rule would not interfere with the effective incentives of the Whistleblower Provision.

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[188] *Cf.* Section 21F, *supra* note 77.

[189] Momborquette, Morvillo, Weiss & Robertson, *supra* note 186, at 4.

[190] Under the Whistleblower Provision, whistleblowers have more of an incentive to use internal channels because the award would be higher if they do not bypass internal reporting protocol. Section 21F, *supra* note 77.

[191] Whistleblowers recover a percentage of the penalty. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 § 922(b)(1), Pub. L. No. 111-203, 124 Stat. 1376, 1842 (codified at 15 U.S.C. § 78u-6). Because the penalties would be lower for strikes one and two, there would be a subsequent reduction in the whistleblower rewards.

[192] *See, e.g.*, Dan Froomkin, *SEC Whistleblowers Waiting for Big Payouts as Rumors of First Award Mount*, HUFFINGTON POST (May 31, 2012, 4:54 PM), http://www.huffingtonpost.com/2012/05/31/sec-whistleblower-reward-payout_n_1560044.html (explaining that the higher the whistleblower award the better the incentive for other whistleblowers).

[193] *See* Kehoe et al., *supra* note 14, at 12.

VI. Challenges of Implementing and Consistently Enforcing the Three-Strike Rule

The proposed Three-Strike Rule is a novel approach in the fight against bribery.[194] The Rule attempts to improve the FCPA's and Whistleblower Provision's effectiveness without causing an undue burden and competitive disadvantage for U.S. companies in the international marketplace.[195] In a global economy where bribery still exists to a large degree,[196] large penalties for FCPA violations disadvantage U.S. companies, at least in the short run, in competing with international companies that cannot be reached by the FCPA.[197] Despite this burden on U.S. companies, Congress decided that the United States needed to take the lead in cracking down on corruption in business deals with foreign officials.[198] Many countries have followed the United States in enacting anti-bribery laws.[199] In the long run, as enforcement increases and bribery of foreign officials decreases, the benefits to competition relying on the quality of goods and services—and not the size of the bribe—is better for the global marketplace.[200]

The Three-Strike Rule balances the interest of the U.S. government in cracking down on international bribery with the interest of companies in staying competitive in an international market even with the strengthened FCPA, the new Whistleblower Provision, and the SEC and DOJ's increased attention to bribery.[201] Administrative and enforcement costs are key challenges to implementing any new rule, and the Three-Strike Rule would be no exception.[202] In particular, the complexity of analysis under the Rule

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[194] *See* discussion *supra* Parts IV and V.
[195] *See* discussion *supra* Parts IV and V.
[196] THE WORLD BANK, *supra* note 17.
[197] Daniel Wagner & Dante Disparte, *Walmart, the FCPA, and America's Ability to Compete*, HUFFINGTON POST (Apr. 29, 2012, 8:08 PM), http://www.huffingtonpost.com/daniel-wagner/walmart-the-fcpa-and-amer_b_1463292.html.
[198] FCPA: A RESOURCE GUIDE, *supra* note 1, at 8.
[199] *See* discussion *supra* Part III.B.
[200] FCPA: A RESOURCE GUIDE, *supra* note 1, at foreword.
[201] *See* discussion *supra* Part V.
[202] *See Regulations and the Rulemaking Process,* REGINFO.GOV, http://www.reginfo.gov/public/jsp/Utilities/faq.jsp (last visited Jan. 11,

may increase costs for the government in enforcing the FCPA.[203] Potential discriminatory enforcement against companies outside of the Three-Strike Rule could occur.[204] Accordingly, the Rule is only worth implementing if the expected benefits of the Rule outweigh the costs of administration. Even if the government does not wish to fully implement the Three-Strike Rule, it could strengthen FCPA enforcement by using the Three-Strike Rule factors when determining the dollar amount of the penalty for a given violation. In this manner, the government could enjoy some of the benefits of the Three-Strike Rule without the added complexity of full implementation. However, this article proposes the Three-Strike Rule instead of a simple determination of the size of penalty so that U.S. companies can easily identify benefits of implementing, actively monitoring, and strictly enforcing an internal FCPA compliance program through reduced sanctions. The Three-Strike Rule would be transparent to the public and highlight the increased effort by the United States to crack down on bribery without damaging U.S. companies' ability to compete in a global marketplace.

VII. Conclusion

The FCPA and the Whistleblower Provision are important statutes that create a fair and honest international marketplace for business.[205] Over the course of many years, the FCPA has increased its reach and prominence within the legal framework of the international market.[206] Together with the Whistleblower Provision, the government is in a stronger position to uncover and prosecute corruption. Further work must be done, however, to strengthen these statutes without overburdening businesses.[207] The proposed Three-Strike Rule can achieve that balance, giving the SEC plenty of leeway to enforce violations of the FCPA while still providing room to reward businesses that strive to comply with the FCPA yet commit a violation. The Rule must be properly defined with parameters for

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2014) (describing the importance of considering all costs when federal agencies create new regulations).

[203] *See* discussion *supra* Part V.B.

[204] *See supra* notes 133–36 and accompanying text.

[205] FCPA: A RESOURCE GUIDE, *supra* note 1, at 90.

[206] *See* discussion *supra* Part II.

[207] *See* discussion *supra* Part IV.

applying the Rule. With a clearly defined Three-Strike Rule framework, the actions that constitute FCPA violations will be clearer to businesses, which will allow businesses to take appropriate steps to eliminate bribery risks knowing the specific benefits that would come from those steps.