

**RAPID TECHNOLOGICAL CHANGE AND U.S.  
ENTREPRENEURIAL RISK IN INTERNATIONAL  
MARKETS: FOCUS ON DATA SECURITY, INFORMATION  
PRIVACY, BRIBERY AND CORRUPTION**

LAWRENCE J. TRAUTMAN

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I. OVERVIEW

Edward P. Lazear observes that, “[E]ntrepreneurs must be jacks-of-all-trades who need not excel in any one skill but are competent in many.”<sup>1</sup> Research from the Kauffman Foundation shows that “without startups, there would be no net job growth in the U.S. economy.”<sup>2</sup> Since the mid-1990s, businesses with fewer than 500 employees have created 60 to 80 percent of the United States’ net new employment.<sup>3</sup>

The phenomenal growth of the Internet during recent years results in a rational perception by entrepreneurs that rapid access is available to international markets and sales. However, lurking in the allure of

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<sup>1</sup> Edward P. Lazear, *Entrepreneurship*, 23 J. LAB. ECON. 649, 649 (2005).

<sup>2</sup> TIM KANE, THE IMPORTANCE OF STARTUPS IN JOB CREATION AND JOB DESTRUCTION 2 (Ewing Marion Kauffman Found. ed., 2010), <http://www.kauffman.org/what-we-do/research/firm-formation-and-growth-series/the-importance-of-startups-in-job-creation-and-job-destruction> [<https://perma.cc/MTR5-9MPA>].

<sup>3</sup> Vivek Wadhwa et al., *Making of A Successful Entrepreneur: Anatomy of an Entrepreneur Part II* 4 (Kauffman Found. Small Research Projects, Research Paper No. 2, 2009), <http://ssrn.com/abstract=1507384> [<https://perma.cc/7RJP-DCDP>].

international expansion is the very real threat of exposure to global cyber security and privacy laws, and widespread bribery and corruption. Every entrepreneur needs to consider their response before being confronted with these problems. Substantial fines, penalties, legal and other expenses and even jail time may result from running afoul of the GDPR, other cybersecurity or privacy laws, the FCPA, United Kingdom Bribery Act or other local anti-bribery or corruption laws. Technology enables rampant growth and sometimes propels an early stage enterprise deeply into international markets before management has time to develop reasoned strategy, planning processes, and necessary resources. Abundant examples of high-growth start-ups serve to illustrate this point. Consider the early history of several of the technological unicorns such as Facebook,<sup>4</sup> Google,<sup>5</sup> Lyft,<sup>6</sup> PayPal<sup>7</sup> or Uber.<sup>8</sup> Uber was operating in Paris three years from just the idea for the company and only a year after the first Uber car was on the road.<sup>9</sup> Within four years of creation, Airbnb had a global presence by opening an office in Germany.<sup>10</sup>

This article proceeds in twelve sections. First, A few thoughts are offered about the who, what, when and where of entrepreneurship. Second, context is provided regarding the impact of rapid technological change on the emerging enterprise. Third is an inquiry about the entrepreneur and enterprise risk. Fourth is a description of the allure of international markets. Fifth, I discuss bribery, corruption, and extortion. Sixth, I focus on the Foreign Corrupt Practices Act (FCPA). Seventh is a look at the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Eighth, is a history and description of

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<sup>4</sup> See Lawrence J. Trautman, *Governance of the Facebook Privacy Crisis*, 20 PITT. J. TECH. L. & POL'Y 43, 48–49 (2020).

<sup>5</sup> See Lawrence J. Trautman, *How Google Perceives Customer Privacy, Cyber, E-commerce, Political and Regulatory Compliance Risks*, 10 WM. & MARY BUS. L. REV. 1, 13 (2018).

<sup>6</sup> See Lyft, Inc., Amendment No. 2 to Registration Statement (Form S-1), at 53–54 (Mar. 27, 2019).

<sup>7</sup> See Lawrence J. Trautman, *E-Commerce, Cyber and Electronic Payment System Risks: Lessons from PayPal*, 16 U.C. DAVIS BUS. L.J. 261, 264–65 (2016).

<sup>8</sup> See Uber Technologies, Inc., Registration Statement (Form S-1), at 32 (Apr. 11, 2019) [hereinafter Uber Prospectus].

<sup>9</sup> *History*, UBER, <https://www.uber.com/newsroom/history/> [https://perma.cc/ZP4R-8BKU].

<sup>10</sup> *About Us*, AIRBNB, <https://press.airbnb.com/fast-facts/> [https://perma.cc/63X5-XQNJ].

the United Kingdom Bribery Act 2010. Ninth is the example of Uber and its distinction of being perhaps the first of the technological unicorns to face a DOJ bribery and corruption investigation. Tenth, is a brief focus on the importance of data security and information privacy. Next, is discussion about the cost of anti-bribery compliance. Bribery and corruption among the United States' top three trading partners: Canada, China, and Mexico are also briefly explored.

Written from the perspective of United States' entrepreneurs, this Article has application to all conducting business in jurisdictions subject to the laws mentioned (GDPR, FCPA, OECD Convention, and UK Bribery Act 2010). It is important to note that those laws and regulations imposed by other jurisdictions in which an entrepreneur seeks to conduct business will also require research, understanding, and compliance. However, discussion about additional jurisdictions far exceeds the scope and permitted word-count of this single law review article.

I believe that this paper contributes to the academic and public dialogue on entrepreneurship, cyber security, social media, internet, international business, bribery and corruption, impact of rapid technological change, and expands the existing small-business literature by better equipping entrepreneurs to recognize and understand risks as they plan to enter international markets.

## II. WHO IS AN ENTREPRENEUR?

*“You may not think of yourself as an entrepreneur yet, but you are. You have an idea you’re sure will change everything; you might have a prototype, or even a first version of a product. You’re smart, ambitious, and hunkered down in a conference room, garage, office, café, apartment, or dorm room, alone with your small team. You think about your idea even when you’re supposed to be doing something else, like studying, performing your day job, or spending time with your kids and partner. You are about to launch a new venture . . . .”<sup>11</sup>*

A review of the literature reveals that the definition of an entrepreneur and entrepreneurial activity may be more complicated than a casual observer might suspect. For example, Mill<sup>12</sup> is credited by Schumpeter with

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<sup>11</sup> ERIC SCHMIDT & JONATHAN ROSENBERG, HOW GOOGLE WORKS 24 (2017).

<sup>12</sup> George Solomon & Charles Matthews, *The Curricular Confusion Between Entrepreneurship Education and Small Business Management: A Qualitative Analysis*, in (continued)

introducing into widespread use by economists the term entrepreneurship.<sup>13</sup> Professors Solomon and Matthews write that “[t]he word ‘entrepreneur’ is derived from the French verb ‘entreprendre’ which means to undertake, to attempt, to try in hand, to serve as a go between, to contract for, or to adventure and to try.”<sup>14</sup> Solomon and Matthews also report that “modern dictionaries and websites utilize ‘risk’ as one of the main definitional terms of the entrepreneur.”<sup>15</sup> Shepherd and Douglas provide the following:

The essence of entrepreneurship is the ability to envision and chart a course for a new business venture by combining information from the functional disciplines and from the external environment in the context of the extraordinary uncertainty and ambiguity which faces a new business venture. It manifests itself in creative strategies, innovative tactics, uncanny perception of trends and market mood changes, courageous leadership when the way forward is not obvious and so on.<sup>16</sup>

Michael Morris and Jeffrey Kaplan observe, “The ability to think and act in entrepreneurial ways entails recognizing and exploiting opportunities, typically under conditions of ambiguity, uncertainty, stress, loneliness, volatility and frustration, among other characteristics.”<sup>17</sup> Prominent Yale entrepreneurship scholar Constance Bagley credits her favorite definition of entrepreneurship, “the pursuit of opportunity without regard for the resources currently controlled,” to her former Harvard

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ANNALS OF ENTREPRENEURSHIP EDUCATION AND PEDAGOGY 93 (Michael H. Morris ed., 2014) (citing Joseph A. Schumpeter, *The Creative Response in Economic History*, in *ESSAYS ON ENTREPRENEURS, INNOVATIONS, BUSINESS CYCLES, AND THE EVOLUTION OF CAPITALISM* 221–31 (Richard V. Clemence ed., 1989)).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 99 (citing Dean A. Shepherd & Evan J. Douglas, *Is Management Education Developing, or Killing, the Entrepreneurial Spirit?*, U.S. ASS’N FOR SMALL BUS. & ENTREPRENEURSHIP CONF. (1997)).

<sup>17</sup> Michael H. Morris & Jeffrey B. Kaplan, *Entrepreneurial (Versus Managerial) Competencies As Drivers of Entrepreneurship Education*, in *ANNALS*, *supra* note 12, at 140 (citing Michael H. Morris et al., *Framing the Entrepreneurial Experience*, 36 *ENTREPRENEURSHIP THEORY & PRAC.* 1 (2012)).

Business School colleague Howard Stevenson.<sup>18</sup> Finally, professors Neck, Greene and Brush define entrepreneurship as:

a practice of identifying and creating from what is relatively unknown, new or emerging. Thus the relevance of theory in entrepreneurship comes into question more often than in any other business discipline because there does not exist a single, unifying theory informing entrepreneurs, entrepreneurial teams, entrepreneurial organizations, and so on how to act or decide from a portfolio of options, in a generalizable sense, under conditions of extreme uncertainty.<sup>19</sup>

These conditions of extreme uncertainty often include the need to decide whether the enterprise has enough resources to take on various competing opportunities. Common challenges include deciding whether and when to engage in trade (export/import) via electronic commerce or to engage in foreign direct investment (FDI).

#### A. *Trade (Export/Import) Via Electronic Commerce*

Professors Schaffer, Agusti and Dhooge define *trade* as “the import or export of goods and services across national borders, usually as part of an exchange.”<sup>20</sup> Very often an enterprise’s first experience in international business, the term *exporting* is defined as “the shipment of goods out of a country or the rendering of services to a buyer located in a foreign country;”<sup>21</sup> while *importing* “is the entering of goods into the customs territory of a country or the receipt of services from a foreign provider.”<sup>22</sup> While a comprehensive discussion of FDI is beyond the scope and focus of this Article, a considerable body of literature exists,<sup>23</sup> including that devoted

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<sup>18</sup> Interview with Constance E. Bagley, Senior Research Scholar in Law, Yale Law Sch. (Apr. 16, 2018).

<sup>19</sup> Heidi M. Neck et al., *Practice-based Entrepreneurship Education Using Actionable Theory*, in ANNALS, *supra* note 12, at 3.

<sup>20</sup> RICHARD SCHAFFER ET AL., INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT 3 (10th ed. 2018).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See Arno R. Lodder, *Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular Economic Commerce, in the Internal Market*, in EU REGULATION OF E-COMMERCE: A COMMENTARY 15 (Arno L. Lodder & Andrew D. Murray eds., 2017); Michael D. Smith et al., *Understanding Digital Markets: Review and Assessment*,  
(continued)

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in UNDERSTANDING THE DIGITAL ECONOMY: DATA, TOOLS, AND RESEARCH 99 (Erik Brynjolfsson & Brian Kahin eds., 2000); Vibhanshu Abhishek et al., *Agency Selling or Reselling? Channel Structures in Electronic Retailing*, 62 MGMT. SCI. 2259 (2016); Nikolay Archak et al., *Deriving the Pricing Power of Product Features by Mining Consumer Reviews*, 57 MGMT. SCI. 1485 (2011); Erik Brynjolfsson et al., *Goodbye Pareto Principle, Hello Long Tail: The Effect of Search Costs on the Concentration of Product Sales*, 57 MGMT. SCI. 1373 (2011); Rong-Ruey Duh et al., *Control and Assurance in E-Commerce: Privacy, Integrity, and Security at eBay*, 3 TAIWAN ACCT. REV. 1 (2002); Michael Ettredge & Vernon J. Richardson, *Assessing the Risk in E-Commerce*, in ICIS 2001 PROCEEDINGS 31 (2001); Anindya Ghose & Sha Yang, *An Empirical Analysis of Search Engine Advertising: Sponsored Search in Electronic Markets*, 55 MGMT. SCI. 1605 (2009); Jacob Goldenberg et al., *The Quest for Content: How User-Generated Links Can Facilitate Online Exploration*, 49 J. MARKETING RES. 452 (2012); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002); W. Kuan Hon et al., *The Problem of 'Personal Data' in Cloud Computing: What Information is Regulated?—The Cloud of Unknowing*, 1 INT'L DATA PRIVACY L. 211 (2011); W. Kuan Hon et al., *Who is Responsible for 'Personal Data' in Cloud Computing?—The Cloud of Unknowing, Part 2*, 2 INT'L DATA PRIVACY L. 3 (2012); Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459 (2006); Gerald L. Lohse et al., *Consumer Buying Behavior on the Internet: Findings from Panel Data*, 14 J. INTERACTIVE MARKETING 15 (2000); Paul Benjamin Lowry et al., *Online Payment Gateways Used to Facilitate E-Commerce Transactions and Improve Risk Management*, 17 COMM. ASS'N FOR INFO. SYS. 123 (2006); Susan M. Mudambi & David Schuff, *What Makes a Helpful Online Review? A Study of Customer Reviews on Amazon.com*, 34 MIS Q. 185 (2010); Gal Oestreicher-Singer & Arun Sundararajan, *The Visible Hand? Demand Effects of Recommendation Networks in Electronic Markets*, 58 MGMT. SCI. 1963 (2012); Steve G. Sutton et al., *Risk Analysis in Extended Enterprise Environments: Identification of Critical Risk Factors in B2B E-Commerce Relationships*, 9 J. ASS'N FOR INFO. SYS. 151 (2008); Rajnish Tiwari et al., *From Electronic to Mobile Commerce: Opportunities Through Technology Convergence for Business Services*, 23 ASIA PACIFIC TECH MONITOR 38 (2006); Sha Yang & Anindya Ghose, *Analyzing the Relationship Between Organic and Sponsored Search Advertising: Positive, Negative, or Zero Interdependence?*, 29 MARKETING SCI. 602 (2010); Dezhi Yin et al., *Anxious or Angry? Effects of Discrete Emotions on the Perceived Helpfulness of Online Reviews*, 38 MIS Q. 539 (2014); Jeanne Ross et al., *From Place to Space: Migrating to Profitable Electronic Commerce Business Models* (MIT Sloan Sch. of Mgmt., Working Paper No. 4358-01, 2001), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=305717](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=305717) [https://perma.cc/6Z6V-LR9T]; Pei-Yu Chen et al., *All Reviews are Not Created Equal: The Disaggregate Impact of Reviews and Reviewers at Amazon.com* (July 20, 2006) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=918083](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=918083) [https://perma.cc/43H2-QMN6]; James P. Nehf, *Electronic Billing of Consumer Accounts Under State and Federal Law* (Nov. 7, 2008) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3280371](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3280371) [https://perma.cc/SF3D-Q33Y].

to the subtopics of: Asia;<sup>24</sup> China;<sup>25</sup> economic uncertainty;<sup>26</sup> intellectual property;<sup>27</sup> and outsourcing.<sup>28</sup>

The advent of the Internet and electronic commerce (marketing) has resulted in customers finding their way to the products and services of early stage enterprises, often before entrepreneurs have had the time to thoughtfully consider the opportunities, requirements, and potential risks associated with international commerce.

### *B. Foreign Direct Investment*

Schaffer, Agusti and Dhooge state that foreign direct investment (FDI) “refers to the ownership and operation or effective control of the productive assets of an ongoing business by an individual or corporate investor who is a resident or national of another country.”<sup>29</sup> FDI is ‘active investments,’ as

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<sup>24</sup> See S.N. Arjun Kumar, *Recent Advances in Shopping Through Mobile: An Indian Perspective*, 2019 PROC. 10TH INT’L CONF. ON DIGITAL STRATEGIES FOR ORGANIZATIONAL SUCCESS 1167; Nguyen Ngoc Duy Phuong & Tran Thi Dai Trang, *Repurchase Intention: The Effect of Service Quality, System Quality, Information Quality, and Customer Satisfaction as Mediating Role: A PLS Approach of M-Commerce Ride Hailing Service in Vietnam*, 5 MARKETING & BRANDING RES. 78 (2018); David Gould et al., *Multidimensional Connectivity: Benefits, Risks, and Policy Implications for Europe and Central Asia* (World Bank Policy Research, Working Paper No. 8438, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3177233](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3177233) [<https://perma.cc/GV48-6FVT>].

<sup>25</sup> See Shaun Breslin, “*Made in China*”: *The Growth of Chinese Trade* (CSGR, Working Paper No. 19/98, 1998), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=146957](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=146957) [<https://perma.cc/3386-4TUC>].

<sup>26</sup> See ROBERT KROL, DOES UNCERTAINTY OVER ECONOMIC POLICY HARM TRADE, FOREIGN INVESTMENT, AND PROSPERITY? (Mercatus Ctr. George Mason Univ. ed., 2018), <https://www.mercatus.org/publications/uncertainty-economic-policy-harm-trade-foreign-investment> [<https://perma.cc/W248-UW4W>].

<sup>27</sup> See Daniel J. Gervais, *Intellectual Property, Trade & Development: The State of Play*, 74 FORDHAM L. REV. 505 (2005); Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885 (2008).

<sup>28</sup> See Jean C. Essila, *The Dynamics of Electronic Supply Chains and Enterprise Resource Planning Systems: The New Business Challenge*, 3 INT’L J. COMPUTERS CLINICAL PRACT. 40 (2018); Galina An & Murat F. Iyigun, *Outsourcing Globally During the Product Life Cycle: A Theory and Some Evidence* (Univ. Colo., Working Paper No. 02-8, 2002), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=334582](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=334582) [<https://perma.cc/9DLG-Y3VJ>].

<sup>29</sup> SCHAFFER ET AL., *supra* note 20, at 10.

distinguished from passive investments. . . .”<sup>30</sup> While a comprehensive discussion of FDI is beyond the scope and focus of this Article, a considerable body of literature exists,<sup>31</sup> including that devoted to the

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<sup>30</sup> *Id.*

<sup>31</sup> See Maria Carkovic & Ross Levine, *Does Foreign Direct Investment Accelerate Economic Growth?*, in DOES FOREIGN DIRECT INVESTMENT PROMOTE DEVELOPMENT? 195 (Theodore H. Moran et al. eds., 2005); Vintila Denisia, *Foreign Direct Investment Theories: An Overview of the Main FDI Theories*, 2 EUR. J. INTERDISC. STUD. 104 (2010); Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 60 INT’L ORG. 811 (2006); José C. Fariñas et al., *Multinational Activity of European Firms and Heterogeneity*, 41 WORLD ECON. 1166 (2018); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005); Sophie Meunier, *Integration by Stealth: How the European Union Gained Competence Over Foreign Direct Investment*, 55 J. COMMON MKT. STUD. 593 (2017); Karl P. Sauvart, *Attracting Foreign Direct Investment and Benefiting From It: Challenges for the Least Developed Countries*, 7 TRANSNAT’L CORP. REV. 125 (2015); Jason W. Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT’L L. 397 (2011); Jennifer Tobin & Susan Rose-Ackerman, *Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties* (Yale L. & Econ., Research Paper No. 293, 2005), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=557121](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=557121) [<https://perma.cc/WT3S-Y8HP>]; Wilfried Altzinger & Christian Bellak, *Direct Versus Indirect FDI: Impact on Domestic Exports and Employment* (Vienna Univ. of Econ. & Bus. Admin., Working Paper No. 9, 1999), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=230006](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=230006) [<https://perma.cc/9UR9-VTYN>]; Karolina Ekholm et al., *Export-Platform Foreign Direct Investment* (Nat’l Bureau of Econ. Research, Working Paper No. 9517, 2003), <https://www.nber.org/papers/w9517> [<https://perma.cc/KL3Z-CCV8>]; Ricardo Hausmann & Eduardo Fernández-Arias, *Foreign Direct Investment: Good Cholesterol?* (Inter-American Dev. Bank, Working Paper No. 417, 2000), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=252192](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=252192) [<https://perma.cc/4V43-P952>]; James E. Rauch, *Development Through Synergistic Reform* (Nat’l Bureau of Econ. Research, Working Paper No. 13170, 2007), <https://www.nber.org/papers/w13170> [<https://perma.cc/M5KZ-M26Q>]; Girum Abebe et al., *Foreign Direct Investment and Knowledge Diffusion in Poor Locations: Evidence from Ethiopia* (Nat’l Bureau of Econ. Research, Working Paper No. 24461, 2018), <https://www.nber.org/papers/w24461> [<https://perma.cc/94V7-Q6RZ>].

subtopics of: accounting;<sup>32</sup> administrative barriers;<sup>33</sup> Asia;<sup>34</sup> capital controls;<sup>35</sup> China;<sup>36</sup> dispute resolution;<sup>37</sup> economic development;<sup>38</sup>

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<sup>32</sup> See Robert W. McGee & Galina G. Preobragenskaya, *Problems of Implementing International Accounting Standards in a Transition Economy: A Case Study of Russia*, in ACCOUNTING AND FINANCIAL SYSTEM REFORM IN A TRANSITION ECONOMY: A CASE STUDY OF RUSSIA 7 (2006); Galina Preobragenskaya & Robert W. McGee, *The Role of International Accounting Standards in Foreign Direct Investment: A Case Study of Russia* (Oct. 28, 2003) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=409020](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=409020) [<https://perma.cc/D9GB-RXCS>].

<sup>33</sup> See Jacques Morisset & Olivier Lumenga Neso, *Administrative Barriers to Foreign Investment in Developing Countries* (World Bank Policy Research, Working Paper No. 2848, 2002), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=636197](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=636197) [<https://perma.cc/3HQ6-7UFL>].

<sup>34</sup> See Luke Nottage & Ana Ubilava, Book Note, *Asia's Changing International Investment Regime: Sustainability, Regionalization and Arbitration*, 44 U.W. AUSTL. L. REV. 195 (2019).

<sup>35</sup> See Mihir A. Desai et al., *Capital Controls, Liberalizations, and Foreign Direct Investment*, 19 REV. FIN. STUD. 1433 (2006).

<sup>36</sup> See Edward M. Graham & Erika Wada, *Foreign Direct Investment in China: Effects on Growth and Economic Performance*, in ACHIEVING HIGH GROWTH: EXPERIENCE OF TRANSITION ECONOMIES IN EAST ASIA (Peter Drysdale ed., 2003); Sajid Anwar & Sizhong Sun, *Foreign Direct Investment in R&D and Domestic Entrepreneurship in China's Manufacturing Industries*, 47 APPLIED ECON. 1633 (2015); Kui-yin Cheung & Ping Lin, *Spillover Effects of FDI on Innovation in China: Evidence from the Provincial Data*, 15 CHINA ECON. REV. 25 (2004); Ping Yu et al., *Foreign Direct Investment and Economic Growth in China: Evidence From a Two-Sector Model*, 23 J. FIN. MGMT. & ANALYSIS 1 (2010); Liang Zheng & Zhong Zhao, *What Drives Spatial Clusters of Entrepreneurship in China? Evidence from Economic Census Data*, 46 CHINA ECON. REV. 229 (2017); F. Gerard Adams et al., *How the Dragon Captured the World Export Markets: Outsourcing and Foreign Investment Lead the Way* (Penn Inst. for Econ. Research, Working Paper No. 04-042, 2004), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=629062](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=629062) [<https://perma.cc/2YWW-HKNE>]; Elissa Braunstein & Gerald Epstein, *Bargaining Power and Foreign Direct Investment in China: Can 1.3 Billion Consumers Tame the Multinationals?* (Political Econ. Research Inst., Working Paper No. 45, 2002), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=343540](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=343540) [<https://perma.cc/3G6J-RNL3>]; Yasheng Huang, *Economic Fragmentation and FDI in China* (William Davidson Inst., Working Paper No. 374, 2001), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=270322](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=270322) [<https://perma.cc/HE75-QERR>]; Jinyan Li, *Development and Tax Policy: Case Study of China* (Comparative Research in Law & Pol. Econ., Research Paper (continued)

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<sup>37</sup> See Vivienne Bath & Luke Nottage, *Foreign Investment and Dispute Resolution Law and Practice in Asia: An Overview*, in *FOREIGN INVESTMENT AND DISPUTE RESOLUTION LAW AND PRACTICE IN ASIA* (Vivienne Bath & Luke Nottage eds., 2011).

<sup>38</sup> See Ans Kolk et al., *Multinationals, International Business, and Poverty: A Cross-Disciplinary Research Overview and Conceptual Framework*, 1 J. INT'L BUS. POL'Y 92 (2018); Caroline Freund & Theodore H. Moran, *Multinational Investors as Export Superstars: How Emerging-Market Governments Can Reshape Comparative Advantage* (Peterson Inst. for Int'l Econ., Working Paper No. 17-1, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2901148](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2901148) [<https://perma.cc/DL7B-DDV6>].

entrepreneurship;<sup>39</sup> Ghana;<sup>40</sup> growth;<sup>41</sup> human capital formation;<sup>42</sup> India;<sup>43</sup> innovation and absorptive capacity;<sup>44</sup> intellectual property rights;<sup>45</sup> law;<sup>46</sup>

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<sup>39</sup> See Zoltan Acs & Nicola Virgill, *Entrepreneurship in Developing Countries*, 6 FOUND. & TRENDS IN ENTREPRENEURSHIP 1 (2010); Subrata Chakrabarty & A. E. Bass, *Encouraging Entrepreneurship: Microfinance, Knowledge Support, and the Costs of Operating in Institutional Voids*, 55 THUNDERBIRD INT'L BUS. REV. 545 (2013); Hernán Herrera-Echeverri et al., *Foreign Direct Investment, Institutional Quality, Economic Freedom and Entrepreneurship in Emerging Markets*, 67 J. BUS. RES. 1921 (2014); Jordan I. Siegel et al., *Egalitarianism, Cultural Distance, and FDI: A New Approach*, 24 ORG. SCI. 1174 (2013); Zoltan J. Acs et al., *The Knowledge Spillover Theory of Entrepreneurship and Foreign Direct Investment* (Jena Econ. Research Papers, Paper No. 2007-059, 2007), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1022928](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1022928) [<https://perma.cc/ZBR5-BG7U>]; Zoltan J. Acs & Siri Terjesen, *Born Local: Two Avenues to Internationalization* (Jena Econ. Research Papers, Paper No. 2007-022, 2007), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1019435](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1019435) [<https://perma.cc/ZSK3-MWPP>]; David B. Audretsch & Mark Sanders, *Globalization and the Rise of the Entrepreneurial Economy* (Jena Econ. Research Papers, Paper No. 2007-003, 2007), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1017761](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1017761) [<https://perma.cc/2GHY-KNR8>]; Seçil Danakol et al., *Foreign Direct Investment and Domestic Entrepreneurship: Blessing or Curse?* (Inst. for the Study of Labor Econ., Discussion Paper No. 7796, 2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2367671](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2367671) [<https://perma.cc/9X3P-YUE6>]; Wim Naudé et al., *Industrialization Lessons from BRICS: A Comparative Analysis* (Inst. for the Study of Labor Econ., Discussion Paper No. 7543, 2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2314838](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2314838) [<https://perma.cc/HC43-YDPW>]; Dirk De Clercq et al., *Knowledge Spillovers and Entrepreneurs' Export Orientation* (2006) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1313334](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1313334) [<https://perma.cc/5Z2Z-9564>].

<sup>40</sup> See Fabian Barthel et al., *The Characteristics and Determinants of FDI in Ghana*, 23 EUROPEAN J. DEV. RES. 389 (2011).

<sup>41</sup> See Simplicé Asongu & Nicholas M. Odhiambo, *Drivers of Growth in Fast Emerging Economies: A Dynamic Instrumental Quantile Approach to Real Output and Its Rates of Growth in BRICS and MINT Countries, 2001–2011*, 18 APPLIED ECON. & INT'L DEV. 5 (2018); Simplicé Asongu et al., *Determinants of Foreign Direct Investment in Fast-Growing Economies: Evidence from the BRICS and MINT Countries*, 4 FIN. INNOVATION, Oct. 2018, at 1, 1; Marta Bengoa & Blanca Sanchez-Robles, *Foreign Direct Investment, Economic Freedom and Growth: New Evidence from Latin America*, 19 EUROPEAN J. POL. ECON. 529 (2003); Andrijana Bogdanovska Djurovic, *The Impact of Foreign Direct Investment on the Economic Growth of Developing Countries (2000–2010)*, 14 ECON. DEV. 63 (2012); Hali J. Edison et al., *International Financial Integration and Economic Growth* 21 J. INT'L MONEY & FIN. 749 (2002); Ramona Jimborean & Anna Kelber, *Foreign Direct Investment Drivers and Growth in Central and Eastern Europe in the Aftermath of the 2007 Global Financial Crisis*, 59 COMP. ECON. STUD. 23 (2017); Areej Aftab Siddiqui & Shahid Ahmed, *Impact of Foreign Direct Investment on Sectoral Growth of Indian Economy*, 7 INT'L J. ECON. & FIN. ISSUES 477 (2017); Miao Wang, *Manufacturing FDI and Economic Growth: Evidence from Asian Economies*, 41 APPLIED ECON. 991 (2009); Ewe-Ghee Lim, *Determinants of, and the Relation Between, Foreign Direct Investment and Growth: A Summary of the Recent Literature* 10 (Int'l Monetary Fund, Working Paper No. 01/175, 2001),  
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[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=880230](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=880230) [https://perma.cc/VYC5-X3DC].

<sup>42</sup> See Koji Miyamoto, *Human Capital Formation and Foreign Direct Investment in Developing Countries* (Org. for Econ. Co-operation & Dev., Working Paper No. 211, 2003), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=668505](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=668505) [https://perma.cc/K46L-QLMF].

<sup>43</sup> See Sebastian Morris, *A Study of the Regional Determinants of Foreign Direct Investments in India, and the Case of Gujarat* (Indian Inst. of Mgmt., Working Paper No. 2004/03/07, 2004), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=651741](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=651741) [https://perma.cc/QH43-N4MV].

<sup>44</sup> See Yuko Kinoshita, *R&D and Technology Spillovers Via FDI: Innovation and Absorptive Capacity* (CERGE-EI, Working Paper No. 163, 2000), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=258194](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=258194) [https://perma.cc/XS8C-V358].

<sup>45</sup> See Robert Bird & Daniel R. Cahoy, *The Impact of Compulsory Licensing on Foreign Direct Investment: A Collective Bargaining Approach*, 45 AM. BUS. L.J. 283 (2008); Saurav Pathak et. al., *Influence of Intellectual Property, Foreign Investment, and Technological Adoption on Technology Entrepreneurship*, 66 J. BUS. RES. 2090 (2013); Beata Smarzynska Javorcik, *Composition of Foreign Direct Investment and Protection of Intellectual Property Rights in Transition Economies*, 48 EUR. ECON. R. 39 (2004); Ermias Tekeste Biadgleng, *IP Rights Under Investment Agreements: The TRIPS-Plus Implications for Enforcement and Protection of Public Interest* (South Ctr. Research, Paper No. 8, 2006), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=943013](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=943013) [https://perma.cc/2F5E-S97J].

<sup>46</sup> Rafael Leal-Arcas, *The Multilateralization of International Investment Law*, 35 N.C. J. INT'L L. & COM. REG. 33 (2009); Joost Pauwelyn, *At the Edge of Chaos? Foreign Investment Law as A Complex Adaptive System, How It Emerged And How It Can Be Reformed*, 29 ICSID REV. 372 (2014).

Malaysia;<sup>47</sup> Mexico;<sup>48</sup> national security;<sup>49</sup> political risk;<sup>50</sup> poverty reduction;<sup>51</sup> protectionism;<sup>52</sup> Russia;<sup>53</sup> spillovers;<sup>54</sup> tax;<sup>55</sup> technology

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<sup>47</sup> See Evelyn S. Devadason, *Malaysia: Trade, Foreign Direct Investment and Regional Integration*, in *SOUTHEAST ASIA AND THE ASEAN ECONOMIC COMMUNITY* 187 (Roderick Macdonald ed., 2019).

<sup>48</sup> See Guillermo José García Sanchez, *The Fine Print of the Mexican Energy Reform*, in *MEXICO'S NEW ENERGY MODEL* 36 (Duncan Wood ed., 2018); Keisuke Kondo, *Sourcing Patterns of Export-Platform Foreign Affiliates: The Case of Japanese Affiliates in Mexico*, 41 *WORLD ECON.* 1437 (2018); Andreas Waldkirch, *The Effects of Foreign Direct Investment in Mexico Since NAFTA*, 33 *WORLD ECON.* 710 (2010).

<sup>49</sup> See Vivienne Bath, *Foreign Investment, the National Interest and National Security: Foreign Direct Investment in Australia and China*, 34 *SYDNEY L. REV.* 5 (2012).

<sup>50</sup> See Geert Bekaert et al., *Political Risk Spreads*, 45 *J. INT'L BUS. STUD.* 471 (2014); Vladimir Benacek et al., *Political Risk, Institutions and Foreign Direct Investment: How Do They Relate in Various European Countries?*, 37 *WORLD ECON.* 625 (2014); Matthias Busse & Carsten Hefeker, *Political Risk, Institutions and Foreign Direct Investment*, 23 *EUR. J. POL. ECON.* 397 (2007); Erasmo Giambona et al., *The Management of Political Risk*, 48 *J. INT'L BUS. STUD.* 523 (2017); Nathan Jensen, *Political Risk, Democratic Institutions, and Foreign Direct Investment*, 70 *J. POL.* 1040 (2008); Sokchea Kim, *Bilateral Investment Treaties, Political Risk and Foreign Direct Investment*, 11 *ASIA PACIFIC J. ECON. & BUS.* 6 (2007); Darryl S. L. Jarvis, *Conceptualizing, Analyzing and Measuring Political Risk: The Evolution of Theory and Method* (Lee Kuan Yew Sch. of Pub. Policy, Research Paper No. LKYSP08-004, 2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1162541](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1162541) [<https://perma.cc/KL3Q-H4P7>]; Jason W. Yackee, *Protecting the French Investor Abroad: Expropriation, Diplomacy, and Sugar in the Congo, 1970-1978* (Univ. of Wis. Law Sch. Legal Studies, Research Paper No. 1444, 2018); Andrey Popovich, *Investing in Emerging Markets: Finding Out How Political Risk Influences FDI in Russia* (Mar. 20, 2007) (unpublished master's thesis, Erasmus University Rotterdam), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=996414](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=996414) [<https://perma.cc/Y3EE-6JL2>].

<sup>51</sup> See Michael Klein et al., *Foreign Direct Investment and Poverty Reduction* (World Bank Policy Research, Working Paper No. 2613, 2001), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=632682](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=632682) [<https://perma.cc/Y8GH-F24Q>].

<sup>52</sup> See Karl Sauvart, *The Rise of FDI Protectionism*, in *A NEW INVESTMENT PARADIGM* 31 (OCO Global ed., 2009).

<sup>53</sup> See Galina G. Preobragenskaya & Robert W. McGee, *Corporate Governance in a Transition Economy: A Case Study of Russia*, 1 *CORP. OWNERSHIP & CONTROL* 61 (2004); Svetlana Ledyeva & Mikael Linden, *Foreign Direct Investment and Economic Growth: Empirical Evidence from Russian Regions* (BOFIT, Discussion Paper No. 17, 2006), <https://helda.helsinki.fi/bof/bitstream/handle/123456789/8066/128375.pdf?sequence=1>

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<sup>54</sup> See Sajid Anwar & Sizhong Sun, *Firm Heterogeneity and FDI-Related Productivity Spillovers: A Theoretical Investigation*, 28 J. INT'L TRADE & ECON. DEV. 1 (2019); Randolph Luca Bruno & Maria Cipollina, *A Meta-Analysis of the Indirect Impact of Foreign Direct Investment in Old and New EU Member States: Understanding Productivity Spillovers*, 41 WORLD ECON. 1342 (2018); Matija Rojec & Mark Knell, *Why is There a Lack of Evidence on Knowledge Spillovers from Foreign Direct Investment?*, 32 J. ECON. SURV. 579 (2018); Anh Ngoc Nguyen et al., *Foreign Direct Investment in Vietnam: Is There Any Evidence of Technological Spillover Effects* (Dev. & Policies Research Ctr., Working Paper No. 18, 2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1117202](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1117202) [<https://perma.cc/V2RG-HZH2>].

<sup>55</sup> See Christian Bellak & Markus Leibrecht, *Do Low Corporate Income Tax Rates Attract FDI? Evidence from Eight Central and East European Countries*, 41 APPLIED ECON. 2691 (2009); Allison D. Christians, *Tax Treaties for Investment and Aid to Sub-Saharan Africa: A Case Study*, 71 BROOK. L. REV. 639 (2005); Mihir A. Desai et al., *Do Tax Havens Divert Economic Activity?*, 90 ECON. LETTERS 219 (2006); Qing Hong & Michael Smart, *In Praise of Tax Havens: International Tax Planning and Foreign Direct Investment*, 54 EUR. ECON. REV. 82 (2010); Michael S. Knoll, *Reconsidering International Tax Neutrality*, 64 TAX L. REV. 99 (2011); Yoram Margalioth, *Tax Competition, Foreign Direct Investments and Growth: Using the Tax System to Promote Developing Countries*, 23 VA. TAX REV. 161 (2003); Ruud A. de Mooij & Sjef Ederveen, *Taxation and Foreign Direct Investment: A Synthesis of Empirical Research*, 10 INT'L TAX & PUB. FIN. 673 (2003); Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 WORLD DEV. 1567 (2005); Michael Lang & Jeffrey P. Owens, *The Role of Tax Treaties in Facilitating Development and Protecting the Tax Base* (WU Int'l Taxation Research Paper Series, Paper No. 3, 2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2398438](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2398438) [<https://perma.cc/JH5M-TSPF>]; Till Siegmann, *The Impact of Bilateral Investment Treaties and Double Taxation Treaties on Foreign Direct Investments* (Univ. of St. Gallen Law & Econ. Research Paper Series, Working Paper No. 22, 2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1268185](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1268185) [<https://perma.cc/KP9F-6HYI>].

transfer;<sup>56</sup> and transition economies.<sup>57</sup> I next take a look at the profound changes to the entrepreneurial environment brought about during the past twenty years by rapid technological change.

### III. RAPID TECHNOLOGICAL CHANGE AND THE EMERGING ENTERPRISE

*“Our physical technologies won’t slow down—Moore’s law will win—so we’re in a race for our social technologies to keep up . . . . Every society and every community must compound the rate at which it reimagines and reinvents its social technologies, because our physical technologies will not likely be slowing down anytime soon.”<sup>58</sup>*

Our lives are forever changed because of the advent, availability, and our reliance on the Internet. These rapid technological advances brought about from Internet availability have forever changed the way of life in both industrialized and lesser developed economies. Many of our daily conveniences have only become available during very recent years,<sup>59</sup> such

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<sup>56</sup> See Bernard M. Hoekman et al., *Transfer of Technology to Developing Countries: Unilateral and Multilateral Policy Options*, 33 *WORLD DEV.* 1587 (2005); Saurav Pathak et al., *Technology Use and Availability in Entrepreneurship: Informal Economy as Moderator of Institutions in Emerging Economies*, 41 *J. TECH. TRANSFER* 506 (2016); Kamal Saggi, *Trade, Foreign Direct Investment, and International Technology Transfer: A Survey*, 17 *WORLD BANK RES. OBSERVER* 191 (2002); Jože P. Damijan et al., *Technology Transfer Through FDI in Top-10 Transition Countries: How Important are Direct Effects, Horizontal and Vertical Spillovers?* (William Davidson Inst., Working Paper No. 549, 2003), <https://deepblue.lib.umich.edu/bitstream/handle/2027.42/39934/wp549.pdf?sequence=3> [<https://perma.cc/Y2MZ-FH2Z>]; Kun Jiang et al., *International Joint Ventures and Internal vs. External Technology Transfer: Evidence from China* (Nat’l Bureau of Econ. Research, Working Paper No. 24455, 2018), <https://www.nber.org/papers/w24455> [<https://perma.cc/SMW3-WJMD>].

<sup>57</sup> See Yuko Kinoshita & Nauro F. Campos, *Why Does FDI Go Where It Goes? New Evidence from the Transition Economies* (William Davidson Inst., Working Paper No. 573, 2003), <https://deepblue.lib.umich.edu/bitstream/handle/2027.42/39959/wp573.pdf?sequence=3> [<https://perma.cc/RWQ4-3AAB>].

<sup>58</sup> THOMAS L. FRIEDMAN, THANK YOU FOR BEING LATE 200–01 (2016) (quoting interview by Thomas L. Friedman with Eric Beinhocker, Exec. Dir., Inst. for New Econ.).

<sup>59</sup> See Lawrence J. Trautman, *Bitcoin, Virtual Currencies, and the Struggle of Law and Regulation to Keep Pace*, 102 *MARQ. L. REV.* 447 (2018).

as: Amazon (1994),<sup>60</sup> Google (1998),<sup>61</sup> PayPal (1998),<sup>62</sup> Skype (2003),<sup>63</sup> Facebook (2004),<sup>64</sup> Pandora (2005),<sup>65</sup> Twitter (2006),<sup>66</sup> Apple iPhone (2007),<sup>67</sup> Kindle (2007),<sup>68</sup> Waze (2007),<sup>69</sup> Airbnb (2008),<sup>70</sup> GitHub (2008),<sup>71</sup> Bitcoin, blockchain and virtual currencies (2009),<sup>72</sup> Uber (2009),<sup>73</sup>

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<sup>60</sup> *Id.* at 471 n.124 (citing Amazon.com, Inc., Annual Report (Form 10-K), at 2 (Feb. 10, 2017)).

<sup>61</sup> *Id.* (citing Trautman, *supra* note 5, at 19); *see also* Alphabet Inc., Quarterly Report (Form 10-Q), at 7 (Oct. 27, 2017).

<sup>62</sup> Trautman, *supra* note 59, at 471 n.124 (citing PayPal, Inc., Registration Statement (Form S-1), at 9 (June 12, 2002)); *see* Lawrence J. Trautman, *E-Commerce, Cyber, and Electronic Payment System Risks: Lessons from PayPal*, 16 U.C. DAVIS BUS. L.J. 261, 275 (2016).

<sup>63</sup> Trautman, *supra* note 59, at 471 n.124 (citing Skype S.à r.l., Registration Statement (Form S-1), at 130 (Aug. 9, 2010)).

<sup>64</sup> *Id.* (citing *About*, FACEBOOK, [https://www.facebook.com/facebook/about/?ref=page\\_internal](https://www.facebook.com/facebook/about/?ref=page_internal) [<https://perma.cc/Z9HQ-4EN4>]).

<sup>65</sup> *Id.* (citing Pandora Media, Inc., Amendment No. 5 to Registration Statement (Form S-1), at 1 (June 2, 2011)).

<sup>66</sup> *Id.* (citing Twitter, Inc., Registration Statement (Form S-1), at 91 (Oct. 3, 2013)).

<sup>67</sup> *Id.* (citing FRIEDMAN, *supra* note 58, at 19–20).

<sup>68</sup> *Id.* (citing FRIEDMAN, *supra* note 58, at 20).

<sup>69</sup> *Id.* (citing Rip Empson, *WTF is Waze and Why Did Google Just Pay a Billion+ For It?*, TECHCRUNCH (June 12, 2013, 12:01 AM), <https://techcrunch.com/2013/06/11/behind-the-maps-whats-in-a-waze-and-why-did-google-just-pay-a-billion-for-it/> [<https://perma.cc/PB5Z-GTKR>]).

<sup>70</sup> *Id.* (citing *About Us*, AIRBNB, <https://news.airbnb.com/about-us/> [<https://perma.cc/8KQ9-MYZS>]).

<sup>71</sup> *Id.* (citing *Press*, GITHUB, <https://github.com/about/press> [<https://perma.cc/E8JU-VJBJ>]).

<sup>72</sup> Lawrence Trautman, *Virtual Currencies Bitcoin & What Now After Liberty Reserve, Silk Road, and Mt. Gox?*, 20 RICH. J.L. & TECH. 13, 43 (2014); *see* Lawrence J. Trautman, *Is Disruptive Blockchain Technology the Future of Financial Services?*, 69 CONSUMER FIN. L. Q. REP. 232, 234 (2016); Lawrence J. Trautman & Alvin C. Harrell, *Bitcoin Versus Regulated Payment Systems: What Gives?*, 38 CARDOZO L. REV. 1041, 1055 (2017).

<sup>73</sup> Trautman, *supra* note 59, at 472 n.124 (citing *Company Info*, UBER, <https://www.uber.com/newsroom/company-info/> [<https://perma.cc/MLJ2-MZ3G>]).

WhatsApp (2009),<sup>74</sup> Instagram (2010),<sup>75</sup> Pinterest (2010),<sup>76</sup> SnapChat (2011),<sup>77</sup> Lyft (2012),<sup>78</sup> and TBH (2017),<sup>79</sup> just to name a few. A cursory review of the history of many of these recently formed enterprises will reveal that the entrepreneurs and early stage management found themselves conducting business in international markets very soon following creation. Accordingly, many entrepreneurs guiding the rapid growth trajectory of an enterprise destined for success may encounter the need to deal with issues of international bribery and corruption even during the early months of operations. A few thoughts to enable thinking about these issues before they must be dealt with is the focus of the next few pages.

The rapid rate of technological change brings challenges to business, community and governmental organizations that would have been unimaginable just a decade or two before. Eric Schmidt and Jonathan Rosenberg write, “[a]s much as technology has affected consumers, it has had an even bigger impact on businesses. In economic terms, when the cost curves shift downward on a primary factor of production in an industry, big-time change is in store for that industry.”<sup>80</sup> Schmidt and Rosenberg observe, “Today, *three* factors of production have become cheaper—information, connectivity, and computing power—affecting any

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<sup>74</sup> *Id.* (citing Parmy Olson, *Exclusive: The Rags-to-Riches Tale of How Jan Koum Built WhatsApp Into Facebook's New \$19 Billion Baby*, FORBES (Feb. 19, 2014, 7:58 PM) <https://www.forbes.com/sites/parmyolson/2014/02/19/exclusive-inside-story-how-jan-koum-built-whatsapp-into-facebooks-new-19-billion-baby/#2da50c02fa19> [https://perma.cc/9LB9-GB7Q]).

<sup>75</sup> Kim-Mai Cutler, *From 0 To \$1 Billion in Two Years: Instagram's Rose-Tinted Ride To Glory*, TECHCRUNCH (Apr. 9, 2012, 9:14 PM), <https://techcrunch.com/2012/04/09/instagram-story-facebook-acquisition/> [https://perma.cc/7KPA-WYFF].

<sup>76</sup> *Press*, PINTEREST, <https://about.pinterest.com/en/node/19/mailto%3Apress%40pinterest.com> [https://perma.cc/6JEM-ZB3S].

<sup>77</sup> Trautman, *supra* note 59, at 472 n.124 (citing Snap Inc., Registration Statement (Form S-1) (Feb. 2, 2017)).

<sup>78</sup> *Id.* (citing Matt Lynley, *Meet Lyft, A Startup Trying To Change San Francisco's Decades-Old Transportation System*, BUSINESS INSIDER (Sept. 7, 2012, 10:15 AM), <https://www.businessinsider.com/lyft-ride-sharing-john-zimmer-2012-9> [https://perma.cc/49Q9-G4DM]).

<sup>79</sup> *See Hello. tbh, We're Moving On*, FACEBOOK (July 2, 2018), <https://about.fb.com/news/2018/07/hello-tbh-moving-on/> [https://perma.cc/EQ2A-S6VY].

<sup>80</sup> SCHMIDT & ROSENBERG, *supra* note 11, at 12.

cost curves in which those factors are involved. This can't help but have disruptive effects."<sup>81</sup> For example, Eric Beinhocker states:

Physical technologies evolve at the pace of science—fast and getting exponentially faster, while social technologies evolve at the pace at which humans can change—much slower. While physical technology change creates new marvels, new gadgets, better medicine, social technology change often creates huge social stresses and turmoil, like the Arab Spring countries trying to go from tribal autocracies to rule of law democracies. Also, our physical technologies can get way ahead of the ability of our social technologies to manage them—nuclear proliferation, bioterrorism, cyber crime—some of which is happening around us right now.<sup>82</sup>

The experience and likely exposure of the rapidly growing enterprise to international bribery and corruption will likely differ among even companies such as those described above, based in large part upon whether they have substantial on-the-ground continuing operations (such as Airbnb), agents conducting or facilitating business on their behalf.

#### IV. THE ENTREPRENEUR AND ENTERPRISE RISK

*“The tectonic, technology-driven shifts that characterize the Internet Century have rendered some of the commonly accepted strategic fundamentals we learned in school and on the job incorrect. So although your plan might change, it needs to be based on a foundational set of principles that are grounded in how things work today and that guide your plan as it shape-shifts its way to success. The plan is fluid, the foundation stable.”*<sup>83</sup>

##### A. Enterprise Risk Management (ERM)

Professors Anette Mikes and Robert S. Kaplan write, “[e]nterprise risk management (ERM) has become a crucial component of contemporary corporate governance reforms, with an abundance of principles, guidelines,

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<sup>81</sup> *Id.*

<sup>82</sup> FRIEDMAN, *supra* note 58, at 200 (quoting interview by Thomas L. Friedman with Eric Beinhocker, Exec. Dir., Inst. for New Econ.).

<sup>83</sup> SCHMIDT & ROSENBERG, *supra* note 11, at 67.

and standards.”<sup>84</sup> We can look to The Committee of Sponsoring Organizations of the Treadway Commission (COSO) who define ERM as the “process, effected by an entity’s board of directors, management and other personnel, applied in strategy setting and across the enterprise, designed to identify potential events that may affect the entity, and manage risks to be within its risk appetite, to provide reasonable assurance regarding the achievement of entity objectives.”<sup>85</sup> Mikes and Kaplan explain that ERM is not focused on the past nor based on past performance measurements. Rather, ERM consists of forward looking tools and processes that have been developed over many years and hopefully tailored to the unique needs and requirements of each specific enterprise. Therefore, “[i]n any particular company’s ERM mix . . . one might find risk maps based on risk identification and assessment processes, stress tests based on data collection and statistical analysis, and scenario analyses based on scenario envisionment and planning.”<sup>86</sup> A foundational concept to established corporations with management systems developed and refined over many years:

ERM is a process, not a result, which is both ongoing over the long-term and is implemented through multiple levels of the organization. ERM also envisions application through an enterprise-wide strategic lens and contemplates measuring risk management objectives and reassessing those objectives within the context of external shifts and internal changes in production and reporting processes.

The result is a risk management system whose language and functions are slanted toward large and established global firms. Implementation through levels of organization optimally assumes a multilayered and hierarchical organization is in place. A strategic perspective

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<sup>84</sup> Anette Mikes & Robert S. Kaplan, *Towards a Contingency Theory of Enterprise Risk Management* 1 (Harvard Bus. Sch., Working Paper No. 13-063, 2014), [https://www.hbs.edu/faculty/Publication%20Files/13-063\\_5e67dffe-aa5e-4fac-a746-7b3c07902520.pdf](https://www.hbs.edu/faculty/Publication%20Files/13-063_5e67dffe-aa5e-4fac-a746-7b3c07902520.pdf) [<https://perma.cc/53QG-F7EG>].

<sup>85</sup> *Id.* at 4 (citing COMM. OF SPONSORING ORG. OF THE TREADWAY COMM’N, ENTERPRISE RISK MANAGEMENT—INTEGRATED FRAMEWORK, EXECUTIVE SUMMARY 2 (2004)); see also Lawrence J. Trautman & Joanna Kimbell, *Bribery and Corruption: The COSO Framework, FCPA, and U.K. Bribery Act*, 30 FLA. J. INT’L L. 191, 215–17 (2018).

<sup>86</sup> Mikes & Kaplan, *supra* note 84, at 5 (citing Anette Mikes, *Risk Management and Calculative Cultures*, 20 MGMT. ACCT. RES. 18, 35 (2009)).

on ERM anticipates an ongoing and concretized strategic framework in the enterprise.<sup>87</sup>

It was the global financial crisis of 2008, according to professors Robert C. Bird and Stephen Kim Park that “launched ERM to prominence as firms witnessed well-entrenched predictive practices failing to provide sufficient guidance to manage the turbulent global economy.”<sup>88</sup> For example, even in the largest most established corporations, in 2009, “only 8.8 percent of surveyed organizations claimed to have a complete ERM system in place. That percentage had increased to 23.4 percent by 2012.”<sup>89</sup>

### B. *Small and Medium Sized Enterprises (SMEs)*

A considerable body of literature now exists about the particular problems typically encountered by small and medium sized enterprises (hereinafter “SMEs”).<sup>90</sup> The United States International Trade Commission

<sup>87</sup> Robert C. Bird & Stephen Kim Park, *Legal and Regulatory Aspects of Enterprise Risk Management for Small and Medium-Sized Enterprises*, in ENTERPRISE RISK MANAGEMENT FOR SMALL AND MEDIUM-SIZED ENTERPRISES 129, 129 (Jeyaraj Vadiveloo ed., 2015).

<sup>88</sup> *Id.*; see also Lawrence J. Trautman, Personal Ethics & the U.S. Financial Collapse of 2007–08: Decade Later After-Action Report (Aug. 12, 2017) (unpublished manuscript), <http://ssrn.com/abstract=2502124> [<https://perma.cc/KL4R-V4MB>].

<sup>89</sup> *Id.*

<sup>90</sup> See Justin W. Evans & Anthony L. Gabel, *Legal Entrepreneurship and the Strategic Virtues of Legal Uncertainty*, 57 AM. BUS. L.J. 593 (2020); Wade M. Danis et al., *The Impact of Managerial Networking Intensity and Market-Based Strategies on Firm Growth During Institutional Upheaval: A Study of Small and Medium-Sized Enterprises in a Transition Economy*, 41 J. INT’L BUS. STUD. 287 (2010); Fabio Musso & Barbara Francioni, *Foreign Markets Entry Mode Decision for Italian Small and Medium-Sized Enterprises*, 7 INT’L J. BUS. & MGMT. 3 (2012); Gaétan de Rassenfosse, *How SMEs Exploit Their Intellectual Property Assets: Evidence from Survey Data*, 39 SMALL BUS. ECON. 437 (2012); Albert Berry & Brian Levy, *Indonesia’s Small and Medium-Size Exporters and Their Support Systems* (World Bank Policy Research, Working Paper No. 1402, 1994), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=615031](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=615031) [<https://perma.cc/UP8G-4RX9>]; Hank Lim & Fukunari Kimura, *The Internationalization of Small and Medium Enterprises in Regional and Global Value Chains* (Asian Dev. Bank Inst., Working Paper No. 231, 2010), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1654304](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1654304) [<https://perma.cc/8P5X-7C65>]; Jonas Onkelinx & Leo Evariste Sleuwaegen, *Internationalization Strategy and Performance of Small and Medium Sized Enterprises* (Nat’l Bank of Belg., Working Paper No. 197, 2010), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1692583](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1692583) [<https://perma.cc/E9Q7-> (continued)]

(ITC) reports, “[t]here is no universally accepted definition of an SME, even within the United States government. This situation reflects the relative nature of the ‘small’ and ‘medium’ size classifications, which can apply differently to firms in the manufacturing, agricultural, and service sectors.”<sup>91</sup> However, several United States governmental agencies such as: the United States Department of Commerce (Commerce), the United States Small Business Administration (SBA), and the United States Department of Agriculture (USDA), issue reports related to this topic. The ITC observes, “[t]he definition used for SMEs by SBA’s Office of Advocacy (SBA Advocacy) is the most straightforward, as it includes all enterprises with fewer than 500 employees. Census employs this definition to delineate its data by firm size across all sectors of the United States economy (using NAICS categories). . . .”<sup>92</sup>

The requirement of sufficient resources devoted to an ongoing strategic organizational framework is simply not available to many, if not most, SMEs.<sup>93</sup> As professors Bird and Park have reported, “[r]easonable assurance regarding achievement of objectives is based upon an organization having such an assessment system in place. . . . SMEs may have few or none of these systems formally in place or, at best, they may only exist in the minds of a few key executives . . . [the visionaries].”<sup>94</sup> For a variety of reasons SMEs may have less resources available to devote to anticipating and managing risk, they may:

already be under intense business pressure that prevents giving these concerns priority. Small firms may be in significant debt to banks or investors. Small firms may also need to develop brand equity in a fashion that larger competitors with established brands have already achieved. Small firms may not have the dedicated staff to implement any process-oriented initiative, let alone one that implements an ERM program with a focus on mitigating

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B46P]; Mai Thi Thanh Thai, *The Internationalization of Vietnamese Small and Medium-Sized Enterprises* (May 14, 2008) (unpublished dissertation, Univ. of St. Gallen), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1918502](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1918502) [<https://perma.cc/HKW6-Z4ZJ>].

<sup>91</sup> U.S. INT’L TRADE COMM’N, PUBL’N 4125, *SMALL AND MEDIUM-SIZED ENTERPRISES: OVERVIEW OF PARTICIPATION IN U.S. EXPORTS 1-2* (2010).

<sup>92</sup> *Id.* at 1-3.

<sup>93</sup> See Bird & Park, *supra* note 87, at 131.

<sup>94</sup> *Id.* at 130.

legal risk. The small firm manager may have to be all things to all people, with the unfortunate consequences that he or she is the master of none. . . . [L]egal rules as applied to small firms may have a different and often more burdensome impact.<sup>95</sup>

In part, this article is inspired by the personal experience of the author while studying law several years ago in Buenos Aires. To illustrate the difficulties of starting a business in Argentina, an American woman who had lived in Argentina for several years explained her frustration and disgust at the never-ending parade of ad hoc requests for cash payments under the guise of required licenses, permits and the like. After almost two years of refusing to pay bribes and attempting to get improvements made to her proposed yoga spa location, she was still not in business. Her story is not an isolated one. Doing business in other cultures, often where bribery is an accepted way of life creates many expensive and dangerous challenges for the unwary.

Another example of how bribery and corruption impacts the lives of entrepreneurs is provided by professor Joseph W. Yockey who relates the story of an individual operating a micro business. As you read this account, please reject the temptation to dismiss pressure being exerted against a single-person business by thinking that the same type of corrupt activity doesn't happen to larger businesses having greater resources—and thus, more to steal. Accordingly, professor Yockey writes:

On December 17, 2010, Mohamed Bouazizi was operating a fruit stand in a large market in Tunisia. At ten o'clock in the morning he watched as local inspectors took his digital scale and several crates of apples and bananas. The seizure was his price for refusing to concede to their bribery demands. An hour later, Mr. Bouazizi set himself on fire in front of a public administration building. He died two weeks later.

Mr. Bouazizi's self-immolation, while incomprehensible to many, did not surprise his fellow Tunisian entrepreneurs. Like them, he was one of thousands of repressed traders living in fear of seeing the benefits of their hard work and investment vanish at the

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<sup>95</sup> *Id.* at 131–32 (citing Robert C. Bird & Elizabeth Brown, *Interactive Regulation*, 13 U. PA. J. BUS. L. 837, 854 (2011)).

hands of corrupt officials. Mr. Bouazizi simply hit a tipping point of despair. With no scale or inventory, he lost his only sources of capital and income. He could no longer pay the daily rent for a market space he spent his entire life trying to secure. His access to property and credit were gone in an instant, along with his future prospects.

The story surrounding Mr. Bouazizi's suicide is extreme, but it captures, in visceral terms, the challenges that corruption poses for entrepreneurs looking to tap into developing markets. At the most basic level, corruption acts as an extra tax that raises transaction costs and the cost of capital. But it also poses safety threats, decreases morale, and hinders the quality of production. It limits the ability of firms to unseat incumbents by fortifying closed networks and creating barriers to entry. It reduces entrepreneurs' trust and confidence in the institutions that drive innovation and economic coordination. Even the simplest transactions—connecting to the internet, moving goods through customs, turning on water service—become rife with uncertainty. More broadly, corruption contravenes the values of freedom, democracy, and self-actualization that entrepreneurial action advances.<sup>96</sup>

Professor Yockey observes, “Mr. Bouazizi's circumstances reveal the quintessential low-level bribery scheme: the extraction of kickbacks from street vendors who are dependent upon staying in public officials' good graces for their livelihoods.”<sup>97</sup> Additional discussion will later be provided about anti-corruption laws and regulations as applied to large, mature enterprises, where, as you would suspect, most of the prosecutions have been brought. However, early-stage, high growth companies may also find themselves in violation of anti-corruption statutes, as is noted in the case of Uber.<sup>98</sup>

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<sup>96</sup> Joseph W. Yockey, *Corrupting Entrepreneurial Action*, in THE CAMBRIDGE HANDBOOK OF LAW AND ENTREPRENEURIAL ACTION 1–2 (D. Gordon Smith & Christine Hurt eds., forthcoming 2021); see Hernando de Soto, *The Real Mohamed Bouazizi*, FOREIGN POLICY (Dec. 16, 2011, 7:13 PM), <https://foreignpolicy.com/2011/12/16/the-real-mohamed-bouazizi/> [<https://perma.cc/EZN8-5542>] (providing a complete account of Mr. Bouazizi's story).

<sup>97</sup> *Id.* at 3.

<sup>98</sup> See *infra* Part X.

## V. THE ALLURE OF INTERNATIONAL MARKETS

*“Airbnb had instantly become global upon its launch... Uber, however, was going to have to methodically enter each market and find employees in every city who would recruit drivers, promote the service to riders, and talk to regulators. . . . [Uber’s] effort to build a global empire was going to be laborious.”*<sup>99</sup>

Many major United States corporations now obtain more than half of their sales from outside the country. During recent years, for example: Intel (85% of sales from overseas);<sup>100</sup> Advanced Micro Devices (85%);<sup>101</sup> Colgate-Palmolive Company (80%);<sup>102</sup> Yum Brands, parent of KFC, Pizza Hut and Taco Bell (77%);<sup>103</sup> Dow Chemical (67%);<sup>104</sup> McDonald’s (66%);<sup>105</sup> IBM (64% of sales from outside the United States);<sup>106</sup> Merck & Co. (59%);<sup>107</sup> General Electric (54%);<sup>108</sup> eBay (52%);<sup>109</sup> and Ford Motor (51%).<sup>110</sup> Given the quick and cost effective potential of using the Internet to increase sales to international markets, it is no wonder that many young businesses seek to sell globally. As discussed in § III, *Infra*, numerous

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<sup>99</sup> BRAD STONE, THE UPSTARTS: UBER, AIRBNB, AND THE BATTLE FOR THE NEW SILICON VALLEY 153–54 (2017).

<sup>100</sup> Rick Newman, *Why U.S. Companies Aren’t So American Anymore: Foreign Sales Are the Main Thing Keeping A Lot of American Companies Healthy*, U.S. NEWS & WORLD REP. (June 30, 2011, 3:58 PM), <http://money.usnews.com/money/blogs/flowchart/2011/06/30/why-us-companies-arent-so-american-anymore> [https://perma.cc/NMP8-49UU].

<sup>101</sup> See Advanced Micro Devices, Inc., Annual Report (Form 10-K), at 53 (Feb. 18, 2014).

<sup>102</sup> See Colgate-Palmolive Company, Annual Report (Form 10-K), at 87 (Feb. 20, 2014).

<sup>103</sup> Yum! Brands, Inc., Annual Report (Form 10-K), at 3 (Feb. 18, 2014); see also Robert W. Emerson & Lawrence J. Trautman, *Lessons About Franchise Risk From YUM Brands and Schlotsky’s*, 24 LEWIS & CLARK L. REV. 997 (2020).

<sup>104</sup> Newman, *supra* note 100.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Merck & Co., Inc., Annual Report (Form 10-K), at 16 (Feb. 27, 2014).

<sup>108</sup> Newman, *supra* note 100.

<sup>109</sup> eBay Inc., Annual Report (Form 10-K), at 39 (Jan. 31, 2014).

<sup>110</sup> Newman, *supra* note 100.

highly successful entrepreneurial start-ups have found themselves engaged in international commerce early in their development.<sup>111</sup>

Professors Schaffer, Agusti and Dhooge warn that those thinking about conducting business in an international environment should consider the threat of exposure to two major types of international crime: (1) transnational organized crime, and (2) transnational business crime.<sup>112</sup> Transnational organized crime happens unwillingly, through the unknown activities of agents, and sometimes just due to proximity. Examples of transnational organized crime include: counterfeiting;<sup>113</sup> cybercrime;<sup>114</sup> firearms trade;<sup>115</sup> human trafficking,<sup>116</sup> money laundering;<sup>117</sup> ocean

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<sup>111</sup> Numerous enterprises that are now household names were started by entrepreneurs relatively recently. See, e.g., Airbnb (2008), see *About Us*, AIRBNB, <https://news.airbnb.com/about-us/> [<https://perma.cc/8KQ9-MYZS>]; Facebook (2004), see *About*, FACEBOOK, [https://www.facebook.com/facebook/about/?ref=page\\_internal](https://www.facebook.com/facebook/about/?ref=page_internal) [<https://perma.cc/Z9HQ-4EN4>]; Uber (2009), see *About Us: The History of Uber*, UBER, <https://www.uber.com/newsroom/history/> [<https://perma.cc/LL9Y-RUK2>].

<sup>112</sup> SCHAFFER ET AL., *supra* note 20, at 38.

<sup>113</sup> See generally Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381 (2005); Sean M. Flynn et al., *The U.S. Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement*, 28 AM. U. INT'L L. REV. 105 (2012); Eric Priest, *The Future of Music and Film Piracy in China*, 21 BERKELEY TECH. L.J. 795 (2006); David S. Wall & Joanna Large, *Jailhouse Frocks: Locating the Public Interest in Policing Counterfeit Luxury Fashion Goods*, 50 BRIT. J. CRIMINOL. 1094 (2010); Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975 (2011).

<sup>114</sup> See David D. Schein & Lawrence J. Trautman, *The Dark Web and Employer Liability*, 18 COLO. TECH. L.J. 49 (2020).

<sup>115</sup> Ben Saul, *The Legal Relationship Between Terrorism and Transnational Crime*, 17 INT'L CRIM. L. REV. 417, 433–34 (2017).

<sup>116</sup> See generally *id.*

<sup>117</sup> See Jeffrey R. Boles, *Financial Sector Executives as Targets for Money Laundering Liability*, 52 AM. BUS. L.J. 365, 365–73 (2015); see also Kathleen A. Lacey & Barbara Crutchfield George, *Crackdown on Money Laundering: A Comparative Analysis of the Feasibility and Effectiveness of Domestic and Multilateral Policy Reforms*, 23 NW. J. INT'L L. & BUS. 263, 267–71 (2003); Lawrence J. Trautman, *Following the Money: Lessons from the Panama Papers, Part I: Tip of the Iceberg*, 121 PENN ST. L. REV. 807 (2017).

piracy;<sup>118</sup> ransom of executives;<sup>119</sup> smuggling of illegal drugs and other items,<sup>120</sup> terrorism,<sup>121</sup> just to name few. Schaffer, Agusti and Dhooge list the following types of transnational business crime: “bribery and corruption, tax evasion, customs fraud, criminal violations of export control laws, business fraud, financial crimes, criminal violations of environmental laws, securities laws, and antitrust laws.”<sup>122</sup>

The entrepreneur seeking to create a presence in an international jurisdiction for the first time may be shocked at the amount of time and expense that is required. Kaplan, Piedra and Seira report “a considerable burden on the entrepreneur looking to register a firm with the appropriate authorities: the average number of days is 47, and the official cost of following these procedures for a simple firm is 47 percent of annual per capita income.”<sup>123</sup> Kaplan, Piedra and Seira also find that “‘stricter’ regulation of entry is associated with sharply higher levels of corruption, and a greater relative size of the unofficial economy.”<sup>124</sup>

## VI. BRIBERY, CORRUPTION AND EXTORTION

*“‘We can’t do that, it would be evil.’ The room suddenly got quiet; it was like a poker game in an old Western, when one player accuses another of cheating and everyone else backs away from the table, waiting for someone to draw. Eric thought, Wow, these guys take these things seriously. . . . The famous Google mantra of ‘Don’t be evil’ . . . genuinely expresses a company value and aspiration that is deeply felt by employees. . . . Googlers do*

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<sup>118</sup> See Mike Madden, *Trading the Shield of Sovereignty for the Scales of Justice: A Proposal for Reform of International Sea Piracy Laws*, 21 U.S.F. MAR. L.J. 139, 140–42 (2008).

<sup>119</sup> See Yehuda Goor, *Ransom Kidnapping and Human Trafficking: The Case of the Sinai Torture Camps*, 36 BERKELEY J. INT’L L. 111 (2018).

<sup>120</sup> See Jeremy Slack & Howard Campbell, *On Narco-Coyotaje: Illicit Regimes and Their Impacts on the U.S.–Mexico Border*, 48 ANTIPODE 1380 (2016).

<sup>121</sup> See generally Saul, *supra* note 115.

<sup>122</sup> SCHAFFER ET AL., *supra* note 20, at 38.

<sup>123</sup> David S. Kaplan et al., *Entry Regulation and Business Start-Ups: Evidence from Mexico*, 95 J. PUB. ECON. 1501, 1501 (2011) (citing Simeon Djankó et al., *The Regulation of Entry*, 117 Q. J. ECON. 1, 4 (2002)).

<sup>124</sup> *Id.*

*regularly check their moral compass when making decisions.*"<sup>125</sup>

A. *Bribery, Corruption and Extortion Defined*

The concepts of bribery and extortion are closely related. The Organization for Economic Cooperation and Development (OECD) describes a *bribe* as:

[An] . . . offer, promise, or giv[ing] of any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business. The Commentaries to the Convention (paragraph 9) clarify that small 'facilitation' payments do not constitute payments made 'to obtain or retain business or other improper advantage' within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance.<sup>126</sup>

Elsewhere, *bribery* is defined as "[t]he corrupt payment, receipt, or solicitation of a private favor for official action;"<sup>127</sup> *commercial bribery* as "(1) The knowing solicitation or acceptance of a benefit in exchange for violating an oath of fidelity, such as that owed by an employee, partner, trustee, or attorney; [(2) omitted]; (3) Corrupt dealing with the agents or employees of prospective buyers to secure an advantage over business competitors."<sup>128</sup> *Extortion* is defined as "(1) The offense committed by a public official who illegally obtains property under the color of office; esp., an official's collection of an unlawful fee. (2) The act or practice of

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<sup>125</sup> See SCHMIDT & ROSENBERG, *supra* note 11, at 64–65.

<sup>126</sup> OECD, GUIDELINES FOR MULTINATIONAL ENTERPRISES 49 n.6 (2011), <https://www.oecd.org/daf/inv/mne/48004323.pdf> [<https://perma.cc/72PZ-YGWZ>].

<sup>127</sup> *Black's Law Dictionary* 80–81 (3rd Pocket ed. 2006).

<sup>128</sup> *Id.* at 81.

obtaining something or compelling some action by illegal means, as by force or coercion.”<sup>129</sup>

Article 1 of the OECD Convention on Combating Bribery of Public Officials in International Business Transactions, adopted by the negotiating conference on November 21, 1997 states:

#### The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.<sup>130</sup>

The importance of OECD developments over the years is discussed more fully in § VII, *Infra*. Now, a few thoughts about the cost to global societies of bribery and corruption.

#### *B. Ethical and Societal Cost of Corruption*

Bribery, extortion, or corruption in any of its various forms, much like a cancer, extracts an unacceptable toll on all citizens of the world. Transparency International observes that, “From children denied an education, to elections decided by money not votes, public sector corruption comes in many forms. Bribes and backroom deals don’t just steal resources from the most vulnerable—they undermine justice and economic

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<sup>129</sup> *Id.* at 272.

<sup>130</sup> OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 1, Dec. 17, 1997, S. Treaty Doc. No. 105-43 (1997).

development, and destroy public trust in leaders.”<sup>131</sup> Corruption presents the basic economic problem that “no net value is created in a bribe, and great costs are imposed.”<sup>132</sup> Philip Nichols observes that “the payment of bribes increases the costs borne by a firm and increases the amount of time that firm will spend interacting with bureaucracies. The firm is likely to experience lower rates of growth and lower productivity than firms that do not pay bribes.”<sup>133</sup>

Alexandra Wrage, President of Annapolis, Maryland-based TRACE International, writes:

Companies that are otherwise cutthroat competitors are recognizing that, on the issue of bribery, they can minimize the ‘prisoners’ dilemma’ only by agreeing to play by the same rules. These agreements reflect a growing global conviction that bribery is wrong, but also that it is uneconomical, inefficient, costly, distorting of proper incentives and outcomes, risky, and generally unprofitable. It is, in short, a poor way to do business.<sup>134</sup>

Timothy Fort and Cindy Schipani report finding “a nearly perfect correlation between corruption and violence in countries around the world. The more corrupt a regime, the more likely it was to resolve disputes through violence.”<sup>135</sup> Furthermore, “the violence doesn’t just flow from rulers, said

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<sup>131</sup> TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX 2013 1 (2013), [https://issuu.com/transparencyinternational/docs/cpi2013\\_brochure\\_single\\_pages/3](https://issuu.com/transparencyinternational/docs/cpi2013_brochure_single_pages/3) [<https://perma.cc/ZMF4-8P46>].

<sup>132</sup> Virginia G. Maurer, Endogenous and Exogenous Approaches to Corruption in the Caribbean Region (Jan. 30, 2014) (unpublished manuscript) (on file with author) (citing SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM (1999)); see also GEORGE T. ABED & SANJEEV GUPTA, GOVERNANCE, CORRUPTION, AND ECONOMIC PERFORMANCE (2002); SUSAN ROSE-ACKERMAN, INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION (2006); Daniel T. Ostad, *When Fraud Pays: Executive Self Dealing and the Failure of Self-Restraint*, 44 AM. BUS. L.J. 571 (2007).

<sup>133</sup> Philip M. Nichols, *The Business Case for Complying With Bribery Laws*, 49 AM. BUS. L.J. 325, 367 (2012).

<sup>134</sup> ALEXANDRA ADDISON WRAGE, BRIBERY AND EXTORTION: UNDERMINING BUSINESS, GOVERNMENTS, AND SECURITY 124 (2007).

<sup>135</sup> Francis X. Donnelly & Sarah Kellogg, *Understanding Corruption*, GW BUS., Fall 2011, at 11 (discussing the work of Timothy L. Fort); see also Timothy L. Fort & Cindy A. Schipani, *Adapting Corporate Governance for Sustainable Peace*, 36 VAND. J. TRANSNAT’L

(continued)

Fort. Sometimes the populace is so frustrated by corrupt leaders that their resentment finally explodes in a physical act . . . [observing that t]he uprising that has spread across Arab countries began [during 2010] with resistance against the corrupt leadership of Tunisia.”<sup>136</sup> Richard Alderman, Director of the United Kingdom’s Serious Fraud Office (SFO) until April 2012, reaches a similar conclusion. He observes:

I have been following . . . the events of the Arab Spring with the very greatest of interest. I have also been looking at what has been happening recently in India, China, Russia, and other countries. When I look, in particular, at the Arab Spring I see that corruption is one of the top issues raised by the citizens of these countries as one of their main grievances against the government or, indeed in some cases, the former government. Some say that bribery is part of the culture of those countries and that we must respect it. The citizens of those countries have demonstrated very clearly to my mind that this is not part of the culture that they are prepared to accept any longer.<sup>137</sup>

India’s 2014 national elections have shown political corruption to be a defining issue with surveys indicating that pervasive graft is widely

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L. 377 (2003); Timothy L. Fort & Cindy A. Schipani, *The Role of the Corporation in Fostering Sustainable Peace*, 35 VAND. J. TRANSNAT’L L. 389, 431 (2002); Timothy L. Fort & Cindy A. Schipani, *Ecology and Violence: The Environmental Dimensions of War* (William Davidson Inst., Working Paper No. 698, 2004), <https://deepblue.lib.umich.edu/bitstream/handle/2027.42/40084/wp698.pdf?sequence=3> [<https://perma.cc/B7YJ-RG4U>].

<sup>136</sup> Donnelly & Kellogg, *supra* note 135, at 11 (discussing the work of Timothy L. Fort); see also Norman D. Bishara, *Governance and Corruption Constraints in the Middle East: Overcoming the Business Ethics Glass Ceiling*, 48 AM. BUS. L.J. 227 (2011), (illustrating how corruption combines with other influences such as weak corporate governance to act as a serious constraint on the business growth of local firms).

<sup>137</sup> Lawrence J. Trautman & Kara Altenbaumer-Price, *Lawyers, Guns, and Money: The Bribery Problem and the U.K. Bribery Act*, 47 INT’L LAW. 481, 483 (2013) (citing Richard Alderman, Dir., U.K. Serious Fraud Office, Address at the Risk Advisory’s D.C. Dinner (Oct. 5, 2011) (transcript available at <https://webarchive.nationalarchives.gov.uk/20120716141440/http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2011/risk-advisory-dinner,-washington-dc.aspx> [<https://perma.cc/5WWN-JVBK>])).

disapproved.<sup>138</sup> “Coalgate,” one of the many scandals during recent years to receive considerable attention in India, “involves allegations that coal-mining rights were given to politically connected companies at low prices in exchange for bribes to politicians and officials.”<sup>139</sup> As a result of Coalgate and many other high-profile bribery cases, a popular nationwide anticorruption movement, the Aam Aadmi Party, has attracted a substantial urban following.<sup>140</sup> Virginia and Ralph Maurer state that “[i]t is easy to short-weight the extraordinary harm and staggering costs to humans that the OECD and other international anti-corruption measures seek to prevent, because the costs, but not the obvious benefits, of successful anti-corruption policy fall on multinational businesses.”<sup>141</sup> Weiss and Rosenblatt show that early empirical literature estimates the effect of corruption on economic growth: Mauro’s emphasis “that corruption may constitute a main obstacle to investment thereby reducing economic growth [and that] Davoodi and Tanzi . . . find that corruption is associated with lower government revenues, higher public investment, but lower expenditures on operations and maintenance and finally lower quality of public infrastructure.”<sup>142</sup> In addition, Mauro provides evidence that corrupt countries are spending less on education and health, and because social spending is assumed to promote growth, it must be concluded that this might be another channel through which corruption may affect growth negatively.<sup>143</sup> What about the causal relationship between crime and economic growth? Enamorado,

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<sup>138</sup> Jesse Pesta, *For Many Indian Voters, Corruption Issue Takes a Back Seat at the Polls*, WALL ST. J. (Apr. 20, 2014, 9:16 PM), <https://www.wsj.com/articles/SB10001424052702304626304579507331975161094> [<https://perma.cc/F8VS-BJZS>].

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Virginia Gallaher Maurer & Ralph Emmett Maurer, *Uncharted Boundaries of the U.S. Foreign Corrupt Practices Act*, 20 J. FIN. CRIME 355, 359 (2013).

<sup>142</sup> Eli Weiss & David Rosenblatt, *Regional Economic Growth in Mexico: Recent Evolution and the Role of Governance* 3 (World Bank Policy Research, Working Paper No. 5369, 2010), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1646792](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1646792) [<https://perma.cc/MA4F-TAJP>] (first citing Paolo Mauro, *Corruption and Growth*, 110 Q. J. ECON. 681 (1995); then citing Vito Tanzi & Hamid Davoodi, *Corruption, Public Investment, and Growth* 1 (Int’l Monetary Fund, Working Paper No. 97/139, 1997), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=882701](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=882701) [<https://perma.cc/PR9U-QSVX>]).

<sup>143</sup> *Id.* (citing Paolo Mauro, *Corruption and the Composition of Government Expenditure*, 69 J. PUB. ECON. 263 (1998)).

Rodriguez-Castelan, and López-Calva report existing literature illustrates that “crime diverts resources that could have been used in more productive ways, crime increases security costs for businesses, it decreases health, it represents a threat to private property, and it discourages domestic and international investment because the investment climate deteriorates.”<sup>144</sup> Minxin Pei observes, “The experiences of . . . developing countries show that runaway corruption undermines critical governing institutions, fuels public resentment, exacerbates socioeconomic inequality, creates massive economic distortions, and magnifies the risks of full-blown crises.”<sup>145</sup> Virginia and Ralph Maurer observe:

[B]ribery distorts efficient allocation of capital and human resources. Companies that do not bribe lose access to infrastructure, such as ports and rail systems, because gatekeepers who control access enrich themselves instead of the nation and people for whom they work. Human resources are mis-allocated as the most rewarding jobs are those that produce income based on crime rather than those based on creating value for the society. Companies that pay bribes either must shrink their profit margins or lower the quality of goods and services provided; they cut corners,

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<sup>144</sup> Ted Enamorado et al., *Crime and Growth Convergence: Evidence from Mexico*, 125 ECON. LETTERS 9, 9 (2014); see PABLO FAJNZYLBER ET AL., DETERMINANTS OF CRIME RATES IN LATIN AMERICA AND THE WORLD: AN EMPIRICAL ASSESSMENT (1998); Benjamin Powell et al., *Corruption, Crime and Economic Growth*, in HANDBOOK ON THE ECONOMICS OF CRIME 328 (Bruce L. Benson & Paul R. Zimmerman eds., 2010); Gabriel Demombynes & Berk Özler, *Crime and Local Inequality in South Africa*, 76 J. DEV. ECON. 265 (2005); Claudia Detotto & Edoardo Otranto, *Does Crime Affect Economic Growth?*, 63 KYKLOS 330 (2010); Mauricio Cárdenas & Sandra Rozo, *Does Crime Lower Growth?: Evidence from Colombia* (Comm’n on Growth & Dev., Working Paper No. 30, 2008), <http://hdl.handle.net/10986/28005> [<https://perma.cc/2EEG-M46K>]; Juan Luis Londoño & Rodrigo Guerrero, *Violencia en América Latina: Epidemiología y Costos* (Inter-American Dev. Bank, Working Paper R-375, 2000), <https://www.utp.edu.co/~porlapaz/docs/violencia/pxp2.pdf> [<https://perma.cc/6SK3-MKZL>]; Christopher Stone, *Crime, Justice, and Growth in South Africa: Toward a Plausible Contribution from Criminal Justice to Economic Growth* (Ctr. for Int’l Dev., Working Paper No. 131, 2006), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=902387&rec=1&srcabs=1971491&pos=8](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=902387&rec=1&srcabs=1971491&pos=8) [<https://perma.cc/A2HW-PP6K>].

<sup>145</sup> Minxin Pei, *Corruption Threatens China’s Future*, CARNEGIE ENDOWMENT INT’L PEACE POLICY BRIEF 55, Oct. 2007, at 1, 1.

and they pay more bribes to inspectors and contract auditors to cover that up. Most tragically, the shared collective economic benefits of government are lost in the developing world, where ordinary people must sacrifice family nutrition, education, and shelter, to meet legal demands for providing essential services. It is not surprising that people of these nations resent foreign companies that buy their government officials. And they resent the countries that fail to control their multinationals and that support a system that imposes unbearable social, political, and economic costs. This resentment is a cost of an incalculable magnitude to those countries which pays most of the international bribes.<sup>146</sup>

### C. *Who Bribes?*

From a survey conducted by the World Economic Forum of 11,232 business managers located in 125 countries, D'Souza and Kaufmann examine data consisting of 146 questions (14 related to corruption) with a goal to monitor critical components in various world economies.<sup>147</sup> The D'Souza and Kaufmann data, also known as the Global Competitiveness Report, reveal that worldwide, "managers across the globe admit that 'firms like theirs' pay illicit payments in order to secure government contracts."<sup>148</sup> As to the details:

On average, approximately 32 percent of managers report that firms like theirs bribe to secure a government contract; this percentage ranges from 13 percent of firms based in high-income OECD countries to 32 percent in middle-income countries and 50 percent in low-income countries. This underscores the fact that while the incidence of bribery does vary across countries, such corrupt behavior is not limited to poorer developing countries.<sup>149</sup>

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<sup>146</sup> Maurer & Maurer, *supra* note 141, at 359–60.

<sup>147</sup> Anna D'Souza & Daniel Kaufmann, *Who Bribes in Public Contracting and Why: Worldwide Evidence from Firms*, 14 *ECON. GOVERNANCE* 333, 337–38 (2013).

<sup>148</sup> *Id.* at 334.

<sup>149</sup> *Id.* at 334–35.

#### D. Which Countries Provide the Greatest Risk?

Transparency International publishes an annual survey of expert opinion from 177 countries as to “perceived levels of public sector corruption.”<sup>150</sup> The face of bribery and corruption tends to be highly local and comes in various scenarios.<sup>151</sup> The Corruption Perceptions Index 2018 rankings show that perceived levels of public sector corruption are: least in Denmark (1<sup>st</sup>); New Zealand (2<sup>nd</sup>); Canada, Luxembourg and Netherlands (tied for 9<sup>th</sup>); United Kingdom (11<sup>th</sup>); United States (22<sup>nd</sup>); India (78<sup>th</sup>); China (87<sup>th</sup>); Mexico (138<sup>th</sup>); Sudan (172<sup>nd</sup>); North Korea (176<sup>th</sup>); and Somalia (180<sup>th</sup>).<sup>152</sup>

#### E. Canada

Canada is the United States’ second largest trading partner in terms of goods.<sup>153</sup> Canada’s Corruption of Foreign Public Officials Act (“CFPOA”)<sup>154</sup> appears deliberately similar to the FCPA. However, unlike the FCPA, Campbell, Preston and O’Hara observe:

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<sup>150</sup> TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX 2018 2 (2019), [https://images.transparencycdn.org/images/CPI\\_2018\\_Executive\\_Summary\\_EN.pdf](https://images.transparencycdn.org/images/CPI_2018_Executive_Summary_EN.pdf) [<https://perma.cc/GZ2P-Q8EZ>]; see also Daniel Egiegba Agbibo, *Between Corruption and Development: The Political Economy of State Robbery in Nigeria*, 108 J. BUS. ETHICS 325, 330 (2012); James H. Davis & John A. Ruhe, *Perceptions of Country Corruption: Antecedents and Outcomes*, 43 J. BUS. ETHICS 275, 281 (2003); Shu Li et al., *Cultural Orientation and Corruption*, 16 ETHICS & BEHAV. 199, 199 (2006); Leo V. Ryan, *Combating Corruption: The 21st Century Ethical Challenge*, 10 BUS. ETHICS Q. 331, 333 (2000); Mark S. Schwartz, “Corporate Efforts to Tackle Corruption: An Impossible Task?” *The Contribution of Thomas Dunfee*, 88 J. BUS. ETHICS 823, 829 (2009); Randi L. Sims & A. Ercan Gegez, *Attitudes Towards Business Ethics: A Five Nation Comparative Study*, 50 J. BUS. ETHICS 253, 256 (2004); Edward H. Spence, *Corruption in the Media*, 22 INT’L J. APPLIED PHIL. 231 (2008); Paul G. Wilhelm, *International Validation of the Corruption Perceptions Index: Implications for Business Ethics and Entrepreneurship Education*, 35 J. BUS. ETHICS 177, 178 (2002).

<sup>151</sup> See generally Maurer & Maurer, *supra* note 141 (discussing bribery and corruption in the Caribbean); Jeffrey Boles, *Examining the Lax Treatment of Commercial Bribery in the United States: A Prescription for Reform*, 51 AM. BUS. L.J. 119 (2014) (providing a discussion about commercial bribery jurisprudence in the United States); Shang-Jin Wei, *How Taxing is Corruption on International Investors?*, 82 REV. ECON. & STAT. 1 (2000).

<sup>152</sup> See TRANSPARENCY INTERNATIONAL, *supra* note 150, at 2–3.

<sup>153</sup> Canada, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/countries-regions/americas/canada> [<https://perma.cc/CMQ4-44CH>].

<sup>154</sup> Corruption of Foreign Public Officials Act, S.C. 1998, c. 34 (Can.).

The CGPOA does not assert jurisdiction over acts of corruption committed entirely outside of Canada, and the CFPOA appears not to apply to the non-profit sector. Aside from these two areas, the CFPOA is a robust regime which necessitates careful compliance activity by Canadian companies and individuals carrying on business abroad.<sup>155</sup>

Recently, an Ottawa businessman, Nazir Karigar, was convicted and sentenced to three years in prison under Canadian bribery laws for his role in a scheme to bribe India government officials, including a minister, to obtain a security technology contract with state-owned Air India.<sup>156</sup> During the past decade, three companies have pleaded guilty under Canada's Corruption of Foreign Public Officials Act, paid a fine and avoided a trial. However, Mr. Karigar is the first individual to be convicted and receive prison time.<sup>157</sup> Since Mr. Karigar's conviction, the maximum sentence under this Act has been increased from five years to fourteen years.<sup>158</sup>

#### F. China

China is currently among the United States' largest goods trading partners.<sup>159</sup> Trautman observes that "China may be considered the new frontier for entrepreneurship; a logical primary source of economical manufacturing, raw materials, component parts, and as a major end market."<sup>160</sup> Journalist David Barboza reports that "prominent corruption

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<sup>155</sup> Neil Campbell et al., *Foreign Corrupt Practices—The Growth and Limitations of Canadian Enforcement Activity*, 23 *IND. INT'L & COMP. L. REV.* 35, 35 (2013).

<sup>156</sup> Kim Mackrael, *Ottawa Man Handed Three-Year Sentence in Landmark Bribery Case*, *THE GLOBE & MAIL* (May 23, 2014), [https://www.theglobeandmail.com/news/national/ottawa-man-handed-three-year-sentence-in-landmark-bribery-case/article18819841/?cmpid=rss1&click=sf\\_globe](https://www.theglobeandmail.com/news/national/ottawa-man-handed-three-year-sentence-in-landmark-bribery-case/article18819841/?cmpid=rss1&click=sf_globe) [<https://perma.cc/R228-QUUC>].

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *The People's Republic of China*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china> [<https://perma.cc/PX88-V2GZ>].

<sup>160</sup> Lawrence J. Trautman, *American Entrepreneur in China: Potholes and Roadblocks on the Silk Road to Prosperity*, 12 *WAKE FOREST J. BUS. & INTELL. PROP. L.* 427 (2012); see also Marisa Anne Pagnattaro, "The Google Challenge": *Enforcement of Noncompete and Trade Secret Agreements for Employees Working in China*, 44 *AM. BUS. L.J.* 603 (2007) (noting just one example of difficulties when conducting business in China).

cases in China are often the outgrowth of power struggles within the Communist Party, with competing factions using the ‘war on corruption’ as a tool to eliminate or weaken rivals and their corporate supporters.”<sup>161</sup> Barboza continues, “This may help explain one of the enduring contradictions of China’s political and economic system: the government regularly publicizes an astonishing number of corruption cases, yet little progress seems to be made in uprooting corruption.”<sup>162</sup>

China appears to be a major country of corruption focus by the United States Department of Justice in its FCPA enforcement priorities.<sup>163</sup> “Failure to contain endemic corruption among Chinese officials poses one of the most serious threats to [China’s] future economic and political stability,” reports the Carnegie Endowment for International Peace in its October 2007 study by Minxin Pei.<sup>164</sup> An expert on economic reform and governance in China, Pei argues that corruption “not only fuels social unrest and contributes to the rise in socioeconomic inequality, but holds major implications beyond its borders for foreign investment, international law, and environmental protection . . . and roughly 10 percent of government spending, contracts, and transactions is estimated to be used as kickbacks and bribes, or simply stolen.”<sup>165</sup> Pei further observes that “[c]orruption has not yet derailed China’s economic rise, sparked a social revolution, or deterred Western investors. But it would be foolish to conclude that the Chinese system has an infinite capacity to absorb the mounting costs of

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<sup>161</sup> David Barboza, *Politics Permeates Anti-Corruption Drive in China*, N.Y. TIMES (Sept. 3, 2009), [https://www.nytimes.com/2009/09/04/business/global/04corrupt.html?\\_r=2&hp=&pagewanted](https://www.nytimes.com/2009/09/04/business/global/04corrupt.html?_r=2&hp=&pagewanted) [https://perma.cc/7LJV-AC9W].

<sup>162</sup> *Id.*; see also Simin Gao, *Disequilibrium Between Regulation and Criminalization to Counter Financial Misconduct: The Case of Shadow Banking in China*, 54 AM. BUS. L.J. 393, 397 (2017); Patricia Pattison & Daniel Herron, *The Mountains Are High and the Emperor is Far Away: Sanctity of Contract in China*, 40 AM. BUS. L.J. 459, 504–06 (2003); Shuangge Wen, *The Achilles Heel That Hobbles the Asian Giant: The Legal and Cultural Impediments to Antibribery Initiatives in China*, 50 AM. BUS. L.J. 483, 484–87 (2013).

<sup>163</sup> SEC, DOJ Continue to Enforce FCPA Cases Involving China and Joint Ventures, MCDERMOTT, WILL & EMERY (Jan. 14, 2011), <https://www.jdsupra.com/legalnews/sec-doj-continue-to-enforce-fcpa-cases-73168/> [https://perma.cc/CB5S-EZX4].

<sup>164</sup> Minxin Pei, *Corruption Threatens China’s Future*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Oct. 9, 2017), <https://carnegieendowment.org/2007/10/09/corruption-threatens-china-s-future-pub-19628> [https://perma.cc/2ENM-N2FE].

<sup>165</sup> *Id.*

corruption. . . . Eventually, growth will falter.”<sup>166</sup> The key findings of Pei’s Carnegie report include:

1. Though the Chinese government has more than 1,200 laws, rules and directives against corruption, implementation is spotty and ineffective. The odds of a corrupt official going to jail are less than three percent, making corruption a high-return, low risk activity. Even low-level officials have the opportunity to amass an illicit fortune of tens of millions of yuan;
2. The amount of money stolen through corruption scandals has risen exponentially since the 1980s. Corruption in China is concentrated in sectors with extensive state involvement, such as infrastructure projects, real estate, government procurement, and financial services. The absence of competitive political process and free press make these high-risk sectors susceptible to fraud, theft, kickbacks, and bribery. The direct costs of corruption could be as much as \$86 billion each year;
3. The indirect costs of corruption (efficiency losses; waste; and damage to the environment, public health, education, credibility and morale) are incalculable. Corruption both undermines social stability (sparking tens of thousands of protests each year), and contributes to China’s environmental degradation, deterioration of social services, and the rising cost of health care, housing and education;
4. China’s corruption also harms Western economic interests, particularly foreign investors who risk environmental, human rights, and financial liabilities, and must compete against rivals who engage in illegal practices to win business in China; and
5. The U.S. government should devote resources to tracking reported cases of corruption in China, increase legal cooperation with China (to prevent illegal immigration by corrupt officials and money laundering), and insist on reforms to China’s law-enforcement practices

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<sup>166</sup> Pei, *supra* note 145, at 5–6.

and legal procedures before tracking Chinese fugitives in the United States and recovering assets they have looted.<sup>167</sup>

Trautman notes that “business formation may take legal counsel as little as an afternoon in the United States: to ascertain availability of a corporate name, draft, and then file a corporate charter and by-laws with the appropriate state authorities. Not so in China . . . it may take as long as two years to move a foreign joint venture or wholly-owned enterprise through the necessary approval processes.<sup>168</sup> Usually 20 “chops”, the official ‘stamp’ of the particular authority, will be required to successfully navigate the many often overlapping layers of relevant Chinese governmental authorities having jurisdiction over any new enterprise, with the following being most significant:

1. *STATE COUNCIL* (the PRC’s major legal governing body) is responsible for the bulk of regulation. If the project involves \$100 million (U.S.) or more the State Council must approve. This is the mechanism where an attempt is made to ensure compliance with the state’s five-year economic plan.
2. *MINISTRY OF COMMERCE* (“MOFCOM”), the central agency located in Beijing that is responsible for approving any project over \$30 million (U.S. \$) [except for Tianjin and Shanghai]; and
3. *COMMISSION OF COMMERCE* (“COMCOM,” formerly COFTEC), the local branch of MOFCOM, may approve projects of \$30 million (U.S.) or less.<sup>169</sup>

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<sup>167</sup> Pei, *supra* note 164 (summary of key findings from Policy Brief 55).

<sup>168</sup> Trautman, *supra* note 160, at 446; *see also* DAVID GRANICK, *CHINESE STATE ENTERPRISES: A REGIONAL PROPERTY RIGHTS ANALYSIS* (1990) (providing detailed studies of twenty case studies of large and medium-sized state-owned Chinese industrial enterprises, covering the period 1975 through 1984); JOHN HASSARD ET AL., *CHINA’S STATE ENTERPRISE REFORM: FROM MARX TO THE MARKET* (2007).

<sup>169</sup> Trautman, *supra* note 160, at 447 (citing Tahirih V. Lee, Professor, Fla. State Univ. Coll. of Law, Lecture for the 2007 International Conference at Nankai University in Tianjin, China (July 9–Aug. 4, 2007)); *see also* Jordan Brandt, *Comparing Foreign Investment in China, Post-WTO Accession, with Foreign Investment in the United States, Post 9/11*, 16 PAC. RIM L. & POL’Y J. 285 (2007).

*G. Mexico*

Mexico is the third largest trading partner of goods with the United States.<sup>170</sup> Commerce with Mexico is profoundly important to the health of the American economy. Trade with Mexico creates jobs that are geographically spread throughout the United States.<sup>171</sup> According to calculations from the Wilson Center, “the border states of California and Texas are the most integrated with Mexico, with 692,000 (11.2%) and 463,000 (7.5%) trade-related jobs respectively.”<sup>172</sup>

Unfortunately, Mexico is now threatened with pervasive violence, fear, and illicit drug trafficking, since “up to 90% of all cocaine bound for the United States goes through Mexico.”<sup>173</sup> Not only have the Mexican cartels taken over the cocaine smuggling routes to the United States, but now they also produce and supply heroin, methamphetamine, and marijuana.<sup>174</sup> Magaloni, Diaz-Cayeros, Matanock & Romero conclude that “citizens in Mexico are trapped in between two illegitimate forces—the drug gangs and their criminal organizations and the police who are supposed to protect

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<sup>170</sup> *Mexico*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/countries-regions/americas/mexico> [<https://perma.cc/S7NH-97UN>].

<sup>171</sup> Christopher Wilson, *Growing Together: Economic Ties Between the United States and Mexico*, WILSON CTR.: MEX. INST., Mar. 2017, at 1, 41–42, [https://www.wilsoncenter.org/sites/default/files/media/documents/publication/growing\\_together\\_economic\\_ties\\_between\\_the\\_united\\_states\\_and\\_mexico.pdf](https://www.wilsoncenter.org/sites/default/files/media/documents/publication/growing_together_economic_ties_between_the_united_states_and_mexico.pdf) [<https://perma.cc/PN8P-566Q>].

<sup>172</sup> *U.S. Embassy–Mexico City: Bilateral Trade Factsheet*, U.S. DEP’T OF STATE (Aug. 2013), <https://photos.state.gov/libraries/mexico/310329/sept13/Bilateral-Trade-0913.pdf> [<https://perma.cc/BD3A-3YSJ>].

<sup>173</sup> Melanie Reid, *Mexico’s Crisis: When There’s a Will, There’s a Way*, 37 OKLA. CITY U. L. REV. 397, 400 (2012) (citing CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., RL 32724, MEXICO-U.S. RELATIONS: ISSUES FOR CONGRESS 3 (2011)).

<sup>174</sup> *Id.* (citing U.S. DEP’T OF STATE, 1 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT: DRUG AND CHEMICAL CONTROL 383 (2011)); see also Farhana Hossain & Xaquín G.V., *The Reach of Mexico’s Drug Cartels*, N.Y. TIMES (Sept. 11, 2011), <https://archive.nytimes.com/www.nytimes.com/interactive/2009/03/22/us/BORDER.html> [<https://perma.cc/W2S7-XZMS>] (observing that the most dominant drug trafficking organizations currently include the Tijuana cartel, the Sinaloa cartel, the Beltrán Leyva organization, Los Zetas, the Juarez cartel, the Gulf cartel, and La Familia).

them.”<sup>175</sup> Fear remains widespread because the corrupt institutions are found everywhere in Mexico—the drug interests:

extort citizens the most in high violence regions and the police does so in low violence ones . . . . This has triggered a spiral of fear: drug gangs signal unambiguously that they are in control and will punish anyone who provides information to the government, while the police . . . can’t . . . regain control of the streets.<sup>176</sup>

During the early 2000s, Mexico had a police and judicial system that was “easily corruptible . . . at all levels of government,” leading to the continued spread of violence.<sup>177</sup> Moreover, cartels began to “diversify their illegal activities—to extortion of small businesses, kidnappings of middle-class individuals, racketeering and control of retail trade in their territories, and extortion of migrant workers—perhaps in associations with police departments.”<sup>178</sup> Extortions to small business and kidnappings of middle-class individuals began to rise.<sup>179</sup> This is the sort of environment that president Calderón faced when he took office in December 2006.<sup>180</sup> And things got worse. New criminal gangs and violence emerged and existing cartels divided as their leaders were captured.<sup>181</sup> “Given the absence of legal (and peaceful) rules and enforcement mechanisms for competitors” in this legal market, disagreements are being solved violently and the competition for consumers usually implies literally killing the

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<sup>175</sup> Alberto Díaz-Cayeros et al., *Living in Fear: Mapping the Social Embeddedness of Drug Gangs and Violence in Mexico* 2 (Nov. 4, 2011) (unpublished manuscript) (on file with author).

<sup>176</sup> *Id.*

<sup>177</sup> Alberto Díaz-Cayeros et al., *Caught in the Crossfire: The Geography of Extortion and Police Corruption in Mexico*, in *GREED, CORRUPTION, AND THE MODERN STATE: ESSAYS IN POLITICAL ECONOMY* 253 (Susan Rose-Ackerman & Paul Lagunes eds., 2015).

<sup>178</sup> *Id.*

<sup>179</sup> *See id.* at 253–54.

<sup>180</sup> *Id.* at 252.

<sup>181</sup> *Id.* (first citing BOB KILLEBREW & JENNIFER BERNAL, *CRIME WARS: CRIMES, CARTELS AND U.S. NATIONAL SECURITY* (2010); then citing JUNE S. BEITTEL, *CONG. RESEARCH SERV.*, R41576, *MEXICO’S DRUG TRAFFICKING ORGANIZATIONS: SOURCE AND SCOPE OF THE VIOLENCE* (2013)).

rival.<sup>182</sup> Citizens are caught in the crossfire of rival drug cartels and criminal gangs.<sup>183</sup>

Reid contends that “Mexican citizens are taught that money can fix anything.”<sup>184</sup> While examples of Mexican corruption abound, a few particulars may be helpful in understanding the magnitude of this problem. To place this discussion in context, it may be useful to focus on a particularly unpleasant, but relevant fact that during recent years; “[t]here are roughly 1,200 murders in Mexico each month.”<sup>185</sup> Melanie Reid observes:

Targets of the drug trafficking-related violence in Mexico have included rival criminal organizations or affiliated gang members, Mexican security forces and public officials, U.S. law enforcement and customs agents, journalists, and civilians (Mexican and American).<sup>186</sup> Kidnapping, robbery, extortion, and alien smuggling are also on the rise.<sup>187</sup>

Public displays of violence are commonplace—Cardinal Juan Jesús Posadas Ocampo was assassinated at a Guadalajara airport parking lot;<sup>188</sup> cartel members captured and tortured Mexican law enforcement, leaving their bodies in the road for other law enforcement to find them;<sup>189</sup> the heads of rival cartel members were rolled out onto a Michoacan discotheque;<sup>190</sup> numerous videos posted on YouTube

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<sup>182</sup> *Id.* at 252–53.

<sup>183</sup> *Id.* at 253.

<sup>184</sup> Reid, *supra* note 173, at 406.

<sup>185</sup> *Id.* at 415 (citing U.S. SENATE CAUCUS ON INT’L NARCOTICS CONTROL, 112TH CONG., REP. ON U.S. & MEXICAN RESPONSES TO MEXICAN DRUG TRAFFICKING ORGANIZATIONS 17 (2011)).

<sup>186</sup> *Id.* (“In 2010, there were 111 homicides of U.S. citizens in Mexico compared to 37 Americans . . . killed in Mexico in 2007, 57 in 2008, and 80 in 2009.”).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* (citing Tim Golden, *Cardinal in Mexico Killed in a Shooting Tied to Drug Battle*, N.Y. TIMES, May 25, 1993, at A1).

<sup>189</sup> *Id.* at 416 (citing *At Least 12 Bodies Found Along Remote Mexican Highway*, CNN (July 14, 2009), <https://www.cnn.com/2009/WORLD/americas/07/14/mexico.slayings/index.html> [<https://perma.cc/7K74-X92K>]).

<sup>190</sup> *Id.* (citing Dudley Althaus, *Mexico Puts ‘The Monkey’ Behind Bars*, HOUS. CHRON., June 22, 2011, at A1).

glorify the violence.<sup>191</sup> It is psychological warfare and the cartels appear to be winning.<sup>192</sup>

In October 2008, thirty-five members of the Mexican Attorney General's Office for Special Investigations of Organized Crime (SIEDO) were either fired or arrested after officials learned that the members had been providing drug traffickers with sensitive law enforcement information in return for significant sums of money. 'In November 2008, the former head of SIEDO was arrested and accused of accepting bribes from a DTO [drug trafficking organization].' Bribery scandals hit the Federal Agency of Investigations (AFI) as well, and AFI was 'largely disbanded in June 2009.'<sup>193</sup>

Drug-related crime in Mexico is expensive: to the Mexican government; it's citizens; and to all those seeking to conduct business there.

While the direct costs of crime and violence have been documented (those caused by expenditures made by individuals, firms or governments directly targeted to prevent or respond to crime), less research has been done on the indirect costs—those that arise from multiplicative effects or externalities created by criminal actions, such as impact on economic growth. In terms of the direct costs, the total budget assigned to security agencies (civilian and military), criminal justice and judicial institutions in 2012 was US\$14.44 billion, approximately 6 percent of the total budget of Mexico's government.<sup>194</sup> In terms of economic losses due to crime, victimization surveys estimate that in 2010 alone, crime cost victims losses of US\$12.9 billion and additional health expenses of US\$619 million. . . . For firms, surveys estimate that losses due to theft and vandalism account for as much as 3.6 percent of their

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<sup>191</sup> *Id.* (citing Rick Jervis, *YouTube Riddled with Drug Cartel Videos, Messages*, USA TODAY, [https://usatoday30.usatoday.com/tech/webguide/internetlife/2009-04-09-cartelonline\\_N.htm](https://usatoday30.usatoday.com/tech/webguide/internetlife/2009-04-09-cartelonline_N.htm) [https://perma.cc/L3LP-UCEA]).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 406–07.

<sup>194</sup> Enamorado et al., *supra* note 144, at 10 (observing that this is the budget for SEDENA, SEMAR, SSP, PGR and the Judicial branch).

product value.<sup>195</sup> Additionally, by 2010, 42.8 percent of Mexico's firms paid for private security, spending about 2.2 percent of their annual sales on these services.<sup>196</sup>

Perhaps the best known example of a corporate corruption scandal to occur in Mexico is illustrated by the April 21, 2012 *New York Times* front page story depicting that Wal-Mart "paid bribes to obtain permits in virtually every corner" of Mexico.<sup>197</sup> Mike Koehler reports that "the payments 'accelerated growth,' got 'zoning maps changed,' made 'environmental objections vanish,' and 'permits that typically took months to process magically materialized in days,' according to the article."<sup>198</sup> Over two years later Wal-Mart has disclosed spending in excess of \$400 million to determine whether it violated the FCPA and under what circumstances.<sup>199</sup> Corporate governance advisor Institutional Shareholder Services said:

Several years into the investigations and more than a decade after the actions at the heart of the allegations began to occur, shareholders still have little insight into the risks associated with the alleged compliance failures, and little reason for confidence that senior executives will be held accountable for any failures which are found to have occurred on their watch.<sup>200</sup>

A brief history of Mexico is required to begin to understand some of the basic ways in which conducting business in Mexico is different from the typical United States experience. Many Americans may find the Mexican system of industrial protection, concentration and corruption very foreign to their experiences and assumptions about how the world works.

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<sup>195</sup> *Id.* (noting average losses for middle high-income countries like Mexico—Argentina, Botswana, Chile, Colombia, Mexico, Panama, Peru, Uruguay, and Venezuela are 2.7%).

<sup>196</sup> *Id.* (citing INT'L FIN. CORP. & WORLD BANK, ENTERPRISE SURVEYS (2012)).

<sup>197</sup> David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 21, 2012 at A1.

<sup>198</sup> Mike Koehler, *Foreign Corrupt Practices Act Enforcement as Seen Through Wal-Mart's Potential Exposure*, 7 WHITE COLLAR CRIME REP., Sept. 21, 2012, at 1–2.

<sup>199</sup> Joann S. Lublin, *Wal-Mart Board Draws Broadside From ISS*, WALL ST. J., May 27, 2014, at B1.

<sup>200</sup> *Id.*; see generally Laurence Iliff & Amy Guthrie, *Oil-Tinged Graft Scandal Roils Mexico*, WALL ST. J., May 30, 2014, at A9 (depicting bribery scandal in the Mexican oil industry).

Between the 1940s and 1980s . . . the government rewarded the private sector through public policy, while privileged entrepreneurs provided economic support to the party in exchange . . . . Tight public control over tariffs, permits, licenses, subsidies, and barriers to foreign competition implied that producers needed to court governments in order to enlarge their market share or even operate in some cases.<sup>201</sup>

In Mexico, states not only have the ability to grant protection from competition, but also to punish through excessive regulation. In fact, regulation has been an important tool for local governments for extorting the private sector. For instance, prior to 1990 regulations in the transport industry prohibited a two-way merchandise transportation—entrepreneurs could only transport from place of origin to destination, but not the other way around. . . . Any firm not wanting to make a return trip with an empty truck had to bribe state and federal bureaucrats.<sup>202</sup> Moreover, regulations required the authorization of the federal government to create a new firm in this industry. The last authorization for a new firm, prior to deregulation, was issued in 1962. As a result, new entrepreneurs were forced to become ‘affiliated’ with existing ones, and only after paying a \$10,000 sign-up fee. Similarly, until 1990 the government controlled concessions for producing and selling matches. Only two firms operated, supplying 80 percent of the market. Customs offices is another example, where licenses were last issued in the 1960s. Finally, in order to establish a cooperative, 16 bureaucratic steps needed to be fulfilled with 7 different ministries. The

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<sup>201</sup> Mario Gamboa-Cavazos et al., *The Organization of Corruption: Political Horizons and Special Interests* 5 (May 29, 2007) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=754325](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=754325) [https://perma.cc/DXU9-JPWD].

<sup>202</sup> *Id.* (observing that only 5 firms controlled 85% of the transportation industry market. Permits held by just 15 groups earned annual profits of 37% of revenues or more than \$450 million according to CARLOS SALINAS DE GORTARI, *MÉXICO: UN PASO DIFÍCIL A LA MODERNIDAD* (2000)).

bureaucratic hurdles could last between three and five years.<sup>203</sup>

Further discussion about corruption in Mexico exceeds the scope of this paper. However, any entrepreneur seeking to conduct business there should give consideration to many of the difficulties presented. Remember, Mexico ranks near the mid-point of the Transparency International Corruption Perceptions Index.<sup>204</sup>

## VII. FOREIGN CORRUPT PRACTICES ACT

*“Companies that venture into foreign markets face risks under the Foreign Corrupt Practices Act.”*<sup>205</sup>

The Foreign Corrupt Practices Act (FCPA)<sup>206</sup> primarily addresses two distinct activities: bribery and improper record-keeping. The statute, in relevant part, prohibits (1) payments of anything of value to foreign officials “in order to assist [the payor] in obtaining or retaining business for or with, or directing business to, any person;”<sup>207</sup> and (2) failing to keep records and books “which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”<sup>208</sup> “When the FCPA is read as a whole, its core of criminality is seen to be bribery of a foreign official to induce him to perform an official duty in a corrupt manner.”<sup>209</sup>

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<sup>203</sup> *Id.* at 5–6 (noting that Article 25 of the Constitution states “National development pertains to the State in order to guarantee that it is integral, that it strengthens national sovereignty, and its democratic regime . . . . The State will plan, conduct, coordinate, and direct national economic activity, and will be in charge of the regulation and promotion of the activities commanded by the general interest.”).

<sup>204</sup> TRANSPARENCY INTERNATIONAL, *supra* note 150, at 3. *But see* Wilhelm, *supra* note 150 (criticizing Transparency International’s Corruption Perceptions Index data collection).

<sup>205</sup> Rod Rosenstein, Deputy Attorney Gen., U.S. Dep’t of Justice, Remarks at Compliance Week’s 2018 Annual Conference for Compliance and Risk Professionals (May 21, 2018) (transcript available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rostenstein-delivers-remarks-compliance-week-s-2018-annual> [<https://perma.cc/AJ7N-3KN5>]).

<sup>206</sup> *See* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1–78ff (2018)).

<sup>207</sup> 15 U.S.C. § 78dd-1(a)(1)(B) (2018).

<sup>208</sup> 15 U.S.C. § 78m(b)(2)(A) (2018).

<sup>209</sup> *United States v. Kay*, 359 F.3d 738, 761 (5th Cir. 2004); *see also* Lawrence J. Trautman & Kara Altenbaumer-Price, *Foreign Corrupt Practices Act: An Update on* (continued)

The prohibitions within the statute apply to virtually every company, whether public or private, or person that touches the United States. Specifically, it applies to four categories of actors: (1) “issuers” (public companies);<sup>210</sup> (2) any business with its principal place of business in the United States or that is organized under the laws of any state, territory, possession, or commonwealth of the United States (private companies);<sup>211</sup> (3) United States citizens, nationals, and residents; and (4) other persons who take any act in furtherance of the corrupt payment while within the territory of the United States.<sup>212</sup> “Issuers” are companies whose securities are registered in the United States or that are required to file periodic reports with the SEC.<sup>213</sup> Issuers and domestic concerns are both subject to the FCPA’s anti-bribery provisions anywhere in the world where they act.<sup>214</sup>

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*Enforcement and SEC and DOJ Guidance*, 41 SEC. REG. L.J. 241, 244 (2013); Lawrence J. Trautman & Kara Altenbaumer-Price, *The Foreign Corrupt Practices Act: Minefield for Directors*, 6 VA. L. & BUS. REV. 145, 147–49 (2011).

<sup>210</sup> Interview by Lowell Bergman with Mark Mendelsohn, Chief Prosecutor, U.S. Dep’t of Justice (Feb. 24, 2009) (noting issuers include both U.S. public companies, as well as foreign companies whose shares trade on U.S. exchanges. As “an example, the department recently prosecuted Siemens AG, a major German multinational firm. It is a German company, but its shares trade on the New York Stock Exchange, which makes it a foreign issuer and therefore subject to the FCPA.”); see also Beverley H. Earle, *Foreign Corrupt Practices Act Amendments: The Omnibus Trade and Competitiveness Act’s Focus on Improving Investment Opportunities*, 37 CLEV. ST. L. REV. 549, 551 (1989); Beverley Earle & Anita Cava, *When is a Bribe Not a Bribe? A Re-Examination of the FCPA in Light of Business Reality*, 23 IND. INT’L & COMP. L. REV. 111, 123 (2013); Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 427 n.15 (2012); Bill Shaw, *The Foreign Corrupt Practices Act and Progeny: Morally Unassailable*, 33 CORNELL INT’L L.J. 689, 695 n.49 (2000).

<sup>211</sup> 15 U.S.C. § 78dd-2(h)(1) (2018) (referred to as “domestic concerns”).

<sup>212</sup> 15 U.S.C. § 78dd-1(a)(3) (2018); 15 U.S.C. § 78dd-2(h) (2018).

<sup>213</sup> Aaron G. Murphy, *The Migratory Patterns of Business in the Global Village*, 2 N.Y.U. J.L. & BUS. 229, 237 (2005) (citing 15 U.S.C. § 78dd-1(a) (2000)).

<sup>214</sup> *Id.* (citing 15 U.S.C. § 78dd-2(i)(1) (2000)).

The Fifth Circuit, in what is considered one of the most comprehensive FCPA cases,<sup>215</sup> *United States v. Kay*,<sup>216</sup> explained the anti-bribery portion of the statute as criminalizing:

Only those payments that are intended to (1) influence a foreign official to act or make a decision in his official capacity, or (2) induce such official to perform or refrain from performing some act in violation of his duty, or (3) secure some wrongful advantage to the payor. And even then, the FCPA criminalizes these kinds of payments only if the result they are intended to produce—their *quid pro quo*—will *assist* (or is intended to assist) the payor in efforts to get or keep some *business* for or with “any person.”<sup>217</sup>

The statute covers “both the kind of bribery that leads to discrete contractual arrangements and the kind that more generally helps a domestic payor obtain or retain business for some person in a foreign country.”<sup>218</sup> A “corrupt intent” is required of the person making, promising, or offering the payment in order to be criminally liable under the FCPA, and “the payment . . . must be intended to induce the recipient to misuse his [or her] official position [in order] wrongfully to direct business to the payor.”<sup>219</sup> Indeed, “the 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

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<sup>215</sup> *United States v. Kozeny*, 493 F. Supp. 2d 693, 705 (S.D.N.Y. 2007) (referencing the Fifth Circuit’s “‘ad nauseum’ review of the legislative history of the FCPA” in *United States v. Kay*, 359 F.3d 738, 758 (5th Cir. 2004)); *see also* Claudius O. Sokenu, *FCPA Enforcement After United States v. Kay: SEC and DOJ Team Up to Increase Consequences of FCPA Violation*, in *THE FOREIGN CORRUPT PRACTICES ACT: COPING WITH HEIGHTENED ENFORCEMENT RISKS* 189 (Lucina A. Low et al. eds., 2007) (“[S]ince the Fifth Circuit decision in *United States v. Kay* resolved the longstanding question about the scope of the FCPA, the SEC’s FCPA enforcement program has employed a renaissance of sorts.”).

<sup>216</sup> 359 F.3d 738 (5th Cir. 2004).

<sup>217</sup> *Id.* at 743.

<sup>218</sup> *Id.* at 755–56.

<sup>219</sup> U.S. DEP’T OF JUSTICE, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 13 (2d ed. 2020), *available at* <https://www.justice.gov/criminal-fraud/file/1292051/download> [<https://perma.cc/J34B-VN29>] (citing S. REP. NO. 95-114, at 10 (1977)).

official position.”<sup>220</sup> While the bribe must be to a foreign official, it should be noted that the *business* to be obtained does not need to be with a foreign government or foreign government instrumentality; rather it need only be with any person or entity within the foreign country.<sup>221</sup> All that matters is that the giver of the bribe intends the receiver to do something; it does not matter if the receiver actually undertakes a course of action in response to the payment.<sup>222</sup> And, the meaning of “foreign official” is quite broad. They need not be employees of government agencies; they can also be employees of partially state-owned or state-run entities—such as national hospitals, airlines, or oil companies—or private entities handling a government function.<sup>223</sup> In a country like China where many businesses are either wholly or partially state-owned, almost anyone can be a government official.

Companies that are indicted under the FPCA, even if a conviction does not result, may be barred from doing business with the United States government.<sup>224</sup> Criminal penalties under the anti-bribery provisions of the statute include a fine of up to \$2 million for the company involved or fines of up to \$100,000 and imprisonment up to five years for any officer, director, shareholder, employee, or agent involved.<sup>225</sup> Civil penalties, against either the company or individuals involved can be pursued by either the DOJ or the SEC, and may include substantial; disgorgement of the pecuniary gain; and specified dollar fines.<sup>226</sup> Fines imposed on individuals cannot be paid by the company.<sup>227</sup> Other criminal statutes may also provide for alternative fines.<sup>228</sup>

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<sup>220</sup> *Kozeny*, 493 F. Supp. 2d at 704 (quoting *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int’l B.V. v. Schreiber*, 327 F.3d 173, 183 (2d Cir. 2003)). However, violators lacking the requisite scienter may still be held to have violated the SEC’s record-keeping rules.

<sup>221</sup> U.S. DEP’T OF JUSTICE, *supra* note 219, at 19.

<sup>222</sup> *Murphy*, *supra* note 213, at 238.

<sup>223</sup> See 15 U.S.C. § 78dd-2(h) (2018).

<sup>224</sup> U.S. DEP’T OF JUSTICE, *supra* note 219, at 72; 48 C.F.R. § 9.406-2(a)(5) (2019) (noting that debarment officials *may* debar contractors for any “offense indicating a lack of business integrity or business honesty.”); Overseas Contractor Reform Act, H.R. 5366, 111th Cong. § 2 (2d Sess. 2010) (passing legislation that requires federal agencies to propose for debarment of federal contractors found to have violated the FCPA.).

<sup>225</sup> 15 U.S.C. § 78dd-2(g) (2018).

<sup>226</sup> 15 U.S.C. § 78u (2018).

<sup>227</sup> 15 U.S.C. § 78dd-2(g)(3) (2018).

<sup>228</sup> U.S. DEP’T OF JUSTICE, *supra* note 219, at 68–72.

FCPA record-keeping provisions also apply to public companies and are enforced by the SEC.<sup>229</sup> Although the record-keeping provisions are aimed at bribes on the books that are disguised as legitimate payments, the FCPA makes it a crime to “make false or misleading statements on a company’s books for any purpose whatsoever.”<sup>230</sup> Even proper “facilitating payments” are in violation of the FCPA if they are not properly accounted for.<sup>231</sup>

Where an “issuer” has a majority interest in a foreign subsidiary, it must ensure the subsidiary has adequate internal accounting controls in place.<sup>232</sup> Regardless of whether the parent company had any knowledge, parent corporations are civilly liable when a wholly owned subsidiary violates the books and records provisions.<sup>233</sup> A willful violation of the books and records provisions of the statute by an individual is subject to criminal penalties of a fine of up to \$5 million and up to 20 years imprisonment.<sup>234</sup> A business may be criminally fined up to \$25 million under the statute.<sup>235</sup> Executives who knowingly issue false certifications are subject to a \$1 million fine and up to 10 years in prison.<sup>236</sup> Those who willfully do so are subject to a \$5 million fine and 20 years in prison.<sup>237</sup>

George Washington University law school dean Jessica Tillipman observes, “The FCPA contains a limited exception to the anti-bribery prohibitions for ‘facilitating’ (sometimes referred to as ‘grease’) payments.”<sup>238</sup> In specific terms, “the Act does not apply ‘to any facilitating payment or expediting payment to a foreign official, political party, or party

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<sup>229</sup> 15 U.S.C. § 78m (2018).

<sup>230</sup> O. Thomas Johnson, Jr., *International Law & Practice: Foreign Corrupt Practices Act*, 1 BEST OF A.B.A. SEC.: GEN. PRAC., SOLO & SMALL FIRM SEC. 38 (1997).

<sup>231</sup> U.S. DEP’T OF JUSTICE, *supra* note 219, at 27–28. Interestingly, Deloitte Financial Advisory Services recommends firms set up a separate facilitation payments account and make all such payments out of it. See Ed Rial, *Beyond Reproach: Why Compliance with Anti-Corruption Laws is Increasingly Critical for Multinational Businesses*, DELOITTE INSIGHTS (Jan. 1, 2009), <https://www2.deloitte.com/us/en/insights/deloitte-review/issue-4/beyond-reproach-the-anti-corruption-compliance-imperative.html> [<https://perma.cc/HJU8-5JYU>].

<sup>232</sup> 15 U.S.C. § 78(m)(b) (2018).

<sup>233</sup> U.S. DEP’T OF JUSTICE, *supra* note 219, at 27–28.

<sup>234</sup> 15 U.S.C. § 78ff(a) (2018).

<sup>235</sup> 15 U.S.C. § 78ff(a) (2018).

<sup>236</sup> 18 U.S.C. § 1350(c) (2018).

<sup>237</sup> 18 U.S.C. § 1350(c) (2018).

<sup>238</sup> Jessica Tillipman, *Foreign Corrupt Practices Act Fundamentals*, BRIEFING PAPERS, Sept. 2008, at 1, 5.

official the purpose of which is to expedite or to secure the performance of a routine governmental action.”<sup>239</sup> In addition:

The purpose of the exception is to allow companies to make payments to foreign officials to speed up the performance of “non-discretionary, ministerial activities performed by mid- or low-level foreign functionaries.”

The Act limits the term “routine governmental action” to actions that are ordinarily and commonly performed by a foreign official in “(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature.” “Routine governmental actions” do not encompass decisions made by foreign officials to award new business to or to continue business with a particular party.<sup>240</sup>

#### A. *Recent Cases*

Gibson Dunn states, “2018 was an extraordinary year in the U.S. government’s effort to combat foreign corruption. The 38 combined FCPA enforcement actions, resulting in \$1 billion in corporate fines, alone provide much to discuss.”<sup>241</sup> The year 2018 also brought “an explosion in the pursuit of FCPA-related offenses, continued multi-national enforcement, and a rare

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<sup>239</sup> *Id.*

<sup>240</sup> *Id.*; see also U.S. SEC Office of Inv’r Educ. & Advocacy, *The Foreign Corrupt Practices Act: Prohibition of the Payment of Bribes to Foreign Officials*, INVESTOR.GOV (Oct. 4, 2011), <https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/foreign-0> [https://perma.cc/B2NK-RE25] (“The FCPA does not apply to any ‘facilitating or expediting payment,’ the purpose of which is to expedite or secure the performance of a ‘routine governmental action.’”).

<sup>241</sup> GIBSON DUNN, 2018 YEAR-END FCPA UPDATE 1 (2019), <https://www.gibsondunn.com/2018-year-end-fcpa-update/> [https://perma.cc/QJC6-GAW3].

appellate decision on the jurisdictional reach of the FCPA, among many other developments.”<sup>242</sup>

Sanctions of approximately \$2.9 billion were assessed for violations of the FCPA during 2018 alone, making 2018 the second-highest annual amount.<sup>243</sup> This is just the cost of penalties and does not include the costs associated with accounting, legal and other internal investigation fees of an FCPA inquiry. During early 2019, the SEC brought charges against Cognizant Technology Solutions Corporation<sup>244</sup> and announced settlements for FCPA violations for FCPA violations with: medical device company Fresenius Medical Care AG & Co KGaA;<sup>245</sup> Mobile TeleSystems PJSC (MTS);<sup>246</sup> a Micronesian government official;<sup>247</sup> and charges against a real estate broker.<sup>248</sup>

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<sup>242</sup> *Id.*; see also Steven R. Salbu, *Mitigating the Harshness of FCPA Enforcement Through a Qualifying Good-Faith Compliance Defense*, 55 AM. BUS. L.J. 475, 522 (2018); Steven R. Salbu, *Redeeming Extraterritorial Bribery and Corruption Laws*, 54 AM. BUS. L.J. 641, 643 (2017).

<sup>243</sup> SHEARMAN & STERLING, FCPA DIGEST: CASES AND REVIEW RELEASE RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977, at 5 (2019), <https://fcpa.shearman.com/siteFiles/FCPA%20Headlines/fcpa-digest.pdf> [<https://perma.cc/ET37-P6UD>].

<sup>244</sup> Press Release No. 2019-12, U.S. Sec. & Exch. Comm’n, SEC Charges Cognizant and Two Former Executives With FCPA Violations (Feb. 15, 2019) [hereinafter Two Former Executives], <https://www.sec.gov/news/press-release/2019-12> [<https://perma.cc/Q9UF-SSB2>].

<sup>245</sup> Press Release No. 2019-48, U.S. Sec. & Exch. Comm’n, SEC Charges Medical Device Company With FCPA Violations (Mar. 29, 2019) [hereinafter Medical Device Co.], <https://www.sec.gov/news/press-release/2019-48> [<https://perma.cc/4R5N-P3B8>].

<sup>246</sup> Press Release No. 2019-27, U.S. Sec. & Exch. Comm’n, Mobile TeleSystems Settles FCPA Violations (Mar. 6, 2019) [hereinafter Mobile TeleSystems], <https://www.sec.gov/news/press-release/2019-27> [<https://perma.cc/CK67-PBQ2>].

<sup>247</sup> Press Release, U.S. Dep’t of Justice, Micronesian Government Official Arrested in Money Laundering Scheme Involving Foreign Bribery (Feb. 12, 2019) [hereinafter Micronesian Gov’t], <https://www.justice.gov/opa/pr/micronesian-government-official-arrested-money-laundering-scheme-involving-foreign-bribery> [<https://perma.cc/Z6D7-3PFY>].

<sup>248</sup> Press Release No. 2014-73, U.S. Sec. & Exch. Comm’n, SEC Charges Hewlett-Packard With FCPA Violations (Apr. 9, 2014) [hereinafter Hewlett-Packard], <https://www.sec.gov/news/press-release/2014-73> [<https://perma.cc/GLB5-N2YS>].

*B. Cognizant Technology Solutions Corporation*

On February 15, 2019 the DOJ issued a press release with the headline “Former President and Former Chief Legal Officer of Publicly Traded Fortune 200 Technology Services Company Indicted in Connection with Alleged Multi-Million Dollar Foreign Bribery Scheme.”<sup>249</sup> The press release states, in relevant part:

Gordon Coburn, 55, of Beaver Creek, Colorado, and Steven Schwartz, 51, of Greenwich, Connecticut, were charged in a 12-count indictment with one count of conspiracy to violate the Foreign Corrupt Practices Act (FCPA), three counts of violating the FCPA, seven counts of falsifying books and records, and one count of circumventing and failing to implement internal accounting controls. The charges stem from an alleged scheme to bribe one or more government officials in India to ensure the issuance of a construction permit necessary to complete the development of an office campus that would support thousands of employees and become one of Cognizant’s largest facilities in India. . . .

According to the indictment, in or about April 2014, Coburn and Schwartz allegedly authorized an unlawful payment of approximately \$2 million to one or more government officials in India to secure and obtain a necessary permit to open a new office campus. To conceal Cognizant’s involvement in the scheme, Coburn, Schwartz and others allegedly agreed that a third-party construction company would obtain the permit by making the illegal bribe payment and that Cognizant would reimburse the construction company through phony construction invoices at the end of the project. The indictment further alleges that in or about late June 2014, after the co-conspirators had agreed that the construction company would make the bribe payment on behalf of Cognizant, the construction company

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<sup>249</sup> Press Release, U.S. Dep’t of Justice, Former President and Former Chief Legal Officer of Publicly Traded Fortune 200 Technology Services Company Indicted in Connection with Alleged Multi-Million Dollar Foreign Bribery Scheme (Feb. 15, 2019), <https://www.justice.gov/opa/pr/former-president-and-former-chief-legal-officer-publicly-traded-fortune-200-technology> [<https://perma.cc/UG5W-67RK>].

secured the necessary government order for Cognizant to obtain the permit, allowing Cognizant to complete the development of the office campus and avoid millions of dollars in costs. Months later, the co-conspirators are alleged to have knowingly caused Cognizant to funnel over \$2 million to the construction company disguised as payment for cost overruns on the office campus when they knew that the actual purpose of the payment was to reimburse the construction company for the bribe payment. According to the indictment, as Coburn, Schwartz and others had previously agreed, they hid the bribe reimbursement payment within a series of line items in a construction change order request to be paid to the construction company, thereby concealing the true nature and purpose of the reimbursement, falsifying Cognizant's books and records, and circumventing and failing to implement its internal controls.<sup>250</sup>

The Securities and Exchange Commission issued a press release regarding the same matter with the headline, "SEC Charges Cognizant and Two Former Executives With FCPA Violations."<sup>251</sup> Accordingly:

The SEC's order as to Cognizant found that the company violated Sections 30A, 13(b)(2)(A) and 13(b)(2)(B) of the Securities Act of 1934, which are anti-bribery, books and records, and internal accounting controls provisions of the federal securities laws. Without admitting or denying the allegations, the company agreed to pay disgorgement and prejudgment interest of approximately \$19 million and a penalty of \$6 million.<sup>252</sup>

*C. Fresenius Medical Care AG & Co KGaA (FMC)*

On March 29, 2019, the SEC issued a press release under the title, "SEC Charges Medical Device Company With FCPA Violations."<sup>253</sup> The SEC announcement states that "Fresenius Medical Care AG & Co KGaA (FMC) has agreed to pay more than \$231 million to resolve parallel SEC and U.S. Department of Justice investigations related to its violations of the Foreign

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<sup>250</sup> *Id.*

<sup>251</sup> Two Former Executives, *supra* note 244.

<sup>252</sup> *Id.*

<sup>253</sup> Medical Device Co., *supra* note 245.

Corrupt Practices Act (FCPA) across multiple countries for nearly a decade.”<sup>254</sup> In addition:

The SEC’s order finds that FMC, a German-based worldwide provider of products and services for individuals with chronic kidney failure engaged in misconduct in Saudi Arabia, Morocco, Angola, Turkey, Spain, China, Serbia, Bosnia, Mexico, and eight countries in the West African region against a backdrop where the company failed to have sufficient internal accounting controls. FMC made improper payments through a variety of schemes, including using sham consulting contracts, falsifying documents, and funneling bribes through a system of third party intermediaries. Despite known red flags of corruption since the early 2000s, FMC devoted insufficient resources to compliance. In some jurisdictions, Fresenius failed to take basic steps such as providing anti-corruption training or performing due diligence on its agents. In many instances, senior management actively engaged in corruption schemes and directed employees to destroy records of misconduct. All told FMC paid nearly \$30 million in bribes to government officials and others to procure business . . . .

FMC agreed to pay \$147 million in disgorgement and interest to the SEC as well as a criminal fine of \$84.7 million as part of a non-prosecution agreement announced today by the Justice Department. FMC must retain an independent compliance monitor for two years and self-report its FCPA compliance efforts for the year after the monitor expires.<sup>255</sup>

*D. Mobile TeleSystems PJSC (MTS)*

On March 6, 2019, the SEC reported that “Russian telecommunications provider Mobile TeleSystems PJSC (MTS) will pay \$100 million to resolve SEC charges that it violated the Foreign Corrupt Practices Act (FCPA) to win business in Uzbekistan.”<sup>256</sup> The SEC charged that:

MTS bribed an Uzbek official who was related to the former President of Uzbekistan and had influence over the Uzbek

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<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> Mobile TeleSystems, *supra* note 246.

telecommunications regulatory authority. During the course of the scheme, MTS made at least \$420 million in illicit payments for the purpose of obtaining and retaining business. The payments enabled MTS to enter the telecommunications market in Uzbekistan and operate there for eight years, during which it generated more than \$2.4 billion in revenues. In 2012, the Uzbek government expropriated MTS's Uzbek operations. As further described in the SEC's order, the bribes were funneled to front companies controlled by the Uzbek official and were disguised in MTS's books as acquisition costs, option payments, purchases of regulatory assets, and charitable donations . . . .

MTS consented to the SEC's order finding that it violated the anti-bribery, books and records and internal accounting control provisions of the Securities Exchange Act of 1934, and requiring it to pay a \$100 million penalty. In a related matter, MTS has entered into a deferred prosecution agreement with the U.S. Department of Justice and its subsidiary has pleaded guilty in federal court, and has agreed to pay a criminal fine and forfeiture in the amount of \$850 million . . . . The company must also retain an independent compliance monitor for at least three years. . . .

This is the third case brought by the SEC and the Department of Justice involving public companies operating in the Uzbek telecommunications market. Taken as a whole, these actions have led to the recovery by U.S. and foreign authorities of \$2.6 billion.<sup>257</sup>

*E. Federated States of Micronesia (FSM)*

On February 12, 2019 the SEC issued a press release under the heading "Micronesian Governmental Official Arrested in Money Laundering Scheme Involving Foreign Bribery."<sup>258</sup> The DOJ announced charges "against a Micronesian government official for his alleged participation in a money laundering scheme involving bribes made to corruptly secure engineering and project management contracts from the government of the

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<sup>257</sup> *Id.*

<sup>258</sup> Micronesian Gov't, *supra* note 247.

Federated States of Micronesia (FSM).”<sup>259</sup> Also related to this case, “a U.S. executive pleaded guilty for his role in a scheme to, among other things, bribe the Micronesian official in violation of the Foreign Corrupt Practices Act (FCPA).”<sup>260</sup> According to the DOJ:

Master Halbert, 44, a Micronesian citizen, was charged in a criminal complaint filed in the District of Hawaii with one count of conspiracy to commit money laundering . . . .

According to the criminal complaint, Halbert was a government official in the FSM Department of Transportation, Communications and Infrastructure who administered FSM’s aviation programs, including the management of its airports. The complaint alleges that between 2006 and 2016, a Hawaii-based engineering and consulting company owned by Frank James Lyon paid bribes to FSM officials, including Halbert, to obtain and retain contracts with the FSM government valued at nearly \$8 million. According to the complaint, Lyon entered into an agreement with Halbert to bribe Halbert in exchange for Halbert’s assistance in securing contracts for Lyon and his company. Lyon and Halbert allegedly agreed that these bribes would be transported from the United States to FSM.

These charges contained in the complaint are merely allegations and the defendant is presumed innocent until proven guilty beyond a reasonable doubt in a court of law.

In the related matter, Lyon, 53, of Honolulu, Hawaii, pleaded guilty on Jan. 22 to a one-count information filed in the District of Hawaii charging him with conspiracy to violate the anti-bribery provisions of the FCPA and to commit federal program fraud.<sup>261</sup>

#### *F. FCPA Settlement with Real Estate Broker*

This case is included to help illustrate the wide variety of circumstances where the FCPA is violated. Here, the SEC announced on September 6, 2018 the settlement of “FCPA charges against a New Jersey real estate

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<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

broker arising out of his attempt to bribe a foreign official while acting as a broker for Colliers International Group, Inc.”<sup>262</sup> The SEC discloses:

Joohyun Bahn attempted to bribe a foreign official of a country in the Middle East as part of an effort to broker the sale of Landmark 72, a high rise commercial building in Vietnam, on behalf of Colliers. The SEC’s order found that Bahn gave the bribe to an accomplice, expecting him to pass it along to the official. But the accomplice, who had misrepresented the official’s involvement in the scheme, kept the money for himself, and the official was unaware of the attempted bribe. The SEC’s order also found that Bahn circumvented Collier’s internal accounting controls, fabricated documents, created fictitious email messages, and lied to Colliers executives. Bahn was also found to have falsely represented that a buyer had committed to acquire the building, thereby causing Colliers to improperly record commission revenue that it would never receive. . . .

The SEC’s order found that Bahn violated the FCPA’s antibribery provisions, caused violations of the Act’s books and records provisions, intentionally circumvented Colliers’ internal accounting controls, and falsified its corporate books and records. Bahn has agreed to pay \$225,000 in disgorgement, which was deemed satisfied by the forfeiture and restitution offered at his September 6, 2018 sentencing in a related criminal proceeding.<sup>263</sup>

#### VIII. OECD CONVENTION

*“The Organization for Economic Co-operation and Development adopted an Anti-Bribery Convention, establishing legal standards to prohibit bribery of public officials in international business transactions. The United States was one of the first signatories. Our leadership*

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<sup>262</sup> Press Release No. 2018-181, U.S. Sec. & Exch. Comm’n, SEC Charges Real Estate Broker With FCPA Violations (Sept. 6, 2018), <https://www.sec.gov/news/press-release/2018-181> [<https://perma.cc/S4TK-VGF2>].

<sup>263</sup> *Id.*

*encouraged other major world powers to commit to doing business with integrity.*"<sup>264</sup>

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention), was adopted in 1997, now has been ratified by 40 nations including the United States as of 2013,<sup>265</sup> and is largely the result of criticism in the United States that complying with the FCPA would hinder the ability of United States businesses to compete globally. United States Deputy Attorney General Rod J. Rosenstein has observed, "Before the enactment of the Foreign Corrupt Practices Act in 1977, paying bribes was an ordinary aspect of doing business. Corruption was rife in many parts of the world. Some European countries allowed companies to deduct bribes on their corporate tax returns."<sup>266</sup> As a result, Congress directed the president to actively encourage the nation's trading partners to enact their own anti-bribery laws.<sup>267</sup> The OECD issues guidance for international business transactions, including anti-bribery guidelines and polices to assist those countries that have anti-corruption enforcement programs.<sup>268</sup> In discussing the history behind the OECD Anti-Bribery Convention, professor Rachel Brewster writes, "The United States made its hardest push for an international

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<sup>264</sup> Rod J. Rosenstein, U.S. Deputy Attorney General, U.S. Dep't of Justice, Keynote Address on FCPA Enforcement Developments (Mar. 7, 2019) (transcript available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-keynote-address-fcpa-enforcement> [<https://perma.cc/M6R7-CRUD>]).

<sup>265</sup> 2013 Year-End FCPA Update, GIBSON DUNN (Jan. 6, 2014), <https://www.gibsondunn.com/2013-year-end-fcpa-update/> [<https://perma.cc/FP5U-FCEY>].

<sup>266</sup> Rosenstein, *supra* note 264.

<sup>267</sup> See FCPA & Anti-Corruption, FOLEY & LARDNER LLP, <https://www.foley.com/en/services/practice-areas/litigation/government-enforcement-defense--investigations/fcpa--anticorruption> [<https://perma.cc/FE8X-E848>].

<sup>268</sup> Susan S. Muck et al., *FCPA Update: Recent Prosecutions and New Enforcement Tools*, LEXOLOGY (Apr. 6, 2010), <https://www.lexology.com/library/detail.aspx?g=a182814b-ce40-4a1a-b1e3-5e3da15dc715> [<https://perma.cc/Y8PP-ZY4C>]; GIBSON DUNN, 2010 YEAR-END FCPA UPDATE 29 (2011), <https://www.gibsondunn.com/wp-content/uploads/documents/publications/2010YearEndFCPAUpdate.pdf> [<https://perma.cc/A624-5RE6>]; Barbara Crutchfield George et al., *The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes Toward Corruption in Business Transactions*, 37 AM. BUS. L.J. 485, 491–92 (2000); Elizabeth K. Spahn, *Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 VA. J. INT'L L. 1, 11–13 (2012).

agreement at the UN's Economic and Social Council ("ECOSOC").<sup>269</sup> At the time, "[t]he proposed agreement would have banned 'illicit payments' to foreign officials, but failed to achieve a consensus due to Cold War politics and North-South fights regarding whether all payments to South Africa's apartheid regime should qualify as illicit."<sup>270</sup> Furthermore:

The United States achieved more success in the OECD with the passage of the 1976 Declaration on International Investment and Multinational Enterprises, which included a general anti-bribery principle. The OECD did not follow up on this declaration, however, so this initiative did not result in any policy changes in OECD states. The United States also succeeded in having the International Chamber of Commerce issue a report that called for greater self-regulation by corporations, but this report similarly did not result in any significant change in policy. . . .

The World Trade Organization ("WTO") (the successor to the GATT) still has next to no regulation on corruption except for the plurilateral Agreement on Government Procurement, which simply includes calls for transparency in government bidding. Efforts in the WTO have arguably failed because U.S. trade negotiators have been unwilling to 'trade' for it. Other nations have demanded additional concessions on access to the American market in return, including an anti-corruption provision, and the U.S. negotiating position has been that anti-bribery should be included as a general principle to improve competitive markets. The WTO's new Trade Facilitation Agreement ("TFA") arguably also could reduce corruption by standardizing customs procedures at ports, but the agreement itself does not include any anti-corruption requirements, rather, the agreement might make it harder for government officials to receive bribes. . . .

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<sup>269</sup> Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611, 1635 (2017).

<sup>270</sup> *Id.* (quoting Mark Pieth, *International Cooperation to Combat Corruption*, in CORRUPTION AND THE GLOBAL ECONOMY 119, 122 (Kimberly Ann Elliott ed., 1997) (noting the failure for the international agreement)).

Between the 1970s and the late 1980s, many OECD members' views of foreign corruption shifted. The primary factors behind that shift were changing views of the damage wrought by corruption and the need to respond to corruption scandals. By the late 1990s, greater economic evidence existed of corruption's damage to international development. Economic research (done by the World Bank and others) made it harder for government officials to maintain that foreign corruption was a harmless (or even efficiency-enhancing) means of engaging in international trade. Policy initiatives against foreign bribery no longer seemed like a quixotic American crusade.<sup>271</sup>

A. *Combating Bribery—Bribe Solicitation and Extortion*

Of particular importance to this discussion, the OECD Guidelines for Multinational Enterprises is reproduced in relevant part:

Combating Bribery, Bribe Solicitation and Extortion

Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Enterprises should also resist the solicitation of bribes and extortion. In particular, enterprises should:

1. Not offer, promise or give undue pecuniary or other advantage to public officials or the employees of business partners. Likewise, enterprises should not request, agree to or accept undue pecuniary or other advantage from public officials or the employees of business partners. Enterprises should not use third parties such as agents and other intermediaries, consultants, representatives, distributors, consortia, contractors and suppliers and joint venture partners for channelling undue pecuniary or other advantages to public officials, or to employees of their business partners or to their relatives or business associates.

2. Develop and adopt adequate internal controls, ethics and compliance programmes or measures for preventing and detecting bribery, developed on the basis of a risk assessment addressing the individual circumstances of an

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<sup>271</sup> *Id.* at 1636–37 (citations omitted).

enterprise, in particular the bribery risks facing the enterprise (such as its geographical and industrial sector of operation). These internal controls, ethics and compliance programmes or measures should include a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of bribing or hiding bribery. Such individual circumstances and bribery risks should be regularly monitored and re-assessed as necessary to ensure the enterprise's internal controls, ethics and compliance programme or measures are adapted and continue to be effective, and to mitigate the risk of enterprises becoming complicit in bribery, bribe solicitation and extortion.

3. Prohibit or discourage, in internal company controls, ethics and compliance programmes or measures, the use of small facilitation payments, which are generally illegal in the countries where they are made, and, when such payments are made, accurately record these in books and financial records.

4. Ensure, taking into account the particular bribery risks facing the enterprise, properly documented due diligence pertaining to the hiring, as well as the appropriate and regular oversight of agents, and that remuneration of agents is appropriate and for legitimate services only. Where relevant, a list of agents engaged in connection with transactions with public bodies and State-owned enterprises should be kept and made available to competent authorities, in accordance with applicable public disclosure requirements.

5. Enhance the transparency of their activities in the fight against bribery, bribe solicitation and extortion. Measures could include making public commitments against bribery, bribe solicitation and extortion, and disclosing the management systems and the internal controls, ethics and compliance programmes or measures adopted by enterprises in order to honour these commitments. Enterprises should also foster openness and

dialogue with the public so as to promote its awareness of and co-operation with the fight against bribery, bribe solicitation and extortion.

6. Promote employee awareness of and compliance with company policies and internal controls, ethics and compliance programmes or measures against bribery, bribe solicitation and extortion through appropriate dissemination of such policies, programmes or measures and through training programmes and disciplinary procedures.

7. Not make illegal contributions to candidates for public office or to political parties or to other political organisations. Political contributions should fully comply with public disclosure requirements and should be reported to senior management.

#### Commentary on Combating Bribery, Bribe Solicitation and Extortion

Bribery and corruption are damaging to democratic institutions and the governance of corporations. They discourage investment and distort international competitive conditions. In particular, the diversion of funds through corrupt practices undermines attempts by citizens to achieve higher levels of economic, social and environmental welfare, and it impedes efforts to reduce poverty. Enterprises have an important role to play in combating these practices.

Propriety, integrity and transparency in both the public and private domains are key concepts in the fight against bribery, bribe solicitation and extortion. The business community, non-governmental organisations, governments and inter-governmental organisations have all co-operated to strengthen public support for anticorruption measures and to enhance transparency and public awareness of the problems of corruption and bribery. The adoption of appropriate corporate governance practices is also an essential element in fostering a culture of ethics within enterprises.

*The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the*

*Anti-Bribery Convention*) entered into force on 15 February 1999. *The Anti-Bribery Convention*, along with the 2009 *Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (the 2009 Anti-Bribery Recommendation), the 2009 Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, and the 2006 Recommendation on Bribery and Officially Supported Export Credits, are the core OECD instruments which target the offering side of the bribery transaction. They aim to eliminate the “supply” of bribes to foreign public officials, with each country taking responsibility for the activities of its enterprises and what happens within its own jurisdiction. A programme of rigorous and systematic monitoring of countries’ implementation of the Anti-Bribery Convention has been established to promote the full implementation of these instruments.

The 2009 Anti-Bribery Recommendation recommends in particular that governments encourage their enterprises to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, taking into account the *Good Practice Guidance on Internal Controls, Ethics and Compliance*, included as Annex II to the 2009 *Anti-Bribery Recommendation*. This *Good Practice Guidance* is addressed to enterprises as well as business organisations and professional associations, and highlights good practices for ensuring the effectiveness of their internal controls, ethics and compliance programmes or measures to prevent and detect foreign bribery.

Private sector and civil society initiatives also help enterprises to design and implement effective anti-bribery policies.<sup>272</sup>

#### B. OECD Good Practice Guidance

In furtherance of objectives toward Combating Bribery of Foreign Public Officials in International Business Transactions, the OECD adopted

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<sup>272</sup> OECD, *supra* note 126, at 47–50.

*The Good Practice Guidance on Internal Controls, Ethics, and Compliance*, particularly intended for use by SMEs, “according to their individual circumstances, including their size, type, legal structure and geographical and industrial sector of operation, as well as the jurisdictional and other basic legal principles under which they operate.”<sup>273</sup> The OECD promulgated the Guidance to assist companies, particularly SMEs, in “establishing and ensuring the effectiveness of internal controls, ethics, and compliance programmes or measures for preventing and detecting the bribery of foreign public officials in their international business transactions . . . (foreign bribery) . . . .”<sup>274</sup> In addition, the Guidance, “recognises that to be effective, such programmes or measures should be interconnected with a company’s overall compliance framework. It is intended to serve as non-legally binding guidance to companies in establishing effective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery.”<sup>275</sup> Because of its significance, the Guidance is reproduced in relevant part:

A) Good Practice Guidance for Companies

Effective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery should be developed on the basis of a risk assessment addressing the individual circumstances of a company, in particular the foreign bribery risks facing the company (such as its geographical and industrial sector of operation). Such circumstances and risks should be regularly monitored, re-assessed, and adapted as necessary to ensure the continued effectiveness of the company’s internal controls, ethics, and compliance programme or measures.

Companies should consider, *inter alia*, the following good practices for ensuring effective internal controls, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery:

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<sup>273</sup> OECD, GOOD PRACTICE GUIDANCE ON INTERNAL CONTROLS, ETHICS, AND COMPLIANCE 1 (2010), <http://www.oecd.org/daf/anti-bribery/44884389.pdf> [<https://perma.cc/Q699-AMCP>].

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

1. strong, explicit and visible support and commitment from senior management to the company's internal controls, ethics and compliance programmes or measures for preventing and detecting foreign bribery;
2. a clearly articulated and visible corporate policy prohibiting foreign bribery;
3. compliance with this prohibition and the related internal controls, ethics, and compliance programmes or measures is the duty of individuals at all levels of the company;
4. oversight of ethics and compliance programmes or measures regarding foreign bribery, including the authority to report matters directly to independent monitoring bodies such as internal audit committees of boards of directors or of supervisory boards, is the duty of one or more senior corporate officers, with an adequate level of autonomy from management, resources, and authority;
5. ethics and compliance programmes or measures designed to prevent and detect foreign bribery, applicable to all directors, officers, and employees, and applicable to all entities over which a company has effective control, including subsidiaries, on, inter alia, the following areas:
  - i) gifts;
  - ii) hospitality, entertainment and expenses;
  - iii) customer travel;
  - iv) political contributions;
  - v) charitable donations and sponsorships;
  - vi) facilitation payments; and
  - vii) solicitation and extortion;
6. ethics and compliance programmes or measures designed to prevent and detect foreign bribery applicable, where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners (hereinafter "business partners"), including, inter alia, the following essential elements:

- i) properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular oversight of business partners;
  - ii) informing business partners of the company's commitment to abiding by laws on the prohibitions against foreign bribery, and of the company's ethics and compliance programme or measures for preventing and detecting such bribery; and
  - iii) seeking a reciprocal commitment from business partners.
7. a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of foreign bribery or hiding such bribery;
8. measures designed to ensure periodic communication, and documented training for all levels of the company, on the company's ethics and compliance programme or measures regarding foreign bribery, as well as, where appropriate, for subsidiaries;
9. appropriate measures to encourage and provide positive support for the observance of ethics and compliance programmes or measures against foreign bribery, at all levels of the company;
10. appropriate disciplinary procedures to address, among other things, violations, at all levels of the company, of laws against foreign bribery, and the company's ethics and compliance programme or measures regarding foreign bribery;
11. effective measures for:
  - i) providing guidance and advice to directors, officers, employees, and, where appropriate, business partners, on complying with the company's ethics and compliance programme or measures, including when they need urgent advice on difficult situations in foreign jurisdictions;

- ii) internal and where possible confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for directors, officers, employees, and, where appropriate, business partners, willing to report breaches of the law or professional standards or ethics occurring within the company, in good faith and on reasonable grounds; and
  - iii) undertaking appropriate action in response to such reports;
12. periodic reviews of the ethics and compliance programmes or measures, designed to evaluate and improve their effectiveness in preventing and detecting foreign bribery, taking into account relevant developments in the field, and evolving international and industry standards.

#### B) Actions by Business Organisations and Professional Associations

Business organisations and professional associations may play an essential role in assisting companies, in particular SMEs, in the development of effective internal control, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery. Such support may include, inter alia:

1. dissemination of information on foreign bribery issues, including regarding relevant developments in international and regional forums, and access to relevant databases;
2. making training, prevention, due diligence, and other compliance tools available;
3. general advice on carrying out due diligence; and
4. general advice and support on resisting extortion and solicitation.<sup>276</sup>

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<sup>276</sup> *Id.* at 1–3.

## IX. U.K. BRIBERY ACT

*“[W]e’ll soon bring a range of machine learning and AI based technology assisted review features to our investigations. . . . This should create even greater efficiencies, and potentially help us reach charging decisions sooner, and shorten the time it takes to progress to trial. . . . Our intelligence unit is already using more powerful analytic tools to make connections across disparate and diverse datasets to enhance our development of strategic intelligence. . . . My goal is to make sure our country is a high risk place for the world’s most sophisticated criminals to operate and I want to support your efforts to do likewise in your jurisdictions.”<sup>277</sup>*

The United Kingdom Bribery Act 2010 covers any companies who employ citizens of the United Kingdom, maintain an office in the United Kingdom, or are service providers to any United Kingdom organizations. Accordingly, any who violate provisions of the Act may be held liable for unlimited fines and jail terms which increase to ten years.<sup>278</sup> The United Kingdom Bribery Act creates four distinct categories of offenses: (1) bribing another person; (2) taking bribes; (3) bribing foreign public officials; and (4) the failure of a commercial organization to prevent bribery.<sup>279</sup> After its implementation date—was postponed twice “to allow companies to put in place what the U.K. Ministry of Justice describes as ‘adequate procedures’ for preventing bribery, the U.K. Bribery Act 2010 became effective on July 1, 2011.”<sup>280</sup> Lord Peter Goldsmith, former United Kingdom attorney general, has observed of the United Kingdom Bribery Act that “it’s wider ranging even than the [United States’ Foreign Corrupt Practices Act], [and]

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<sup>277</sup> Lisa Osofsky, Dir., U.K. Serious Fraud Office, Address at the Cambridge International Symposium on Economic Crime: Ensuring Our Country is a High Risk Place for the World’s Most Sophisticated Criminals to Operate (Sept. 3, 2018) (transcript available at <https://www.sfo.gov.uk/2018/09/03/lisa-osofsky-making-the-uk-a-high-risk-country-for-fraud-bribery-and-corruption/> [<https://perma.cc/JN5K-YCCD>]).

<sup>278</sup> Bribery Act 2010, c. 23, § 11 (Eng.); Lawrence J. Trautman & Kara Altenbaumer-Price, *Lawyers, Guns, and Money: The Bribery Problem and U.K. Bribery Act*, 47 INT’L LAW. 481, 502 (2013).

<sup>279</sup> Bribery Act 2010, c. 23, §§ 1–2, 6, 7 (Eng.); Trautman & Altenbaumer-Price, *supra* note 278, at 501.

<sup>280</sup> Chris Johnson, *U.K. Bribery Act Finally Takes Effect*, AM. LAW. (Mar. 31, 2011), <https://www.law.com/almID/1202488636998/> [<https://perma.cc/6H5L-EMJG>].

it's going to affect all companies with business in the U.K., even if they're not incorporated here."<sup>281</sup> In addition, "[t]he enforcement agencies have greater powers and the penalties are much tougher than under previous U.K. law."<sup>282</sup> Bruce W. Bean and Emma H. MacGuidwin find that the failure of a commercial enterprise to prevent a bribe is the new corporate crime created by the United Kingdom Bribery Act.<sup>283</sup> Requiring neither *mens rea* nor actual knowledge of the offending bribe, non-United Kingdom companies will likely find the Act troublesome because it contains an expansive concept of what constitutes a bribe, the Act has an unparalleled jurisdictional reach, and "the offending act of bribery need not be committed by an officer or employee of the company, but rather, any 'associated person' may trigger the new strict liability crime of "failing to prevent bribery."<sup>284</sup>

It might be reasonable to think that your start-up is so small that the full power of the government of the United Kingdom will not have any interest in prosecuting you over a small bribe. Consider the December 2012 conviction of Mawia Mushtaq who reportedly attempted to offer a £200 or £300 bribe (approximately \$335 to \$500) in exchange for a passing grade necessary to obtain a private taxi licence.<sup>285</sup> The third prosecution under the UK Bribery Act involved University of Bath student Yang Li's dissertation grade that was just short of the 40% passing grade. Upon visiting two of his tutors, Mr. Li placed £5,000 cash on the table proposing that "you can keep the money if you give me a pass mark . . . ." Unfortunately for Mr. Li, when asked to leave by his tutor who declined the offer, an air pistol fell from his pocket. The net result is that Mr. Li received a prison sentence of twelve months for the offense of bribery, plus six months for the firearm offense.<sup>286</sup> Ernst & Young observed that "the case indicates that simpler bribery

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<sup>281</sup> *Id.* (citing Chris Johnson, *Letter from London: Gearing Up for the New U.K. Bribery Law*, AM. LAW. DAILY (Oct. 4, 2010, 5:01 PM), <https://amlawdaily.typepad.com/amlawdaily/2010/10/letter-from-london-uk-s-draconian-new-bribery-law-is-boon-for-americas-fcpa-specialists.html#tp> [https://perma.cc/47G4-993Z]).

<sup>282</sup> *Id.*

<sup>283</sup> Bruce W. Bean & Emma H. MacGuidwin, *Unscrewing the Inscrutable: The UK Bribery Act 2010*, 23 IND. INT'L & COMP. L. REV. 63, 63 (2013).

<sup>284</sup> *Id.* at 63–64; see also Alun Milford, Gen. Counsel, U.K. Serious Fraud Office, Address at the World Bribery and Compliance Forum (Oct. 15, 2013) (transcript available at <https://www.sfo.gov.uk/2013/10/15/world-bribery-compliance-forum-2013/> [https://perma.cc/D972-99J5]).

<sup>285</sup> Ernst & Young LLP, *Cases in Prior Periods*, 4 UK BRIBERY DIGEST 8, 8 (2014).

<sup>286</sup> *Id.*

scenarios can move through the legal system quite swiftly: the bribery incident was in November 2012 and Mr. Li was convicted in April 2013.”<sup>287</sup> Regardless of their countries of origin, any entrepreneurial enterprise conducting international business will inevitably be impacted by the local, United Kingdom and United States anti-bribery statutes.

#### X. BRIBERY, CORRUPTION AND THE RAPIDLY EXPANDING ENTERPRISE

*“Irrespective of whether we did everything that is being said about us in London today (to be clear, I don’t think we did), it really matters what people think of us . . . especially in a global business like ours, where actions in one part of the world can have serious consequences in another. . . . Going forward, it’s critical that we act with integrity in everything we do, and learn how to be a better partner to every city we operate in. That doesn’t mean abandoning our principles . . . but rather building trust through our actions and our behavior. In doing so, we will show that Uber is not just a really great product, but a really great company that is meaningful contributing to society, beyond its business and its bottom line.”*<sup>288</sup>

Technology enables rampant growth and sometimes propels an early stage enterprise deeply into international markets before management has time to develop reasoned strategy, planning processes, and necessary resources. For example, “Airbnb had instantly become global upon its launch.”<sup>289</sup> Uber CEO Dara Khosrowshahi explains that in just a very few years, Uber had amassed “three million driving partners” worldwide.<sup>290</sup> A prominent scholarly reviewer of an early draft of this Article expressed concern that the bulk of this paper focused at that time on issues and examples related to large multinationals and had little relevance to a small

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<sup>287</sup> *Id.*

<sup>288</sup> Nick Statt, *Uber’s New CEO Tells Employees There is ‘High Cost to a Bad Reputation’ After London Ban*, THE VERGE (Sept. 22, 2017, 5:35 PM), <https://www.theverge.com/2017/9/22/16352666/uber-ceo-dara-khosrowshahi-london-ban-statement-reputation> [<https://perma.cc/T86F-KMBD>].

<sup>289</sup> See STONE, *supra* note 99, at 153.

<sup>290</sup> Recode, *Uber CEO Dara Khosrowshahi at Code 2018*, VOX (June 4, 2018), <https://www.vox.com/2018/5/31/17397186/full-transcript-uber-dara-khosrowshahi-code-2018>.

or early stage business seeking to enter foreign markets. This criticism may have been well founded at the time given the reviewer's perspective and experience. However, it is my belief that all entrepreneurs need to understand the minefields involved with exposure to international bribery and corruption. Several years ago FCPA cases against young, rapidly expanding United States companies generally had not been brought. This does not mean that early stage United States companies had not committed FCPA violations, just that highly visible cases had not yet been brought. However, by 2017, it appears that FCPA violations were being investigated in the case of Uber operations in Asia.<sup>291</sup>

#### A. *Uber*

*The Wall Street Journal* reports on August 29, 2017 that the United States Department of Justice has opened an investigation into whether Uber has violated the Foreign Corrupt Practices Act.<sup>292</sup> Valuable lessons can be learned by every early stage enterprise by considering the chronology of Uber's financially successful expansion to date. On November 17, 2008 entrepreneur Garrett Camp formed UberCab as a California LLC.<sup>293</sup> It appears that Uber was a side project for Camp and future CEO Travis Kalanick during most of 2009, with data architecture and development work being conducted by Oscar Salazar, Jose Uribe and Zulma Rodriguez. Activities continued into 2010, with the hiring of Ryan Graves as CEO in January and UberCab's apps going live in Apple's App Store during early June 2010.<sup>294</sup> By July 2010, "Uber had \$1.3 million in the bank, a \$5.3 million valuation, an office (small and crowded), and a product (buggy). It was finally looking like a real startup."<sup>295</sup> Almost immediately, the company ran into regulatory problems in San Francisco; net result, in 2010, Uber was a tiny company.<sup>296</sup> "It had some half a dozen employees, a few

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<sup>291</sup> See Douglas MacMillan & Aruna Viswanatha, *Uber Faces Investigation of Possible Foreign-Bribery-Law Violations*, WALL ST. J. (Aug. 29, 2017, 5:34 PM), <https://www.wsj.com/articles/justice-department-investigates-whether-uber-violated-u-s-foreign-bribery-laws-1504040457> [https://perma.cc/4EP5-QEY7].

<sup>292</sup> *Id.*; see also Paresch Dave, *Uber Reportedly Cooperating with U.S. Investigation on Possible Overseas Bribes*, L.A. TIMES (Aug. 29, 2017, 9:20 PM), <https://www.latimes.com/business/technology/la-fi-tn-uber-foreign-bribes-20170829-story.html>.

<sup>293</sup> STONE, *supra* note 99, at 46.

<sup>294</sup> *Id.* at 57.

<sup>295</sup> *Id.* at 61.

<sup>296</sup> *Id.* at 120–22.

dozen limo drivers in San Francisco using the platform, and little in the way of expansion plans.”<sup>297</sup> However, as author Brad Stone observes:

Uber was turning out to be a company rooted in complex math. Its biggest challenge . . . was finding ways to attract more drivers during peak hours and to route cars into the areas of highest demand. Uber had the data to make those kinds of prescient decisions. In fact, it was slowly dawning on the founders and board members that Uber was going to have more data about how people moved around cities than just about any other company in history.<sup>298</sup>

*B. Uber’s Phenomenal International Growth*

A look at milestone data points in Uber’s spectacular growth include: first international expansion to Paris (launch December 2011);<sup>299</sup> launch of operations in Sydney Australia (November 2012);<sup>300</sup> Mexico City (August 2013);<sup>301</sup> operations in 100 cities (April 2014); 300 cities (May 2015); 500 cities (December 2016); and 5 billion trip threshold reached (May 20, 2017), the last 3 billion trips provided in less than a year.<sup>302</sup> Publication of Uber’s prospectus in conjunction with its 2019 Initial Public Offering (IPO) disclosed that Uber now operates “[on] 6 Continents; 3 platform offerings; [in] 700+ Cities; 91M MAPCs [monthly active platform consumers]; 14 Million Trips a day; and \$78 billion Paid to Drivers.”<sup>303</sup>

Bloomberg reports that Uber has embarked on an internal investigation of its Asian operations and overseas bribery concerns of “payments made by staff in Indonesia . . . . Attorneys are focused on suspicious activity in at least five Asian countries: China, India, Indonesia, Malaysia and South

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<sup>297</sup> *Id.* at 120.

<sup>298</sup> *Id.* at 121.

<sup>299</sup> *History*, *supra* note 9.

<sup>300</sup> Jon Russell, *Uber Goes Official in Australia as it Ends 6 Weeks of Testing and Launches in Sydney*, NEXT WEB (Nov. 20, 2012), <https://thenextweb.com/au/2012/11/30/uber-goes-official-in-australia-as-it-comes-out-of-testing-and-launches-in-sydney/> [<https://perma.cc/A2BT-6QFD>].

<sup>301</sup> *Uber Has Launched in Mexico City!*, UBER BLOG (Aug. 2, 2013), <https://www.uber.com/es-MX/blog/mexico-city/uber-has-launched-in-mexico-city/> [<https://perma.cc/ME9Y-9QW9>].

<sup>302</sup> See Mansoor Iqbal, *Uber Revenue and Usage Statistics*, BUS. OF APPS (Oct. 30, 2020), <https://www.businessofapps.com/data/uber-statistics/#1> [<https://perma.cc/B7UW-4AMF>].

<sup>303</sup> Uber Prospectus, *supra* note 8.

Korea.”<sup>304</sup> Approximately six months later, Uber discloses that, “We have operations in countries known to experience high levels of corruption and are currently subject to inquiries, investigations, and requests for information with respect to our compliance with a number of anti-corruption laws to which we are subject.”<sup>305</sup> In addition:

We have operations in, and have business relationships with, entities in countries known to experience high levels of corruption. We are subject to the FCPA and other similar laws outside the United States that prohibit improper payments or offers of payments to foreign governments, their officials, and political parties for the purpose of obtaining or retaining business. U.S. and non-U.S. regulators alike continue to focus on the enforcement of these laws, and we may be subject to additional compliance requirements to identify criminal activity and payments to sanctioned parties. Our activities in certain countries with high levels of corruption enhance the risk of unauthorized payments or offers of payments by Drivers, consumers, restaurants, shippers or carriers, employees, consultants, or business partners in violation of various anti-corruption laws, including the FCPA, even though the actions of these parties are often outside our control. Our acquisition of Careem may further enhance this risk because users of Careem’s platform and Careem’s employees, consultants, and business partners may not be familiar with, or currently subject to, these anti-corruption laws. After the acquisition, we plan to provide significant training to Careem’s employees, consultants, and business partners. However, our existing and future safeguards, including training and compliance programs to discourage these practices by such parties, may not prove effective, and such parties may engage in conduct for which we could be held responsible. Additional compliance requirements may compel us to revise or expand our compliance program, including the

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<sup>304</sup> Eric Newcomer, *Uber Faces Widespread Asia Bribery Allegations Amid U.S. Criminal Probe*, BLOOMBERG (Sept. 20, 2017, 2:03 AM), <https://www.bloomberg.com/news/articles/2017-09-20/uber-is-said-to-review-asia-dealings-amid-u-s-criminal-probe> [<https://perma.cc/U6CS-8ZVJ>].

<sup>305</sup> Uber Prospectus, *supra* note 8, at 62.

procedures we use to verify the identity of platform users and monitor international and domestic transactions. We received requests from the DOJ in May 2017 and August 2017 with respect to an investigation into allegations of small payments to police in Indonesia and other potential improper payments in other countries in which we operate or have operated, including in Malaysia, China, and India. The investigation is ongoing, and we are cooperating with the DOJ in this investigation. If we are determined to have violated the FCPA or similar laws, we may be subject to criminal sanctions and other liabilities, which would adversely affect our business, financial condition, and operating results.<sup>306</sup>

To put Uber's experience into perspective it is helpful to reflect on just how astonishing Uber's growth trajectory has been. As Brad Stone observes, "By the beginning of 2014, Uber had introduced the ridesharing service UberX in twenty-eight cities. By the end of 2016, UberX and other flavors of Uber ridesharing were in more than four-hundred and fifty major cities around the world."<sup>307</sup> Should every start-up management team experiencing profound growth contemplate that bribery and corruption is likely to become one of the biggest challenges to enterprise growth as expansion invades cultures having different values and business practices? Consider Brad Stone's description of growth at Uber:

Propelled by lower prices and higher ride volumes, Uber's already vigorous business exploded—exponentially. Uber booked a cumulative two hundred million rides by the beginning of 2014, one billion rides by the beginning of 2016, and two billion rides only six months later. Its employee base grew from 550 to 8,000 during this time. A \$1.4 billion investment led by Fidelity Investments and BlackRock in June 2014 valued the company at \$18 billion. That had already seemed bonkers then, but two years later, its valuation had more than tripled, to \$68 billion, making Uber the most highly valued privately held technology startup in history.<sup>308</sup>

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<sup>306</sup> *Id.*

<sup>307</sup> STONE, *supra* note 99, at 295.

<sup>308</sup> *Id.*

### C. *Uber FCPA Update*

As Uber's growth trajectory continues, little appears in the press as to developments with the 2017 DOJ inquiry into potential FCPA violations.<sup>309</sup> Uber's annual report for the period ended December 31, 2019 discloses:

We have operations in, and have business relationships with, entities in countries known to experience high levels of corruption. We are subject to the FCPA and other similar laws outside the United States that prohibit improper payments or offers of payments to foreign governments, their officials, and political parties for the purpose of obtaining or retaining business. . . . We received requests from the DOJ in May 2017 and August 2017 with respect to an investigation into allegations of small payments to police in Indonesia and other potential improper payments in other countries in which we operate or have operated, including Malaysia, China, and India. In December 2019, the fraud section of the DOJ's Criminal Division (the "Fraud Section") informed us the the Fraud Section closed its inquiry and will not be pursuing enforcement action against us in relation to such matters.<sup>310</sup>

### D. *Uber Acquisition of Careem*

Uber discloses entering during March 2019, "into an asset purchase agreement to acquire Careem for approximately \$3.1 billion . . . . In January 2020, we completed the acquisition following clearance of the transaction in Egypt, Jordan, Saudi Arabia and the United Arab Emirates, which represented substantially all of the major markets where regulatory approval was required."<sup>311</sup> Uber warns:

Our acquisition of Careem may further enhance this [FCPA] risk because users of Careem's platform and Careem's employees, consultants, and business partners may not be familiar with, and may not have been previously subject to, these anti-corruption laws. We plan to provide significant training to Careem's employees, consultants, and business partners. However, our existing and future safeguards, including training and compliance programs to

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<sup>309</sup> See MacMillan & Viswanatha, *supra* note 291.

<sup>310</sup> Uber Technologies, Inc., Annual Report (Form-10K), at 37 (Mar. 2, 2020).

<sup>311</sup> *Id.* at 29.

discourage these practices by such parties, may not prove effective, and such parties may engage in conduct for which we could be held responsible.<sup>312</sup>

*E. Potential Technological Opportunity*

Just as Uber and a number of other young technological enterprises are leveraging the power of the Internet to solve global problems and produce jobs, professor Joseph Yockey suggests that “corruption’s corrosive effects on entrepreneurial action” may be reduced through “private initiatives within a progressive framework of new governance.”<sup>313</sup> Accordingly:

This idea calls to mind another recent response to a major international problem: terrorism. In early 2016, the United States government sought the help of several leading technology companies to address the growing number of terror attacks at home and abroad. Top officials from the DOJ, FBI, and Department of Homeland Security met with representatives from Apple, Facebook, Twitter, and other Silicon Valley companies to explore how extremist content can be identified, as well as how to counter terrorist propaganda with compelling alternative content. The administration describes this process as part of a plan to collaborate ‘with technology partners and others to ensure that we are bringing our best private and public sector thinking to combatting terrorism.’

The time has come to adopt a similar strategy in the fight against corruption. Corruption will never disappear entirely, but entrepreneurs possess the agility to organize and experiment in ways that large, entrenched public bureaucracies working alone can rarely match. Measures that entrepreneurs develop collaboratively also embody an attractive democratic quality. Even if they are unable to afford sophisticated compliance programs or counsel, most should be able to participate in multi-stakeholder conversations that seek to find creative alternatives to sanction-driven, supply-side regulation. When undertaken in good faith, the resulting interaction will lead to better-informed policy ideas, better conditions for

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<sup>312</sup> *Id.* at 37.

<sup>313</sup> Yockey, *supra* note 96, at 27–28.

entrepreneurship, and, over time, ought to boost the social capital of all involved.<sup>314</sup>

## XI. DATA SECURITY AND INFORMATION PRIVACY

### A. *Data Security and the Emerging Enterprise*

By now, everyone is aware of the crisis in enterprise data security and the need to protect all data systems from cyberattack.<sup>315</sup> Cybersecurity has become a major risk not just for large corporations, non-profits of any size, but small, emerging enterprises as well.<sup>316</sup> During August 2019, widespread accounts of the theft of 106 million digital records held by United States financial services giant Capital One Financial Corp. are reported.<sup>317</sup> *The Wall Street Journal* captures the moment by running an article captioned, “*Consumers Feel Breach Fatigue.*”<sup>318</sup>

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<sup>314</sup> *Id.* at 28 (citing Chris Strohm & Sarah Frier, *Obama Seeks Silicon Valley Help in Fight Against Terrorism*, BLOOMBERG (Jan. 8, 2016, 7:17 PM), <https://www.bloomberg.com/news/articles/2016-01-08/u-s-seeking-tech-cooperation-to-counter-extremist-recruitment> [<https://perma.cc/W6QX-8HVB>]).

<sup>315</sup> See Amanda N. Craig et al., *Proactive Cybersecurity: A Comparative Industry and Regulatory Analysis*, 52 AM. BUS. L.J. 721, 760 (2015); Lawrence J. Trautman, *Congressional Cybersecurity Oversight: Who's Who and How It Works*, 5 J.L. & CYBER WARFARE 147 (2016); Lawrence J. Trautman, *Cybersecurity: What About U.S. Policy?*, 2015 U. ILL. J.L. TECH. & POL'Y 341 (2015); Lawrence J. Trautman, *Is Cyberattack the Next Pearl Harbor?*, 18 N.C. J.L. & TECH. 233 (2016); Lawrence J. Trautman, *Managing Cyberthreat*, 33 SANTA CLARA HIGH TECH. L.J. 230 (2016); Lawrence J. Trautman & Peter C. Ormerod, *Industrial Cyber Vulnerabilities: Lessons from Stuxnet and the Internet of Things*, 72 U. MIAMI L. REV. 761 (2018); Lawrence J. Trautman & Peter C. Ormerod, *WannaCry, Ransomware, and the Emerging Threat to Corporations*, 86 TENN. L. REV. 503 (2019).

<sup>316</sup> See Lawrence J. Trautman & Kara Altenbaumer-Price, *D&O Insurance: A Primer*, 1 AM. U. BUS. L. REV. 337 (2012); Lawrence J. Trautman & Janet Ford, *Nonprofit Governance: The Basics*, 52 AKRON L. REV. 971, 972 (2018); Lawrence J. Trautman et al., *Corporate Information Technology Governance Under Fire*, 8 J. STRATEGIC & INT'L STUD. 105, 108 (2013).

<sup>317</sup> Robert McMillan, *How the Accused Capital One Hacker Stole Reams of Data From the Cloud*, WALL ST. J. (Aug. 4, 2019, 6:21 PM), <https://www.wsj.com/articles/how-the-accused-capital-one-hacker-stole-reams-of-data-from-the-cloud-11564911001> [<https://perma.cc/6Q2M-8YMQ>].

<sup>318</sup> Julia Carpenter & Bourree Lam, *Consumers Feel Breach Fatigue*, WALL ST. J., Aug. 5, 2019 at B4.

As just one example of the breach of an entrepreneurial start-up, during June 2019, the *Wall Street Journal* ran a story with the headline, “*A Tiny Startup, Felled by a Cyberattack*.”<sup>319</sup> Ruth Simon reports how during January 2019, “cyber thieves ran roughly 100,000 stolen [credit] card numbers through the payment system of Innovative Higher Ed Consulting, Inc., a two-person start-up in New York. Soon after . . . the startup’s payment processor sent a \$27,000 bill for reversing the charges.”<sup>320</sup> Like many financially fragile start-ups, “the fledgling company had just \$1,200 in revenue when it closed in May because of the cyberattack.”<sup>321</sup> The data security challenge is further complicated by the increasing rate of technological change and introduction of disruptive new technologies.<sup>322</sup> While a comprehensive treatment of the subject of cybersecurity is beyond the scope of this Article, a few thoughts to highlight the risk to every young enterprise is in order.

Every start-up utilizing the Internet for marketing will generally be responsible for the same data and privacy duties and responsibilities as the largest corporate entities.<sup>323</sup> The same data risk issues of large enterprises

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<sup>319</sup> Ruth Simon, *A Tiny Startup, Felled by a Cyberattack*, WALL ST. J., June 3, 2019 at B6.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> Lawrence J. Trautman et al., *Governance of the Internet of Things (IoT)*, 60 JURIMETRICS 315, 316 (2020); Lawrence J. Trautman et al., *Posted: No Phishing*, 8 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. (forthcoming 2021); Lawrence J. Trautman & Mason J. Molesky, *A Primer for Blockchain*, 88 UMKC L. REV. 239, 239 (2019); Lawrence J. Trautman et al., *Teaching Ethics and Values in an Age of Rapid Technological Change* (Aug. 13, 2020) (unpublished manuscript), <http://ssrn.com/abstract=3102552> [<https://perma.cc/DP7T-T9XQ>].

<sup>323</sup> See Patricia Sánchez Abril et al., *Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee*, 49 AM. BUS. L.J. 63 (2012); Corey A. Ciocchetti, *The Eavesdropping Employer: A Twenty-First Century Framework for Employee Monitoring*, 48 AM. BUS. L.J. 285 (2011); Joan T.A. Gabel & Nancy R. Mansfield, *The Information Revolution and its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 AM. BUS. L.J. 301 (2003); Nancy J. King & V.T. Raja, *What Do They Really Know About Me in the Cloud? A Comparative Law Perspective on Protecting Privacy and Security of Sensitive Consumer Data*, 50 AM. BUS. L.J. 413 (2013); Susan Park & Patricia Sánchez Abril, *Digital Self-Ownership: A Publicity-Rights Framework for Determining Employee Social Media Rights*, 53 AM. BUS. L.J. 537 (2016); Susan Park, *Employee Internet Privacy: A Proposed Act that Balances Legitimate Employer Rights and Employee Privacy*, 51 AM. BUS. L.J. 779 (2014); Robert Sprague & Mary Ellen Wells, *Regulating Online Buzz* (continued)

plague smaller entities as well, and much can be learned from the disclosure language of the larger firms.<sup>324</sup> Start-ups may benefit from placing a priority on the early recruitment of data and information technology expertise to the management team and governing board.<sup>325</sup>

### B. Privacy Regulation

In my recent article titled, “Governance of the Facebook Privacy Crisis” I write, “In November 2018, the *New York Times* ran a front-page story describing how Facebook covered up knowledge and disclosure of Russian-linked activity and exploitation resulting in Kremlin led disruption of the 2016 U.S. elections, ‘broadcast [of] viral propaganda and inspir[ing] deadly campaigns of hate across the globe.’”<sup>326</sup> Then, it becomes evident by mid-December 2018, “that the Russian efforts leading up to the 2016 U.S. elections were much more extensive than previously thought. Two studies conducted for the United States Senate Select Committee on Intelligence (SSCI) . . . provide considerable new information and analysis about the Russian Internet Research Agency (IRA) influence operations targeting American citizens.”<sup>327</sup> Both Facebook, Google, and a number of influential and successful high growth social media platforms soon realize they have

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*Marketing: Untangling a Web of Deceit*, 47 AM. BUS. L.J. 415 (2010); Lawrence J. Trautman & Kara Altenbaumer-Price, *The Board’s Responsibility for Information Technology Governance*, 28 J. MARSHALL J. COMPUTER & INFO. L. 313 (2011); Lawrence J. Trautman & Peter C. Ormerod, *Corporate Directors’ and Officers’ Cybersecurity Standard of Care: The Yahoo Data Breach*, 66 AM. U. L. REV. 1231 (2017); Lawrence J. Trautman & George P. Michaely, Jr., *The SEC and the Internet: Regulating the Web of Deceit*, 68 CONSUMER FIN. L. Q. REP. 262 (2014); Neal Newman & Lawrence J. Trautman, *Securities Law: An Overview* (unpublished manuscript) (on file with authors); Lawrence J. Trautman et al., *Corporate Directors: Who They Are, What They Do, Cyber and Other Contemporary Challenges* (unpublished manuscript) (on file with authors).

<sup>324</sup> Trautman, *supra* note 5, at 6; *see also* Trautman, *supra* note 7, at 263.

<sup>325</sup> Lawrence J. Trautman, *The Matrix: The Board’s Responsibility for Director Selection and Recruitment*, 11 FLA. ST. U. BUS. REV. 75, 81 (2012); *see also* Lawrence J. Trautman, *Who Sits on Texas Corporate Boards? Texas Corporate Directors: Who They Are & What They Do*, 16 HOUS. BUS. & TAX L.J. 44, 97 (2016); Lawrence J. Trautman, *Who Qualifies as an Audit Committee Financial Expert Under SEC Regulations and NYSE Rules?*, 11 DEPAUL BUS. & COM. L.J. 205, 233 (2013); Lawrence J. Trautman, *The Board’s Responsibility for Crisis Governance*, 13 HASTINGS BUS. L.J. 275, 317 (2017).

<sup>326</sup> *See* Trautman, *supra* note 4, at 98 (quoting Sheera Frenkel et al., *Delay, Deny, Deflect: How Facebook Leaders Leaned Out in Crisis*, N.Y. TIMES, Nov. 15, 2018, at A1).

<sup>327</sup> *Id.* at 46.

been used by nation states for propaganda purposes.<sup>328</sup> Previously, Russia was identified by the U.S. intelligence community for their meddling with the 2016 American presidential elections.<sup>329</sup> The *New York Times* reporting “suggests that it wasn’t until the Facebook board meeting held September 6, 2017 that board audit committee chairman Erskin Bowles became aware of Facebook’s internal awareness of the extent to which Russian operatives had utilized the Facebook and Instagram platforms for influence campaigns in the United States.”<sup>330</sup> The numerous legal challenges facing every entrepreneurial venture require substantial resources and understanding.<sup>331</sup> In the United States, new state law privacy requirements such as the California Consumer Privacy Act (CCPA) require attention.<sup>332</sup> International requirements, such as those imposed by the European Union’s General Data Protection Regulation (GDPR) are likely applicable even for a two-person start-up in rural America, if the business incorporates the Internet and reaches citizens within applicable jurisdictions.<sup>333</sup>

## XII. VALUE, COST, AND OPPORTUNITY OF COMPLIANCE

*“Compliance mitigates risk, making companies more valuable and less likely to encounter unanticipated costs that may result from protracted investigations and penalties.”*<sup>334</sup>

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<sup>328</sup> *Id.* at 103.

<sup>329</sup> *Id.* at 46 (citing Elias Groll, *United States Accuses Russia of Using Hacking to Meddle in Election*, FOREIGN POLICY (Oct. 7, 2016), <https://foreignpolicy.com/2016/10/07/united-states-accuses-russia-of-using-hacking-to-meddle-in-election/> [https://perma.cc/S6VH-3GMR] (explaining the attacks on the American political system)).

<sup>330</sup> *Id.* at 98 (citing Frenkel et al., *supra* note 326) (explaining Facebook’s knowledge of Russia’s influence on American elections via its own platforms).

<sup>331</sup> Lawrence J. Trautman et al., *Some Key Things U.S. Entrepreneurs Need to Know About the Law and Lawyers*, 46 TEXAS J. BUS. L. 155, 156 (2016).

<sup>332</sup> See Eric Goldman, *An Introduction to the California Consumer Privacy Act (CCPA)* 1 (July 9, 2018) (unpublished manuscript), <https://ssrn.com/abstract=3211013> [https://perma.cc/J97Q-ENXE].

<sup>333</sup> Kimberly A. Houser & W. Gregory Voss, *GDPR: The End of Google and Facebook or a New Paradigm in Data Privacy?*, 25 RICH. J.L. & TECH 1, 8 (2018); see also W. Gregory Voss & Kimberly A. Houser, *Personal Data and the GDPR: Providing a Competitive Advantage for U.S. Companies*, 56 AM. BUS. L.J. 287, 290 (2019).

<sup>334</sup> Rosenstein, *supra* note 205.

Virginia and Ralph Maurer ask the question, “How much money is enough money to spend on compliance?”<sup>335</sup> Indeed, “[e]thics and compliance is not a profit center in a business organization; it is an overhead cost in the current fiscal year with a return on investment that is difficult to measure in both the short and the long term.”<sup>336</sup> To an entrepreneur seeking to expand her business to international markets, the unanticipated cost of anti-bribery compliance may pose a staggering surprise.<sup>337</sup> Philip Nichols states:

[T]he research as a whole presents a strong business case for complying with rules that prohibit the payment of bribes and for developing programs and policies that ensure compliance with laws prohibiting the payment of bribes. Firms that develop and implement such programs and thereby avoid paying bribes should also avoid the costs imposed by the payment of bribes and enjoy an advantage over firms that continue to pay bribes.<sup>338</sup>

In some jurisdictions, particularly in transition economies, substandard accounting records and auditing standards may prove an impediment to compliance programs.<sup>339</sup> Professor Ralph H. Folsom writes, “Disclosures

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<sup>335</sup> Maurer & Maurer, *supra* note 141, at 357.

<sup>336</sup> *Id.*

<sup>337</sup> Trautman & Altenbaumer-Price (2013), *supra* note 209, at 271.

<sup>338</sup> Nichols, *supra* note 133, at 368; *see generally* Robert C. Bird & Stephen Kim Park, *The Domains of Corporate Counsel in an Era of Compliance*, 53 AM. BUS. L.J. 203 (2016); Todd Haugh, *Nudging Corporate Compliance*, 54 AM. BUS. L.J. 683 (2017); Steven R. Salbu, *Transnational Bribery: The Big Questions*, 21 NW. J. INT’L L. & BUS. 435, 437 (2001) (considering whether it can be ethical to pay a bribe, and if so, whether our laws should recognize this; whether the FCPA’s notion of ‘routine government actions’ creates a viable standard for distinguishing acceptable and unacceptable payments; whether corporate principles can have a meaningful impact in the battle against global corruption; and whether NGO’s should supplant government action in fighting global corruption).

<sup>339</sup> *See* Robert W. McGee, *Accounting and Auditing Aspects of Corporate Governance in Emerging Economies*, in EMERGING MARKETS: PERFORMANCE, ANALYSIS AND INNOVATION 661 (Greg N. Gregoriou ed., 2009); *see also* MCGEE & PREOBRAGENSKAYA, *supra* note 32, at 46; Galina G. Preobragenskaya & Robert W. McGee, *Auditing in Transition Economies: A Case Study of Russia*, 1 ICFAI J. AUDIT PRAC. 65 (2004); Galina G. Preobragenskaya & Robert W. McGee, *Converting the Accounting System of a Transition Economy: A Case Study of Russia*, 1 INT’L J. ACCT. AUDITING & PERFORMANCE EVALUATION 448 (2004).

of corruption in China frequently appear to involve government officials and officers of state-controlled corporations.”<sup>340</sup> Confirmation and other problems encountered by outside auditors in China are notorious.<sup>341</sup> Numerous scholars have written about the topic of whistleblowing,<sup>342</sup> the prevalence of which may differ from culture to culture, country to country.

Observing that “corruption and human rights are intimately connected,”<sup>343</sup> Norman Bishara and David Hess suggest that corporations have the opportunity to do much more “than simply taking efforts to ensure that their employees or agents do not pay bribes . . . [and suggest] a framework of developing and implementing effective policies and procedures that is marked by the transparency of a publication regime.”<sup>344</sup>

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<sup>340</sup> Ralph H. Folsom, *A Commentary on the Globalization of Foreign Corrupt Practices Law 1* (Univ. of San Diego Sch. of Law, Research Paper No. 18-373, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3314302](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3314302) [https://perma.cc/LAV3-SE3A].

<sup>341</sup> See generally ROBERT W. MCGEE & GALINA G. PREOBRAGENSKAYA, *ACCOUNTING AND FINANCIAL SYSTEMS REFORM IN EASTERN EUROPE AND ASIA* (2006); *ACCOUNTING REFORM IN TRANSITION AND DEVELOPING ECONOMIES* (Robert W. McGee ed., 2009); Robert W. McGee et al., *The Timeliness of Financial Reporting: A Comparative Study of the People's Republic of China and the European Union*, in *CORPORATE GOVERNANCE IN TRANSITION ECONOMIES* 211 (Robert W. McGee ed., 2009); Robert W. McGee & Xiaoli Yuan, *The Timeliness of Financial Reporting: A Comparative Study of the People's Republic of China and the USA*, in *CORPORATE GOVERNANCE IN TRANSITION ECONOMIES*, *supra* note 341, at 201; Gin Chong, *International Insurance Audits and Governance*, 23 INT'L J. ACCT. & INFO. MGMT. 152 (2015).

<sup>342</sup> See generally Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99 (2000); Elletta Sangrey Callahan et al., *Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Responsibility*, 40 AM. BUS. L.J. 177 (2002); Leora F. Eisenstadt & Jennifer M. Pacella, *Whistleblowers Need Not Apply*, 55 AM. BUS. L.J. 665 (2018); Jennifer M. Pacella, *Silencing Whistleblowers by Contract*, 55 AM. BUS. L.J. 261 (2018).

<sup>343</sup> Norman Bishara & David Hess, *Human Rights and a Corporation's Duty to Combat Corruption*, in *LAW, BUSINESS AND HUMAN RIGHTS: BRIDGING THE GAP* 71 (Robert C. Bird et al. eds., 2014).

<sup>344</sup> *Id.* at 89; see also David Hess, *Catalyzing Corporate Commitment to Combating Corruption*, 88 J. BUS. ETHICS 781, 781 (2008) (exploring the possibility of “amnesty programs for corporations that self-disclose corrupt payments, the use of corporate monitors in the enforcement of anti-corruption laws, . . . sustainability reporting indicators related to  
(continued)

As we go to press, it is obvious that risks associated with global health and pandemic considerations will likely be with us for many decades to come.<sup>345</sup>

### XIII. CONCLUSION

As the world continues to grow smaller and the economic and business importance of markets such as Canada, China, and Mexico continue to grow, United States entrepreneurs must necessarily become sensitive to the pervasive environment of bribery and corruption, and to anti-bribery risks contained in local laws, the Foreign Corrupt Practices Act, and United Kingdom Bribery Act 2010. Failure to do so puts their companies, investors and themselves at grave risk for getting caught in the deep and expensive quagmire of heightened enforcement. As the world economy seeks to recover from the 2020 COVID-19 pandemic, job formation and international trade is of paramount importance. Recognition of these important ethical issues and having a plan for expertise and compliance, puts entrepreneurs and their companies on the forefront of modern business ethics and operations.

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bribery, and implementation of multi-stakeholder initiatives to support a corporate principles approach”); Andrew B. Spalding, *Corruption, Corporations, and the New Human Right*, 91 WASH. U. L. REV. 1365, 1365 (2014), (contending that “freedom from corruption can and should be understood as a human right . . . [T]he FCPA can become a more powerful statutory tool for deterring corporate rights violations overseas. . . .”); Robert C. Bird & Lucien J. Dhooge, *Bridging the Credibility Gap Between Transnational Corporations and Human Rights* 2 (Mar. 11, 2011) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1783579](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1783579) [<https://perma.cc/4E3K-WSYL>] (“[R]especting human rights and avoiding negative impacts through the performance of due diligence presents value opportunities and strategic advantages beneficial to firm performance.”).

<sup>345</sup> Eddie Bernice Johnson & Lawrence J. Trautman, *The Demographics of Death: An Early Look at COVID-19, Cultural and Racial Bias in America*, 48 HASTINGS CONST. L.Q. (forthcoming 2021).

