

# EXAMINING ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT

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## HEARING BEFORE THE SUBCOMMITTEE ON CRIME AND DRUGS OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE ONE HUNDRED ELEVENTH CONGRESS SECOND SESSION

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## EXAMINING ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT

TUESDAY, NOVEMBER 30, 2010

U.S. SENATE,  
SUBCOMMITTEE ON CRIME AND DRUGS,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC*

The Subcommittee met, pursuant to notice, at 10:21 a.m., Room 226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Subcommittee, presiding.

Present: Senators Leahy, Klobuchar, and Coons.

### OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Good morning, ladies and gentlemen. The Criminal Law Subcommittee will now proceed with this hearing focusing on sentencing under the Foreign Corrupt Practices Act.

I regret the delay, but we just started the third vote this morning, and I voted at the outset so I could come and begin this hearing. We hate to keep people waiting, but voting is our priority activity. That comes ahead of all other items.

Less than a month ago, I noted the media reports about the resolution of a case under the Foreign Corrupt Practices Act. It involved six oil and gas companies and a prominent freight-forwarding company, which agreed to pay some \$236 million in criminal and civil penalties in what was reputed to be one of the largest corporate bribery cases ever to focus on a single industry.

My eye was caught by that for a number of factors. One was the concern, which I had expressed some time ago, on the handling of a case involving Siemens AG, which was prosecuted under the Foreign Corrupt Practices Act, with the criminal information specifying, quote, "Siemens' employees sometimes carried cash in suitcases across international borders to pay bribes."

Siemens received billions of dollars' worth of government contracts because of these payments. Siemens' conduct was egregious, staggering, brazen, and systematic, and there exists a corporate culture in which bribery was tolerated and even rewarded at the highest levels of the company.

The total criminal fine was \$450 million. Siemens also reached a settlement of a related civil complaint by the SEC and agreed to pay \$350 million in disgorgement of profits. When added to fines paid in connection with related cases brought by German officials, Siemens will pay a combined total of more than \$1.6 billion in fines, penalties and disgorgements.

(1)

Siemens enjoyed revenues that year of \$105 billion and income of approximately \$8 billion. Now, while \$1.6 billion is a lot of money, it is not when you take a look at the other figures involving Siemens.

I have been concerned about law enforcement for a long time and have had some experience in the field and am convinced that the only impact on matters of this sort is a jail sentence. Fines added to the cost of doing business end up being paid by the shareholders. Criminal conduct is individual.

Nobody likes to pay fines, but it does not amount to a whole lot in the context of what is going on here. So I thought it would be useful to ask the Department of Justice to come in to see how many answers they could give.

Oversight is a major function of Congress. Oversight of the criminal law is a major function of the Judiciary Committee; and, with all we have to do, we do not do very much of it, do not do very much of it at all.

Some of us have some substantial experience in this line of work. The experience has been slightly more than doubled in the last 10 seconds, with the arrival of Chairman Senator Leahy.

Patrick, I was making a comment about money fines, talking about Siemens' \$1.6 billion income over \$100 billion profits over \$8 billion, and this hearing was motivated by an article which appeared less than a month ago about six oil and gas companies agreed to pay \$236 million criminal and civil penalties.

I made the point that fines come out of the corporation, come out of the shareholders. It does not deal with the individual conduct of violating the law, and expressed my own view that the only effective way to deal as the deterrent is with jail sentences.

So I was just saying, as you walked in, we brought the Department of Justice in. Oversight is a very big function. You are the Chairman. I was the Chairman. You were the Chairman before that.

Senator LEAHY. We have gone back and forth.

Senator SPECTER. Well, we do not do a whole lot of oversight, because we have so much else to do. But I was just on that point.

It is fairly well publicized that District Attorney Leahy or Prosecutor Leahy in Burlington was tougher then than he is now, which is hard to believe, but he was, and I was DA of Philadelphia. We had been at the national DA's convention in Philadelphia, I was the host, in 1870–1970.

[Laughter.]

Senator SPECTER. Patrick, I yield to you.

#### **STATEMENT OF HON. PATRICK LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT**

Senator LEAHY. Well, thank you, and I will be very brief. I was here just to compliment Senator Specter. As he said, we have served together almost 30 years in the Senate. We did first meet on that national DA's meeting in Philadelphia, where he hosted it and did, as usual, a superb job. We became friends and have stayed friends.

There are only a handful of Senators who have served on this committee for 30 years, five full terms, and Senator Specter is one

of them. He has been Committee Chairman. He has been Chairman of the Juvenile Justice Subcommittee, the Chairman of the Terrorism Technology and Government Information Subcommittee, Chairman of the Crime and Drug Subcommittee.

You have all these titles, but they do not really talk about everything he has done. He passed the Career Criminal Act. He saved the juvenile justice program from elimination, something that today, it is hard for anybody to think that such a valuable piece of legislation might have disappeared. If it had not been for his herculean efforts, it would have.

We worked closely on a bipartisan investigation on what went wrong at Ruby Ridge. We worked together to protect constitutional rights, those guaranteed by the First, the Second, the Fourth, Fifth, Sixth, Eighth, Ninth Amendments, including work on press shield legislation here.

So my point being here is just to compliment him, and I will step out of the way, because he has chaired so many hearings.

I found this in the archives, and this may have been the hearing, the first hearing you ever conducted. It is a hearing before the Subcommittee on Juvenile Justice, 97th Congress, first session, April 1, 1981. Strom Thurmond was the Chairman. Mac Mathias, Paul Laxalt, Bob Dole, Alan Simpson, John East, Jeremiah Denton—I am just naming people who have left us since—Joe Biden, Ted Kennedy, Bob Byrd, Howard Metzenbaum, Dennis DeConcini, Max Baucus, Howell Heflin, and you and I somewhere down near the bottom on both sides. So I just wanted to give you that.

I want to speak more on the floor about Senator Specter, but I just wanted to come here and compliment him.

Senator SPECTER. Well, thank you very much, Mr. Chairman. Those are high words of praise and I appreciate them very much.

Senator KLOBUCHAR, would you care to make an opening statement?

Senator KLOBUCHAR. No. Just that I agree with everything that Senator Leahy said about you, Mr. Chairman.

Senator SPECTER. Well, thank you.

We will proceed now to the acting Deputy Assistant Attorney General, the Criminal Division, the honorable Greg Andres. Mr. Andres comes to this position with a very extensive background in law enforcement. He was an assistant United States attorney in the eastern district of New York for more than a decade; served as chief of the criminal division there for 3 years; previously was deputy chief of the criminal division and deputy chief of the organized crime and racketeering section; graduate of Notre Dame and University of Chicago Law School; Law Review member; clerk to a Federal judge.

We welcome you here—good morning, Senator Coons—and look forward to your testimony.

**STATEMENT OF HON. GREG ANDRES, ACTING DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, DC**

Mr. ANDRES. Thank you, Chairman Specter and distinguished members of the Subcommittee. Thank you for the opportunity to

appear before you today to discuss the Department of Justice's enforcement of the Foreign Corrupt Practices Act.

The investigation and prosecution of transnational bribery is an important priority for the Department of Justice, and we have been hard at work. In particular, over approximately the last 2 years, we have substantially increased the number of our prosecutions against corporations and individual executives. We have collected more in criminal fines than in any other period in the history of our FCPA enforcement. We are proud of our accomplishments, and others have taken note, as well.

On October 20, 2010, following a rigorous official review, the Organization for Economic Cooperation and Development, known as the OECD, applauded the Departments of Justice, Commerce and State, and the SEC for our collective efforts in the fight against foreign bribery.

In its official report, the OECD's working group on bribery in international business transactions noted that the United States has investigated and prosecuted the most foreign bribery cases among the partners to the anti-bribery convention.

The OECD's report makes clear that the United States' success in enforcing the FCPA has far outpaced any other country's enforcement of its foreign bribery laws. We remain committed to this effort. We are grateful for the Subcommittee's interest and to the Chairman for inviting the criminal division to discuss the department's progress.

FCPA enforcement is as strong today as it has ever been, and we believe it is getting stronger. In the past year alone, we have prosecuted and entered into corporate resolutions with some of the world's largest corporations. But that is only part of the story.

We are also vigorously pursuing individual defendants who violate the FCPA, and we do not hesitate to seek jail terms for these offenders, when appropriate. The department has made the prosecution of individuals a critical part of its FCPA enforcement strategy. We understand well that it is an important and effective deterrent.

Paying large criminal penalties cannot be viewed as and is not simply the cost of doing business. Corporate prosecutions and resolutions do not and cannot provide a safe haven for corporate officials. And every agreement resolving a corporate FCPA investigation explicitly states that it provides no protection against prosecution for individuals.

The department has charged over 50 individuals with FCPA violations since January of 2009. Today, there are approximately 35 defendants awaiting trial on FCPA charges in the United States; specifically, in Houston, Miami, Los Angeles, Santa Ana, and Washington, DC. By contrast, in 2004, the department charged only two individuals with FCPA violations.

FCPA enforcement has always been important and it is particularly critical today. The World Bank estimates that more than \$1 trillion in bribes is paid each year, \$1 trillion. This amounts to approximately 3 percent of the world's economy.

As Attorney General Holder explained to an audience earlier this year, bribery in international business transactions weakens eco-



conomic development; it undermines confidence in the marketplace; and it distorts competition.

Thus, FCPA enforcement is vital to ensuring the integrity of the world's markets and to ensuring sustainable development globally. At the Department of Justice, together with our partners at other Federal agencies and around the world, we have made combating transnational bribery a priority.

We look forward to working with Congress as we continue our important mission to prevent, deter, and prosecute foreign corruption. Thank you for listening. And I will be pleased to take any questions you may have.

[The prepared statement of Mr. Andres appears as a submission for the record.]

Senator SPECTER. Mr. Andres, you talk about collecting more in criminal fines than anyone else, prosecuted more cases than other countries who are parties to the convention, and you say you do not hesitate to go after individuals.

But whom have you sent to jail?

Mr. ANDRES. Senator, thank you for the opportunity to address this issue. I know it is important to you and that you have spoken forcefully about it, and it is important to the department.

As I mentioned, since January of 2009, we have charged more than 50 individuals. Approximately 35 of those have been——

Senator SPECTER. I have heard that and I have heard about charges and I know what charges are, but come to question, who is going to jail?

Mr. ANDRES. Sir, to give you specific examples, Jack Stanley, as part of the KBR prosecution, was an officer and director, was sentenced to 84 months imprisonment for his involvement in the bribery of Nigerian officials to obtain engineering, procurement and construction contracts.

John Warwick and Charles Jumet, executives in a Virginia engineering firm, were both charged with conspiring to violate the FCPA's anti-bribery provisions. Warwick pled guilty and was sentenced in June of 2010 to 37 months imprisonment. Co-defendant Charles Jumet was charged with conspiring to violate the FCPA and making false statements to Federal agents. He was sentenced to 87 months imprisonment.

In September 2010, three former employees and a partner of Nexus Technologies were sentenced for their involvement in a conspiracy to bribe officials of the Vietnamese government. One defendant was sentenced to 16 months imprisonment, another to 9 months imprisonment.

Christian Sapsizian, from February of 2000 through September of 2004, Sapsizian, a French national and vice president for Latin America for Alcatel, conspired with others to pay more than \$2.5 million in bribes to senior Costa Rican officials. On September 23, 2008, he was sentenced to 30 months imprisonment.

There are, of course, others, as well, Senator. I am happy to provide other examples.

I would say this, though, with respect——

Senator SPECTER. I wish you would. I counted up your recitation, I get six jail sentences. Staff has prepared a long list of prosecu-

tions and fines, without any jail sentences at all, from November 4, 2010.

The Noble Corporation, fines of more than \$2.5 million; Panalpina, Inc., fines of more \$70 million; Pride Forasol, more than \$32 million; Shell Nigeria, \$30 million; Tidewater, \$7.35 million; Transocean, \$13.44 million. But nobody went to jail in those cases.

Mr. ANDRES. Senator, Gerald Green and Patricia Green were two defendants that went to trial. They were each sentenced to 6 months imprisonment, 6 months of home confinement.

Senator SPECTER. Are you saying that those jail sentences were handed down from cases I just enumerated?

Mr. ANDRES. No. Senator, the cases that you referred to are, obviously, corporate dispositions and in some of those, the investigation, particularly in the Panalpina-related cases, are ongoing. In fact, there is ongoing litigation with respect to those employees of those corporations.

With respect to the prosecution of corporations and individuals, it is not an either/or proposition for the department. We seek to prosecute both corporations and individuals who have violated the FCPA.

With respect to those cases, there are a number of challenges for charging individuals in this particular area.

Senator SPECTER. My time is almost up. Did anybody go to jail in the Siemens case?

Mr. ANDRES. Senator, as we have said before, in the Siemens case, that investigation is ongoing. There are a number of prosecutions ongoing in Germany.

Senator SPECTER. Are there individuals who are being prosecuted?

Mr. ANDRES. That investigation is ongoing, Senator.

Senator SPECTER. Are there any individuals being prosecuted?

Mr. ANDRES. No individuals in the United States have been charged yet with respect to the Siemens matter. But as has been made clear in the court documents filed, the government has attempted to obtain information about individual defendants.

In our sentencing memoranda—

Senator SPECTER. Well, I am going to conclude, because I do not want to go past the red light. I will return to this on the second round.

Senator Klobuchar.

Mr. ANDRES. Thank you, Senator.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman, and thank you for convening this important hearing and for your skillful chairmanship of this Subcommittee over the last several months.

Thank you, as well, Mr. Andres, for your work and your enforcement efforts, and especially the criminal penalties in the most egregious cases that you mentioned.

I am taking a little different tact here, because I do appreciate that you have ramped things up with some of these most egregious cases. And as a former prosecutor, I certainly realize that enforcement of the law can make a difference and it changes practices.

But, also, one of the basic principles of due process is that people in companies have to be able to know what the law is in order to

comply with it. And I will tell you that I have heard from many very good standing companies in my State that they do not always know what behavior will trigger an enforcement action.

As we know, the goal is not just to punish bad actors after a violation is committed, but rather to prohibit actions from happening in the first place. So a lot of my questions are focused on how we can incentivize corporations to make sure they have appropriate compliance procedures in place and that they voluntarily disclose violations when a rogue employee violates the law.

I head up the Subcommittee on Exports and Commerce, a big believer in the President's focus of trying to double exports. I believe this is the way that we are going to get ourselves out of this economic downturn. And I have a State where we truly believe in exporting all over the world and it is what I think has given our State a leg up when you look at our unemployment rate compared to other States.

At the same time, I have heard a lot of concerns about any little conduct is going to trigger some kind of investigation. So my first question is—and in your testimony, you detailed several of the large cases that DOJ has prosecuted over the last few years.

While many of these cases, clearly, these egregious cases may be clear-cut, I have heard from some businesses that additional guidelines laying out best practices would help them operate with more certainty.

Have you given any thought to increasing the guidance you give businesses, especially in situations covered by the FCPA that are not so clear or fall into gray areas?

Mr. ANDRES. Yes, Senator. As you may know, there is a unique procedure under the current law that allows companies to seek an advisory opinion under the FCPA. So that allows companies to provide facts and information to the department and we are able to give them an advisory opinion as to specific conduct and whether that conduct violates the FCPA.

I believe that procedure is unique among the criminal laws. Those opinions are published and available to companies to analyze them, to understand where the government is focusing its enforcement, and what specifically violates the law.

One other area where the government is particularly transparent in this area is with the publication and filing of our non-prosecution agreements, deferred prosecution agreements, information, and indictments. We have a Website at the Department of Justice—

Senator KLOBUCHAR. And do you think there is more that you can do, though? Because this is what I keep hearing of their concerns, of relatively minor things, and they are just not sure if it is a gray area or not. That what you are doing is not enough?

Mr. ANDRES. Again, the best procedure is the advisory opinions, but officials from the department speak routinely about the Foreign Corrupt Practices Act, and our filings are rather detailed in specifically what we are looking for by way of compliance.

The OECD's good practice guidance also provides information about the appropriate compliance procedures, and the sentencing guidelines also reference compliance procedures.

Senator KLOBUCHAR. Has the department established or considered establishing a self-disclosure program, such as is offered by the department with the antitrust amnesty program, to encourage those companies that discover FCPA violations through their compliance efforts to disclose them to the department?

It seems to me like that would be a way of advancing anti-corruption efforts.

Mr. ANDRES. Many of our cases rely on the self-disclosure and cooperation of corporations, and we encourage that. Self-disclosure and cooperation are two of the nine factors that the government considers as part of the principles of Federal prosecution of business entities when we are making our charging decisions and we are deciding how to resolve cases.

We do not believe that immunity is appropriate, just as we do not believe that a bank robber should get immunity for disclosing that he robbed a bank. The fact alone that a company discloses their involvement in criminal activity or that of an employee in criminal activity does not amount necessarily to getting a pass for those crimes.

We think the antitrust provisions are different, because in that field, obviously, it takes two or more competitors to collude to fix prices. There is not the same incentives or the same criminal conspiracies necessarily at work with respect to the FCPA.

But I will say this. In many of the cases that we resolve, some of which we decline to prosecute, self-disclosure is a very important factor and we believe that the current factors that the department follows under the principles of business organizations give sufficient motivation to self-disclose and cooperate.

Senator KLOBUCHAR. Companies are obligated to disclosure, is that right, when they hear about things?

Mr. ANDRES. They are not obligated to disclosure.

Senator KLOBUCHAR. They are not.

Mr. ANDRES. They make a decision to disclose and in return for their disclosing and their investigating, in large part, their own criminal conduct, they get meaningful credit with the department and that credit goes into the decision whether to file an information or charge the company, whether to enter a deferred prosecution or a non-prosecution agreement.

Senator KLOBUCHAR. How many disclosures has the DOJ received since 2007?

Mr. ANDRES. I would not know the specific number. I can get that for you, Senator. But it is significant. We are getting a significant number of disclosures from corporations about their own criminal conduct. I think that, in part, relates to the passage of the Sarbanes-Oxley legislation, which encourages corporations to review their own books and records.

Senator KLOBUCHAR. Well, I will look forward to getting that, as well as working with you going forward. And I will have some more questions for the second round.

Thank you.

Mr. ANDRES. Thank you, Senator.

Senator SPECTER. Senator Coons.

Senator COONS. Thank you, Senator Specter, and thank you for bringing forward this important hearing today and this focus on this important area of transnational illegal activity.

Mr. Andres, I would be interested in hearing more about the impact on the other signatories to the anti-bribery convention of your ramped-up enforcement efforts by the department.

I will commend you for being more aggressive in pursuing this area, but I will also share some of the questions of Senator Klobuchar about standards and process.

But, first, I just wanted to ask—a number of these very large transnational cases have involved cooperation with allies, Germany, Venezuela, Switzerland, others. What success have we had in urging other signatories to step up their activities comparable to ours? What strains has it produced on some of our alliances? And then what impact does it have on the activity of elected officials or government officials in other countries?

Mr. ANDRES. Thank you, Senator Coons. We have made significant efforts abroad through our participation in international organizations, through our cooperation with other law enforcement agencies abroad, and through our own prosecution of foreign corporations.

First, the United States is a leader in the OECD and particularly in the working group on bribery. The United States has just undergone what they call the phase three review, in which we have a peer review of our own enforcement practices.

The last stage of the review related to—or one of the prior stages—what laws are on the books, and now the concentration is on who is prosecuting companies.

Other countries and other signatories to that convention will also now undergo the peer review. And through our own efforts and the efforts of others at the OECD, pressure has been brought upon other countries to also prosecute foreign bribery.

I would cite to the BAE resolution and the Department of Justice's longstanding relationship with the serious fraud office in the United Kingdom. Also, on the Siemens matter, we cooperated and we worked and continue to work with the German authorities. In the Innospec matter, we also worked with the serious fraud office.

In some cases, we are not only prosecuting foreign companies, we are also extraditing foreign individuals to bring them back to the United States.

So I would say that our work abroad has been important. I would also note that the attorney general himself visited the OECD to stress the importance of its work, as did the assistant attorney general for the criminal division, Lanny Breuer.

We are working with our partners and, particularly through organizations like the OECD, we think we are having an effect.

Lastly, I would just point to the recent passage of the U.K.'s law on bribery, which is viewed as aggressive, and that, I think, is the outgrowth, not just, obviously, of the United States, but our work at the foreign organizations like the OECD.

Senator COONS. Has there been any reported appreciable change in the conduct or behavior of public officials overseas in response to our more aggressive enforcement or, as some companies have suggested, is this simply putting U.S.-headquartered companies at

a disadvantage in not actually having some positive or desirable impact on the conduct of foreign officials?

Mr. ANDRES. It is hard to quantify specifically what the effect would be on foreign officials. I will say that we are clearly prosecuting foreign companies. Approximately half the cases that we have brought over the last 2 years have been against foreign companies.

I will say that there is clearly an increased awareness in places like China and Russia. We have been invited to speak and have spoke to officials from the Department of Justice, in China about these issues. We have also worked with the Chinese delegation that came to the United States and, in coordination with the Chamber of Commerce, addressed some of these issues.

So I think there clearly is a heightened awareness around the world and people are taking notice, and, hopefully, that will have an effect on foreign officials.

Senator COONS. And are there other remedies the department is seeking, debarment, exclusion from government contracting or other remedies, that are also potentially part of the solution to the ongoing challenges you face?

Mr. ANDRES. Sure. With respect to debarment, I think it is important to remember that the Department of Justice is not the agency that is in charge of debarment; that is, it is not within our jurisdiction.

Our role is to investigate and to prosecute violations of the Foreign Corrupt Practices Act. Debarment decisions are made by the officials at the various contracting government agencies.

Secondly, debarment is not or was not intended to be punitive or punishment, but, rather, a means for government agencies to protect themselves against unscrupulous and poorly performing contractors. The debarment authorities make the decision whether the company is a presently responsible contractor.

So the debarment decision is clearly not one within the Department of Justice. Our job is to make sure that the facts of our investigation are transparent and that we communicate that information to the debarring authority so that they will have all the available information to make their own decisions.

Again, we publish and file all of our agreements. They are rather explicit as to the criminal conduct at issue, and, hopefully, those allow the debarring officials to make the appropriate decisions.

Senator SPECTER. Thank you, Senator Coons.

Mr. Andres, I am not going to take a second round, because we got started late and have another panel and we are going to be running into the later activities.

I will pursue a couple of questions with you informally, and I am not looking for answers now. But you commented—if there are individual prosecutions as to Siemens, I would like to pursue that, to the extent you can tell us. Those are 2008 matters, and I would like to pursue the question as to where you are going on this case.

It was reported less than a month ago with the fines, and I ask you for your comments later about the deterrent effect when you have publicity—you cannot control the publicity, but you can control when you announce a disposition of cases.

But it certainly gives the appearance on Siemens, with fines only, in the most recent case, with fines only, that it is not a matter for jail sentences, and you have to find some way to publicize your other good works on jail sentences.

Senator KLOBUCHAR, would you care to question further?

Senator KLOBUCHAR. I just wanted to follow-up on a few things that—and I will try to be quick here—that Senator Coons raised about the other countries. And I know in your testimony, you noted that the United States' success in enforcing the FCPA has far outpaced any other country's enforcement of its foreign bribery laws and that you have been working with our trading partners, as you discuss with them, to encourage them to enhance their effort.

Again, I have heard from a number of businesses in my State—and this was not an organized discussion, this is over a year of people bringing up what is making it difficult for them to export, when all we want to do is create jobs in this country. I have heard from businesses who remain concerned that they just want an even playing field and that not enough is being done to ensure that some of the other countries who are trading are also enforcing similar laws.

Can you discuss in further detail what our government is doing to ensure a level playing field for our companies competing overseas?

Mr. ANDRES. Again, it is primarily through our work in international organizations like the OECD and our peer review process of other countries. When our prosecutors go to the OECD, they talk to other prosecutors from around the world about the prosecutions in their own countries and there are questions posed to each of those prosecutors about why they are not prosecuting bad actors and corporations in their own countries.

Again, we also are pursuing many foreign companies with prosecutions here in the United States. To some extent, underlying these criticisms about the level playing field, I think, is the notion or the claim that our FCPA enforcement has been bad for business in the United States.

We at the Department of Justice disagree with that. Foreign bribery cannot be good for business, and good compliance is a good way for companies to make sure that there is not waste, fraud and abuse. So we think that good compliance is good for corporations and that our enforcement is not bad for business and that we are leveling the playing field by attacking foreign bribery both here in the United States and abroad.

Senator KLOBUCHAR. Well, I would never want to say that foreign bribery and letting it go is a good thing. I do not think that at all. And certainly, the examples of the cases you mentioned are good examples of good work you are doing.

I just believe that there is a problem with companies not being so afraid of what is going to happen if they disclose for minor things. And so what I hope you are open to doing going forward is to at least have some discussion about this. I know you believe there is enough guidance for them. I do not think that they think that there is.

If we could just have a discussion of that going forward with I do not know who, but if you would be open to that, I think that would be helpful with a number of companies and others. Again,

these are companies that they have told me that they cannot sleep at night because they are worrying about this and they are just trying to follow the law, but it is very difficult for them to figure out what is following the law.

So if we could have some discussion going forward on this, I think it would be helpful, because, again, I know we share this mutual belief that we want our country to be strong. We do not want bad bribery, but at the same time, we want clear rules.

So I might have some additional questions—I know that the Chairman wants to move on here—about Mr. Weissmann’s testimony and your response to some of his points. But I would just hope you would be open to discussing this going forward.

Mr. ANDRES. We are certainly open to that, Senator. Thank you.

Senator KLOBUCHAR. Thank you.

Senator SPECTER. Thank you, Senator Klobuchar.

Senator Coons, do you have any further questions?

Mr. COONS. I will simply, if I might, add I have some personal experience from private practice in exactly this issue. Working for an excellent company, trying to deliver good compliance was, at times, a challenge, because of the moving target of knowing exactly what the compliance standards were.

This was a number of years ago. Your advisory opinions, I think, have helped significantly. But I think we will listen attentively to the other panels for some clarity about what the current challenges are and would welcome an opportunity to continue to work with you and the department on helping clarify exactly what constitutes good compliance so that in-house counsel can sleep at night and compliant companies can more actively and effectively export.

Mr. ANDRES. Thank you, Senator.

Senator COONS. Thank you.

Senator SPECTER. Thank you very much, Mr. Andres.

We call the second panel now, Professor Koehler, Mr. Weissmann, Mr. Volkov.

Our first witness is Michael Koehler, Assistant Professor of Business Law at Butler University in Indianapolis; expertise in the Foreign Corrupt Practices Act evidenced by his publications in the Georgetown Journal of International Law and the Indiana Law Review.

He practiced law in this area; graduate of the University of Wisconsin Law School and the University of South Dakota.

Thank you for appearing as a witness today, Professor Koehler, and the floor is yours.

**STATEMENT OF MIKE KOEHLER, ASSISTANT PROFESSOR OF BUSINESS LAW, BUTLER UNIVERSITY, INDIANAPOLIS, INDIANA**

Mr. KOEHLER. Thank you, Senator Specter, other members of the subcommittee. Thank you for that introduction.

I also run a Website called fcpaprofessor, and part of my mission with that Website is to ask the “why” questions that are increasingly present in this era of aggressive enforcement. So given that mission, I, obviously, commend Chairman Specter for calling this hearing and I am grateful to have this opportunity to participate.



The FCPA is a fundamentally sound statute that was passed by Congress in 1977 for a very specific and valid reason, and my prepared statement provides a brief overview of the legislative history on that issue.

That the FCPA is a fundamentally sound statute does not mean that FCPA enforcement is fundamentally sound. And the recent article I wrote in the Georgetown Journal of International Law, "The Facade of FCPA Enforcement," details several pillars which constitute this current facade environment that exists.

One pillar that I would like to talk about today is the pillar which is very frequent, that is where seemingly clear-cut cases of corporate bribery, per the Department of Justice's own allegations, are not resolved with FCPA anti-bribery charges, and it is this facade pillar that I would like to talk about today, because I really think it undermines the rhetoric that DOJ uses when it describes its FCPA enforcement program and it undermines the deterrence that proper FCPA enforcement can achieve.

So despite numerous public statements during this era of the FCPA's resurgence that the DOJ will vigorously pursue violators and that paying bribes to get foreign contracts will not be tolerated, the undeniable fact is that in the most egregious cases of corporate bribery, the DOJ does not charge FCPA anti-bribery violations. And the Siemens and the BAE enforcement actions that have already been alluded to here today are perfect examples of those.

Not only is it that these companies were not charged with FCPA anti-bribery violations, but the deterrence message is also undermined when one analyzes the extent of U.S. Government business these companies have done in the immediate aftermath of the bribery scandals.

Using [recovery.gov](http://recovery.gov), one will find that Siemens alone has been awarded numerous Federal Government contracts with U.S. stimulus dollars in the immediate 12 months after the bribery scandal. And one will also find that BAE, this month alone—not only was BAE not charged with FCPA anti-bribery violations, but this month alone, BAE, according to its Website, has secured \$50 million in U.S. Government contracts, including, in September 2010, securing a \$40 million contract from the FBI, the same exact government agency that investigated BAE for its improper conduct.

So deterrence is not achieved when a company that bribes is not charged with FCPA anti-bribery violations. Deterrence is not achieved when a company settles a matter for an amount less than the business gained through bribery, nor is deterrence achieved when the U.S. Government continues to award multimillion dollar contracts to the same companies that are engaged in these bribery schemes.

There has been a bit of discussion today about a potential debarment penalty. I believe that a debarment penalty in egregious cases of corporate bribery that legitimately satisfy the FCPA's anti-bribery elements should be considered, and I would note that H.R. 5366 recently passed the House. That is now in the Senate.

However, because of the facade of FCPA enforcement, this bill, as currently drafted, will, in my opinion, be an impotent bill.

I would next like to discuss the prosecution of individuals rather quickly. The key to achieving deterrence in the FCPA context is

prosecuting individuals, again, to the extent the individuals' conduct legitimately satisfies the elements of an FCPA anti-bribery violation.

For corporate employees with job duties providing an opportunity to violate the FCPA, it is easy to dismiss corporate money being spent on fines and penalties. It is not easy to dismiss hearing of an employee with your same job background being sent to Federal prison for violating the FCPA.

So during this era of the FCPA's resurgence, clearly, the DOJ has prosecuted more individuals, but, again, a "why" question needs to be asked, and Chairman Specter has asked many of these "why" questions already when it comes to the lack of individual prosecutions in Siemens, BAE, Daimler and some other cases.

I would also like to note that just because prosecuting individuals adequately deters and could, thus, be a cornerstone of the DOJ's FCPA enforcement program, when one looks at the numbers that the DOJ has cited, i.e., 50 individual prosecutions over the last couple of years, one will find the following: 24 individuals are in one case, the so-called Africa Sting case, where FBI agents posing as a president of Gabon, had largely owners of small companies engaged in fictitious business transactions; and, another 22 individuals are in a group of cases where the foreign officials are employees of state-owned or—

Senator SPECTER. Professor Koehler, how much more time will you need?

Mr. KOEHLER. Just about 30 seconds, Chairman. Another 22 individuals are in cases where the so-called foreign officials are employees of state-owned or controlled companies, and interpretation, I believe, is contrary to the intent of Congress in enacting the FCPA.

The issue is not whether FCPA enforcement is good or bad for any one constituency, but whether the DOJ, in many cases, is enforcing the FCPA consistent with its provisions.

So these are some of the issues I think that need to be examined, and the time to examine them is now. So thank you for the opportunity to participate in these hearings, and I would be happy to take any questions.

[The prepared statement of Mr. Koehler appears as a submission for the record.]

Senator SPECTER. Thank you, Professor Koehler. Our next witness is Mr. Andrew Weissmann, co-chair of the white collar defense investigation practice at Jenner & Block. Mr. Weissmann had been director of the Enron task force and the chief of the criminal law division of the United States Attorney's office for the eastern district of New York, has been chief of the criminal division there; has overseen a wide array of white collar crime investigations.

We thank you for joining us, Mr. Weissmann, and the floor is yours.

**STATEMENT OF ANDREW WEISSMANN, PARTNER, JENNER & BLOCK, LLP, NEW YORK, NY**

Mr. WEISSMANN. Good morning, Chairman Specter, members of the committee, and staff. I testify today on behalf of the United

States Chamber of Commerce and the Chamber's Institute for Legal Reform.

I do not take issue with the basic premise of the FCPA. The original goals of the FCPA, that is, to deter and punish corrupt transactions overseas that undermine public confidence in business and government alike remain important.

Rather, I suggest improvements to that statute that will provide greater notice of what is prohibited, greater incentives to organizations to have robust compliance programs, and be fairer in implementation.

I briefly discuss here two possible reforms. The first is to add an affirmative compliance defense that would be available to companies that maintain rigorous FCPA-compliant systems. Such a defense is already included in the new anti-bribery law in the United Kingdom.

Second, it would be important to clarify the definition of a, quote, "foreign official," unquote, within the meaning of the FCPA. As the law does not make clear who qualifies as a foreign official, it is, thus, not clear to which transactions the statute will apply.

One of the reasons it is important to have a clearer statute, particularly in the FCPA arena, is that corporations cannot typically take the risk of going to trial and, thus, there is a dearth of legal rulings on the provisions of the FCPA as it applies to organizations.

Thus, the government's interpretation can be the first and the last word on the scope of the statute as it applies to a company. The lack of judicial oversight, expansive government interpretation of the FCPA, and the increased enforcement that you heard about from Mr. Andres have led to considerable concern and uncertainty about how and when the FCPA applies to overseas business activities. And the solution is not to do away with the FCPA.

Rather, it is to think about whether there are ways to modify it to make it clear what is and is not prohibited and to enact legislation that encourages businesses to be vigilant and compliant.

So to address the first idea, which is a compliance defense, the problem with the existing FCPA statute is that it does not provide for a defense if individual employees circumvent compliance measures that are reasonably calculated to identify and prevent FCPA violations.

Currently, companies may receive credit from the Department of Justice for a compliance program, but that would be only at the discretion of the government and unclear up front how that discretion will be exercised; or, at sentencing, it can be a factor to be given a reduced sentence under the United States sentencing guidelines.

That is not sufficient. The statute should be modified, as it is in the United Kingdom, to mandate consideration of compliance programs during the liability discussion of an FCPA prosecution. For instance, a company that has done due diligence before it acquires another company and discovers an historic FCPA issue at that acquired company should not bear criminal responsibility for that other company's actions.

Similarly, as another hypothetical, which I think is quite real in practice, an organization that has an ideal compliance program has

done nothing wrong as a company, when an employee nevertheless flouts that program a bride. The company, as opposed to an individual, has committed no wrong that we, as a society, want to deter or punish. But that is the current state of the law.

Remember that it will only take—for the Department of Justice to bring an FCPA case—one employee at any level of the organization to bring a case regardless of the diligence of that company.

Such a defense will bring the FCPA in line with a series of Supreme Court cases in the civil context, where the Court has placed limitations on the application of respondent superior and determined that it should not apply where the company can show that it took specific steps to prevent the offending employee's actions.

Having such a defense would incentivize companies to deter FCPA violations, identify FCPA violations, and self-report such violations. It will also serve to make companies not victims of rogue employees. And to be clear, such a defense distinguishes responsible companies from irresponsible companies.

It would do nothing, for instance, in the next Enron. The next bad company that comes along is not going to be helped one iota by having such a defense.

Then just briefly, since I see I am over time, the statute as currently written provides no meaningful way of identifying who an instrumentality of a foreign government is. In my written testimony, I provide examples of how that particular provision could be rectified to provide clear guidance to make the statute fairer; so that companies that are bent on applying the law and staying on the right side of the law can do so in advance, without having to worry about being prosecuted.

Thank you.

[The prepared statement of Mr. Weissmann appears as a submission for the record.]

Senator SPECTER. Thank you, Mr. Weissmann.

Our final witness is Mr. Michael Volkov, litigation partner at Mayer Brown; has an extensive background in law enforcement; was an assistant U.S. attorney for 17 years here in DC and, before that, worked on this Committee with Senator Hatch and chief counsel of the Crime, Terrorism and Homeland Security Committee.

Thank you very much for joining us, Mr. Volkov, and we look forward to your testimony.

**STATEMENT OF MICHAEL VOLKOV, PARTNER, MAYER BROWN, LLP, WASHINGTON, DC**

Mr. VOLKOV. Thank you, and good morning, Chairman Specter and members of the committee. Thank you for this opportunity to discuss with you the enforcement of the Foreign Corrupt Practices Act.

At the outset, I want to say that it is an honor to appear before the Subcommittee for the first time since I left the Judiciary Committee staff in 2005. I have many, many fond professional and personal memories of the work I was able to do here as part of the Committee staff, and it is nice to return.

In the last 5 years, FCPA enforcement has risen to unprecedented levels. The Justice Department has sent a very strong mes-

sage and the business community is well aware of the need for compliance.

But to increase compliance, the Justice Department needs to review and modify its voluntary disclosure process. For most corporations, the decision to make a voluntary disclosure is complicated by the uncertainty of the ultimate punishment or the benefit of making such a disclosure.

The Justice Department provides no clarity as to that point. There simply is no guarantee for what benefits a corporation will earn for voluntary disclosure. Now, you do not need an economist or you do not need any smart person to know that in the absence of clarity and transparency, companies may not accurately weigh the pros and cons of voluntary disclosure; hence, the sleepless nights of company officials.

What I am proposing is a more balanced enforcement approach. One is to increase the incentive to comply with the law and to distinguish between corporations that engage in flagrant violations, like Siemens, like Daimler, of the FCPA and those that seek to comply in good faith, but, nonetheless, as Mr. Weissmann was outlining, can be held liable for the actions of a few employees.

In my view, these two goals can be accomplished by adopting a corporate self-compliance limited amnesty program. Now, I want to acknowledge here that former Federal Judge Stanley Sporkin is a mentor and the so-called father of the FCPA, who comes from Pennsylvania, has articulated a very similar proposal for many years.

He is no shrinking violet when it comes to enforcement matters. Judge Sporkin's proposal consists of the following elements: a participating company agrees to conduct a full and complete review of the company's compliance with the FCPA for the 5 previous years; the internal review is then conducted jointly by a major accounting firm, law firm, or with a specialized accounting firm; the company further agrees to disclose the results, to come into the Justice Department and the SEC and say what it found, disclose it to the investors, and disclose it to the public.

If the company discovers any violations in the audit, the company agrees to take all steps necessary to eliminate the problems and implement the appropriate controls to prevent future violations. The company would then subject itself to an annual review for 5 years to ensure that compliance was being maintained.

The company would then also be required to retain an FCPA compliance monitor, who would annually certify—certify, under oath, under penalty of perjury, to the SEC and the DOJ that the company was in compliance.

Now, in exchange for these actions, the SEC and DOJ would agree not to initiate an enforcement action against the company during this period, except—and this is a big exception—for those flagrant or egregious violations, meaning where a company's culture, like Siemens, where a company's business depends upon and was built upon a bribery scheme; not in a situation where companies are trying in good faith to comply and are not—and make a mistake, make a mistake as to what their interpretation of the law is.

Now, I wanted to turn to one other issue, which two of the Senators or two of the members had referred to, and that is the international efforts against bribery and corruption. One glaring omission in this overall enforcement scheme is that the bribe-takers themselves, the people taking the money in the government are not prosecuted.

Could you imagine here in the United States if we had that situation, where people taking the bribes would not be prosecuted? At its inception, the FCPA was the only statute of its kind anywhere in the world, but we live in a different place now.

The United Kingdom recently enacted the Anti-Bribery Act, which will become effective in April 2011. I was surprised to learn that Italy, in 2001, had enacted an anti-bribery act very similar in terms of being strict in terms of enforcement.

Now, look, the United Kingdom's act is even more stringent than the FCPA. But international efforts against bribery and corruption need to increase. There is just no question about it.

You cannot be the only enforcer in the world and expect to clean up the world. That is not our role. We need to put more emphasis on helping other countries improve their enforcement programs.

Next week, I am participating in a conference here at the World Bank, titled "The International Corruption Hunters Alliance," at which all the countries, many, many countries are sending representatives, prosecutors, investigators, and public officials to try and put together some meaningful enforcement programs. This is a good thing and we should support it as much as we can.

It is important to note that if all the signatories, 39 signatories, to the anti-bribery convention—

Senator SPECTER. Mr. Volkov, how much more time will you need?

Mr. VOLKOV. This is my last point. If all the signatories to the anti-bribery convention enforced the law, that is 75 percent of the world's exports would be under that type of enforcement regime.

Thank you, and look forward to answering your questions.

[The prepared statement of Mr. Volkov appears as a submission for the record.]

Senator SPECTER. Thank you, Mr. Volkov.

Professor Koehler and Mr. Volkov, you have both zeroed in on Siemens. Mr. Volkov, do you think that there ought to be individual jail sentences in Siemens?

Mr. VOLKOV. Well, Mr. Chairman, I think you have raised a really important point with the department, which is—and this may be against my client's interests, but I will tell you, quite honestly, that if I were a prosecutor and I have the corporation's cooperation, the first thing I am going to do is find the five worst actors in that corporation.

The corporation is what had handed me all the evidence that I need, and I am going to have them indicted. I do not understand why that did not happen. I cannot give you an explanation for that. But you have certainly made a very important point.

Why, in the most significant cases, is nobody going to jail? And I cannot say that I disagree with your concern.

Senator SPECTER. When you see all the publicity on Siemens, a big fine and \$100 billion in revenues, \$8 billion in profits, and no

jail sentence, what effect does that have? Is this not really a signal that you can violate the act and pay a fine?

Mr. VOLKOV. Well, I would hope that that is not the result. I will tell you, in terms of counseling clients, I get the sleepless calls that Senator Klobuchar referred to, which was I have people who call me very, very in good faith, who want to comply, but yet have difficulty because of the uncertainties surrounding the law or the absence of clear statements.

I would say that there has been a shockwave sent through the world community by the Siemens case. On the other hand, I know from my experience as a prosecutor, when somebody goes to jail and you are a high level executive—when Bernie Ebbers went to jail or when any of those officials went to jail, that was a big deal when he went to jail for life.

When Bernie Madoff goes to jail for 50 years, that is a big deal. That sends a message. You are right. I cannot say what the marginal difference would be, but I will tell you this. The size of the fine in that case was no laughing matter in terms of many companies.

Senator SPECTER. Professor Koehler, you talked at some length about Siemens. Have you become conversant with the facts and what individuals did in that case?

Mr. KOEHLER. Yes, very much so. One of the things I do as an academic is I analyze every single FCPA enforcement action there is. So I am very familiar with the facts of that case.

The DOJ's—

Senator SPECTER. What do you think about a 2008 case—

Mr. KOEHLER. Well, it is ironic that in the case—

Senator SPECTER. I am not finished with my question.

Mr. KOEHLER. Sorry.

Senator SPECTER. With a 2008 case and the giant fines and those characterizations which I read earlier out of the indictment and no jail?

Mr. KOEHLER. It is highly ironic in the case that the Department of Justice terms the most egregious case of corporate bribery the FCPA has ever seen, that there is no individual prosecutions.

I guess it would be one thing if these prosecutions were just commenced, as in the Panalpina cases last month, but as you know, we have been going on nearly 2 years now.

The DOJ's sentencing memorandum says that compliance, legal, internal audit, and corporate finance departments all played a significant role in the conduct at issue.

Now, for foreign nationals, there are some jurisdictional issues that must be met, but the Department of Justice has never shied away from pursuing incredibly broad—

Senator SPECTER. I will not ask you to be specific in the open hearing, although you are not subject to liability for what you testify at a hearing, but we will proceed with you privately as to the inquiries you have made and what you know.

What I intend to do is to confront the department with that and see if we can get answers. We do not have their files and the inquiries you made look to be promising and we would like to have the benefit of that, if you would be willing to give us a hand on that. Would you?

Mr. KOEHLER. I would be happy to assist, yes.

Senator SPECTER. Mr. Weissmann, overall, I have listened with care to your recommendations for modifications and I think you make some good points when you talk about a compliance defense, talk about rogue employees.

There, you have the totality of the conduct of the corporation exonerated. Before my red light goes on, I will ask you the question. That is, overall, do you think that the act is fairly well balanced and fairly well enforced or too tough?

Mr. WEISSMANN. I think there is no question that many of the cases that were brought up today, such as Siemens, fall far, far, far into the—that it is amply warranted for the application of the statute.

The problem is that every company in America and many companies overseas worry about the statute daily. And so regardless of what the Department of Justice is doing, people think about the statute and could their conduct fall on one side of it versus the other and will they be subject to an investigation.

So it is a difficult question to answer, because I have seen many prosecutions where you say, of course, that seems like a just result and should have been warranted, but there are many companies that are hurt by the ambiguities in the statute and what I think is the over-breadth of some of its provisions on a daily basis.

Senator SPECTER. Thank you, Mr. Weissmann.

Senator KLOBUCHAR.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. It has been an interesting discussion. And since I brought up the sleepless nights, I want to point out this is not my major concern here.

When I have sleepless nights about legislation, I do not think my constituents feel sorry for me. But I used it as an example that there are companies that are trying to comply.

My major concern is if we have an uneven playing field that is hurting American business while we balance the obvious need to have this law on the books and to enforce it and to go after egregious bribery.

So I guess my first question is of you, Mr. Volkov. You brought up how we get other countries to also enforce their statute. How do you think we do that? You said you were going to this conference, but what would be the best way, whether it is with agreements we have with those countries, conventions? How do you think we do that?

Mr. VOLKOV. Well, already, some issues have been raised in terms of our mutual assistance treaties and the process being very difficult to secure evidence or share information back and forth. That is one issue.

There also is just a lack of basic information on prosecution and expertise. What happens frequently is that our government ends up training people. It had to prosecute and investigate corruption-type cases and those folks then go out, somewhat like here, into the private sector and they go out and they go and make more money and do not stay as government prosecutors in these other countries.



I think it requires the efforts that the Administration has already done, which is to work with the other countries, but I think there is also some basic groundwork that needs to be done.

For example, they do not even know—countries do not even know how to share information across law enforcement agencies. They do not know who to contact. They do not know who are even the points of contact among various countries. And I think we have to continue to encourage those types of efforts.

Senator KLOBUCHAR. And when Senator Specter was asking you about the compliance ideas and you mentioned the judge's ideas, is it your argument that, in fact, if you made some changes to the statute to better encourage compliance, that it would be easier, in fact, to root out some of the bad actors who could then be prosecuted criminally in an easier fashion?

Mr. VOLKOV. Absolutely. And I think that Mr. Weissmann's points are all good, particularly with regard to the foreign officials.

Senator KLOBUCHAR. And that was my next question, is if you agreed with some of his proposals, as well.

Mr. VOLKOV. Absolutely. Here is one of the ironies, to Mr. Weissmann's point. One of the hardest countries to go into and to conduct business is China, because, basically, all of my clients assume that everybody they deal with there is a foreign official, because they are a state-owned enterprise under this broad definition.

I do not think that was the intent when the FCPA was passed, to prevent—to put businesses—

Senator KLOBUCHAR. What year was it passed?

Mr. VOLKOV. That was 1977 was the original.

Senator KLOBUCHAR. That was before we were doing a lot of business—

Mr. VOLKOV. With China.

Senator KLOBUCHAR.—in these countries.

Mr. VOLKOV. Right.

Senator KLOBUCHAR. Mr. Weissmann, if we could just follow-up on that point. I was looking at your testimony here and you talked about some of the issues that arise, like is a payment to a professor to speak at a conference for prospective clients an FCPA violation. What if the professor works at a university that receives public grants or is state-run? What if the professor works for a Chinese company that is owned, in part, by the state?

For example, I heard about what if a nurse attends a conference and then gets some money for a cab ride home because the metro has stopped, is she a state official for those purposes. Could you elaborate on some of the issues and how we could try to fix that to make it clearer?

Mr. WEISSMANN. Sure. It is important to note that the FCPA has no materiality requirement and no de minimis exception. So \$10 can be enough. And there is no balancing as there is in SEC rules to determine whether the violation was material to the company. So it is really a broad statute.

One of the things, to address your prior question, that could be done to help put people on an even playing field is to look at the U.K. bill and realize that there are two provisions that it has that we do not have. One, there is the compliance defense, which I will

not bore you with; and, the other is that the U.K. bill actually punishes the foreign officials and imposes liability for soliciting abroad.

That does not exist in the United States. And if you are trying to figure out ways to put America on an even playing field, one is to have similar laws. And since often what you see in these cases is not that companies are actively trying to solicit, but they are, in many ways, the victim of the company saying—the country saying this is what you need to do. If there was greater enforcement, including in the United States, on those people, that would help, as well.

In terms of who a foreign official is, the statute provides some guidance, but gives no guidance on the ambiguous word, which is an instrumentality of a foreign government. So one example that I think is useful is to think about if that were applied here, potentially, anybody who works for Bloomberg Media or, potentially, General Motors could be considered a public official for the purposes of the FCPA.

Senator KLOBUCHAR. Why is that?

Mr. WEISSMANN. Because in Bloomberg Media, since my hometown is New York, the mayor of New York has a substantial stake in that company, and so it could be considered a public company, in which case, all employees of that instrumentality would be covered by the FCPA.

Similarly, General Motors, if you take it a month ago, would have been majority owned by the public. And even now, with a non-majority stake, the Department of Justice has taken the view that even in cases where it is a non-majority ownership, that that is sufficient to trigger being a foreign official for the purposes of the FCPA.

So what could help is having actual rules. And one example of how this could be solved is in the accounting literature, there are strict rules about when you are a third party for purposes of accounting, whether you are actually controlled by the company, what percentage ownership you have for determining whether you are dealing with a third party or whether you are going to be determined to be dealing with yourself, essentially. And those kinds of analogies could be used to provide clear guidance, particularly in an area where there is criminal liability at stake.

So, ironically, you have very clear rules for SEC and accounting literature, but not in the case of the criminal statute, such as the FCPA.

Senator KLOBUCHAR. Thank you.

Senator SPECTER. Thank you, Senator Klobuchar.

Senator Coons.

Senator COONS. Thank you, Senator. I just simply wanted to commend you, Senator Specter, for pursuing aggressively, in egregious cases such as Siemens, where there is a failure to charge individually or pursue individually, to thank the members of the Committee who have—the members of the testifying panel today for your input.

I would welcome an opportunity to work with the Committee on potential amendments to the act that would allow clarification on the definition of foreign official, the creation of a compliance defense.

There are egregious offenders and we do need to continue to pursue aggressively foreign corruption. I am interested in what might someday happen as our allies begin to join us, the Italians, the U.K. government, others, and then how we would begin to harmonize the actual enforcement.

Today, we are the only nation that is extending an extraterritorial reach and going after the citizens of other countries, we may someday find ourselves on the receiving end of such transnational actions.

If I might, just one last question, Mr. Volkov. Any suggestions about what we might be doing to strengthen our regime in terms of its effectiveness for transnational jurisdiction and how we might harmonize it with what we see the U.K. doing, and, yes, I was surprised to learn, as well, Italy?

Mr. VOLKOV. Yes. Well, I think there is a lot going on already. I think that the 36 other signatories need to be cajoled, be whatever needs to be done to try to persuade them to adopt some kind of law.

The extraterritorial reach that you mention with regard to the United States law is very significant, but wait until you see what happens in England. In England, all you have to do is be doing business, in quotes, meaning—and what that means, you do not have to have a principal place of business, you do not have to be doing anything.

If you sell your product in England, you are subject to their anti-corruption and anti-bribery restrictions, which are much stricter with regard to—are about to be—with regard to hospitality and just providing, let us say, food at an event or whatever. It makes it much more difficult.

The one point I wanted to go back to, which I did not have a chance to clarify, is that Judge Sporkin's proposal is—and I have nothing against Mr. Weissmann. He is a colleague and I love him, but I do not favor creating a defense, because the defense requires the corporation to go to trial. The defense requires the corporation to get indicted.

We have already seen what happened with Arthur Andersen and the demise of a company, the demise of hundreds of thousands of jobs in the Houston community. What we are saying with Judge Sporkin's proposal is let us do it up front, do the compliance, certify to it, and we will give you this—you have to report to us on a yearly basis, and I bet you almost—many of my clients would choose that option, because they would rather be safe than sorry. And so they want to have a compliance program that does not require them to get indicted and then raise it as a defense.

That is the difference that we have, because we are trying to distinguish between good faith actors and those that are the egregious, flagrant cases.

Senator COONS. What would be the mechanism for actually acting on Judge Sporkin's proposal?

Mr. VOLKOV. Well, it could be done—in other words, how could it get implemented?

Senator COONS. Right.

Mr. VOLKOV. Well, the Department of Justice—and you will notice this in reaction to a lot of the criticism coming from Chairman

Specter and others—has said, “Oh, well, now we are going to take a look and see if there should be some kind of leniency program like the antitrust division’s leniency program.”

They can implement this on their own. They could do it tomorrow. This is an exercise of prosecutorial discretion. They could do it tomorrow.

Now, to the extent they need statutory changes, obviously, they would have to come to Congress. But they could do it right now and there is no reason for them to not do it right now, because like I said, I mean, it is good for business, for me, but it is not good for the country in terms of American business and making it competitive, because we are spending more and more time with clients, dedicating hours and hours to just these types of questions.

I have a nurse. Can I give her a sandwich to eat at a conference? Can I do that? And they have to call up the law firm and ask them.

Senator COONS. Well, I appreciate the Chamber’s advocacy on this and the testimony of every member of the panel, and thank you for that clarification.

Thank you very much, Mr. Chairman, for the chance to ask questions.

Senator SPECTER. Thank you, Senator Coons.

Anything further?

[No response.]

Senator SPECTER. Thank you very much, Professor Koehler, Mr. Weissmann, and Mr. Volkov.

That concludes the hearing.

[Whereupon, at 11:42 a.m, the hearing was adjourned.]

[Questions and answers and submissions for the record follow.]

## QUESTIONS AND ANSWERS

Senate Committee on the Judiciary, Subcommittee on Crime and Drugs  
Hearing on  
“Examining Enforcement of the Foreign Corrupt Practices Act”

Questions for the Record by Senator Christopher A. Coons

### Questions for Greg Andres

1. What steps could Congress take to help ensure broader application of anti-bribery laws, as exemplified by the FCPA and the UK’s Bribery Act, to all companies engaged in transnational business?

*RESPONSE: We believe that the Department of Justice’s criminal enforcement of the FCPA has had a significant impact in preventing and deterring transnational bribery. To help ensure this continued level of enforcement, we believe that Congress could do three things: first, continue its support for existing criminal enforcement mechanisms; second, continue its support of the Working Group on Bribery of the Organisation for Economic Co-operation and Development (OECD), which encourages other OECD member countries to enforce their transnational bribery laws, and of the G20 Anticorruption Working Group; and third, support the Administration’s efforts to engage in bilateral negotiations with key trading partners to encourage them to pass and enforce transnational bribery laws.*

2. Would a mandatory, conduct-based, debarment remedy for companies that engage in egregious bribery further the deterrent effect of the FCPA?

*RESPONSE: While it is possible that a mandatory, conduct-based debarment remedy for companies that engage in egregious bribery might have some deterrent effect, that remedy would likely be outweighed by the accompanying decrease in incentives for companies to make voluntary disclosures, remediate problems, and improve their compliance systems. As such, mandatory debarment would likely be counterproductive, as it would reduce the number of voluntary disclosures and concomitantly limit corporate remediation and the implementation of enhanced compliance programs.*

3. Would a mandatory, conduct-based, debarment remedy for companies that engage in egregious bribery curtail prosecutorial discretion in a manner that would be damaging to the Department’s enforcement of the FCPA?

*RESPONSE: As noted above, a mandatory conduct-based debarment remedy for companies could well have a negative impact on the Government’s ability to investigate and prosecute transnational corruption effectively. The purpose of debarment proceedings historically has been to protect the public fisc, not to deter or punish wrongdoing. Linking mandatory debarment to a criminal resolution would fundamentally alter the incentives of a contractor-company to reach an FCPA resolution because such a resolution would likely lead to the cessation of revenues for a government contractor—a virtual death knell for the contractor-company. Similarly, mandatory debarment would impinge negatively on*

*prosecutorial discretion. If every criminal FCPA resolution were to carry with it mandatory debarment consequences, then prosecutors would lose the necessary flexibility to tailor an appropriate resolution given the facts and circumstances of each individual case.*

4. Does some aspect of either the FCPA or the nature of corporate bribery schemes make it more difficult to establish personal criminal liability against executives at larger companies, as compared to executives at smaller companies?

*RESPONSE: The challenges in establishing personal criminal liability vary substantially from case to case. In certain cases, it may be that senior executives at a large company may not be as directly involved in obtaining business for the company as senior executives at a smaller one. Consequently, in such cases, it may be that the senior executives were not involved in the foreign bribery. As a general matter, the more removed an executive is from the bribery, the more difficult it can be to establish the executive's criminal liability. Furthermore, there are other challenges to prosecuting small and large companies' corporate officials, including the need to secure evidence of wrongdoing in foreign countries that necessarily requires the cooperation of foreign law enforcement authorities. To be sure, foreign bribery schemes are often complex and they present a range of challenges for prosecutors.*

5. What is the Department's position on adding a formal compliance defense to the FCPA?

*RESPONSE: The Department opposes the adoption of a formal compliance defense. To begin, in every case, the Department already considers a company's compliance efforts in making appropriate prosecutorial decisions, and the United States Sentencing Guidelines also appropriately credits a company's compliance efforts in any sentencing determination. Further, the establishment of a compliance defense would mark a significant departure from traditional principles of corporate criminal liability, one that could detract from effective enforcement of the FCPA. Among other things, the creation of such a defense would transform criminal FCPA trials into a battle of experts over whether the company had established a sufficient compliance mechanism. Against this backdrop, companies may feel the need to implement a purely paper compliance program that could be defended by an "expert," even if the measures are not effective in stopping bribery. If the FCPA were amended to permit companies to hide behind such programs, it would erect an additional hurdle for prosecutors in what are already difficult and complex cases to prove.*

6. What is the Department's position on adding an amnesty program, similar to the one proposed by Mr. Volkov and Judge Sporkin?

*RESPONSE: The Department does not support the idea of an FCPA amnesty program. Amnesty programs, such as the one used in antitrust enforcement, are typically established to assist law enforcement to identify and prosecute criminal behavior that would otherwise be undetected. Because antitrust crimes by definition involve some form of collusion, those crimes are often not disclosed or*

*revealed without the cooperation of at least one party involved in the criminal activity. For that reason, an antitrust amnesty program provides meaningful benefits to law enforcement, not just corporate wrongdoers. The challenges in FCPA investigations and prosecutions are different, and an amnesty program is not warranted, or preferable, to a system that is already driven by significant incentives for self-disclosure. Indeed, numerous mechanisms already exist to ensure that FCPA violations are brought to the Department's attention, including required disclosures to the market pursuant to Sarbanes Oxley, international law enforcement cooperation, reporting from U.S. embassy personnel, reporting by civil society, the newly established Dodd-Frank SEC whistleblower program, and voluntary disclosures by companies. As the beneficiary of these established sources of information, the Department does not presently face difficulty in identifying sources of information of FCPA criminal violations. Consequently, an amnesty program would provide protection for corporations who violate the law without providing accompanying meaningful benefits to law enforcement. Finally, consistent with the United States Sentencing Guidelines and the Department's Principles of Federal Prosecution of Business Organizations, the Department already provides meaningful credit for voluntary self-disclosures, extraordinary cooperation, and substantial remediation by corporations where appropriate and deserved.*

7. In the absence of a compliance and/or amnesty program, do you agree that well-meaning businesses are faced with significant uncertainty as to their potential exposure to civil and criminal penalties under the FCPA? Why or why not?

*RESPONSE: The Department believes it provides clear guidance to companies with respect to FCPA enforcement through a variety of means. To begin, the Department has published a "Lay Person's Guide to the FCPA," a plain-language explanation of the FCPA, which is available on the Department's FCPA website: <http://www.justice.gov/criminal/fraud/fcpa/>. That website also includes documents related to more than 140 FCPA prosecutions dating back to 1998, charging documents, plea agreements, deferred prosecution and non-prosecution agreements, press releases, and relevant pleadings and orders. These documents are lengthy and detailed.*

*Moreover, to the extent that a company is uncertain as to whether a contemplated action is lawful, it can avail itself of the FCPA opinion procedure set forth in 15 U.S.C. § 78dd-1(e) and 78dd-2(f)—a unique feature of the FCPA. This procedure allows the company to request a determination in advance as to whether its proposed conduct would constitute a violation of the FCPA. The opinions, which are also available on the Department's FCPA website, provide significant additional guidance on the Department's interpretation of the FCPA. In the end, a review of the Department's FCPA enforcement actions makes clear that companies have never been charged for minor or incidental issues. By contrast, the Department's prosecutions involved extensive and often widespread corruption over significant periods of time.*

8. Does the Department agree that statutory clarification of “foreign official” would help clarify to businesses which of their transactions could be subject to the FCPA?

*RESPONSE: The term “foreign official” has been defined in relevant case law and opinion releases. Some defense attorneys have attempted to argue that the definition of “foreign official” does not extend to the employees of state-owned or state-controlled enterprises. But courts that have considered the matter have rejected this argument. For instance, in a November 2010 decision denying a defendant’s motion to dismiss an FCPA indictment, a federal district court in Miami rejected the defendant’s claim that a foreign state-owned telecommunications company “cannot be an instrumentality under the FCPA’s definition of foreign official.” In doing so, the court explained that the “plain language of this statute and the plain meaning of this term show that [the telecommunications company] could be an instrumentality . . . .” United States v. Esquenazi, et al., 1:09-cr-21010-JEM, Dkt. No. 309 at 3 (S.D. Fla. Nov. 19, 2010). In agreeing with the Department, the court went on to state that “persons of common intelligence would have fair notice of the statute’s prohibitions.” *Id.* A similar motion was also rejected by a federal district court in Philadelphia, after which the court accepted guilty pleas from all of the defendants, including a corporation. See United States v. Nguyen, et al., 2:08-cr-00522-TJS, Dkt. No. 144 (E.D. Pa. Dec. 30, 2009).*

*In addition, the OECD Anti-Bribery Convention requires that such employees be included in the definition of “foreign official.” In the end, any company with questions concerning the term’s definition can seek an opinion from the Department under the FCPA opinion release procedure.*

9. In the absence of statutory clarification, what generally-applicable guidance has the Department provided with respect to the definition of “foreign official”, specifically as to what qualifies an organization or entity as an “instrumentality” of a foreign government?

*RESPONSE: The Department has provided significant guidance regarding the definition of a “foreign official.” The Department has issued at least five publicly available advisory opinions concerning whether a party fit within the definition of “foreign official,” all of which are available on the Department’s FCPA website. For example, the Department issued such an opinion on September 1, 2010. In addition, the Department has made publicly available numerous charging documents that clearly identify whom the Department views as foreign officials. Similarly, the Department has been consistent and clear for many years in its charging documents that state-owned and state-controlled enterprises constitute “agencies” and/or “instrumentalities” under the FCPA.*

10. What definition of “instrumentality” of a foreign government does the Department use when applying the FCPA?

*RESPONSE: The Department employs the plain meaning of the term “instrumentality” of a foreign government. An “instrumentality” of a foreign government includes not only a department, agency, or bureau of the government*



itself, but also state-owned and state-controlled enterprises. As explained in response to question 8 above, in a November 2010 decision denying a defendant's motion to dismiss an FCPA indictment, a federal district court in Miami rejected the defendant's claim that a foreign state-owned telecommunications company "cannot be an instrumentality under the FCPA's definition of foreign official." In doing so, the court explained that the "plain language of this statute and the plain meaning of this term show that [the telecommunications company] could be an instrumentality . . . ." United States v. Esquenazi, et al., 1:09-cr-21010-JEM, Dkt. No. 309 at 3 (S.D. Fla. Nov. 19, 2010). In agreeing with the Department, the court went on to state that "persons of common intelligence would have fair notice of the statute's prohibitions." Id. A similar motion was also rejected by a federal district court in Philadelphia, after which the court accepted guilty pleas from all of the defendants, including a corporation. See United States v. Nguyen, et al., 2:08-cr-00522-TJS, Dkt. No. 144 (E.D. Pa. Dec. 30, 2009).

11. Under what circumstances might criminal liability for a successor company, based purely on undiscovered and not reasonably discoverable past acts committed by a company that it has acquired, be justified?

**RESPONSE:** *Successor liability is a well-established principle of corporate criminal liability. The Department seeks to impose successor liability on a company only when supported by the particular facts and circumstances of the case and the law. The Department does not hold acquirers strictly liable for the acts of their predecessors. Rather, the Department decides whether to seek to impose successor liability on a case-by-case basis after making an evaluation of all the relevant facts and circumstances.*

*For example, during 2010, the Department formally declined to prosecute a parent corporation arising out of its subsidiaries' alleged potential FCPA violations. The Department did so for a number of reasons related to the specific facts and circumstances of the case, including because: (a) the parent corporation voluntarily provided information to the Department; and (b) the parent conducted extensive post-acquisition due-diligence and training that gave rise to its discovery of the potential FCPA violations.*

## Questions for the Record

Senate Committee on the Judiciary, Subcommittee on Crime and Drugs  
Hearing on  
“Examining Enforcement of the Foreign Corrupt Practices Act”

Questions for the Record by Senator Amy Klobuchar

1. Do you believe companies could comply with more certainty with the FCPA if they were provided with more generally-applicable guidance from the Department in regards to situations covered by the FCPA that are not clear cut or fall into “gray” areas?

*RESPONSE: The Department believes it provides clear guidance to companies with respect to FCPA enforcement through a variety of means. To begin, the Department has published a “Lay Person’s Guide to the FCPA,” a plain-language explanation of the FCPA, which is available on the Department’s FCPA website: <http://www.justice.gov/criminal/fraud/fcpa/>. That website also includes documents related to more than 140 FCPA prosecutions dating back to 1998, including charging documents, plea agreements, deferred prosecution and non-prosecution agreements, press releases, and relevant pleadings and orders. These documents are lengthy and detailed. Moreover, to the extent that a company is uncertain as to whether a contemplated action is lawful, it can avail itself of the FCPA opinion procedure set forth in 15 U.S.C. §§ 78dd-1(e) and 78dd-2(f) – a unique feature of the FCPA. This procedure allows the company to request a determination in advance as to whether its proposed conduct would constitute a violation of the FCPA. The opinions, which are also available on the Department’s FCPA website, provide significant additional guidance on the Department’s interpretation of the FCPA. In the end, a review of the Department’s FCPA enforcement actions makes clear that companies have never been charged for minor or incidental issues. By contrast, the Department’s prosecutions involved extensive and often widespread corruption over significant periods of time.*

2. What would be the most helpful steps our government could take in the area of anti-bribery to create a more level playing field for U.S. companies competing overseas?

*RESPONSE: The United States should continue to engage with foreign governments and multi-national organizations to ensure that they encourage, adopt and fully enforce anti-bribery laws. The Department has played a lead role in that effort and continues to do so. For example, the Department, along with the Commerce and State Departments, helped lead the negotiations for a treaty to combat transnational bribery of foreign public officials with many of our major trading partners at the Organisation for Economic Co-operation and Development. More recently, the USG was a leading proponent and negotiator of a new 2009 recommendation for further combating such bribery, as well as good practice guidance for preventing and detecting such bribery, a document agreed upon by the 38 parties to the OECD Anti-Bribery Convention aimed at assisting business with compliance efforts. Today the Departments of Commerce, Justice, and State and the SEC send representatives to the Anti-Bribery Working Group, which oversees the implementation of the treaty, as well as to the G20 Anticorruption Working Group.*

*To be clear, the United States has consistently encouraged other nations to seek greater enforcement of foreign bribery violations. In addition, the United States frequently engages in bilateral and multilateral discussions with key trading partners, in which we encourage other countries to adopt and enforce transnational bribery laws, as well as seeking anti-corruption commitments in recent trade agreements. The Departments of Justice, Commerce, and State are also working to ensure that other countries fulfill their treaty obligations, such as the OECD Anti-Bribery Convention and the U.N. Convention Against Corruption, to enact and enforce laws that criminalize foreign bribery. Finally, the Department does not focus its FCPA enforcement efforts only upon United States companies. To the contrary, in 2010, the Department resolved FCPA-related actions against numerous foreign companies, including companies based in France, Germany, the Netherlands, Switzerland and the United Kingdom.*

3. What is the Department's position on creating a rebuttable presumption that small gifts such as meals are not undertaken for the purpose of obtaining business improperly?

*RESPONSE: While it is difficult to evaluate the impact of any proposed statutory change without a specific legislative proposal, the Department opposes the creation of such a rebuttable presumption. Congress recognized in passing the FCPA that corruption can be accomplished through the provision of anything of value, including gifts and meals, when that thing of value is offered in exchange for assistance in obtaining or retaining business. In the Department's experience, in some countries and in some industries, the most damaging corruption takes the form of small "gifts" or payments, which are repeated over time. By way of comparison, in a number of recent, high-profile domestic corruption cases, American public officials have acknowledged that they were corrupted by a stream of benefits that included small gifts and meals. Furthermore, a review of FCPA enforcement actions demonstrates that small gifts such as meals have never been, and are not, the primary basis for FCPA actions brought by the Department. Where meals and entertainment have been the basis for FCPA enforcement actions, they have typically been part of a large scheme in which gifts, travel, and entertainment -- amounting to many thousands or millions of dollars in the aggregate -- have been used to corrupt public officials in order to obtain business, or have been one aspect of a broader foreign bribery scheme. Accordingly, we believe that such a change is not necessary.*

4. What is the Department's position on amending the FCPA to bring the intent standard for corporations in line with the current "willfulness" standard that applies to individuals?

*RESPONSE: At this time, the Department does not believe that it is necessary or appropriate to amend the FCPA's intent standard with respect to corporations. The Principles of Federal Prosecution of Business Organizations already governs the Department's decisions regarding whether to charge corporations for federal crimes, including under the FCPA. When evaluating whether to charge a corporation, the Principles require the Department to consider "the nature and seriousness of the offense," the "pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management," as well as a host of other important factors. Furthermore, the Department is not prosecuting FCPA matters where a corporation engaged in something less than willful criminal conduct.*

Senate Judiciary Committee Subcommittee on Crime and Drugs Hearing,  
 "Examining Enforcement of the Foreign Corrupt Practices Act"  
 Questions from Senator Specter for  
 Professor Mike Koehler

1. *Professor Koehler, during the November 30, 2010, Subcommittee on Crime and Drugs hearing, I asked you about the Siemens prosecution. You said, "It is highly ironic in the case that the Department of Justice terms the most egregious case of corporate bribery the FCPA has ever seen that there [are] no individual prosecutions." Can you please supply the Subcommittee with the Department of Justice's most egregious examples of individual conduct associated with the Siemens prosecution along with citations to the information, indictment, press releases, or other public documents from which you culled the information?*

The below chart identifies specific references to individual conduct (albeit in a generic fashion) associated with the Siemens prosecution as alleged or described by the DOJ in its publicly available charging / resolution documents.

Individual Conduct	Cite
Because the DOJ's criminal information against Siemens AG only charges FCPA books and records and internal control violations, the information largely focuses on the lack of internal controls within the company and how certain senior executives knew of or failed to inquire further as to certain conduct suggesting bribe payments were being made. The information describes the following "select senior officers and directors."	Criminal Information, U.S. v. Siemens AG ¶¶'s 21-27; ¶¶'s 35-88. <sup>1</sup>
"Officer A," a German citizen, was President and Chief Executive Officer of Siemens from 1992 to 2005, a senior member of the Siemens ZV [a Corporate Executive Committee] from 1992 to 2005, and Chairman of the Supervisory Board from 2005 to 2007."	
"Officer B," a German citizen, was General Counsel from 1992 to 2004 and the Chief Compliance Officer from 2004 until the end of 2006.	
"Officer C," a German citizen, was Chief Financial Officer of Siemens from 1998 to 2006."	
"Officer D," a German citizen, was a member of the Siemens ZV and a senior executive with management and oversight responsibility for PTG [Power Transmission and Distribution Operating Group] and the Americas from 2000 until 2007."	
"Officer E," a German citizen, was a member of the Siemens ZV from 1994 until 2007."	

<sup>1</sup> Available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/siemensakt-info.pdf>.

<p>"Officer F," a German citizen, was a member of the Siemens ZV from 2003 to 2007."</p> <p>"Officer G," a German citizen, was President and Chief Executive Officer of Siemens from 2005 to 2007."</p>	
<p>Even though the DOJ criminal information against Siemens AG does not charge FCPA anti-bribery violations, the information does allege certain improper payments, including allegations as to the following individuals.</p> <p>"Siemens Greece COM [Communications Operating Group] manager admitted to the Corporate Compliance Officer and Internal Audit that he had received substantial funds to make 'bonus payments' to managers at the Greek national telephone company, OTE."</p> <p>The information alleges as follows: "from on or about March 12, 2001 to in or about 2007, Siemens made payments totaling approximately \$1,360,000,000 through various mechanisms. Of this amount, approximately \$554,500,000 was paid for unknown purposes, including approximately \$341,000,000 constituting direct payments to business consultants. The remaining \$805,500,000 of this amount was intended in whole or in part as corrupt payments to foreign officials through" various payment mechanisms. In describing the payment mechanisms, the information specifically refers to: "COM employees," "COM's accounting department," and "two former COM managers."</p> <p>As to Siemens bribe payments in connection with the U.N. Oil for Food Program, the information identifies the following individuals:</p> <p>"several PG [Power Generation Group] operational managers"</p> <p>"a PG employee"</p> <p>"OFFP Agent A" [a Paraguayan company registered in Jordan]</p> <p>"a now-deceased PG employee"</p> <p>"OFFP Agent B" [an Iraqi citizen]</p> <p>"OFFP Agent C" [an Iraqi citizen]</p> <p>"OFFP Agent D" [an Iraqi citizen]</p> <p>"GTT [Gas Turbine Technologies S.p.A., an Italian subsidiary of Siemens] employees"</p>	<p>Id. ¶ 84.</p> <p>Id. ¶90(a)-(i).</p> <p>Id. ¶¶s 104-133.</p>
<p>The DOJ Siemens enforcement action also included three separate conspiracy charges against Siemens subsidiaries: Siemens S.A.</p>	

<p>(Venezuela); Siemens S.A. (Argentina); and Siemens Bangladesh Limited.</p> <p>The Siemens S.A. (Venezuela) information alleged bribe payments in connection with mass transit projects in Venezuela and identifies the following individuals.</p> <p>"Officer A," a Venezuelan citizen, who is named as a co-conspirator but not as a defendant, was the President of Siemens Venezuela from 1997 through 2006. Officer A was responsible for overseeing Siemens business activities in Venezuela and had extensive direct involvement in the MetroMara and ValMetro transportation projects."</p> <p>"Agent A," a Venezuelan citizen, who is named as a co-conspirator but not as a defendant, was a businessman who had extensive contacts with then current and former government officials in Venezuela. Agent A controlled four entities, three of which had offices in South Florida. These four entities purported to provide business consulting services, but in reality were used as conduits for bribe payments from Siemens Venezuela to government officials in connection with the MetroMara and ValMetro projects."</p> <p>"Agent B" a German citizen, who is named as a co-conspirator but not as a defendant, was a businessman who had previously retired from Siemens as a manager in the Power Generation Group and who had been a consultant for Siemens."</p> <p>The Siemens S.A. (Argentina) information alleged bribe payments in connection with several government infrastructure projects in Argentina, including a national identity card project, and identifies the following individuals.</p> <p>"Officer A," a German citizen, was chairperson of the Board of Siemens Argentina from in or about December 20, 2000 to in or about October 1, 2002, and a senior executive of Siemens from in or about October 2000 to in or about 2007. From in or about October 2000 to in or about 2007, Officer A had oversight responsibilities for both PTD [Power Transmission and Distribution] and the Americas, including Siemens Argentina, and was involved in the national identity card project."</p> <p>"Officer B," a German citizen, was a senior executive of Siemens Argentina from in or about 1983 to in or about 1989 and again in 1991, and was a senior executive of Siemens from in or about 1996 to in or about 2003. After his move to Siemens, Officer B remained involved in Siemens Argentina business, including the national identity card-project."</p> <p>"Argentina Executive A," a non-United States citizen, who is named as a co-conspirator but not as a defendant, was a senior executive of Siemens</p>	<p>Criminal Information, U.S. v. Siemens S.A. (Venezuela) ¶¶s 6-8.<sup>2</sup></p> <p>Criminal Information, U.S. v. Siemens S.A. (Argentina) ¶¶s 8, 9, 10, 12, 13, 15, 19, 20.<sup>3</sup></p>
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<sup>2</sup> Available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/12-12-08siemensvenez-information.pdf>.

<sup>3</sup> Available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/siemensargen-info.pdf>.

Argentina from in or about 1996 to in or about 2002 and was chiefly responsible for the day-to-day management of the national identity card project."

"Argentina Executive B," a German citizen, who is named as a co-conspirator but not as a defendant, was an employee of Siemens Argentina from 1986 to in or about 1991 and a senior executive of Siemens Argentina from in or about May 2002 to in or about July 2008. Argentina Executive B facilitated some of the improperly recorded corrupt payments made in connection with the national identity card project."

"Agent A," an Argentine citizen, who is named as a co-conspirator but not as a defendant, was a former board member of Siemens Argentina. Agent A had ties to various high-level Argentine government officials and acted as a purported business consultant to Siemens Argentina and its affiliates on the Argentine national Identity card project."

"Agent B," a German citizen, who is named as a co-conspirator but not as a defendant, was a former Siemens PTD employee and controlled a purported business consulting entity, Consulting Firm B, used by Siemens Argentina to make improperly recorded corrupt payments to Argentine government officials in connection with the Argentine national identity card project."

"Former Official A," an Argentine citizen, who is named as a co-conspirator but not as a defendant, was an official in the Argentine government until in or about 1999, and then became a member of the Argentine Congress until in or about 2007. Siemens Argentina authorized corrupt payments to Former Official A in connection with the national identity card project."

"Former Minister A," an Argentine citizen, who is named as a co-conspirator but not as a defendant, was a former minister in the Argentine government with close ties to other Argentine officials. Former Minister A was engaged by Siemens to prevent the national identity card project from being terminated. A Siemens Argentina employee drafted a memorandum stating that Former Minister A had "large influence" and that up to \$1,000,000 in payments would be necessary, though "the use of the money (end recipient) [was] unknown." Siemens Argentina authorized improperly recorded corrupt payments to Former Minister A from Siemens Argentina with the expectation that he would pass along some portion of those payments to a senior officer of the Argentine Sindicatura General, the national audit board, in an attempt to retain for Siemens Argentina the contract for the national identity card project."

<p>The Siemens Bangladesh Limited information alleged bribe payments in connection with a digital cellular mobile telephone network for the Bangladeshi government (the "BTTB Project") and identifies the following individuals.</p> <p>"Bangladesh Executive A," a German citizen, who is named as a co-conspirator but not as a defendant, was a senior executive of Siemens Bangladesh until in or about 2004, when he became a senior executive of Siemens Taiwan."</p> <p>"Bangladesh Executive B," a Bangladeshi citizen, who is named as a co-conspirator but not as a defendant, was the head of the telecommunications business within Siemens Bangladesh and was chiefly responsible for the day-to-day management of the BTTB Project bidding process and implementation."</p> <p>"Bangladesh Executive C," a German citizen, who is named as a co-conspirator but not as a defendant, replaced Bangladesh Executive A as a senior executive of Siemens Bangladesh in or about 2004."</p> <p>"Consultant A," a Bangladeshi citizen, who is named as a co-conspirator but not as a defendant, acted as a purported business consultant for Siemens Bangladesh in connection with the BTTB Project."</p> <p>"Consultant B," a Bangladeshi citizen, who is named as a co-conspirator but not as a defendant, acted as a purported business consultant for Siemens Bangladesh in connection with the BTTB Project."</p> <p>"Consultant C," a dual citizen of Bangladesh and the United States, who is named as a co-conspirator but not as a defendant, acted as a purported business consultant for Siemens Bangladesh in connection with the BTTB Project and had close ties to MOPT [Ministry of Posts and Telecommunications] Official A."</p> <p>"Relative A," a Bangladeshi citizen, who is named as a co-conspirator but not as a defendant, was the son of a high-level official of the Bangladeshi executive branch and had influence over the decision to award the BTTB Project."</p>	<p>Criminal Information, U.S. v. Siemens Bangladesh Limited ¶¶s 12-18<sup>4</sup></p>
<p>The DOJ's sentencing memorandum (as to Siemens AG and the above referenced subsidiaries) states as follows: "Compliance, legal, internal audit, and corporate finance departments were a significant focus of the investigation and were discovered to be areas of the company that played a significant role in the violations"</p>	<p>DOJ Sentencing Memorandum at page 2.<sup>5</sup></p>
<p>The DOJ's transcript of the press conference announcing the Siemens enforcement action states as follows.</p>	<p>DOJ transcript of press conference</p>

<sup>4</sup> Available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/siemensbangla-info.pdf>.

<sup>5</sup> Available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/12-12-08siemens-ag-sentencing-memo.pdf>.



<p>“From the 1990s through 2007, Siemens engaged in a systematic and widespread effort to make and to hide hundreds of millions of dollars in bribe payments across the globe. These efforts by Siemens executives included using off-the-books slush fund accounts and shell companies to facilitate bribes, making false entries on the company’s books and record by, for example, falsely recording bribes as consulting fees; by accumulating profit reserves as a liability on company books, and then using these funds to facilitate bribe payments. These efforts also included short-changing audits that might have gotten too close to so-called ‘business consultants,’ who in fact conduits for illicit payments; using removable post-it notes so as to hide the identity of executives who had authorized illicit payoffs; and last, the time-tested method of suitcases filled with cash. More than \$800 million in bribes were paid by Siemens and various of its entities over the course of 2001 to 2007.”</p>	announcing Siemens enforcement action at page 1. <sup>6</sup>
<p>At the press conference, Acting Assistant Attorney General Friedrich was asked “how was it the company was charged as opposed to some of the former executives.” Friedrich stated as follows. “My comment to that is that this investigation continues.</p>	Id. at page 6.
<p>Later in the press conference, Friedrich was asked the following question. “You and Mr. Persichini [Assistant Director in Charge of the Washington Field Office of the FBI] both said that corporate executives were willfully engaged in this practice as standard operating procedure over a period of years widespread. Why does the investigation need to continue? It sounds like you had identified executives who were engaged in this patterned practice of behavior. Why were no individuals charged?” Friedrich responded as follows. “I’ll say it’s not infrequent that a disposition is reached first vis-a-vis a company and then there are individual prosecutions after that. I’m not commenting on this case in specific. I’m talking about the practice generally. I wouldn’t draw the conclusion that you’re drawing.”</p>	Id. at page 7.
<p>Later in the press conference, Friedrich was asked the following question. “I may ask you to kind of bear with my ignorance of the U.S. law. Will you give me a little bit kind of advice how you proceed regarding the prosecution against the corporate executives or individuals who were involved in this? I mean just I understand that you can’t talk about the specifics of this specific case. But how would that proceed? You have now done with the company, but you can still look at persons who were, let’s say, five years ago were running the show, who tolerated or even encouraged this. How would that (inaudible)?” Friedrich responded as follows. “Sure. Well, let me say this. In terms of our prosecution of corporations, that has been directed over the years by various policy memos, the last one issued by the Deputy Attorney</p>	Id. at page 8.

<sup>6</sup> Available at <http://www.justice.gov/opa/pr/2008/December/08-opa-1112.html>.

<p>General Mark Filip this year. Among the things that it talks about in terms of prosecutions is the fact that where we prosecute a corporation, that is not a substitute for prosecution of individuals. I think that language is something like rarely will it be the case that even a guilty plea by a company means that we will not pursue individuals. So that's the policy statement of the Department. And just from different corporate fraud cases that I've worked on over the years, as I said before in answer to another reporter's question, it's not unusual that the government will reach a settlement or a disposition or a plea with a company, get information, get facts, get documents, and then use that to go on from there to build a record that can be used either to decide to indict or not indict culpable executives within a company.</p>	
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2. *Professor Koehler, your written statements says, "The manner in which the Siemens and BAE enforcement actions were resolved significantly undermines numerous DOJ public statements regarding its FCPA enforcement program. Further, the extent of Siemens and BAE business with the U.S. government in the immediate aftermath of the bribery scandals legitimately raises the question of whether, aside from the fines and penalties of getting caught, it even matters if a company engages in conduct that violates the FCPA." (Koehler 13-14.) Can you explain why you think the Siemens and BAE resolutions undermine the ultimate deterrent effect of FCPA prosecutions?*

Simply stated, notwithstanding the DOJ's allegations in the Siemens and BAE enforcement actions seemingly establishing *prima facie* FCPA anti-bribery violations by both companies, neither company was charged with FCPA anti-bribery violations. Maximum deterrence is not achieved when a company, in egregious instances of corporate misconduct, is charged with less than the most harsh criminal offense.

Nor is maximum deterrence achieved when a company pays a criminal fine less than the amount of business the company obtained or retained because of its criminal conduct. The DOJ's transcript of the press conference announcing the Siemens enforcement action notes that by virtue of its corrupt payments Siemens "received billions of dollars worth of government contracts."<sup>7</sup> Even accounting for the SEC and German resolutions, the total fines and penalties do not add up to "billions of dollars."

The DOJ's sentencing memorandum is instructive in terms of specific projects influenced by Siemens bribe payments. For example: (i) Siemens entities made over \$31 million in corrupt payments in exchange for favorable business treatment in connection with a \$1 billion dollar project in Argentina – yet the criminal penalty for this conduct, given the

<sup>7</sup> Available at <http://www.justice.gov/opa/pr/2008/December/08-opa-1112.html>.

charge prosecuted, was only \$500,000; (ii) Siemens entities made over \$18 million in corrupt payments in exchange for favorable business treatment in connection with two major mass transit projects in Venezuela – yet the criminal penalty for this conduct, given the charge prosecuted, was only \$500,000; and (iii) Siemens entities made over \$5 million in corrupt payments in exchange for favorable treatment during the bidding process on a mobile telephone project in Bangladesh – yet the criminal penalty for this conduct, given the charge prosecuted, was only \$500,000.

More broadly, maximum deterrence is not achieved when a law is enforced in an inconsistent fashion and where the end result is that certain companies, in certain industry, that sell certain products to certain customers are essentially immune from certain charges.

3. Professor Koehler, in your article, *The Façade of FCPA Enforcement*, you note that “*The Principles of Prosecution state that ‘[p]rosecutors may enter into plea agreements with corporations’ but that ‘[i]n negotiating plea agreements with corporations, as with individuals, prosecutors should generally seek a plea to the most serious, readily provable offense charged.’*”<sup>8</sup> Yet you note that “*the DOJ seemingly violated this principle by agreeing to plea agreements with Siemens and BAE Systems . . . that did not include FCPA anti-bribery charges.*”<sup>9</sup> ***Why do you think the DOJ did not insist on plea agreements that included anti-bribery FCPA charges? Do you think concerns about debarment animated the DOJ’s willingness to only charge record and book-keeping FCPA claims?***

[Note – BAE was charged with one count of conspiracy of “making certain false, inaccurate and incomplete statements to the U.S. government and failing to honor certain undertakings given to the U.S. government.”]

Debarment issues (both in the U.S. and in Europe) clearly were a major factor in why the DOJ did not charge Siemens or BAE with FCPA anti-bribery violations, despite DOJ allegations seemingly establishing *prima facie* FCPA anti-bribery violations by both companies.

The DOJ’s sentencing memorandum in the Siemens matter states, at page 11, as follows. “In accordance with the Department’s Principles of Federal Prosecution of Business Organizations, the Department considered a number of factors in its decisions regarding the overall disposition. Those factors included, but were not limited to, Siemens’ cooperation and remediation efforts, as well as any collateral consequences, including whether there would be disproportionate harm to the shareholders, pension holders, employees, and other persons not proven personally culpable, and the impact on the public, arising from the prosecution. The Department’s analysis of collateral consequences included the consideration of the risk of debarment and exclusion from government contracts. In considering the overall disposition, the Department also considered related cases of other governmental authorities.”<sup>10</sup>

<sup>8</sup> Mike Koehler, *The Façade of FCPA Enforcement*, 41 Geo. J. Int’l L. 907, 990 (2010).

<sup>9</sup> *Id.*

<sup>10</sup> Available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/12-12-08siemens-ag-sentencing-memo.pdf>.

At the December 15, 2008 press conference announcing resolution of the Siemens enforcement action, Acting Assistant Attorney General Friedrich was asked the following question.

“Can you tell me a little about why the Justice Department agreed? They actually didn’t plead guilty to bribery. They pleaded guilty to other related charges. Can you tell me a little bit about why you felt it was okay to allow them to not plead guilty directly to a direct bribery charge.”<sup>11</sup>

Friedrich’s response was as follows.

“Right. You know, I think every case that we have to make these judgments with regard to companies, that’s always a very difficult calculus, and one that we evaluate carefully and closely on a case-by-case basis. And while I’m not going to comment specifically on the inclusion or exclusion of any specific charge here, what I can tell you about is this case had two things. One, it had a very dramatic and widespread crime on the one hand. On the other hand you also had significant remediation and cooperation by the company. And if you look through our sentencing memorandum, you’re going to see in even more detail what some of those things are. I think in terms of legal hours billed by Siemens in this case it was something like 1.5 million hours. It makes a lot of happy lawyers out there. The fact of who they brought in as their monitor. Their monitor in this case, which they proposed and which we agreed to, is a gentleman by the name of Theo Weigle. He is the former finance minister of Germany. He is an attorney who served in the German Parliament. He is well-regarded and, you know, we thought perfectly well-suited to handle a monitorship in this type of case, you know, which will last for something like four years. So the company engaged in very, very significant reforms, and they did so even prior to the disposition that was reached today. And in this case one weighed all the factors. This was the right disposition and the court agreed with our proposal.”<sup>12</sup>

The DOJ’s sentencing memorandum in the BAE matter similarly states, at pages 13-16, as follows. “In accordance with the Department’s Principles of Federal Prosecution of Business Organizations, the Department considered a number of facts in its decisions regarding the overall disposition in this case, including but not limited to the following facts...”<sup>13</sup> One, of several facts identified in the sentencing memorandum, states as follows. “Collateral consequences, including whether there is a disproportionate harm to the shareholders, pension holders, employees, and other persons not proven personally culpable,

<sup>11</sup> Available at <http://www.justice.gov/opa/pr/2008/December/08-opa-1112.html>.

<sup>12</sup> *Id.*

<sup>13</sup> Available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/02-22-10baesystems-sentenc-memo.pdf>.

as well as impact on the public arising from the prosecution.” Supporting statements under this heading included the following: (i) European Union Directive 2004/18/EC, which has recently been enacted in all EU countries through implementing legislation, provides that companies convicted of corruption offenses *shall* be mandatorily excluded from government contracts. (ii) BAES’s business is primarily from government contracts, including with several EU customers. (iii) Mandatory exclusion under EU debarment regulations is unlikely in light of the nature of the charge to which BAES is pleading. Discretionary debarment will presumably be considered and determined by various suspension and debarment officials. (iv) The Department will communicate with U.S. debarment and regulatory authorities, and relevant foreign authorities, if requested to do so, regarding the nature of the offense to which BAES has been convicted, the conduct engaged in by BAES, its remediation efforts, and the facts relevant to an assessment of whether BAES is presently a responsible government contractor.” (emphasis in original).

4. *Professor Koehler, can you please tell us what you meant by your “Fourth Pillar” in The Façade of FCPA Enforcement, which you term “Bribery, Yet No Bribery”?*<sup>14</sup>

The term “bribery, yet no bribery” as used in *The Façade of FCPA Enforcement* refers to the fact that, with increasing frequency, the DOJ in FCPA or FCPA-related enforcement actions allege in its charging documents (whether a criminal information, a statement of facts, a non-prosecution agreement or a deferred prosecution agreement) facts sufficient to establish a *prima facie* FCPA anti-bribery violation by a company. However, the DOJ does not actually charge the company with an FCPA anti-bribery violation. Thus, bribery, yet no bribery.

In addition to the Siemens and BAE matters (discussed in my prepared statement and in greater detail at pages 990-996 of the *Façade* article), the March 2010 FCPA enforcement action against Daimler AG is also instructive. In a criminal information against Daimler AG, the DOJ alleged as follows. “Between 1998 and January 2008, Daimler made hundreds of improper payments worth tens of millions of dollars to foreign officials in at least 22 countries - including China, Croatia, Egypt, Greece, Hungary, Indonesia, Iraq, Ivory Coast, Latvia, Nigeria, Russia, Serbia and Montenegro, Thailand, Turkey, Turkmenistan, Uzbekistan, Vietnam, and others - to assist in securing contracts with government customers for the purchase of Daimler vehicles valued at hundreds of millions of dollars. In some cases, Daimler wired these improper payments to U.S. bank accounts or to the foreign bank accounts of U. S. shell companies in order to transmit the bribe. In at least one instance, a U.S. shell company was incorporated for the specific purpose of entering into a sham consulting agreement with Daimler in order to conceal improper payments routed through the shell company to foreign government officials. Certain improper payments even continued as late as January 2008. In all cases, Daimler improperly recorded these payments in its corporate books and records.”<sup>15</sup>

Yet, as in Siemens and BAE, Daimler was not charged with FCPA anti-bribery violations. The criminal information merely charges conspiracy to violate the FCPA’s books and records provisions and knowingly falsifying books, records, and accounts. Even more

<sup>14</sup> Mike Koehler, *The Façade of FCPA Enforcement*, 41 Geo. J. Int’l L. 907, 990 (2010).

<sup>15</sup> Available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/daimlerag-info.pdf>.

troubling, Daimler did not actually plead guilty to these charges, rather it was allowed to settle the enforcement action via a deferred prosecution agreement notwithstanding the fact the DOJ alleged that “Daimler longstanding violations” resulted from a variety of factors, including “a corporate culture that tolerated and/or encouraged bribery.”<sup>16</sup>

5. *Professor Koehler, you testified that “The U.S. government currently has the power to suspend a contractor from public contracting upon indictment of an FCPA anti-bribery offense and to debar the contractor upon conviction of an FCPA anti-bribery offense. However, this remedy has apparently never been used in the FCPA context and specific charges are often structured, as in the Siemens and BAE matters, to avoid potential application of various debarment provisions.” (Koehler at 13, internal citations omitted, emphasis added.) Why do you think this is so? Should Congress enact H.R. 5366 so that the DOJ could prosecute violations of the anti-bribery provisions of the FCPA while allowing the relevant agency to waive mandatory debarment?*

The uncomfortable truth is that some of the most egregious FCPA violators, per the DOJ’s own allegations, are some of the largest and most important U.S. government (and foreign government) contractors or suppliers – including of goods and services critical to national security. For instance, the first paragraph of the DOJ’s BAE criminal information states as follows. “In 2008, BAES was the largest defense contractor in Europe and the fifth largest in the United States, as measured by sales.”<sup>17</sup>

As Greg Andres (DOJ – Deputy Assistant Attorney General – Criminal Division) noted at the November 30<sup>th</sup> hearing, the debarment decision is one made by contracting officers at specific government agencies. Thus, contracting officers at specific government agencies would seem to be in the best position to answer the question of why the debarment remedy, currently provided for in 48 CFR 9.406, has never been used in the FCPA context.

Nevertheless, it is clear from DOJ plea agreements and/or sentencing memoranda in FCPA or FCPA-related enforcement actions that the DOJ agrees to cooperate with the violator in future government contracting issues. For instance, paragraph 13 of the DOJ – Siemens AG plea agreement, under the heading, “Department Concessions” states as follows. “The Department further agrees to cooperate with Siemens AG, in a form and manner to be agreed, in bringing facts relating to the nature of the charges and to Siemens AG’s cooperation, remediation and its present reliability and responsibility as a government contractor to the attention of other governmental authorities as requested.”<sup>18</sup> Similarly, paragraph 13 of the DOJ – BAE Systems plea agreement, again under the heading, “Department Concessions” states as follows. “The Department further agrees to cooperate with BAES, in a form and manner to be agreed, in bringing facts relating to the nature of the charge and to BAES’ remediation and its present reliability and responsibility as a government contractor to the attention of other U.S. and foreign governmental authorities as requested.”<sup>19</sup>

<sup>16</sup> *Id.*

<sup>17</sup> Available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/02-01-10baesystems-info.pdf>.

<sup>18</sup> Available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/siemensakt-plea-agree.pdf>.

<sup>19</sup> Available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/03-01-10baesystems-plea-agree.pdf>.

It is a curious (and I submit improper) function of law enforcement for the DOJ to contractually agree to “cooperate” with companies such as Siemens and BAE in the context of resolving serious criminal violations. I further submit that greater oversight is needed as to the nature and extent of the DOJ’s cooperation with Siemens and BAE (and other similar instances) and what is meant by the term cooperate “in a form and manner to be agreed.”

As to oversight of the DOJ and debarment issues, Congressman Edolphus Towns, Chairman of the House Committee on Oversight and Government Reform, has asked the right questions. In a May 18, 2010 letter to Attorney General Holder, the House Committee expressed its concern “that settlements of civil and criminal cases by DOJ are being used as a shield to foreclose other appropriate remedies, such as suspension and debarment, that protect the government from continuing to do business with contractors who do not have satisfactory records of quality performance and business ethics.”<sup>20</sup> The letter references certain FCPA enforcement actions and correctly notes that in many instances the DOJ agrees to intervene on the violators behalf. The letter specifically states: “This type of clause, in which DOJ agrees to take the company’s side in suspension and debarment proceedings, has become standard and continues to this day. In a settlement just last month in which Daimler paid \$185 million to settle criminal and civil charges that it violated the Foreign Corrupt Practices Act, DOJ ‘agrees to cooperate with Daimler [...] with respect to Daimler’s present reliability and responsibility as a government contractor.’”<sup>21</sup> The letter requested DOJ answers to several specific debarment related questions by May 28, 2010. I do not believe that DOJ’s response is in the public domain, but I submit the answers should be so that the public is best informed as to DOJ’s involvement in debarment issues in the aftermath of its FCPA or FCPA-related enforcement actions.

As to H.R. 5366, it should be noted that under 48 CFR 9.406 a government contracting officer “may” suspend a contractor from public contracting upon indictment of an FCPA anti-bribery offense and “may” debar the contractor upon conviction of an FCPA anti-bribery offense.

H.R. 5366 would require that “any person found to be in violation of the [FCPA’s anti-bribery provisions] *shall* be proposed for debarment from any contract or grant awarded by the Federal Government within 30 days after a final judgment of such violation” unless such debarment is waived by the head of a Federal agency. (emphasis added).

However, as noted in my prepared statement and during my testimony, because of the “façade of FCPA enforcement” H.R. 5366, as currently drafted, represents impotent legislation. The trigger term for debarment consideration is “found to be in violation” of the FCPA’s anti-bribery provisions. As demonstrated by the Siemens, BAE, and Daimler enforcement actions (among other examples that could also be cited) these companies were not even charged with FCPA anti-bribery violations. Thus the condition precedent for debarment consideration would not have been triggered in these enforcement actions.

In addition, even if a company is “charged” with FCPA anti-bribery violations, the DOJ frequently allows the company to resolve the allegations via a non-prosecution agreement or deferred prosecution agreement. Under these resolution vehicles, the charges are never actually

<sup>20</sup> Available at [http://oversight.house.gov/index.php?option=com\\_content&task=view&id=4938&Itemid=49](http://oversight.house.gov/index.php?option=com_content&task=view&id=4938&Itemid=49).

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

prosecuted. Thus again, the condition precedent for debarment consideration “found to be in violation” of the FCPA’s anti-bribery provisions will not be triggered.

If the Senate concludes that imposing a debarment penalty on companies that commit FCPA anti-bribery violations represents sound public policy, which I believe it does in egregious instances of corporate bribery that legitimately satisfy the elements of an FCPA anti-bribery violation involving high-level executives and/or board participation, the challenge will be drafting language that is capable of accomplishing its stated objective given how the FCPA has come to be enforced by the DOJ. For the two reasons stated above, the “found to be in violation” of the FCPA’s anti-bribery provisions language will seldom be triggered.

However, the solution is not to amend the trigger language to state (something to the effect) that any company that resolves an FCPA enforcement action, such as through a non-prosecution or deferred prosecution agreement, should be proposed for debarment. The problem with this approach, as I highlight in both my prepared statement and my *Façade* article, is that companies often agree to enter into such resolution vehicles because it is quicker, easier and more cost efficient than actively defending an FCPA enforcement action – even if the theory of prosecution is based on dubious or untested legal theories. In other words, non-prosecution agreements and deferred prosecution agreements in the FCPA context do not necessarily reflect a triumph of the DOJ’s legal position or necessarily establish that FCPA anti-bribery violations have occurred. Debarment under such circumstances would not be warranted.



**SUBMISSIONS FOR THE RECORD  
STATEMENT OF**

**GREG ANDRES**

**ACTING DEPUTY ASSISTANT ATTORNEY GENERAL**

**BEFORE THE**

**SUBCOMMITTEE ON CRIME AND DRUGS**

**COMMITTEE ON THE JUDICIARY**

**UNITED STATES SENATE**

**ENTITLED**

**“EXAMINING ENFORCEMENT OF THE FOREIGN  
CORRUPT PRACTICES ACT”**

**PRESENTED**

**NOVEMBER 30, 2010**

## I. INTRODUCTION

Chairman Specter, Ranking Member Graham, and distinguished Members of the Subcommittee: Thank you for the opportunity to appear before you to discuss the Department of Justice's enforcement of the Foreign Corrupt Practices Act (FCPA). The investigation and prosecution of transnational bribery is an important priority for the Department of Justice, and we have been hard at work. In particular, over approximately the last two years, we have substantially increased the number of our prosecutions against corporations and individual executives, and we have collected more in criminal fines than in any other period in the history of our FCPA enforcement.

We are proud of our accomplishments, and others have taken note as well. On October 20, 2010, following a rigorous official review, the Organisation for Economic Co-operation and Development (OECD) applauded the Departments of Justice, Commerce and State, and the SEC for our collective efforts in the fight against foreign bribery. In its official report, the OECD's Working Group on Bribery in International Business Transactions noted that "[t]he United States has investigated and prosecuted the most foreign bribery cases among the Parties to the Anti-Bribery Convention." The Working Group's report further stated that:

The creation of a dedicated FCPA unit in the SEC, continued enforcement of books and records and internal controls provisions by the DOJ and SEC, increased focus on the prosecution of individuals and the size of sanctions have had a deterrent effect and, combined with guidance on the implementation of these standards, has raised awareness of U.S. accounting and auditing requirements among all issuers.

In short, the OECD's report makes clear that the United States' success in enforcing the FCPA has far outpaced any other country's enforcement of its foreign bribery laws, and we are working with our trading partners to encourage them to enhance their efforts. We remain

committed to this effort, and we are grateful for the Subcommittee's interest and to the Chairman for inviting the Criminal Division to discuss the Department's progress.

## II. PROSECUTIONS

FCPA enforcement is as strong as it has ever been. And we believe it is getting stronger. In the past year alone, the Department of Justice has imposed the most criminal penalties in FCPA-related cases in any single 12-month period – well over \$1 billion. During that time, we have prosecuted and entered into corporate resolutions with a variety of corporate entities, including BAE Systems plc, Daimler AG, Technip S.A., Snamprogetti Netherlands B.V., Alliance One International, Inc., Universal Corporation, Panalpina World Transport, Transocean Inc., Tidewater Marine International Inc., Shell Nigeria Exploration and Production Company, Noble Corporation, and Pride International Inc., to name a few.

But that is only part of the story: we are also vigorously pursuing individual defendants who violate the FCPA, and we will not hesitate to seek jail terms for these offenders when appropriate. The Department has made the prosecution of individuals a critical part of its FCPA enforcement strategy. We understand well that this is an important and effective deterrent. Paying large criminal penalties cannot be viewed, and is not, simply “the cost of doing business.” Corporate prosecutions and resolutions do not and cannot provide a safe haven for corporate officials, and every agreement resolving a corporate FCPA investigation explicitly states that it provides no protection against prosecution for individuals.

Since 2009, the Department has charged over 50 individuals with FCPA violations. Today, there are approximately 35 defendants awaiting trial on FCPA charges in the United States – in Houston, Miami, Los Angeles, Santa Ana, and Washington, D.C. By contrast, in 2004, the Department had charged only two individuals with FCPA violations.

Several recent FCPA prosecutions against individuals evidence the emphasis the Department has placed on this component of its enforcement strategy.

- On January 19, 2010, indictments were unsealed against 22 defendants in the military and law enforcement products industry. These indictments arose out of the Department's most extensive use ever of undercover law enforcement techniques in an FCPA investigation, and they represent the single largest prosecution of individuals in the history of the Department's FCPA enforcement efforts.
- In December 2009 and early 2010, eight individual defendants were charged in connection with an alleged scheme by U.S. telecom companies to bribe former officials at Haiti Telco, Haiti's state-owned national telecommunications company. Certain of the defendants allegedly paid more than \$800,000 to shell companies to be used for bribes to Haitian officials. In addition, the defendants are alleged to have created false records claiming that the payments were for "consulting services" that were never intended or performed. The charged individuals include two executives of a Miami-Dade County-based telecommunications company, the president of Florida-based Telecom Consulting Services Corporation, and two former Haitian government officials. One defendant who pleaded guilty received a sentence of 57 months' imprisonment and another received a sentence of 48 months' imprisonment. Trial is set to begin on November 29 in the Southern District of Florida for the four remaining defendants on FCPA and other charges.
- Between late 2008 and July 2010, the Department has aggressively pursued individuals and related corporate entities in the *Kellogg Brown & Root* (KBR) matter. For example, on September 3, 2008, Jack Stanley, KBR's former CEO, pleaded guilty in the Southern District of Texas to a two-count criminal information charging him with conspiracy to violate the FCPA and conspiracy to commit mail and wire fraud. In doing so, Stanley admitted, among other things, that he authorized the hiring of two company agents to pay bribes to a range of Nigerian government officials to assist the joint venture in obtaining the contracts. As part of his plea agreement, Stanley agreed to a prison sentence of 84 months, subject to a potential reduction for cooperation with our ongoing investigations.
- On August 6, 2010, the Department again achieved success against individuals and related corporate parties in the *Alliance One* matter. Alliance One International Inc., a global tobacco leaf merchant headquartered in Morrisville, North Carolina, entered into a non-prosecution agreement with the Department's Fraud Section and the U.S. Attorney's Office for the Western District of Virginia, and two of its foreign subsidiaries pleaded guilty to FCPA violations and were sentenced to pay criminal fines totaling \$9.25 million for violations of the FCPA arising out of corrupt payments made to foreign officials in Kyrgyzstan and Thailand. In addition, Bobby Jay Elkin, Jr., a former Kyrgyzstan country manager for Alliance One International Inc., pleaded guilty to a one-count criminal information charging him with conspiracy to violate the FCPA. During his plea hearing, Elkin admitted to conspiring to make

- Between November 2009 and October 2010, the Department charged both corporate entities and individuals for violations of the FCPA in the *ABB Ltd.* matter and the related *Lindsey Manufacturing Company* matter. For example, in the *ABB Ltd.* matter, in September 2009, an ABB Ltd. subsidiary pleaded guilty to FCPA violations, and ABB Ltd. entered into a deferred prosecution agreement concerning a second subsidiary's FCPA violations. As a result of these dispositions, ABB Ltd., and the subsidiary that pleaded guilty paid the United States criminal fines totaling \$19 million. In addition, in November 2009, the principal of a Mexican company that served as a sales representative in connection with one of the charged ABB Ltd. subsidiary's criminal conduct, pleaded guilty in the Southern District of Texas for his role in the conspiracy. In the *Lindsey Manufacturing Company* matter, in October 2010, the Department indicted Lindsey Manufacturing Company, the company's CEO and CFO, and two principals of a Mexican company that served as Lindsey Manufacturing sales representative for their alleged roles in a conspiracy to pay bribes to Mexican government officials at a state-owned utility company.

These cases and others demonstrate the Department's commitment to vigorously prosecuting individuals and, where appropriate, related corporate entities for FCPA violations and related offenses.

### III. CHALLENGES AND FOREIGN COOPERATION

While the prosecution of individuals remains a crucial component of the Department's FCPA enforcement program, it is worth noting the substantial challenges involved in these prosecutions. Often they involve jurisdictional hurdles, foreign evidence and witnesses, foreign prosecutions, and issues with the relevant statute of limitations. Thus, more than ever before, we are working to increase our cooperation with our foreign counterparts. Our participation in the OECD's Working Group on Bribery, for example, has helped us to foster closer relationships with some of our largest trading partners. These partnerships have yielded important results. As noted, last March, the Department resolved a corruption investigation of BAE Systems plc by

securing a guilty plea and a \$400 million criminal fine. In so doing, the Justice Department benefited substantially from its cooperation with the U.K.'s Serious Fraud Office.

The same is true of the Innospec case, also resolved in March 2010, in which Innospec Inc. pleaded guilty and agreed to pay a \$14.1 million criminal fine. Partnerships like the one we have with the Serious Fraud Office are critical to our transnational approach to combating foreign bribery, and we expect to rely on our foreign partners in future cases, as well as to assist them in bringing their own prosecutions.

The *Siemens* matter also helps illustrate the role that other countries can and should play in connection with our international anti-corruption efforts. That matter involves bribery prosecutions in both the United States and in Germany. There, in December 2008, Siemens Aktiengesellschaft (Siemens AG), a German corporation, pleaded guilty in the United States to violations of the FCPA. Siemens subsidiaries in Argentina, Bangladesh, and Venezuela, each pleaded guilty to separate FCPA violations. In connection with these guilty pleas Siemens agreed to pay a criminal fine of approximately \$448.5 million and each of the subsidiaries agreed to pay criminal fines of \$500,000 for a combined total of \$450 million.

In addition, German authorities have charged a number of Siemens executives with bribery related offenses, including seven executives of a Siemens' subsidiary charged last year with bribery and money laundering in connection with a 1990s contract with the Greek telecommunications company. Germany's aggressive enforcement activity in this matter reveals how the Department must coordinate with other nations and take into account their interests and sovereignty in this area.

#### IV. CORPORATE RESOLUTIONS

Let me address briefly the use of deferred and non-prosecution agreements in our FCPA practice. We believe that these kinds of resolutions are vital to the Department's efforts. So-called "DPAs" and "NPAs" provide the Department with appropriate alternatives to outright prosecution or declination, and the Department has used them effectively for many years. They provide an effective means to ensure that corporations make compliance enhancements and take affirmative remedial actions. They also help to ensure that corporations provide crucial cooperation in ongoing criminal investigations of the companies themselves, potential individual defendants, and other companies in the same industry.

There are still other benefits, including benefits to the public. For example, corporate agreements can result in the resolution of matters more quickly than other dispositions because such issues will have been fully negotiated without protracted and costly litigation. They also allow the Department to investigate and discover other criminal conduct more quickly than would otherwise be possible; and generally they require the relevant corporation to initiate or substantially improve their ethics and compliance programs. They also provide guidance to other companies when they are made public.

Further, these agreements, in appropriate cases, permit the Department to achieve important results for the public without subjecting companies to collateral consequences of prosecution and conviction. Such collateral consequences can include dissolution of the company, loss of jobs, elimination of beneficial products or services from the marketplace, and substantial shareholder losses.

It is also important to note that the Department's Principles of Federal Prosecution of Business Organizations prescribe the appropriate circumstances under which the Department

may enter into these agreements. Thus, the Department enters into these agreements only after careful consideration of these guidelines and the issues discussed above.

## **V. CONCLUSION**

While FCPA enforcement has always been important, it is particularly critical today. The World Bank estimates that more than \$1 trillion in bribes is paid each year, which amounts to approximately 3% of the world economy. Some experts have concluded that these bribes amount to a 20% tax on foreign investment.

As Attorney General Holder explained to an audience earlier this year, and as discussed above, bribery in international business transactions weakens economic development; it undermines confidence in the marketplace; and it distorts competition. Thus, FCPA enforcement is vital to ensuring the integrity of the world's markets and ensuring sustainable development globally. The Department's FCPA enforcement program serves not only to hold accountable those who corrupt foreign officials, but in doing so it also serves to make the international business climate more transparent and fair for everyone. FCPA enforcement both roots out foreign corruption and deters it from taking hold in the first place.

Some have suggested that FCPA enforcement puts American businesses at a competitive disadvantage vis-à-vis their foreign counterparts. We believe the opposite: American companies do not need to engage in foreign bribery to be competitive. Many U.S. companies have told us that they use the FCPA as a shield against solicitation by foreign officials, telling them under our laws they cannot make such bribe payments. Moreover, the Department does not only prosecute U.S. companies and individuals under the Act. Indeed, over the last five years, more than half of the corporate FCPA resolutions have involved foreign companies or U.S. subsidiaries of foreign companies.



In addition, the United States, through its FCPA enforcement efforts, leads by example, and other countries are following. For instance, the United Kingdom passed a landmark anti-bribery law earlier this year, sending a clear message to the British business community that the U.K. will not tolerate bribery in international commerce. As another example, Germany and the United States worked together closely in investigating and then successfully resolving the case against Siemens. Moreover, the OECD review discussed earlier demonstrates the importance of this issue in the international community and revealed the United States as a leader in this area.

The Department of Justice along with its partners at the Departments of Commerce and State have put the issue of fighting corruption squarely on the international agenda and are working to get our trading partners to commit to joining the fight. At the OECD, in the G-20, in the United Nations, and through other efforts, we are working to get other countries to uphold our shared responsibility to eliminate corruption in international business.

\* \* \* \* \*

In conclusion, we at the Department of Justice, together with our partners at other federal agencies and around the world, have made combating transnational bribery a significant priority. We have devoted substantial resources to vigorously enforcing the FCPA, and this effort has support from the highest levels of the Department. We look forward to working with Congress as we continue our important mission to prevent, deter, and prosecute foreign corruption.

Prepared Statement of Professor Mike Koehler

Assistant Professor of Business Law  
Butler University

Before the Subcommittee on Crime and Drugs of the  
United States Senate Committee on the Judiciary

November 30, 2010

**“Examining Enforcement of the Foreign Corrupt Practices Act”**

My name is Mike Kochler and I am an Assistant Professor of Business Law at Butler University in Indianapolis, Indiana. Prior to entering academia last year, I was an attorney in private practice for approximately ten years at an international law firm. A substantial portion of my practice during that time focused on the Foreign Corrupt Practices Act ("FCPA") and I conducted numerous FCPA internal investigations around the world, negotiated resolutions to FCPA enforcement actions with government enforcement agencies, and advised clients on FCPA compliance and risk assessment.

The FCPA is the predominate area of my scholarship and public engagement. My FCPA scholarship has appeared in numerous law reviews and journals and my most recent scholarship "The Façade of FCPA Enforcement" was recently published by the Georgetown Journal of International Law.<sup>1</sup> I manage the site FCPA Professor, a forum devoted to the FCPA and related topics, and my mission statement is to cover not only the "who, what, and where" of FCPA enforcement actions, news, and legislative initiatives, but also and most importantly, to explore the "why" questions increasingly present in this area of aggressive FCPA enforcement."<sup>2</sup> Given this mission, I commend Chairman Specter for calling this hearing, "Examining Enforcement of the Foreign Corrupt Practices Act," and I am grateful for the opportunity to participate.

*Congressional Intent in Enacting the FCPA*

The FCPA is a fundamentally sound statute that was passed by Congress in 1977 for a specific reason. The mid-1970's witnessed admissions by U.S. companies of making what could only be called bribe payments to foreign government officials to advance business interests. The recipients of such payments included the Japanese Prime Minister, members of the Dutch Royal Family, the Honduran head of state, the President of Gabon, Saudi Generals, and Italian political parties. Congress was surprised to learn that there was no direct U.S. statute that prohibited such improper payments to foreign government officials. For approximately three years, Congress considered various bills to address such payments mindful of the difficult foreign policy questions presented by such payments. The end result was the FCPA, a pioneering statute at the time, the first ever domestic statute governing the conduct of domestic companies in their interactions, both direct and indirect, with foreign government officials in foreign markets. In enacting the FCPA in 1977, Congress specifically intended for its anti-bribery provisions to be narrow in scope and Congress further recognized and accepted that the FCPA would not cover every type of questionable payment uncovered or disclosed during the mid-1970's.<sup>3</sup>

<sup>1</sup> "The Façade of FCPA Enforcement," 41 Georgetown Journal of International Law 907 (2010).

<sup>2</sup> See <http://fcpprofessor.blogspot.com/>

<sup>3</sup> See e.g., Senate Report 95-114 as to S. 305 (May 1977) and House Report 85-640 as to H.R. 3815 (September 1977).

That the FCPA is a fundamentally sound statute does not mean that the FCPA could not be improved by a future Congress consistent with the original intent of the 95<sup>th</sup> Congress in enacting the FCPA. On this issue, it is unfortunate that recent FCPA reform proposals<sup>4</sup> (such as amending the FCPA to include a viable compliance defense like that found in the United Kingdom's recently enacted Bribery Act) have been assailed by some as "pro-bribery" proposals or akin to paving the way for business to go on a bribery binge.<sup>5</sup> In certain respects, this hearing and perhaps others that may follow, bring us bring back to the 1980's when Congress held extensive hearings on the then recently enacted FCPA. In 1981, Senator Alfonse D'Amato opened Senate hearings on a bill to amend the FCPA as follows:

"The discussion which takes place during these hearings is not a debate between those who oppose bribery and those who support it. I see the major issue before us to be whether the law, including both its antibribery and accounting provisions, is the best approach, or whether it has created unnecessary costs and burdens out of proportion to the purposes for which it was enacted, and whether it serves our national interests."<sup>6</sup>

Senator John Chafee, a leader in the FCPA reform movement, similarly stated as follows:

"We've learned a great deal about the Foreign Corrupt Practices Act [since it was enacted]. We've learned that the best of intentions can go awry and create confusion and great cost to our economy."<sup>7</sup>

The words of Congressional leaders on the subject back then should serve as guiding words now. What is perhaps most notable about the above comments is that they occurred during an era when the DOJ exercised prudent restraint in enforcing the FCPA consistent with the narrow objective of Congress in enacting the law.

#### *Why Has FCPA Enforcement Changed?*

That the FCPA is a fundamentally sound statute does not mean that FCPA enforcement is always fundamentally sound. FCPA enforcement has materially and dramatically changed during the past six years. As has been widely reported, there have been more FCPA enforcement actions during the past six years than between 1977 and 2005. Earlier this month in a speech before an FCPA audience Assistant Attorney General Lanny Breuer noted that in the past year the DOJ "has imposed the most criminal

<sup>4</sup> See e.g., Andrew Weissmann and Alixandra Smith, "Restoring Balance -- Proposed Amendments to the Foreign Corrupt Practices Act," U.S. Chamber Institute for Legal Reform (October 2010).

<sup>5</sup> See e.g., Keith Olbermann, MSNBC Countdown (October 27, 2010).

<sup>6</sup> "Business Accounting and Foreign Trade Simplification Act," Joint Hearings Before the Subcommittee on Securities and the Subcommittee on International Finance and Monetary Policy of the Committee on Banking, Housing, and Urban Affairs, United States Senate, 97<sup>th</sup> Congress, First Session, on S. 708 (May 20 and 21, June 16, July 23 and 24, 1981).

<sup>7</sup> Id.

penalties in FCPA-related cases in any single 12-month period – well over \$1 billion.”<sup>8</sup> In his speech, Assistant Attorney General Breuer empathically stated “we are in a new era of FCPA enforcement; and we are here to stay.”<sup>9</sup>

However the question must be asked, why are we in a new era of FCPA enforcement and why has FCPA enforcement materially and dramatically changed during the past six years? The FCPA’s provisions have not changed over the last decade. There has not been, I submit, any court decision that has legitimized certain of the enforcement theories which yield the highest quantity of FCPA enforcement actions.

The individual perhaps most qualified to answer the question of why we are in a new era of FCPA enforcement and why FCPA enforcement has materially changed during the past six years is Mark Mendelsohn. Between 2005 and April 2010, Mendelsohn was the Deputy Chief of the DOJ Fraud Section and the person “responsible for overseeing all DOJ investigations and prosecutions under the FCPA” during the period of its resurgence.<sup>10</sup> Like most DOJ FCPA enforcement attorneys, Mendelsohn, after his government service, became a partner at a major law firm where he now provides FCPA defense and compliance services. In a recent interview with “The Boardroom Channel” Mendelsohn was asked about the increase in FCPA enforcement actions and candidly stated that “what’s really changed is not so much the legislation, but the enforcement and approach to enforcement by U.S. authorities.”<sup>11</sup>

It is this new approach to FCPA enforcement that is most in need of examination. As I highlight in the “Façade of FCPA Enforcement” in most instances there is no judicial scrutiny of FCPA enforcement theories and the end result is that the FCPA often means what the DOJ says it means. In many cases, what the DOJ says the FCPA means is contrary to Congressional intent.<sup>12</sup>

Two trends during this “new era of FCPA enforcement” are most instructive. The first involves the DOJ’s interpretation of the FCPA’s key “foreign official” element. The second involves the DOJ’s interpretation of the FCPA’s key “obtain or retain business” element coupled with the DOJ’s seeming unwillingness to recognize the FCPA’s express exception for so-called facilitating or expediting payments.

It surprises most people upon learning, and rightfully so, that most recent FCPA enforcement actions have absolutely nothing to do with foreign government officials. Rather, the alleged “foreign official” is an employee of an alleged state-owned or state-controlled enterprise (“SOE”) who is deemed a “foreign official” by the DOJ. This designation rests on the theory that the “foreign official’s” employer (even if a company with publicly traded stock and other attributes of a private business) is an

<sup>8</sup> See Comments of Assistant Attorney General Breuer at the 24<sup>th</sup> National Conference on the Foreign Corrupt Practices Act (November 16, 2010).

<sup>9</sup> Id.

<sup>10</sup> See <http://www.paulweiss.com/mark-f-mendelsohn/>

<sup>11</sup> See <http://www.boardmember.com/BRC.aspx?taxid=1040&id=5647>

<sup>12</sup> The same statement also applies to many of the SEC’s FCPA enforcement theories.

“instrumentality” of a foreign government. The DOJ’s interpretation in the FCPA context is the functional equivalent of the DOJ alleging that General Motors Co. (“GM”) or American International Group Inc. (“AIG”) are “instrumentalities” of the U.S. government and that GM and AIG employees are therefore U.S. “officials” occupying the same status as members of this committee or others in government.<sup>13</sup>

As I note in the “Façade of FCPA Enforcement” this legal interpretation is at the core of the majority of recent FCPA enforcement actions even though this interpretation has never been fully examined by a court. More importantly, this central feature of FCPA enforcement contradicts the intent of Congress in enacting the FCPA. The salient facts are as follows. (1) During its multi-year investigation of foreign corporate payments, Congress was aware of the existence of SOEs and that some of the questionable payments uncovered or disclosed may have involved such entities. (2) In certain of the bills introduced in Congress to address foreign corporate payments, the definition of “foreign government” expressly included SOE entities. These bills were introduced in both the Senate and the House during both the 94<sup>th</sup> and 95<sup>th</sup> Congress. (3) Despite being aware of SOEs and despite exhibiting a capability for drafting a definition that expressly included SOEs in other bills, Congress chose not to include such definitions or concepts in what ultimately become the FCPA in 1977.

The second questionable feature defining this “new era of FCPA enforcement” involves the DOJ’s interpretation of the FCPA’s key “obtain or retain business” element coupled with the DOJ’s seeming unwillingness to recognize the FCPA’s express exception for so-called facilitating and expediting payments.

The 95<sup>th</sup> Congress specifically excluded from the FCPA’s “foreign official” definition any employee of a foreign government “whose duties are essentially ministerial or clerical.” The relevant Senate Report states, in pertinent part, as follows. “The statute does not [...] cover so-called ‘grease’ payments such as payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties.”<sup>14</sup> Similarly, the relevant House Report states, in pertinent part, as follows.

“The language of the bill is deliberately cast in terms which differentiate between [corrupt payments] and facilitating payments, sometimes called ‘grease payments.’ [...] For example, a gratuity paid to a customs official to speed the processing of a customs document would not be reached by this bill. Nor would it reach payments made to secure permits, licenses, or

<sup>13</sup> On November 18, 2010, GM completed an initial public offering thereby reducing the U.S. government’s ownership of GM to less than a majority stake. However, in the FCPA context, the DOJ has taken the position that even minority ownership by a foreign government in a commercial enterprise can still render employees of that enterprise “foreign officials” under the FCPA. See *U.S. v. Kellogg Brown & Root LLC*, Case No. H-09-071 (S.D. Tex. February 6, 2009) (alleging that employees of Nigeria LNG Limited (“NLNG”) were “foreign officials” despite the fact that NLNG is owned 51% by a consortium of private multinational oil companies).

<sup>14</sup> See Senate Report No. 95-114 (May 2, 1977).

the expeditious performance of similar duties of an essentially ministerial or clerical nature which must of necessity be performed in any event. While payments made to assure or to speed the proper performance of a foreign official's duties may be reprehensible in the United States, the committee recognizes that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments. As a result, the committee has not attempted to reach such payments."<sup>15</sup>

The 100<sup>th</sup> Congress that amended the FCPA in 1988 removed this exception from the "foreign official" definition and created an express stand-alone exception for facilitating and expediting payments in connection with "routine governmental action" – an exception currently found in the FCPA. The relevant Conference Report states that the intent of the Congress is that the term "routine governmental action" shall apply to, for instance, obtaining permits, licenses, or other governmental approvals to qualify a person to do business in a foreign country and "actions of a similar nature."<sup>16</sup> The Conference Report further states that "ordinarily and commonly performed" actions with respect to permits or licenses "would not include those governmental approvals involving an exercise of discretion by a government official where the actions are the functional equivalent of 'obtaining or retaining business'...".

As I highlight in the "Façade of FCPA Enforcement" several FCPA enforcement actions during this era of resurgence concern payments made to secure foreign licenses, permits, applications, certificates or in connection with customs and tax duties. For instance, earlier this month the DOJ announced resolution of coordinated FCPA enforcement actions involving numerous companies in the oil and gas industry. The allegations centered on payments made indirectly to Nigerian Customs Service employees in connection with securing or renewing temporary importation permits so that rigs could remain in Nigerian waters.<sup>17</sup> In resolving the matters largely through non-prosecution or deferred prosecution agreements, the companies collectively agreed to pay approximately \$236 million in combined fines, penalties and disgorgement.

#### *The Impact of the "New Era of FCPA Enforcement"*

In a recent Bloomberg article regarding the increase in FCPA enforcement actions and the questionable legal theories many enforcement actions are based on, Denis McInerney (DOJ Fraud Section Chief) said that "the courts are available to companies if they dispute the [DOJ's] interpretation of the law."<sup>18</sup> While a true statement, such a response ignores the fact that the DOJ has made it so easy for companies subject to an FCPA inquiry to resolve the matter via a resolution vehicle such as a non-prosecution agreement ("NPA")

<sup>15</sup> See House Report No. 95-640 (September 28, 1977).

<sup>16</sup> See Conference Report 100-576 (April 20, 1987).

<sup>17</sup> See DOJ Release, "Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than \$156 Million in Criminal Penalties," (November 4, 2010).

<sup>18</sup> See David Voreacos, "Swiss Shipper Finds Resistance Futile in U.S. Bribery Probe," Bloomberg (November 13, 2010).

or a deferred prosecution agreement (“DPA”) neither of which results in the company being prosecuted for anything. These resolution vehicles are subject to little or no judicial scrutiny.<sup>19</sup> Thus, whether intentional or not, the DOJ has created the conditions by which many of its FCPA enforcement theories are insulated from judicial scrutiny in all but the rarest of circumstances.

Why would a company settle an FCPA enforcement action that is based on questionable enforcement theories, including those seemingly in direct conflict with the FCPA’s statutory provisions and the FCPA’s legislative history? Simply put, because of the “carrots” and “sticks” relevant to resolving a DOJ enforcement action.

As I highlight in “The Façade of FCPA Enforcement” application of the DOJ’s Principles of Federal Prosecution of Business Organization (“Principles of Prosecution”) and the U.S. Sentencing Guidelines in the FCPA context routinely nudge corporate defendants to resolve FCPA matters regardless of the DOJ’s legal theories or the existence of valid and legitimate defenses. To challenge the DOJ’s theories, its interpretation of facts, or to raise valid and legitimate FCPA defenses is failure to cooperate in the DOJ’s investigation and failure to acknowledge acceptance of responsibility – both factors under the Principles of Prosecution and the Sentencing Guidelines that will result in significant adverse consequences to the company.

Not surprisingly, no company subject to an FCPA inquiry in this “new era of FCPA enforcement” has challenged the DOJ in any meaningful way. It is simply easier, more cost efficient, and more certain for a company to agree to an NPA or DPA, and thereby agree to the DOJ’s version of the facts and its FCPA interpretations, than it is to be criminally indicted and mount a valid legal defense.

Lost in this entire exercise however is the salient question of whether the conduct at issue, in most cases, even violated the FCPA. Indeed, in a September 2010 interview with Corporate Crime Reporter, Mark Mendelsohn stated that a “danger” with NPAs and DPAs “is that it is tempting” for the DOJ “to seek to resolve cases through DPAs or NPAs that don’t actually constitute violations of the law.”<sup>20</sup> Asked directly – if the DOJ “did not have the choice of deferred or non prosecution agreements, what would happen to the number of FCPA settlements every year,” Mendelsohn stated as follows: “if the Department only had the option of bringing a criminal case or declining to bring a case, you would certainly bring fewer cases.”<sup>21</sup>

Against this backdrop there has been increased criticism of FCPA enforcement and rightfully so. A recent Forbes article titled “The Bribery Racket” quotes an FCPA practitioner as saying “the scope of things companies have to worry about is enlarging all the time as the government asserts violations in circumstances where it’s unclear if they

<sup>19</sup> See U.S. Government Accountability Office, Corporate Crime: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, But Should Evaluate Effectiveness (2009).

<sup>20</sup> See <http://www.corporatecrimereporter.com/mendelsohn091010.htm> (September 13, 2010 print edition).

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



would prevail in court.”<sup>22</sup> A former DOJ FCPA enforcement attorney, who prosecuted Lockheed for FCPA violations in the mid-1990’s, was recently asked whether “FCPA enforcement, during the last decade, morph[ed] into something other than what Congress intended the FCPA to address when passed in 1977” and stated as follows:

“The last decade of FCPA enforcement has seen extraordinary evolution, and I think you have to say that when Congress passed the law in 1977, they did not envision the wide reach of enforcement today and the types of things that the government gets involved in, such as transactions, joint ventures, and successor liability. I do think that the DOJ and the SEC have stayed generally true to the vision of the FCPA, which focuses on things of value, primarily money, going to foreign government officials in exchange for business.”<sup>23</sup>

The above quotes are representative of a growing chorus questioning this “new era of FCPA enforcement.” While this new era has spawned a “thriving and lucrative anti-bribery complex”<sup>24</sup> and while this new era has, in the words of the former head of the DOJ’s FCPA enforcement program for a portion of the 1980’s, been “good business for law firms, good business for accounting firms, good business for consulting firms, and DOJ lawyers who create the marketplace and then get a job,”<sup>25</sup> whether this new era is good for those subject to the FCPA (both companies and individuals) is another question and I submit the answer is no.

As I argue in “The Façade of FCPA Enforcement” the façade matters for a number of reasons. To those subject to the FCPA, the façade of FCPA enforcement matters because it breeds overcompliance by risk-averse companies mindful of the consequences of a DOJ FCPA inquiry – even if that inquiry is not based on viable legal theories.

The over-compliance I discuss in “The Façade of FCPA Enforcement” includes mundane matters like companies engaging high-priced lawyers to analyze FCPA compliance risk for inviting certain foreign customers to trade shows, company golf outings, or providing various cultural versions of fruit baskets during holidays. The overcompliance includes, to use the cliché, “spending a million bucks to catch a dollar” when a facilitating or expediting payment is perhaps made to a foreign customs agent demanding a “grease” payment to supplement his meager government salary to do what he is otherwise required to do.

In examining FCPA enforcement it would be useful for this committee to perhaps hear first-hand from those within corporate organizations who can directly speak to how this “new era of FCPA enforcement” has unnecessarily increased compliance costs out of proportion to the goals of the FCPA. Compliance based on the law is wise and cost-effective from the standpoint of reducing legal exposure. However, compliance based on

<sup>22</sup> Nathan Vardi, “The Bribery Racket,” *Forbes* (June 7, 2010).

<sup>23</sup> FCPA Professor, “A Q&A With Martin Weinstein,” (May 18, 2010).

<sup>24</sup> Nathan Vardi, “The Bribery Racket,” *Forbes* (June 7, 2010).

<sup>25</sup> *Id.* quoting Joseph Covington.

the DOJ's frequent untested or dubious FCPA interpretations is wasteful and diverts limited corporate resources from other value-added endeavors.

In his speech earlier this month to an FCPA audience, Assistant Attorney General Breuer analogized the "FCPA enforcement is 'bad for business'" suggestion to saying that "public corruption prosecutions are 'bad for government'" – both suggestions he called "exactly upside down."<sup>26</sup> His dismissive remarks again reflect the mindset that considering FCPA reform or examining FCPA enforcement is a "pro-bribery" exercise or akin to paving the way for business to go on a bribery binge.

The issue is not whether FCPA enforcement is "bad for business," but whether the DOJ is enforcing, in many instances, the FCPA consistent with its provisions and consistent with Congressional intent. This is not an "upside down" suggestion, but rather a suggestion anchored in fundamental principles of U.S. law.

*Bribery, Yet No Bribery and Continued U.S. Government Contracts Do Not Deter*

There are many pillars to the "The Façade of FCPA Enforcement" I describe and one is the frequent instances where seemingly clear cases of corporate bribery, per the DOJ's own allegations, are resolved *without* FCPA anti-bribery charges.

In numerous public statements during this era of the FCPA's resurgence the DOJ has consistently portrayed an FCPA enforcement program containing the following attributes: sending the message that "paying of bribes to get foreign contracts ... is illegal ... and will not be tolerated;"<sup>27</sup> holding "accountable those who corrupt foreign officials;"<sup>28</sup> "vigorously" pursuing violations of the FCPA;<sup>29</sup> and applying a "consistent, principled approach" in prosecuting cases to "provide clarity, consistency, and certainty in outcomes."<sup>30</sup>

The DOJ's rhetoric is not consistent with its conduct in the most egregious cases of corporate bribery as the below enforcement actions demonstrate.

In December 2008, the DOJ announced the filing of a criminal information against Siemens Aktiengesellschaft ("Siemens AG").<sup>31</sup> According to the DOJ release, over a six-year period:

<sup>26</sup> See Comments of Assistant Attorney General Breuer at the 24<sup>th</sup> National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010).

<sup>27</sup> See Comments of Assistant Attorney General Lanny Breuer, 22<sup>nd</sup> National Forum on the Foreign Corrupt Practices Act (November 19, 2009).

<sup>28</sup> See Comments of Assistant Attorney General Breuer at the 24<sup>th</sup> National Conference on the Foreign Corrupt Practices Act (November 16, 2010).

<sup>29</sup> See Comments of Assistant Attorney General Breuer at the National Association of Criminal Defense Lawyers (Oct. 1, 2009).

<sup>30</sup> See Comments of Assistant Attorney General Lanny Breuer, 22<sup>nd</sup> National Forum on the Foreign Corrupt Practices Act (November 19, 2009).

<sup>31</sup> See DOJ Release, "Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines" (Dec. 15, 2008). Despite being a German company with principal offices in Berlin and Munich, Siemens became subject to the FCPA

“Siemens AG made payments totaling approximately \$1.36 billion through various mechanisms. Of this amount, approximately \$554.5 million was paid for unknown purposes, including approximately \$341 million in direct payments to business consultants for unknown purposes. The remaining \$805.5 million of this amount was intended in whole or in part as corrupt payments to foreign officials through the payment mechanisms, which included cash desks and slush funds.”<sup>32</sup>

The DOJ’s Acting Assistant Attorney General stated that the charges “make clear that for much of its operations across the globe, bribery was nothing less than standard operating procedure for Siemens.” The Director of the SEC’s Division of Enforcement stated that the “pattern of bribery by Siemens was unprecedented in scale and geographic reach and the “[t]he corruption involved more than \$1.4 billion in bribes to government officials in Asia, Africa, Europe, the Middle East and the Americas.” Other senior U.S. enforcement officials noted that there existed a “corporate culture in which bribery was tolerated and even rewarded at the highest levels of the company.”

As to the amount of business Siemens gained because of the corrupt payments, the DOJ’s sentencing memorandum states that calculating a traditional loss figure under the Sentencing Guidelines “would be overly burdensome, if not impossible” given the “literally thousands of contracts over many years.”

Siemens bribery scheme would seem to be a clear case of an FCPA anti-bribery violation. Yet, the DOJ’s criminal information against Siemens did not contain any FCPA anti-bribery charges.<sup>33</sup>

According to the DOJ’s sentencing memorandum it considered a “number of factors” in its disposition of the enforcement action including “Siemens’ cooperation” and “collateral consequences” including “consideration of the risk of debarment and exclusion from government contracts.” The fine range under the sentencing guidelines for Siemens conduct was \$1.35 billion - \$2.70 billion. However, the DOJ and Siemens agreed to resolve the case for approximately \$450 million – 67% below the minimum penalty pursuant to the Sentencing Guidelines.<sup>34</sup>

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because, since March 2001, its shares have been listed on the New York Stock Exchange, making it an “issuer” for purposes of the FCPA. Furthermore, certain Siemens subsidiary companies with offices in the U.S. participated in the bribery scheme, thus providing an independent U.S. nexus for FCPA anti-bribery charges.

<sup>32</sup> Id.

<sup>33</sup> While the DOJ also did charge Siemens S.A. – Argentina, Siemens Bangladesh Limited and Siemens S.A. – Venezuela with conspiracy to violate the FCPA’s anti-bribery provisions and/or violating the FCPA’s books and records and internal control provisions. Siemens, the entity that orchestrated the entire bribery scheme according to the DOJ’s allegations, escaped FCPA anti-bribery charges.

<sup>34</sup> Siemens also settled a related SEC enforcement action in which it agreed to pay \$350 million in disgorgement.

The DOJ gave Siemens cooperation credit, which helped reduce the sentencing guidelines range, even though Siemens began cooperating only *after* German law enforcement agencies raided its offices and the homes of certain of its employees.

In an interview with the International Bar Association, Mark Mendelsohn, while still a DOJ official, defended the DOJ enforcement action and said that it sends a “very, very strong ... deterrent message.”<sup>35</sup>

It is difficult to comprehend what “deterrent message” is sent when a company that engages in bribery “unprecedented in scale and geographic scope,” and where bribery was “nothing less than standard operating procedure,” is not charged with FCPA anti-bribery violations and is allowed to pay a criminal fine in an amount less than the business gained because of the improper payments.

Further, it is difficult to reconcile frequent DOJ statements such as “paying bribes to get foreign contracts ... will not be tolerated” and those who bribe will be held “accountable” when one analyzes the extent of U.S. government business Siemens entities were awarded in the twelve month period following resolution of the December 2008 bribery scandal. Using [www.recovery.gov](http://www.recovery.gov) (a U.S. government website detailing listing entities that receive money from the \$787 billion American Recovery and Reinvestment Act stimulus bill signed by President Obama in February 2009), one finds that Siemens entities were awarded numerous U.S. government contracts funded by U.S. taxpayer stimulus dollars including by the following government departments: Department of Defense, Department of the Air Force, Department of the Army, Department of Transportation, Department of Health and Human Services, Department of Energy, Department of Commerce, Department of Housing and Urban Development, and the General Services Administration. Even the DOJ awarded a Siemens entity a contract funded with stimulus dollars.

The chief executive of a Siemens business unit was recently quoted as saying, “one of the beauties of the federal government spending is it didn’t drop off during the recession.”<sup>36</sup> Apparently one the beauties of engaging in bribery “unprecedented in scale and geographic scope” is also not being charged with FCPA anti-bribery violations and experiencing no slow down in U.S. government contracts in the immediate aftermath of the bribery scandal.

The Siemens enforcement action is not the only recent enforcement action that contributes to the façade of FCPA enforcement.

In February 2010, the DOJ announced the filing of a criminal information against BAE Systems Plc (“BAE”). Among other allegations, the information charges that BAE served as the “prime contractor to the U.K. government following the conclusion of a Formal Understanding between the U.K. and the Kingdom of Saudi Arabia (“KSA”)” in

<sup>35</sup> See <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=21F61C45-0318-41F6-89F8-3E8C01EC57B1>.

<sup>36</sup> Paul Glader, “Siemens Seeks More U.S. Orders,” *The Wall Street Journal* (August 10, 2010).

which BAE sold several Tornado and Hawk aircraft, “along with other military hardware, training and services,” to the U.K. government, which sold the material and services to the Saudi government. The information refers to these frequent arrangements as the “KSA Fighter Deals.” In connection with these deals the information alleges that “BAE provided substantial benefits to one KSA public official, who was in a position of influence regarding the KSA Fighter Deals (the “KSA Official”), and to the KSA Official’s associates.”

According to the indictment, BAE “provided these benefits through various payment mechanisms both in the territorial jurisdiction of the U.S. and elsewhere.” This allegation is important because the FCPA only applies to a company like BAE (a foreign company with no shares listed on a U.S. exchange) if conduct in furtherance of the bribery scheme has a U.S. nexus. The information contains additional allegations that clearly demonstrate that BAE’s bribery scheme had a U.S. nexus. For instance, the information alleges that BAE “provided support services to [the] KSA Official while in the territory of the U.S.” and that these benefits “included the purchase of travel and accommodations, security services, real estate, automobiles and personal items.” The information alleges that a single BAE employee during one year submitted over \$5 million in invoices for benefits provided to the KSA Official.

BAE’s bribery scheme would seem to be another clear case of an FCPA anti-bribery violation. Yet, the DOJ’s criminal information against BAE likewise did not contain any FCPA anti-bribery charges. Rather, BAE was charged with one count of conspiracy for “making certain false, inaccurate and incomplete statements to the U.S. government and failing to honor certain undertakings given to the U.S. government, thereby defrauding the United States ...”. Among the false statements BAE made to the U.S. government was its commitment to not knowingly violate the FCPA. BAE settled the enforcement action by agreeing to pay a \$400 million criminal fine.<sup>37</sup>

The DOJ’s sentencing memorandum begins by noting that BAE “is the world’s largest defense contractor, and the fifth largest provider of defense materials to the United States government.” According to the sentencing memorandum it considered a “number of factors” in its disposition of the enforcement action including applicable debarment provisions providing “that companies convicted of corruption offenses shall be mandatorily excluded from government contracts” while also stating that BAE’s business “is primarily from government contracts.”

As in the Siemens matter, it is likewise difficult to reconcile frequent DOJ statements such as “paying bribes to get foreign contracts ... will not be tolerated” and those who bribe will be held “accountable” when one analyzes the extent of U.S. government business BAE entities have been awarded since resolution of the February 2010 enforcement action. A quick glance at BAE’s press releases will evidence numerous multi-million U.S. government contracts since February 2010, including approximately \$50 million in U.S. government contracts this month alone. Perhaps most alarming is

<sup>37</sup> See DOJ Release, “BAE Systems Plc Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine,” (March 1, 2010).

that in September 2010, the FBI, the same agency that assisted in the investigation of BAE's conduct giving rise to the February 2010 enforcement action, awarded a \$40 million information security contract to a BAE entity.<sup>38</sup>

Deterrence is not achieved when companies and individuals that bribe are not charged with FCPA anti-bribery violations nor is deterrence achieved when U.S. government agencies continue to award multi-million dollar contracts to companies in the immediate aftermath of bribery scandals.

In order for the DOJ's deterrence message to be completely heard and understood egregious instances of corporate bribery that legitimately satisfy the elements of an FCPA anti-bribery violation involving high-level executives and/or board participation should be followed with debarment proceedings against the offender. The U.S. government currently has the power to suspend a contractor from public contracting upon indictment of an FCPA anti-bribery offense and to debar the contractor upon conviction of an FCPA anti-bribery offense.<sup>39</sup> However this remedy has apparently never been used in the FCPA context and specific charges are often structured, as in the Siemens and BAE matters, to avoid potential application of various debarment provisions.

Relevant to the debarment remedy, in September 2010 the House unanimously passed H.R. 5366, the "Overseas Contractor Reform Act" (the "Act"). The Act generally provides that a corporation "found to be in violation of the [FCPA's anti-bribery provisions] shall be proposed for debarment from any contract or grant awarded by the Federal Government within 30 days after a final judgment of such a violation."

However, because of the façade of FCPA enforcement, the Act represents impotent legislation. The Act's trigger term for debarment consideration – "found to be in violation" of the FCPA's anti-bribery provisions – is a trigger that is *not* reached in nearly every FCPA enforcement action. Again, Siemens and BAE were not charged with FCPA anti-bribery violations. Further, because of the prevalence of NPAs and DPAs in the FCPA context, a company entering into such an agreement with the DOJ is never "found to be in violation" of the FCPA's anti-bribery provisions.

The Act has been referred to the Senate Committee on Homeland Security and Governmental Affairs. If the Senate concludes that imposing a debarment penalty on companies that commit FCPA anti-bribery violations represents sound public policy, which I believe it does in egregious instances of corporate bribery that legitimately satisfy the elements of an FCPA anti-bribery violation involving high-level executives and/or board participation, the Senate must first understand the façade of FCPA enforcement and draft a bill that can actually accomplish its stated purpose.

The manner in which the Siemens and BAE enforcement actions were resolved significantly undermines numerous DOJ public statements regarding its FCPA enforcement program. Further, the extent of Siemens and BAE business with the U.S.

<sup>38</sup> BAE release, "BAE Systems to Provide Cyber Security to FBI in \$40 Million Order, (Sept. 21, 2010).

<sup>39</sup> See 48 CFR 9.406.

government in the immediate aftermath of the bribery scandals legitimately raises the question of whether, aside from the fines and penalties of getting caught, it even matters if a company engages in conduct that violates the FCPA. Although DOJ Fraud Section Chief Denis McNerney recently rejected such an assertion,<sup>40</sup> one is certainly justified in concluding that violating the FCPA may merely be a cost of business for certain companies in certain industries.

As mentioned above, the DOJ has publicly stated that “paying of bribes to get foreign contracts ... will not be tolerated.” However, the message sent in the Siemens and BAE enforcement actions is that bribery will be “tolerated” if the violator is a certain company, in a certain industry, that sells certain products, to certain customers. These enforcement actions thus not only contribute to the “façade of FCPA enforcement,” but more broadly undermine the rule of law and the notion that facts are to be applied to the law and the law is to be applied equally to all those subject to the law.

*Legitimate Individual Prosecutions Deter, Yet Are Infrequent*

Key to achieving deterrence in the FCPA context is prosecuting individuals, to the extent the individual’s conduct legitimately satisfies the elements of an FCPA anti-bribery violation. For a corporate employee with job duties that provide an opportunity to violate the FCPA, it is easy to dismiss corporate money being used to pay corporate FCPA fines and penalties. It is not easy to dismiss hearing of an individual with a similar background and job duties being criminally indicted and sent to federal prison for violating the FCPA.

The DOJ has long recognized that a corporate fine-only enforcement program is not effective and does not adequately deter future FCPA violations. In 1986, John Keeney (Deputy Assistant Attorney General, Criminal Division, DOJ) submitted written responses in the context of Senate Hearings concerning a bill to amend the FCPA. He stated as follows:

“If the risk of conduct in violation of the statute becomes merely monetary, the fine will simply become a cost of doing business, payable only upon being caught and in many instances, it will be only a fraction of the profit acquired from the corrupt activity. Absent the threat of incarceration, there may no longer be any compelling need to resist the urge to acquire business in any way possible.”<sup>41</sup>

<sup>40</sup> See, “DOJ Official Touts Positive OECD Report on U.S. Foreign Bribery Law,” Inside U.S. Trade (October 22, 2010) (covering McNerney’s October 21<sup>st</sup> speech to an American Bar Association meeting).

<sup>41</sup> See Response to Written Questions of Senator D’Amato From John C. Keeney, Business Accounting and Foreign Trade Simplification Act, Joint Hearing Before the Subcommittee on International Finance and Monetary Policy and the Subcommittee on Securities of the Committee on Banking, Housing, and Urban Affairs, United States Senate, 99<sup>th</sup> Congress, Second Session, on S. 430 (June 10, 1986).

Thus, recent comments such as those by Hank Walther (Deputy Chief Fraud Section) that a corporate fine-only FCPA enforcement program allows companies to calculate FCPA settlements as the cost of doing business are not new.<sup>42</sup>

During this era of the FCPA's resurgence, the DOJ has consistently stated that prosecution of individuals is a "cornerstone" of its FCPA enforcement strategy."<sup>43</sup> Yet, here again a "why" question must be asked. If the DOJ has long recognized that a corporate fine-only FCPA enforcement program is not effective and does not adequately deter future FCPA violations, and if prosecution of individuals is a "cornerstone" of the DOJ's FCPA enforcement program, then why is DOJ's FCPA enforcement program largely a corporate fine-only program devoid of individual prosecutions?

The DOJ's sentencing memorandum in Siemens states that compliance, legal, internal audit, and corporate finance departments all "played a significant role" in the conduct. Yet, no individuals have been charged. In May 2010, Senator Specter asked Assistant Attorney General Breuer about the lack of individual prosecutions in the Siemens matter and Breuer stated that the DOJ has not "closed out nor have we claimed to have closed out investigations with respect to individuals."<sup>44</sup> Six months have since passed and the largest FCPA enforcement action involving bribery "unprecedented in scale and geographic scope" has yet to result in any individual prosecution. Similarly, no individuals have been charged in connection with the BAE enforcement action.

The lack of individual prosecutions in the Siemens and BAE matters is hardly unique, rather it is another trend that defines this "new era of FCPA enforcement."

For instance, in March 2010, the DOJ charged Daimler AG with engaging in a "long-standing practice of paying bribes" to foreign officials. The criminal information alleges that "between 1998 and January 2008, Daimler made hundreds of improper payments worth tens of millions of dollars to foreign officials in at least 22 countries [...] to assist in securing contracts with government customers for the purchase of Daimler vehicles valued at hundreds of millions of dollars." According to the information, "in some cases, Daimler wired these improper payments to U.S. bank accounts or to the foreign bank accounts of U.S. shell companies in order to transmit the bribes" and "in total, the corrupt transactions with a territorial connection to the United States resulted in over \$50,000,000 in pre-tax profits for Daimler." No individuals have been charged in this case either.

The Daimler enforcement action also contributes to the façade of FCPA enforcement in that, like Siemens and BAE, it was not charged with FCPA anti-bribery violations despite the above allegations. Further, Daimler was allowed to settle the enforcement

<sup>42</sup> See Aruna Viswanatha, "Targeting Executives in FCPA Cases Can Lead to Industry-Wide Probes," *Main Justice* (June 23, 2010).

<sup>43</sup> See Comments of Assistant Attorney General Lanny Breuer, 22<sup>nd</sup> National Forum on the Foreign Corrupt Practices Act (November 19, 2009).

<sup>44</sup> See Hearings Before the Senate Judiciary Committee, Subcommittee on Crimes and Drugs (May 4, 2010).



action via a DPA by which it was not required to plead guilty to anything (at least Siemens and BAE pleaded guilty to something – even if it was not an FCPA anti-bribery violation). According to the DOJ's sentencing memorandum, it considered a "number of factors" in its disposition of the enforcement action including applicable debarment provisions providing "that companies convicted of corruption offenses shall be mandatorily excluded from government contracts." Even though the sentencing memorandum states that the U.S. government's investigation of Daimler's conduct began with a "whistleblower complaint" to the U.S. Department of Labor pursuant to Sarbanes-Oxley, the DOJ nevertheless gave Daimler cooperation credit, which helped reduce the sentencing guidelines range. The fine range under the sentencing guidelines for Daimler's conduct was \$116 - \$232 million. However, the DOJ and Daimler agreed to resolve the case for approximately \$94 million – 20% below the minimum penalty pursuant to the sentencing guidelines.

The lack of individual prosecutions in the most high-profile egregious instances of corporate bribery causes one to legitimately wonder whether the conduct was engaged in by ghosts.

It also causes one to legitimately wonder whether there are two tiers of justice when it comes to FCPA enforcement.

One tier is that major corporate bribery schemes are not even charged as FCPA anti-bribery offenses, the companies are awarded multi-million U.S. government contracts in the immediate aftermath of the enforcement actions (including by the same agencies that investigated and prosecuted the conduct at issue) and no individuals are charged.

The other tier includes cases like Charles Paul Edward Jumet. In April 2010, Jumet was sentenced to approximately seven years in federal prison.<sup>45</sup> His crime was conspiring to violate the same law that Siemens, BAE, and Daimler (and other corporations) are apparently immune from violating – the FCPA's anti-bribery provisions. Jumet's conduct can only be described as minor compared to the hundreds of millions of dollars of bribe payments the DOJ alleged in Siemens, BAE and Daimler. According to the DOJ, Jumet and others paid Panamanian officials approximately \$200,000 to receive lighthouse and buoy contracts along the waterways of the Panama Canal. In the DOJ's post-sentencing release, Assistant Attorney General Breuer stated that the sentence, "the longest ever imposed for violating the FCPA – is an important milestone in our effort to deter foreign bribery."<sup>46</sup> Other government officials stated that the sentence "makes clear" that bribery "is a serious crime that the U.S. government is intent on enforcing" and that those "who intentionally bribe" will be "prosecuted to the maximum extent."

<sup>45</sup> Jumet's "FCPA" sentence was 67 months, he was also sentenced 20 months for making false statements in connection with the DOJ's investigation.

<sup>46</sup> See DOJ Release, "Virginia Resident Sentenced to 87 Months in Prison for Bribing Government Officials," (April 19, 2010).

The question to be asked though is the DOJ “intent on enforcing” and “prosecuting to the maximum extent” all FCPA anti-bribery violations or just certain violations?

In addition to this high-profile egregious instances of corporate bribery there have also been numerous other instances in which a company settles an FCPA anti-bribery enforcement action without any related individual prosecutions. For instance, in December 2009, the DOJ announced that California-based telecommunications company, UTStarcom, Inc., entered into an NPA and agreed to pay a “\$1.5 million fine for violations of the [FCPA] by providing travel and other things of value to foreign officials, specifically employees at state-owned telecommunications firms” in China.”<sup>47</sup> The NPA states that “Executive A” (a U.S. citizen) approved the contracts at issue that included a provision by which the company would pay for purported overseas training trips that were mostly leisure trips for the customers. Likewise, in June 2008, the DOJ announced that Minnesota-based medical device company, AGA Medical Corp., entered into a DPA and agreed to pay a \$2 million fine based on allegations that it made “corrupt payments to doctors in China who were employed by government-owned hospitals” so that the “Chinese doctors [could direct] the government-owned hospitals to purchase AGA’s products rather than those of the company’s competitors.”<sup>48</sup> According to the DPA “Officer A,” “Employee B,” and “Employee C” (all U.S. citizens) were key participants in the alleged conduct.

No individuals have been prosecuted in connection with the UTStarcom, Inc. and AGA Medical Corp. enforcement actions and these are just two examples of numerous other instances that could also be cited. However, a reason no individuals have been charged in these enforcement actions may have more to do with the quality of the corporate enforcement action than any other factor. As previously described, given the prevalence of NPAs and DPAs in the FCPA context and the ease in which DOJ offers these alternative resolution vehicles to companies subject to an FCPA inquiry, companies agree to enter into such resolution vehicles regardless of the DOJ’s legal theories or the existence of valid and legitimate defenses. It is simply easier, more cost efficient, and more certain for a company (such as UTStarcom, Inc. or AGA Medical Corp.) to agree to a NPA or DPA than it is to be criminally indicted and mount a valid legal defense – even if the DOJ’s theory of prosecution is questionable as it was in both of these cases. Again, no company subject to an FCPA inquiry in this era of the FCPA’s resurgence has challenged the DOJ in any meaningful way. Individuals, on the other hand, face a deprivation of personal liberty, and are more likely to force the DOJ to satisfy its high burden of proof as to all FCPA elements.

In his November 2010 speech, Assistant Attorney General Breuer provided the following

<sup>47</sup> See DOJ Release, “UTStarcom, Inc. Agrees to Pay \$1.5 Million Penalty for Acts of Foreign Bribery in China,” (December 31, 2009).

<sup>48</sup> DOJ Release, “AGA Medical Corporation Agrees to Pay \$2 Million Penalty and Enter Deferred Prosecution Agreement for FCPA Violations,” (June 3, 2008).

statistics as to individual FCPA prosecutions: in 2004 the DOJ charged two individuals under the FCPA; in 2005 the DOJ charged five individuals; and last year and this year combined the DOJ has charged over 50 individuals.<sup>49</sup>

However, an analysis of these figures reveals interesting results. The approximate 50 individuals charged in recent FCPA cases break down as follows:

Twenty-two individuals have been in one case, the so-called Africa Sting case, in which FBI agents (posing as representatives of the President of Gabon with the assistance of an individual who had already pleaded guilty to unrelated FCPA violations) facilitated fictitious business transactions largely involving owners and employees of military and law enforcement products companies; and

Twenty-four individuals are or were in cases where the recipient of the alleged payments was not a bona fide foreign government officials. Rather the DOJ's theory of prosecution was or is based on the above-mentioned theory that employees of alleged SOEs are "foreign officials" under the FCPA – an interpretation that is contrary to Congressional intent. (These prosecutions are: Control Components Inc. employees/agents (8 individuals); Haiti Teleco related cases (6 individuals); Mexico Comisión Federal de Electricidad related-cases (6 individuals); and Nexus Technology employees/agents (4 individuals).

Prosecuting individuals is a key to achieving deterrence in the FCPA context and should thus be a "cornerstone" of the DOJ's FCPA enforcement program. However, the answer is not to manufacture cases or to prosecute individuals based on legal interpretations contrary to the intent of Congress in enacting the FCPA while at the same time failing to prosecute individuals in connection with the most egregious cases of corporate bribery.

A final trend relevant to "Examining Enforcement of the Foreign Corrupt Practices Act" is that during this "new era of FCPA enforcement" federal court judges sentencing individual FCPA defendants are undeniably seeing the conduct at issue materially different than the DOJ. The sentencing of individual defendants in FCPA cases is one of the only areas of FCPA enforcement when someone other than the DOJ analyzes the conduct at issue. Thus, the following sentences and remarks are highly instructive.

In October 2010, Judge Jackson Kiser (W.D.Va.) rejected the approximate three year sentence requested by the DOJ and sentenced Bobby Jay Elkin, Jr. to probation. Elkin, an employee in the tobacco industry, previously pleaded guilty to conspiracy to violate the FCPA by paying or authorizing payments to certain Kyrgyzstan government agencies to obtain licenses or approvals in connection with tobacco purchases. In rejecting the DOJ's

<sup>49</sup> See Comments of Assistant Attorney General Breuer at the 24<sup>th</sup> National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010).

sentencing recommendation, Judge Kiser stated that the CIA routinely bribes Afghan warlords and that this “sort of goes to the morality of the situation.”<sup>50</sup> Moreover, Judge Kiser “said he would waive the usual travel restrictions of probation and allow Elkin to return to Kyrgyzstan and resume his job” in the tobacco industry.

In September 2010, Judge Timothy Savage (E.D.Pa.) rejected the 14-17 year sentence requested by the DOJ and sentenced Nam Nguyen to 16 months in prison (plus two years of supervised release). Nguyen previously pleaded guilty to a conspiracy to bribe officials of alleged Vietnamese government owned or controlled agencies in connection with equipment and technology contracts. In its sentencing brief, the DOJ stated that its sentencing recommendation should be accepted “to promote general deterrence” and that such conduct “will hardly be deterred by sending the message that the consequences of such conduct is at worst several months of imprisonment.” Judge Savage also rejected multi-year sentences requested by the DOJ for other defendants in the case and sentenced those defendants to probation.

In August 2010, Judge George Wu (C.D.Cal.) rejected the 10 year sentence requested by the DOJ and sentenced Gerald and Patricia Green to six months in prison (followed by three years of probation). The Greens were previously found guilty by a jury of, among other things, making improper payments to a Thailand Tourism Minister to secure contracts for a Bangkok Film Festival.

In November 2009, Judge Shira Scheindin (S.D.N.Y.) rejected the 10 year sentence requested by the DOJ and sentenced Frederic Bourke to 366 days in prison (followed by three years probation). Bourke previously was found guilty by a jury of conspiring to bribe senior government officials in Azerbaijan in what the DOJ termed a “massive bribery scheme” to ensure privatization of the State Oil Company of the Azerbaijan Republic in a rigged auction. In sentencing Bourke, Judge Scheindin stated - “after years of supervising this case, it’s still not entirely clear to me whether Mr. Bourke is a victim or a crook or little bit of both.”<sup>51</sup>

### Conclusion

Despite being a fundamentally sound statute, the FCPA is being enforced in this “new era of FCPA enforcement” in many fundamentally unsound ways. The issue is not whether FCPA enforcement is good or bad for any one constituency, but whether the DOJ is enforcing, in many instances, the FCPA consistent with its provisions and consistent with

<sup>50</sup> Mike Gangloff, “Judge Gives Tobacco Exec Probation, Fine for Bribery,” The Roanoke Times (Oct. 22, 2010).

<sup>51</sup> David Glovin, “Bourke Gets One Year in Prison in Azerbaijan Bribery Case,” Bloomberg (Nov. 11, 2009).

Congressional intent. The issue is also whether the DOJ's rhetoric is consistent with its conduct in prosecuting the most egregious instances of corporate bribery so that FCPA enforcement deters and not yield inconsistent results and two tiers of justice. These are the issues that need to be examined and the time to examine these issues is now.

Thank you for providing me the opportunity to participate in this important hearing.

**Statement Of Senator Patrick Leahy,  
Chairman, Senate Judiciary Committee,  
Hearing on "Examining Enforcement of the Foreign Corrupt Practices Act"  
November 30, 2010**

Today, the Judiciary Committee considers an important anti-corruption statute, the Foreign Corrupt Practices Act. I thank Senator Specter for chairing a hearing on this timely topic, one on which I have worked with Senator Specter for decades. In the past two years, the Justice Department charged more than 50 individuals and collected nearly \$2 billion in criminal fines in cases related to this important statute. I applaud the Justice Department for its recent success and hope that Federal prosecutors will continue to aggressively pursue the companies and individuals engaged in corrupt behavior overseas.

Effective enforcement of the Foreign Corrupt Practices Act is critical to the integrity of international business and economic development. In order to deter corrupt conduct, individuals involved in bribery schemes must face jail time for their offenses. Similarly, corporations must face criminal penalties, or a culture of corruption may persist, perpetuating violations over time. Aggressive enforcement of systematic violations by corporations, as by individuals, is necessary to ensure true deterrence of this intolerable conduct.

I have long been a champion of anti-corruption efforts, both at home and abroad. That is why Senator Cornyn and I joined together to introduce the "Public Corruption Prosecution Improvements Act," a bill that will strengthen and clarify key aspects of federal criminal law and provide new tools to help investigators and prosecutors attack public corruption nationwide. That is also why I have introduced legislation to restore the honest services fraud statute after the Supreme Court significantly narrowed its application to fraud and corruption. I look forward to working with Senators of both parties to pass these bills and to ensure effective enforcement of corruption statutes including the Foreign Corrupt Practices Act.

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**Testimony of**  
**Michael Volkov, Esq.**  
**Partner, Mayer Brown LLP**  
**Before the**  
**Senate Judiciary Committee**  
**Subcommittee on Crime and Drugs**  
**Hearing on**  
**“Examining Enforcement of the Foreign Corrupt Practices Act”**  
**Tuesday, November 30, 2010**  
**Dirksen Senate Office Building, Room 226**  
**9:30 a.m**

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Testimony of  
Michael Volkov, Esq.  
Partner, Mayer Brown LLP

Before the

Senate Judiciary Committee  
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“Examining Enforcement of the Foreign Corrupt Practices Act”  
Tuesday, November 30, 2010  
Dirksen Senate Office Building, Room 226  
9:30 a.m.

Good morning Chairman Specter, Ranking Member Graham, and Members of the Subcommittee: thank you for this opportunity to discuss with you the enforcement of the Foreign Corrupt Practices Act, commonly known as the FCPA.

At the outset, I want to say that it is an honor to appear before the Subcommittee for the first time since I left the Judiciary Committee staff in 2005. I have many fond professional and personal memories of the work I was able to do here as part of the Committee staff.

Today, I bring my perspective as a former federal prosecutor in the US Attorney’s Office in the District of Columbia for more than 17 years, and as a partner at Mayer Brown currently representing individuals and companies.

#### The Historical Context of the FCPA

In the mid-1970s, more than 400 American companies admitted to the Securities and Exchange Commission that they had collectively made over \$300 million in improper or illegal payments to officials of foreign governments and had, in many cases, failed to accurately record those transactions in their corporate books and records.<sup>1</sup> Viewing these revelations as a sign that the American business climate was being jeopardized by corporate bribery,<sup>2</sup> Congress responded by enacting the landmark Foreign Corrupt Practices Act of 1977.

The FCPA addressed this perceived crisis in two ways. First, the statute made it unlawful for companies headquartered in the United States or with securities registered in the United States to use instrumentalities of interstate commerce, such as the mail and wires, to offer or pay bribes to officials of foreign governments for the purpose of obtaining or retaining business.

<sup>1</sup> See H.R. Rep. No. 95-640, at 1-2 (1977).

<sup>2</sup> See S. Rep. No. 95-114, at 3-4 (1977) (concluding that due to these bribes, “[t]he image of American democracy abroad has been tarnished. Confidence in the financial integrity of our corporations has been impaired. The efficient functioning of our capital markets has been impaired . . . . A strong anti-bribery law is urgently needed to bring these corrupt practices to a halt and to restore public confidence in the integrity of the American business system.”)



Second, Congress imposed more stringent recordkeeping requirements on public companies with securities listed in the United States.

Since 1977, the FCPA has had enforcement “ups” and downs.” However, it is clear that in the last five (5) years FCPA enforcement has risen to unprecedented levels. Record-setting fines have been paid by companies and more and more individuals have been prosecuted.<sup>3</sup>

The Justice Department has sent a very strong message – they have employed techniques typically reserved for prosecutions of violent gangs and organized crime – that is, the use of undercover officers, confidential informants, one-party consent recordings, and search warrants. In addition, the Justice Department has announced industry-wide investigations which are directed at specific businesses and their foreign operations. Finally, and probably most importantly, the Justice Department and the SEC have both dedicated additional resources – attorneys, law enforcement, and support staff – to FCPA enforcement.

The FCPA defense bar is well aware of the Justice Department’s new strategies and approaches. As a result, more and more company clients have sought proactive advice and assistance on designing and implementing sophisticated compliance programs. Much of my practice now is devoted to advising corporations on compliance issues. From the Justice Department’s and SEC’s perspectives, the increase in compliance efforts should be a welcome development.

The Justice Department’s focus on aggressive enforcement, like any other criminal law, is aimed at deterring violations. For companies that means increasing compliance. If compliance is the overall aim, the Justice Department and the SEC should entertain new approaches and strategies.

In looking at the issue of compliance, the enforcement programs must distinguish between companies that seek in good faith to comply with the FCPA by dedicating resources to implement meaningful controls, conduct comprehensive training and impose a due diligence

<sup>3</sup> In recent years, both the DOJ and SEC have aggressively pursued FCPA actions against individuals. These criminal actions demonstrate the breadth of both the conduct susceptible to FCPA criminal enforcement and the individuals within the statute’s reach. In *Jefferson*, U.S. Congressman William Jefferson was indicted on charges including, violation of the FCPA for allegedly paying bribes to a Nigerian official to advance the business interests of his family. Press Release, Dep’t of Justice, Congressman William Jefferson Indicted on Bribery, Racketeering, Money Laundering, Obstruction of Justice, and Related Charges (June 4, 2007). In *Salam*, a former U.S. army civilian translator and naturalized U.S. citizen, pleaded guilty to violating the FCPA by offering a senior Iraqi police official \$60,000 in exchange for the official’s assistance in facilitating the purchase of 1,000 armored vests and a map printer for \$1 million, plus an additional \$28,000 to \$35,000 to an undercover agent posing as an Iraqi procurement officer. Press Release, Dept of Justice, U.S. Civilian Translator Sentenced for Offering Bribes to Iraqi and U.S. Officials While Working in Adnon Palace in Baghdad (Feb. 5, 2007). In *Amoako*, a former regional director for ITXC Corp. pleaded guilty to violating the FCPA in connection with paying bribes worth approximately \$266,000 in the form of illegal “commissions” to employees of foreign state-owned telecommunications companies located in Nigeria, Rwanda, and Senegal. And in March 2007, Edgar Valverde Acosta, a Costa Rican citizen and Christian Sapsizian, a French citizen, were indicted on charges they conspired to pay \$2.5 million in bribes to Costa Rican officials in order to obtain a telecommunications contract on behalf of their employer, Alcatel, a French company whose American depositary receipts were traded on the New York stock exchange. Press Release, Dep’t of Justice, Former Regional Director of ITXC Corp. Pleads Guilty in Foreign Bribery Scheme (Sept. 6, 2006).

review process to make sure that third party agents hired in foreign countries do not engage in bribery. Assuming that a company makes such good faith efforts to comply with the FCPA, there is no reason to punish the corporation for the illegal actions of a “rogue” employee or small group of “rogue” employees that violate the FCPA contrary to the company’s code of ethics, compliance program and training efforts. Unfortunately, under current corporate criminal law, the actions of a single employee can be – and frequently are – attributed to the corporation to hold the corporation criminally liable. As reflected in the US Sentencing Guidelines, the corporation’s compliance efforts can be recognized as a “mitigating” factor but the tarnish of a conviction and a fine, with all of the attendant consequences can be far-reaching and frequently unfair.

#### **Voluntary Disclosure: The Engine That Fuels FCPA Enforcement**

The Justice Department regularly urges companies to engage in the “voluntary disclosure” process. After a company makes a voluntary disclosure, the Justice Department then enlists the company to conduct a comprehensive internal investigation which eventually leads to a disclosure of any and all potential violations. At the conclusion, the Justice Department negotiates a fine, a guilty plea typically for subsidiaries, or a non-prosecution or deferred prosecution agreement.

By encouraging voluntary disclosure, the Justice Department has increased its prosecutions, minimized the use of its investigative resources, and increased the Treasury’s coffers with substantial fines. Cooperating witnesses from the company are mined for additional leads on other companies and other bribery schemes, which frequently lead to further investigations and disclosures by companies.<sup>4</sup>

For most corporations that discover a potential FCPA violation, there is simply no other choice but to engage in the voluntary disclosure process. But the decision to do so is complicated by one major consideration – what are the terms of the disclosure? What benefit is there to such a disclosure and what are the costs of such disclosure?

The Justice Department has not provided clarity on this point. Instead, the Justice Department offer vague promises of benefits and little to no certainty as to results, all to preserve its discretion to impose a fine and plea as they see fit. FCPA professionals advise companies in this situation by reading “tea leaves” – trying to make sense out of a number of past prosecutions. But it is difficult to do. There simply is no guarantee for what benefits a corporation will earn for voluntary disclosure.

<sup>4</sup> Of course, voluntary disclosure necessarily implicates attorney-client privilege issues. I agree with Chairman Specter’s proposed Attorney-Client Privilege Protection Act of 2006. Although the bill would prohibit federal prosecutors from seeking corporate waivers of attorney-client privilege in return for leniency in prosecutions, or from considering such waivers in making charging decisions, and protect employee rights in corporate investigations, overriding provisions of the so-called Thompson Memorandum of 2003, it was not enacted and this issue remains an ongoing concern.

You do not need an economist to know that in the absence of clarity and transparency, companies may not accurately weigh the pros and cons of voluntary disclosure. Or as Bob Dylan wrote, "You don't need a weatherman to know which way the wind blows."<sup>5</sup>

For many companies, it is a difficult choice – does the company disclose the problem with no certainty as to the result or punishment, or does the company fix the problem internally and implement new programs to ensure compliance while running the risk that law enforcement may learn of such past violations. In most cases, companies opt to enter the Justice Department's disclosure process.

#### **A Corporate Self-Compliance Program: Maximizing Incentives to Comply**

A more balanced approach is needed: (1) to increase even more the incentive to comply with the law; and (2) to distinguish between corporations that engage in flagrant violations of the FCPA and those that seek to comply in good faith but nonetheless can be held liable for the actions of a few employees.

In my view, these two goals can be accomplished by adopting a corporate self-compliance, limited amnesty program. This would be a win-win for the government and for businesses. Such a program would establish a corporate compliance baseline which will inoculate companies against certain FCPA violations.

Because of the lack of any structure or established incentives, more and more FCPA professionals are urging the Justice Department to adopt some form of a corporate amnesty program so that corporations know and act in response to a set of defined benefits. I join the chorus of FCPA professionals – former DOJ officials and legal scholars – to propose a program which will increase compliance without undermining the Justice Department's enforcement program; indeed, my proposal will enhance the Justice Department's ultimate aim of increasing compliance.

I want to acknowledge here that former judge Stanley Sporkin, a mentor and the so-called father of the FCPA, has articulated a very similar proposal for many years. To give credit where it is due, he is the source for this proposal and he has the experience and the credibility to know that such a proposal would enhance corporate compliance.<sup>6</sup>

Judge Sporkin's proposal consists of the following elements:

1. A participating company agrees to conduct a full and complete review of the company's compliance with the FCPA for the five (5) previous years;
2. The internal review is conducted jointly by a major accounting firm or specialized forensic accounting firm and a law firm;

<sup>5</sup> Subterranean Homesick Blues, Bob Dylan, Columbia Records (1965).

<sup>6</sup> At the inception of the FCPA, there was a voluntary disclosure program that fell into disuse in the 1980s. In 2001, however, the Seaboard Report was issued and echoed what former Judge Sporkin had earlier proposed, and which I have outlined here, as an effective means to increase corporate compliance.

3. The company further agrees to disclose the results of the legal-accounting audit to the SEC, the DOJ, its investors and the public;

4. If the company discovers any violations in the audit, the company agrees to take all steps to eliminate the problems and implement the appropriate controls to prevent further violations.

5. The company would subject itself to an annual review for five (5) years to ensure that compliance was being maintained.

6. The company would retain an FCPA compliance officer (akin to an independent compliance monitor) who would annually certify the SEC and the DOJ that the company was in compliance.

7. In exchange for these actions, the SEC and DOJ would agree not to initiate an enforcement action against the company during this period except that such an agreement would not apply to violations which rose to a flagrant or egregious level.

As such, the program would create incentives for companies to adopt and maintain robust compliance measures and reduce the case load and investigative burden of government agencies that enforce the FCPA while reassuring regulators that companies are proactively taking steps to address corruption issues.

Some have suggested that the Justice Department implement a leniency program similar to the one currently used by the Antitrust Division with great success.<sup>7</sup> The Antitrust Division first implemented a leniency program in 1978<sup>8</sup> and substantially revised the program with the issuance of a Corporate Leniency Policy in 1993 and a Leniency Policy for Individuals in 1994. Through the Division's leniency program, a corporation can avoid criminal conviction and fines, and individuals can avoid criminal conviction, prison terms, and fines, by being the first to confess participation in a criminal antitrust violation, fully cooperating with the Division, and meeting other specified conditions.<sup>9</sup>

While at first glance, the Antitrust Division's model is attractive for the FCPA, there are significant differences in purpose between the FCPA and Antitrust Division's enforcement programs. The Antitrust Division program is intended to encourage corporate cooperation to

<sup>7</sup> Robert Tarun and Peter Tomczak of Baker & McKenzie have recently proposed a detailed FCPA Leniency Policy in the *American Criminal Law Review*. See Vol. 47 at 153. Their proposal draws upon the Antitrust Division policies and responds to growing concerns by corporate clients and their counsel that the benefits to companies that conduct costly and lengthy internal investigations and self-report misconduct are uncertain since it is virtually impossible to predict whether DOJ will impose a deferred prosecution or non-prosecution agreement, penalties or pass altogether.

<sup>8</sup> See <http://www.justice.gov/atr/public/criminal/leniency.htm>.

<sup>9</sup> The Division understands that when corporate counsel first obtains indications of a possible criminal antitrust violation, authoritative personnel for the company may not have sufficient information to know for certain whether the corporation has engaged in such a violation, an admission of which is required to obtain a conditional leniency letter. The Division grants only one corporate leniency per conspiracy, and in applying for leniency, the company is in a race with its co-conspirators and possibly its own employees who may also be preparing to apply for individual leniency.

unravel cartels, i.e. anti-competitive agreements among member companies. The first to cooperate is given a benefit and higher penalties are extracted from the other companies based on their decision to cooperate or plead guilty. This same purpose – the discovery of group behavior – is not at issue in an FCPA violation where a single company engages in the bribery or other improper conduct. Other than certain individuals who are criminally liable, providing a leniency offer to the company for an FCPA violation, may or may not result in the prosecution of other significant actors.

### **International Efforts Against Bribery and Corruption**

If we are to think about this issue in terms of incentive structures and deterrence, one glaring omission in current enforcement activities is prosecutions of the bribe-takers themselves – the “supply side” of bribery. If the bribe-takers are prosecuted abroad, there will be less interest and incentive for individuals and/or companies to engage in activities prohibited by the FCPA. In the earliest days of FCPA enforcement, the DOJ occasionally sought to apply the FCPA to foreign officials. For example, in 1990, the DOJ charged two Canadian officials, Castle and Lowry, with conspiring to violate the FCPA, but the courts rejected this theory, holding that a foreign official could not be held liable for conspiring to violate a statute that he could not be charged with violating directly. Subsequently, in 1994 in the GE case, the U.S. charged Rami Dotan, the Israeli general who received the bribes, with conspiracy to violate the FCPA’s books and records provisions. Dotan was subsequently prosecuted in Israel and never stood trial in the United States. Since then, until last year, there have been no FCPA cases involving foreign officials. In 2009, in two separate cases, the DOJ charged the foreign officials who allegedly received bribes from U.S. individuals with assorted crimes other than the FCPA.

At its inception, the FCPA was the only statute of its kind anywhere in the world<sup>10</sup>, and accordingly was susceptible to being viewed as a unilateral and almost quixotic American effort to stem the flow of corporate funds into the coffers of corrupt foreign officials. Today, in contrast, the FCPA’s underlying anti-corruption objective has garnered broad international acceptance.

Mirroring this development, the FCPA itself has taken on a correspondingly global scope. The FCPA’s anti-bribery provisions no longer apply solely to American companies and individuals. Rather, as amended in 1998, the FCPA now also prohibits foreign individuals and business entities from using the instrumentalities of domestic interstate commerce to facilitate the payment of a foreign bribe while on American soil.<sup>11</sup> Additionally, the FCPA now applies globally to the actions of American individuals and businesses, making it unlawful for them or their agents to engage in the conduct proscribed by the FCPA while outside the United States, irrespective of whether they make use of the instrumentalities of domestic interstate commerce in the process.<sup>12</sup>

<sup>10</sup> Testimony of Paul V. Gerlach, SEC Associate Director of Enforcement, before the House Subcommittee on Finance and Hazardous Materials, Sept. 10, 1998, available at <http://www.sec.gov/news/testimony/testarchive/1998/tsty1198.txt>.

<sup>11</sup> See 15 U.S.C. § 78dd-3(a).

<sup>12</sup> See 15 U.S.C. § 78dd-1(g); 15 U.S.C. § 78dd-2(i).

International efforts against bribery and corruption need to increase so that more than a handful of countries actively prosecute bribery and bribe takers need to be prosecuted. We need to put more emphasis on helping other countries improve their enforcement programs. The OECD Antibribery Convention requires parties to make promising, offering, or giving a bribe to an official of another government a crime. Although 38 countries have ratified the convention, Transparency International reports that as of the end of 2009 only seven – Denmark, Germany, Italy, Norway, Switzerland, the United Kingdom, and the United States are actively enforcing this provision. Another nine -- Argentina, Belgium, Finland, France, Japan, South Korea,, the Netherlands, Spain and Sweden are making some effort to enforce it; and 20 -- *Australia, Austria, Brazil, Bulgaria, Canada, Chile, the Czech Republic, Estonia, Greece, Hungary, Ireland, Israel, Mexico, New Zealand, Poland, Portugal, Slovak Republic, Slovenia, South Africa and Turkey* have taken few if any steps to enforce the convention.<sup>13</sup>

When it comes to the prosecution of officials who accepted bribes from transnational companies, there has been even less activity.<sup>14</sup> In the last 30 years, only three countries – South Korea, Italy, and Argentina – have prosecuted more than five officials for accepting a bribe. Another ten – South Africa, Lesotho, India, Canada, Russia, Norway, Brazil, Bangladesh, Germany and China – have prosecuted three to five individuals; the U.S., Mexico, Indonesia, the Czech Republic, and Afghanistan have each prosecuted two, and 17 countries – Slovenia, Rwanda, Nigeria, Namibia, Montenegro, Malaysia, Macedonia, Liberia, Hungary, Greece, Ghana, Ethiopia, Egypt, Costa Rica, Columbia, Chile, and Austria have each prosecuted one.

But the tide is turning and there is growing international attention and cooperation. Indeed, I'm participating in a conference sponsored by the World Bank next week. The "International Corruption Hunters Alliance" recognizes the importance of globally aligned efforts to resolve corruption cases, but there are several obstacles to global cooperation. First, there is a lack of mechanisms for reaching a comprehensive resolution between a company that has admitted wrongdoing and the many jurisdictions affected, and second, the failure of "victim" countries to prosecute those who took the bribes. It is this failure to prosecute bribe-takers that severely hampers international enforcement, since public officials know they can demand bribes with impunity and there is little deterrence.

The World Bank faces challenges in its efforts to deter corruption in the projects that it finances and the Bank has established regional networks of anti-corruption enforcement personnel in borrowing countries. The December meeting in Washington DC will bring network members together with authorities from countries that have prosecuted bribe payers, private sector representatives, and members of international organizations, to create a global enforcement alliance. This high-level meeting is an important and crucial step to establishing a policy framework for global settlements and fines, establishing a restitution fund, and also for establishing a course for key parallel investigations, bi-lateral cooperation and mutual assistance and information and expertise sharing.

<sup>13</sup> Transparency International, Progress Report 2010: Enforcement of the OECD Antibribery Convention, July 2010, available at [http://www.transparency.org/publications/publications/conventions/oecd\\_report\\_2010](http://www.transparency.org/publications/publications/conventions/oecd_report_2010).

<sup>14</sup> TRACE, Global Enforcement Report 2010, available at <https://secure.traceinternational.org/documents/TRACEGlobalEnforcementReport2010.pdf>.

The United States has been at the forefront of this area of enforcement and it is time that we contribute to and learn from others in an increasingly complex global economy that sees corporations and individuals doing business across borders on a daily basis. There is an urgent need for a balanced global enforcement program. I commend the World Bank for its efforts. The Network is now made up of 120 officials from 31 countries.<sup>15</sup> The strings attached to funds from multilateral development banks rightly include compliance with robust anti-corruption measures and ongoing monitoring by the Bank. Interestingly, the World Bank Group<sup>16</sup> has recently developed a Voluntary Disclosure Program to allow entities and individuals to come forward and admit to wrongdoing and disclose the results of an internal investigation.

The aggressive and extra-territorial enforcement of the FCPA by the United States might have caused substantial international friction in an earlier era, in which the FCPA truly stood alone in criminalizing bribery of officials in other states. The landscape has changed dramatically on the international front, however, as demonstrated by the recent adoption of several international accords on the subject of cross-border bribery.

#### 1. The OECD Convention On Combating Bribery (1999)

This Convention entered into force in February 1999 and now has been ratified by 38 countries, including the United States, Canada, and most EU member states.<sup>17</sup> In principal part, the OECD Convention requires state parties to “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.”<sup>18</sup> The Convention also requires parties to establish criminal penalties for aiding and abetting foreign bribery, and for attempts and conspiracies to commit acts of bribery.<sup>19</sup> Further demonstrating the FCPA’s international influence, the OECD convention also requires parties to adopt or maintain “laws and regulations regarding the maintenance of books and records” and other accounting statements “to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions” and other techniques commonly used “for the purpose of bribing foreign public officials or [] hiding such bribery.”<sup>20</sup> While the OECD Convention leaves parties with substantial scope to design their own penalties and enforcement mechanisms, it calls for tough penalties.

<sup>15</sup> Annual Integrity Report, Integrity Vice Presidency, The World Bank Group 12 (2010), *available at* [http://siteresources.worldbank.org/INTDOI/Resources/INT\\_AnnualReport\\_web.pdf](http://siteresources.worldbank.org/INTDOI/Resources/INT_AnnualReport_web.pdf).

<sup>16</sup> The World Bank Group is made up of two development institutions owned by 187 member countries — the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA).

<sup>17</sup> See <http://www.oecd.org/dataoecd/59/13/1898632.pdf> (listing parties and ratification dates).

<sup>18</sup> See OECD Convention, Art. 1, § 1. The full English text of the Convention is *available at* <http://www.oecd.org/dataoecd/4/18/38028044.pdf>.

<sup>19</sup> See *id.* § 2.

<sup>20</sup> See *id.* § 8.

Highlights from the Working Group on Bribery enforcement data collected as of May 2010 include<sup>21</sup>:

- 148 individuals and 77 entities have been sanctioned under criminal proceedings for foreign bribery in 13 Parties between the time the Convention entered into force in 1999 and the end of 2009.
- At least 40 of the sanctioned individuals were sentenced to prison for foreign bribery.
- Approximately 280 investigations are ongoing in 21 Parties to the Anti-Bribery Convention.

## 2. The United Nations Convention Against Corruption

On October 31, 2003, the UN General Assembly adopted the UN Convention Against Corruption, an international accord which entered into force on December 14, 2005.<sup>22</sup> The Convention covers a broad range of topics relating to the task of combating corruption, including the bribery of domestic public officials, commercial bribery, money laundering, and embezzlement. In addition, the Convention, like the FCPA, condemns the practice of bribing foreign public officials, and calls on parties to establish criminal offenses prohibiting the intentional offer, promise or extension of any “undue advantage” to a “foreign public official or an official of a public international organization” in order to induce the official to act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.<sup>23</sup> The UN Convention also calls on parties to prohibit the keeping of off-the-books accounts and accounting falsification, thus mirroring the FCPA’s books and records provisions.<sup>24</sup> And in another echo of the FCPA, the Convention requires on parties to extend jurisdiction over offenses committed within its territory, and provides that they may exercise jurisdiction over any violation committed by any “national” or “habitual resident” of the signatory. All told, these provisions so substantially adopt the FCPA’s model of combating foreign bribery that the Justice Department took the position before Congress that “[t]he Convention effectively requires all States Parties to adopt a “Foreign Corrupt Practices Act” of their own.”<sup>25</sup>

Judge Sporkin has additionally suggested the establishment of a country-by-country list of agents that have been vetted and audited by an independent international auditing group. Each country would require that the agents on the list agree to certain restrictions (e.g. avoid using proceeds to pay any member of government or other third party to obtain business, cooperate in any investigation by U.S. and international authorities) and countries would only allow the use of such approved local agents. This would provide transparency and accountability and directly

<sup>21</sup> See [http://www.oecd.org/document/3/0,3343,en\\_2649\\_34859\\_45452483\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/3/0,3343,en_2649_34859_45452483_1_1_1_1,00.html).

<sup>22</sup> See [http://www.unodc.org/unodc/crime\\_convention\\_corruption.html](http://www.unodc.org/unodc/crime_convention_corruption.html). The full text of the UN Convention is available at [http://www.unodc.org/pdf/crime/convention\\_corruption/signing/Convention-e.pdf](http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf).

<sup>23</sup> See UN Convention, Art. 16, §1.

<sup>24</sup> See UN Convention, Art. 12, § 3.

<sup>25</sup> See Statement of Bruce C. Swartz, Deputy Assistant Attorney General, Before the Committee on Foreign Relations of the United States Senate, June 21, 2006, available at <http://www.senate.gov/~foreign/testimony/2006/SwartzTestimony060621.pdf>.



target one of the most important conduits for FCPA violations – the use of agents. Additionally, the international auditing group would evaluate each contract to determine whether the contract was awarded fairly and “listed governments” would be incentivized to participate by gaining eligibility to obtain certain benefits from the World Bank and other world financial institutions as well as the countries where the contracting companies are themselves domiciled.

#### **Conclusion**

Companies are actively trying to comply with the FCPA by implementing and improving compliance programs. We need to encourage companies to continue to engage in proactive and preemptive action. An emphasis on global cooperation and efforts toward a limited amnesty program will create the necessary incentives to combat corrupt activity. Companies are willing to undertake timely, costly and international internal investigations, but they need to do so in an environment that allows them to have predictability with respect to the government’s subsequent actions.

Again, I thank the Chairman and Ranking Member and I look forward to answering any questions that Members of the Subcommittee may have.

## Written Testimony

*United States Senate Subcommittee on Crime and Drugs of the Committee on the Judiciary*  
**“Examining Enforcement of the Foreign Corrupt Practices Act”**  
 November 30, 2010

**Mr. Andrew Weissmann**

Partner, Jenner & Block LLP on behalf of the United States Chamber of Commerce and the U.S. Chamber Institute for Legal Reform

Good morning Chairman Specter, Ranking Member Graham, and members of the Committee and staff. I am Andrew Weissmann, a partner at the law firm of Jenner & Block in New York. I served for 15 years as an Assistant United States Attorney in the Eastern District of New York and had the privilege to represent the United States as the Director of the Department of Justice’s Enron Task Force and Special Counsel to the Director of the FBI. I also am an adjunct Professor of Law at Fordham Law School, where I teach Criminal Procedure. I am here testifying today on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform. The U.S. Chamber of Commerce is the world’s largest business federation, representing the interests of 3 million businesses and organizations of every size, sector, and region. The U.S. Chamber Institute for Legal Reform was founded in 1998, to make the nation’s legal system simpler, fairer and faster for everyone.

Over three decades after the Foreign Corrupt Practices Act (“FCPA”) was enacted the justifications for the FCPA still ring true: Corrupt business transactions are unethical and undermine public confidence in the free market system, both here and abroad. When Congress proposed the bills that would become the FCPA in 1977, it repeatedly made the case that strong anti-bribery legislation would benefit the business community. The House Report listed a host of ways in which foreign bribery harms American businesses - it erodes public confidence in the integrity of the free market system, rewards corruption instead of efficiency, and creates foreign policy problems.<sup>1</sup> The report posited that a strong anti-bribery law “would actually help U.S. corporations resist corrupt demands.”<sup>2</sup>

I am here today not to take issue with the basic premise of the FCPA, as I believe such statements are as true now as they were when the FCPA was first introduced. Instead, I wish to suggest a number of concrete improvements to the statute, which was enacted quickly, that will allow businesses operating in today’s environment to have a clear understanding of what is and is not a violation of the FCPA. In short, the experience with the FCPA for the past 30 years has revealed ways in which it can be improved.

It is clear that the FCPA has recently become a favored tool of law enforcement. While there were only three open FCPA investigations in 2002, there were 120 such

<sup>1</sup> See H.R. Rep. No. 95-640, at 4-5 (1977).

<sup>2</sup> *Id.*

investigations pending at the end of 2009 -- a forty-fold increase.<sup>3</sup> The increased attention has even led this past year to the use of a "sting" operation to capture 22 company executives allegedly agreeing to pay bribes to an FBI undercover agent posing as a foreign official.<sup>4</sup> Such an operation is part of the government's devoting significant new resources to FCPA enforcement actions. In 2009, for example, the Securities and Exchange Commission ("SEC") created a new Foreign Corrupt Practices Unit,<sup>5</sup> and the Department of Justice's ("DOJ") top anti-corruption prosecutor recently stated that it planned to continue to focus on FCPA enforcement and that the DOJ Fraud Section "could grow by as much as 50%" in 2010 and 2011.<sup>6</sup>

In spite of this rise in enforcement and investigatory action, judicial oversight and rulings on the meaning of the provisions of the FCPA are still minimal.<sup>7</sup> Commercial organizations are rarely positioned to litigate an FCPA enforcement action to its conclusion, and the risk of serious jail time for individual defendants has led most to plead. Thus, the primary statutory interpretive function is still being performed almost exclusively by the DOJ Fraud Section and the SEC. Many commentators have expressed concern that the DOJ thus effectively serves as both prosecutor and judge in the FCPA context, because the Department both brings FCPA charges and effectively controls the

<sup>3</sup> See Russell Gold & David Crawford, U.S., *Other Nations Step Up Bribery Battle*, WALL ST. J., Sep. 12, 2008, at B1; Dionne Searcey, *U.S. Cracks Down on Corporate Bribes*, WALL ST. J., May 26, 2009, at A1.

<sup>4</sup> See Press Release, Department of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme, (January 19, 2010), available at <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html>.

<sup>5</sup> See Robert Khuzami, Director, Division of Enforcement, Securities and Exchange Commission, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (August 5, 2009), available at <http://www.sec.gov/news/speech/2009/spch080509rk.htm> ("The Foreign Corrupt Practices Act unit will focus on new and proactive approaches to identifying violations of the Foreign Corrupt Practice Act ... While we have been active in this area, more needs to be done, including being more proactive in investigations, working more closely with our foreign counterparts, and taking a more global approach to these violations.")

<sup>6</sup> David Hechler, *DOJ UNIT That Prosecutes FCPA to Bulk Up 'Substantially,'* CORPORATE COUNSEL (February 26, 2010), [http://www.law.com/jsp/article.jsp?id=1202444612530&pos=atagance&src=EMC-Email&et=editorial&bu=Law.com&pt=LAWCOM%20Newswire&cn=NW\\_20100226&kw=DOJ%20Unit%20That%20Prosecutes%20FCPA%20to%20Bulk%20Up%20%27Substantially%27](http://www.law.com/jsp/article.jsp?id=1202444612530&pos=atagance&src=EMC-Email&et=editorial&bu=Law.com&pt=LAWCOM%20Newswire&cn=NW_20100226&kw=DOJ%20Unit%20That%20Prosecutes%20FCPA%20to%20Bulk%20Up%20%27Substantially%27).

<sup>7</sup> James C. Morgan, *Deferred Prosecution Agreements: Recent Justice Department Guidance*, Manufacturers Alliance/MAPI e-Alert E-466, Apr. 2, 2008.

disposition of the FCPA cases it initiates.<sup>8</sup> Or, as my fellow panelist has stated, “the FCPA means what the enforcement agencies say it means.”<sup>9</sup>

The FCPA had been tailored to balance various competing interests, but that balance has been altered, at times, by aggressive application and interpretations of the statute by the government. Instead of serving the original intent of the statute, which was to punish companies that participate in foreign bribery, actions taken under more expansive interpretations of the statute may ultimately punish corporations whose connection to improper acts is attenuated at best and nonexistent at worst.

The result is that the FCPA, as it currently written and implemented, leaves corporations vulnerable to civil and criminal penalties for a wide variety of conduct that is in many cases beyond their control and sometimes even their knowledge. It also exposes businesses to predatory follow-on civil suits that often get filed in the wake of a FCPA enforcement action.<sup>10</sup> In fact, there is reason to believe that the FCPA has made U.S. businesses less competitive than their foreign counterparts who do not have significant FCPA exposure.<sup>11</sup> Critics of the FCPA have also argued that ambiguous areas of the law, where what is permitted may not be clear, have had a chilling effect on U.S. business because many companies have ceased foreign operations rather than face the uncertainties of FCPA enforcement.<sup>12</sup>

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<sup>8</sup> Kevin M. King and William M. Sullivan, *Vigorous FCPA Enforcement Reflects Pursuit of Foreign Bribery*, 5(3) ATLANTIC COAST IN-HOUSE 19, March 2008 (discussing how in 2007, of the 11 enforcement actions the DOJ took against corporations, seven were resolved entirely through either a deferred prosecution agreement or a non-prosecution agreement).

<sup>9</sup> Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 Ind. L. Rev. 389, 410 (2010).

<sup>10</sup> Hanna Hasl-Kelchner, *International Business: How a FCPA Violation Can Morph Criminal Liability into Civil Liability*, ALL BUSINESS, Aug. 28, 2009.

<sup>11</sup> See P. Beck et al., *The Impact of the Foreign Corrupt Practices Act on US Exports*, 12 MANAGERIAL AND DECISION ECON. 295 (1991); Scott P. Boylan, *Organized Crime in Russia: Implications for U.S. and International Law*, 19 FORDHAM INT’L L.J. 1999, 2015-2022 (1996); John Bray, *International Business Attitudes Toward Corruption*, GLOBAL CORRUPTION REPORT 316 (2004). In a 1999 report to Congress authored by the Congressional Research Service (“CRS”), a division of the Library of Congress that provides nonpartisan analysis on current legislative issues, it was estimated that the FCPA’s anti-bribery provisions have cost up to \$1 billion annually in lost U.S. export trade. Michael V. Seitzinger, Cong. Research Serv., RL 30079, Foreign Corrupt Practices Act (Mar. 3, 1999).

<sup>12</sup> *Id.*

Of course, the solution to this problem is not to do away with the FCPA. Rather, the FCPA should be modified to make clear what is and what is not a violation. The statute should take into account the realities that confront businesses that operate in countries with endemic corruption (e.g., Russia, which is consistently ranked by Transparency International as among the most corrupt in the world) or in countries where many companies are state-owned (e.g., China) and it therefore may not be immediately apparent whether an individual is considered a “foreign official” within the meaning of the act. As the U.S. government has not prohibited U.S. companies from engaging in business in such countries, a company that chooses to engage in such business faces unique hurdles. The FCPA should incentivize the company to establish compliance systems that will actively discourage and detect bribery, but should also permit companies that maintain such effective systems to avail themselves of an affirmative defense to charges of FCPA violations. This is so because in such countries even if companies have strong compliance systems in place, a third-party vendor or errant employee may be tempted to engage in unauthorized acts that violate the business’s explicit anti-bribery policies.

It is unfair to hold a business criminally liable for behavior that was neither sanctioned by or known to the business. The imposition of criminal liability in such a situation does nothing to further the goals of the FCPA; it merely creates the illusion that the problem of bribery is being addressed, while the parties that actually engaged in bribery often continue on, undeterred and unpunished. The FCPA should instead encourage businesses to be vigilant and compliant.

For this reason, and given the current state of enforcement, the FCPA is ripe for much needed clarification and reform through improvements to the existing statute. Today I will discuss five improvements that are aimed at providing more certainty to the business community when trying to comply with the FCPA, while promoting efficiency, and enhancing public confidence in the integrity of the free market system as well as the underlying principles of our criminal justice system. They are:

- (1) Adding a compliance defense;
- (2) Defining a “foreign official” under the statute.
- (3) Adding a “willfulness” requirement for corporate criminal liability;
- (4) Limiting a company’s liability for the prior actions of a company it has acquired;  
and
- (5) Limiting a company’s liability for acts of a subsidiary.

#### 1. Adding The Compliance Defense Recognized By The United Kingdom And Others

The FCPA does not currently provide a compliance defense; that is, a defense that would permit companies to fight the imposition of criminal liability for FCPA violations, if the individual employees or agents had circumvented compliance measures that were

otherwise reasonable in identifying and preventing such violations. A company can therefore currently be held liable for FCPA violations committed by its employees or subsidiaries even if the company has a first-rate FCPA compliance program. Certain benefits may currently accrue to companies that have strong FCPA compliance programs – the DOJ or SEC may decide to enter a non-prosecution or deferred prosecution agreement with such companies if violations are uncovered, for example,<sup>13</sup> and such compliance systems can be taken into account at sentencing.<sup>14</sup> However, such benefits are subject to unlimited prosecutorial discretion, are available only after the liability phase of a FCPA prosecution, or both.

By contrast, the comprehensive Bribery Act of 2010 recently passed by the British Parliament – Section 6 of which addresses bribes of foreign officials and closely tracks the FCPA – provides a specific defense to liability if a corporate entity can show that it has “adequate procedures” in place to detect and deter improper conduct.<sup>15</sup> In September 2010, U.K.’s Ministry of Justice provided initial guidance on what may constitute such “adequate procedures”<sup>16</sup> sufficient to qualify for the defense.<sup>17</sup>

<sup>13</sup> See Principles of Federal Prosecution of Business Organizations, Title 9, Chapter 9-28.000, UNITED STATES ATTORNEY’S MANUAL, *available at* [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/28mcr.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcr.htm) (decision whether to charge). While evidence of a strong compliance program may help a corporation reach a non-prosecution or deferred prosecution agreement in connection with FCPA charges, the government has complete discretion as to how much credit to give for such a program. Thus, a corporation may still find that it is pressured to give up certain rights or to accept certain punishments in order to achieve what is not only a desired, but a fair, outcome. See, e.g., Gerald E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 59 (1997).

<sup>14</sup> See U.S.S.G. § 8B2.1.

<sup>15</sup> See Bribery Act of 2010, ch. 23, § 7(2) (U.K.).

<sup>16</sup> Section 9 of the Act requires the Secretary of State to publish and then solicit comments on such guidance. Bribery Act of 2010, ch. 23 § 9 (U.K.). The comment period runs until November 8, 2010.

<sup>17</sup> While this feature of the Bribery Act is laudable, other aspects of the Act are more troubling. For example, unlike the FCPA, the Act does not permit any exception for facilitation payments. See Iris E. Bennett, Jessie K. Liu and Cynthia J. Robertson, *U.K. Enacts Bribery Act 2010 As A Major Foreign Bribery Legislative Reform*, Jenner & Block White Collar Defense and Investigations Practice Advisory, May 20, 2010, *available at* [http://www.jenner.com/files/tbl\\_s20Publications%5CRelatedDocumentsPDFs1252%5C2998%5CU%20K%20%20Enacts%20Bribery%20Act%202010%20As%20A%20Major%20Foreign%20Bribery%20Legislative%20Reform\\_05-20-10.pdf](http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C2998%5CU%20K%20%20Enacts%20Bribery%20Act%202010%20As%20A%20Major%20Foreign%20Bribery%20Legislative%20Reform_05-20-10.pdf). It also criminalizes “commercial bribery” – that is, payments not to a foreign official, but to a business

In 2001, the Italian government also passed a statute that proscribes foreign bribery.<sup>18</sup> Like the UK Anti-Bribery bill, it contains a compliance defense. Articles 6 and 7 of the statute permit a company to avoid liability if it can demonstrate that, before employees of the company engaged in a specific crime (*e.g.*, bribery), it (1) adopted and implemented a model of organization, management and control (the “Organizational Model”) designed to prevent that crime, (2) engaged an autonomous body to supervise and approve the model, and (3) the autonomous body adequately exercised its duties.<sup>19</sup>

The principles embodied in the British and Italian laws closely track the factors currently taken into consideration by courts in the United States only at a very different phase of the criminal process, namely when considering whether a corporation should have a slight reduction in its culpability score when sentencing it for FCPA or other violations.<sup>20</sup> These principles – which Congress and the Sentencing Commission have already identified as key indicators of a strong and effective compliance program – should be considered instead during the liability phase of an FCPA prosecution.<sup>21</sup> The adoption of such a compliance defense will not only increase compliance with the FCPA by providing businesses with an incentive to deter, identify, and self-report potential and existing violations, but will also protect corporations from employees who commit crimes despite a corporation’s diligence. And it will give corporations some measure of protection from aggressive or misinformed prosecutors, who can exploit the power imbalance inherent in the current FCPA statute – which permits indictment of a corporation even for the acts of a single, low-level rogue employee – to force corporations into deferred prosecution agreements.<sup>22</sup>

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partner or associate for “financial or other advantage” – without clearly defining what “financial or other advantage” means. Bribery Act of 2010, ch. 23 § 1, 2 (U.K.).

<sup>18</sup> Legislative Decree no. 231 of 8 June 2001; *see also Italian Law No. 231/2001: Avoiding Liability for Crimes Committed by a Company's Representatives*, McDermott, Will & Emery, April 27, 2009, *available at* <http://www.mwe.com/info/news/wp0409f.pdf>. The statute proscribes a variety of criminal activity, including foreign bribery.

<sup>19</sup> *See id.*

<sup>20</sup> *See* U.S.S.G. § 8B2.1.

<sup>21</sup> There is evidence that Congress may be open to such a proposal. In 1988, the United States House of Representatives proposed adding a similar “safe harbor” to the FCPA, which would have shielded companies that established procedures that were “reasonabl[y] expected to prevent and detect” FCPA violations from vicarious liability for FCPA violations of employees. *See* H.R. Conf. Rep. on H.R. 3, 100th Cong., 2d Sess. 916, 922 (1988).

<sup>22</sup> *See* Andrew Weissmann, Richard Ziegler, Luke McLoughlin & Joseph McFadden, *Reforming Corporate Criminal Liability to Promote Responsible Corporate Behavior*,

In addition, institution of a compliance defense will bring enforcement of the FCPA in line with Supreme Court precedent, which has recognized that it is appropriate and fair to limit *respondeat superior* liability where a company can demonstrate that it took specific steps to prevent the offending employee's actions. See, e.g., *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999). The Court concluded in *Kolstad* that, in the punitive damages context, "an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.'" *Id.* at 545. This holding was motivated by a concern that the existing standard was "dissuading employers from implementing programs or policies to" comply with Title VII for fear that such programs would bring to light violations for which a company would ultimately be liable, no matter what steps it had undertaken to prevent such violations. *Id.* at 544-45. Here, companies may similarly be dissuaded from instituting a rigorous FCPA compliance program for fear that such a program will serve only to expose the company to increased liability, and will do little to actually protect the company. An FCPA compliance defense will help blunt some of these existing "perverse incentives." *Id.* at 545.<sup>23</sup>

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U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (Oct. 2008), available at [http://www.instituteforlegalreform.com/component/tilr\\_issues/29.html](http://www.instituteforlegalreform.com/component/tilr_issues/29.html).

<sup>23</sup> See also Andrew Weissmann with David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L. J. 411, 432-33 (2007) (describing the lack of incentive for corporations "to implement effective compliance programs" given that "[u]nder the current legal regime, a corporation is given no benefit at all under the law for even the best internal compliance program if such crime nevertheless occurs"). Numerous judges, former and current prosecutors, and legislative counsel have criticized the current system. See, e.g., Preet Bharara, *Corporations Cry Uncle and their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53 (2007); Edwin Meese III, *Closing Commentary on Corporate Criminal Liability: Legal, Ethical, and Managerial Implications*, AM. CRIM. L. REV. 1545 (2007); George J. Terwilliger III, *Under-Breaded Shrimp and Other High-Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 AM. CRIM. L. REV. 1417 (2007); Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes*, AM. CRIM. L. REV. 1279 (2007); Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319 (2007); Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23 (1997); Hon. Lewis A. Kaplan, Remarks to the New York State Bar Association: Should We Reconsider Corporate Criminal Liability? (Jan. 24, 2007), available at [http://nysbar.com/blogs/comfed/2007/06/should\\_we\\_reconsider\\_corporate.html](http://nysbar.com/blogs/comfed/2007/06/should_we_reconsider_corporate.html).

The critique from scholars and practitioners has also been persistent and compelling. See, e.g., Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994); Kathleen F. Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593 (1988); H. Lowell Brown, *Vicarious Criminal Liability of Corporations for the Acts of Their*



## 2. Clarifying the Definition of “Foreign Official”

Another ambiguity in the FCPA that requires clarity is the definition of “foreign official” in the anti-bribery provisions. The statute defines – unhelpfully – a “foreign official” as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization,<sup>24</sup> or any person acting in an official capacity for or on behalf of any such government or department, agency, or

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*Employees and Agents*, 41 LOY. L. REV. 279, 324 (1995); Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Criminal Liability*, 75 MINN. L. REV. 1095 (1991); Pamela H. Bucy, *Trends in Corporate Criminal Prosecutions*, 44 AM. CRIM. L. REV. 1287 (2007); John C. Coffee, Jr., “No Soul To Damn: No Body To Kick”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981); John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996); Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY L. REV. 468 (1988); Richard S. Gruner & Louis M. Brown, *Organizational Justice: Recognizing and Rewarding the Good Citizen Corporation*, 21 J. CORP. L. 731 (1996); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996); V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355 (1999); Bruce H. Kobayashi, *Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, 69 GEO. WASH. L. REV. 715 (2001); William S. Laufer & Alan Strudler, *Corporate Crime and Making Amends*, AM. CRIM. L. REV. 1307 (2007); Craig S. Lerner & Moin A. Yahya, *Left Behind After Sarbanes-Oxley*, 44 AM. CRIM. L. REV. 1383 (2007); Geraldine Szott Moohr, *Of Bad Apples and Bad Trees: Considering Fault-Based Liability for the Complicit Corporation*, 44 AM. CRIM. L. REV. 1343 (2007); Ellen S. Podgor, *A New Corporate World Mandates a “Good Faith” Affirmative Defense*, AM. CRIM. L. REV. 1537 (2007); Paul H. Robinson, *The Practice of Restorative Justice: The Virtues of Restorative Process, the Vices of “Restorative Justice,”* 2003 UTAH L. REV. 375, 384-85; Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Shield to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS L. REV. 605, 689 (1995); Bruce Coleman, Comment, *Is Corporate Criminal Liability Really Necessary?*, 29 SW. L.J. 908, 927 (1975); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction*, 92 HARV. L. REV. 1227 (1979); John Baker, *Corporations Aren’t Criminals*, WALL ST. J., Apr. 22, 2002, at A3.

<sup>24</sup> A “public international organization” is “(i) an organization that has been designated by Executive Order pursuant to Section 1 of the International Organizations Immunities Act (22 U.S.C. § 288), or (ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.” 15 U.S.C. §§ 78dd-1(f)(1)(B), 2(h)(2)(B), 3(f)(2).

instrumentality, or for or on behalf of any such public international organization.”<sup>25</sup> The text of the statute does not, however, define “instrumentality”; it is therefore unclear what types of entities are “instrumentalit[ies]” of a foreign government such that their employees will be considered “foreign officials” for purposes of the FCPA.

Consider this: is a payment to a professor to speak at a conference for prospective clients an FCPA violation? What if the professor works at a university that receives public grants or is state run? What if the professor works for a Chinese company that is owned in part by the state? Since the FCPA statute on its face does not indicate that these situations are beyond its reach, and there is no requirement that the company know it is violating the FCPA or even acting wrongly, the DOJ or the SEC could prosecute a company for engaging in such actions. Are these far-fetched examples? The real life examples below suggest not.

The DOJ and SEC have provided no specific guidance on what sorts of entities they believe qualify as “instrumentalities” under the FCPA. However, their enforcement of the statute makes it clear that they interpret the term extremely broadly, and that this interpretation sweeps in payments to companies that are state-owned or state-controlled. Once an entity is defined as an “instrumentality”, all employees of the entity – regardless of rank, title or position – are considered “foreign officials.” And although the government’s expansive interpretation of “instrumentality” has not yet been tested in the courts and is unlikely to be tested in the near future, this interpretation has served as a component in the majority of current FCPA enforcement actions; by one estimate, nearly fully two-thirds of enforcement actions brought against corporations in 2009 involved the enforcement agencies’ interpretation of the “foreign official” element to include employees of state-owned entities.<sup>26</sup>

The following are examples of instances where the government has pursued FCPA violations predicated on an expansive reading of what sorts of entities are “instrumentalities” of a foreign government:

- **Control Components, Inc.** - In 2009, the DOJ and SEC brought actions against Control Components, Inc. for payments totaling approximately \$4.9 million over four years to a variety of entities in China, Malaysia, South Korea and the United Arab Emirates. Among those entities were companies that the government defined as Chinese “state-owned customers.”<sup>27</sup> In the criminal information filed against Control Components, the DOJ stated summarily that “[t]he officers and

<sup>25</sup> 15 U.S.C. §§ 78dd-1(f)(1), 78dd-2(h)(2)(A), 78dd-3(f)(2).

<sup>26</sup> See Koehler, 43 IND. L. REV. at 411-13.

<sup>27</sup> Criminal Information, *United States v. Control Components Inc.*, No. SACR09-00162 (C.D. Cal. Jul. 28, 2009), available at [http://www.justice.gov/criminal/pr/press\\_releases/2009/07/07-31-09control-guilty-information.pdf](http://www.justice.gov/criminal/pr/press_releases/2009/07/07-31-09control-guilty-information.pdf).

employees of these entities, including but not limited to the Vice-Presidents, Engineering Managers, General Managers, Procurement Managers, and Purchasing Officers, were ‘foreign officials’ within the meaning of the FCPA.”<sup>28</sup>

- **Lucent Technologies** – In 2007, the SEC charged Lucent with violations of the books-and-records and internal control provisions of the FCPA in connection with hundreds of trips that Lucent had financed for employees of some of its Chinese customers.<sup>29</sup> The SEC alleged that financing the trips constituted improper conduct under the FCPA because “many of Lucent’s Chinese customers were state-owned or state-controlled companies that constituted instrumentalities of the government of China and whose employees, consequently, were foreign officials under the FCPA.”<sup>30</sup>
- **Baker Hughes** – In 2007, the SEC and DOJ brought actions against Baker Hughes and its subsidiaries for, *inter alia*, payments made to a company called Kazakhoil. The government claimed that the payments constituted violations of the FCPA because Kazakhoil was an “instrumentality” of a foreign government as it was “controlled by officials of the Government of Kazakhstan,” making its officers and employees “foreign officials.”<sup>31</sup>

As these examples illustrate, the government has interpreted “instrumentality” in the FCPA to encompass entities that are directly owned or controlled by a foreign government (the Lucent Technologies and Control Components cases) and entities that are controlled by members of a foreign government (the Baker Hughes case). The latter effectively sweeps in entities that are only tangentially related to a foreign government, with sometimes absurd results. Taken to its logical conclusion, the government’s position means that – if the United States were a foreign government – employees of General Motors or AIG could be considered “foreign officials” of the United States government, because the government owns portions of the company; so could employees of Bloomberg Media, 85% of which is owned by a government official (the Mayor of New York City, Mike Bloomberg).

The government’s approach to what companies qualify as “instrumentalities” of foreign governments injects uncertainty and raises U.S. government barriers against American businesses seeking to sell their goods and services abroad in an ever-increasing global marketplace. Without an understanding of what companies are considered

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<sup>28</sup> *Id.*

<sup>29</sup> See Complaint, *S.E.C. v. Lucent Technologies*, C.A. No. 07-2301, (D.D.C. Dec. 21, 2007), available at <http://www.sec.gov/litigation/complaints/2007/comp20414.pdf>.

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

<sup>31</sup> Criminal Information, *United States v. Baker Hughes Inc.*, No. H-07-129 (S.D. Tex. Apr. 11, 2007).

“instrumentalities,” companies have no way of knowing whether the FCPA applies to a particular transaction or business relationship, particularly in countries like China where most if not all companies are either partially or entirely owned or controlled by the state. The FCPA should therefore be modified to include a clear definition of “instrumentality.” Such a definition could indicate the percentage ownership by a foreign government that will qualify a corporation as an “instrumentality”; whether ownership by a foreign official necessarily qualifies a company as an instrumentality and, if so, whether the foreign official must be of a particular rank or the ownership must reach a certain percentage threshold; and to what extent “control” by a foreign government or official will qualify a company as an “instrumentality.”

### 3. Adding a “Willfulness” Requirement for Corporate Criminal Liability

There is an anomaly in the current FCPA statute: although the language of the FCPA limits an individual’s liability for violations of the anti-bribery provisions to situations in which she has violated the act “willfully,” it does not contain any similar limitation for corporations.<sup>32</sup> This omission substantially extends the scope of corporate criminal liability – as opposed to individual liability – since it means that a company can face criminal penalties for a violation of the FCPA even if it (and its employees) did not know that its conduct was unlawful or even wrong. *See, e.g., Bryan v. United States*, 524 U.S. 184, 191-92 (1998) (under a “willfulness” standard, the government must “prove that the defendant acted with knowledge that his conduct was unlawful”) (internal citation and quotation omitted). In other words, the absence of a “willful” requirement opens the door for the government to threaten corporations – but not individuals through whom they act – with what is tantamount to strict liability for improper payments under the anti-bribery provisions of the act. Given that corporations are by their very nature at least one step removed from conduct that runs afoul of the anti-bribery provisions than the individuals who actually commit improper acts, it is only fair to – at the very least – hold the corporate entity to the same level of *mens rea* as individuals for such acts. Indeed, since the corporation can only be liable if an individual for whom the corporation is liable (typically an employee) has committed the criminal act, it should not be possible to convict a corporation unless the employee is liable. Such individual liability requires willful conduct; so should corporate liability.

<sup>32</sup> 15 U.S.C. § 78dd-3(a)(2). The anti-bribery provisions do contain a requirement that conduct in furtherance of an improper payment must be “corrupt” in order to constitute an FCPA violation, and this requirement applies to both corporate entities and to individuals. *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a). The statute does not define the word “corruptly,” but courts have consistently interpreted it to mean an act that is done “voluntarily and intentionally, and with a bad purpose.” *See, e.g., United States v. Kay*, 513 F.3d 461, 463 (5th Cir. 2008). However, the requirement that an individual’s conduct be “willful” in addition to “corrupt” adds another layer of intent; namely, it requires a showing that not only was the act in question made with a bad purpose, but with the knowledge that conduct was unlawful. *Id.* at 449-50; *see also* Jenner FCPA Treatise at 1-20.

Adding a willfulness requirement will also ameliorate another unfairness in the FCPA statute. Permitting a corporation to be criminally punished for improper acts of its subsidiaries that it has no knowledge of runs counter to the intent of the drafters of the FCPA. Nothing in the legislative history suggests that the statute was intended to allow a parent corporation to be charged with criminal violations of the anti-bribery provisions by another company, even a subsidiary, if it had no knowledge of improper payments. At most, the drafters indicated that if a parent company's ignorance of the actions of a foreign subsidiary was a result of conscious avoidance, or "looking the other way," that such parent "could be in violation of section 102 requiring companies to devise and maintain adequate accounting controls."<sup>33</sup>

Furthermore, because the federal government has construed its FCPA jurisdiction to cover acts that have nothing more than a tangential connection to the United States,<sup>34</sup> the lack of a "willful" requirement means that corporations can potentially be held criminally liable for anti-bribery violations in situations where they not only do not have knowledge of the improper payments, but also do not even know that American law is applicable to the actions in question. In such a case, the parent corporation could be charged with violations of the anti-bribery provisions, even if it was unaware that the FCPA could reach such payments. For example, in connection with the Siemens case, the DOJ separately charged a Siemens subsidiary in Bangladesh with conspiracy to violate the FCPA, predicated in part on payments that occurred outside of the United States and that solely involved foreign entities; the DOJ's jurisdictional hook for those payments was that some of the money connected to the transactions had passed at some point through

<sup>33</sup> See S. Rep. No. 95-114, at 11 (1977).

<sup>34</sup> The government's increasingly broad interpretation of the jurisdictional reach of the FCPA is another example of how the DOJ and SEC have aggressively pushed enforcement of the FCPA. In addition to the Siemens case discussed *supra*, the government charged BAE Systems, a British company, with FCPA violations based on the possible use of U.S. bank accounts to make improper payments; against DPC Tianjin, a Chinese subsidiary of an American company, because certain improper payments were reflected in a budget that was at one point emailed to the American parent; and against SSI International Far East ("SSIFE"), a Korean subsidiary of an American company, and individual employees of SSIFE who were foreign citizens, because requests related to certain improper payments were "transmitted" to people located in the United States. See Press Release, Department of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine (Mar. 1, 2010), *available at* <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html>; Press Release, Department of Justice, DPC (Tianjin) Ltd. Charged With Violating the Foreign Corrupt Practices Act (May 20, 2005), *available at* [http://www.justice.gov/opa/pr/2005/May/05\\_crm\\_282.htm](http://www.justice.gov/opa/pr/2005/May/05_crm_282.htm); and Press Release, Department of Justice, Former Senior Officer of Schnitzer Steel Industries Inc. Subsidiary Pleads Guilty to Foreign Bribes (Jun. 29, 2007), *available at* [http://www.justice.gov/opa/pr/2007/June/07\\_crm\\_474.html](http://www.justice.gov/opa/pr/2007/June/07_crm_474.html).

American bank accounts.<sup>35</sup> But given that any back-office wire that crosses into the United States can be cited by the United States as a basis for application of the FCPA, a defendant can be convicted although completely unaware that her conduct would or could violate American law.<sup>36</sup>

For all these reasons, the “willfulness” requirement should be extended to corporate liability, at the very least to the anti-bribery provisions. This statutory modification would significantly reduce the potential for American companies to be criminally sanctioned for anti-bribery violations, particularly those of which the company had no direct knowledge or for which the company could not have anticipated that American law would apply. The statute should also preclude unknowing *de minimus* contact with the United States as a predicate for jurisdiction: the defendant should either have to know of such contact or the contact, if unknown, should have to be substantial and meaningful to the bribery charged (and thus foreseeable).

#### 4. Limiting a Company’s Successor Criminal FCPA Liability for Prior Acts of a Company it Has Acquired

Under the current enforcement regime, a company may be held criminally liable under the FCPA not only for its own actions, but for the actions of a company that it acquires or becomes associated with via a merger – even if those acts took place prior to the acquisition or merger and were entirely unknown to the acquiring company.<sup>37</sup> Such a standard of criminal liability is generally antithetical to the goals of the criminal law, including punishing culpable conduct or deterring offending behavior. While a company may mitigate its risk by conducting due diligence prior to an acquisition or merger (or, in

<sup>35</sup> See Criminal Information, *United States v. Siemens Bangladesh Limited*, Cr. No. 08-369-RJL (D.D.C Dec. 12, 2008), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/siemensbangla-info.pdf>.

<sup>36</sup> This is problematic because it is another way a corporation may be held liable without the government needing to prove that the corporation acted with the requisite criminal intent. See, e.g., Brian Walsh and Tiffany Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*, THE HERITAGE FOUNDATION AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (May 5, 2010), available at [http://s3.amazonaws.com/thf\\_media/2010/pdf/WithoutIntent\\_lo-res.pdf](http://s3.amazonaws.com/thf_media/2010/pdf/WithoutIntent_lo-res.pdf) (advocating for meaningful *mens rea* requirements as an essential protection against unjust convictions).

<sup>37</sup> See, e.g., Department of Justice FCPA Opinion Procedure Release No. 03-01 (Jan. 15, 2003), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2003/0301.pdf> (advising that a company that conducted due diligence on a target company and self-reported any violations that took place pre-acquisition may be able to escape criminal and/or civil successor liability, thereby suggesting that successor liability was a viable theory of liability under the FCPA).

certain circumstances, immediately following an acquisition or merger),<sup>38</sup> that does not constitute a legal defense if a matter nevertheless arises that was not detected. Thus, even when an acquiring company has conducted exhaustive due diligence and immediately self-reported the suspected violations of the target company, it is still currently legally susceptible to criminal prosecution and severe penalties.

A. The Problem of Successor Liability

The DOJ appears to have first stated its position that a company can be subject to criminal successor liability under the FCPA in an opinion published in 2003.<sup>39</sup> In the years since, the government has continually reiterated that the one way companies can appeal to the government to exercise its discretion not to seek to impose criminal successor FCPA liability for pre-acquisition or pre-merger actions by a target company is rigorous due diligence accompanied by disclosure of any violations. For instance, in a 2006 speech given by then-Assistant Attorney General Alice Fisher, Fisher stressed that any company seeking to acquire a target company with overseas dealings should include as a component of its due diligence a search for indicators of FCPA violations, and that disregard of such indicators could lead to “successor liability” for the prior conduct of a target’s actions.<sup>40</sup>

The uncertainty about how much due diligence is sufficient, coupled with the threat of successor liability even if thorough due diligence is undertaken, have in recent years had a significant chilling effect on mergers and acquisitions. For example, Lockheed Martin terminated its acquisition of Titan Corporation when it learned about certain bribes paid by Titan’s African subsidiary that were uncovered during pre-closing due diligence; Lockheed Martin was simply unwilling to take on the risk of FCPA successor liability for those bribes.<sup>41</sup>

<sup>38</sup> See Department of Justice FCPA Opinion Procedure Release No. 08-02 (Jun. 13, 2008), *available at* <http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0802.html> (providing advice on proper post-acquisition due diligence in the rare situation where it was impossible for the acquiring company to perform due diligence on the target prior to acquisition).

<sup>39</sup> See Department of Justice FCPA Opinion Procedure Release No. 03-01 (Jan. 15, 2003).

<sup>40</sup> Alice S. Fisher, Assistant Attorney General, United States Department of Justice, Prepared Remarks at the American Bar Association National Institute on the Foreign Corrupt Practices Act (October 16, 2006), *available at* <http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf>.

<sup>41</sup> See Margaret M. Ayres and Bethany K. Hipp, *FCPA Considerations in Mergers and Acquisitions*, 1619 PLI/CORP 241, 249 (Sept. 17, 2007); *see also* SEC Litig. Rel. No. 19107, 2005 WL 474238 (Mar. 1, 2005), *available at* <http://404.gov/litigation/litreleases/lr19107.htm>.

Recent FCPA enforcement actions indicate that the government has moved beyond simply asking companies to look for FCPA violations of a target company during due diligence if those companies want to escape successor liability. For proof, one need only look to the DOJ's Opinion Procedure Release No. 08-02 ("Opinion 08-02"), in which the DOJ provided advice to a company inquiring about the necessary amount of post-acquisition due diligence on a target company required in a situation where pre-acquisition due diligence could not be undertaken. The DOJ required the company to conduct due diligence on a scale equivalent to a vast internal investigation in order to avoid prosecution by the DOJ for any FCPA violations previously committed by the target company.<sup>42</sup>

That potential for so-called criminal successor liability which animated Opinion 08-02 is real.

- **Alliance One** – Alliance One is an American tobacco company that was formed in 2005 with the merger of Dimon Incorporated ("Dimon") and Standard Commercial Corporation ("SCC"). Employees and agents of two foreign subsidiaries of Dimon and SCC committed FCPA violations before the merger.<sup>43</sup> In 2010, the DOJ brought a criminal case against Alliance One on a successor liability theory.<sup>44</sup> The DOJ ultimately entered a non-prosecution agreement with Alliance One, which requires Alliance One to cooperate with the DOJ's ongoing investigation and to retain an independent compliance monitor for a minimum of three years. (Alliance One also settled a related civil complaint brought by the SEC, and agreed to disgorge approximately \$10 million in profits).
- **Snamprogetti** – Snamprogetti was a wholly-owned Dutch subsidiary of a company called ENI S.p.A. From approximately 1994 to 2004, Snamprogetti

<sup>42</sup> See Department of Justice FCPA Opinion Procedure Release No. 08-02 (Jun. 13, 2008), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf>.

<sup>43</sup> See Press Release, Department of Justice, Alliance One International Inc. and Universal Corporation Resolve Related FCPA Matters Involving Bribes Paid to Foreign Government Officials (Aug. 6, 2010), available at <http://www.justice.gov/opa/pr/2010/August/10-crm-903.html>; see Press Release, Securities and Exchange Commission, SEC Files Anti-Bribery Charges Against Two Global Tobacco Companies (Aug. 6, 2010), available at <http://www.sec.gov/litigation/litreleases/2010/lr21618.htm>.

<sup>44</sup> See, e.g., Complaint, *Securities and Exchange Commission v. Alliance One International, Inc.*, Civil Action No. 01:10-cv-01319 (RMU) (D.D.C. Aug. 6, 2010), available at <http://www.sec.gov/litigation/complaints/2010/comp21618-alliance-one.pdf> (describing the merger in ¶ 1 of the Complaint, and then detailing the actions taken by the Dimon and SCC subsidiaries, which formed the basis for the charges against Alliance One).



participated in a complex and far-reaching bribery scheme.<sup>45</sup> In 2006, after the then-completed conduct was under investigation, ENI sold Snamprogetti to another company, Saipem S.p.A. Snamprogetti was charged with criminal violations of the FCPA in connection with the scheme in July 2010.<sup>46</sup> The DOJ ultimately reached a deferred prosecution agreement in connection with these charges; that agreement was between the DOJ, Snamprogetti, ENI and Saipem.<sup>47</sup> The agreement provides that Snamprogetti pay a \$240 million fine, for which ENI and Saipem are jointly and severally liable; that ENI, Snamprogetti and Saipem institute a corporate compliance program; and that the statute of limitations for any action against Snamprogetti, ENI and Saipem connected to the underlying facts in the matter will be tolled for the duration of the agreement. Saipem's inclusion in the deferred prosecution agreement clearly indicates that it is being held criminally liable for Snamprogetti's actions on a theory of successor liability.

These cases illustrate the purest form of FCPA successor liability, where the conduct that constituted an FCPA violation or violations was complete *prior* to a merger or acquisition that connected that conduct to the corporate entity that was ultimately charged or held liable for that conduct. The conduct underlying the violations in the Alliance One case predated the very existence of the corporate entity that was charged with the violations; the conduct in the Saipem case predated the company's acquisition of the subsidiary that had committed the violations. Regardless, both companies were held accountable as if they themselves had engaged in the improper conduct.

#### B. Federal Successor Liability Law

Successor liability law in the United States is complex; it originated in state law as "an equitable remedy against formalistic attempts to circumvent contractual or statutory liability rules."<sup>48</sup> Though it varies from state to state, the question of whether successor liability can be imposed generally requires a complex analysis of various factors, including whether the successor company expressly agreed to assume the liability, or if a merger or acquisition was fraudulently entered into to escape liability.<sup>49</sup> Courts may also look to whether it is in the public interest to impose such liability. *See, e.g., United States v. Cigarette Merchandisers Ass'n, Inc.*, 136 F. Supp. 214 (S.D.N.Y. 1955).

<sup>45</sup> See Criminal Information, *United States v. Snamprogetti Netherlands B.V.*, Crim. No. H-10-460, (S.D. Tex. Jul. 7, 2010), ECF No. 1.

<sup>46</sup> *See id.*

<sup>47</sup> See Deferred Prosecution Agreement, *United States v. Snamprogetti Netherlands B.V.*, Crim. No. H-10-460, (S.D. Tex. Jul. 7, 2010), ECF No. 3.

<sup>48</sup> Aaron Xavier Fellmeth, *Cure Without A Disease: The Emerging Doctrine Of Successor Liability In International Trade Regulation*, 31 YALE J. INT'L L. 127, 136 (2006).

<sup>49</sup> See Carolyn Lindsay, *More Than You Bargained For: Successor Liability Under the U.S. Foreign Corrupt Practices Act*, 35 OHIO N.U.L. REV. 959, 965-68 (2009).

A federal court considering a question of successor liability in the context of a state law claim will clearly look to the law of the relevant state for the proper analysis. But, as there is no relevant federal corporate law, there is no clear avenue for determining whether corporate criminal successor liability is appropriate in a federal action brought by the government. Thus federal courts have had to make the determination of whether to impose successor liability on a case-by-case, statute-by-statute basis. In the majority of cases where a federal court has imposed successor liability, the enforcement action has involved civil penalties and has arisen in connection with regulatory laws, such as environmental remediation statutes (particularly the Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA) and labor statutes (particularly the National Labor Relations Act, or NLRA).<sup>50</sup>

There are only a few cases in which a federal court has had to consider the question of criminal successor liability, and in most of them, courts have declined to permit such liability for a corporation with no knowledge of the prior bad acts. For example, in *Rodriguez v. Banco Central*, 777 F. Supp. 1043, 1064 (D.P.R. 1991), *aff'd*, 990 F.2d 7 (1st Cir. 1993), the court declined to permit successor liability in connection with a RICO action, finding that “successor liability should be found only sparingly and in extreme cases due to the requirement that RICO liability only attaches to knowing affirmatively willing participants.” Similarly, in *R.C.M. Executive Gallery Corp. v. Rols Capital Co.*, 901 F. Supp. 630, 635 (S.D.N.Y. 1995), the court concluded that it is possible for a corporation to be found liable as a successor only if there is a showing that the purchaser had knowledge of the RICO Act violation at the time of purchase.<sup>51</sup>

Because the issue of criminal successor liability under the FCPA has never been raised in court, no corporation charged on the basis of such a theory of liability has ever put the government to a test of whether such liability is appropriate for that specific corporation; nor has it considered the broader question of whether criminal successor liability is appropriate for the FCPA as a general matter. I contend that it is not.

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<sup>50</sup> Fellmeth, 31 YALE J. INT’L L. at 142; *see, e.g., Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 92 (3d Cir. 1988) (finding successor liability in connection with a CERCLA enforcement action); *Golden State Bottling Co. v. Nat’l Labor Relations Bd.*, 414 U.S. 168, 176 (1973) (finding successor liability in connection with a NLRA enforcement action).

<sup>51</sup> There are some exceptions. In *United States v. Alamo Bank of Texas*, 880 F.2d 828 (5th Cir. 1989), Alamo Bank (“Alamo”) was prosecuted for violations of the Bank Secrecy Act that had been committed by a company called Central National Bank (“CNB”), several years prior to its merger with Alamo Bank. The court concluded that Alamo could be charged with the criminal violations because “CNB continues to exist, albeit now as part of Alamo...Thus, Alamo is CNB, and it is CNB now named Alamo which is responsible for CNB’s actions and liabilities. This includes criminal responsibility.” *Id.* at 830. Alamo’s ignorance of the acts committed by CNB did not persuade the court that it should escape successor liability. *Id.*

C. The Legislative Fix

Clear parameters need to be placed on successor liability in the FCPA context. At a minimum, a corporation, irrespective of whether or not it conducts reasonable due diligence prior to and/or immediately after an acquisition or merger, should not be held criminally liable for such historical violations. Under the criminal law, a company (just like a person) should not be held liable for the actions of another company it did not act in concert with. Yet in the FCPA context that is just what is happening. Of course if the successor company inherits employees who continue to commit an FCPA violation, that new conduct can rightfully be imputed to the new company, but that is not a limitation that is currently being applied by the government. Simply put, the DOJ should not be able to impute criminal actions of employees of another company, to a current company. That would extend *respondeat superior* (imputation of current employee conduct to an employer) beyond its already vast bounds. Certainly, if a company does conduct reasonable due diligence, the company should not as a matter of law (not as a matter of mere DOJ or SEC discretion) be subject to liability, for much the same reason that a compliance defense is a shield to corporate liability in the U.K. and Italy.

In addition, it is important to more clearly delineate what constitutes “sufficient due diligence.” Obviously, what is considered “sufficient” diligence will vary depending on the inherent risks in a given merger or acquisition - e.g., whether the target company does significant business in regions that are known for corruption - and the size and complexity of the deal. But it is important to dispel the notion that adequate due diligence requires a full-blown internal investigation and the expenditure of extraordinary resources. Instead, guidance could be created, akin to Section 8 of the United States Sentencing Guidelines, that spells out the general due diligence steps that are warranted.

5. Limiting a Parent Company’s Civil Liability for the Acts of a Subsidiary

While the DOJ has not yet taken such action, the SEC routinely charges parent companies with civil violations of the anti-bribery provisions based on actions taken by foreign subsidiaries of which the parent is entirely ignorant. This approach is contrary to the statutory language of the anti-bribery provisions, which – even if they do not require evidence of “willfulness” – do require evidence of knowledge and intent for liability.<sup>52</sup> It is contrary to the position taken by the drafters of the FCPA, who recognized the “inherent jurisdictional, enforcement and diplomatic difficulties raised by the inclusion of foreign subsidiaries of U.S. companies in the direct prohibitions of the bill” and who made clear that an issuer or domestic concern should only be liable for the actions of a foreign subsidiary if the issuer or domestic concern engaged in bribery by acting “through” the subsidiary.<sup>53</sup> And it appears to be out of step with the government’s stated

<sup>52</sup> See *infra* footnote 32.

<sup>53</sup> See H.R. Conf. Rep. 95-831, at 14 (1977). See also *supra* fn 33 and accompanying text (the drafters intended that actions of a foreign subsidiary unknown to a parent company could constitute FCPA liability only under the books-and-records and internal controls provisions, and not under the anti-bribery provisions).

position that a parent corporation “may be held liable for the acts of [a] foreign subsidiary[y] [only] where they authorized, directed, or controlled the activity in question.”<sup>54</sup>

The following are two examples:

- **United Industrial Corporation (“UIC”)** – The SEC charged UIC, an American aerospace and defense systems contractor, with violations of the FCPA’s anti-bribery provisions based on allegations that a UIC subsidiary – ACL Technologies, Inc. – made more than \$100,000 in improper payments to a third-party.<sup>55</sup> The SEC did not, however, allege that UIC had any direct knowledge of the fact that its subsidiary violated the anti-bribery provisions of the FCPA by making these payments.<sup>56</sup> Thus the SEC’s unspoken theory was that UIC could be held liable for violating the anti-bribery provisions of the FCPA – separate and apart from UIC’s failure to institute proper controls – even if it had no knowledge of the improper payments or therefore their unlawfulness. The complaint was silent as to whether the subsidiary’s employees knew the payments were either illegal or wrongful under the local law.
- **Diagnostics Product Company (“DPC”)** – In 2005, the SEC alleged that a Chinese subsidiary of Diagnostics Products Company (“DPC”), an American company, had violated the anti-bribery provisions of the FCPA by routinely making improper commission payments to doctors at state-controlled hospitals between 1991 and 2002.<sup>57</sup> The SEC charged that “as a result” of the payments made by the subsidiary, DPC itself could be charged with a violation of the anti-bribery provisions.<sup>58</sup> There was no allegation that DPC had any knowledge of these payments; in fact, the SEC’s Complaint clearly stated that DPC only learned of the payments in November 2002. It also acknowledged that DPC put a halt to the payments immediately upon learning of them.<sup>59</sup>

<sup>54</sup> See DEPARTMENT OF JUSTICE, LAYPERSON’S GUIDE TO FCPA, *available at* <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf>.

<sup>55</sup> See United Industrial Corp., Exchange Act Release No. 60005, 2009 WL 1507586 (May 29, 2009), *available at* <http://www.sec.gov/litigation/admin/2009/34-60005.pdf>; SEC Litig. Rel. No. 21063, 2009 WL 1507590 (May 29, 2009), *available at* <http://www.sec.gov/litigation/litreleases/2009/lr21063.htm>.

<sup>56</sup> See *id.*

<sup>57</sup> See Diagnostics Products Corp., Exchange Act Release No. 51724, 2005 WL 1211548 (May 20, 2005), *available at* <http://www.sec.gov/litigation/admin/34-51724.pdf>.

<sup>58</sup> *Id.*

<sup>59</sup> See *id.*

To date, the SEC has provided no explanation for how it supports the theory espoused in these cases – that a parent company may be liable for a subsidiary’s violations of the anti-bribery provisions where the activity was not “authorized, directed or controlled” by the parent or where the parent did not itself act “through” the subsidiary, but, to the contrary, where the subsidiary’s improper acts were undertaken without the parent’s knowledge, consent, assistance or approval. Nor has the theory been put to the test in court.

As the scope of this potential liability is not definitively established, it is a source of significant concern for American companies with foreign subsidiaries. A parent’s control of the corporate actions of a foreign subsidiary should not expose the company to liability under the anti-bribery provisions where it neither directed, authorized nor even knew about the improper payments in question.

#### IV. CONCLUSION

The recent dramatic increase in FCPA enforcement, coupled with the lack of judicial oversight, has created significant uncertainty among the American business community about the scope of the statute. In addition, some of the enforcement actions brought by the SEC and DOJ are not commensurate with the original goals of the FCPA, in that they fail to reach the true bad actors and instead assign criminal liability to corporate entities with attenuated or non-existent connections to potential FCPA violations. The reforms I have outlined here are in line with similar reforms in other countries, such as the new limitation on corporate liability for bribery in Britain and new corporate statutes in Italy, and will help the statute become more equitable, its criminal strictures clearer, and its effect on American business no more onerous than warranted.