# Eliminating *Schmiergeld*: Lessons Learned from the Enforcement of Foreign Anti-Bribery Laws in the United States and Germany

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*Responsible for nearly seventy-five percent of the world's foreign anti-bribery sanctions imposed since the turn of the century, Germany and the United States have emerged as global leaders in the fight against cross-border business corruption. The legal frameworks enabling that active enforcement, the U.S.'s Foreign Corrupt Practices Act (FCPA) and Germany's Gesetz zur Bekämpfung internationaler Bestechung, provide contesting legislative blueprints for eradicating bribery in the solicitation of international business contracts. This Note argues that specific aspects of the U.S. anti-bribery regime should be incorporated into Germany's system, and vice-versa, to strengthen the enforcement and deterrent capacities of the systems in place. The United States should, mirroring German procedure, increase judicial oversight of its criminal and civil sanctions, reduce the prosecutorial discretion inherent in its approach to anti-bribery indictments, and criminalize the use of "grease-payments," or facilitation payments. On the other hand, Germany should, taking a page from the U.S. book, introduce criminal liability for corporations, provide whistleblower protections, launch an incentive program for whistleblower disclosures that lead to successful prosecutions, and publicly report anti-corruption sanctions to deter future foreign bribery. These recommendations can serve as a wider paradigm for balancing prosecutorial activism with domestic business interests and competitiveness—as both the United States and Germany have sought to do.*

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## INTRODUCTION

Under the watchful guidance of the Organisation for Economic Co-operation and Development (OECD), the last twenty years have seen an immense shift in

international norms and practices aimed at eliminating the use of *schmiergeld*[1] in business transactions. Frustrating a practice of eliciting favorable treatment from government elites that has been around for millennia,[2] this shift finds its origins in the unilateral legislative actions of the United States in the 1970s.[3] Subsequent diplomatic efforts by the United States to initiate talks for international joint action would eventually lead in 1998 to the creation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[4]

Prior to attempts to reform the system of international business transactions by U.S. administrations from Ford to Clinton, bribery had become quite commonplace in the 1970s. Notably, in the wake of Watergate, the Securities and Exchange Commission discovered hundreds of corporate "slush funds" established to direct payments to foreign officials—payments that were still legal at the time.[5] Troubled by this trend, President Carter signed into law the Foreign Corrupt Practices Act (FCPA) on December 19, 1977, aspiring for greater corporate accountability in U.S. business ventures abroad.[6] When, on December 17, 1997, the OECD Convention was opened for signature, parties to the convention would agree to enact domestic legislation criminalizing acts of foreign bribery, in effect mirroring the legal structure of the United States.[7] Although the turn of the twenty-first century saw a vast expansion, particularly in OECD countries, of extraterritorial anti-bribery regimes akin to the U.S. model, for the two decades after 1977 the FCPA stood alone in its fight against corruption.[8] It is surprising, then, that Germany has eclipsed the United States as the OECD country with the most criminal sanctions in foreign bribery cases; it has authorized over forty-two percent of all sanctions since 1998 compared to United States' thirty-two percent.[9] To its credit, the American Bar Association has strongly commended the

1. *See* Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on Its Twentieth Birthday*, 18 NW. J. INT'L L. & BUS. 269, 269–70 (1998) (indicating the German origin of the word for bribery in its combination of the words *schmiere*, or grease, and *geld*, or money).

2. *See* JOHN T. NOONAN, JR., BRIBES, at xi (1984) (illustrating cases from as early as ancient Egypt).

3. *See* H. LOWELL BROWN, BRIBERY IN INTERNATIONAL COMMERCE § 1.1, Westlaw (updated May 2018) (noting that the United States was the first nation to outlaw the bribery of foreign government officials by its own citizens); *see also* Elizabeth K. Spahn, *Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 VA. J. INT'L L. 1, 7 (2012) ("In the bribery-reform context, the United States's unilateral criminal law enforcement, but decidedly not military action, provided the initial impetus for reform.").

4. *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43 (1998) [hereinafter OECD Convention].

5. S. REP. NO. 105-277, at 1 (1998).

6. Foreign Corrupt Practices Act of 1977, Pub. L. 95-213, 91 Stat. 1494; Presidential Statement on Signing the Foreign Corrupt Practices and Investment Disclosure Bill, 13 WEEKLY COMP. PRES. DOC. 1909 (Dec. 20, 1977) [hereinafter 1977 Carter Statement].

7. *See* OECD Convention, *supra* note 4, at v.

8. *See* BROWN, *supra* note 3, at § 1.1.

9. *See* ORG. FOR ECON. CO-OPERATION & DEV., WORKING GRP. ON BRIBERY, 2016 DATA ON ENFORCEMENT OF THE ANTI-BRIBERY CONVENTION 5–6 (2017), http://www.oecd.org/daf/anti-bribery/Anti-Bribery-Convention-Enforcement-Data-2016.pdf [hereinafter OECD 2016 DATA].

German government, after the enactment of its International Anti-Corruption Act in 1998, for "assum[ing] a leading position in the investigation and prosecution of foreign bribery cases."[10]

Leading efforts to diminish corrupt business practices abroad in tandem, the enforcement mechanisms under the United States' FCPA and Germany's *Gesetz zur Bekämpfung internationaler Bestechung* (International Anti-Corruption Law) are far from perfect. This Note argues that the integration of specific components of the FCPA into the International Anti-Corruption Law, and exemplary aspects of the German law into the FCPA, would eliminate significant concerns that plague each law.

This Note proceeds in four parts. First, to frame my recommendations in historical and legislative context, Part I describes the state of affairs that drove the U.S. Congress to legislative action, what that particular legislation entailed, and subsequent amendments to the U.S. legal framework. Then, it will discuss U.S. efforts to undertake multilateral lawmaking and the impact thereof. In Part II, this Note explores the political and economic circumstances at the source of Germany's development of its anti-bribery framework, the intricacies of that framework, and amendments to the legislative scheme. In Part III, this Note sets out to compare the two legal systems.

In Part IV, this Note provides recommendations for reforming both anti-bribery systems. For the United States, this Note urges (1) an increase of judicial oversight in FCPA enforcement actions, which are now dominated by out-of-court settlement resolutions; (2) a decrease in investigatory and prosecutorial discretion; and (3) the criminalization of facilitation, or "grease," payments. On the other hand, Germany should consider several modifications proven effective in the United States. It should (1) criminalize legal entities, namely, corporations; (2) provide stronger whistleblower protections and incentives for voluntary disclosures of corrupt acts; and (3) increase judicial transparency for its anti-bribery enforcement actions.

Considering the specific weaknesses brought to light in this Note, it must be said that the Note does not intend to criticize the active steps pursued by both the United States and Germany to enforce their anti-bribery laws; instead, this Note provides recommendations to advance the ethical goals set by both governments. Modification of such robust systems requires close attention to the effectiveness of the reforms proposed. Notably, the reforms presented here have already seen success in practice. The changes suggested in this Note will help alleviate some of the public concerns with the anti-bribery laws in place, and the harmonization of the two most active anti-bribery regimes will serve to protect the competitiveness of both U.S. and German multinational corporations.

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10. *See* Sara C. Sáenz, *Explaining International Variance in Foreign Bribery Prosecution: A Comparative Case Study*, 26 DUKE J. COMP. & INT'L L. 269, 277 (2015) (quoting T. Markus Funk & Jess A. Dance, *Global Litigator: Germany's Increasingly Robust Anticorruption Efforts*, AM. BAR ASS'N. (2012), https://www.americanbar.org/groups/litigation/publications/litigation_journal/2011_12/spring/global_litigator_potential_collateral_estoppel_effect/ [https://perma.cc/UHB5-448Y]).

## I. HISTORY OF THE U.S. ANTI-BRIBERY FRAMEWORK

The following Part examines the events that led to the enactment of the U.S. Foreign Corrupt Practices Act and the substantive legislative changes made to the framework since its initial enactment. It further details the efforts of the United States to disseminate anti-bribery norms in the OECD.

### A. BEFORE THE ENACTMENT OF THE FOREIGN CORRUPT PRACTICES ACT

The systematic nature of the foreign payments from U.S. corporate "slush funds" in the early 1970s did more than raise a few eyebrows.[11] Bribes aimed at the governments of friendly nations—namely Japan, Mexico, the Netherlands, and Italy—created a political quagmire for the Ford administration, which was still feeling the aftershocks of President Nixon's resignation.[12] A Securities and Exchange Commission investigation, initiated as an effort to uncover wrongdoing at the Watergate complex, discovered that over 300 companies had made hundreds of millions of dollars in corrupt payments to foreign officials in the preceding decade.[13] After a change in the Oval Office and more than twenty months of congressional debate to determine the legal foundation that would best address the problem, on December 20, 1977, President Carter signed into law the Foreign Corrupt Practices Act.[14]

### B. PASSAGE OF THE FOREIGN CORRUPT PRACTICES ACT: 1977

Comprehensive in both its scope and reach, the FCPA proscribes the making of improper payments to foreign government officials and certain other persons, specifically to curb the use of corporate funds for corrupt objectives.[15] It likewise imposes strict reporting and recordkeeping requirements on corporations to facilitate enforcement.[16] In more certain terms, the new law stated:

> It shall be unlawful for any issuer . . . to . . . offer, gift, promise to give, or authorization of the giving of anything of value to . . . any foreign official for purposes of . . . influencing any act or decision of such foreign official in his official capacity, [] inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official . . . in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person . . . .[17]

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11. S. REP. NO. 105-277, at 1 (1998).

12. *Id.*; United States v. Kay, 359 F.3d 738, 749 (5th Cir. 2004) ("[T]he 1977 legislative history . . . convinces us that Congress meant to prohibit a range of payments wider than only those that directly influence the acquisition or retention of government contracts or similar commercial or industrial arrangements.").

13. *See* S. REP. NO. 95-114, at 3 (1977).

14. 1977 Carter Statement, *supra* note 6, at 1909.

15. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78dd-3 (2012).

16. *See id.* § 78m.

17. *Id.* § 78dd-1(a).

The first of its kind, this legislative framework provided both the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) with ammunition to eradicate the payment of foreign bribes. The Act criminalized foreign bribery conducted by companies and individuals falling under the definition of "domestic concern," which includes U.S. nationals and companies registered in U.S. states,[18] and it amended the Securities Exchange Act of 1934 to extend the jurisdiction of the SEC to penalize foreign bribery by foreign registered corporations and their agents—creating liability for "issuers" of specific classes of securities.[19] The securities issuance provision extended the reach of civil and criminal sanctions to foreign companies that, for example, sold equity on U.S. stock exchanges or raised debt in the U.S. capital markets.[20]

The FCPA, as its name would suggest, applies exclusively to payments made to foreign officials. The U.S. legal system operates on a "presumption that United States law governs domestically but does not rule the world,"[21] unless explicitly provided otherwise.[22] Here, the FCPA enforcement framework has taken the necessary steps to "rule the world" of business transactions. The extraterritorial application of the FCPA, conditioned explicitly on foreign government involvement, indicates a desire to limit bribery as an unfair business practice on a global scale even if that enforcement is restricted by a required nexus to U.S. markets.[23]

In response to an enforcement action brought under the FCPA, a corporation or individual can plead two affirmative defenses: that the payment was legal in the country it was made, or that the payment constituted a reasonable and bona fide expenditure related either to the promotion of a product or the performance of the contract in question.[24] Those expenditures can include travel and lodging expenses for the foreign official, creating a narrow exception for expenses

18. *Id.* § 78dd-2.

19. *Id.* § 78dd-1.

20. *See* Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 913 (2010).

21. Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007); *see also* David Keenan & Sabrina P. Shroff, *Taking the Presumption Against Extraterritoriality Seriously in Criminal Cases After* Morrison *and* Kiobel, 45 LOY. U. CHI. L.J. 71, 74 (2013) (explaining that the Supreme Court, after deciding two cases on the extraterritorial reach of U.S. securities law and the Alien Tort Statute, strongly reaffirmed its commitment to limiting the foreign reach of domestic law).

22. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 117 (2013).

23. *See* Rod Rosenstein, Deputy Att'y Gen., Dep't of Justice, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign [https://perma.cc/G3FN-43DY]. Rosenstein reiterated the U.S. position, stating that "[w]e will enforce [the FCPA] against both foreign and domestic companies that avail themselves of the privileges of the American marketplace." *Id.*

24. *See* 15 U.S.C. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c). Recently, the Second Circuit effectively eviscerated the local law defense by noting that the payment must be explicitly legalized in the country that it was made; it was not sufficient for the defendant to have been absolved of all criminal liability in that country. Thus, absent an express legislative provision allowing a specific payment to government officials for discretionary acts—the existence of which would create an uproar—that affirmative defense cannot be claimed. *See* United States v. Kozeny, 664 F. Supp. 2d 369, 394–95 (S.D.N.Y. 2009), *aff'd*, 667 F.3d 122 (2d Cir. 2011).

legitimately related to securing the business contract.[25] However, given the limited judicial scrutiny of FCPA enforcement actions—as discussed in section III.A—the affirmative defenses rarely prevail in practice.

### C. UPDATING THE FOREIGN CORRUPT PRACTICES ACT: 1988

In 1988, Congress amended the FCPA in its comprehensive Omnibus Trade and Competitiveness Act.[26] The 1988 amendment increased the potential penalties companies and individuals could incur for a violation of the anti-bribery provision,[27] and required that an agent "knowingly" breached the reporting requirements of the Act, removing language allowing for prosecution when the agent has a reason to know the books were falsified .[28] At the time of enactment, Senator Proxmire of Wisconsin argued that the heightened standard for such a conviction would severely undercut the effectiveness of the provision and encourage intentional ignorance by compliance officers.[29] Supporters, on the other hand, argued that the new standard would ensure the application of consistent sanctions and provide clearer guidelines for corporate actors seeking to follow the compliance standards in good faith.[30] However, the limited textual changes in 1988 did little to motivate the DOJ and SEC to increase enforcement efforts, making Senator Proxmire's fears unwarranted. Without international assistance to supplement U.S. enforcement actions, FCPA investigations during the first two decades were limited to cases that were met with "express approval" from Washington.[31] In the first twenty years, the DOJ brought only thirty actions and the SEC only three.[32]

### D. NEGOTIATING THE OECD CONVENTION: 1989–1998

In the wake of the 1988 FCPA Amendment, President George H.W. Bush sought, as early as 1989, to solicit international cooperation for the enforcement of anti-bribery laws.[33] After the enactment of the FCPA, regulators subjected

25. 15 U.S.C. § 78dd-1(c)(2).

26. Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 102 Stat. 1415.

27. Sec. 5003, §§ 30A, 104, 102 Stat. at 1415–25; 134 CONG. REC. S20,095 (daily ed. Aug. 3, 1988) (statement of Sen. Heinz) [hereinafter 1988 Heinz Statement].

28. § 5002, 102 Stat. at 1415.

29. 1988 Heinz Statement, *supra* note 27, at 20,095 (explaining Senator Proxmire's opposition to the FCPA Amendments).

30. *Id.*; *see also* S. REP. NO. 95-114 (1997) (noting the recommendation of the Committee on Banking, Housing and Urban Affairs to adopt the newly-drafted FCPA).

31. *See* Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT'L L. & COM. REG. 83, 93 (2007).

32. Robert C. Blume & J. Taylor McConkie, *Navigating the Foreign Corrupt Practices Act: The Increasing Cost of Overseas Bribery*, 36 COLO. LAW. 91, 91 (2007).

33. *See* Spahn, *supra* note 3, at 10; *see also* ORG. FOR ECON. CO-OPERATION & DEV., UNITED STATES PROPOSAL FOR AN INTERNATIONAL AGREEMENT ON ILLICIT PAYMENTS 2 (Mar. 14, 1989), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/12/16/united-states-proposal-on-the-issue-of-illicit-payments.pdf ("The goal of an international agreement would be to ensure that individuals and enterprises in OECD member states are subject to comparable national legal standards governing bribery in conducting international commercial transactions. The central element of such an agreement would be a binding obligation by members to enact appropriate civil, administrative and criminal

U.S. companies to anti-bribery sanctions in circumstances where similarly placed foreign companies operated freely.[34] Although the Commerce Department found that between 1994 and 1998—a mere four-year span during the two decades the FCPA operated in isolation—allegations of external bribery played a role in over 180 lost contracts worth more than $80 billion, the Senate Committee in charge of the 1998 FCPA Amendment acknowledged that the amount could not be determined with any certainty.[35] Lost export trade since the enactment of the FCPA has been set at widely diverging amounts, with President Clinton declaring that U.S. companies lost about $30 billion a year in international contracts because of the ever-looming threat of enforcement.[36]

Despite the impact on American competitiveness, at the time of passage of the original FCPA, it was difficult to find anyone publicly critical of the anti-bribery legislation.[37] Thus, rather than eliminate U.S. legislation altogether, politicians turned instead to the dissemination of U.S. practices in foreign jurisdictions. This, they hoped, would subject foreign-registered companies to similar restrictions placed on U.S. actors. Therefore, in 1994, after sustained pressure from the United States, the OECD began officially drafting its Anti-Bribery Convention.[38] The drafters of the OECD Convention promoted the expansion of domestic legislation in member states, and President Clinton encouraged this undertaking as a means of leveling the playing field.[39]

Although an ad hoc Working Group within the OECD on the topic of anti-bribery was established in 1989, it took nearly a decade to ratify the treaty. Despite the negotiation obstacles, leaders of OECD countries quickly realized the potential for political controversy in failing to ratify a treaty with the sole objective of curbing government corruption. It helped that Clinton's chief negotiator, Daniel Tarullo, knew to press where it hurt. Carrying around a list of ten global companies regarded as the biggest violators, Tarullo would suggest making the list

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penalties to punish their nationals and corporatiions [sic] who commit bribery in connection with such transactions.").

34. *See* Spahn, *supra* note 3, at 10; *see also* Presidential Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, 34 WEEKLY COMP. PRES. DOC. 2290, 2290 (Nov. 10, 1998) [hereinafter 1998 Clinton Statement] ("Since the enactment in 1977 of the Foreign Corrupt Practices Act (FCPA), U.S. businesses have faced criminal penalties if they engaged in business-related bribery of foreign public officials. Foreign competitors, however, did not have similar restrictions and could engage in this corrupt activity without fear of penalty.").

35. S. REP. NO. 105-277, at 2 (1998).

36. *See* 1998 Clinton Statement, *supra* note 34, at 2290; *see also* MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., FOREIGN CORRUPT PRACTICES ACT (1999), http://congressionalresearch.com/RL30079/document.php?study=FOREIGN+CORRUPT+PRACTICES+ACT [https://perma.cc/TT74-UHEW] (noting estimated costs of up to $1 billion in lost export trade per year).

37. 124 CONG. REC. S83, 83–85 (daily ed. Jan. 19, 1978) (statement of Sen. Proxmire) (ordering an article, Michael C. Jensen, *Antibribery Law Has Some Teeth*, N.Y. TIMES (Dec. 25, 1977), to be included in the record stating, "[b]usinessmen, whatever their private reservations, can hardly say publicly that they are opposed to a law that punishes bribery.").

38. *See* Christopher K. Carlberg, *A Truly Level Playing Field for International Business: Improving the OECD Convention on Combating Bribery Using Clear Standards*, 26 B.C. INT'L & COMP. L. REV. 95, 98 (2003).

39. *See* 1998 Clinton Statement, *supra* note 34, at 2290.

public whenever his European counterparts resisted efforts to criminalize specific elements of the behavior in question.[40]

After poring over the particulars, country representatives signed the Convention on December 17, 1997 and opened the text for ratification.[41] Within the first three years of passage, thirty-one of the thirty-five OECD countries and three non-OECD countries had acceded or ratified the Convention—a remarkable pace for international conventions of such significance.[42] Today, all thirty-five OECD countries and nine non-OECD countries—Argentina, Brazil, Bulgaria, Colombia, Costa Rica, Lithuania, Peru, Russia, and South Africa—are party to the Convention.[43]

The Convention, in a mere seven pages, sets out the obligations of party states to establish domestic regulation prohibiting the bribery of foreign officials. The Convention does not prescribe a specific text for a legislative framework to be adopted but provides broad duties for the criminalization of certain behaviors, mutual assistance between enforcement agencies, and means for the extradition of violators.[44] It further creates a mechanism for rigorous peer review of member states.[45] The OECD Working Group on Bribery monitors progress in multiple phases of recommendations, follow-up, and reporting on legislative developments.[46] Even so, the Convention left member states with significant prosecutorial discretion, resulting in widely disproportionate levels of enforcement.[47]

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40. For an in-depth analysis by Professor Tarullo of the Convention he helped negotiate, see Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665, 669 (2004) . In Tarullo's work, he explains the game theory of entering to OED negotiations and the costs associated with being the first mover. *See id*.; *see also* Spahn, *supra* note 3, at 11.

41. OECD Convention, *supra* note 4.

42. *See* ORG. FOR ECON. CO-OPERATION & DEV., RATIFICATION STATUS AS OF MAY 2017, http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf (last visited Dec. 27, 2018); *see also, e.g*., United Nations Comm'n on Int'l Trade Law, *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html [https://perma.cc/6U2G-9BMF] (last visited Sept. 28, 2018) (only 33 states ratified the famed New York Convention in its first decade; now, 159 states are party to the convention).

43. *See* ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 42; *see also Peru to Join Two Major OECD Conventions: Anti-Bribery Convention and Multilateral Convention on Mutual Administrative Assistance in Tax Matters*, ORG. FOR ECON. CO-OPERATION & DEV. (May 28, 2018), http://www.oecd.org/corruption/peru-to-join-two-major-oecd-conventions-anti-bribery-convention-and-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters.htm [https://perma.cc/5T6C-D2XJ] (recording announcement by Peru's Minister of Economy and Finance that the country will join the OECD Anti-Bribery Convention).

44. *See* OECD Convention, *supra* note 4, at viii–ix.

45. *See id*. at 45.

46. *OECD Working Group on Bribery in International Business Transactions*, ORG. FOR ECON. CO-OPERATION & DEV., http://www.oecd.org/corruption/anti-bribery/anti-briberyconvention/oecdworkinggrouponbriberyininternationalbusinesstransactions.htm [https://perma.cc/V44Z-DR55] (last visited Dec. 28, 2018).

47. *See* OECD Convention, *supra* note 4, art. 5; *see also* OECD 2016 DATA, *supra* note 9, at 5–6 (Germany has prosecuted nearly forty-three percent of all anti-bribery sanctions since 1999, whereas Argentina, Australia, Brazil, Colombia, the Czech Republic, Denmark, Estonia, Greece, Iceland, Ireland, Latvia, Mexico, New Zealand, Portugal, the Slovak Republic, Slovenia, South Africa, Spain, and Turkey—all party to the convention—have yet to prosecute a single individual or legal entity).

### E. UPDATING THE FOREIGN CORRUPT PRACTICES ACT: 1998

In anticipation of its ratification of the Convention, which would introduce a small number of new obligations under international law to restructure domestic legislation, the U.S. Congress once again set out to update the FCPA framework. On November 10, 1998, President Clinton signed into law the International Anti-Bribery and Fair Competition Act to implement the Convention, which he would ratify less than a month later.[48] Specifically, the amendment added a provision, prompted by identical language in the Convention, extending criminal liability to payments made in an effort to secure any improper advantage in the conduct of international business.[49] It likewise extended coverage of the FCPA to persons—including non-U.S. nationals—who act within the United States in furtherance of a corrupt scheme, creating a definitive territorial jurisdiction in an otherwise extraterritorial framework.[50]

## II. HISTORY OF THE GERMAN ANTI-BRIBERY FRAMEWORK

The following Part examines the historical context before the criminalization of foreign bribery in Germany and details the subsequent legislative actions taken by the German Bundestag to combat international bribery.

### A. THE LEAD UP TO THE CRIMINALIZATION OF FOREIGN BRIBERY

Mirroring the scandal-driven reform in the U.S. case, Germany's development of anti-bribery laws materialized in part because of public outrage after the exposure of political misconduct. In November 1981, at the Flick Industrial Holding Company—rebuilt after World War II into Germany's biggest family-owned corporation—investigators stumbled upon a complicated system of domestic corruption that would threaten to take down Chancellor Helmut Kohl, the most powerful politician in West Germany at the time.[51] Initiated as an investigation of massive tax evasion after a sale of $833 million in Daimler–Benz shares, the probe discovered that two successive Economic Ministers—Hans Friederichs and Otto Graf Lambsdorff—had accepted large bribes to sign off on a tax waiver worth $175 million.[52] After an indictment was filed against Lambsdorff, the latter of the two Economic Ministers involved in the affair, he remained in his post for more than six months while the government around him struggled to cope with

48. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302.

49. 15 U.S.C. § 78dd-3 (2012).

50. *Id.* § 78dd-3(a) (extending liability to persons acting "while in the territory of the United States"); *see also* United States v. Hoskins, 902 F.3d 69, 85 (2d Cir. 2018) (noting that foreign nationals can be indicted under the FCPA if their involvement in the crime occurred in the United States).

51. *See* Julie Strawn & Charles G. Hogan, *Democracy on the Take: Flick Scandal Shakes West German Politics*, MULTINATIONAL MONITOR (Dec. 1984/Jan. 1985), https://www.multinationalmonitor.org/hyper/issues/1984/12/strawn.html [https://perma.cc/AXD7-GZSG] (Kohl admitted to taking envelopes filled with cash but maintained that any money he received was given straight to his Christian Democratic Party).

52. *See id.*

the public fallout of what would later be dubbed the Flick Affair.[53] All major political parties in Germany at the time—the Christian Democratic Union (CDU), the Christian Social Union (CSU), the Free Democratic Party (FDP), and the Social Democratic Party (SDP)—were found to have received bribes from Flick.[54] In all, more than 1,700 politicians and businessmen were investigated.[55] Only three individuals—including Lambsdorff—however, "were found guilty of tax evasion and sentenced to fines."[56] This outcome has led to widespread *Parteienverdrossenheit*—or "disillusionment with [the] political parties."[57]

Thus, with tarnished reputations in tow, in 1997 the German Bundestag enacted the *Gesetz zur Bekämpfung der Korruption* (Anti-Corruption Act) to eradicate bribery directed at German political actors, criminalizing conduct both for the offeror-corporation and recipient-government official.[58] The Act did not apply the anti-bribery provision to acts taken in commercial practice abroad, however, and thus prior to 1998, little stood in the way of foreign private sector bribery by German corporations. This practice became so endemic to the business world that the practice was characterized by a spokesman of the German federal criminal investigators as "institutionalized corruption."[59] German companies could even deduct bribes to foreign governments from their tax obligations.[60]

The complex apparatus set up by the corporate leaders of Siemens AG provides some insight into the extent of the corruption.[61] In one widely reported example, Reinhard Siekaczek's telecommunications unit at Siemens transferred money from Austrian bank accounts—and later from accounts in Switzerland and Liechtenstein—to offshore accounts owned by the world's governing elites

53. *See id.*

54. Thomas Saalfeld, *Court and Parties: Evolution and Problems of Political Funding in Germany*, *in* PARTY FINANCE AND POLITICAL CORRUPTION 89, 103 (Robert Williams ed., 2000). The main German political parties involved were the Christian Democratic Union (CDU), the Christian Social Union (CSU), the Free Democratic Party (FDP), and the Social Democratic Party (SDP).

55. Strawn & Hogan, *supra* note 51.

56. Saalfeld, *supra* note 54, at 102.

57. Dan Hough, *Anti-Corruption in Germany; A Culture of Complacency?*, INT'L ASS'N FOR THE STUDY GERMAN POL., https://iasgp.wordpress.com/2015/08/25/dan-hough-anti-corruption-in-germany-a-culture-of-complacency/ [https://perma.cc/J6QS-NXND] (last visited Dec. 29, 2018).

58. *See* Sebastian Wolf, *Modernization of the German Anti-Corruption Criminal Law by International Legal Provisions*, 7 GERMAN L.J. 785, 786–87 (2006); *see also* Gesetz zur Bekämpfung der Korruption [KorrBekG] [Anti-Corruption Act], Aug. 19, 1997, BUNDEGESETZBLATT [BGBL I] at 2038 (Ger.) (addressing the accepting of bribes in sections 331 and 332 of the German Criminal Code and the giving of bribes in sections 333 and 334 of the Code).

59. Siri Schubert & T. Christian Miller, *At Siemens, Bribery Was Just a Line Item*, N.Y. TIMES (Dec. 20, 2008), https://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html [https://nyti.ms/2jE03A6].

60. Nicholas Lord, Regulating Transnational Corporate Bribery in the UK and Germany 138 (2011) (unpublished Ph.D. dissertation, Cardiff University), https://orca.cf.ac.uk/26844/1/Nicholas%20Lord_PhD%20Thesis_May%202012%20-%20NEW.pdf; *see also* Information at ¶ 37, United States v. Siemens AG (D.D.C. Dec. 12, 2008) (No. 08-00367) [hereinafter Siemens Information] (listing bribes under common tax term *nützliche aufwendungen* or "useful expenditures").

61. David Gow, *Siemens Boss Admits Setting Up Slush Funds*, GUARDIAN (May 26, 2008, 7:01 PM), https://www.theguardian.com/business/2008/may/27/technology.europe [https://perma.cc/Z72P-TYVX].

in the British Virgin Islands and Dubai.[62] Siekaczek, a former Siemens senior manager convicted in 2008 for his involvement in the €1.3 billion bribery scheme, cooperated with German authorities to expose the company's systematic approach to foreign bribery. He noted, for example, that managers conducting business in Greece would set aside five percent to six percent of the value of a particular contract to ensure an advantage over direct competitors bidding for the same contract.[63] Taking perhaps too literally the meaning of "Greece" payments,[64] Siekaczek said that "[p]eople will only say about Siemens that they were unlucky and that they broke the 11th Commandment . . . . The 11th Commandment is: 'Don't get caught.'"[65]

### B. PASSAGE OF THE INTERNATIONAL ANTI-CORRUPTION LAW: 1998

The pressure applied by U.S. negotiators in the lead up to the implementation of the OECD Convention was instrumental in convincing other countries to accept the Convention's anti-bribery obligations and adopt domestic legislation to criminalize similar behavior. To bring the German Criminal Code into compliance with obligations under the OECD Convention, on November 13, 1998, the Bundestag enacted the *Gesetz zur Bekämpfung internationaler Bestechung* (International Anti-Corruption Act), which would take effect on January 1 of the following year.[66] It equalizes criminal liability for bribes targeting foreign officials to the liability set by the 1997 Anti-Corruption Act for bribes aimed at domestic actors, applying the following provision to actions abroad:

> Whosoever offers, promises or grants a benefit to a public official, a person entrusted with special public service functions or a soldier of the Armed Forces for that person or a third person in return for the fact that he performed or will in the future perform an official act and thereby violated or will violate his official duties shall be liable . . . .[67]

The new legislation also criminalizes any attempt to induce the action of a public servant in violation of that official's duties, but unlike the Anti-Corruption Act, the International Anti-Corruption Act does not criminalize passive bribery—the taking of bribes while in public office.[68] It does not extend liability to individuals who bribe foreign officials for *past* actions, even if they would be prosecuted

62. Schubert & Miller, *supra* note 59.

63. *Id.*

64. *See* Sporkin, *supra* note 1, at 269 n.2 (noting that the direct translation of the German word used to describe bribery is "grease money").

65. Schubert & Miller, *supra* note 59.

66. Gesetz zur Bekämpfung intemationaler Bestechung [IntBestG] [Act Against International Corruption], Sept. 21, 1998, BUNDESGESETZBLATT [BGBL II] at 2327 (Ger.).

67. STRAFGESETZBUCH [StGB] [GERMAN PENAL CODE], § 334(1), *translation at* http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [https://perma.cc/R68R-MF6S].

68. *See id.* § 332; *see also* Wolf, *supra* note 58, at 787 (noting that the International Anti-Corruption Act only provides the authority to punish active bribery).

for similar acts directed at German public officials.[69] Notably, the extraterritorial reach of the International Anti-Corruption Act applies to both German citizens and foreigners found within the jurisdiction of the German state.[70] In 2016, more than twenty-five percent of criminal investigations for offering bribes were initiated against non-German nationals—highlighting the country's willingness to prosecute foreigners.[71] Finally, bolstering the enforcement of the anti-bribery norms both domestically and abroad, the *Steuergesetz* (Tax Act) of 1999 eliminated the provision allowing corporations to take a tax deduction for bribes paid.[72]

Although criticized for imposing only the minimal requirements set out by the OECD Convention,[73] in its current format the German International Anti-Corruption Act has contributed more criminal sanctions from 1999 to 2016 than any other anti-bribery system in place.[74]

### C. UPDATING THE GERMAN ANTI-CORRUPTION LAW: 2015

In November 2015, the German Bundestag enacted the *Gesetz zur Bekämpfung der Korruption* (Act to Combat Corruption) to impose the liabilities associated with domestic bribery on acts directed at European officials, bringing the German Code in line with expectations under the European Union (EU) Anti-Corruption Act.[75] The newest iteration of the Criminal Code also contains a provision against money laundering and sets out a duty for corporate employees to refrain from giving benefits on the basis of an agreement for wrongdoing with another company's agent or employee—in effect criminalizing private sector collusion.[76] All things considered, the amendment provided a rather minor modification to Germany's anti-bribery framework and changed little in terms of the prosecution of foreign bribery.

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69. Wolf, *supra* note 58, at 789.

70. *See* ANNA OEHMICHEN, EUR. CRIM. B. ASS'N, OVERVIEW ON ANTI-CORRUPTION RULES AND REGULATIONS IN GERMANY (2016), http://www.ecba.org/extdocserv/projects/ace/20160126_ACE_CountryreportGermany.pdf; *see also* STRAFGESETZBUCH [StGB], *supra* note 67, § 7 (providing statutory authority to punish criminal behavior abroad).

71. *See Police Crime Statistics 2016*, PCS BUNDESKRIMINALAMT (July 24, 2017), https://www.bka.de/EN/CurrentInformation/PoliceCrimeStatistics/2016/pcs2016.html [https://perma.cc/3XDT-F9KZ].

72. ORG. FOR ECON. CO-OPERATION & DEV., WORKING GRP. ON BRIBERY, GERMANY: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 14, http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2386529.pdf.

73. Wolf, *supra* note 58, at 785.

74. *See* OECD 2016 DATA, *supra* note 9, at 5–6 (recording that from 1999 to 2016 Germany amassed 257 sanctions, whereas the United States—the second most prominent enforcer—amassed 191 sanctions).

75. Gesetz zur Bekämpfung der Korruption [KorrBekG] [Act to Combat Corruption], Nov. 20, 2015, BUNDEGESETZBLATT [BGBL I] at 2025 (Ger.).

76. HEINER HUGGER, CLIFFORD CHANCE LLP, GERMAN LAW ON FIGHTING CORRUPTION—STRENGTHENING CRIMINAL ANTI-CORRUPTION LAW AND CRIMINAL ANTI-MONEY LAUNDERING LAW—HAS ENTERED INTO EFFECT (2016), https://www.cliffordchance.com/briefings/2016/01/german_law_on_fightingcorruptionstrengthenin.html [https://perma.cc/4YFP-Y6MB].

## III. ENFORCEMENT UNDER THE FCPA AND INTERNATIONAL ANTI-CORRUPTION ACT

So far, this Note has discussed the histories of both the U.S. and German anti-bribery systems. The following Part examines the differences between those systems and the resulting effects on enforcement of the otherwise comparable legislative schemes.

### A. THE AUTHORITY TO INVESTIGATE AND ENFORCE

In the U.S. system, the FCPA delegates specific investigatory and enforcement authority to the federal government's Securities and Exchange Commission and the Department of Justice. Although the SEC has jurisdiction for civil enforcement against corporations with a securities issuance nexus, the DOJ is responsible for all criminal enforcement of the statute and civil enforcement for entities and individuals that do not fall within the "Issuer" definition.[77] The DOJ can file indictments in federal district court, but typically an anti-bribery investigation concludes with a resolution or out-of-court settlement, providing limited judicial oversight.[78] FCPA resolutions include non-prosecution agreements (NPAs), deferred prosecution agreements (DPAs), and SEC settlements.[79] Individuals and corporations are significantly more likely to settle with the SEC and DOJ than risk large sanctions if their indictment is taken to trial.[80]

Although NPAs are not filed in court, they set out a privately negotiated settlement for the acceptance of responsibility and the implementation of a compliance protocol, and they do so publicly.[81] On the other hand, DPAs are filed in court and likewise include a general assumption of responsibility and an agreement by the agency to defer prosecution of the corporation or individual for a period of time.[82] Both NPAs and DPAs predominantly include monetary sanctions, or fines, as part of the settlement.[83]

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77. Koehler, *supra* note 20, at 923–24.

78. *Id.* at 909 (noting that "judicial scrutiny is virtually non-existent in the FCPA context given the frequency with which FCPA enforcement actions are resolved through DOJ non-prosecution agreements ('NPAs'), deferred prosecution agreements ('DPAs'), pleas, or SEC settlements").

79. *Id.*

80. *See id.* at 927 ("it is not surprising that every company subject to an FCPA inquiry during the facade of enforcement era has opted to resolve such matters through an NPA, DPA, or plea regardless of the DOJ's legal theories, ambiguous facts, or the existence of valid and legitimate defenses. Simply put, challenging the DOJ is too risky. In fact, no company has challenged the DOJ in an FCPA enforcement action in the last twenty years.").

81. Koehler, *supra* note 20, at 934–35; *see, e.g.*, Letter from Deborah Connor, Acting Chief, Money Laundering and Asset Recovery Section, Criminal Div., U.S. Dep't of Justice, to Brad S. Karp & Susanna Buergel, Paul, Weiss, Rifkind, Wharton & Garrison LLP, on Banamex USA Criminal Investigation (May 18, 2017), https://www.justice.gov/opa/press-release/file/967871/download (providing terms of NPA).

82. Koehler, *supra* note 20, at 934.

83. *See* CRIMINAL DIV., U.S. DEP'T OF JUSTICE & ENF'T DIV., U.S. SEC. & EXCH. COMM'N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 68 (2012) [hereinafter FCPA RESOURCE GUIDE], https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf (explaining U.S. Sentencing Guidelines for DPAs and NPAs to calculate monetary penalties in accordance with the offense level of the defendant).

Unlike the FCPA, the various German anti-bribery acts discussed above in Part III do not confer exclusive authority to prosecute corrupt corporate behavior to any agency or bureau. Transnational bribery and corruption are instead prosecuted at the level of *Bundesländer*, comparable to the level of U.S. states in a federal system, which contain roughly 110 public prosecutor's offices tasked with enforcing the anti-bribery provisions of the criminal code.[84] The level of enforcement thus varies based on manpower, resources, and divergent levels of anti-corruption expertise across the different offices.[85] Nevertheless, the addition of specialized departments to exclusively investigate the corruption and bribery cases in the *Bundesländer* will likely create a substantial uptick in sanctions.[86] Further, cooperation and cross-jurisdictional assistance decreases some of the concerns of a decentralized system.[87]

German prosecutors, unlike their American counterparts, must open an investigation when potential violations of the Criminal Code are brought to their attention.[88] The cases, however, can be prioritized according to importance, and like the NPAs and DPAs in the U.S. system, the prosecutors are afforded multiple mechanisms by which they can pursue a pre-court settlement with the accused individual.[89] This pre-court resolution can take several forms. First, in the case of misdemeanors,[90] with limited public interest in the prosecution, the prosecutor—with the approval of a court—can dismiss the charges altogether.[91] Second, if the court so agrees, under section 153a of the Code of Criminal Procedure the public prosecution office can impose specific conditions and instructions in lieu of filing the charges in court.[92] Third, the individual can plea bargain with the prosecutor,

84. Lord, *supra* note 60, at 148–49.

85. *Id*. at 150–51.

86. ORG. FOR ECON. CO-OPERATION & DEV., WORKING GRP. ON BRIBERY, IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION: PHASE 4 REPORT ON GERMANY 44 (2018) [hereinafter OECD, PHASE 4 REPORT], http://www.oecd.org/corruption/anti-bribery/Germany-Phase-4-Report-ENG.pdf (explaining that the OECD anti-bribery country examiners noted "with concern the persistence of a significant difference in terms of awareness, specialisation and experience in foreign bribery matters among the prosecutors from different Länder" and "believe that, a more consistent approach to the complexity of the foreign bribery offence should be ensured amongst prosecution offices.").

87. *See* Lord, *supra* note 60, at 151.

88. *Id*. at 157 ("The *Legalitätsprinzip* (principle of legality) . . . provides that prosecution of an offence is mandatory for the public prosecutor." (quoting ANKE FRECKMANN & THOMAS WEGERICH, THE GERMAN LEGAL SYSTEM 187 (1999))).

89. *See* Tobias Eggers & Sebastian Wagner, *Bribery and Corruption 2019: Germany*, GLOBAL LEGAL INSIGHTS, https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/germany [https://perma.cc/AGY2-4MLH] (last visited Jan. 13, 2019) (noting "the [German Code of Criminal Procedure] provides the possibility of pre-trial settlements and in-trial plea bargains.").

90. Unless an especially aggravated case, most acts of bribery fall within the definition of misdemeanor. *See* STRAFGESETZBUCH [StGB], *supra* note 67, § 12 (defining misdemeanors as unlawful acts punishable by a minimum term of imprisonment of less than a year or by fine); *see also id*. §§ 333–34 (omitting a minimum term of imprisonment for giving bribes or for giving bribes as an incentive to the recipient's violating his official duties).

91. STRAFPROZESSORDNUNG [StPO] [GERMAN CODE OF CRIMINAL PROCEDURE], § 153(1), *translation at* https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.pdf.

92. *Id*. § 153a(1). This practice is considered a "conditional dismissal."

although the final agreement must contain a confession to be valid.[93] Between 1999 and 2016, seventy-three percent of the sanctions imposed by the German government in anti-corruption investigations consisted of an agreed upon settlement under section 153a.[94]

### B. THE CRIMINAL LIABILITY OF INDIVIDUALS AND LEGAL ENTITIES

The U.S. FCPA sets no distinction between the criminal liability of domestic corporations, foreign corporations—as long as those companies meet the securities issuance requirement—and individuals.[95] Along with potential criminal sanctions, the SEC can assess civil penalties against corporate violators for the ill-gotten gain from the corrupt conduct, plus interest and additional monetary penalties.[96] In light of the broad provisions of the FCPA, any legal entity with a sufficient nexus to the jurisdiction can be prosecuted for crimes related to bribery. The seriousness of the U.S. prosecution efforts is demonstrated by the size of the sanctions assessed against both foreign and domestic legal entities: in the last decade alone, the DOJ and SEC have penalized 142 corporate entities more than $12 billion.[97]

That is not the case in Germany, however. Whereas the possibility of the criminal liability of corporations is assumed in the U.S. legal system,[98] in Germany only natural persons can be punished under the Criminal Code.[99] Corporations cannot be held criminally liable under the German anti-bribery system, even if the actions of individuals responsible distinctly enrich the corporation. That being said, a corporation's unjust enrichment is not necessarily beyond the reach of the German authorities. The Administrative Offence Act authorizes the government to assess civil penalties against corporations either at a maximum fixed amount of €10 million or as high as the economic advantage generated from the bribe.[100] Even then, the Administrative Offence Act has only been used two times from

93. *Id.* § 257c.

94. *See* OECD 2016 DATA, *supra* note 9, at 5.

95. *See* 15 U.S.C. § 78dd-1(a) (2012) (defining anti-bribery obligations for specific issuers of equity in the same terms as the liability for agents and employees); *see also* § 78dd-2(a) (applying the anti-bribery provisions to any domestic concern, which includes both U.S. nationals and domestic companies).

96. *See* FCPA RESOURCE GUIDE, *supra* note 83, at 76.

97. *See* SHEARMAN & STERLING LLP, FCPA DIGEST: CASES AND REVIEW RELEASE RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977, at ii, iv (2018) https://shearman.symplicity.com/files/32a/32ae4f446d680242c4eb148b7af145eb.pdf.

98. *See generally* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996) (providing an in-depth analysis of federal criminal liability of corporate entities in the United States).

99. *See* OEHMICHEN, *supra* note 70, at 4 (noting that "according to current German law only natural persons can be punished as criminal offenders").

100. GESETZ ÜBER ORDNUNGSWIDRIGKEITEN [OWiG] [GERMAN CODE OF ADMINISTRATIVE OFFENSES], § 30(2), *translation at* https://www.gesetze-im-internet.de/englisch_owig/ englisch_owig.pdf; *see also* STRAFGESETZBUCH [StGB], *supra* note 67, § 73 (allowing recovery of profits gained by means of criminal offense); Eggers & Wagner, *supra* note 89 (noting that statutory maximum of the Code of Administrative Offenses is €10 million or as high as the profit associated with the offense).

1999 to 2016 to sanction legal entities.[101]

### C. WHISTLEBLOWER PROTECTION

Whistleblowers can serve as a valuable asset for investigators in the eradication of corporate bribery, and U.S. legislators have recognized that potential. In the wake of the Enron collapse, yet another corporate scandal that served as a significant catalyst for regulatory change, the U.S. Congress passed the Sarbanes–Oxley Act.[102] It requires, *inter alia*, mandatory disclosure of accurate financial reports by publicly traded companies and that the government enforces that disclosure requirement with civil and criminal penalties.[103] It further extended the whistleblower protections already afforded public sector employees to parts of the private sector.[104] Establishing the first anti-retaliation protection of private-sector whistleblowers, Sarbanes–Oxley aimed to protect individuals seeking to report fraud or potential violations of federal securities law by their employer.[105] The protected conduct extends to employees who provide "information, cause information to be provided, or otherwise assist in an investigation" of the company's fraudulent activities, and the law creates a new civil right of action for retaliatory discrimination in those private sector settings.[106]

The Sarbanes–Oxley Act laid the groundwork for the Dodd–Frank Act, which Congress enacted in response to the 2008 financial crash.[107] Dodd–Frank created the Office of the Whistleblower at the SEC and increased the relief authorized in a private right of action, allowing recovery of twice the amount of back pay and a grant of litigation and attorneys' costs.[108] It also stipulates that the SEC must compensate a whistleblower for submitting information that results in administrative or judicial sanctions exceeding $1 million.[109] If the whistleblower fulfills a set of criteria, the reward amount is calculated based on the sanction assessed against the corporation, and can range from ten percent to thirty percent of the monetary sanction.[110]

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101. *See* OECD 2016 DATA, *supra* note 9, at 6.

102. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

103. *See* 18 U.S.C. § 1350 (2012) (creating criminal liability for a failure of a corporate official to properly certify financial reports); *see also* 15 U.S.C. § 7241 (2012) (creating civil liability for corporations certifying financial reports).

104. *See* Sarbanes–Oxley Act of 2002 § 806 (providing whistleblower protections to employees of publicly traded companies).

105. 18 U.S.C. § 1514A (2012); *see* Bradley J. McAllister, *The Impact of the Dodd–Frank Whistleblower Provisions on FCPA Enforcement and Modern Corporate Compliance Programs*, 14 BERKELEY BUS. L.J. 45, 50 (2017) ("Prior to the adoption of SOX in 2002, most private sector whistleblower laws only protected employees who raised concerns about dangers to public health or safety.").

106. Tides v. Boeing Co., 644 F.3d 809, 815 (9th Cir. 2011) (quoting 18 U.S.C. § 1514A(a)(1)).

107. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

108. 15 U.S.C. § 78u-6(h)(1)(C) (2012).

109. § 78u-6(a)(1), (b)(1).

110. *Id.*; *see also* § 78u-6(c)(2)(A)–(D) (the whistleblower cannot, for example, be an employee of a regulatory or law enforcement agency, have discovered the fraud in an audit required by federal law, or be convicted of a criminal violation in relation to the information disclosed to the SEC).

Germany's legal landscape for whistleblowers looks remarkably different. In the Flick Affair, mentioned in Part II.A, Klaus Forster, the tax investigator who uncovered far-reaching political corruption, was forced to resign from his post without recourse.[111] More than three decades later, the German government has done little to enact whistleblower protections of the sort that would have protected Forster's job. Germany has authorized limited measures to remedy the absence of a general whistleblowing framework but has yet to enact comprehensive reform.[112] In some contexts, German courts have even disincentivized whistleblowing by public officials, and there is no clear legal duty for private sector employees and directors to reveal public bribery in financial disclosures.[113]

### D. THE CRIMINALIZATION OF FACILITATION PAYMENTS

The FCPA provides an exception to liability for facilitation payments, or payments aimed at securing the performance of a routine governmental action.[114] The provision permits companies and individuals to make "grease payments" for largely non-discretionary, ministerial activities to ease procedural impediments to a successful transaction.[115] The congressional record for the original 1977 FCPA indicated support for payments meant to expedite customs processes, secure permits, and even get adequate police protection for particular goods in transit;[116] the 1988 amendment codifies the exception.[117] Even so, the bookkeeping requirements of the FCPA still apply, which means that for companies to qualify for the exception, they must still provide a valid accounting of facilitation payments.[118]

On the other hand, the German code criminalizes the receipt of any benefit to which a public official is not entitled. There is no narrow carve-out for facilitation

111. *See* Guido Strack, *Whistleblowing in Germany*, *in* WHISTLEBLOWING: IN DEFENSE OF PROPER ACTION 109, 111 (Marek Arszutowicz & Wojciech W. Gasparski eds., 2011).

112. *See* ORG. FOR ECON. CO-OPERATION & DEV., G20 ANTI-CORRUPTION WORKING GRP., STUDY ON WHISTLEBLOWER PROTECTION FRAMEWORKS, COMPENDIUM OF BEST PRACTICES AND GUIDING PRINCIPLES FOR LEGISLATION 18 (2011), https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf (providing that some provisions in the German labor code and subsequent enforcement in the Federal Labour Court establish limited protections from employment discrimination to employees exercising their public right to cooperate with German prosecutors).

113. *Id.* at 24 ("[T]he Federal Labour Court has upheld in certain occasions that public servants wishing to disclose wrongdoings have to first seek in-house clarification and determine the appropriateness of their disclosure or they could face a legal dismissal if they fail to correctly outweigh the public interest versus their loyalty obligation."); OECD, PHASE 4 REPORT, *supra* note 86, at 16 (discussing "the absence of legal provisions governing self-reporting foreign bribery or related offences").

114. *See* 15 U.S.C. § 78dd-1(b) (2012).

115. *See* United States v. Kay, 359 F.3d 738, 747 (5th Cir. 2004) (citing H.R. REP. NO. 95-640, at 4 (1977)); SEC v. Jackson, 908 F. Supp. 2d 834, 857–58 (S.D. Tex. 2012) (quoting H.R. REP. NO. 95-640, at 4 (1977)).

116. S. REP. NO. 95-114, at 10 (1977).

117. Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, sec. 5003, § 30A(c), 102 Stat. 1415, 1416–17.

118. FCPA RESOURCE GUIDE, *supra* note 83, at 38–49.

payments.[119] If given for a corrupt purpose, including to secure even the nondiscretionary action of a foreign official, the payments are illegal by definition.

## IV. PROPOSALS FOR THE U.S. AND GERMAN ANTI-BRIBERY REGIMES

Critics of anti-bribery activism note that vigorous enforcement of corruption laws chills legitimate business abroad,[120] but harmonization of the two most active regimes will ameliorate that problem. This Part proposes that, by extracting the most sensible provisions of both the German and U.S. systems, legislators will be able to balance domestic corporate interests and anti-bribery norms. Consistent enforcement across Germany and the United States, as standard bearers for the rest of the world, will level the playing field for corporate entities entering into international business transactions with foreign governments and subject all actors to equivalent restrictions.

### A. INCREASING JUDICIAL OVERSIGHT OF SETTLEMENTS IN U.S. ANTI-BRIBERY CASES

In Germany, out-of-court settlements with individuals investigated for violating the International Anti-Corruption Act must be approved by a competent court before the prosecutor is able to drop the charges.[121] All terminations of criminal proceedings must be reported to the *Bundesländer* departments of justice to ensure uniformity, and for a conditional dismissal or plea bargain to be reached in German proceedings, the court must find that it is in the public's interest to do so.[122] Because the judge has access to the entire investigatory file when he or she rules on the validity of the monetary settlement, the judge remains well informed of the complex facts that drive the dismissal.[123] Although the German system is not without fault,[124] it provides an effective procedure for judicial review of settlements levied against individuals charged with violating anti-corruption laws.

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119. *See* Eggers & Wagner, *supra* note 89.

120. Leslie Wayne, *Hits, and Misses, in a War on Bribery*, N.Y. TIMES (Mar. 10, 2012), www.nytimes.com/2012/03/11/business/corporate-bribery-war-has-hits-and-a-few-misses.html [https://nyti.ms/2IUiEnG].

121. STRAFPROZESSORDNUNG [StPO], *supra* note 91, § 153a(1), 257(c).

122. *Id.*; *see also* ORG. FOR ECON. CO-OPERATION & DEV., WORKING GRP. ON BRIBERY, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN GERMANY 45–46 (2011), http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Germanyphase3reportEN.pdf [hereinafter OECD, PHASE 3 REPORT] (noting German law provides grounds for dismissal "if the conduct of proceedings would pose a risk of serious detriment to the Federal Republic of Germany or if other predominant public interests present an obstacle to prosecution").

123. *See* Shawn Marie Boyne, *Prosecutorial Accountability in the Rechtsstaat: The Tension Between Law, Politics, and the Public Interest* 12 (Robert H. McKinney Sch. Law, Ind. Univ., Legal Studies Research Paper No. 2016-29, 2017).

124. *See* Regina E. Rauxloh, *Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle?*, 34 FORDHAM INT'L L.J. 296, 306 (2011) (noting that the negotiation of conditional dismissals can favor some defendants and disadvantage others); *see also* OECD, PHASE 3 REPORT, *supra* note 122, at 16 (recommending that the German government supply clear criteria to ensure "uniform application of" § 153a dismissals).

In contrast, the U.S. system effectively eliminates judicial oversight of FCPA investigations and enforcement efforts. Privately negotiated settlements in the United States, which are subject to little or no judicial scrutiny, act as de facto caselaw for future enforcement actions.[125] The use of NPAs and DPAs in FCPA enforcement ensures that sole discretion over settlements is left with the U.S. Attorney in charge of the case. By definition, NPAs are not filed with the court and courts have restricted judicial oversight of DPAs. In 2016, the D.C. Circuit significantly hindered judicial oversight of DPAs when it ruled that the court could not scrutinize the prosecution's discretionary decisions in filing DPAs and that judgment would have to be entered even on DPAs that the judge viewed as too lenient.[126] This development effectively eliminated judicial oversight for even the settlement resolutions filed in court.

A party accused by investigators in the United States will more readily bargain with SEC and DOJ enforcers because, due to a lack of caselaw and jurisprudence, a party cannot predict its chances of success before a court.[127] Furthermore, without the guidance of caselaw to interpret FCPA provisions, corporations can overcompensate in their compliance efforts to the detriment of their business interests.[128] To resolve those unwelcome costs, the United States should look to the mandatory judicial involvement practiced by Germany. The German model would resolve some of the complex problems that the proliferation of out-of-court settlements has created for companies and individuals subject to the FCPA's far-reaching provisions.

### B. DECREASING DISCRETION TO INDICT IN THE U.S. FRAMEWORK

Alternatively, German prosecutors, under the principle of *legalität*, are given no discretion to investigate potential corruption when they become aware of a sufficient suspicion of wrongdoing.[129] German prosecutors can still consider practical reasons for disposing of a particular case with the approval of a court,

125. *See* Koehler, *supra* note 20, at 998.

126. *See* United States v. Fokker Servs. B.V., 818 F.3d 733, 741 (D.C. Cir. 2016); *see also* SHEARMAN & STERLING LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 13 (2017), https://www.shearman.com/-/media/Files/NewsInsights/Publications/2017/01/FCPA-Trends–Patterns–January-2017–050217.pdf ("[T]he Department [of Justice] all but ensured that the DOJ's (and SEC's for that matter) use of pre-trial agreements like DPAs would be essentially free from judicial scrutiny.").

127. *See* Koehler, *supra* note 20, at 1001 ("[T]he facade of FCPA enforcement has bread [sic] overcompliance because most risk-averse companies calibrate FCPA compliance policies and procedures to whatever legal signpost may be gleaned from a typical FCPA resolution vehicle.").

128. *See* Pete J. Georgis, Comment, *Settling with Your Hands Tied: Why Judicial Intervention Is Needed to Curb an Expanding Interpretation of the Foreign Corrupt Practices Act*, 42 GOLDEN GATE U. L. REV. 243, 247 (2012) ("[R]isk-averse companies have been forced into an environment where heightened levels of risk and over-compliance have led to the formation of intricate and expensive corporate compliance programs.").

129. *See supra* note 88 and accompanying text.

but they can do so only after a thorough investigation.[130] Therefore, the system seeks to ensure the uniform application of law without external influence.[131] The German prosecutor is not a party to the case and seeks to ensure a fair outcome for both the government and the individual charged, helping justice prevail over career-focused prosecutorial self-interest.[132]

On the other hand, the discretion of SEC and DOJ officials to investigate crimes of foreign bribery is limited solely by a set of broad principles and considerations.[133] In fear, perhaps, of missing a factor, the list provides U.S. Attorneys with ample ammunition to threaten companies even before indictments are filed.[134] The final decision of whether to investigate corporations and individuals with the strength of the U.S. government's enforcement apparatus often lies in the hands of one U.S. Attorney—which, as noted in section IV.A, is de jure unreviewable by the court system in the absence of arbitrary or capricious decision making. Critics have noted this prosecutorial discretion coerces corporate entities to settle cases rather than "betting the farm" on a prolonged legal battle.[135] Prosecutors in the United States retain incredible leverage in negotiations with corporations even if there was no inherent wrongdoing, which can drag even law-abiding companies into bankruptcy.[136] Furthermore, President Trump recently complained that the FCPA was a "horrible law," vowing to change it to protect

130. *See* Lord, *supra* note 60, at 158 (explaining that German Prosecutors have the legal duty "to investigate all potential cases that come to their attention and aim to bring criminal charges where possible").

131. *See* Boyne, *supra* note 123, at 4 (noting that as a result of the various characteristics of the office, "it is tempting to classify German prosecutors as apolitical legal technocrats").

132. *See id*. at 6 ("[M]ost prosecutors are not invested in 'winning a case.' While judges lead the presentation of evidence at trial, ideally prosecutors function like second judges and join the judge(s) in questioning witnesses.").

133. *See* FCPA RESOURCE GUIDE, *supra* note 83, at 52–54 (noting that SEC discretion to pursue an FCPA claim relies on "the statutes or rules potentially violated; the egregiousness of the potential violation; the potential magnitude of the violation; whether the potentially harmed group is particularly vulnerable or at risk; whether the conduct is ongoing; whether the conduct can be investigated efficiently and within the statute of limitations period; and whether other authorities, including federal or state agencies or regulators, might be better suited to investigate the conduct" and also that DOJ discretion relies on nine separate factors).

134. *See* Brendan J. Keefe, Note, *Revisions of the Thompson Memorandum and Avoiding the* Stein *Problems: A Review of the Federal Policy on the Prosecution of Business Organizations*, 42 CONN. L. REV. 273, 276–79 (2009) (noting the prosecutors' pre-indictment threats to KPMG contravened its employees' constitutional rights).

135. *See* Cortney C. Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 462–63 (2010) (citing Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1866 (2005)).

136. David C. Weiss, Note, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471, 511–12 (2009); *see also* Jeffrey S. Kinsler, *Arthur Andersen and the Temple of Doom*, 37 SW. U. L. REV. 97, 99, 107 (2008) (describing the demise of Arthur Andersen, a consulting firm, which in the early 2000s had over 85,000 global employees, and lost most of its $9 billion in value even though the U.S. Supreme Court reversed the firm's conviction).

U.S. competitiveness abroad.[137] His Attorney General at the time, Jeff Sessions, committed his department to enforcing the anti-bribery laws in place but expressed similar concerns about the prejudice the FCPA creates against U.S. business.[138]

Removing some discretionary investigation powers from U.S. Attorneys—who answer to the politically appointed head of the Department of Justice—will ensure a shifting political landscape will not influence active FCPA enforcement. Although it is unrealistic to assume that the United States will adopt Germany's *Legalitätsprinzip* in its enforcement of the FCPA, the United States would benefit from a set of statutes standardizing the government's investigatory power, so as to limit its discretionary scope and the ability of political actors in the executive branch to stray from active prosecution.

### C. ELIMINATING THE FACILITATION PAYMENT EXCEPTION IN THE U.S. FRAMEWORK

Furthermore, the United States should alter the provisions of the FCPA that allow facilitation payments. Facilitation payments, or payments aimed at securing routine government action, were not outlawed in the initial enactment of the OECD Convention.[139] But since 2009, the OECD has strongly challenged their use, describing them as "corrosive" to the anti-corruption framework.[140] The OECD's proposed criminalization of facilitation payments does not cover the standard costs of submitting forms, applying for export licenses, or routine services from government agencies, but rather payments directed explicitly at foreign officials for the purpose of expediting routine government practices outside their discretion.[141] Bribes for those services impair the ability of other corporate actors to receive those routine services in a timely manner.

All that remains, then, is to call the facilitation payments exception in the FCPA framework what it is: sanctioned bribery. The payments fall within the definition of bribery,[142] and the operation of the payments are remarkably similar to

137. Jim Zarroli, *Trump Used to Disparage an Anti-Bribery Law; Will He Enforce It Now?*, NPR (Nov. 8, 2017, 5:03 AM), https://www.npr.org/2017/11/08/561059555/trump-used-to-disparage-an-anti-bribery-law-will-he-enforce-it-now [https://perma.cc/GC8W-KB8D].

138. *Id.*

139. OECD Convention, *supra* note 4, 23.

140. Jon Jordan, *The OECD's Call for an End to "Corrosive" Facilitation Payments and the International Focus on the Facilitation Payments Exception Under the Foreign Corrupt Practices Act*, 13 U. PA. J. BUS. L. 881, 897 (2011) (quoting Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Commentary 9, Dec. 17, 1997, 37 I.L.M. 1).

141. Meg Beasley, Note, *Dysfunctional Equivalence: Why the OECD Anti-Bribery Convention Provides Insufficient Guidance in the Era of Multinational Corporations*, 47 GEO. WASH. INT'L L. REV. 191, 209 (2015) (noting that the FCPA definition of a facilitation payment, which does not include the standard payments associated with doing business abroad, was challenged by the 2009 OECD Working Group on Bribery and subsequent U.S. country reports); *see also* Beverley Earle & Anita Cava, *When Is a Bribe Not a Bribe? A Re-Examination of the FCPA in Light of Business Reality*, 23 IND. INT'L & COMP. L. REV. 111, 119–20 (2013) (explaining that the OECD does not provide a complete definition of facilitation payment despite its efforts to eradicate the phenomenon).

142. *See Bribery*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The corrupt payment, receipt, or solicitation of a private favor for official action."); *see also* 15 U.S.C. 78dd-1(b) (2012) (defining facilitation payments as transfers intended "to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official").

those made illegal, such as where a corrupt government official is paid illicit funds to take certain actions. The exception threatens to engulf the rule because the line between discretionary and routine government actions can easily blur. The OECD implementation protocol for the Convention includes three phases of domestic investigation and reporting, and it has at several points regarded the U.S. exception as "subject to misuse" and an "area of risk."[143]

On the other hand, Germany, as discussed in section III.D, makes no distinction between payments directed at foreign officials to secure the routine services of their respective offices and payments directed at foreign officials to secure favorable discretionary action. Germany is not alone in this regard. Almost every country that has acceded to the OECD Convention, save for five, criminalizes facilitation payments to foreign officials, equating it to standard bribery of foreign officials for the receipt of discretionary favors.[144] Therefore, the United States should follow suit and eliminate the significant loophole it has carved into its anti-bribery framework, thereby enforcing a norm already followed by many of its domestic companies[145] and almost all of its international counterparts.

### D. INTRODUCING CRIMINAL LIABILITY FOR CORPORATE ENTITIES IN THE GERMAN FRAMEWORK

Germany also has indisputable flaws in its legal framework. A lack of criminal liability for corporations cannot be cured with the introduction of a civil penalty. Although individual managers and directors may be dissuaded by the criminal sentences they can serve, a corporation is left with two choices in the face of the civil enforcement scheme in Germany. This is best illustrated with a simple example: the corporation has the choice to pay a five percent bribe on a $250 million contract[146] that it expects to make $25 million in profits from,[147] and the corporation expects that the German government can investigate and penalize a maximum of ten percent of all companies that violate its anti-bribery laws.[148] The

143. *See* Jordan, *supra* note 140, at 900–01.

144. *See id.* at 888–89. The five member-states to the OECD Convention that have not yet criminalized facilitation payments are: Australia, Denmark, South Korea, New Zealand, and the United States. *See Country Reports on the Implementation of the OECD Anti-Bribery Convention*, ORG. FOR ECON. CO-OPERATION & DEV, http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm [https://perma.cc/H4J4-WZQE] (last visited Oct. 1, 2018).

145. *See* Jordan, *supra* note 140, at 909 ("[M]ost domestic companies have affirmatively sought to ban or narrow the use of facilitation payments within their operations.").

146. *See* Schubert & Miller, *supra* note 59 ("Typically, amounts ranged from 5 percent to 6 percent of a contract's value.").

147. *See, e.g.*, GRANT THORNTON LLP, 2016 GRANT THORNTON GOVERNMENT CONTRACTORS SURVEY 9 (2017), https://www.grantthornton.com/-/media/content-page-files/public-sector/pdfs/surveys/2017/government-cntractors-survey-view-online.ashx?la=en&hash=6DAA97D1570ABA4301A5464065F9755A1C32EB8D (providing that in 2016, more than forty-five percent of government contractors see profits between six and ten percent, and more than fifteen percent of all government contracts attain profits greater than eleven percent).

148. There is no meaningful way to determine the effectiveness of the German investigations at curbing corruption, and thus the ten percent is purely fictional—and likely generous. *See* OECD 2016 DATA, *supra* note 9, at 5 (noting that between 1999 and 2016, only thirteen corporations have been penalized under the Administrative Offense Act, whereas in the same time period, 244 individuals were

corporate entity has two options: (1) fail to bribe the foreign official and lose the contractual bid, or (2) bribe the foreign official $12.5 million, receive the $25 million premium, and take the small—but not meaningless—chance that the German government confiscates the premium.

In the first case, the outcome is preordained. The corporation will walk away empty-handed every time. In the second case, however, the outcome in ten percent of cases will result in a loss of $12.5 million (because the bribe cannot be recovered), whereas in ninety percent of cases the corporation will receive a premium of $12.5 million. Social and moral considerations aside, the choice to bribe results in an expected net gain of $10 million—$10 million higher than the company's expected outcome if it chose to forego the bribe.[149] Without further criminal deterrence or a degree of enforcement nearing fifty percent, the corporation will find it economically expedient to continue its bribing scheme in the hypothetical case described above.

The case of Reinhard Siekaczek, the Siemens manager discussed in section II. A, further exemplifies the limitation a lack of corporate criminal liability imposes on the effort to combat corruption. Siemens' unquenchable desire to maximize profits strong-armed a man known for his "deep company loyalty" into managing million-dollar bribes, all while taking none of it for himself.[150] Well aware of the criminal penalties he could face for his actions, Siekaczek continued nonetheless to act as the middle-man in his company's scheme.[151] Criminal penalties directed at individuals thus may not provide sufficient deterrence to corporate bribery.[152] Additionally, the Siemens scandal did not even disqualify the company from bidding for future governmental contracts with the German government because it could not be charged criminally; it remains certified to bid for those contracts.[153] Although Germany has accomplished much in the last two decades in eradicating cross-border bribery, the institutional pressures to bribe will remain present in the German business world without further criminal deterrence targeting the corporate entity itself, like in the U.S. framework. Thus, Germany should extend criminal liability to corporations, or at a minimum, vastly increase the civil penalties a corporation can face for illegally soliciting business.

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sanctioned—indicating that the use of civil penalties aimed at corporations lags behind criminal enforcement).

149. 90% x $12.5 million – 10% x -$12.5 million = $10 million.

150. *See* Schubert & Miller, *supra* note 59.

151. *See id.* ("Although Mr. Siekaczek was reluctant to take the job offered that night, he justified it as economic necessity.").

152. *See* ORG. FOR ECON. CO-OPERATION & DEV., ANTI-CORRUPTION DIV., THE LIABILITY OF LEGAL PERSONS FOR FOREIGN BRIBERY: A STOCKTAKING REPORT 7 (2016), http://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf (noting that corporate "liability frameworks create additional incentives that induce companies to have effective compliance programs and cooperate in the law enforcement process, in order to enhance the detection, prevention, investigation and resolution of cases of foreign bribery").

153. Eric Lichtblau & Carter Dougherty, *Siemens to Pay $1.34 Billion in Fines*, N.Y. TIMES (Dec. 15, 2008), https://www.nytimes.com/2008/12/16/business/worldbusiness/16siemens.html [https://nyti.ms/2nvMSn8].

### E. ADOPTING WHISTLEBLOWER PROTECTIONS AND INCENTIVES IN THE GERMAN FRAMEWORK

The U.S. whistleblower protections have proved effective in promoting the discovery of corporate violations of the anti-bribery laws and have assisted individual FCPA investigations. Shortcomings in the German system, on the other hand, have led some to sharply criticize the German government's inability to coalesce around a legal framework safeguarding good-faith whistleblowers.[154] Affording whistleblowers protection against retaliatory discrimination and harassment eliminates a high barrier to reporting.[155] To that end, Germany should first construct an anonymous reporting channel that is readily available in each of the *Bundesländer*. Second, it should create judicially enforceable employment retaliation claims for both internal and external disclosures.[156] Protections for employees who report internally before alerting the authorities will ensure the company compliance officer can be appraised of the situation earlier and can take immediate actions to remedy the violations. The end goal of eradicating bribery need not be enforced solely by painstakingly thorough criminal and civil investigations; remedial actions by corporate actors produce similar results.[157]

Furthermore, the German government should consider providing monetary incentives for whistleblowers. The introduction of the U.S. incentive system in 2010—which paid out nearly $50 million to whistleblowers in 2017 alone—was accompanied by an almost 1000% increase in whistleblower tips from 2011 to 2012.[158] Notably, although FCPA related violations reflect less than five percent of all tips received, in 2017 the SEC still received 210 tips regarding foreign bribery from a multitude of foreign countries.[159] Given the confidentiality requirements of the program, there is no publicly available data on the effectiveness of those tips in leading to sanctions, but in at least one reported example, the whistleblower tip directly brought about a successful $25 million FCPA enforcement

154. *See* Strack, *supra* note 111, at 118; *see also* Matthias von Hein, *Whistleblowers in Germany: Loved, Hated, Poorly Protected*, DEUTSCHE WELLE (May 1, 2016), http://www.dw.com/en/whistleblowers-in-germany-loved-hated-poorly-protected/a-19228525 [https://perma.cc/DDN4-65GA] (noting German whistleblowers need greater legal protections).

155. *See* Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 777 (2018) (noting that the statutory framework works principally by "enlisting whistleblowers to 'assist the Government [in] identify[ing] and prosecut[ing] persons who have violated securities laws'" (quoting S. REP. NO. 111-176, at 110 (2010))).

156. For OECD's 2017 published guidelines for effective whistleblower protections, see ORG. FOR ECON. CO-OPERATION & DEV., ANTI-CORRUPTION DIV., THE ROLE OF WHISTLEBLOWERS AND WHISTLEBLOWER PROTECTION (2017), http://www.oecd.org/corruption/anti-bribery/OECD-The-Role-of-Whistleblowers-in-the-Detection-of-Foreign-Bribery.pdf.

157. *See* FCPA RESOURCE GUIDE, *supra* note 83, at 56–62 (discussing corporate compliance programs aimed at detecting and remediating FCPA violations).

158. *See* U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT TO CONGRESS: WHISTLEBLOWER PROGRAM 23, 29 (2017), https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf (noting that in FY 2011 the SEC received 334 tips, and in FY 2012 it received 3,001 tips).

159. *Id.* at 24, 26 (noting that the SEC has received whistleblower tips from individuals in 114 different countries outside the United States).

action.[160] The introduction in Germany of a monetary incentive program based on a percentage of the civil penalties assessed against the corporation, combined with whistleblower protections, will motivate an increase in employee disclosures of illegal actions and increase the capacity of the anti-bribery framework.

### F. INCREASING TRANSPARENCY IN GERMAN ANTI-BRIBERY PROCEEDINGS

Finally, Germany stands to benefit from publicly reporting its anti-bribery sanctions. The enforcers of anti-bribery laws in the United States, the SEC and DOJ, judiciously publish both court decisions and out-of-court settlements reached with corporations and individuals sanctioned for FCPA violations.[161] That publicity has a dual purpose, for both corporate actors and the general public. Faced with information on the government's active enforcement, corporations and individual actors are more likely to determine that the negative consequences, particularly the hundreds of millions of dollars that can be assessed as a sanction and potential prison time, outweigh the profits they stand to gain by using bribes.[162] Additionally, publication of FCPA enforcement efforts produces accountability by informing the public, the news media, and activist NGOs of the illegal activities of the corporation. On December 12, 2008, the day that the SEC filed its FCPA complaint in the U.S. District Court for the District of Columbia against Siemens, the company lost 4.81% in market value.[163] Its market cap dropped more than €1.9 billion.[164] This provides strong financial incentives for corporate actors with equity interests in their companies to comply with FCPA rules, and the enforcement of the FCPA is thus bolstered by the public disclosure of sanctions.

On the other hand, the German framework lacks the U.S model's deterrent effect. This is particularly relevant for settlements under section 153a of the Criminal Code because those sanctions are seldom made public.[165] To effectively

160. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges BHP Billiton With Violating FCPA at Olympic Games (May 20, 2015), https://www.sec.gov/news/pressrelease/2015-93.html [https://perma.cc/B473-848B]; *see also* SHEARMAN & STERLING, *supra* note 126, at 28 (noting that the BHP Billiton settlement was based on information provided by a whistleblower).

161. *See supra* Section III.A.

162. *See, e.g.*, Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 437 (2012) ("A 2011 study found that thirty-five percent of the individuals who were the subject of a government-initiated civil and/or criminal action based on alleged violations of the FCPA in the prior six years were the president, chief executive officer, or chief operating officer of their respective companies. Such prosecutions likely are the key to maximizing the FCPA's deterrent impact." (footnote omitted)).

163. *See* Siemens Information, *supra* note 60; *see also SIE.DE Historical Prices*, YAHOO FINANCE, https://finance.yahoo.com/quote/SIE.DE/history/ [https://perma.cc/37AH-BU96] (last visited Jan. 13, 2019) (noting that the opening price of Siemens publicly traded shares on the German stock exchange on December 11, 2008 was €48.12 and the closing price on December 12, 2008 was €45.91).

164. *See* Siemens Aktiengesellschaft, Annual Report (Form 20-F) (Sept. 30, 2009), https://www.sec.gov/Archives/edgar/data/1135644/000095012309068324/f03197e20vf.htm [https://perma.cc/VSR9-BFVW] (declaring that there were 866,425,760 outstanding shares in September 2009). Market capitalization is based on the market value of a publicly traded company's outstanding shares; the one-day €2.21 drop in share price therefore wiped off €1.915 billion.

165. *See* Branislav Hock, *Transnational Bribery: When Is Extraterritoriality Appropriate?*, 11 CHARLESTON L. REV. 305, 328 (2017) ("German authorities rarely publicize information about concluded foreign bribery cases . . . ."); *see also* OECD, PHASE 3 REPORT, *supra* note 122, at 26 (noting

deter corporate corruption, without expanding the budget of the various public prosecutor offices and specialized agencies dealing exclusively with bribery investigations, the German government should increase the transparency of its enforcement efforts. This will help Germany meet its obligations under the OECD Convention to "[f]oster[] accountability and transparency domestically and internationally, including publicising the rationale for and nature of responses to corruption cases,"[166] and will provide an efficient means of ensuring compliance with its anti-bribery laws. By forcing German companies and individual managers to scrutinize the cost of bribery in terms of anticipated penalties and public outcry, enforcement publicity changes the calculus in favor of restraint. Given the active enforcement role the German government has taken in curbing bribery in international business transactions, Germany will benefit greatly from raising awareness of that prosecutorial activism.

## CONCLUSION

Most of the legislative acts and amendments discussed in this Note stemmed from the fallouts of various political scandals and controversies. To avoid repeating history, I hope legislative zeal will preempt the need for a new scandal before the recommendations above are embraced in the anti-bribery frameworks of the United States, Germany, and other countries.

Inevitably, multi-jurisdictional cooperation will be vital to the eradication of cross-border bribery in the decades to come. To achieve that joint action, international harmonization efforts should take note of the lessons learned from the most active enforcers of anti-bribery laws in the world. Harmonizing the existing mechanisms used to investigate and enforce different anti-corruption regimes will facilitate the proliferation of the norms established in the late 1970s by the United States and harnessed by the German government in the last two decades. The analysis above examines the systemic characteristics that have proved valuable to the eradication of bribery, and it lays the groundwork for evidence-based recommendations for countries seeking to contribute to the international enforcement of bribery laws. The analysis demonstrates what aspects have proved effective in practice, so that countries can derive a workable balance between prosecutorial activism and encouraging domestic firms to engage in international business transactions. This is just one step towards eradicating the use of foreign bribery and its ruinous distortion of international markets and the shifting of profits to unscrupulous public officials, but it is a vital first step in creating a less corrupt business environment.

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that the German government "indicated that there is no central register of data on criminal convictions as this falls into the responsibility of the [*Bundesl*]*änder*. It was therefore impossible for the [OECD] examiners to assess how many cases have been dropped at the prosecution stage"); Hough, *supra* note 57 (noting that "it is very difficult indeed to find comparable data on which people and which companies have been subject to legal proceedings").

166. ORG. FOR ECON. CO-OPERATION & DEV., WORKING GRP. ON BRIBERY, RECOMMENDATION OF THE COUNCIL FOR DEVELOPMENT CO-OPERATION ACTORS ON MANAGING THE RISK OF CORRUPTION 10 (2016), http://www.oecd.org/corruption/anti-bribery/Recommendation-Development-Cooperation-Corruption.pdf.