Hastings Business Law Journal

Volume 19
Number 1 *Winter 2023*

Article 3

Winter 2023

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ABSTRACT

Despite the significant interplays between national security and corruption, discourse around the national security dimensions of the Foreign Corrupt Practices Act (FCPA) – the most prominent global anti-corruption framework – has been limited. With the deepening of global economic dependencies and data flows in critical areas such as telecommunications and ICT, there is ample reason to suggest that the use of private sector entities by governments for national security (e.g., intelligence-gathering) purposes is only likely to become more common. Recent controversies around the activities of Crypto AG and Huawei only serve to support this trend.

Within this broad context, this paper focusses on two distinct but closely related issues concerning the FCPA. First, it focusses on the least-discussed provision of the framework, the national security exemption, and aims to add to the discourse around it by introducing new legislative and historical context regarding its origins and operationalization. Conversely, the second part of this paper focuses on a well-studied part of the FCPA, the anti-bribery provision, and aims to apply existing jurisprudence to the emerging issues in the national security domain. In doing so, it employs a case-study approach modeled on historical as well as recent examples of private sector cooperation for national security purposes. Together, both parts aim to add to the discourse and close the analytical 'loop' concerning the interplay between national security and the FCPA.

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I. INTRODUCTION

Of all the provisions of the United States Foreign Corrupt Practices Act ('FCPA'),[1] perhaps the least studied is the exemption provided to certain activities undertaken for national security purposes.[2] Limited in scope and secretive in its application, there is more unknown than known about this enigmatic (and somewhat incongruous) provision which insulates *issuers* from liability for violations of the 'books and records' and 'accounting controls' provisions of the FCPA.

Ordinarily, given its nexus to national security, such a provision would be consigned to a fate in the shadows – immune from scholarly or judicial attention.[3] However, recent developments including renewed scrutiny on use of a Swiss company by the Central Intelligence Agency ('CIA') to compromise global communications infrastructure,[4] and debates surrounding Chinese-government control of Huawei,[5] have turned the spotlight back on the age-old[6] use of private sector entities by governments to advance national security and intelligence-gathering objectives – the very interplay that the national security exemption of the FCPA seeks to shield from public scrutiny.

Considering the topicality of these developments and their critical implications for global security, this paper explores the national security dimensions of the FCPA, the scope of its national security exemption, and aims to close the analytical loop by considering whether, and how, its better-studied anti-bribery prohibitions apply to bribery carried out in pursuance of national security.

Within this context, **Chapter II** sets context by presenting a broad overview of the interplay between corruption and national security in general. Drawing on declassified CIA documents, many of which are discussed for the very first time in this context, and the legislative history of

1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 to 77dd-3 (2020)).

2. 15 U.S.C. § 78m(b)(3)(A).

3. Mike Koehler, *The CIA's Classified Relationships with U.S. Publicly Traded Companies and the FCPA,* FCPA PROFESSOR (Mar. 20, 2020), http://fcpaprofessor.com/cias-classified-relationships-u-s-publicly-traded- companies-fcpa/ (perhaps the only writing which focusses exclusively on this provision). *See generally* Mike Koehler, *National Security and the FCPA,* FCPA PROFESSOR (Jan. 15, 2018), http://fcpaprofessor.com/national-security-fcpa/; *see also* Mike Koehler, *The Uncomfortable Truths and Double Standards of Bribery Enforcement,* 84 FORDHAM L. REV. 525 (2015) (for a more general overview of FCPA and national security considerations).

4. Greg Miller, *The Intelligence Coup of the Century*, WASH. POST (Feb. 11, 2020), https://www.washingtonpost.com/graphics/2020/world/national-security/cia-crypto-encryption-machines-espionage/.

5. *See, e.g.*, Sean Keene, *Huawei Ban Timeline: Detained CFO Makes Deal with US Justice Department*, CNET (Sep. 30, 2021), https://www.cnet.com/news/privacy/huawei-ban-timeline-detained-cfo-makes-deal-with-us-justice-department/; Scott Ikeda, *Crypto AG Shows That U.S. Concern Over Huawei Encryption Backdoors Comes from Long Experience Doing the Same Thing,* CPO MAG. (Feb. 25, 2020), https://www.cpomagazine.com/data-privacy/crypto-ag-shows-that-u-s-concern-over-huawei-encryption-backdoors-comes-from-long-experience-doing-the-same-thing/.

6. *See* S. REP NO. 94-755, at 205 (1976) (Church Committee Report Chapter on CIA Proprietaries).

the national security exemption, **Chapter III** provides unique insight into how the FCPA deals with this interplay in the American context. Following on, **Chapter IV** shifts focus from the national security exemption to the core of the FCPA – its anti-bribery provisions – and considers its key elements as relevant to the payment of bribes to advance national security objectives, including (i) the requirement for "corrupt" intent; and (ii) the *business purpose* test. Based on the disposition on these issues, this chapter also briefly considers questions concerning the public authority defense and whether the governmental agency at whose behest the payment is made may itself be a covered entity within the scope of the FCPA. The concluding chapter, **Chapter V**, summarizes the conclusions of the preceding chapters.

II. NATIONAL SECURITY AND CORRUPTION: A CONSIDERATION OF INTERPLAYS

In an oft-cited statistic, the United Nations ('UN') estimates that more than one trillion dollars (USD 1,000,000,000,000) is paid in bribes annually while another 2.6 trillion dollars is stolen – all due to corruption.[7] Amounting to more than five percent of global GDP and recognized as a major impediment to the achievement of the UN's 2030 Sustainable Development Goals,[8] corruption is stated to "*[rob] societies of schools, hospitals and other vital services, [drive] away foreign investment and [strip] nations of their natural resources.*"[9] In similar vein, the World Economic Forum (WEF) estimates that developing nations collectively lose a total of 1.26 trillion dollars to corruption, bribery, theft, and tax evasion every year – enough money to "*lift the 1.4 billion people who get by on less than $1.25 a day above the poverty threshold and keep them there for at least six years.*"[10] Similar studies chronicle the economic impacts of corruption on various social-economic spheres such as in reducing total investments,[11] reducing

7. U.N. Law & Crime Prevention, *The Costs of Corruption: Values, Economic Development under Assault, Trillions Lost, says Guterres*, U.N. NEWS (Dec. 9, 2018), https://news.un.org/en/story/2018/12/1027971. *See generally* Joseph Nye, *Corruption: A Cost-Benefit Analysis*, *in* POLITICAL CORRUPTION HANDBOOK 967-968 (Arnold Heidenheimer ed., Transaction Publishers, 1989) (for a widely accepted definition of the term); Kimberley Thachuk, *Corruption and International Security*, 25 SAIS REV. OF INT'L AFF. 143, 145 (Winter-Spring 2005), https://muse.jhu.edu/article/181955/pdf (last visited May 15, 2020).

8. *See, e.g.*, TRANSPARENCY INT'L, *No Sustainable Development without Tackling Corruption: The Importance of Tracking SDG 16* (July 17, 2017), https://www.transparency.org/en/news/no-sustainable-development-without-tackling-corruption-SDG-16.

9. U.N. Law & Crime Prevention, *supra* note 7 at 3.

10. Sean Fleming, *Corruption Costs Developing Countries $1.26 Trillion Every Year – yet Half of EMEA Think it's Acceptable*, WORLD ECON. F. AGENDA (Dec. 9, 2019), https://www.weforum.org/agenda/2019/12/corruption-global-problem-statistics-cost/.

11. Dominik Enste & Christina Heldman, *Causes and Consequences of Corruption: An Overview of Empirical Results*, IW-REPORT 2/2017 (Jan. 25, 2017), https://www.econstor.eu/bitstream/10419/157204/1/IW-Report-2017-02.pdf.

foreign direct investments,[12] and enhancing inequalities.[13] These effects translate to harms for overall economic growth and sustainable development – diverting funds from and negatively impacting education,[14] healthcare,[15] public sector services,[16] and innovation.[17] These harms are particularly pronounced in relation to poorer communities and emerging economies.[18]

While these statistics provide valuable insight into the nature and scale of the threat from corruption, they also reveal a traditional emphasis of corruption-related research on sociological, economic, and development related themes. While this is not surprising, corruption can also have latent implications for other equally critical areas of governance – including, most notably, security.[19]

While not a traditional area of emphasis,[20] increasing levels of attention have been paid to the relationship between corruption and different themes in national and global (in)security.[21] Corruption is increasingly acknowledged as a major threat to stability and peace.[22] For instance, several studies point to the role of corruption as an important driver of resentment towards and distrust in governments – driving individuals to "*bolster the ranks of non-state actors, from organised crime groups to terrorist organisations…*" and setting the scene for violence and conflict.[23] Other

12. *Id.* at 25.

13. Nieves Zuniga, *Correlation Between Corruption and Inequality*, U4 EXPERT ANSWER (July 6, 2017), https://www.u4.no/publications/correlation-between-corruption-and-inequality.pdf.

14. Sanjeev Gupta, Hamid Davoodi & Erwin Tiongson, *Corruption and the Provision of Health Care and Education Services* (June 2000), https://www.imf.org/external/pubs/ft/wp/2000/wp00116.pdf.

15. Karolina MacLachlan et al., *The Fifth Column: Understanding the Relationship Between Corruption and Conflict*, TRANSPARENCY INT'L (Katherine Dixon & Leah Wawro eds., July 2017), https://ti-defence.org/wp-content/uploads/2017/09/The_Fifth_Column_Web.pdf.

16. *See, e.g.*, U.N. OFF. ON DRUGS AND CRIME, *Manifestations and Consequences of Public Sector Corruption*, https://www.unodc.org/e4j/en/anti-corruption/module-4/key-issues/manifestations-and-consequences-of-public-sector-corruption.html (last visited May 15, 2020).

17. Caroline Paunov, *How Corruption Hurts Innovation,* WORLD ECON. F. AGENDA (Feb. 10, 2016), https://www.weforum.org/agenda/2016/02/how-corruption-hurts-innovation.

18. *See generally* Elvin Mirzayev, *How Corruption Affects Emerging Economies,* INVESTOPEDIA (Apr. 10, 2020), https://www.investopedia.com/articles/investing/012215/how-corruption-affects-emerging-economies.asp.

19. MacLachlan et al., *supra* note 15 at 2.

20. *Id.*

21. Matthew Murray & Andrew Spalding, *Freedom from Official Corruption as a Human Right,* BROOKINGS (Jan. 2015), https://www.brookings.edu/wp-content/uploads/2016/06/Murray-and-Spalding_v06.pdf; Kimberley Thachuk, *Corruption and International Security,* 25 SAIS REV. OF INT'L AFF. 143, 145 (2005), https://muse.jhu.edu/article/181955/pdf.

22. Mark Pyman et al., Corruption as a Threat to Stability and Peace, TRANSPARENCY INT'L DEUTSCHLAND E.V. (Feb. 2014), https://ti-defence.org/wp-content/uploads/2016/03/2014-01_CorruptionThreatStabilityPeace.pdf; OFF. ECON. COOP. DEV., INTEGRITY IN STATEBUILDING: ANTI-CORRUPTION WITH A STATEBUILDING LENS 9 (Aug. 2009) https://static1.squarespace.com/static/5728c7b18259b5e0087689a6/t/57ab3e99be659454809c15dc/1470840473978/Karen+Hussman+Integrity+in+state-building-lens+%281%29.pdf. *See also* Karolina MacLachlan, *Corruption and Conflict: Hand in Glove*, NATO REV. (Dec. 6, 2018), https://www.nato.int/docu/review/articles/2018/12/06/corruption-and-conflict-hand-in-glove/index.html.

23. MacLachlan et al., *supra* note 15, at 2.

studies suggest that corruption not only drives extremist recruitment, but also facilitates their functioning and "*hollows out*" state institutions meant to counter them.[24] Where conflicts are ongoing, corruption undermines state and international responses – with conflicts in Kenya, Iraq, and Afghanistan providing ready examples.[25] At a higher level of abstraction, empirical evidence suggests that the relationship between corruption and conflict flows both ways – with corruption causing conflict as well as following it.[26]

Within this backdrop, a relatively understudied interplay is that between state-sponsored corruption and security[27] – particularly as it relates to foreign intelligence activities. What makes this interplay different from the examples above is the role accorded to corruption itself. While the cases above considered corruption and its causational/correlational relationships with security, here the focus is on corruption *as a tool* to advance the national security objectives of one actor – potentially at the expense of the national security of another. Given that the focus here is on an already illegal phenomenon traditionally disguised from external scrutiny, within an ecosystem of classified information and espionage, the fact that it is understudied is unsurprising. The subsequent sections of this paper attempt to throw light on this interplay through the lens of the FCPA – arguably the world's most robust and prominent anti-corruption framework.[28]

After surveying relevant provisions of the FCPA relating to this interplay, this paper highlights and analyzes key legal issues which will determine *whether the framework applies to the use of bribery for national security purposes by government and private sector actors* with the same robust approach that it applies to commercially motivated graft.

24. Dave Allen el al., *The Big Spin: Corruption and the Growth of Violent Extremism*, TRANSPARENCY INT'L, (Leah Wawro & Karolina MacLachlan eds., Feb. 2017), https://ti-defence.org/wp-content/uploads/2017/02/The_Big_Spin_Web-1.pdf. *See*, *e.g.*, Narrelle Gilchrist & Norman Eisen, *Corruption and Terrorism: The Case of Kenya*, ORDER FROM CHAOS (Aug. 22, 2019), https://www.brookings.edu/blog/order-from-chaos/2019/08/22/corruption-and-terrorism-the-case-of-kenya/.

25. MacLachlan et al., *supra* note 15 at 2.

26. MacLachlan et al., *supra* note 15 at 6. *See also,* Enste et al., *supra* note 12 at 4; THE WORLD BANK, WORLD DEVELOPMENT REPORT 2011: CONFLICT, SECURITY, AND DEVELOPMENT, https://openknowledge.worldbank.org/handle/10986/4389 (last visited May 15, 2020); Kayla Izenman & Tom Keatinge, RUSI (Apr. 2, 2020), https://rusi.org/explore-our-research/publications/occasional-papers/exploring-connections-corruption-terrorism-and-terrorist-financing.

27. Jonathan Eubank, *"Ghost Money": Assessing the Risks of State-Sponsored Bribery*, THE GLOB. ANTICORRUPTION BLOG (June 10, 2019), https://globalanticorruptionblog.com/2019/06/10/ghost-money-assessing-the-risks-of-state-sponsored-bribery/.

28. Benjamin Schmidt, *FCPA: Looking Back on the World's Most Enforced Anti-Corruption Law*, ANTI-CORRUPTION & GOVERNANCE CTR. (Feb. 20, 2020), https://acgc.cipe.org/business-of-integrity-blog/fcpa-looking-back-on-the-worlds-most-enforced-anti-corruption-law/.

III. THE FCPA AND NATIONAL SECURITY: AN INTRODUCTION

Enacted in 1977 in response to revelations of widespread bribery of foreign officials by U.S. companies,[29] the FCPA is a federal anti-corruption framework comprising 'anti-bribery' as well as 'accounting' provisions.[30]

In summary, the anti-bribery provisions prohibit the "*offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value*" (hereinafter 'payment' of 'anything of value') to a covered foreign official or entity[31] in order to "*[influence] any act or decision of [such foreign official or entity] in his or her official capacity, [induce such foreign official or entity] to do or omit to do any act in violation of [its lawful duty] . . . or to secure any other improper advantage . . . in order to [obtain, retain, or direct business to any person].*"[32] For payments or conduct to be covered by this prohibition, they must be carried out with *corrupt* intent[33] and, where criminal liability is sought for individuals, violations must be willful.[34] These provisions apply to cover:[35] (1) "issuers"[36] and their officers, directors, employees, agents, and shareholders;[37] (2) "domestic concerns"[38] and their officers, directors, employees, agents, and shareholders;[39] and (3) certain foreign persons and entities (other than issuers and domestic concerns) acting while in the territory of the United States.[40]

In addition, the FCPA includes 'accounting provisions' which are intended to prevent "*the falsification of corporate books and records to conceal bribery.*"[41] These provisions require issuers to (i) make and keep books, records, and accounts, which "*in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer*"[42]

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29. Michael V. Seitzinger, *Foreign Corrupt Practices Act: A Legal Overview*, CRS REP. FOR CONGRESS (Sept. 2, 2004), https://digital.library.unt.edu/ark:/67531/metadc821543/m2/1/high_res_d/RS21925_2004Sep02.pdf; Michael V. Seitzinger, *Foreign Corrupt Practices Act (FCPA): Congressional Interest and Executive Enforcement*, *in Brief* 1 (Mar. 15, 2016), https://sgp.fas.org/crs/misc/R41466.pdf.

30. U.S. DEPT. OF JUST. & SEC, Just. Manual, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 2 (Nov. 14, 2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf (hereinafter "U.S. Dep't of Just., Manual").

31. 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A) (defining "foreign official").

32. U.S. Dep't of Just., Manual, at 14. S*ee* 107 n.74, 108 n.75; *see also,* 15 U.S.C. §§ 78dd- 1(a), 78dd-2(a), 78dd-3(a).

33. 15 U.S.C. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A); U.S. Dep't of Just., Manual, at 14.

34. 15 U.S.C. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A); U.S. Dep't of Just., Manual, at 14.

35. U.S. Dep't of Just., Manual at 10.

36. *Id.* at 11 ("*A company is an "issuer" under the FCPA if it has a class of securities registered under Section 12 of the Exchange Act46 or is required to file periodic and other reports with SEC under Section 15(d) of the Exchange Act*").

37. 15 U.S.C. § 78dd-1(a).

38. 15 U.S.C. § 78dd-2(h)(1).

39. 15 U.S.C. § 78dd-2(a).

40. 15 U.S.C. §§ 78dd-3(a), 78dd-3(f)(1) (defining "person" for purposes of provision).

41. U.S. Dep't of Just., Manual at 39.

42. Section 13(b)(2)(A) of the Exchange Act, 15 U.S.C. § 78m(b)(2)(A).

and (ii) devise and maintain a system or internal accounting controls "*sufficient to assure management's control, authority, and responsibility over the firm's assets*."[43]

A. THE NATIONAL SECURITY EXEMPTION: AN INTRODUCTION

The FCPA contains several exceptions and defenses to conduct prohibited under the provisions above. For instance, a defendant alleged to have violated the anti-bribery provisions may be able to avert liability by showing that the payment (or transaction) in question was lawful under foreign law[44] or a 'reasonable' and 'bona fide' expenditure relating to the (i) promotion, demonstration, or explanation of a product or service, or (ii) the performance of a governmental contract.[45] In addition, "*facilitating or expediting*" payments made to covered foreign parties in order to "*expedite or to secure the performance of a routine governmental action*" are excepted from the anti-bribery provision.[46]

As relevant to the present study, issuers are shielded from liability for violations of the accounting provisions[47] of the FCPA where acting "*in cooperation with*" and "*upon the specific, written directive of*" the head of any federal department or agency in relations to matters "*concerning the national security of the United States.*"[48] However, unlike the provisions above, the national security exemption has received negligible attention. The provision seems to have never been cited in judicial decisions, is unaddressed in the DOJ manual, and rarely attracts more than a few perfunctory sentences – largely paraphrasing statutory language – in most FCPA guides and commentaries.[49]

Despite this lack of attention, several generalized observations may be made from the text of the provision itself. *First*, it is well-acknowledged that the exemption only applies to obligations arising under the *accounting* provisions of the FCPA[50] – which, in turn, only apply to *issuers*. Practically, this exemption allows issuers to misrepresent or disguise payments relating to national security. *Second*, there are clear statutory requirements relating to how the exemption is operationalized. Deviations from compliance with the accounting obligations by issuers must be on the basis of *express, written*

43. Section 13(b)(2)(B) of the Exchange Act, 15 U.S.C. § 78m(b)(2)(B).

44. 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1).

45. 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

46. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

47. 15 U.S.C. § 78m(b)(2).

48. 15 U.S.C. § 78m(b)(3)(A). *See also* 15 U.S.C. § 78m(b)(3)(B).

49. S*ee, e.g.*, DONALD J. ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT § 3:4, PRACTISING LEGAL INSTITUTE (2nd ed. 2013).

50. SIMPSON THACHER & BARTLETT LLP, *The International Anti-Bribery Act of 1998 Amends the Foreign Corrupt Practices Act and Implements the OECD Convention Combatting Bribery of Foreign Public Officials* (Nov. 24, 1998), www.stblaw.com/docs/default-source/cold-fusion-existing-content/publications/pub404.pdf; ANTHONY J. PERFILIO, FOREIGN MILITARY SALES HANDBOOK § 12:20, WL (database updated Oct. 2021); PETER J. HENNING, 2 CORPORATE CRIMINAL LIABILITY, § 9:21 (3rd ed. 2019), WL (database updated Sept. 2020).

directives of the *head* of a *federal department or agency* who, in turn, must have been authorized to issue such directives by a Executive order.[51] Further, a directive issued under this provision must meet certain standards of particularity – detailing the *specific facts and circumstances* with respect to which national security exemption is to be invoked.[52] *Lastly*, in terms of accountability measures, each directive, unless renewed in writing, expires one year from issuance.[53] The federal official responsible for issuing directives is required to maintain a complete file of all such directives and, further, to annually transmit a 'summary of matters' covered by directives in force at any point during the previous year to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.[54]

B. NATIONAL SECURITY AND THE FCPA: EXAMINING HISTORICAL CONTOURS

Declassified CIA records and legislative history provide some additional context regarding the national security exemption and its use.[55]

In relation to legislative history of the framework, it is notable that the initial version of the FCPA did not include a national security exemption.[56] Upon introduction, the bill was referred to the Senate Committee on Banking, Housing and Urban Affairs for further study.[57] It was within this Committee that the national security exemption was first discussed. During a mark-up session held on Apr. 6, 1977, it was proposed that Title I of S.305 be amended so as to not inadvertently require "*public disclosure of contracts between federal agencies and corporations which are classified for national security or national defense purposes.*"[58]

As highlighted in the ensuing discussion, the amendment was intended to have the effect of continuing to permit federal agencies "*responsible for national security and national defense to exempt [. . .] classified contracts from [. . .] public disclosure requirements"* while the SEC would continue to have access to them.[59] While the Committee was reluctant to consider, in open session, specific instances where the exemption would be

51. 15 U.S.C. § 78m(b)(3)(A).

52. *Id.*

53. *Id.*

54. 15 U.S.C. § 78m(b)(3)(B).

55. To the author's knowledge, barring a few of these documents (discussed on the FCPA PROFESSOR Blog Post), most have not been surveyed before.

56. S. 305, 95th Congress (Jan. 18, 1977). It may also be noted that the bill, as introduced, was not known as the FCPA at the time.

57. See *Actions Overview S.305 – 95th Congress (1977-1978)*, CONGRESS.GOV, https://www.congress.gov/bill/95th-congress/senate-bill/305/actions?KWICView=false (last visited May 16, 2020).

58. *Corporate Bribery: Markup Session of the United States Senate Committee on Banking, Housing and Urban Affairs on S. 305 held on Apr. 6, 1977*, 95th Congress, 37 (1977) (transcript of Markup session discussion) (hereinafter "Markup Session").

59. *Markup Session* at 38.

operationalized, it was noted that the exemption was intended to cover "*contracts . . . typically for the procurement of equipment and equipment [which are] frequently very sensitive . . . [being for] defense or intelligence purposes*".[60] The amendment, considered by the Committee to primarily deal with 'procurement' matters, was stated to be supported by the Administration as well as the SEC, adjudged to be necessary and, therefore, was inserted into S.305.[61]

The provision was also the subject matter of discussion at the conference stage of the legislative process. While the Senate bill (S.305) contained the national security exemption, the House version did not.[62] Upon the House's initiative, and subsequent to negotiations within conference, the proposed provision was amended to require that: (i) each exemption directive under the national security provision be issued only pursuant to Presidential authority to issue such directives; and (ii) a summary of all such directives shall be submitted annually to appropriate intelligence committees.[63] This version of the provision was enacted and remains current today. Notably, the conference report also contained the following statement of intent concerning the provision and its scope:

> *The conferees intend to make clear, as set forth in the Senate provision, that the only matters to be excluded from the requirements of paragraph (2) are those which would result, or would be likely to result in the disclosure of information which has been classified by the appropriate department or agency for protection in the interests of the national security and then only to the extent that such information is specifically related to the person's lawful cooperation*.[64]

Declassified materials demonstrate that the CIA was closely concerned with and involved in the passage of the FCPA, including the national security exemption. For instance, several documents suggest that the Agency closely followed the FCPA legislative proposal pre-enactment.[65] Language proposed

60. *Markup Session* at 38.

61. *Markup Session* at 38.

62. H. REPT. NO. 95-831, at 11 (1977).

63. H. REPT. NO. 95-831, at 11 (1977) ("*The House receded to the Senate with an amendment. The amendment required that each directive be issued only pursuant to Presidential authority to issue such directives…In addition, the amendment provides that a summary of all such directives shall be submitted annually to the appropriate intelligence oversight committees….*")

64. H. REPT. NO. 95-831, at 11 (1977).

65. *See, e.g.,* INTERNAL NOTE ON PROPOSED AMENDMENTS TO S.3664, A BILL "TO AMEND THE SECURITIES EXCHANGE ACT OF 1934 TO REQUIRE ISSUERS OF SECURITIES REGISTERED PURSUANT TO SECTION 12 OF SUCH ACT TO MAINTAIN ACCURATE RECORDS, TO PROHIBIT CERTAIN BRIBES, AND FOR OTHER PURPOSES", CIA FOIA READING ROOM, CIA-RDP79-00957A000100100048-7, https://www.cia.gov/library/readingroom/docs/CIA-RDP79-00957A000100100048-7.pdf (last visited May 17, 2020) (Internal note along with an undated internal CIA document proposing amendments to the FCPA bill to account for national security concerns; The note suggests that the CIA's proposed amendments were rejected in favor of a broad general national security exemption) (hereinafter "INTERNAL NOTE").Several declassified entries on the journal of the Office of Legislative Counsel of the CIA also reference check-ins on the status of the FCPA at various stages of the legislative process: JOURNAL – OFFICE OF LEGISLATIVE COUNSEL DT. MONDAY – 26 JULY 1976, at 2 (July 26, 1976), CIA FOIA READING ROOM, CIA-RDP79-00957A0001001000033-3,

by the Agency for the national security exemption was seemingly narrowed in Congress[66] – which also ended up enacting broad accountability safeguards on the issuance of exemption directives.[67] Notably, the CIA was requested (by the OMB) for its comments on the FCPA prior to its Presidential approval. In declassified correspondence, the Agency stated that it took no position regarding much of the proposed framework (including the anti-bribery provisions) but expressed strong support for the national security exemption included as Section 102(3) of Title I of the proposal. In relation to this provision, the Agency noted that it "*protects from public disclosure national security information . . .*" and "*must be included in the legislation if necessary and lawful endeavors between this Agency and U.S. corporations are to be protected . . . .*"[68] A declassified memo also included FCPA-related amendments on a "*legislative watch list*" used to monitor Congressional activities and track legislation and votes.[69]

There are also several interesting documents which relate to the impact of the FCPA on operational matters. For instance, there are indications based on journal entries that CIA officials, in 1978, considered Section 102 of FCPA as potentially "*[forcing] corporate management to reveal whether the company has any CIA officers on its payroll.*"[70] Although, whether such a

https://www.cia.gov/library/readingroom/docs/CIA-RDP79-00957A000100100033-3.pdf (Last visited May 17, 2020); JOURNAL – OFFICE OF LEGISLATIVE COUNSEL DT. WEDNESDAY – 15 SEPTEMBER 1976 (Sep. 15, 1976), CIA FOIA READING ROOM, CIA-RDP79-00957A0001001000017-1, https://www.cia.gov/library/readingroom/docs/CIA-RDP79-00957A000100100017-1.pdf (last visited May 17, 2020) (contains two entries relating to the FCPA and notes further steps to "*learn the current state of play*"); OFFICIAL ROUTING SLIP TO OFFICE OF LEGISLATIVE COUNSEL AND RM 7D35 HQS FROM ASSOCIATE GENERAL COUNSEL DATED – 10 SEP. 1976 (Sep 10, 1976), CIA FOIA READING ROOM, CIA-RDP79-00957A000100100019-9, https://www.cia.gov/library/readingroom/docs/CIA-RDP79-00957A000100100019-9.pdf (last visited May 17, 2020) (containing notes on an undisclosed memo concerning the introduction of the anti-bribery provisions of FCPA in the House); ROUTING AND RECORD SHEET FROM LEGISLATIVE COUNSEL TO LOGS AND PROCUREMENT DIV., GENERAL COUNSEL DT. 27 AUGUST 1976, at 25 (Aug. 27, 1976), CIA FOIA READING ROOM, CIA-RDP77M00144R001100220010-8, https://www.cia.gov/library/readingroom/docs/CIA-RDP77M00144R001100220010-8.pdf (last visited May 17, 2020); LETTER FROM CIA OFFICE OF LEGISLATIVE COUNSEL TO OFFICE OF MANAGEMENT AND BUDGET DT. 17 SEP 1976 (Sep. 17, 1976), CIA FOIA READING ROOM, CIA-RDP78M02660R000800020022=5,https://www.cia.gov/library/readingroom/docs/CIA-RDP78M02660R000800020022-5.pdf (Letter/memo to OMB from CIA showing concern that the FCPA would require the disclosure of classified information and attaching the CIA's proposed amendments to S.3664 – with an undated noting that the CIA was pleased to hear that the Administration was opposed to S.3664).

66. *Id.* INTERNAL NOTE.

67. H. REPT. NO. 95-831, at 11 (1977).

68. LETTER FROM STANSFIELD TURNER (DCI) TO JAMES M. FREY (OMB) DT. 13 DECEMBER 1977, at 1 (Dec. 13, 1977), CIA FOIA READING ROOM, CIA-RDP80M00165A002100060006-0, https://www.cia.gov/library/readingroom/docs/CIA-RDP80M00165A002100060006-0.pdf (last visited May 17, 2020).

69. MEMORANDUM RE: TRACKING LEGISLATION AND VOTES DT. 10 FEBRUARY 1987, at 2 (Feb 10, 1987), CIA FOIA READING ROOM, CIA-RDP90M00004R000900080010-0, https://www.cia.gov/library/readingroom/docs/CIA-RDP90M00004R000900080010-0.pdf (last visited May 17, 2020).

70. JOURNAL – OFFICE OF LEGISLATIVE COUNSEL DT. 31 JULY 1978, at 2 (July 31, 1978), CIA FOIA READING ROOM, CIA-RDP81M00980R003100020001-5,

position was adopted is unclear. A declassified draft memorandum from September 1978 is particularly interesting.[71] This memorandum, inter alia, contains references to the following practices concerning exemption directives under the FCPA (as followed in 1978):

- The Director of Central Intelligence, in April 1978, delegated responsibility for initiation and maintenance of FCPA exemption directives to the CIA office of the General Counsel (OGC).[72] Other documents reveal that the handling of exemption directives under the FCPA was a task entrusted to the Operational Support Division of OGC.[73]
- Based on an Agency-wide survey, it was concluded that there were *six* major categories of "*confidential CIA/U.S. corporate relationships*" (also referred to as "*CIA/publicly held corporation relationships*")[74] for which specific exemption directives would be required to be issued.[75] Presidential authorization for these six categories was obtained.[76]
- Each corporate recipient of an exemption directive had a 'designated senior corporate official' who would formally acknowledge receipt of the directive and return the original to the Agency for filing.[77]
- The Agency was – in 1978 – in the process of preparing a 'significant' number of exemption directives. However, further references to these directives are redacted.[78]

Other declassified files which mention the FCPA include documents such as policy and legislative memoranda circulated to the CIA for

https://www.cia.gov/library/readingroom/docs/CIA-RDP81M00980R003100020001-5.pdf (last visited May 17, 2020).

71. MEMORANDUM FOR THE DIRECTOR OF CENTRAL INTELLIGENCE FROM ANTHONY A. LAPHAM, GENERAL COUNSEL WITH SUBJECT "REPORT TO CONGRESSIONAL OVERSIGHT COMMITTEES REGARDING EXEMPTION DIRECTIVES ISSUED UNDER FOREIGN CORRUPT PRACTICES ACT", at 2 (Sept. 29, 1978), CIA FOIA READING ROOM, CIA-RDP81M00980R003000100002-6 (document internally numbered as OGC 78-6499), https://www.cia.gov/library/readingroom/docs/CIA-RDP81M00980R003000100002-6.pdf (last visited May 17, 2020) (hereinafter 'LAPHAM MEMO').

72. LAPHAM MEMO, at 2 (1978).

73. PROPOSAL FROM MAX HUGEL (DEPUTY DIRECTOR FOR ADMINISTRATION) RE: REVISION OF [REDACTED] AND FIGURE 2A, OFFICE OF GENERAL COUNSEL, (JOB #9419), at 6 (Mar. 18, 1981), CIA FOIA READING ROOM, CIA-RDP84B00890R000400070065-8, https://www.cia.gov/library/readingroom/docs/CIA-RDP84B00890R000400070065-8.pdf (last visited May 17, 2020).

74. MEMORANDUM FOR THE DIRECTOR OF CENTRAL INTELLIGENCE FROM ANTHONY A. LAPHAM, GENERAL COUNSEL WITH SUBJECT "LTR TO THE HONORABLE ZBIGNIEW BRZEZINSKI, ASST. TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS, REGARDING IMPLEMENTATION OF THE FOREIGN CORRUPT PRACTICES ACT OF 1977", at 1 (Mar. 8, 1978), CIA FOIA READING ROOM, CIA-RDP81M00980R000800040076-7, https://www.cia.gov/library/readingroom/docs/CIA-RDP81M00980R000800040076-7.pdf (last visited May 17, 2020) (hereinafter "BRZEZINSKI LETTER MEMO").

75. LAPHAM MEMO, at 2 (1978).

76. LAPHAM MEMO, at 2 (1978). *See also* BRZEZINSKI LETTER MEMO (1978).

77. LAPHAM MEMO, at 2 (1978).

78. LAPHAM MEMO, at 2 (1978).

comment,[79] reports outlining legislative-executive cooperation on intelligence matters,[80] and memoranda outlining CIA periodic reporting requirements to Congress.[81] While these documents are dated, they demonstrate the close historical relationship between intelligence gathering activities, the private sector, and the early FCPA.

C. THE CORPORATION IN NATIONAL SECURITY: A CONTINUING LEGACY

If the CIA, in 1978, required a 'significant' number of exemption directives to be issued to operationalize corporations for its intelligence gathering activities, this number is only likely to be much higher in the modern context with globalization and the dominant roles played by U.S. corporations worldwide.[82] While the full extent of the manners in which corporations cooperate for intelligence purposes will likely be never known, public reporting, legislative history, and declassified documents reveal, at least, some of the forms that such cooperation can take.

As discussed at the time of the inclusion of the national security exemption, one of its key objectives was to shield sensitive *procurement* transactions for goods or services from public scrutiny.[83] Conceivably, where the CIA or another agency cannot make sensitive purchases or sales directly, it may use an established market participant to intermediate the transaction on an undisclosed basis – with provisions like the FCPA's national security exemption providing cover. *Second*, as reporting indicates, intelligence agencies often enter into 'commercial cover' arrangements with multinational enterprises. These facilitate the placement of agents, disguised as employees of the enterprise, for intelligence and likely other national

79. *See, e.g.,* MEMORANDUM FROM ALAN CHARLES RAUL (OMB) TO DESIGNATED AGENCY HEADS WITH SUBJECT "EXECUTIVE ORDER IMPLEMENTING THE OMNIBUS TRADE ACT", at 7-8 (Nov. 16, 1988), CIA FOIA READING ROOM, CIA-RDP90M00005R001400130002-6, https://www.cia.gov/library/readingroom/docs/CIA-RDP90M00005R001400130002-6.pdf (last visited May 17, 2020).

80. DRAFT DCI ANNUAL REPORT ON RELATIONS WITH THE CONGRESS AND OTHER LEGAL AND PROPRIETY MATTERS (EXTRACTS), at 49 (Dec. 13, 1978), CIA FOIA READING ROOM, CIA-RDP81M00980R002300040002-1, https://www.cia.gov/library/readingroom/docs/CIA-RDP81M00980R002300040002-1.pdf (last visited May 13, 2020).

81. MEMORANDUM WITH SUBJECT "REQUEST FOR COMMENTS: REVISED DOCUMENT "PERIODIC CONGRESSIONAL REPORTING REQUIREMENTS OF THE CENTRAL INTELLIGENCE AGENCY", at 2 (Jan. 9, 1986), CIA FOIA READING ROOM, CIA-RDP88G01332R000100010026-2, https://www.cia.gov/library/readingroom/docs/CIA-RDP88G01332R000100010026-2.pdf (last visited May 17, 2020).

82. *See, e.g.,* Jenna Ross, *These wo charts show U.S. dominance of global markets,* WORLD ECON. F. AGENDA (BLOG) (Feb. 27, 2020), https://www.weforum.org/agenda/2020/02/dominance-american-companies-global-markets-industry/ (last visited May 17, 2020); *and* Hamish Preston, *What's Your U.S. View?,* INDEXOLOGY BLOG (Jan. 15, 2020), https://www.indexologyblog.com/2020/01/15/whats-your-u-s-view/ (last visited May 17, 2020).

83. *Markup Session* at 37-38.

security purposes.[84] *Third*, as seen in the cases of Crypto AG,[85] Air America,[86] Brewster Jennings,[87] intelligence agencies may, directly or indirectly, enter into arrangements to own and/or control the activities of private entities operating in areas of strategic interest or to provide cover for its employees. Such arrangements, often constructed through untraceable fronts and intermediaries, permit governmental actors to foray into the private sector at arms-length for intelligence or other national security purposes.[88] *Fourth*, as seen in relation to Project Azorian, the CIA may contract with a private corporation for operational purposes – other than merely procurement. Here, the CIA contracted with Howard Hughes' Summa Corporation to help recover a sunken Soviet nuclear submarine from the Pacific Ocean bed.[89] *Fifth,* reports suggest that the CIA makes venture capital investments through entities such as In-Q-Tel in companies "*that can deliver useful technology to the intelligence community within 36 months.*"[90] *Sixth,* it is conceivable that private enterprises with global operations may be used to funnel payments, personnel, or equipment for covert operational matters abroad[91] –with provisions like the FCPA exemption once again providing cover. In all the above cases, the CIA (or other intelligence agencies) may act indirectly through front corporations for reasons that include shielding private sector entities from public blowback or criticism in case of exposure.[92]

84. *See* S. REP NO. 94-755, at 205 (1976) (Church Committee Report Chapter on CIA Proprietaries). *See, e.g., C.I.A. Covert Activities Abroad Shielded by Major U.S. Companies*, N.Y. TIMES (May 11, 1975), https://www.nytimes.com/1975/05/11/archives/cia-covert-activities-abroad-shielded-by-major-us-companies.html (last visited May 17, 2020).

85. Miller, *supra* note 4.

86. CTR. FOR THE STUDY OF INTEL. (CIA), AIR AMERICA: UPHOLDING THE AIRMEN'S BOND (2009), https://www.cia.gov/library/publications/intelligence-history/air-america/air-america.pdf (last visited May 17, 2020).

87. Walter Pincus and Mike Allen, *Leak of Agent's Name Causes Exposure of CIA Front Firm,* WASH. POST (Oct. 4, 2003), https://www.washingtonpost.com/archive/politics/2003/10/04/leak-of-agents-name-causes-exposure-of-cia-front-firm/623d7224-8048-4187-a3e0-3d51b0b6ba58/ (last visited May 17, 2020).

88. Joseph Menn, *Strong ties bind spy agencies and Silicon Valley,* REUTERS (July 3, 2013), https://www.reuters.com/article/us-usa-security-siliconvalley/strong-ties-bind-spy-agencies-and-silicon-valley-idUSBRE96214I20130703 (last visited May 17, 2020).

89. James Phelan, *An Easy Burglary Led to the Disclosure of Hughes-C.I.A. Plan to Salvage Soviet Sub,* N.Y. TIMES (Mar. 27, 1975), https://www.nytimes.com/1975/03/27/archives/an-easy-burglary-led-to-the-disclosure-of-hughescia-plan-to-salvage.html (last visited May 17, 2020).

90. Paul Szoldra, *14 cutting edge firms funded by the CIA,* BUS. INSIDER (Sept. 21, 2016), https://www.businessinsider.com/companies-funded-by-cia-2016-9 (last visited May 17, 2020); Lee Fang, *The CIA is investing in firms that mine your tweets and Instagram photos,* THE INTERCEPT (Apr. 14, 2016), available at https://theintercept.com/2016/04/14/in-undisclosed-cia-investments-social-media-mining-looms-large/ (last visited May 17, 2020).

91. *See, e.g.,* CTR. FOR THE STUDY OF INTEL.(CIA), AIR AMERICA: UPHOLDING THE AIRMEN'S BOND (2009), https://www.cia.gov/library/publications/intelligence-history/air-america/air-america.pdf (last visited May 17, 2020).

92. Joseph Menn, *Strong ties bind spy agencies and Silicon Valley,* REUTERS (July 3, 2013), https://www.reuters.com/article/us-usa-security-siliconvalley/strong-ties-bind-spy-agencies-and-silicon-valley-idUSBRE96214I20130703 (last visited May 17, 2020).

While there is no guarantee that the above examples overlap with any of the 'six' categories identified within CIA documents cited previously, if nothing else, they provide broad but verified examples of the forms of private sector cooperation on national security.

IV. BACK TO THE FUTURE: FCPA AND NATIONAL SECURITY

The sections above sought to provide a brief introduction to the interplay between national security, anti-corruption, and the private sector. This material also raises several issues concerning the FCPA and its scope. While the national security exemption applies to violations of the accounting provisions of the FCPA, several key questions arise in relation to the anti-bribery provision.

This section considers whether an FCPA-covered entity, making prohibited payments on behalf of a governmental actor, for national security purposes, can theoretically incur liability under this provision. While it is clear that there is no national security exemption applicable to the anti-bribery provisions, little – if any – analysis has considered the other issues likely to be raised by the attempted application of these provisions to covered conduct motivated by national security objectives.

For the purposes of this section, the hypothetical cooperation scenario that may be assumed to be that of a U.S. government agency – such as the CIA – seeking to achieve intelligence or national security objectives by supporting a well-known listed U.S. technology multinational ("X Corp") to acquire market share within a foreign jurisdiction. While the objectives for such cooperation may vary, in the present hypothetical, X Corp is intended to penetrate the telecommunications infrastructure sector of the foreign market with a view towards opening up new channels of signals intelligence gathering and playing spoiler against a competing bid by an entity owned by a hostile state.[93] X Corp is willing to cooperate, its participation is witting, and the endeavor is funded by the CIA through a front entity.

The foreign government floats a tender and X Corp submits a competitive bid. However, X Corp being a new market entrant is questioned as to its experience and competence. In order to sway the underpaid foreign official in charge of administering the tender, X Corp pays a substantial and well-disguised cash bribe. In due course, many competing bidders are disqualified on technical grounds and X Corp is awarded the tender. The follow-on security clearance process passes without any issues. After all, X Corp is a publicly held Fortune 100 entity with an illustrious client-base and a long-established reputation as a market leader. The penetration is complete.

A reading of the scenario (as is) suggests that several basic elements of the anti-bribery provision are assumed to be satisfied. For one, X Corp is

93. Typically, such activity may relate to a sector of strategic or critical importance such as backbone telecommunications infrastructure or public-sector cloud computing or information technology services (examples of critical sectors).

U.S. listed entity squarely covered under the *issuer* leg of the FCPA – the same category to which the national security exemption applies.[94] Further, the prohibited payment in question is in cash and, therefore, clearly a payment of something of value.[95] The recipient is a foreign government official responsible for award of the telecommunications tender[96] and the bribe is intended to *influence* the act of the official and obtain an *improper* advantage in the process.[97] These elements are unlikely to be controversial in most situations of the category covered herein. However, questions remain around the more subjective elements of the provision – including the requirement for *corrupt* intent and the *business purpose* test. These are considered below.

A. CORRUPT INTENT AND NATIONAL SECURITY

The *first* of these is the requirement that conduct, to amount to a violation of the anti-bribery provisions, must be done 'corruptly' (i.e. with *corrupt* intent).[98] Here, the key question is whether the intent of a covered entity (such as X Corp) is of a *corrupt* nature where the prohibited payment is at the behest of a government agency for intelligence gathering or national security purposes.

At the outset, it is important to acknowledge that there is some level of disagreement as to *what* must be done with *corrupt* intent in order to attract the application of the anti-bribery provisions of the FCPA. While the weight of authority considers that the *payment* (or offer, promise to pay, or making of a gift) in question must be with *corrupt* intent,[99] at least one authority argues that, rather than the payment, the intent requirement applies to the *activities* which trigger the federal jurisdictional bases of the anti-bribery provisions.[100] The DOJ, as well as courts, have consistently construed the corrupt intent requirement to apply to the *payment* in question (the former approach).[101] While a question of interpretation that will remain open for

94. 15 U.S.C. § 78m(b)(3)(A) (2020). For purposes of this hypothetical, 78dd-1 is assumed to be applicable. However, as the discussion pertains to elements common to all three branches of the FCPA, the discussion is equally applicable to § 78dd-2 and § 78dd-3.

95. DOJ MANUAL, at 14-16 (2012).

96. This individual is a 'foreign official' for purposes of 15 U.S.C. § 78dd-1(f)(1)(A).

97. Acts such as disqualifying competing bidders improperly and favoring X Corp's bid would fulfill requirements of 15 U.S.C. § 78dd-1(a)(1)(A)(i).

98. 15 U.S.C. § 78dd-1(a).

99. Robert W. Tarun, THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK: A PRACTICAL GUIDE FOR MULTINATIONAL GENERAL COUNSEL, TRANSACTIONAL LAWYERS, AND WHITE COLLAR CRIMINAL PRACTITIONERS 7 (2015).

100. Kevin T. Abikoff, John F. Wood, and Michael H. Huneke, ANTI-CORRUPTION LAW AND COMPLIANCE: GUIDE TO THE FCPA AND BEYOND § 4.III.B, Bloomberg Law (2018); (i.e., "*[usage] of…the U.S. mails or the means or instrumentalities of U.S. interstate commerce"* must be done *corruptly*).

101. *S.E.C. v. Straub,* 921 F.Supp.2d 244, 263 (2013).

courts to settle conclusively, the disposition on this issue does not affect the question concerning bribes for national security purposes.[102]

More germane to the present analysis is the question of whether national security related bribery substantively falls within the scope of 'corrupt' for the purposes of the provision. While the FCPA itself does not define the term, there is broad consensus on its meaning. At the time of enactment, committees of the House as well as Senate noted that:

> *The word "corruptly" connotes an evil motive or purpose such as that required under 18 U.S.C. 201(b) which prohibits domestic bribery. As in 18 U.S.C. 201(b), the word "corruptly" indicates an intent or desire wrongfully to influence the recipient. It does not require that the act be fully consummated or succeed in producing the desired outcome.*[103]

The DOJ as well as courts have adopted approaches which *track* the language above.[104] For instance, in *Schreiber,*[105] the Second Circuit held that:

> *[T]he word "corruptly" in the FCPA signifies, in addition to the element of "general intent" present in most criminal statutes, a bad or wrongful purpose and an intent to influence a foreign official to misuse his official position.106*

A similar approach was adopted by the Eighth Circuit in *Liebo*[107] where the court upheld a jury instruction which stated that an act is corruptly done "if done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means."[108] In *Kay*,[109] the Fifth Circuit upheld a similar instruction which defined corruptly to mean "*knowingly and dishonestly, with the specific intent to achieve an unlawful result by influencing a foreign public official's action in one's own favor*."[110] Additionally, it has been noted that corrupt intent must involve some "*expectation of a quid pro quo*"[111] and can typically be established through circumstantial evidence.[112] Payments made in response to extortionate

102. This is so as the present analysis is intended to focus on the substantive meaning of 'corrupt intent' rather what conduct such intent requirement applies to.

103. H.R. Rep. No. 95-640, at 7–8 (1977); S. Rep. No. 94-1031, at 7 (1976); S. Rep. No. 95-114, at 10 (1977) ("*The word 'corruptly' connotes an evil motive or purpose, an intent to wrongfully influence the recipient. It does not require that the act be fully consummated, or succeed in producing the desired outcome.*"); H. Lowell Brown, BRIBERY IN INTERNATIONAL COMMERCE § 2.6, Westlaw (database updated Feb 2020).

104. F. Joseph Warin, Michael S. Diamant, and Elizabeth G. Silver, THE U.S. FOREIGN CORRUPT PRACTICES ACT: ENFORCEMENT AND COMPLIANCE §C Portfolio 285, Bloomberg Law (updated 2017).

105. *Stichting v. Schreiber*, 327 F.3d 173 (2d Cir. 2003).

106. *Id.* at 182.

107. *United States v. Liebo*, 923 F.2d 1308 (8th Cir. 1991).

108. *Id.* at 1312.

109. *United States v. Kay,* 513 F.3d 461 (5th Cir. 2008).

110. *Id.* at 464.

111. Ved P. Nanda, THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS § 18.11 Westlaw (database updated Oct. 2019).

112. Kevin T. Abikoff et al., *Anti-Corruption Law And Compliance: Guide To The Fcpa And Beyond § 4.III.B*, Bloomberg L. (2018), https://www.bloomberglaw.com/product/blaw/document/25895444520 ("*[E]ach payment need not be correlated with a specific official act. Rather, it is sufficient to show that*

demands "*under imminent threat of physical harm*" cannot be said to have been made with corrupt intent.[113]

The discussion above makes clear that corrupt intent, at its core, involves the intent to influence a foreign official to *misuse their official position* in order to wrongfully direct, obtain, or retain business.[114] In other words, it is concerned with the intent behind the prohibited act of bribery in question – in many cases, to win a contract or to acquire certain business. Therefore, as long as a covered entity or person engages in bribery with the objective of achieving an unlawful end (such as the award of a tender based on non-merit considerations), its intent will likely be found to be corrupt.

This is unlikely to change in a national security context where a covered person or entity aims to advance business goals albeit with ulterior motives. While the ulterior or underlying *reasons or justifications* behind a prohibited payment may be to advance security or intelligence objectives, the corrupt intent requirement of the FCPA does not operate at this level of inquiry. As long as the intent is to improperly influence a foreign official in their decision-making, a secondary intent will not matter, and the intent will overall likely be considered corrupt in nature.[115] Further, a bribe paid to win a bid will satisfy the standard in *Liebo* as being both an unlawful means (a bribe) as well as an unlawful end (the non-merit award of the tender).[116]

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the payor intended for each payment to induce the official to adopt a specific course of action. In other words, the intended exchange in bribery can be 'this for these' or 'these for these,' not just 'this for that.'") (internal citations omitted).

113. U.S. Dep't of Just., Manual at 27; F. Joseph Warin et al., The U.S. Foreign Corrupt Practices Act: Enforcement And Compliance § C Portfolio 285 (2017), https://www.bloomberglaw.com/product/blaw/document/XOFGSR18?criteria_id=2dac91ec9c2a056f9f2b433776d38e50&searchGuid=8ada6535-c6a2-49c1-9895-bd1c27214129&search32=nyvr3hIxaHRTjX2JIBUOjw%3D%3DpA8a6zeMVAvJlkRQQ4ZjGDabHMZLf04ePGfpZfLA4ntf4YlIXHp42uFSSVOC-R4Fi3ONRa5WQQ4v_C3Z3a-BeRRLm6_I_UH5l3_qr3sHXSbs1r4uJLNBNImt8Jp46wGV.; S. Rep. No. 95-114, at 10 (1977)("*true extortion situations would not be covered by this provision since a payment to an official to keep an oil rig from being dynamited should not be held to be made with the requisite corrupt purposes.*"). *See also* U.S. Dep't of Just., Manual at 11(FN 169):

> "In order to establish duress or coercion, a defendant must demonstrate that the defendant was under unlawful, present, immediate, and impending threat of death or serious bodily injury; that the defendant did not negligently or recklessly create a situation where he would be forced to engage in criminal conduct (e.g., had been making payments as part of an ongoing bribery scheme); that the defendant had no reasonable legal alternative to violating the law; and that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm…[citation omitted].").

114. ROBERT W. TARUN, THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK: A PRACTICAL GUIDE FOR MULTINATIONAL GENERAL COUNSEL, TRANSACTIONAL LAWYERS, AND WHITE COLLAR CRIMINAL PRACTITIONERS 7 (2015).

115. Kevin T. Abikoff et al., Anti-Corruption Law And Compliance: Guide To The Fcpa And Beyond § 4.III.A.1 (2018), https://www.bloomberglaw.com/product/blaw/document/25895444520 (A defendant's possession of dual purposes, one legitimate and the other corrupt, does not protect the defendant from liability from the corrupt partial intent). See *United States v. Coyne*, 4 F.3d 100, 113 (2d Cir. 1993).

116. *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991).

The above survey suggests that the focus is on intent vis-à-vis the specific parties and payment at issue. If the object of the latter is to influence a foreign official improperly, corrupt intent will likely be found. Therefore, there is presently no support for the view that the advancement of national security objectives by a prohibited act or payment would not be considered as satisfying the corrupt intent requirement under the anti-bribery provisions of the FCPA.

B. THE BUSINESS PURPOSE TEST AND NATIONAL SECURITY

The *second* question is whether the payment has been made "*to assist [the covered entity] in obtaining or retaining business for or with, or directing business to, any person.*"[117] This is known as the business purpose test.[118] As applied to the present scenario, can it be stated that X Corp is acting for a 'business purpose' in bribing a foreign official to win a tender, albeit for national security purposes?

At its core, the question – once again – boils down to the level of abstraction at which the analysis is conducted. If the transaction is seen in isolation (as a bribe to win a tender), it is clearly for a business purpose (winning the tender). However, if seen more broadly (as an intelligence or national security operation), it is less clear. Here, questions arise relating to the meaning of 'business purpose' as well as whether *business* value and *quid pro quo* with the governmental agency play a role. If the tender won by X Corp was always going to be a loss-making endeavor, compensated by the CIA, does it meet the 'business purpose' test?

The test, in general, has been interpreted and construed broadly[119] to include "*bribe payments made to secure favorable tax treatment, to reduce or eliminate customs duties, to obtain government action to prevent competitors from entering a market, or to circumvent a licensing or permit requirement . . . .*"[120] In *Kay*, the Fifth Circuit found that bribes paid to obtain favorable tax treatment – and thereby reduce customs and sales tax liabilities – would satisfy the business purpose test.[121] In doing so, the Court found that

117. KEVIN T. ABIKOFF ET AL., ANTI-CORRUPTION LAW AND COMPLIANCE: GUIDE TO THE FCPA AND BEYOND 67 (2018), https://www.bloomberglaw.com/product/blaw/document/25895444520; 15 U.S.C. § 78dd-1(a) (2020).

118. F. JOSEPH WARIN ET AL., THE U.S. FOREIGN CORRUPT PRACTICES ACT: ENFORCEMENT AND COMPLIANCE § C Portfolio 285 (2017), https://www.bloomberglaw.com/product/blaw/document/XOFGSR18?criteria_id=2dac91ec9c2a056f9f2b433776d38e50&searchGuid=8ada6535-c6a2-49c1-9895bd1c27214129&search32=nyvr3hIxaHRTjX2JIBUOjw%3D%3DpA8a6zeMVAvJlkRQQ4ZjGDabHMZLf04ePGfpZfLA4ntf4YlIXHp42uFSSVOC-R4Fi3ONRa5WQQ4v_C3Z3a-BeRRLm6_I_UH5l3_qr3sHXSbs1r4uJLNBNImt8Jp46wGV.

119. KEVIN T. ABIKOFF ET AL., ANTI-CORRUPTION LAW AND COMPLIANCE: GUIDE TO THE FCPA AND BEYOND 156 (2018), https://www.bloomberglaw.com/product/blaw/document/25895444520; DOJ at 12. *See* H.R. Rep. No. 95-831, at 12 (referring to "business purpose" test); H. LOWELL BROWN, BRIBERY IN INTERNATIONAL COMMERCE § 2.9, Westlaw (database updated Feb. 2020).

120. U.S. Dep't of Just., Manual at 13.

121. U.S. Dep't of Just., Manual at 13; *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004).

the FCPA was intended to cover payments "*wider than only those that directly influence the acquisition or retention of government contracts or similar commercial or industrial arrangements.*"[122] According to the court:

> *[T]he congressional target was bribery paid to engender assistance in improving the business opportunities of the payor or his beneficiary, irrespective of whether that assistance be direct or indirect, and irrespective of whether it be related to administering the law, awarding, extending, or renewing a contract, or executing or preserving an agreement.*[123]

At the same time, the court in *Kay* also hinted that circumstances where a bribe has the effect of only increasing profit margins of "*an already profitable venture or ensur[ing] profitability of some start-up venture*" would not be considered as obtaining or retaining business.[124] Overall, the above has been understood to result in a general principle that the 'business' sought to be obtained or retained "*[need not be] with the foreign government or foreign government instrumentality that receives the offer or payment.*"[125] Similarly, the meaning of this language is not to be restricted to the mere awarding or renewal of contracts[126] and would include the *"conduct of overseas business*" in general.[127] These decisions suggest that – if sought to be applied in a new context such as national security – the breadth of the business purpose test is all but assured.

Within the context of a scenario such as that of X Corp, if seen merely at the transactional level, there would be no difficulty in finding that a covered entity or person engaging in prohibited conduct did so for the purposes of acquiring new business relationships and opportunities in the foreign state. Here, to win a tender to supply telecommunications infrastructure. If taken more broadly, as purely a national security operation, this conclusion is still likely to hold. Even where an entity like X Corp sought to penetrate a foreign market in a manner bereft of true business justification or opportunities to turn a profit, such scenarios are also likely to be caught by the breadth of the business purpose test. At the outset, it would seem that the business purpose test – as currently interpreted – is agnostic to business sense or profit-making potential of an opportunity. There is nothing within existing jurisprudence that 'business,' for purposes of the test, must be

122. *United States v. Kay*, 359 F.3d 738, 749 (5th Cir. 2004).

123. *Id.* at 750.

124. *Id.* at 760.

125. F. JOSEPH WARIN ET AL., THE U.S. FOREIGN CORRUPT PRACTICES ACT: ENFORCEMENT AND COMPLIANCE § C Portfolio 285 (2017), https://www.bloomberglaw.com/product/blaw/document/XOFGSR18?criteria_id=2dac91ec9c2a056f9f2b433776d38e50&searchGuid=8ada6535-c6a2-49c1-9895-bd1c27214129&search32=nyvr3hIxaHRTjX2JIBUOjw%3D%3DpA8a6zeMVAvJlkRQQ4ZjGDabHMZLf04ePGfpZfLA4ntf4YlIXHp42uFSSVOC-R4Fi3ONRa5WQQ4v_C3Z3a-BeRRLm6_I_UH5l3_qr3sHXSbs1r4uJLNBNImt8Jp46wGV.

126. *Id.*

127. H. LOWELL BROWN, BRIBERY IN INTERNATIONAL COMMERCE § 2.9, Westlaw (database updated Feb 2020).

successful. As long as the prohibited payment resulted in a business *opportunity,* it is likely to be covered. Even where a business opportunity is loss-making, there are likely to be reputational and marketing benefits that come with the winning of a tender in a critical sector in a foreign market.

While no decision has directly addressed this issue, the acceptance, in *Kay* that the test was meant to encompass bribes paid to improve business opportunities of the payor or beneficiary would suggest that it may extend to cover reputational and other intangible business gains arising from the award of a governmental tender. At the same time, the qualification in *Kay*[128] means that the applicability of such a principle would be a fact-specific exercise likely dependent on showing that the covered entity actually benefited from the reputational benefits of its successful bid.

Overall, in either of the above scenarios, there is nothing within extant jurisprudence which indicates that the business purpose test may stand in the way of applying the anti-bribery provisions of the FCPA to a national security operation involving the payment of bribes to secure market penetration.

Reading this conclusion with the sections above, it is clear that nothing within the text of the FCPA, or existing interpretations thereof, would protect an entity like X Corp from incurring liability under the anti-bribery provisions of the FCPA. Regardless of the fact that the prohibited payment was made to advance national security objectives, there is nothing within the statutory scheme of the FCPA to prevent such a payment from being considered as one prohibited under these provisions.

C. COVERAGE OF GOVERNMENTAL AGENCIES: STATUTORY SCHEME

While the sections above sought to consider the elements of the anti-bribery provisions as they applied to corporations in the national security context, this section briefly analyzes whether these norms cover the concerned arm of government at whose behest the corporation pays a bribe.

As outlined above, the anti-bribery provisions of the FCPA apply primarily to three categories of persons – issuers under 15 U.S.C. § 78dd-1, domestic concerns under 15 U.S.C. § 78dd-2 U.S., and other foreign persons and (non-issuer) entities under 15 U.S.C. § 78dd-3. In all of these three categories, the anti-bribery provisions cover primary actors as well as their officers, directors, employees, agents, and stockholders.

It is apparent from the breadth of these provisions that their primary focus is on the private sector. In relation to potential domestic governmental actors, it is clear that neither the first nor last categories above are applicable. For similar reasons, the *organizations* leg[129] of the *domestic concerns* category would not apply. While the *individuals* leg[130] of this category is

128. *United States v. Kay*, 359 F.3d 738, 760 (5th Cir. 2004).
129. 15 U.S.C. § 78dd-2(h)(1)(B) (2020).
130. 15 U.S.C. § 78dd-2(h)(1)(A) (2020).

wider (applying to U.S. persons generally), it is likely to be of extremely limited application in the national security context.[131] As a result, it is unlikely that a governmental actor would, in most circumstances, be considered to fall within a category of entity directly covered under the anti-bribery provisions of the FCPA.

In ordinary course, more relevant to this issue is likely to be the indirect theories of civil and criminal liability available in relation to prohibited conduct under the FCPA. These include principles available under the aiding and abetting[132] and conspiracy[133] general statutes.

Another scenario where these categories may be relevant is where a governmental actor channels payments through owned or managed corporate entities which fall within a covered category. Within this context, several intelligence agencies have been known to control or maintain investments in private entities – formally[134] as well as informally.[135] Where such an intermediary entity facilitates a payment to the bribe-paying entity, the former could theoretically incur liability under the primary or indirect theories of liability of the anti-bribery provisions. While this will be a fact-specific evaluation, unlike in the case of governmental actors, there is no threshold issue regarding coverage of such entities under the anti-bribery provisions.

D. COVERAGE OF GOVERNMENTAL AUTHORITIES: THE PUBLIC AUTHORITY DEFENSE

A key consideration that remains for analysis is the public authority defense – an affirmative defense under which a defendant "*seeks exoneration based on the fact that he reasonably relied on the authority of a government official to engage him in covert or illegal activity*".[136] A typical scenario where this defense is asserted is where an informant or cooperating party engages in criminal conduct at the request of governmental actors – such as law enforcement or intelligence agencies. For example, where an undercover

131. This is because individuals are unlikely to act in their personal capacities in relation to matters of national security.

132. 18 U.S.C. § 2 (2020); U.S. Dep't of Just., Manual at 34.

133. 18 U.S.C. § 371 (2020); U.S. Dep't of Just., Manual at 34.

134. Paul Szoldra, *14 cutting edge firms funded by the CIA,* BUS. INSIDER (Sept. 21, 2016), https://www.businessinsider.com/companies-funded-by-cia-2016-9 (last visited May 17, 2020); Lee Fang, *The CIA is investing in firms that mine your tweets and Instagram photos,* THE INTERCEPT (Apr. 14, 2016), https://theintercept.com/2016/04/14/in-undisclosed-cia-investments-social-media-mining-looms-large/ (last visited May 17, 2020).

135. *See* S. Rep No. 94-755, at 205 (1976) (Church Committee Report Chapter on CIA Proprietaries); Pincus, *supra* note 87; Center for Study of Intelligence, *supra* note 86.

136. *See U.S. v. Spires*, 79 F.3d 464 (5th Cir. 1996); *U.S. v. Achter*, 52 F.3d 753 (8th Cir. 1995); *U.S. v. Baptista-Rodriguez*, 17 F.3d 1354, 39 Fed. R. Evid. Serv. (LCP) 22 (11th Cir. 1994); *U.S. v. Reyes Vasquez*, 905 F.2d 1497 (11th Cir. 1990).

DEA informant enters, upon instruction, into an illegal transaction to purchase marijuana from a dealer under investigation.[137]

In legal terms, as the DOJ itself notes, there are several interrelated doctrines which are often conflated into this defense.[138] This includes scenarios where: (i) the defendant asserts a mistaken, but honest, belief that he/she was acting for or in cooperation with the government, (ii) the *affirmative* defense of public authority, and (iii) entrapment by estoppel. While the specific defense at issue will be highly fact-specific in a given scenario, as relevant to the national security context, the most relevant theory to consider is the affirmative defense of public authority. The typically premeditated nature of covert operations, the need to mobilize funds, and the lack of a national security exemption to the anti-bribery provisions make it unlikely that version (i) or (iii) would be relevant in such a context.

As far as the affirmative defense of public authority is concerned, it is not a *carte blanche* to violate the law. Decisions seem to either implicitly or expressly hold that the defendant must have held "*a reasonable belief that a government official has approved [the criminal actions]*". Further, courts have generally found that the government official must have real (i.e., actual) authority to authorize violation of the law by the defendant.[139]

These judicial limits are of significant relevance in the national security context. Taking the example of a CIA-funded bribe to win market access or sell compromised equipment, the bribe-paying entity would likely be unable to avail of the public authority defense in such a circumstance. In *Rosenthal*[140], the Eleventh Circuit, citing Executive Order 12333, observed (sic):

> *Officials of the C.I.A. or any other intelligence agency of the United States do not have the authority to authorize conduct which would violate "the constitution or statutes of the United States", including federal narcotics laws*.[141]

This holding has also subsequently been cited with approval.[142] Anecdotally, former CIA case officers have acknowledged the impact of the FCPA on operations. Commenting on the moral defensibility of the act of bribing a foreign government, a former CIA officer commented that she "*would not break the law, but if the law were changed, I would find the bribes morally acceptable*".[143] Another decorated former officer seems to obliquely

137. Dale Gilsinger, Annotated, *Construction and Application of "Public Authority Defense" to Criminal Proceedings,* 24 A.L.R. 6th 455, §2 (2007).

138. U.S. Dep't of Just., Manual (Jan. 15, 2021), https://www.justice.gov/archives/jm/criminal-resource-manual-2055-public-authority-defense (last visited May 17, 2020).

139. *United States v. Anderson*, 872 F.2d 1508, 1515 (11th Cir. 1989); *United States v. Rosenthal*, 793 F.2d 1214, 1236 (11th Cir.), *modified*, 801 F.2d 378 (1986), *and cert. denied*, 480 U.S. 919 (1987).

140. *Rosenthal*, 793 F.2d at 1214, *cert denied*, 480 U.S. at 919.

141. *Id.* at 1236.

142. *See, e.g., United States v. Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995), *opinion amended on denial of reh'g*, 98 F.3d 1100 (9th Cir. 1996).

143. JAMES M. OLSON, TO CATCH A SPY: THE ART OF COUNTERINTELLIGENCE 180 (2019).

suggest that the passage of the FCPA affected the ability of the CIA to ensure competitiveness of U.S. corporations.[144] Not only is the CIA constrained under the FCPA but arrangements between the Agency and the DOJ require reporting of violations of federal law by its personnel or observed in the conduct of operations.[145]

Also relevant to the present analysis is the related 'negation of intent' doctrine considered in cases such as *Giffen*.[146] Rather than an affirmative defense, this plea involves trying to rebut government evidence of the requisite standard of intent being met.[147] However, due to its limited acceptance and anti-bribery provision of the FCPA requiring a relatively low 'corruptly' *mens rea* standard, it likely may not be raised by a bribe-paying entity in the national security context.[148]

While much in this area of covert operations will remain grey, the availability of the public authority defense is not among them. The lack of authority of the CIA (or other intelligence authorities) to authorize the violation of U.S. laws will mean, barring significant judicial capitulation on the actual authority requirement, that entities operating at their behest will be unable to assert this defense in relation to violations of the anti-bribery provisions of the FCPA. Whether officials of concerned agencies (or their intermediaries) can themselves avail of the public authority or equivalent defenses is a question of governmental immunity and vicarious liability that is beyond the scope of this paper.

E. IMPLICATIONS FOR CRYPTO AG

While the sections above largely addressed hypothetical scenarios, this section aims to apply this analysis to the Crypto AG case referenced above. At the same time, it may be noted that questions relating to Crypto AG, due to issues of limitation,[149] are also all but hypothetical.

Public reporting around the Crypto AG operation suggests that there is documentary evidence that the Swiss entity "*and its secret owners engaged in subtle smear campaigns against rival companies, according to the*

144. *Id.* at 180-81. Unsurprisingly, neither suggests that the CIA's practices were amended subsequent to the enactment of the FCPA.

145. *See* MEMORANDUM OF UNDERSTANDING: REPORTING OF INFORMATION CONCERNING FEDERAL CRIMES (1995), https://fas.org/irp/agency/doj/mou-crimes.pdf (last visited May 17, 2020).

146. *United States v. Giffen*, 473 F.3d 30 (2d Cir. 2006).

147. *Id.* at 43 ("This is not an affirmative defense, but rather an attempt to rebut the government's proof of the intent element of a crime by showing that the defendant had a good-faith belief that he was acting with government authorization.").

148. *Id.* at 43 ("The relevance, and hence admissibility, of such a belief would depend, however, on the nature of the intent element of the charged crime, and whether a defendant's belief that his actions were authorized by the government would negate that intent.") (The Court also notes that the doctrine had thus far only been recognized in the Eleventh Circuit).

149. U.S. Dep't of Just., Manual, *supra* note 30, at 34 ("The FCPA's anti-bribery and accounting provisions do not specify a statute of limitations for criminal actions. Accordingly, the general five-year limitations period set forth in 18 U.S.C. § 3282 applies to substantive criminal violations of the Act").

documents, and plied government officials with bribes."[150] In the absence of any additional information or supporting documentation, certain assumptions may have to be made regarding the nature of the bribes. Reasonably, it may be assumed that the bribes fell within the broad definition of 'anything of value' and that they were paid to individuals who qualified as 'foreign officials' for purposes of the anti-bribery provisions of the FCPA. As the analysis above shows, when a payment is made with the aim of achieving an improper result from a foreign official, it will likely qualify as being one made with corrupt intent. Here, bribes were seemingly paid in order to either maintain Crypto AG's market position or to acquire new business. Both would meet the requirement for *corrupt intent* and satisfy the broad *business purpose* test.

What remains, therefore, is considering whether Crypto AG and its "*secret owners*" were covered under the anti-bribery provisions, and if the conduct met any recognized jurisdictional base. While it is impossible to reach a conclusive result on this issue without knowing the nature of relationship between the U.S. government and Crypto AG, reporting suggests that the CIA and BND, either directly or indirectly,[151] owned the entity as its joint shareholders.[152] Other reporting provides more detailed information – including the intermediary entities through which ownership was concealed from third parties.[153] Reporting also suggests that at least some of the corporate leadership at Crypto AG were *"witting to the CIA ownership*" and actively took directions from ownership on sales, strategy, and – critically – product development. This status quo continued from the early 1970s till the early 1990s when the BND exited the ownership of Crypto AG – making the CIA the sole owner.[154]

At the outset, it is to be noted that at least some part of the relationship between the CIA and Crypto AG, including its initiation, likely preceded the enactment of the FCPA in 1977. Similarly, most of the arrangement – especially its peak – subsisted prior to 1998 when amendments extended the framework to "*foreign firms and persons who cause, directly or through agents, an act in furtherance of such a corrupt payment to take place within*

150. CRYPTO MUSEUM, OPERATION RUBICON: THE SECRET PURCHASE OF CRYPTO AG BY BND AND CIA (Dec. 12, 2019), https://www.cryptomuseum.com/intel/cia/rubicon.htm (last visited May 17, 2020) (hereinafter CRYPTO MUSEUM). *See also* Scott Ikeda, *Crypto AG Shows That U.S. Concern Over Huawei Encryption Backdoors Comes from Long Experience Doing the Same Thing,* CPO MAG. (Feb. 25, 2020), https://www.cpomagazine.com/data-privacy/crypto-ag-shows-that-u-s-concern-over-huawei-encryption-backdoors-comes-from-long-experience-doing-the-same-thing/ (last visited May 18, 2020).

151. Miller, *supra* note 4; Scott Shane and Tom Bowman, *Rigging the Game: Spy Sting*, BALTIMORE SUN (Dec. 10, 1995), https://www.baltimoresun.com/news/bs-xpm-1995-12-10-1995344001-story.html (last visited May 18, 2020); CRYPTO MUSEUM, *supra* note 150.

152. Miller, *supra* note 4; ("When confronted with evidence that Crypto had been owned by the CIA and BND, Linde looked visibly shaken, and said that during negotiations he never learned the identities of the company's shareholders. He asked when the story would be published, saying he had employees overseas and voicing concern for their safety."); CRYPTO MUSEUM, *supra* note 150.

153. CRYPTO MUSEUM, *supra* note 150.

154. *Id.*

the territory of the United States."[155] As there was no involvement of any *issuer* entity, the only leg of the FCPA which would likely apply to the majority of the operation is that pertaining to 'domestic concerns'. While the Swiss-entity did not qualify under this leg as it was located abroad, the CIA front entity – allegedly "Intercom Associates"[156] – was supposedly incorporated in the U.S. As a result, the latter may be considered a domestic concern under 15 U.S.C. § 78dd-2 along with all U.S. nationals and residents associated with its operation.[157]

Therefore, if either this entity, or any of the associated individuals "*[made] use of the mails or any means or instrumentality of interstate commerce*" to make a prohibited payment, they may attract § 78dd-2 liability. As suggested in public reporting, the CIA – through Intercom Associates – took part in several meetings with representatives of Crypto AG on various issues relating to the operation of the business. If any of these involved discussions pertaining to the bribery of foreign officials, they would likely be covered under the 'domestic concerns' leg of the FCPA. Similarly, if the front entity or associated individuals made use of interstate commerce – including channels such as the mail[158] or telephones[159] – to communicate with Crypto AG on issues relating to such payments, such conduct may also be covered under the 'domestic concerns' leg.

Public reporting also indicates the involvement of *issuer* entities such as Motorola in providing technical consulting to the CIA as well as Crypto AG during the course of the operation.[160] If any such entity was a witting participant to the operation, and provided support in relation to the selection of foreign nations or officials to target – from a technical penetration perspective – their conduct could have theoretically been covered under the indirect theories of FCPA liability. However, till such time as additional information becomes available regarding the role of each of the participants of the Crypto AG operation, definitive conclusions on FCPA-related violations will be difficult. At the same time, this section should be seen not as an end in itself but as a means to operationalizing the preceding analysis – in consideration of how the FCPA framework addresses national security operations which involve governmental actors as well as covered private entities. Despite limitations, the anti-bribery provisions of the FCPA would not seem to outright condone bribery for national security purposes.

155. U.S. DEP'T OF JUST., FOREIGN CORRUPT PRACTICES ACT: AN OVERVIEW, https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act (last visited May 17, 2020).

156. CRYPTO MUSEUM, *supra* note 150.

157. 15 U.S.C. § 78dd-2(h)(1)(B).

158. *See, e.g., United States v. Riccardelli*, 794 F.2d 829, 834 (2d Cir. 1986).

159. *See, e.g., United States v. Dela Cruz,* 358 F.3d 623, 625 (9th Cir. 2004).

160. Miller, *supra* note 4; CRYPTO MUSEUM, *supra* note 150.

V. CONCLUSIONS AND IMPLICATIONS

The interplays of national security and corruption hold stark implications for global governance and development. This paper aims to add to the discourse around this in the context of the FCPA – a prominent anti-corruption framework with global reach. The first part of this paper aimed to add context to an understudied provision of the FCPA – the national security exemption – through a unique survey of historical and legislative material surrounding the provision.

Conversely, the second part of this paper aims to close a gap in the analytical discourse by applying a well-known part of the FCPA – the anti-bribery provisions – to critical questions concerning state-sponsored bribery carried out for national security purposes. In sum, there is nothing to suggest that the anti-bribery provisions of the FCPA would not apply where a bribe is paid by a covered entity to advance a state's national security interests. At the same time, several legal considerations – including jurisdiction and public authority defenses – have to be considered before it may be conclusively stated that an intelligence agency, like the CIA, may be held liable under the anti-bribery provisions of the FCPA. However, questions like these are only likely to grow in relevance in times to come – with modern technology creating never-before-seen levels of global dependencies and data flows in critical sectors. Going forward, this is likely to also raise new questions from transnational and comparative perspectives.[161]

161. *See, e.g.,* Jeremy Horder, *On Her Majesty's Commercial Service: Bribery, Public Officials and the UK Intelligence Services*, 74 THE MOD. L. REV. 911 (2011) (noting the UK perspective on the interplay between national security and anti-corruption).

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