NOTE

The U.K. Bribery Act v. The FCPA: A Comparative Analysis Considering President Trump's Second Term

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Introduction

The United Kingdom Bribery Act (UKBA) and the Foreign Corrupt Practices Act (FCPA) represent two fundamentally different enforcement philosophies to address foreign bribery.[1] Where the UKBA involves an uncompromising strict liability approach to address foreign bribery, the FCPA appears more pragmatic in allowing exceptions for "facilitation payments.[2] The two statutes further diverge significantly in their enforcement standards and even the scope of their jurisdictional reach.[3] Enacted in 1977, the FCPA's core function is to prohibit U.S. individuals and businesses for bribing foreign officials to obtain or retain business.[4] The statute further requires U.S. businesses to keep records accurately and establish internal controls to prevent foreign bribery.[5] In contrast, the UKBA was enacted in 2010, with a focus on addressing both supply and demand side bribery in both the public and private sectors.[6] The UKBA's provisions do not address corporate accounting.[7]

Amid the UKBA and FCPA's differences, President Donald J. Trump's administration announced new changes to FCPA enforcement policy early in his second term.[8] These changes aim to address the "overexpansive" and "unpredictable" nature of FCPA enforcement under prior administrations.[9] The new changes include measures like promoting individual accountability and emphasizing the FCPA's "facilitating payments exception," which prior administrations have disregarded.[10] Another change includes offering greater incentives for companies to voluntarily self-disclose FCPA violations.[11] These changes to FCPA enforcement are critical for improving the statute's deterrence impact and fairness, which prior administrations have often compromised in favor of maximizing the quantity of enforcement actions brought.[12] The Trump administration's changes to FCPA policy superficially

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1. Sharifa G. Hunter, *A Comparative Analysis of the Foreign Corrupt Practices Act and the U.K. Bribery Act, and the Practical Implications of Both on International Business*, 18 ILSA J. INT'L & COMP. L. 89, 92-93, 95 (Fall 2011).

2. *Id.* at 96, 99.

3. *See id.* at 93-96.

4. U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, *A Resource Guide to the Foreign Corrupt Practices Act Second Edition* 1, 2 (2020).

5. *Id.* at 1.

6. *See* Hunter, *supra* note 1, at 97, 98.

7. *Id.* at 93.

8. Memorandum from Todd Blanche, Deputy Att'y Gen., U.S. Dep't of Justice to All U.S. Att'ys et al., Guidelines for Investigations and Enforcement of the Foreign Corrupt Practices Act (June 9, 2025) ["Blanche Memo"].

9. Exec. Order 14,209, 90 Fed. Reg. 9587 (Feb. 10, 2025).

10. *See* Emily N. Strauss, *"Easing Out" The FCPA Facilitation Payment Exception*, 93 B.U. L. REV. 235, 251-55 (2022) (alleged misconduct arguably fell within the facilitating payments exception).

11. *See* Matthew Galeotti, Head of Criminal Division, U.S. Dep't of Justice, Address at the American Conference Institute Conference (June 10, 2025) ["Galeotti Speech"].

12. Mike Koehler, *Ten Seldom Discussed Foreign Corrupt Practices Act Facts You*

appear to deepen the contrast between the statute and its British counterpart, with the new guidelines aimed at easing American companies' concerns of aggressive prosecution.[13] Whereas the UKBA operates under a philosophy where aggressive prosecution is key to deterring foreign bribery.[14] Nevertheless, both the Trump administration's FCPA policies and the UKBA share a view toward maximizing deterrence of foreign bribery, while still maintaining fairness within their enforcement strategies.[15]

In this respect, the Trump administration's changes to FCPA policy would benefit from adopting key characteristics of the UKBA, one of them being its penalties. The UKBA is notoriously strict in penalties, with individuals caught violating it facing a maximum of ten years imprisonment and unlimited fines.[16] Meanwhile, the FCPA imposes only a maximum of five years imprisonment, criminal fines up to $100,000, and civil penalties of up to $10,000 per violation.[17] Increasing penalties for individual violations is crucial for improving the FCPA's deterrence impact, as individuals are far more likely to refrain from wrongdoing when penalties are strict.[18]

A major distinction between the UKBA and the FCPA, is the former also prosecutes companies for failing to prevent an offense.[19] This refers to situations where a company's employee engages in foreign bribery with the intention to benefit the company, without the company's knowledge.[20] This is ordinarily a strict liability offense, however the UKBA offers companies an affirmative defense when they violate this offense, namely the "adequate procedures" defense.[21] Under this defense, companies can avoid penalties if they can sufficiently prove that they had adequate procedures in place when their employee engaged in foreign bribery, designed to prevent such misconduct.[22] Adding the "adequate procedures" defense to FCPA enforcement policy would greatly benefit the statute's fairness, since for much of its history, prosecutors have leveraged the FCPA to exclusively penalize corporations for the actions of their employees.[23] This enforcement

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Need to Know, BLOOMBERG BNA WHITE COLLAR CRIME REPORT 1, 6, 10 (2015).

13. *See* The executive order pausing FCPA enforcement, 90 Fed. Reg. 9587; Blanche Memo, *supra* note 8.

14. *See* Hunter, *supra* note 1, at 96.

15. *See* Blanche Memo, *supra* note 8; Sentencing Council, *Bribery* (last visited Dec. 24, 2025), https://sentencingcouncil.org.uk/guidelines/bribery/ (mentioning how the UKBA considers culpability and harm in sentencing guidelines).

16. Hunter, *supra* note 1, at 104.

17. *Id.* at 103.

18. *See* Koehler, *supra* note 12, at 7.

19. Hunter, *supra* note 1, at 95.

20. *Id.*, at 96.

21. Ministry of Justice, *Bribery Act 2010 Guidance* (Feb. 11, 2012), https://www.gov.uk/government/publications/bribery-act-2010-guidance [https://perma.cc/77TL-VEMS].

22. *Id.*

23. *See* Mike Koehler, *Not One Company Employee Has Been Charged With FCPA Offenses By The DOJ*, FCPA PROFESSOR (July 12, 2017), https://fcpaprofessor.com/nearly-20-corporate-fcpa-enforcement-actions-doj-approximately-1-4-billion-collected-not-one-company-employee-charged-fcpa-offenses-doj/ [https://perma.cc/G36E-CBEF].

strategy of prior administrations greatly undermined the FCPA's fairness, as innocent stockholders, employees, and managers in American companies were left, in principle, responsible for the actions of a few of their employees.[24]

This Note will first describe the origin and evolution of the FCPA until its latest amendment in 1998. The Note will further describe the goals and constraints of foreign anti-bribery laws generally. It will then present the strategies of FCPA enforcement under prior administrations, including how these strategies have undermined U.S. anti-corruption efforts. Then, the Note will examine President Trump's changes to FCPA enforcement strategy and why they are beneficial to U.S. anti-corruption efforts. This Note argues that the Trump administration's changes to FCPA enforcement policy are beneficial for improving the FCPA's fairness and deterrence impact for three reasons. First, these changes will close an accountability gap in prior enforcement by emphasizing individual liability for corporate misconduct. Second, they will strengthen corporate transparency and compliance through a generous voluntary self-disclosure policy. Third, the new changes will reduce arbitrary enforcement of the FCPA by restricting enforcement agencies' abilities to broadly interpret the statute beyond its original intent.

This Note will further present the United Kingdom's approach to counter bribery under the UKBA, including its unique features such as strict liability and broad jurisdictional scope. This Note contends that the Trump administration would further improve the FCPA's deterrence impact and fairness by adopting two features of the UKBA. First, the Trump administration should view the UKBA's individual sentencing guidelines as a reference point and increase the severity of individual penalties for FCPA violations. Second, the Trump administration should instruct the DOJ to adopt ex ante compliance criteria such that meeting them presumptively results in no prosecution, mirroring the UKBA's adequate procedures defense.

I. The Origin and Evolution of the FCPA Until its 1998 Amendment

To understand how the FCPA became broadly construed beyond its original intent, it is first necessary to understand the statute's origins and development over time. Congress felt the need for an effective foreign anti-bribery statute in the aftermath of the Watergate scandal.[25] During that time, Congress became aware of rampant foreign bribery among U.S. corporations.[26] Nevertheless, Congress did not desire a broad foreign anti-bribery statute.[27] Rather, Congress understood that American businesses operating overseas often experience difficult conditions that require small

24. Koehler, *supra* note 12, at 9.

25. Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 932, 938 (2012).

26. Upton Au, *Toward a Reconceived Legislative Intent Behind the Foreign Corrupt Practices Act: The Public Safety Rationale for Prohibiting Bribery Abroad*, 79 BROOK. L. REV. 925, 928-29(2014).

27. *See* Koehler, *supra* note 25, at 1005.

bribes to local officials.[28] Later administrations overlooked this reality.[29] In its inception in 1977, the FCPA prohibited only a "narrow category" of payments to foreign officials in its anti-bribery provisions, specifically to procure government contracts or influence foreign legislation.[30] The statute also had accounting provisions which mandated American businesses to keep accurate financial records that reflect their transactions.[31] Furthermore, legislative records from the FCPA's inception repeatedly emphasize Congress's desire not to penalize small bribes paid to low level government officials.[32] Thus, the FCPA included an exception for "facilitating payments exception," exempting small bribes to "ministerial or clerical" foreign officials.[33]

Congress amended the FCPA in 1988, softening compliance burdens for American businesses by expanding the "facilitation payments exception" and adding two affirmative defenses to the statute.[34] It further pressured the executive branch to consult other countries to adopt similar foreign anti-bribery laws.[35] The product of this effort was the Organization for Economic Co-operation and Development (OECD) Convention on combating bribery, which the U.S. signed in 1997.[36] This treaty signaled signatory countries' commitment to criminalizing foreign bribery, and required signatory countries to adopt its core provisions through domestic legislation.[37] Thus, Congress amended the FCPA a second time in 1998.[38] Though this amendment broadened the FCPA's scope, such as asserting jurisdiction over foreign individuals for bribes made from the U.S., FCPA enforcement rates remained low after this amendment.[39]

II. Goals and Constraints of Foreign Anti-Bribery Statutes

To better understand how the FCPA should be enforced, it is critical to examine scholarly views around the goals and tensions of foreign anti-bribery statutes. Scholars agree that the fundamental goal of foreign anti-bribery statutes is to deter individuals and entities within one country from bribing

28. *Id.*

29. *See* Mike Koehler, *Has The FCPA Been Successful In Achieving Its Objectives?*, 2019 ILL. L. REV. 1267, 1284-85 (2019).

30. Koehler, *supra* note 25, at 1005, 1007.

31. *Id.* at 986-87.

32. *Id.* at 1005-06.

33. *Id.* at 1008.

34. Adam Fremantle & Sherman Katz, The Foreign Corrupt Practices Act Amendments of 1988, 23 INT'L L. 755, 762-63 (1989).

35. *Id.* at 764.

36. H. Lowell Brown, *Extraterritorial Jurisdiction under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed its Grasp*, 26 N.C. J. INT'L L. & COM. REG. 239, 264 (2001).

37. *Id.* at 240.

38. *Id.*

39. *Id.* at 288-89; Travis Albea, *The Foreign Corrupt Practices Act: The Evolution of Enforcement*, CAMPBELL LAW OBSERVER (Jan. 15, 2015), https://campbelllawobserver.com/the-foreign-corrupt-practices-act-the-evolution-of-enforcement/ [https://perma.cc/9KD6-GHCM].

officials in another country.[40] These statutes, such as the FCPA and the UKBA, attempt to deter bribery through provisions that prohibit individuals and entities within the U.S. and U.K.'s respective jurisdictions from bribing foreign officials.[41] Despite this effort, however, foreign anti-bribery statutes face risks of inefficiency, such as in the U.S. where prosecutors focus more on the optics of high enforcement rates rather than measurably deterring foreign bribery.[42] This breeds inefficiency, as risk-averse business actors may engage in overcompliance in order to avoid scrutiny from enforcement agencies employing expansive enforcement theories.[43]

Another tension within foreign anti-bribery statutes is balancing simultaneous goals of deterring foreign bribery while not placing a country's own individuals and entities at a competitive disadvantage abroad.[44] Congress included a facilitation payments exception within the FCPA to account for precisely this concern, so that American companies would not face a disadvantage operating in countries with looser norms of local bribery.[45] Despite this inclusion, however, enforcement agencies have employed enforcement theories that disregard the exception without judicial scrutiny.[46] As a result, the FCPA faces risk of enabling American companies to face competitive disadvantages abroad from countries without comparably strict foreign anti-bribery enforcement.[47]

Therefore, one may understand foreign anti-bribery statutes as an effort to deter foreign bribery from individuals and entities within its jurisdiction. Nevertheless, such statutes face tensions regarding inefficiency and balancing competing goals. Foreign anti-bribery statutes, such as the FCPA, may experience inefficient enforcement when prosecutors prioritize the quantity of enforcement theories brought, resulting in the risk of overcompliance by risk-averse corporations. Foreign anti-bribery statutes also face tension with respect to competing goals, namely, to deter bribery while not placing one's own individuals and entities at a competitive disadvantage when engaging in business in foreign countries. As seen with the FCPA, disregarding explicit

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40. *See* Elizabeth K. Spahn, *Implementing Global anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention against Corruption*, 23 IND. INT'L & COMPAR. L. REV. 1, 4 (2013); Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions against Emerging Markets*, 62 FLA. L. REV. 351 (April 2010).

41. Lindsey Hills, *Universal Anti-Bribery Legislation Can Save International Business: A Comparison of the FCPA and the UKBA in an Attempt to Create Universal Legislation to Combat Bribery around the Globe*, 13 RICH. J. GLOBAL L. & BUS. 469, 470-73 (Fall 2014).

42. *See* Mike Koehler, *The Facade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907 (2010) (mentioning how a significant amount of FCPA actions have been brought under untested enforcement theories without judicial scrutiny).

43. *See id.*

44. *See* Spahn, *supra* note 40, at 4-6.

45. Koehler, *supra* note 25, at 1005.

46. *See* Koehler, *supra* note 42, at 909, 976.

47. *See* Rachel Brewster, *The Domestic and International Enforcement of the OECD anti-Bribery Convention*, 15 CHI. J. INT'L L. 84, 100 (2014) (describing how many countries with foreign anti-bribery laws have incentives to underenforce their obligations under the OECD Anti-bribery Convention).

exceptions within a foreign anti-bribery statute risks that countries' business actors being disadvantaged when competing with counterparts from countries without comparably strict foreign anti-bribery enforcement.

III. Prior Administrations' FCPA Enforcement Strategies and Their Shortcomings

It was not until President George W. Bush's administration that FCPA enforcement significantly increased.[48] The Bush administration's "vigorous enforcement" strategy prioritized the number of cases brought rather than the quality.[49] For instance, an archived webpage from President Bush's administration emphasized that FCPA enforcement has increased under his watch, "including 5 cases in the past 6 months alone."[50] A significant means by which the Bush administration increased the quantity of FCPA enforcement was prosecutors' widespread use of deferred-prosecution agreements (DPAs) and non-prosecution agreements (NPA), starting in 2004.[51] DPAs and NPAs allow the DOJ or SEC to forgo prosecution in exchange for concessions from a corporate defendant.[52] These agreements therefore allow both prosecutors and corporate defendants to save time and resources by avoiding a full trial.[53] However, DPAs and NPAs have major issues, such as the lack of judicial scrutiny involved in both their respective processes.[54] This insulation allows prosecutors to employ expansive enforcement theories without having to meet the burden of proof for the crime.[55]

The Obama administration emulated the Bush administration's strategy of prioritizing the quantity of FCPA enforcement actions rather than their quality.[56] An archived webpage from the Obama administration reads, "since 2009, more than 50 corporations and 50 individuals have been convicted for FCPA violations.[57] These numbers are deceptive, however, as they leave out

48. Albea, *supra* note 39.

49. *Principled Responsibility: Fueling Anti-Corruption Commitments and Transforming the Culture of Corruption*, U.S. DEP'T OF JUSTICE ARCHIVE (Apr.3, 2007), https://2001-2009.state.gov/p/inl/rls/other/82588.htm [https://perma.cc/9HLK-4A87] ["Bush administration's enforcement strategy"].

50. *Id.*

51. Koehler, *supra* note 12, at 10.

52. *See id.* at 7.

53. Riddle Compliance, *Ethics And Compliance Consulting: Developing a Compliance Program Under A Non-Prosecution Agreement or a Deferred Prosecution Agreement*, https://riddlecompliance.com/ethics-and-compliance-consulting-developing-a-compliance-program-under-a-non-prosecution-agreement-or-deferred-prosecution-agreement/ [https://perma.cc/T5RT-QK78].

54. Koehler, *supra* note 12, at 7.

55. *See id.* at 4, 7.

56. *See* Bush administration's enforcement strategy, *supra* note 49; Koehler, *supra* note 12, at 6-7; The White House, *FACT SHEET: The U.S. Global Anticorruption Agenda*, NATIONAL ARCHIVES (Sept. 14, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/09/24/fact-sheet-us-global-Anticorruption-Agenda [https://perma.cc/BU54-6PRL]["the White House"].

57. The White House, *supra* note 56.

that prosecutors resolved most FCPA cases during this time through NPAs and DPAs rather than convictions.[58] Along with allowing expansive FCPA interpretations, prior administrations' reliance on DPAs and NPAs for FCPA enforcement was flawed for two public policy reasons.[59] First, since these vehicles do not require a company to plead guilty to any charges, these settlements resolve major FCPA violations too lightly.[60] Second, NPAs and DPAs pressure corporations into complying purely out of risk aversion and a desire to avoid costly litigation, thereby penalizing potentially innocent defendants.[61]

The Obama administration was also vocal about the need for individual accountability for corporate misconduct, which it addressed through the Yates memorandum (memo) in 2015.[62] From the Yates memo until the end of the Obama administration, however, the DOJ did not charge a single individual in its FCPA enforcement actions.[63] The Biden administration mirrored prior administrations' vocal prioritization of FCPA cases, though the rate of enforcement actions lowered during his term.[64] Overall, prior administrations have enabled expansive FCPA enforcement theories by prioritizing the quantity of enforcement actions over quality.

IV. President Trump's Improvements to the FCPA

A. Closing the Accountability Gap: The Trump Administration's Emphasis in Individual Liability.

The first reason that President Trump's changes to FCPA enforcement policy are beneficial to U.S. anti-corruption efforts, is because they emphasize individual liability for corporate misconduct.[65] Despite their rhetoric on individual accountability, prior administrations oversaw a wide gap between individual and corporate FCPA prosecutions.[66] The Trump administration has moved to close this gap by directing the DOJ to prioritize individual prosecutions for corporate misconduct even above corporate accountability.[67] Pursuing individual accountability for FCPA violations is crucial for deterrence, since individuals are more likely to alter their behavior

58. *See* Koehler, *supra* note 12, at 7.
59. *Id.* at 6-7.
60. *Id.* at 7.
61. *Id.*
62. *See* Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 AM. CRIM. L. REV. 109, 112 (2020)
63. *See* Koehler, *supra* note 23.
64. Stanford Law School, *FCPA Statistics & Analytics, Foreign Corrupt Practices Act Clearinghouse* (last visited Nov. 19, 2025), https://fcpa.stanford.edu/statistics-analytics.html?tab=1 [https://perma.cc/879M-H8WF].
65. *See* Blanche Memo, *supra* note 8.
66. *See* Garrett, *supra* note 62, at 129-30; Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 U.C. DAVIS L. REV. 497, 541, (2015).
67. *See* Blanche Memo, *supra* note 8; Koehler, *supra* note 12, at 8 (arguing that prosecutors, motivated by the ease of DPAs and NPAs, prefer prosecuting corporations over individuals).

under threat of personal punishment than a corporate fine.[68] The DOJ further believes individual accountability is essential for fairness, because holding corporations exclusively responsible for the wrongdoing of a few individuals is unfair.[69]

The accountability gap between individual and corporate accountability emerged around 2004, with the widespread use of NPAs and DPAs to resolve FCPA cases.[70] Thus, the Bush and Obama administrations undermined principles of accountability, fairness, and deterrence in U.S. anti-corruption efforts by failing to effectively prosecute individuals for FCPA violations.[71] In response to this accountability gap, the Obama administration announced the Yates memo in 2015.[72] The Yates memo announced several policy shifts to strengthen efforts to hold individuals accountable for corporate misconduct.[73] Despite these efforts, the memo corresponded with a decrease in individual charges for FCPA violations.[74] The Yates Memo was ineffective because it failed to directly address the practical challenges of identifying individuals responsible for corporate misconduct.[75] For instance, the Yates memo left open the possibility for corporations to scapegoat individuals rather than identify the true individuals responsible for misconduct.[76]

The Trump administration will close the accountability gap because it addresses the root cause of the disparity.[77] This gap was perpetuated by an enforcement philosophy that favored prosecuting corporations to the exclusion of individuals.[78] While neither the DOJ nor SEC have explicitly articulated this approach, prosecutors' reliance on DPAs and NPAs naturally discouraged pursuing individual violators of the FCPA.[79] This is because in cases where the evidence of criminal conduct is weak, as it often is in a DPA or NPA, individuals are more likely to test the prosecution's case.[80] Thus, prosecutors were reluctant to bring cases against individuals in the first place.[81] The Trump administration has responded to this dilemma by shifting FCPA enforcement philosophy to prioritizing individual prosecutions above

68. Mike Koehler, *supra* note 12, at 7.

69. *Id.* at 9.

70. *See* Koehler, *supra* note 66, at 541.

71. *See* Koehler, *supra* note 12, at 9.

72. *See* Garrett, *supra* note 62, at 129.

73. *See* Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice to All U.S. Att'ys et al., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) ["Yates Memo"].

74. *See* Garrett, *supra* note 62, at 133.

75. *See* Garrett, *The Metamorphosis of Corporate Criminal Prosecutions*, 101 Va. L. Rev. 60, 66 (2016).

76. *Id.*

77. *See* Blanche Memo, *supra* note 2; Koehler, *supra* note 66, at 554-55 (arguing that a cause for the gap in individual accountability is prosecutors' preference to prosecute business organizations instead of individuals).

78. Koehler, *supra* note 66, at 554-55.

79. *Id.*

80. *Id.* at 554.

81. *Id.* at 554-55.

corporate accountability, rather than vice versa.[82] On June 9th, 2025, DAG Todd Blanche released the "Blanche memo" with comprehensive new FCPA enforcement guidelines for prosecutors.[83] The Blanche memo instructs prosecutors to focus on cases in which individuals have engaged in criminal misconduct, and not attribute nonspecific "malfeasance" to corporate structures.[84] This phrasing directly rejects "collective knowledge doctrine," which prior administrations have used to attribute knowledge of a crime to a corporation from the aggregated knowledge of its employees.[85]

Collective knowledge doctrine allowed prosecutors to hold corporations accountable for FCPA violations by aggregating relevant information known to various different employees.[86] The doctrine facilitated aggressive and arbitrary FCPA enforcement actions, as corporations cannot realistically keep track of the information known by all of its employees.[87] This doctrine also corresponded with less individual prosecutions, as prosecutors favored easier cases where they could prosecute companies using collective knowledge doctrine.[88] The Trump administration's rejection of "collective knowledge doctrine" now shifts enforcement pressure away from corporations to individuals.[89] In order to enforce the FCPA, prosecutors must find an individual within a corporation that knowingly violated the statute.[90] The Trump administration has thus directly removed a key incentive that prosecutors had not to focus investigations on individuals.[91]

Proof that the Trump administration's strategy closes the accountability gap, is that the first FCPA enforcement action under the Trump administration is against individuals.[92] In August 2025, the DOJ unsealed an indictment against two businessmen from Mexico for FCPA violations,

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82. Memorandum from Matthew R. Galeotti, Head of the Criminal Division, U.S. Dep't of Justice to All U.S. Att'ys et al., Focus, Fairness, and Efficiency in the Fight Against White-Collar Crime (May 12, 2025) ["Galeotti Memo"]; *See* Koehler, *supra* note 66, at 554-55 (describing prior FCPA enforcement strategy as prioritizing corporate over individual accountability for the sake of convenience).

83. Blanche Memo, *supra* note 8.

84. *Id.*

85. Linklaters, *FCPA Pause Ends with U.S. DOJ's New "America First" Enforcement Strategy* (June 13, 2025), https://www.linklaters.com/insights/blogs/businesscrimelinks/2025/june/fcpa-pause-ends-with-us-dojs-new-america-first-enforcement-strategy [https://perma.cc/U4F9-FWXL]; *see* Koehler, *supra* note 66, at 555 (describing how DPA's are used to attribute misconduct to companies through the alleged criminal conduct of its employees).

86. Linklaters, *supra* note 85.

87. *See* Koehler, *supra* note 66, at 555; Robert W. Thomas, *Corporate Criminal Law Is Too Broad– Worse, It's Too Narrow*, 51 ARIZ. ST. L.J. 199, 241 (2020).

88. Koehler, *supra* note 66, at 555.

89. *See* Blanche Memo, *supra* note 8.

90. *See id*.

91. *See* Linklaters, *supra* note 85; Koehler, *supra* note 66, at 555.

92. U.S. Dep't of Justice, *Two Mexican Nationals Charged for Bribing State-Owned Energy Officials* (Aug. 11, 2025), https://www.justice.gov/opa/pr/two-mexican-nationals-charged-bribing-state-owned-energy-officials [https://perma.cc/KAS4-R7R2]["Pemex case"].

Ramon Rovirosa and Marioi Avila.[93] TBoth are affiliated with an oil and gas company in Texas called Roma energy.[94] The charges allege that Rovirosa and Avila offered at least $150,000 in bribes to Petroleos Mexicanos (Pemex), Mexico's state owned oil company, in order to secure energy contracts.[95] Crucially, the DOJ's focus on individual accountability in this case differs from its approach in analogous cases in prior years.[96] In prior administrations, the DOJ would prosecute an entire company for the misconduct of several of its employees, thereby undermining its own notion of fairness.[97] An example of this involves the DOJ case against the Brazilian aircraft manufacturer Embraer in 2016.[98] Here, the DOJ alleged that Embraer had paid millions of dollars in bribes to win government aircraft contracts in three continents.[99] In fact however, these bribes were the decision of several Embraer executives and employees, rather than the entire company.[100] Nevertheless, the DOJ made Embraer pay $107 million in fines through a DPA, but did not charge a single employee.[101]

The difference in approach between the Pemex and Embraer cases demonstrates a tangible improvement in U.S. anti-corruption efforts.[102] One reason is because the Pemex case, unlike Embraer, involves pursuing criminal convictions rather than a DPA or NPA.[103] This means that in Pemex, unlike Embraer, the DOJ cannot easily resolve the case by exclusively penalizing a company rather than the individuals responsible for the misconduct.[104] Nevertheless, the DOJ exclusively penalized Embraer for its employees' misconduct, despite claiming to know the exact individuals responsible for the FCPA violations.[105] When a corporation faces exclusive penalties for individual wrongdoing, this can unfairly affect innocent employees and

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93. *Id.*

94. MND Staff, *US Indicts Mexican CEO and Former Politician in Pemex Bribery Scheme*, MEXICO NEWS DAILY (Aug.12, 2025), https://mexiconewsdaily.com/news/pemex-bribery-scheme/ [https://perma.cc/AL7R-PBXJ].

95. *Id.*

96. *See id.*; Koehler, *supra* note 63 (noting that many FCPA actions between 2015 and 2017 the DOJ charged no corporate employees with violating the statute).

97. *See* Koehler, *supra* note 12, at 9; Koehler, *supra* note 66, at 555.

98. Koehler, *supra* note 63.

99. U.S. Dep't of Justice, *Embraer Agrees to Pay More than $107 Million to Resolve Foreign Corrupt Practices Act Charges* (Oct. 24, 2016), https://www.justice.gov/archives/opa/pr/embraer-agrees-pay-more-107-million-resolve-foreign-corrupt-practices-act-charges [https://perma.cc/33CE-CAUJ]["Embraer case"].

100. *Id.*

101. *Id.*; Koehler, *supra* note 63.

102. *See* Koehler, *supra* note 66, at 544, 546 (hypothesizing that pursuing criminal convictions result in higher quality FCPA actions than DPAs and NPAs).

103. Pemex, *supra* note 92; Embraer, *supra* note 99; Koehler, *supra* note 12, at 7.

104. *See* Koehler, *supra* note 66, at 554-55; Embraer case, *supra* note 99.

105. *See* Koehler, *supra* note 63; U.S. v. Embraer S.A, No. 0:16-cr-60294-JIC, 1, 23 (S.D. Fla., Oct. 24, 2016), https://www.justice.gov/d9/press-releases/attachments/2016/10/24/embraer_dpa.pdf [https://perma.cc/LC7F-SBYV])(Deferred Prosecution Agreement).

shareholders who were not involved in the misconduct.[106] The DOJ avoids this possibility in Pemex by focusing their case solely on Rovirosa and Avila, rather than Roma Energy.[107] Prosecutors' focus on individuals in the Pemex case also improves the FCPA's deterrence impact. This is because the threat of prison time that Rovirosa and Avila face is more likely to deter individuals from corporate misconduct, than imposing a fine on Roma Energy.[108]

Taken together, the first reason that the Trump administration will improve U.S. anti-corruption efforts is by emphasizing individual liability for corporate misconduct. Prior administrations oversaw a wide accountability gap between individuals and corporations for FCPA violations. The Trump administration is closing this gap by prioritizing individual accountability and rejecting "collective knowledge doctrine." These steps remove incentives for prosecutors to easily resolve cases by shifting blame on corporations rather than individuals. The ongoing Pemex case demonstrates tangible improvement in U.S. anti-corruption efforts. This is since the approach in Pemex achieves fairness and deterrence by focusing on individuals rather than companies. Prior cases like Embraer fell short of these values.

B. Enhancing Voluntary Self-disclosure Under the Trump Administration

The Trump administration's changes to the FCPA are further beneficial because they will strengthen corporate transparency and compliance through a generous voluntary self-disclosure policy.[109] An effective voluntary self-disclosure policy is crucial for U.S. anti-corruption efforts as it eases the ability of prosecutors to detect FCPA violations.[110] The opportunity to self-disclose also benefits corporate defendants, as it decreases criminal penalties and promotes a culture of compliance within an organization.[111] Recognizing this reality, the Trump administration has improved existing policy by improving incentives for companies to self-disclose violations.[112] Under the

106. *See* Koehler, *supra* note 12, at 9.

107. *See* Pemex, *supra* note 92; MND Staff, *supra* note 94.

108. *See* Koehler, *supra* note 12, at 7.

109. *See* Galeotti Speech, *supra* note 11; Corporate Crime Reporter, *Caldwell Says FCPA Pilot Program Leading to Uptick in Voluntary Disclosures* (Nov. 3, 2016), https://www.corporatecrimereporter.com/news/200/caldwell-says-fcpa-pilot-program-leading-to-uptick-in-voluntary-disclosures/ [https://perma.cc/4AHL-MRVD] (explaining how offering incentives for companies to voluntarily self disclose tangibly leads to more corporate self disclosures).

110. *See* Mike Koehler, "*The Percentage of Corporate DOJ And SEC FCPA Enforcement Actions That Result From A Voluntary Disclosure",* FCPA PROFESSOR (Aug. 3, 2022), https://fcpaprofessor.com/percentage-corporate-doj-sec-fcpa-enforcement-actions-result-voluntary-disclosure/ [https://perma.cc/H3KA-BPKJ] (showing that over a third of all FCPA actions brought from 2011-2022 have been through voluntary self disclosures).

111. Mohsen Farshneshani, "*The Benefits of Voluntary Self-Disclosure: How Businesses Can Mitigate Risk and Build Trust"*, LEGALREADER (Feb. 12, 2025), https://www.legalreader.com/benefits-of-voluntary-self-disclosure-how-businesses-can-mitigate-risks-and-build-trust/ [https://perma.cc/UM59-5Z94].

112. Terwilliger et al., "*DOJ White Collar Policy Shift Signal Calibration, But Not Revolution in Enforcement*," VINSON & ELKINS (June 3, 2025),

FCPA's first formalized voluntary self-disclosure program, the DOJ awarded companies that voluntarily self-disclosed a consideration of a declination to prosecute them.[113] Notably, this "FCPA pilot program" did not specify under which circumstances the DOJ would actually issue a declination rather than merely consider one.[114] Similarly under the Biden administration, prosecutors were left significant latitude to find minor flaws in companies' approach to voluntary self-disclosure.[115] This led to inconsistent treatment of corporations' voluntary self-disclosure efforts.[116] Ambiguity in rewards for voluntary self-disclosure are a significant obstacle to improving corporate transparency.[117] If corporations are not convinced that the guidelines for self-disclosure are clear enough or that incentives are not generous enough, they may choose not to disclose at all.[118]

As a result of remaining ambiguity under President Biden's changes to the FCPA, companies' faced unpredictable outcomes from voluntary self-disclosure.[119] An example of this inconsistency is the DOJ's approach to two companies' voluntary disclosure in 2023, Albemarle Corporation (Albemarle) and Lifecore Biomedical Inc. (Lifecore).[120] In both cases, there were no aggravating factors.[121] Both companies also voluntarily self-reported violations, fully cooperated, and remediated their misconduct.[122]

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https://www.velaw.com/insights/focus-fairness-efficiency-doj-white-collar-policy-shifts-signal-recalibration-but-not-revolution-in-enforcement/ [https://perma.cc/MNC4-UTES].

113. U.S. Dep't of Justice, *Criminal Division Launches New FCPA Pilot Program* (Apr. 5, 2016), https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program [https://perma.cc/GLQ3-UMGA].

114. *Id.*

115. Gibson Dunn, *2023 Year-End FCPA Update* (Feb. 15, 2024), https://www.gibsondunn.com/2023-year-end-fcpa-update/ [https://perma.cc/L6PY-BAHQ] (pointing out that one company received credit for its voluntary self disclosure while another did not, and the only difference was the time it took each company to self disclose).

116. *See id.* (describing cases involving two respective companies, Albamarle and Lifecore, that received differing credit for voluntary self disclosure during the Biden administration).

117. Sarah Marberg, *Promises of Leniency: Whether Companies Should Self-Disclose Violations of the Foreign Corrupt Practices Act*, 45 VAND. J. TRANSNAT'L L. 557, 560-61 (Mar. 2012).

118. *Id.*

119. *See* Gibson Dunn, *supra* note 115; Morrison Foerster, *In Revised Corporate Enforcement Policy, DOJ Increases Incentives for Voluntary Self-Disclosure and Cooperation* (Jan. 18, 2023), https://www.mofo.com/resources/insights/230118-in-revised-corporate-enforcement-policy [https://perma.cc/B66V-6RY9](noting how there is a "potential" for declinations, under President Biden's changes to FCPA voluntary self-disclosure guidelines).

120. *Id.*

121. U.S. Dep't of Justice, "*Albemarle to Pay Over $218M to Resolve Foreign Corrupt Practices*" (Sept. 29, 2023), https://www.justice.gov/archives/opa/pr/albemarle-pay-over-218m-resolve-foreign-corrupt-practices-act-investigation [https://perma.cc/DAQ2-6SM7] ["Albemarle case"]; U.S. Dep't of Justice, "*Re: Lifecore Biomedical, Inc. (f/k/a Landec Corporation)*" (Nov. 16, 2023), https://www.justice.gov/criminal/media/1325521/dl?inline [https://perma.cc/R25Q-YLPM] ["Lifecore case"].

122. *See* Albemarle case, *supra* note 121; Lifecore case, *supra* note 121.

Nonetheless, the DOJ chose to grant Lifecore a declination, while refusing to treat Albemarle's self-reporting as sufficient "voluntary self-disclosure."[123] The sole difference between the cases was the time it took each company to report its violations.[124] Lifecore took three months to disclose its alleged violations while Albemarle took nine.[125]

In order for a disclosure to count as voluntary self-disclosure, it must be made "reasonably promptly" from when a company discovers a violation.[126] The DOJ has not specified how soon a disclosure needs to be made to be reasonably prompt.[127] Despite this ambiguity, the DOJ believed that Albemarle's disclosure was not reasonably prompt while Lifecore's was.[128] Thus, the DOJ leveraged ambiguity in a single phrase, reasonably prompt, in order to reach vastly different conclusions in otherwise analogous cases. The Trump administration seeks to prevent precisely this unpredictability with a streamlined process for voluntary self-disclosure.[129] Under the new policy, a voluntary self-disclosure will render a declination, rather than merely a "presumption of a declination."[130] One may argue the new policy is still ambiguous, for instance DOJ has not removed the vague "reasonably prompt" requirement in order to voluntarily self-disclose.[131] However, the Trump administration has paired its new changes to the FCPA's voluntary self-disclosure policy with new instructions that discourage penalizing minor deviations from the guidelines.[132]

Furthermore, Matthew Galeotti, head of the DOJ's criminal division, emphasized that in order not to grant a declination for a company's voluntary self-disclosure, there would need to be "truly aggravating circumstances" present.[133] The DOJ's denial of a declination for Albemarle, though predating Galeotti's instructions, runs contrary to longstanding assumptions that specific and lenient guidelines promote corporate transparency.[134] Meanwhile, the Trump administration's approach to voluntary self-disclosure has tangibly improved the DOJ's treatment of voluntary self-disclosures.[135]

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123. *See* Albemarle case, *supra* note 121; Lifecore case, *supra* note 121.

124. *See* Albemarle case, *supra* note 121; Lifecore case, *supra* note 121.

125. *See* Gibson Dunn, *supra* note 115.

126. U.S. Dep't of Justice, *Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy*, *Justice Manual* § 9-47.120 (Nov. 2024), https://www.justice.gov/criminal/criminal-fraud/file/1562831/dl?inline= [https://perma.cc/3GQA-VVFR].

127. *Id.*

128. *See* Albemarle case, *supra* note 121; Lifecore case, *supra* note 121.

129. *See* Galeotti Speech, *supra* note 11.

130. *Id.*

131. U.S. Dep't of Justice, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, *Justice Manual* § 9-47.120 (May 2025), https://www.justice.gov/criminal/media/1400031/dl?inline [https://perma.cc/AYE3-FSMF].

132. *See* Galeotti Speech, *supra* note 11.

133. *See id.*

134. *See id.*; Albemarle case, *supra* note 121; Marberg, *supra* note 117, at 560-61 (noting that uncertain disclosure rewards discourage voluntary disclosure of violations).

135. *See* Terwilliger et al., *supra* note 112.

On August 7, 2025, the DOJ announced an agreement to decline prosecution of Liberty Mutual Insurance Company (Liberty Mutual).[136] The DOJ had found evidence that Liberty Mutual's subsidiary in India, Liberty General Insurance (LGI), had paid millions of dollars in bribes to six state owned banks in India.[137] In exchange for the bribes, bank employees referred customers to LGI for its insurance products. Liberty Mutual disclosed the violation to the DOJ while an internal investigation into the misconduct was ongoing.[138]

The DOJ chose to grant a declination to Liberty Mutual for correctly following the voluntary self disclosure guidelines.[139] In the Lifecore and Albemarle cases, the DOJ highlighted the promptness of when the respective companies chose to self disclose.[140] With Liberty Mutual, meanwhile, the DOJ refrained from mentioning the specific months it took Liberty Mutual to disclose.[141] Instead, the DOJ credited Liberty Mutual for disclosing in a "timely manner," including while its internal investigation was still ongoing.[142] This relative lack of scrutiny towards the time it took for Liberty Mutual to disclose compared to Albemarle and Lifecore, shows that the DOJ is taking a more supportive stance towards companies self-disclosing rather than scanning for minor mistakes.

Therefore, the second reason the Trump administration's changes to FCPA guidelines are beneficial to U.S. anti-corruption efforts is because they will strengthen corporate transparency through a generous voluntary self disclosure policy. The Trump administration's new guidelines for voluntary self disclosure are a clear improvement over prior administrations, as they clarify guidelines and offer greater incentives to voluntarily self disclose. Furthermore, the new guidelines do not heavily scrutinize companies that do voluntarily self-disclose. The Liberty Mutual declination demonstrates this philosophy, as the DOJ refrained from its past tendency to scrutinize minor mistakes in a company's disclosure process. Through greater incentives to disclose and clearer guidance, the Trump administration's voluntary self disclosure policy motivates greater corporate transparency than prior administrations.

C. Reducing Arbitrary Enforcement Under the Trump Administration's

136. U.S. Dep't of Justice, *Re: Liberty Mutual Insurance Company* (Aug. 7, 2025), https://www.justice.gov/criminal/media/1410761/dl?inline [https://perma.cc/G82V-AHEB] ["Liberty Mutual Declination*"*].

137. *Id.*

138. *Id.*

139. Paul Weiss, *DOJ Resolves First Corporate FCPA Case Following Enforcement Pause with Declination to Prosecute Liberty Mutual* (Aug. 18, 2025), https://www.paulweiss.com/insights/client-memos/doj-resolves-first-corporate-fcpa-case-following-enforcement-pause-with-declination-to-prosecute-liberty-mutual [https://perma.cc/9BAZ-AWD6].

140. *See* Albemarle case, *supra* note 121; Lifecore case, *supra* note 121.

141. *See* Liberty Mutual Declination, *supra* note 136.

142. *Id.*

FCPA Policy.

The third reason why the Trump administration's changes to FCPA guidelines enhance U.S. anticorruption efforts is because they will reduce arbitrary enforcement of the statute. This is because the new changes will restrict prosecutors' ability to broadly interpret the FCPA beyond Congress's original intent.[143] Congress intended the FCPA to be a limited statute that prohibits only a "narrow range" of actionable payments against foreign officials, and to offer a clear exception for facilitation payments.[144] Prosecutors' reliance on DPAs and NPAs has shielded their enforcement theories from judicial scrutiny, allowing them to expansively interpret the FCPA.[145] The Trump administration has addressed this dilemma by instructing individual prosecutions over corporate accountability, which discourages DPA and NPA usage.[146]

The Trump administration took several steps to restrain prosecutors' ability to expansively interpret the FCPA. On February 5, 2025, Attorney General (AG) Pam Bondi released a memo directing the DOJ to focus its FCPA enforcement efforts on alleged misconduct with a connection to cartels and transnational corruption organizations (TCOs).[147] Shortly after this memo, President Trump issued an executive order to pause FCPA investigations and enforcement actions for 180 days.[148] The pause on FCPA enforcement was lifted after around four months, and DAG Blanche released the "Blanche memo" with new comprehensive guidelines for FCPA enforcement.[149] The Blanche memo discourages DPA and NPA use by instructing prosecutors to favor individual prosecutions over penalizing corporations, and to be mindful of the facilitating payments exception in the FCPA.[150]

Individual prosecutions are more strongly correlated with pursuing criminal convictions rather than DPAs and NPAs.[151] DPAs and NPAs correlate weakly with individual accountability since prosecutors typically employ these agreements where evidence of wrongdoing is weak, unlike in criminal convictions. Individuals, unlike corporations, face the threat of incarceration if they are found guilty, and therefore are more likely than

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143. *See* Blanche Memo, *supra* note 8; Koehler, *supra* note 66, at 548, 554 (describing how DPA and NPA usage is a significant reason for arbitrary FCPA actions).

144. Koehler, *supra* note 25, at 1003.

145. Koehler, *supra* note 12, at 7.

146. *See* Blanche Memo, *supra* note 8; Koehler, *supra* note 66, at 555.

147. Memorandum from Pam Bondi, U.S. Att'y Gen., U.S. Dep't of Justice to All U.S. Att'ys et al., Total Elimination of Cartels and Transnational Criminal Organizations (Feb. 5, 2025).

148. *See* Exec. Order No. 14,209, 90 Fed. Reg. 9587 (Feb. 10, 2025),

149. Stanford et al., *Client Alert: Back in Action: The Trump Administration Lifts "Pause" in Foreign Corrupt Practices Act Enforcement* (June 17, 2025), https://www.jenner.com/en/news-insights/publications/client-alert-back-in-action-the-trump-administration-lifts-pause-in-foreign-corrupt-practices-act-enforcement [https://perma.cc/J3B2-K278].

150. *See* Blanche Memo, *supra* note 8; Koehler, *supra* note 66, at 555.

151. *See* Koehler, *supra* note 66, at 541, 543.

corporations to challenge tenuous enforcement theories.[152] Consequently, prosecutors are reluctant to use NPAs and DPAs against individuals.[153] The Blanche Memo's emphasis on the facilitating payments exception also discourages DPA and NPA use, as prosecutors often use those agreements as a cover to disregard the exception.[154] Since President Trump's second term, the DOJ has used such a vehicle for only one out of three FCPA cases it has brought.[155] This means that American citizens and businesses are at lower risk of prosecution from prosecutors who are insulated from judicial scrutiny.[156] One case that demonstrates prosecutors' reduced reliance on DPAs and NPAs is the DOJ's recent action against SGO Corporation Limited (Smartmatic).[157]

In October 2025, Smartmatic, along with two of its executives, Roger Martinez and Jorge Vasquez, were charged in a superseding indictment with violation of the FCPA.[158] The DOJ alleges that Martinez and Vasquez had paid over $1 million in bribes to a Filipino government official to obtain and retain business for Smartmatic's benefit.[159] This prosecution is a rare instance where the DOJ has criminally charged a business organization for FCPA violations, rather than use a DPA.[160] Furthermore, the fact that this case involves individual prosecutions, just as the Blanche memo emphasizes, indicates that prosecutors acknowledge the memo's preference for criminal convictions over DPAs.[161] During prior administrations, in contrast, prosecutors pressured business organizations to pay massive penalties for conduct that arguably fell squarely outside the FCPA's scope.[162] One example of this is the SEC's prosecution of Dow Chemical (Dow), which the agency prosecuted in 2007 for violating FCPA accounting provisions.[163]

The sole reason was because Dow's subsidiary in India regularly paid officials in India to secure the registration and licensing of its products in the country.[164] This conduct fits the language of the FCPA's facilitation payments

152. Koehler, *supra* note 66, at 554-55.

153. *Id.*

154. *See id.* at 553; Strauss, *supra* note 10, at 251-55.

155. *See* Pemex case, *supra* note 92; U.S. Dep't of Justice, *Voting Machine Company Charged in Philippine Bribery and Money Laundering Scheme*, (Oct. 16, 2025), https://www.justice.gov/usao-sdfl/pr/voting-machine-company-charged-philippine-bribery-and-money-laundering-scheme [https://perma.cc/2XKC-26TZ] ["Smartmatic case"]; Castellano et al., *Millicom Subsidiary Enters into First FCPA Corporate DPA Since FCPA Pause Lifted*, JD SUPRA (Nov. 18, 2025), https://www.jdsupra.com/legalnews/millicom-subsidiary-enters-into-first-2960466/ [https://perma.cc/MFZ4-6TWR].

156. *See* Koehler, *supra* note 12, at 7.

157. Smartmatic case, *supra* note 155.

158. *Id.*

159. *Id.*

160. Mike Koehler, *Smartmatic Criminally Charged With FCPA and Related Offenses*, FCPA PROFESSOR (Oct. 17, 2025), https://fcpaprofessor.com/smartmatic-criminally-charged-with-fcpa-and-related-offenses/ [https://perma.cc/RV34-TYLU].

161. *See* Smartmatic Case, *supra* note 155; Blanche Memo, *supra* note 8.

162. *See* Strauss, *supra* note 10, at 251-55.

163. *Id.* at 251-52.

164. *Id.*

exception, yet the SEC charged Dow with failing to record the payments.[165] Dow's prosecution was controversial since Congress never intended to subject exempt payments to FCPA scrutiny.[166] In Smartmatic, unlike Dow, prosecutors will have to satisfy their ultimate burden of proof that Smartmatic truly committed an FCPA violation.[167] This is a significant improvement as judicial scrutiny is an effective check on overexpansive FCPA prosecutions.[168] Both the DOJ and SEC have a losing record when it comes to proving FCPA violations before a court.[169] Therefore, the Trump administration's encouragement of full criminal convictions over DPAs and NPAs will directly reduce prosecutors' expansive FCPA interpretations.[170]

Thus, the third reason why the Trump administration's changes to the FCPA enhance U.S. anticorruption efforts is by reducing arbitrary enforcement of the statute. The new administration has moved to reduce arbitrary enforcement through new guidelines under the Blanche memo, which encourages full criminal convictions over DPAs and NPAs. Full criminal convictions reduce arbitrary FCPA enforcement as they necessitate judicial scrutiny over prosecutors' enforcement theories. This will result in greater quality FCPA enforcement, as judicial scrutiny over enforcement theories is an effective check on arbitrary prosecutions. Past companies like Dow faced arbitrary enforcement by prosecutors precisely due to the lack of judicial scrutiny in such cases. The Trump administration is now helping to restore prosecutors' interpretation of the FCPA closer to Congress's intent. Namely, for the FCPA to remain a limited statute with a clear exception for facilitation payments.

V. Summary of How the Trump Administration Has Enhanced the FCPA's Fairness and Deterrence Impact

Taken together, the Trump administration has tangibly improved FCPA enforcement strategy in various aspects. The Trump administration's changes to FCPA policy impact existing deficiencies in holding individuals accountable, improving voluntary self-disclosure guidelines, and reducing arbitrary enforcement of the statute. These deficiencies harmed U.S. anti-corruption efforts by undermining the FCPA's fairness, efficiency, and deterrence impact. Prior administrations fell short of achieving individual accountability for corporate misconduct. The Trump administration has addressed this deficiency through new instructions for prosecutors to prioritize individual prosecutions even above corporate accountability. This has led to individuals being held accountable in multiple new FCPA cases. Furthermore, the Trump administration has improved the FCPA's voluntary self-disclosure policy by offering greater incentives for companies to self-

165. *Id.*

166. *Id.* at 251 (citing Dow as an indication of prosecutors' "dim" view of the facilitation payments exception); *see* Koehler, *supra* note 12, at 2, 3.

167. *See* Koehler, *supra* note 12, at 6, 7.

168. *See* Koehler, *supra* note 66, at 505.

169. Koehler, *supra* note 12, at 6.

170. *See id.*; Blanche Memo, *supra* note 8; Koehler, *supra* note 66, at 554-55.

disclose and clarifying existing disclosure policy.

As a result, companies no longer face penalization for minor procedural errors while disclosing, as the Liberty Mutual declination demonstrates. The Trump administration has also reduced arbitrary enforcement of the FCPA through new guidelines under the Blanche memo that encourage full criminal convictions over NPA and DPAs. This will lead to a tangible reduction in overexpansive FCPA interpretations by prosecutors, as their cases are now more frequently subject to judicial scrutiny. Overall, the Trump administration has moved to restore FCPA enforcement closer to Congress's original intent. This is to promote a culture of anti-corruption amongst American citizens and businesses, without burdening them with aggressive prosecutions.

VI. The U.K's Approach Under the Bribery Act 2010

A. Formation of the UKBA

To understand how certain features of the UKBA would improve the efficiency and fairness impact of new FCPA guidelines, it is necessary to examine the UKBA's origins. In 1997, the U.K. Government signed the OECD *Anti-Bribery Convention*.[171] The OECD *Anti-Bribery Convention* came into force in the U.K. in 1999.[172] This convention required signatory countries to enact domestic legislation that prohibits bribery relating to foreign government officials.[173] For several years after the OECD *Anti-Bribery Convention* entered into force in the U.K., the OECD criticized the country for failing to effectively implement its provisions.[174] For instance, an OECD report from its Working Group on Bribery in International Business Transactions (WGB) expressed concern in 2005 that no company or individual had been indicted or tried for bribing foreign public officials ever since the U.K. ratified the OECD *Anti-Bribery Convention*.[175]

During this interim between the U.K.'s ratification of the convention and the UKBA's enactment, the country failed to address clear cases of foreign bribery.[176] One such case was the *Al Yamamah Affair*, which involved allegations that a major U.K. based defense contractor had paid bribes to senior Saudi Arabian officials.[177] The U.K.'s Serious Fraud Office (SFO) garnered significant controversy in this case, since it chose to discontinue its initial investigations into the foreign bribery allegations.[178] In response to the *Al Yamamah affair*, the WGB criticized the U.K. for systemic deficiencies in

171. Gordon Belch, *An Analysis of the Efficacy of the Bribery Act 2010*, 5 ABERDEEN STUD. L. REV. 134, 135-36 (2014).

172. John Hatchard, *Combating the Bribery of Foreign Public Officials: The Impact of the UK Bribery Act 2010,* 4 LAW & DEV. REV. 281, 285 (2011).

173. Belch, *supra* note 171, at 136.

174. Hatchard, *supra* note 172, at 285.

175. *Id.* at 285.

176. *See id.*

177. *Id.* at 285.

178. *Id.* at 285-86.

the investigation and prosecution of foreign bribery cases.[179] Amid public criticism of the U.K. from the WGB, the U.K.'s ratification of the OECD *Anti-Bribery Convention*, and a new emphasis on business ethics stemming from the *Al Yamamah affair*, the U.K. was motivated to develop a comprehensive foreign anti-bribery statute.[180] This resulted in the UKBA's enactment in 2010.[181]

From this course of events, it is clear that the UKBA and FCPA were created with different motivations in mind.[182] The U.S. Congress desired the FCPA largely to address political concerns, such as foreign policy considerations.[183] Specifically, Congress was concerned that U.S. corporations should not be allowed to weaken a friendly government through bribery and corruption, particularly when the U.S. relies on its alliance with that country.[184] In contrast, the U.K. Parliament desired the UKBA specifically to enhance the consistency and effectiveness of its existing anti-bribery legislation, both out of ethics concerns and to comply with the OECD *Anti-Bribery Convention*'s requirements.[185] Given that the U.K. enacted the UKBA specifically to maximize consistency and effectiveness when prosecuting foreign bribery, unlike the FCPA, it is fair to infer that the FCPA may improve in its own consistency and effectiveness by adopting certain features of the UKBA.[186]

B. The UKBA's Unique Features

Given the distinct motivations for the UKBA's enactment as compared to the FCPA, the UKBA has several unique features compared to its American counterpart.[187] Whereas the FCPA imposes both accounting and recordkeeping requirements upon U.S. companies in order to prevent them from concealing corrupt payments, the UKBA contains no such requirements.[188] However, the UKBA's anti-bribery provisions are far more comprehensive than the FCPA's.[189] The UKBA penalizes four separate bribery offenses.[190] These are the act of bribing, being bribed, bribing a foreign public official, and failing as a commercial organization to prevent

179. *Id.* at 286.
180. *Id.* at 288.
181. *See id*.
182. *See* Belch, *supra* note 171, at 135; Koehler, *supra* note 12, at 1-2.
183. Koehler, *supra* note 12, at 1-2.
184. Koehler, *supra* note 12, at 1.
185. *See* Belch, *supra* note 171, at 135; Hatchard, *supra* note 172, at 286, 288 (noting that the WGB's pressure on the U.K. to "effectively" handle foreign bribery cases influenced the creation of the UKBA).
186. *See* Belch, *supra* note 171, at 135; Hatchard, *supra* note 172, at 286, 288; Koehler, *supra* note 12, at 1-2 (noting that the "main reason" for the FCPA's enactment was political reasons such as foreign policy concerns).
187. *See* Hatchard, *supra* note 172, at 289-90 (noting that the UKBA was made to be a comprehensive anti-bribery statute); Koehler, *supra* note 12, at 2 (describing Congress's intention for the FCPA to prohibit only a narrow range of payments).
188. *See* Hunter, *supra* note 1, at 92-93.
189. *Id.* at 93.
190. *Id.*

bribery.[191] Meanwhile, the FCPA's anti-bribery provisions cover the act of U.S. individuals or entities bribing foreign officials with corrupt intent in order to obtain or retain business.[192]

Even where there is overlap between the UKBA and FCPA, such as their mutual prohibition against bribing foreign officials, the UKBA takes a stricter attitude towards evaluating such offenses.[193] Congress deliberately carved out a facilitating payments exception into the FCPA, in order to exempt U.S. companies from violations when they are operating in foreign environments where low level bribery is inevitable.[194] Meanwhile, the UKBA's prohibition against bribing foreign public officials has no exemption for facilitation payments.[195] The UKBA is also stricter in regards to individual penalties for bribing foreign officials, as compared to the FCPA.[196] Individuals who violate the FCPA's anti-bribery provisions are subject to a maximum of five years imprisonment, criminal fines up to $100,000, and civil penalties of up to $10,000 per violation.[197] Meanwhile, under the UKBA individuals face up to ten years imprisonment and unlimited fines, while company directors may also be potentially disqualified from their position.[198]

One unique feature of the UKBA is its penalization of commercial organizations that fail to prevent foreign bribery under section 7 of the statute.[199] Under this offense, "relevant commercial organizations" (RCOs), i.e., U.K. companies and overseas entities that carry on business or part of a business in the U.K., are liable for a section 7 offense if persons associated with them engage in foreign bribery.[200] A person is "associated with an RCO if they perform services on the companies' behalf.[201] This offense within the UKBA results in the statute having far greater jurisdictional reach than the FCPA. One may counter that this is not really unique to the UKBA, as U.S. businesses can be found liable for the activities of their employees along with their foreign subsidiaries.[202] However, the key difference here is that the RCO itself only needs to carry on at least part of a business in the U.K., whereas in

191. *Id.*
192. *Id.*
193. *See* Hatchard, *supra* note 172, at 290; Koehler, *supra* note 12, at 3.
194. *See* Koehler, *supra* note 12, at 3.
195. Hatchard, *supra* note 172, at 290.
196. *See* Hunter, *supra* note 1, at 103-04.
197. Hunter, *supra* note 1, at 103.
198. Hunter, *supra* note 1, at 104.
199. Hatchard, *supra* note 172, at 292; *See* Arnold & Porter LLP, *The Extraterritorial Reach of the FCPA and the UKBA: Implications for International Business* (Mar. 2012), https://www.arnoldporter.com/-/media/files/perspectives/publications/2012/03/the-extraterritorial-reach-of-the-fcpa-and-the-u__/files/newsletter-item/fileattachment/advisory-extraterritorial_reach_fcpa_and_uk_brib__.pdf?rev=2712d89045eb4834b6e81acb67d6a981&sc_lang=en&hash=E8D97B1F7F06E6D47741403D3215730A [https://perma.cc/B7H3-5ZY6].
200. *See* Hatchard, *supra* note 172, at 292.
201. *Id.*
202. Arnold & Porter LLP, *supra* note 191.

the FCPA prosecutors need a stronger jurisdictional hook with the U.S.[203] For instance, prosecutors would need to find that the company is organized under U.S. law, has a principal place of business in the U.S., or is listed on U.S. stock exchanges or used U.S. mails to commit their violation.[204]

The UKBA's broad jurisdictional reach under section 7 means that even a foreign company with merely a subsidiary in the U.K. can be prosecuted by the SFO for a UKBA violation.[205] This would not be possible under the FCPA.[206] Another unique feature of the UKBA is that it offers RCOs a defense if they are found vicariously liable for the actions of associated persons.[207] This defense allows U.K. companies to have an affirmative defense against a section 7 violation if the company can prove it had "adequate procedures" in place to prevent such a violation.[208] The FCPA has no "adequate procedures" defense, which leaves U.S. companies that rely on third parties or employees in foreign countries vulnerable to expansive prosecution theories without an affirmative defense available.[209]

VII. The Trump Administration Should Learn From the UKBA To Further improve the FCPA's Deterrence Impact

A. Deterrence Gaps in ihe Trump Administration's FCPA Guidelines

Despite the Trump administration's improvements to FCPA enforcement policy, such as emphasizing individual accountability, the new FCPA guidelines leave room for improvement with respect to reducing individual misconduct.[210] The Blanche memo does not instruct prosecutors to advocate for the higher end of sentencing guidelines when pursuing criminal convictions against individuals guilty of FCPA violations.[211] Specifically, the Blanche memo emphasizes the certainty of individual punishment for FCPA violations, but does not emphasize an increase in the severity of punishment for such misconduct.[212] This approach only partially fulfills renowned economist Gary Becker's economic model of deterrence.[213] Becker's model articulates that deterrence is maximized when the probability of punishment

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203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. Hatchard, *supra* note 172, at 293.
208. Hunter, *supra* note 1, at 102-03.
209. *Id.*; *see* Dieter Juedes, *Taming the FCPA Overreach Through an Adequate Procedures Defense*, 4 WM. & MARY BUS. L. REV. 37, 42, 52-53 (2013) (arguing that American firms need an "adequate procedures" defense to avoid liability for the actions of their agents in foreign countries).
210. *See* Blanche Memo, *supra* note 8 (does not instruct prosecutors to advocate for increased penalties against individuals); GARY S. BECKER, ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 14 (1974) (explaining that deterrence is most present when penalties are sufficiently certain and severe).
211. *See* Blanche Memo, *supra* note 8.
212. *See id.*
213. *See* BECKER, *supra* note 210, at 14.

is as close to certain as possible, and the severity of the punishment exceeds the benefit gained from the crime.[214] In comparison to the FCPA, even considering its new enforcement guidelines under the Blanche memo, the UKBA aligns far closer to Becker's model of deterrence.[215] This Note thus contends that the deterrence impact of the new FCPA enforcement policy can be optimized if the Trump administration changes FCPA enforcement policy to align closer to the UKBA's individual sentencing guidelines.

B. Assessing Whether FCPA Individual Penalties Are Sufficiently Severe

In order to examine how the Trump administration can address remaining deterrence gaps in FCPA guidelines with respect to individual misconduct, it is first necessary to establish that current FCPA individual penalties are insufficiently severe. One may counter this claim by holding that measuring whether a penalty is "insufficiently severe" is a subjective task, and thus it is difficult to make objective conclusions about the severity of such penalties. However, while the sufficiency of the severity of FCPA individual penalties is subjective in isolation, an objective evaluation becomes possible once the inquiry is anchored to a fixed normative objective, such as deterrence.[216] Here, an objective evaluation of the sufficiency of FCPA penalties may involve examining whether current sanctions prescribed by the statute are as effective as possible at stopping recidivism.[217] Based on Becker's model, effectiveness is best represented by the severity and certainty of punishment.[218] Focusing on the sufficiency of individual penalties, the evidence indirectly suggests that in spite of the penalties for FCPA violations, individual recidivism still occurs.[219] As of February 2025, 22 companies have been repeat offenders of FCPA violations.[220]

In several instances of corporate recidivism of FCPA violations, prosecutors did not punish individuals and instead penalized the offense

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214. *Id.*

215. *See id.*; Blanche Memo, *supra* note 8; Hunter, *supra* note 1, at 104 (explaining that the UKBA allows for unlimited criminal penalties and up to ten years imprisonment, and potential career consequences).

216. Fiveable Content Team, *Value Judgments*, FIVEABLE (last visited Dec. 31 2025), https://fiveable.me/key-terms/honors-economics/value-judgments [https://perma.cc/V4X5-C88L]; Steve Hoenisch, *Max Weber's View of Objectivity in Social Science*, CRITICISM.COM (last visited Dec. 31 2025), https://criticism.com/md/weber1.html [https://perma.cc/XH8C-VXB3] (explaining Weber's belief that once a value is established, a value-free investigation is possible into the most efficient means of bringing about that end).

217. *See* Hoenisch, *supra* note 216 (explaining Weber's view that once a value is fixed, a value-free investigation is possible into the most efficient means of bringing about that value).

218. *See* BECKER, *supra* note 210, at 14.

219. Mike Koehler, *FCPA Repeat Offenders*, FCPA PROFESSOR (Feb. 10, 2025), https://fcpaprofessor.com/fcpa-repeat-offenders-8/ [https://perma.cc/Z35G-HBZ4](pointing out that several companies have engaged in repeat FCPA offenses); *see* Koehler, *supra* note 12, at 7 (noting that individuals within companies are responsible for violations, and they are not adequately deterred solely through corporate fines).

220. *See* Koehler, *supra* note 219.

solely by fining the relevant corporation.[221] That fact raises the risk that individual recidivism was the cause of those instances of corporate recidivism.[222] This is because when corporate misconduct is penalized solely through a corporate fine without penalties against individuals, then the individuals responsible for orchestrating the corporate misconduct are not adequately deterred from repeat offenses.[223] Given that several corporate repeat offenders of the FCPA were punished solely through corporate fines, without accompanying individual liability, this makes plausible that the same individuals who orchestrated misconduct within those corporations the first time were not adequately deterred and repeated the violation.[224]

Evidence shows that in spite of the pre-existing FCPA individual penalties in place, individual recidivism of FCPA offenses has still been possible due to the lack of emphasis on individual liability.[225] One could counter that deterrence against individual recidivism has been directly addressed through the Blanche memo's emphasis on individual liability, appealing to Becker's idea that increasing certainty of punishment contributes to greater deterrence.[226] However, this reform does not eliminate the risk of recidivism, because it leaves open the possibility of repeat offenses if the individuals' gain from the misconduct is greater than their penalty for the FCPA violation.[227] One example of this is the prosecution of Nam Nguyen in 2010, who pleaded guilty to an FCPA violation for negotiating illegal contracts and bribes with Vietnamese officials.[228]

Nguyen was an employee in a company that paid $250,000 in bribes to

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221. *See* U.S. Dep't of Justice, *ABB Agrees to Pay Over $315 Million To Resolve Coordinated Global Foreign Bribery Case* (Dec. 2, 2022), https://www.justice.gov/archives/opa/pr/abb-agrees-pay-over-315-million-resolve-coordinated-global-foreign-bribery-case [https://perma.cc/T799-Z82P](describing the penalty as a corporate fine without mention of accompanying individual prosecutions) ["ABB case"]; U.S. Dep't of Justice, *SAP to Pay Over $220M to Resolve Foreign Bribery Investigations* (Jan. 10, 2024), https://www.justice.gov/archives/opa/pr/sap-pay-over-220m-resolve-foreign-bribery-investigations [https://perma.cc/WFT9-6FLD] (describing the penalty as a corporate fine without mention of accompanying individual prosecutions) [hereinafter"SPA case"].

222. *See* Koehler, *supra* note 12, at 7 (explaining that it is individuals that are responsible for corporate misconduct, and that individuals are not adequately deterred solely by corporate fines).

223. *See id.*

224. *See* ABB case, *supra* note 221; SPA case, *supra* note 221; Koehler, *supra* note 12, at 7.

225. *See* Koehler, *supra* note 219; Koehler, *supra* note 12, at 7; Hunter, *supra* note 1, at 103.

226. *See* Blanche Memo; BECKER, *supra* note 210, at 14.

227. *See* Becker, *supra* note 210, at 14.

228. U.S. Dep't of Justice, *Nexus Technologies Inc. and Three Employees Plead Guilty to Paying Bribes to Vietnamese Officials* (Mar. 16, 2010), https://www.justice.gov/archives/opa/pr/nexus-technologies-inc-and-three-employees-plead-guilty-paying-bribes-vietnamese-officials [https://perma.cc/7QPY-J2MP] ["Nguyen case"]; Gary Stein, *Sentencing of Individuals in FCPA Cases*, 18 BUSINESS CRIMES BULLETIN 5 (Jan. 2011), https://www.mwe.com/wp-content/uploads/srz-documents/stein-g_crimes_bulletin_money_sentencing_of_individuals_in_fcpa.pdf [https://perma.cc/ADY7-HVYL].

Vietnamese officials in order to procure contracts for his employer.[229] Despite Nguyen facing up to 37 years in prison and being the lead defendant in this scandal, Nguyen received only a 16 month sentence following a trial.[230] Therefore, even in instances where there are individual penalties for FCPA violations, the Nguyen case informs that the severity of punishment may still not be sufficient enough to deter recidivism.[231] This is because in the Nguyen case, the sentence Nguyen received was lenient relative to the gain he received from the crime, which falls short of the standard of sufficiently severe punishment that Becker's model articulates.[232]

Taken together, it is evident that FCPA individual penalties may be insufficiently severe, even when considering the new FCPA guidelines under the Trump administration. Examining the sufficiency of FCPA individual penalties necessitates an anchor to a normative value to be objective, and here that value is deterrence. When examining past FCPA actions for their deterrence impact, one sees a pattern of corporate recidivism. Moreover, many of these recidivist companies were punished solely by corporate fines, which raised the risk that these companies were repeating offenses due to the recidivism of individual employees undeterred by punishment borne solely by their employer.

The Blanche memo has partially improved the FCPA's deterrence gap by emphasizing individual liability for corporate misconduct, which corresponds to increasing the certainty of punishment in Becker's model of deterrence. Nevertheless, the Nguyen case informs that even when individuals are punished, the severity of their punishment may not outweigh the gains they received from the crime. This means there remains room within the FCPA to increase the severity of individual punishments so that they consistently outweigh the benefits that a defendant received from the violation.

C. Aligning With UKBA Sentencing Guidelines Will Enhance FCPA Deterrence Impact

Amid the insufficient severity of current FCPA individual penalties, the Trump administration can enhance FCPA deterrence impact by amending its new guidelines to align with UKBA individual penalties.[233] This is because the UKBA's individual penalties, unlike the FCPA's, are sufficiently severe when evaluated by Becker's economic model of deterrence.[234] Individuals found guilty of violating the UKBA are subject to up to ten years imprisonment and unlimited fines.[235] The unlimited fines here is particularly

229. Nguyen case, *supra* note 228.

230. *See id*.; Stein, *supra* note 228.

231. *See* Stein, *supra* note 228; BECKER, *supra* note 210, at 14.

232. *See* Nguyen case, *supra* note 228; Stein, *supra* note 228; BECKER, *supra* note 210, at 14 (explaining that a punishment is sufficiently severe when the harm from the punishment exceeds the gains from the crime).

233. *See* Nguyen case, *supra* note 228; Stein, *supra* note 228; Blanche Memo, *supra* note 8; Hunter, *supra* note 1, at 103-04.

234. *See* Hunter, *supra* note 1, at 103-04; BECKER, *supra* note 210, at 14.

235. Hunter, *supra* note 1, at 104.

important, as it means that UKBA individual penalties can theoretically outweigh any potential gain that an individual may have received from foreign bribery.[236] This means UKBA individual penalties are sufficiently severe according to Becker's model, since the model refers to penalties as sufficiently severe when their severity outweighs the gains that an individual receives from the crime.[237]

One may counter that it is not feasible for the Trump administration to align FCPA individual penalties with UKBA sentencing guidelines, as the president cannot change laws that have been passed by Congress.[238] Nevertheless, the president can emulate the UKBA's longer prison sentences and fine amounts by encouraging "charge stacking" in FCPA prosecutions.[239] Charge stacking refers to prosecutors charging defendants with as many crimes for a single incident as they can, thereby leading to more jail time for an offense than a single charge would yield.[240] By instructing the DOJ to stack charges against individuals in FCPA investigations, the Trump administration can emulate the UKBA's long prison sentences and high fines for individuals who engage in foreign bribery.[241] One example of charge stacking resulting in potentially longer sentences for individuals in FCPA investigations involves the Smartmatic case under the Trump administration.[242]

In the Smartmatic case, two defendants, Piñate and Vasquez, had caused $1 million in bribes to be paid to a foreign official in the Philippines.[243] In order to facilitate the bribes, the defendants created a slush fund by over-invoicing the cost per voting machine supplied for the 2016 Philippine elections.[244] The defendants further concealed the bribes by using coded language, creating fraudulent contracts, and routing transactions through bank accounts in Asia, Europe, and the U.S.[245] These actions taken to

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236. *See id.*; BECKER, *supra* note 210, at 14.

237. *See* Hunter, *supra* note 1, at 104; BECKER, *supra* note 210, at 14.

238. *See* Koehler, *supra* note 25, at 1002 (mentioning that Congress passed the FCPA); Jo Ciavaglia, *What is an executive order? How Much power do they hold over the federal government*, PHILLBURBS.COM (Mar. 7, 2025), https://www.phillyburbs.com/story/news/local/2025/03/07/what-is-an-executive-order-trump-power-authority-federal-supreme-court-constitution-laws/81740988007/ [https://perma.cc/Z2WM-7TF3].

239. *See* Hunter, *supra* note 1, at 104; Shah Law Firm PLLC, *What Does Charge Stacking in a Criminal Case Mean?* (last visited Jan. 6, 2026), https://arjashahlaw.com/blog/stacking-charges/ [https://perma.cc/UHD8-57XP] (explaining that prosecutors use charge stacking to lengthen potential criminal penalties); Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1054 (2013) (mentioning that presidents have long exercised influence over criminal enforcement to advance their policy agendas).

240. Tanner Law Offices, LLC, *Criminal-Charge Stacking and Double Jeopardy* (Aug. 9, 2024), https://www.tanner-law.com/blog/charge-stacking-and-double-jeopardy/. [https://perma.cc/7NU5-LTNZ]

241. *See* Andrias, *supra* note 239, at 1054; Hunter, *supra* note 1, at 104; Tanner Law Offices, LLC, *supra* note 240.

242. Smartmatic case, *supra* note 155.

243. *Id.*

244. *Id.*

245. *Id.*

facilitate and conceal the bribes are significant to note, as they violate the FCPA's accounting provisions, conspiracy to commit money laundering, and laundering of monetary instruments.[246] Amid these overlapping violations for the same misconduct, namely facilitating and concealing bribes, prosecutors chose to stack multiple charges on Piñate and Vasquez.

Specifically, prosecutors charged both defendants with one count of violating the FCPA, one count of conspiracy to commit money laundering, and three counts of international laundering of monetary instruments.[247] Due to this charge stacking, the defendants faced far higher sentencing ranges than they would have if they had only been charged with an FCPA violation.[248] Specifically, Piñate and Vasquez faced up to 20 years in prison for each count of international laundering of monetary instruments and conspiracy to commit money laundering.[249] Meanwhile, they faced only up to five years for every FCPA violation they committed.[250] Therefore, by stacking multiple charges against individual defendants that violate the FCPA, prosecutors can emulate the UKBA's individual penalties in the severity of punishment that individuals face for a violation.[251] This is due to the increase in potential punishment that results from charge stacking.[252]

Taken together, the Trump administration can enhance the FCPA's deterrence impact by amending FCPA guidelines to prioritize charge stacking against individuals who violate the FCPA. This addresses the FCPA's remaining deterrence gaps by aligning the statute's individual penalties closer to sentencing guidelines under the UKBA, which has sufficiently severe penalties based on Becker's economic model of deterrence. Furthermore, given the Trump administration's ability to influence federal prosecutor's priority agendas in FCPA enforcement, this solution is feasible.[253]

VIII. Improving the FCPA's Fairness Impact: Adding an "Adequate Procedures" Defense to the FCPA

Aside from deterrence gaps, a remaining issue with the new FCPA guidelines under the Trump administration is lack of fairness in FCPA

246. *See id.*; U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, *A Resource Guide to the Foreign Corrupt Practices Act Second Edition* 1 (2020); U.S. Dep't of Justice, *2182. Jury Instruction – 18. U.S.C. 1956 – Laundering of Monetary Instruments*, CRIM. RESOURCE MAN. (Apr. 24, 1996), https://www.justice.gov/archives/jm/criminal-resource-manual-2182-jury-instruction-18-usc-1956-laundering-monetary-instruments [https://perma.cc/5HJW-RVC8]; U.S. Dep't of Justice, *2166. Jury Instruction – Conspiracy To Commit Money Laundering*, CRIM. RESOURCE MAN. (last visited Jan. 7, 2026), https://www.justice.gov/archives/jm/criminal-resource-manual-2166-jury-instruction-conspiracy-commit-money-laundering [https://perma.cc/FU6C-EDVD].

247. Smartmatic case, *supra* note 155.

248. *See id.*

249. *Id.*

250. *Id.*

251. *See id.*; Hunter, *supra* note 1, at 104; Becker, *supra* note 210, at 14.

252. *See* Tanner Law Offices, LLC, *supra* note 240; Smartmatic case, *supra* note 155.

253. *See* Blanche Memo, *supra* note 8; Andrias, *supra* note 239, at 1054.

prosecutions.[254] Specifically, corporations face extreme difficulty in complying with the FCPA due to its lack of affirmative defenses and absence of judicial and administrative guidance.[255] This causes American firms to be at a disadvantage when operating in foreign markets, as they invest heavily in ensuring compliance with FCPA provisions without reassurance of its sufficiency.[256] Furthermore, the Trump administration's new FCPA guidelines have not remedied this lack of guidance on proactive FCPA compliance.[257]

Rather, the Trump administration's main reform addressing fairness has been instructing prosecutors to treat voluntary self disclosures more generously than prior administrations.[258] However, this reform does not solve the FCPA's fairness gap because it still leaves companies that choose not to voluntarily self-disclose violations vulnerable to unfair prosecutions.[259] Meanwhile, the UKBA avoids this fairness gap by offering an "adequate procedures" defense to firms when they are sued for the actions of their employees.[260] With the adequate procedures defense as a reference point, the Trump administration has a sound inspiration to enhance the FCPA's fairness impact without violating the separation of powers.[261] Specifically, the Trump administration can instruct the DOJ to adopt ex ante compliance criteria such that meeting them will presumptively result in no prosecution.[262]

To establish that the Trump administration can enhance the FCPA's fairness through adopting measures like the UKBA's adequate procedures defense, it is important to demonstrate the extent of the FCPA's existing fairness gap. The FCPA is particularly vulnerable to lack of fairness critiques because firms are often held vicariously liable for the actions of their agents, including in foreign markets.[263] This lack of fairness is further exacerbated by

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254. *See* Juedes, *supra* note 209, at 42 (2013) (arguing that FCPA compliance by corporations is often "extremely difficult" due to lack of affirmative defenses).

255. *Id.*

256. *Id.*

257. *See id.*; Blanche Memo, *supra* note 8; Galeotti Speech, *supra* note 11.

258. *See* Galeotti Speech, *supra* note 11.

259. *Id.*; *see* Juedes, *supra* note 209, at 42-44 (arguing that American firms are subject to expansive statutory interpretation that makes FCPA compliance unfair).

260. *See* Alex Casey, *The UK's Failure-to-Prevent-Bribery Offense Has Succeeded in Preventing Bribery*, GLOBAL ANTICORRUPTION BLOG (Feb. 20, 2025), https://globalanticorruptionblog.com/2025/02/20/the-uks-failure-to-prevent-bribery-offense-has-succeeded-in-preventing-bribery/#more-27391[https://perma.cc/8KK9-CLT5] (arguing that the adequate procedures defense is not too vague to be effective); Hatchard, *supra* note 172, at 294 (explaining that the UKBA statutorily requires guidance to be published on how to comply with the adequate procedures defense).

261. *See* Hatchard, *supra* note 172, at 294; Gallagher Law Library, *Legislative Process: United States: Bill to Law*, UNIV. OF WASH. SCH. OF L. (last visited Jan.10, 2026), https://lib.law.uw.edu/legproc (explaining the lawmaking process without mentioning that the president can play any role in making or amending a national law).

262. *See* Andrias, *supra* note 239, at 1054 (mentioning the president's ability to amend agency enforcement priorities to align with their policy agendas); Exec. Order 14,209, *supra* note 9 (describing the Trump administration's FCPA enforcement agenda); Blanche Memo, *supra* note 8 (demonstrating how the DOJ aligned with the Trump administration's FCPA enforcement agenda).

263. *See* Koehler, *supra* note 66, at 555 (arguing that prosecutors often impute the

the fact that using agents is unavoidable, since firms often rely on them to navigate the vastly different traditions and customs in a foreign market.[264] Holding corporations solely responsible for the actions of their employees and agents is fundamentally unfair since it wrongfully punishes parties within the corporation who were not responsible for the misconduct.[265] Another reason that companies face unfair prosecution for FCPA violations is the existing affirmative defenses in the statute are rarely used and rarely applicable. The first affirmative defense, which applies if a certain bribe is expressly legal in the country in which the bribe was made, is rarely applicable because no country has an express law permitting any form of bribery.[266]

The second affirmative defense applies if a payment is a "reasonable and bona fide expenditure" directly related to the demonstration of products or services, or the execution or performance of a contract with a foreign government or agency.[267] This affirmative defense is rarely usable since courts and the DOJ have given little guidance on when a payment is a bribe or a reasonable expense.[268] One example of how companies face unfairness under current FCPA enforcement is the case of American oil services firm Ensco International.[269] Ensco abandoned operations in Nigeria directly due to concerns over potential FCPA scrutiny over payments made to officials for permission to import oil-drilling rigs to the area.[270] Based on Congress's intent for the FCPA to exempt facilitation payments from FCPA scrutiny, a US company should not have to fear prosecution in such circumstances.[271] Nevertheless, in practice the facilitation payment exemption has been narrowed to such an extent that U.S. companies cannot rely on it without fear of FCPA scrutiny.[272]

Given the severity of fairness gaps in current FCPA enforcement, even amid the Trump administration's enforcement guidelines, the UKBA's "adequate procedures" defense is a useful reference point for a new remedy to enhance the statute's fairness.[273] The UKBA's adequate procedures defense is a useful reference point for solutions to the FCPA's fairness gap, because it applies precisely where the FCPA's lack of fairness is salient.[274] Namely, the UKBA's adequate procedures defense applies when a UK

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actions of employees onto the corporation); Juedes, *supra* note 209, at 52.

264. Juedes, *supra* note 209, at 52.

265. *See* Koehler, *supra* note 12, at 9 (noting how solely punishing a company for the actions of its employees may result in downstream harm to third parties like innocent employees and shareholders who did not commit the violation).

266. Juedes, *supra* note 209, at 47.

267. *See id.* at 47-48.

268. *Id.* at 48.

269. *Id.* at 58.

270. *Id.*

271. *See* Koehler, *supra* note 12, at 3.

272. *See* Juedes, *supra* note 209, at 46-47.

273. *See id.* at 46-47, 58; Blanche Memo, *supra* note 8 (neglecting to mention clearer guidelines for companies to proactively avoid FCPA prosecution); Casey, *supra* note 260.

274. *See* Casey, *supra* note 260; Juedes, *supra* note 209, at 52.

corporation is being held liable for the actions of its employee or agent in a foreign market.[275] Similarly, the FCPA's lack of fairness is most pronounced when a US company is vulnerable to FCPA prosecution under vicarious liability while using an agent in a foreign market.[276]

The adequate procedures defense works by allowing a UK company to affirmatively defend against an SFO investigation by alleging that in spite of an employee engaging in foreign bribery, the company had adequate procedures in place to prevent such misconduct.[277] Furthermore, the adequate procedures defense is more fair than FCPA's current affirmative defenses because unlike the latter, the adequate procedure's defense has guidance on how to use it.[278] One may counter that the adequate procedures defense is still insufficient since it lacks precise guidance for compliance with its requirements in a company's individual circumstances.[279] While this is true, this does not limit the adequate procedures defense from being a reference point for the Trump administration, since the administration can simply add greater clarity to its own reform inspired by the affirmative defense.[280] In order to implement the solution, the Trump administration should instruct the DOJ to decline FCPA investigations ex ante where U.S. companies are shown to have complied with the agency's guidelines on effective FCPA compliance.[281] Such a measure would enhance the FCPA's fairness by allowing U.S. companies to participate in foreign markets without fear of expansive or aggressive FCPA enforcement under vicarious liability theories.[282]

Taken together, the Trump administration's FCPA guidelines have not addressed core fairness gaps pre-existing in FCPA prosecutions of companies. Specifically, companies are vulnerable to unfair FCPA prosecutions when operating in foreign markets due to theories of vicarious liability that prosecutors use when the companies rely on agents in foreign markets, even though reliance on agents in foreign markets is often necessary to navigate the unique cultural dynamics in each country. Furthermore, both prosecutors and courts have given little guidance on how U.S. companies can proactively comply with the FCPA to proactively avoid prosecution. This is coupled with a lack of effective affirmative defenses available to corporations facing expansive and aggressive prosecutions for alleged FCPA violations.

The UKBA's adequate procedures defense, meanwhile, resolves this fairness gap since it addresses the root cause of frequent FCPA scrutiny. Namely, the adequate procedures defense is available when a UK company faces UKBA scrutiny for alleged foreign bribery done by the company's

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275. *See* Hatchard, *supra* note 172, at 293.

276. *See* Juedes, *supra* note 209, at 52-53.

277. Hatchard, *supra* note 172, at 293.

278. *See* Casey, *supra* note 260; Juedes, *supra* note 209, at 47-49.

279. *See* Casey, *supra* note 260.

280. *See id.*; Andrias, *supra* note 239, at 1054; Blanche Memo, *supra* note 8 (demonstrating how the Trump administration's FCPA guidance demonstrates clarity, such as with regards to enforcement priorities).

281. *See* Andrias, *supra* note 239, at 1054.

282. *See* Juedes, *supra* note 209, at 52-533, 60.

employee or agent. Furthermore, the UK has given substantial guidance on how to comply with the adequate procedure defenses' prerequisites to use it. With this defense as a reference point, the Trump administration has ample inspiration to enhance the FCPA's fairness in a similar way. Specifically, the Trump administration could do this by instructing the DOJ to adopt ex ante compliance criteria with the FCPA, such that a company that fulfills the criteria will presumptively not face prosecution.

Conclusion

The Trump administration has significantly enhanced FCPA guidelines through measures that enhance the statute's fairness and deterrence impact. Under the Trump administration's FCPA guidelines, prosecutors are encouraged to increase individual accountability, treat voluntary self-disclosures more generously, and reduce expansive enforcement theories. Despite these reforms, however, the FCPA remains vulnerable to certain deterrence and fairness gaps in its implementation. For deterrence, the FCPA's individual penalties are insufficiently severe, relative to economist Gary Becker's model of deterrence. Conversely, the UKBA's individual penalties align closely with Becker's model of deterrence, since the statute prescribes potentially unlimited fines and long imprisonment for violations. To enhance the FCPA's deterrence effect, the Trump administration should seek to align FCPA penalties closer with the UKBA's individual sentencing guidelines.

The administration should do this through charge-stacking, in which prosecutors bring forth multiple charges against a defendant for a single offense. Charge stacking in the FCPA context yields a similar effect to increasing the individual penalties for FCPA violations, as defendants would face longer sentences with multiple charges brought against them. Meanwhile, the FCPA's existing fairness gap is due to U.S. companies' vulnerability to aggressive prosecution while operating in foreign markets, particularly due to their reliance on agents in those countries. In such cases, U.S. companies lack reliable affirmative defenses to prevent costly prosecutions if they had proactively attempted to comply with FCPA guidelines.

Alternately, the UKBA offers an "adequate procedures" affirmative defense. This defense allows UK companies to evade liability even where the companies' agent in a foreign market engaged in foreign bribery. The defense is applicable specifically when the UK company can prove that it had adequate procedures in place to prevent the violation. The Trump administration can enhance the FCPA's fairness by offering a remedy like the adequate procedures defense. While the Trump administration cannot amend the statute, the administration can instruct the DOJ to offer ex ante compliance criteria, which if met would presumptively result in no investigation into an alleged FCPA violation by a US company's agent in a foreign market. This remedy would offer U.S. companies clearer guidance on how to avoid FCPA scrutiny for operating in foreign markets, along with a mechanism for defending against such scrutiny if it occurs.