NAVIGATING FCPA COMPLIANCE IN MEXICO

by

Daniela DiMiceli

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ProQuest LLC.
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106 - 1346

Abstract

Compliance with the Foreign Corrupt Practices Act (FCPA) can be a complex matter for American companies conducting business in Mexico because the regulation's antibribery requirements do not reconcile with the local cultural and law enforcement practices commonly found in developing countries. In Mexico the high levels of corruption and impunity combined with hefty fines for FCPA violations may discourage companies from investing in the country, furthering the economic loss for locals. Findings reveal that FCPA compliance in Mexico is feasible. Legitimate American companies looking to obtain or maintain business dealings in Mexico must be knowledgeable of FCPA requirements and take actions to prepare management and employees to protect the company from noncompliance. Considering that most bribery in Mexico involves petty amounts, and that bribery requests are likely coming from police officers and Mexican government officials, companies can prepare to manage FCPA requirements by implementing a compliance program that provides guidance and establishes protocols for those circumstances. There may be a significant expenditure associated with the implementation of a compliance program, but it is worthwhile compared to the potential fines and penalties for noncompliance. However, American companies cannot sustain FCPA compliance alone. Key recommendations include a call for further action from both Mexican and American authorities. FCPA compliance can improve and effectively contribute to staving off corruption if the multinational governing bodies increase collaboration to align the investigation and prosecution of mutual cases. This alignment would improve Mexico's poor record of enforcement against corruption and send a uniform message that corruption is not tolerated in either country.
Keywords: Economic Crime Management, Dr. Shannon Johnson, transnational, DOJ, SEC.

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Introduction

A key deterrent of economic crime is the implementation of a law that is perceived to have a substantial degree of punishment and a high likelihood that the violation will be discovered because the combination of these two factors compels compliance. If the economic gain resulting from the violation outweighs the penalty and there are no other severe consequences, then compliance is challenging. Bribery is one aspect of economic crime where the likelihood of noncompliance is high, particularly if the act involves transnational counterparties. For American companies conducting business in developing countries like Mexico where corruption via bribery is commonplace, an act of bribery may be the result of a rational assessment where business profits overcome legal compliance. Although transnational bribery may be perceived to be a harmless act of mutual benefit, it contributes to perpetuate the poverty cycle in developing countries like Mexico (Ratcliffe, 2014).

American Law Governing Foreign Corruption

The Congress of the United States of America enacted the Foreign Corrupt Practices Act (FCPA) in 1977 to prohibit American organizations and individuals from obtaining an unfair business advantage derived from bribing foreign officials (Department of Justice, n.d.). Simply put, the FCPA makes it a crime under the U.S. Code for a person or entity to buy an advantage over other business competitors in a foreign country via the personal gain of a government official from such foreign country. The FCPA can be enforced under civil prosecution by either the Securities and Exchange Commission (SEC) for public companies under its supervision or by the United States Department of Justice (DOJ). Additionally, the latter can also pursue criminal prosecution (United States Department of Justice & Securities and Exchange Commission, 2012). The FCPA is comprised of two key areas: the antibribery and the accounting provisions.

The antibribery provision is the focus of this paper, and it defines which parties, actions, items, and behaviors are covered under the act in addition to establishing acceptable defenses and exceptions. The accounting provision applies only to public companies, and it supports the antibribery provision in that it requires the maintenance of accurate recordkeeping and a system of internal controls that is aligned with other financial reporting requirements of the SEC. Therefore, if a public company fails to record a bribe in their books but there is not enough evidence for the DOJ to prosecute, the SEC can bring an enforcement action because the company filed misstated financial statements. The penalty for a criminal violation of the antibribery provision includes a fine up to $2 million per incident for organizations and up to $250,000 and five years imprisonment for individuals. Civil penalties for both organizations and individuals include a fine of up to $16,000 per violation in addition to "collateral consequences including suspension or debarment from contracting with the federal government, cross-debarment by multilateral development banks, and the suspension or revocation of certain export privileges" (United States Department of Justice & Securities and Exchange Commission, 2012, p. 69).

The key definitions included in the antibribery provision can be broad and difficult to interpret. For instance the FCPA touches most individuals employed or connected with a public company that trades stock on an American exchange because the provisions apply to certain persons and business entities defined as "domestic concerns," that is, any officer, director, employee, or agent of such domestic concern (United States Department of Justice & Securities and Exchange Commission, 2012). Further, an entity is not able to hide behind a third party who is conducting business on its behalf, including consultants and facilitators. The provisions also

apply to any corporation where 51% of the ownership is tied to U.S. concerns. Therefore, the FCPA may extend to joint ventures if it passes the ownership percent test.

FCPA enforcement has gained more attention since 2008 due to record-breaking fines resulting from cases like Siemens Atkiengesellschaft (Siemens AG), Total S.A., and KBR, in addition to recent high profile cases like Walmart's investigation by both the Department of Justice and the SEC that started in 2011. The Walmart case has potential to exceed previous record fines if the allegations are true. Although the investigation continues, it has caused a ripple effect for the world's largest retailer that resulted in additional legal and compliance expenditures of $439 million through 2014 and an additional accrual related to the FCPA compliance program spending for 2015 in the range of $200 to $240 million (Jaeger, 2014). These extreme enforcement cases and the pending result of Walmart's have rekindled the debate and have drawn attention to the importance of the FCPA. American companies are competing in a global economy involving a clash of business cultures where an exchange of gifts and favors may be the customary manner of doing business and where red tape and bureaucracy are normally skirted by facilitating fees without other alternatives face a difficult decision: adhere to local customs or possibly forfeit a business opportunity.

Criminal prosecution. The number of FCPA cases under indictment and subsequent prosecution has grown steadily after the first FCPA violation prosecution took place in 1979 in the case US v. Kenny International Corporation. The first FCPA case involved a bribery scheme in the Cook Islands, and the FCPA enforcement resulted in a fine of $50,000 in addition to a plea agreement and cooperation with local authorities of the foreign country (Department of Justice, n.d.). In the 1980s the next wave of FCPA prosecutions followed with 17 cases prosecuted, including the first case where an individual was charged with violation of the FCPA. In the

1990s the DOJ prosecutions increased to 28, and there was a significant increase in the number of FCPA prosecutions in the following decade: Between the years 2000 and 2010, there were 109 FCPA prosecutions. From 2011 through 2014 another significant increase in FCPA filings reached 68 cases involving some large, well-known American corporations including Hewlett Packard, Alcoa, Archer Daniels Midland, Ralph Lauren Corporation, Tyson Foods, and Pfizer. Although there were some criminal convictions of individuals for FCPA violations, penalties to a corporation per se have been limited to monetary fines and disgorgement.

Civil prosecution. Until 2001 the SEC had not prosecuted more than one FCPA violation case per year. Subsequently and through the second quarter of 2014, the SEC increased the number of filings to over 100 cases. Part of the increase is due to the fact that in 2010 the SEC's enforcement division created a specialized unit to empower FCPA enforcement. Notably, the case against the French company Total S.A. settled for approximately $400 million (Securities and Exchange Commission, n.d.). Although some cases are prosecuted by both the DOJ and the SEC, the SEC has assigned steeper fines but also granted leniency towards establishing nonprosecution or deferred prosecution agreements with violators willing to self-disclose and cooperate with the investigation. In this aspect public companies have an advantage over private companies because they have the opportunity to work with the SEC to be spared a costly trial and settle FCPA violation charges. Public companies caught in a bribery case can obtain leniency and avoid criminal prosecution by following these actions: offer full cooperation, show robust internal controls and policies, agree to pay the fines, and condemn those individuals directly responsible for the acts. The civil side of bribery convictions is very effective compared to the criminal side. Even though the volume of cases prosecuted has increased, enforcement

faces the expanding evolution of bribery that churns innovative methods to the transactions that are difficult to detect and prosecute.

Evolution of Bribery

Bribery has evolved and become subtler and, therefore, harder to detect over the past three decades since the inception of the FCPA. Bribery is no longer conducted in the shadow of Swiss bank accounts and underground deals. Bribery had to transform from the blatant payoffs because of the increased regulatory and public scrutiny (Silverstein, 2012). Although American companies may not set out with the intent to bribe, there are many developing countries where it is nearly impossible to conduct business without enriching a few public officials. Silverstein (2012) further discloses creative types of bribery exchanges that can take place with low risk of detection. These include stock tips, contributions to nonprofit foundations that get diverted and funneled to corrupt leaders, additional taxes or royalties paid to shell corporations, and extortion schemes. Such activities are difficult to detect even with today's availability of and accessibility to information.

Corruption in Mexico

Mexican corruption has been typically evidenced through political analysis, economic studies, and sometimes legal studies (Ferreyra-Orozco, 2010). In its current state corruption in Mexico has reached a level so high that it includes law enforcement: Corruption of the Mexican police force "represents an obstacle to the state to succeed" (Ionescu, 2011, p. 185). Further, it spans throughout all levels of jurisdiction: federal, state, and municipal. The bureaucratic corruption in Mexico is the aspect that affects well-intentioned American companies trying to obtain or maintain business relationships. Companies not willing to pay-to-play may be passed over in government contract bids, eliminating fair competitiveness. Further, simple

administrative requests such as obtaining building permits may be deliberately lengthy or rejected until a facilitating payment is received. Although Mexico has robust anticorruption laws (Ratcliffe, 2014), enforcement is lacking, and few are willing to be forthcoming. Keeping to U.S. law in a foreign country in these instances may result in lost opportunities to foreign competitors who may not be subject to similar law in their home countries.

The most important cost of bribery is often overlooked: the social cost to the citizens of the country where the corruption took place. The value of the FCPA may be thwarted because corruption does not appear to cause immediate, visible harm. Instead, it has long term consequences, as noted by Breuer and Khuzami in the FCPA Guide: "Corruption has corrosive effects on democratic institutions, undermining public accountability and diverting public resources from important priorities such as health, education and infrastructure" (United States Department of Justice & Securities and Exchange Commission, 2012, p. 2). Further, there is evidence of a strong correlation between corruption and poverty. According to Ratcliffe (2014), there is "a strong correlation between perceived high levels of corruption and low economic growth" (p. 85). For Mexico this is confirmed by the corruption index rating assigned by Transparency International, which is updated and published annually and it ranks Mexico as high in corruption at 103rd out of 177 nations (Transparency International, 2014). In addition, when measured for its enforcement actions by the Organisation for Economic Co-operation and Development (OECD) convention, Mexico's is rated low, with little enforcement. Further, Mexico's rating for control of corruption ranks in the 44th percentile when compared to other nations, which indicates a high probability that public office is run by a selected few who use their position in power to obtain personal gain (Transparency International, n.d.).

Purpose of This Paper

The purpose of this paper is to ascertain the feasibility of compliance with the FCPA while conducting business in a developing country where corruption is boundless. Specifically, this research is focused on the perspective of a legitimate American company trying to obtain or maintain business in Mexico. The research herein includes an examination of the dynamics between the local cultural practices and the FCPA provisions to determine whether it is realistic to demand that a foreign law intended for American business behavior be inserted into the practices of Mexican society without any detriment. Further, the purpose of this paper extends to a review of the financial impact of the FCPA by comparing the expenditure necessary to implement a suitable compliance program to the potential financial loss resulting from noncompliance. The objective of this paper is to identify situations where a bribe is implicitly or explicitly demanded by a Mexican official, the applicability of the FCPA to these situations, and recourses available to avert bribery. This paper attempts to evaluate the effectiveness of these alternatives to conclude whether there is sufficient regulatory and law enforcement support in both the US and Mexico to enable ethical business conduct that will also benefit the citizens of Mexico. The determination of feasibility is important because American companies may turn away from investing in Mexico due to concerns over the ability to comply with FPCA requirements, thus avoiding the risk of significant fines and reputational damage. Conversely, unprepared American companies may conduct business in Mexico and participate in local practices that violate the FCPA. This paper aims to determine whether the local environment is prepared to provide channels to timely investigate and resolve allegations of unethical behavior that rejects well-intentioned companies and continues to welcome bribers that perpetuate the cycle of personal enrichment of a few individuals.

Literature Review

The corruption problem in Mexico is aggravated by a vicious cycle of impunity due to failure of both law enforcement and the judicial system. There are no incentives that compel citizens to trust the judicial system. The lack of trust demoralizes law enforcement. The meager record of arrests, prosecutions, and prison terms for wrongdoers enforces that sentiment. In addition corruption is a common practice by the drug cartels that offer significant bribes to state officials to keep the drug traffic flowing (Morris, 2012). Citizens who come forward with accusations or information about criminal activity may pay the price with their own lives (Partlow, 2014). American companies entering this environment need to reconcile the business objective to succeed in Mexico with the behavior required by the Foreign Corrupt Practices Act (FCPA).

The first part of this literature review explores the requirements of the FCPA, recent trends in enforcement, and the criticism over FCPA effectiveness. Understanding the provisions of the FCPA provide a venue to identify the areas of the program that impinge on the efficiency of an American company conducting business in Mexico. The second part of this literature review examines the depth and breadth of corruption in Mexico and the identification of the types and levels of government officials subject to bribery and corruption that may obstruct FCPA compliance. Thirdly, this literature review provides insights into the cost of implementing a compliance program to address FCPA concerns compared to the cost of noncompliance based on an examination of previous cases of FCPA violation penalties. Lastly, the literature identifies and reviews the recourses available to American companies when confronted by a situation when a bribe is implicitly or explicitly requested from a government official.

FCPA Effectiveness

The FCPA was dormant for most of the three decades since its inception. However, new technologies and information availability have helped in the identification of possible violations. Record fines involving large transnational companies incited critics and supporters of the FCPA in expressing polarized views of the regulation, its effectiveness, and the effects on American business. Prosecutors have been successful in the targeted effort to increase the identification and enforcement of FCPA violations in recent years. In 2008 Siemens Atkiengesellschaft (Siemens AG), a global powerhouse in electrical engineering, agreed to a record combined fine and disgorgement fee in the amount of $800 million in connection with FCPA violations in Argentina (Livshiz, 2014). It should be noted that although Siemens AG is a German company, it is under the regulation of the Securities and Exchange Commission (SEC) as a registered company trading stock in the U.S. market, therefore, the FCPA is applicable. Siemens AG also settled with the equivalent German regulator agency for the same amount (Livshiz, 2014). Other sizeable FCPA violations include the SEC disgorgement fee from Halliburton in the amount of $177 million in addition to criminal charges and a fine of $402 million of its subsidiary KBR. In 2014 the SEC and Department of Justice (DOJ) also reached an agreement with Alcoa to settle for a total of $384 million in criminal fines, revenue disgorgement, and penalties related to FCPA violations (Weismann, Buscaglia, & Peterson, 2013, p. 610). However, the size of the Siemens, Halliburton, and Alcoa settlements are outliers and among the top ten largest cases.

FCPA under fire. Part of the criticism of the effectiveness of the FCPA stems from instances when violators are given the chance to collaborate with the DOJ and the SEC in exchange for an informal disposition. An informal disposition constitutes a deferred prosecution agreement or a nonprosecution agreement (Weismann et al., 2013). A typical FCPA prosecution

is similar to the case against Tyson Foods, Inc., charged by the SEC in 2011. Tyson Foods's subsidiary bribed two Mexican state veterinarians to favor the certification of Tyson products for export. The result was a disgorgement fee of $1.2 million and a deferred prosecution agreement that yielded a $4 million criminal penalty (Weismann et al., 2013). The argument that low monetary penalties coupled with informal disposition of cases support corruption in Mexico as business-as-usual corporate behavior (Weismann et al., 2013) is countered by the notion that the informal prosecution is an intentional act to shift the focus of culpability from the company to the individual (Thomas, 2010). The effect of putting an individual behind bars is a model of deterrence that is more effective than dismantling a company (Thomas, 2010).

Other critics take a business approach to view the FCPA impact. Ratcliffe (2014) notes that the "most consistent and resounding criticism has been that compliance with the FCPA has cost American companies overseas business by crippling their competitive position abroad" (p. 96). Additionally, there is criticism that even after making significant investment in compliance programs, companies may still be liable for FCPA violations (Livshiz, 2014). This is possible if the compliance program is deemed by the regulators as weak or ineffective. These considerations question the effectiveness of the FCPA and if left unaddressed undermine the confidence of American companies' foreign investments.

A contradicting exclusion. The FCPA includes an exception for small facilitating or expediting payments. This element generates confusion because it seems to contradict the core principle of the FCPA. Sometimes referred to as grease payments, small facilitating payments are allowed if made to speed up "routine governmental action" (United States Department of Justice & Securities and Exchange Commission, 2012, p. 25) because they are considered "necessary and ordinary company business expenses under the Internal Revenue Code"

(Weismann et al., 2013, p. 594). This exclusion applies to items such as expedited consulate services, mail, or supply of utilities. The clarification included in the FCPA Resource Guide by the United States Department of Justice and Securities and Exchange Commission (2012) is that the payment is not made "in connection with obtaining or maintaining new business" (p. 25). Providing a small value payment to an inspector to have the electricity turned on in a factory would likely be classified as an allowable facilitating payment and not likely to be considered a bribe (United States Department of Justice & Securities and Exchange Commission, 2012). This type of bribery may be insignificant to the US, however, the exemption for facilitating payments may be in direct conflict with local antibribery laws and incentivizes illicit behavior, regardless of the amount.

Vague terminology. Another aspect of the long-standing criticisms of the FCPA regulation is the vagueness of its terminology, thus prompting the DOJ and the SEC to attempt a simplified resource guide to the FCPA. It is important to have a clear understanding of the FCPA provisions so that American companies can abide by the law. Overall, the outline of the FCPA prohibits a briber classified as a domestic concern from participating in a prohibited transaction to exchange *anything of value* with a *foreign official*. These simple terms, however, are expansive and subject to interpretation.

Defining "domestic concerns." The first point is to understand who is covered by the regulation because it extends beyond American companies. The definition includes any issuer trading stock on a national securities exchange as well as its "officers, directors, employees, agents, and shareholders" (United States Department of Justice & Securities and Exchange Commission, 2012, p. 10). Further, the FCPA applies to all domestic concerns, that is, "any individual who is a citizen, national, or resident of the United States" (United States Department

of Justice & Securities and Exchange Commission, 2012, p. 11). In addition any entity regardless of the structure type is covered as long as it is organized under U.S. jurisdiction (United States Department of Justice & Securities and Exchange Commission, 2012). This provision puts a lot of pressure on the executives of a large multinational company, because although not directly involved in the daily activity of a remote subsidiary, the companies are assigned responsibility for any employee's actions, even if the perpetrators acted alone and against the company's directives. Executives must be aware of the business conduct of employees and individuals representing the company's subsidiaries in Mexico because they may be responsible for their actions if bribery is involved. Moreover, foreign individuals are also affected by the FCPA if they commit the violation while in the United States (United States Department of Justice & Securities and Exchange Commission, 2012).

Types of prohibited transactions. The type of activity covered by the FCPA is broad. To identify a covered activity, the FCPA proposes the business purpose test to determine if the intent of the payments was to improperly influence a covered foreign individual to use his or her position "in order to assist…in obtaining or retaining business for or with, or directing business to, any person" (United States Department of Justice & Securities and Exchange Commission, 2012, p. 12). Beyond the exchange of payment for business, less obvious improper activities covered include obtaining tax advantages, extending contracts, and bypassing regulations (United States Department of Justice & Securities and Exchange Commission, 2012). Moreover, the covered activity is subject to the FCPA if it is done *corruptly* and *willfully*. The Resource Guide defines *corruptly* as "an intent or desire to wrongfully influence the recipient" (United States Department of Justice & Securities and Exchange Commission, 2012, p. 14). Although the

term *willfully* is not defined in the regulation, there is no proof of willfulness required for conviction.

The FCPA includes a provision that the exchange of anything of value must take place, and it is not limited to cash but also includes gifts, travel and entertainment, and any charitable contribution that is later funneled to the foreign official recipient (United States Department of Justice & Securities and Exchange Commission, 2012). Further, the accounting provisions require that a public company maintain a system of records to disclose all payments to government officials. This requirement sets the private sector at an advantage (Weismann et al., 2013) because a bribery investigation is more likely to succeed if the alleged transaction is recorded on the books of the company, however disguised.

Defining "foreign officials." The FCPA applies when the recipient of the bribe is a foreign official, and similar to the definition of domestic concern, the term is broad. The Resource Guide clarifies that the recipient must be a foreign official, who is an "officer or employee of a foreign government and to those acting on the foreign government's behalf" (United States Department of Justice & Securities and Exchange Commission, 2012, p. 20). The definition encompasses members of ruling royal families and state owned enterprises. This provision is particularly difficult to determine in countries like China where the government owns the majority of business interests, therefore individuals tied to these businesses as employees or representatives may be classified as foreign officials. For business dealings in Mexico, the implication is that it affects low level ranking employees such as clerks and police officers. However, the foreign official's level of influence, control, and ownership are factors considered by the DOJ and SEC when determining the violation (United States Department of Justice & Securities and Exchange Commission, 2012). Muma (2014) has proposed that the

foreign official hesitation can be solved by requiring each country to disclose and register those individuals who are considered a foreign official with substantial power and therefore subject to the FCPA requirements.

Case Volume and Informal Disposition

The number of FCPA cases prosecuted has increased significantly in the last decade. However, the manner in which the cases are settled fuels criticism. Informal disposition agreements send a message that a monetary fine is a likely outcome. This prosecutorial conduct may enforce the idea that FCPA compliance is "the cost of doing business" (Weismann et al., 2013, p. 592). Weismann, Buscaglia, and Peterson (2013) classify the FCPA prosecution record prior to 2006 as "abysmal," citing the regulation's failure to deter bribery. After 2006, however, the number of cases started trending up. Figure 1 illustrates the steady growth in the prosecution of FCPA cases from 2002 through 2011.

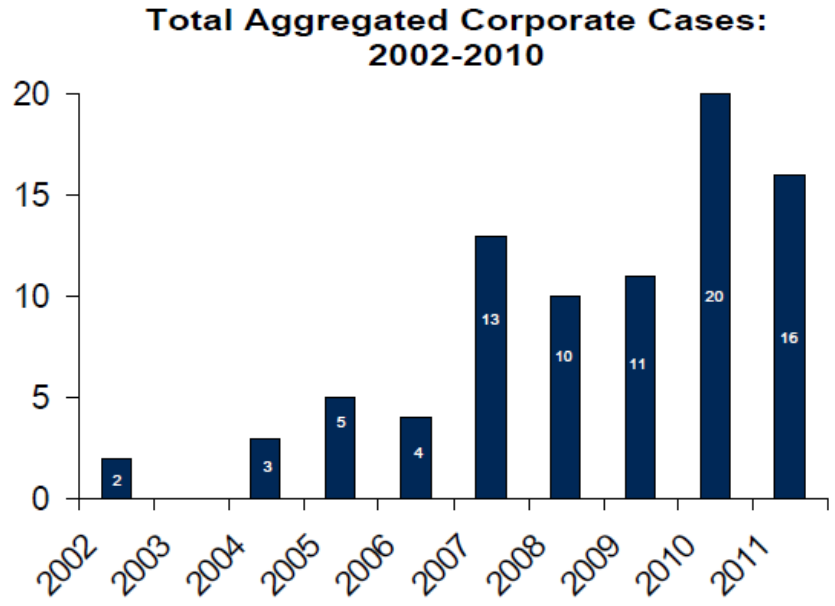

Figure 1. Total Aggregated Corporate Cases.
Reveals the number of FCPA enforcement actions from 2002 through 2011. Adapted from FCPA Digest Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act (Shearman & Sterling, 2012, p. 1)

Between the SEC and DOJ, the number of cases continued to trend upwards in 2012 and 2013. Although some cases are still open, the DOJ identified 13 cases in 2012 and 23 cases in 2013 (Department of Justice, n.d.). The SEC closed eight enforcement cases in 2012 and 10 cases in 2013 (Securities and Exchange Commission, n.d.). It should be noted that some cases overlap, that is, the prosecution of multiple defendants span out of the same case, but it is reported and accounted separately (Weismann et al., 2013). Although the increase has been significant and trending, Weismann et al. (2013) argue that monetary fines alone are not a deterrent to corrupt behavior. Further, considering the number of annual prosecutions compared to the volume of global transactions involving U.S. concerns, the number is hardly significant.

Most FCPA cases are settled informally via informal prosecution agreements. These are negotiated agreements between the prosecutor and defendant and became effective in 1993, and there are two types: a deferred prosecution agreement and a nonprosecution agreement. In a deferred prosecution agreement, the defendant acquiesces to an indictment by the prosecutor but also signs an agreement with terms specified by the prosecutor. If the defendant complies with such terms, over time the prosecutor dismisses the indictment. The main difference between a deferred prosecution agreement and a nonprosecution agreement is the lack of indictment (Maurer & Maurer, 2013). In both types of agreements, the defendant follows the prescribed steps set up by the prosecutor and avoids any admission of guilt. These agreements have been the primary means of FCPA violation settlements in the past decade (Maurer & Maurer, 2013). Although the number of FCPA prosecutions has not increased significantly, the disgorgement of profits combined with penalties has increased. Weismann et al. (2013) noted that the US reported to the OECD that over $1 billion has been recovered since 2004.

Mexico Matters

The importance of Mexico is that it is a major trading partner with the US. The value of the "trade between the US and Mexico is now valued at $1 billion dollars a day" (Rosen et al., 2013, p. 629). Further, through August 2014 the year-to-date trade in goods places Mexico as the third largest trading partner with the US with 13.5% of total trade, behind only China and Canada with 14.2% and 16.7%, respectively (U.S. Census Bureau, 2014). The value of this trade is significant, especially considering that Mexico is a neighboring country that shares a large geographical border with the US, and much of what happens in Mexico affects the United States.

Widespread corruption in Mexico. There is evidence that corruption has become systemically embedded within the Mexican culture. There is a popular motto in Mexico that provides insight into the mindset related to corruption in the country: "El que no tranza, no avanza," which translates into "He who does not cheat, does not get ahead" (Zabludovsky, 2013, p. 4). This impacts FCPA compliance because corruption is widespread for Mexican officials who are considered "covered" from an FCPA standpoint, ranging from low- to high-level officials. There is a high level of corruption among the 400,000 police officers (Ionescu, 2011, p. 183), which supports the claim that it is "difficult at times to differentiate violators from enforcers" (Morris, 2012, p. 29). Sarsfield (2012) examined "the well-known corrupt act of *mordida*" (p. 215) in Mexico City, that is, "bribe seeking and offering when a citizen is accused of or commits a traffic infringement" (p.215) and concluded that bribery is the primary tactic. Corruption reaches all levels of Mexican government officials: port and prison officials, incumbent politicians and candidates, district attorneys, mayors, and city officials (Morris, 2012). In 2008 during a high profile corruption takedown that resulted in the arrest of, among others, the head of the Mexican Interpol, "directors of the federal police and close associates of

the secretary of public security" (Morris, 2012, p. 29). Morris (2012) further concludes that "Mexico suffers a glaring rule of law deficit" (p. 29). Corruption reaches Mexican politics as well. On a separate case, a Mexican governor came under suspicion after bragging about extravagant purchases. His successor later discovered a discrepancy in state funds of approximately $190 million. Similar corruption cases are discovered often, but beyond the initial shaming there is little repercussion to the violator (Zabludovsky, 2013). Impunity fuels the feelings of the majority of citizens feel that the Mexican government's ability to fight corruption is ineffective (Transparency International, n.d.).

Negligible enforcement in Mexico. It is difficult to accurately estimate the breadth and depth of corruption in Mexico based on actual prosecutions. Since 1977 Mexico has pursued four enforcement actions in domestic bribery cases, and there were no cases related to foreign bribery (Trace International, 2014). Absent actual case data to pinpoint the actors and situations prone to bribery, the entity Trace International implemented a voluntary, anonymous bribery hotline that collected data for three years between 2007 and 2010. The results illustrated in Figure 2 showed that almost one half (45%) of the alleged bribe takers were police officers. Other types of bribe takers included government officials, provincial or state government officials, employees of state-owned entities, city officials, judges or representatives of the Judiciary, military, and ruling party officials. All these categories fit into the FCPA definition of "public official" and, therefore, could be considered a violation of the FCPA if alleged bribes were from companies subject to the FCPA.

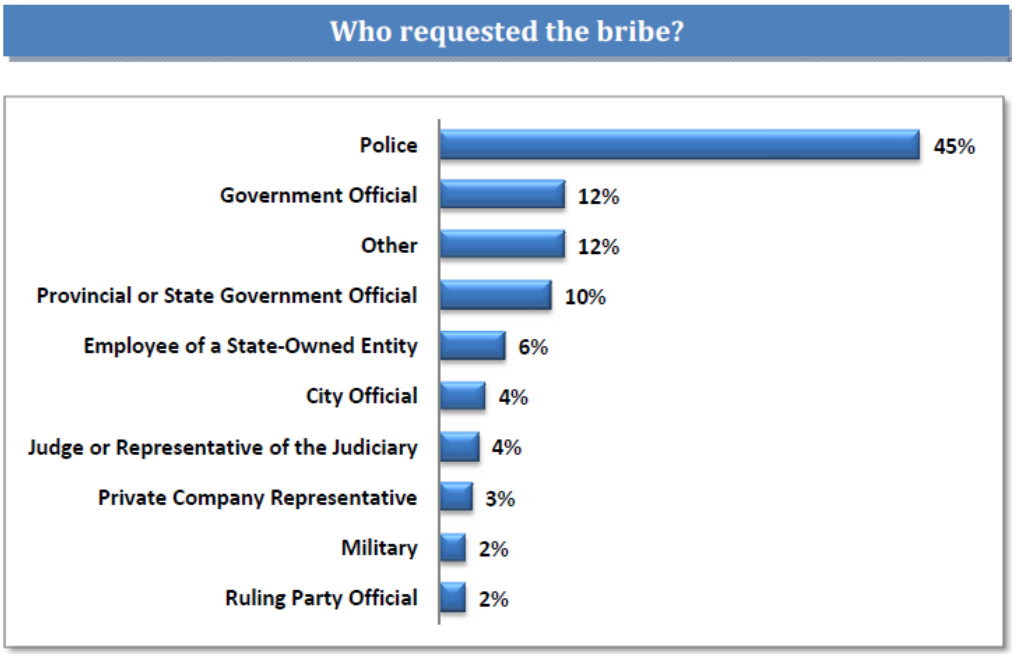

Figure 2. Who Requested the Bribe?
Reveals the profile of the bribe taker. Adapted from Business Registry for International Bribery and Extortion (Business Registry for International Bribery and Extortion) 2010 Mexico Report (Business Registry for International Bribery and Extortion, 2010, p. 4).

The study further revealed that the value of the bribes is primarily small. Approximately 55% of the value of the bribes was under $1,000. Another notable element of the study is that 15% of respondents disclosed difficulty in putting a value to the bribe, possibly denoting nonmonetary advantages such as favoritism and cronyism. See Figure 3.

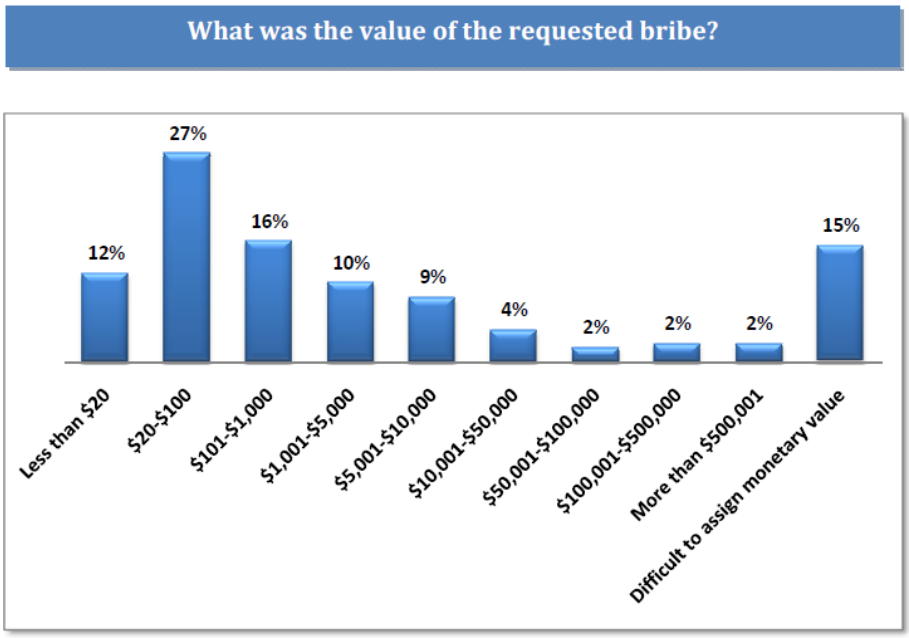

Figure 3. What Was the Value of the Requested Bribe?
Reveals the monetary significance of the bribe. Adapted from Business Registry for International Bribery and Extortion (Business Registry for International Bribery and Extortion) 2010 Mexico Report (Business Registry for International Bribery and Extortion, 2010, p. 8).

The study also revealed that the bribe is diverse in nature. This is evident considering that 23% of the bribes are related to protection from harm, 15% are for services the respondent was already entitled to receive, and 29% of the respondents could not classify the bribe. The bribes given in exchange for protection and services already rendered or entitled to may qualify as an excluded transaction under the FCPA because it is not a payment made to obtain or retain business with a particular party. The FCPA Guide describes "providing police protection" (United States Department of Justice & Securities and Exchange Commission, 2012, p. 25) as a routine governmental action that can be excluded from the FCPA. More detail related to the protection bribes shown in Figure 4 are needed, however it is possible that they can be considered legal payments under the FCPA, even if they are illegal under Mexican law. Further, the study shows that the bribes for services already entitled to or already rendered may be classified as routine governmental action and, therefore, excluded from the FCPA as well. The

remaining three categories of bribes can undoubtedly be categorized as violations for those companies subject to the FCPA because they involve winning new business and obtaining influence with or over a government official, which correspond to 28% of the responses, as illustrated in Figure 4.

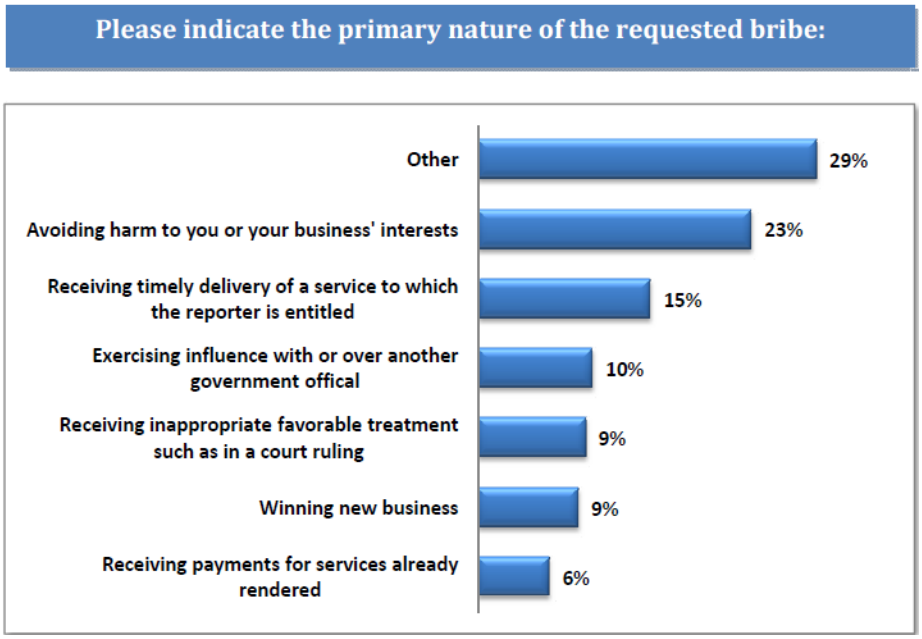

Figure 4. Please Indicate the Primary Nature of the Requested Bribe.
Reveals the nature of the bribe. Adapted from Business Registry for International Bribery and Extortion (Business Registry for International Bribery and Extortion) 2010 Mexico Report (Business Registry for International Bribery and Extortion, 2010, p. 7).

Walmart's alleged FCPA violation. The widespread corruption in Mexico is validated by the impending Walmart FCPA case. In 2012 a story published by The New York Times via a whistleblower ousted Walmart as the executer of grease payments to government officials to speed up the permits for construction of its stores throughout Mexico, which took place over many years. Walmart is the world's largest retailer and the largest private employer in Mexico. Walmart may have just followed the bureaucratic protocol in Mexico: Builders pad budgets for

about 10% of the project to pay the individual in power to officials to authorize the project. Such expediting payments may appear reasonable for American builders, considering that the number of days to obtain a permit in the US is 26 days, while in Mexico it is 81. More than delaying permits, some bureaucrats may go out of their way to delay the decision to purposefully yield a bribe (”Walmart’s Mexican morass,” 2012). Considering that Walmart, the world’s largest retailer that boasts significant economic and legal power, can succumb to paying bribes in the normal course of business to be present in Mexico’s markets, there is little doubt that smaller entities will encounter the same barriers. The case is significant because the manner in which the case was ousted implicates Walmart in hiding FCPA violations from regulators. Although the Walmart case is still under investigation and the alleged bribery is not permissible under Mexican law, possible FCPA violation defenses include the rationale that the payments were made for facilitating activities, which may be allowed under the FCPA facilitation exception.

The Price of a Compliance Program

The expense associated with implementing an effective compliance program is not easily estimated because each program is unique, commensurate with the company’s size, industry, global span, and degree of complexity. In addition a compliance program generally encompasses several related topics such as ethics, gifts and entertainment, antimoney laundering, personal securities trading, conflict of interest, and other industry-specific regulatory compliance demands that add layers of complexity and increase the cost of the program. For most companies implementing an FCPA compliance policy and procedures is merely adding another layer to an existing overarching compliance program. Due to the multipart composition of a compliance program, most cost estimates are all-inclusive and not directly related to implementing an FCPA program. One estimate shows that a compliance program ranges between $450,000 to over $16

million and on average costs $3.5 million (Ponemon Institute, 2011). Although the estimated expense of implementing a compliance program may appear high, it is significantly lower than the outlay of an FCPA investigation and aftermath recovery. Following the bribery allegations in 2012, Walmart spent $439 million in legal and compliance expenditures and reserved another $200 million for the resolution of FCPA troubles, including implementing a new compliance program (Jaeger, 2014). Although the FCPA regulation does not offer an infallible compliance program model, companies looking into protecting themselves from liability related to an FCPA violation may find the correct path in the Federal Sentencing Guidelines. The Federal Sentencing Guidelines establish key elements such as cooperation, voluntary disclosure of impropriety, and an effective compliance program that if demonstrated could mitigate potential criminal charges (Girgenti & Hedley, 2011). Having an effective compliance program in place may reduce or eliminate liability stemming from actions of rogue employees who violate the FCPA against company directives. Implementing a robust program is important because of the FCPA covered parties concept, whereby company management may be held responsible for actions of all employees if the compliance program is viewed as lacking content and management support. Investment banking firm Morgan Stanley evaded prosecution from both DOJ and SEC by coming forward with a self-investigation into a former employee for misconduct in China (Slaughter & Ciresi, 2014). Morgan Stanley showed that its FCPA compliance program was robust by disclosing that the employee in question had received annual FCPA training and at least 35 FCPA compliance reminders and had responded to an annual certification of conduct and disclosure of personal dealings along with directives specific to the area under his management (Sklar, 2012). The system of internal controls over the ethics and compliance program at Morgan Stanley contained all categories that the Federal Sentencing Guidelines

expects; for Morgan Stanley the key point was to prove that it had conducted "effective training programs for directors, officers, employees, and other agents to provide such individuals with periodic information appropriate to their respective roles and responsibilities related to the ethics and compliance program" (Girgenti & Hedley, 2011, p. 99).

There are secondary costs for public companies in violation of the FCPA. One factor is the market reaction to FCPA announcements. The stock prices tend to drop when a company is implicated in an FCPA violation, even before the investigation starts (Wong & Conroy, 2009). Other factors include credit worthiness downgrading and class action lawsuits, and in the case of Titan, Inc., the company also lost a pending merger with Lockheed Martin after acknowledging losses associated with illegal activities resulting from FCPA violations (Wong & Conroy, 2009).

The US Is Not Alone

Global efforts are taking place in other sovereignties to curb corruption. There is an abundance of regulation and international agreements to support the end of corruption and both the US and Mexico have joined and committed to support the anticorruption efforts via several associations. Countries that have joined The Organisation for Economic Co-operation and Development (OECD), including the US, agreed to a clause to prohibit bribery in international business dealings and "to criminalize the bribery of foreign public officials in international business transactions" (United States Department of Justice & Securities and Exchange Commission, 2012, p. 7). The United Nations implemented the Convention Against Corruption (UNCAC) in 2005. In 1999 European countries implemented the Council of Europe and established the Group of States Against Corruption (GRECO) (United States Department of Justice & Securities and Exchange Commission, 2012). The US also collaborated with Latin American countries to sign the Inter-American Convention Against Corruption (IACAC). This

international effort provides evidence that curbing corruption is an important matter and participating countries have taken similar position.

Corruption is a concern for Mexican authorities who are taking steps to control corruption although the progress is slow and there is evidence that it may not be operating as expected. Mexico's commitment is evident by the country's membership and close work with OECD, UNCAC, and ICAC organizations (Robinson, 2013). Further, the enactment of the law "Ley Federal Anticorrupción en Contrataciones Públicas" (Federal Anticorruption Law in Public Procurement) in 2012 provides for sanctions and fines for "cohecho" (bribe) of public officials in the process of securing public contracts with the federal government (Robinson, 2013). However, the scope of the new law is limited to public procurement contracts and the punishment, and because the law is not criminal in nature, it does not result in imprisonment as punishment. Instead, the punishment is limited to sanctions and disgorgement (Robinson, 2013). A positive development in the new law is the protection to whistleblowers, domestic or foreign. Even though there are visible efforts in the fight against corruption, Mexico ranks 103rd out of 177 nations in the corruption perception index (Transparency International, 2014). Although there is no dispute that corruption in Mexico is widespread, there is indication that the bribes are primarily related to petty offenses and committed by police officers.

FCPA Compliance Challenges

The vague language in the regulatory requirements of the FCPA along the high expense attached to implementing and maintaining a robust compliance program comprise the toughest challenges within FCPA compliance. Muma (2014) proposes that the definitions in the FCPA are vague and problematic on purpose. Although the DOJ and the SEC have provided specific examples of each definition to provide guidance of what is considered a violation of the FCPA,

they have not changed the legislation, which is problematic and subject to present-day interpretation. Keeping a broad definition of the terms provides flexibility to address the evolving nature of bribery. Muma (2014) also proposes that it is unjust that smaller companies are at a greater risk for being locked out of the market for fear of fines and imprisonment stemming from noncompliance because these companies lack subject-matter expertise and are unable to afford hiring major law firms to design and support a comprehensive compliance program.

Discussion of Findings

Based on the review of the literature discussed in this paper, there is an indication that conducting business in Mexico can coexist with the Foreign Corrupt Practices Act (FCPA) requirements. It is possible for American companies to conduct and maintain business transactions in Mexico that are ethical and compliant with both local and U.S. laws. There are no obstacles or uncertainty so grave to substantiate that companies should abandon investing in Mexico because of concerns over FCPA violations. Five conclusions can be drawn from the literature review. First, Mexico's corruption problem is severe and widespread but mostly involves petty amounts, and bribe takers are primarily the police force. Second, the *facilitating* payment exception of the FPCA is contradictory to local laws and undermines the spirit of the FCPA. Third, it is cost-beneficial to abide by the FCPA because the cost of non-compliance can be massive. Fourth, little recourse is available for companies confronted with corruption, and existing channels are ineffective. Lastly, there is a significant disparity in the enforcement and investigation of corruption cases between the US and Mexico. Although both countries have legislation condemning corrupt acts, only the US is actively enforcing such laws. Nevertheless, the combined result of these findings supports the conclusion that American companies can conduct business in Mexico after considering and addressing these five matters.

Mexico's Corruption Problem

Although low wages is not the only factor, Mexican government officials paid low salaries and working under poor conditions are more likely to be exposed to corrupt acts. An overwhelming percentage of local police force utilizes *mordida* (bribery) to compensate for low wages (Morris, 2012). Instead of tracking down those who break the law, the police force has become part of the problem. In addition the legal system is inundated with corruption fueled by

disparity in wages (Ferreira-Orozco, 2010). A wide gap in wages between lower ranking judiciary members and the magistrate may lead an individual in a position of power to perceive that the wages are not commensurate with the workload and working conditions, creating a perfect justification for taking bribes (Ferreira-Orozco, 2010). A clerk may be able to find building permits amid a mound of delayed applications if the company is willing to express gratitude, namely, to pay a bribe.

Further, the corruption problem in Mexico is augmented as the drug cartels gain strength. The link between corruption and criminal business cannot not be ignored because corruption is one of the main tactics drug cartels employ to thrive in Mexico (Morris, 2012). Although Mexico's drug problem is not the focus of this paper, it is a factor that influences the public perception that corruption is widespread and fighting against it is dangerous. Powerful drug cartels have succeeded in taking over entire regions of the country (Partlow, 2014). Citizens learn that fighting corruption translated into fighting the cartels, and the consequences are frightful and potentially deadly (Partlow, 2014). The cartels' retaliation is violence and brutality, which perpetuates the perception that citizens have to accept corruption as part of the normal life.

Facilitating **Payments Undermine Local Law**

To recapitulate *facilitating* or *expediting* payments is an exception in the FCPA regulation to allow for small outside payments that take place in the course of requesting routine governmental action (United States Department of Justice & Securities and Exchange Commission, 2012). This exception favors American companies but contradicts local law. This type of activity is permitted because the end goal is for the company to be able to function and such *facilitating* or *expediting* payment activities are not connected with a decision by a local government official to obtain or retain business for the American company, which would violate

FCPA principles. However, bribing any type of government official is a crime according to local law, regardless of the company's intention. Allowing American companies to make *facilitating* payments undermines local law and authority and contributes to the perpetuation of corruption because it may give the appearance that an acceptable transaction took place.

Compliance is Worthwhile

Managers of American companies looking to implement an FCPA compliance program can compare the expenditures necessary for the implementation of a robust program to the negative financial impact of an FCPA investigation or the amount of potential fines for a violation to find that it is worthwhile to invest in a compliance program, which typically involves engaging experts in the subject matter and in the design of internal controls to align the program with management's philosophy. A robust compliance program should satisfy the Federal Sentencing Guidelines' overall approach that it is effective in preventing and detecting criminal conduct. This statement implies that compliance programs are not infallible but are reliable to a reasonable extent and that compliance programs can be unique and molded to fit the company's FCPA risk. Larger, more complex companies transacting with multiple countries in high volume will need a more robust program than a smaller company that occasionally transacts with a single sovereignty. For overarching compliance programs a larger scope comes with a higher price tag.

Expenditures related to a compliance program. A compliance program is the output of management's philosophy and approach towards integrity, and similar to a code of ethics, it can guide employees facing an ethical situation involving corruption. The hesitation related to a compliance program is not because American companies are against ethical behavior but because it is a natural response by management to analyze the cost-benefit of any expenditure. Compliance does not generate revenue; the benefits of the program do not offer an immediate

economic benefit to the company (Maurer & Maurer, 2013). Therefore, it is reasonably expected that management should perform due diligence and careful planning on this type of expenditure. The amount a company should expect to expend on the implementation of a compliance program varies considering that the sufficiency of a compliance program is subjective. The low range estimate is $450,000, and the average is $3.5 million (Ponemon Institute, 2011). From a business perspective this puts American companies at a great disadvantage from foreign competitors who may not have the same level of compliance to bear. In addition, this expense may be out of reach to smaller companies but it is still required to conduct business. Considering that FCPA is one part of many in an overarching compliance program, companies with a larger number of subsidiaries and complex, industry-regulated operations such as food and drug may expect to expend higher amounts in compliance, and smaller companies that may not be able to afford even the low end of the estimated cost may have to utilize more creative solutions to spread the FCPA compliance message, because although the breadth of the compliance program may differ, abiding by the law is not discretionary.

Economic loss related to noncompliance. The impact of FCPA violations goes beyond regulator and prosecutorial fees and penalties. A company's stock price tends to drop upon news of FCPA violations (Wong & Conroy, 2009). In addition the expenses related to an FCPA investigation alone "can be staggering" (Maurer & Maurer, 2013, p. 357). Further, local residents may resent foreign companies and respective nations that use economic power to corrupt government officials, and the effect is "a cost of incalculable magnitude" (Maurer & Maurer, 2013, p. 360). The subjective nature of these economic costs makes it difficult to measure the total impact of noncompliance. However, the measurable cost of noncompliance imposed via fees and penalties is estimated to be on average $9.4 million, twice the average cost of

implementing and maintain a compliance program (Ponemon Institute, 2011). Therefore, from a financial perspective American companies should opt for the implementation of a robust compliance program (Ponemon Institute, 2011) and include a layer dedicated to FCPA compliance.

Few Recourses Available

The role of the DOJ an SEC is limited to protecting the public and guarding investments, thus safeguarding U.S. markets and providing a fair playing field. These agencies operate under the assumption of a capitalistic approach, that is, the best product at the best price wins over the competition. However, there are no provisions that guide companies on how to proceed in countries where corruption prevails over capitalism. Rigged bidding, cronyism, and favoritism are some examples of unethical behavior that remain to be solved. Reporting such behavior to Mexican officials is risky because corruption reaches all levels of government officials. Fear of physical harm or retaliation can be a concern for American companies. The FCPA whistleblower program does not support resolving a company's grievance when confronted with corruption while conducting business in a foreign nation. It's an after-the-fact provision to expose a company instead of assisting in the pursuit of fairness. Pursuing legal recourse by alerting Mexican law enforcement to investigate is a slow and thus far ineffective process. Although Mexico has launched its first two foreign bribery investigations, there are several deficiencies in its laws and the lack of "human and financial resources" (Organisation for Economic Co-operation and Development, 2011, p. 18) dedicated to handle this type of caseload. Further, although there is a consensus on the high incidence of domestic bribery, statistics show that the number of investigations and prosecutions is low (Organisation for Economic Co-operation and

Development, 2011). From 2006 to 2010 the annual average number of domestic investigations and prosecutions was three, which indicates the low efficiency of the legal process.

US versus Mexico Dichotomy

The disparity in enforcement levels between the US and Mexico sends mixed messages to companies. On the American enforcement side, stringent requirements for a robust compliance program and record fines send companies scrambling to abide. On the Mexican side "the maximum fine for foreign bribery is up to the equivalent of one thousand days of minimum wage" (Transparency International, 2013, p. 58) and at the current exchange rate, the fine is approximately $6,000. There is a possibility of suspension or dissolution of the company, however, considering there have been no cases to date, that clause has not been enforced. Further, American enforcement prosecutes individuals involved in the case separately from the company. The outcome of each prosecution is independent of the other. Unlike Mexican law, which states that a company can only be held liable if a "natural person who is a member or representative of the company has been convicted of the crime" (Transparency International, 2013, p. 58), Mexican prosecutors have to prove that that the company had knowledge of the actions. Additionally, liability cannot be imposed on state-owned or controlled enterprises (Transparency International, 2013).

The Mexican enforcement response to the Walmart case if allegations are proven true may have historical significance and provide law enforcement credibility. Companies, regulators, critics, and the public may equate the outcome of the Walmart case to the seriousness of the Mexican government in fighting corruption. For American enforcement, Walmart's troubles are not in the FCPA violation per se. The company's alleged knowledge and cover-up of the bribery actions year after year is a negative element considering the Federal Sentencing Guidelines. The

fact that the allegation was not self-reported may weigh heavily on the penalty, although the company's reaction subsequent to the allegation has been exemplary. Nonetheless, there is an expectation that Walmart will be made an example by the DOJ and SEC. Mexican authorities have the same opportunity to send a strong message if the allegations against Walmart prove to be veritable.

Recommendations and Conclusions

Compliance with the Foreign Corrupt Practices Act (FCPA) is an area of growing concern for American companies because the outcome of recent enforcement actions has resulted in significant economic loss for violators and also revealed that corruption can touch companies of all sizes and span across diverse industries. FCPA compliance is a complex challenge considering it involves foreign individuals that are not under U.S. jurisdiction and, therefore, cannot be punished or even be compelled to testify in an American court. Further, local business customs and regulation over corruption may be asymmetrical or in conflict with those in the US. Therefore, an effective FCPA compliance requires a symbiotic cooperation among all parties involved, where each participant has a role to fulfill. This collaboration is important because FCPA compliance is beneficial to all parties involved: Legitimate companies seeking fair competition gain an expanded customer base and increased profits, a developing country in need of foreign investment collects additional taxes to provide for its citizens' welfare, law and enforcement agencies rely on strong regulation to apply justice, and citizens enjoy quality products and services at the lowest price. FCPA compliance in Mexico has not achieved this collaborative state, and therefore, the recommendations below should be considered in order to stimulate ethical behavior that enables improved quality of life for host nations, which is the foundation of FCPA compliance.

American Companies

Taking a proactive approach to comply with the FCPA is a company's best direction considering it is an element that prosecutors evaluate when determining whether to present a deferred or nonprosecutorial agreement to a company. Further, investors and consumers gain additional comfort when they perceive the company has an ethical approach to global business.

American companies should implement a robust anticorruption compliance program that includes at minimum all elements cited in the Federal Sentencing Guidelines. The program should be distributed to all subsidiaries, followed by a mandatory training for all individuals with authority to obtain or maintain business dealings with Mexican government officials. The frequency of subsequent training can be determined based on the risk of exposure to corruption. More important, the compliance program should cite common situations where bribery occurs in Mexico and the procedures available to escalate the matter. Specifically, the compliance program should include examples of corrupt behavior that is likely to take place while conducting business in Mexico and show the action expected from employees. The program should explain the law and link employees' role and responsibility to the consequence of an FCPA violation. Finally, the program should assert that the company pursues prosecution of employees who deviate from the program and expose the company to risk. Though an anticorruption program can vary in length and complexity based on the company, it is acceptable that implementation of a compliance program should be commensurate with the business risk and size. A risk assessment can be prepared to introduce areas the business is most exposed to potential corruption in Mexico. These steps provide both company and employees the information, resources, and means to comply with the FCPA and may reduce company liability in cases where a rogue employee deviates from such guidance. It is important to emphasize that the program is a mirror image of management's vision, or tone at the top, which assumes that management is legitimate and principled and that the program reflects management's vision and beliefs on ethical behavior while conducting business, otherwise the program is not valid.

In the case where a company, despite its best proactive efforts to comply with the FCPA, becomes aware that a potential FCPA violation has occurred, it should consult with expert

outside counsel to self report because the long term effect on the company's reputation is likely to have a significant negative impact. Self reporting an internal investigation denotes collaboration with authorities, which can minimize the regulatory enforcement outcome.

American Government

There should be stronger coordination and collaboration between US and Mexico in the investigation and prosecution of FCPA violations. Finding commonalities in both laws can save time and significant expense that is beneficial to both countries. That is, for bribery cases involving both US and Mexico concerns, a partnership can be formed to perform one investigation instead of two, and the results can then be relayed to enforcement agencies in each country for appropriate action. This collaboration can align the results and send a unified message that corruption is not tolerated in either country. This approach breaks down the jurisdiction barrier that has allowed ambiguity in FCPA compliance. In addition, there should be a similar transnational coordination in the distribution and use of monies collected from fines, penalties, and disgorgement.

A restitution program. The penalty for violations should include a restitution sum to be used to benefit the local community affected by the corruption. From the perspective of a Mexican citizen, there is a secondary loss after the corrupt act itself, when the monies collected from the violation stay in the US. The restitution amount should be net of the costs incurred by the US government, and the remaining amount can be returned to the host nation. It is possible for the DOJ to remit restitution to identifiable victims; it has done so before in the US v. Mason Engineering case in 1990. However, due to corruption in high level places in Mexico, there is an uncertainty that the money will fall into the wrong hands and be stolen or squandered.

Sizeable fines. FCPA violation fines are significant and should continue as such. The violation amounts should not leave any doubt or enable a calculation that proves that compliance is optional as a financial decision or that it is just one more expense resulting from normal business operation. Delivering steep penalties justifies the investment in an overall compliance program and promotes establishing a compliance culture that incentivizes good behavior. The violation amount should be larger than the sum of the benefits received because of the corruption, the loss suffered by the citizens, the costs incurred by enforcement agencies, and a moral cost that guarantees the company will not repeat the action. In addition the value of the penalty should consider the company's net worth and annual profits to make a measured effort to send a message that the company is not likely to forget or repeat the violation in the future.

Revise FCPA provisions. The *facilitating* payments exception should be repealed from the FCPA. Allowing for certain small payments of corrupt intent counters local efforts to combat corruption by allowing payments to a group of foreign official employees. The intention of the FCPA may have been to protect American companies' investments in foreign locations that, after making a significant investment, became vulnerable while conducting normal business operations. Instead, *facilitating* payments incentivize local corruption by making it legal within the books and records. Instead, there should be a system to allow the company to escalate the situation to both governments involved for a quick, joint response.

Mexican Government

Mexican authorities have made measured strides towards fighting corruption by implementing a new regulation to fight corruption at the procurement level. Although it is commendable to start the fight on corruption by implementing a regulation of limited scope that is more manageable, it will only be validated by investigations and subsequent enforcement. In a

country plagued by corruption, it is expected that the new regulation will yield many cases, and only then the new procurement anticorruption law will be a model for future expansion into other areas of government. Considering that neither the bribe taker nor giver has much to gain from revealing a corrupt act, a whistleblower is the best chance for the Mexican government to identify and combat corrupt acts. Although acting as a whistleblower is not part of the Mexican culture for fear of retribution or physical threats, cooperation between the US and Mexico by offering large rewards and possibly witness protection relocation may help bring corruption to the surface.

Further Research Needed

This research indicates that although there is sufficient evidence that Mexico is plagued with corruption in all levels within the government, additional research should be based on information obtained from actual prosecution of corruption cases to provide an understanding of the root cause of the failures in the process that are enabling bribery. The perception of corruption is primarily based on citizens' opinions, studies, and independent evaluation that generate the country's corruption index. However, in the preparation to defend against corruption, it is necessary to identify different situations and venues where bribery can flourish in order to educate the parties to the action and to analyze the root cause of corruption to enable the government to take actions to eradicate it. This is necessary because corruption has evolved into creative arrangements. For example, until a few decades ago bribery signified a suitcase full of cash passed under a table in a shady restaurant. Bribery has evolved, and it may be difficult to identify and prove that it took place. The "thing of value" has evolved, and it ranges from providing stock tips, buying real estate at inflated prices, giving vacation trips disguised as conferences, partnering with a local company that is owned by a foreign official, or preparing

fake travel arrangements to substantiate expenses that were used to pay off government officials, to preferential hiring treatment for the children of government officials. Providing preferential treatment in a corrupt way is a real life example of an alleged FCPA violation perpetrated by the reputable American company JP Morgan Chase. Whistleblowers revealed that JP Morgan Chase in China may have hired the sons and daughters of government officials who awarded money management and investment contracts, which makes them foreign officials and, therefore, applicable under the FCPA. In exchange for the portfolio, JP Morgan hired the sons and daughters at significant wages. These examples of resourceful bribery demonstrate how corrupt parties can change the means of corruption to hide and evade FCPA compliance, therefore making it harder to detect and enforce violations. It is likely that bribery in Mexico has evolved in a similar manner; therefore, additional efforts are needed in identifying and analyzing the extent and means of corruption to generate more effective solutions to eliminate it.

Conclusions

Concerns over FCPA compliance are not a deterrent to obtaining or maintaining business relationships in Mexico. There are ways to prepare an American company's management and employees for a challenging business environment where corruption may be perceived as an ordinary act. American companies should be aware that there is a high volume of petty bribery that can be expected from local Mexican officials. It should be noted that being aware of corruption is different from accepting it. Corruption is a serious concern for developing countries, and foreign nations should not take advantage of resources and services resulting from a corrupt act because it indirectly affects local citizens negatively. FCPA compliance in Mexico can be exponentially challenging because corruption has penetrated law enforcement and the judicial system. The perception of impunity further aggravates the lack of denunciations by the

public. The legacy of violence from the drug cartels threatens citizens who are fearful and cynical over impunity and the justice system. Although these are problems for the Mexican government to solve, working in collaboration can be beneficial to both countries.

American companies should operate in a manner that follows the spirit of the law, which for the FCPA is to condemn all types of corrupt acts. This requires an unwavering anticorruption position from company leaders, both in fact and in appearance, that conveys the message that employees must think and act ethically, and deviation from this behavior should be punished. American companies lead the world in many aspects and anticorruption should be another example of how leaders can pave the way for ethical business behavior.

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