First Assignment

1. **Introduction: The Problem of Corruption (September 6)**

   A. **Subject**

   In this introductory class, we will cover three main topics:

   1. The problem of corruption generally, and transnational bribery specifically, including debates over the nature/extent of the problem, its implications for economic development, government legitimacy and stability, foreign policy, and national security.

   2. The history leading up to the enactment of the United States Foreign Corrupt Practices Act (“FCPA”) in 1977, including the disclosure program initiated by the U.S. Securities and Exchange Commission (“SEC”) in the 1970s for “sensitive payments,” the “honest and faithful services” theory of fraud articulated in the United Brands prosecution, and subsequent changes and developments, including the recent surge in FCPA enforcement as well as the availability of alternative statutes and theories.

   3. An overview of the structure of the FCPA and its major features, and the basic principles of jurisdiction under the FCPA and corporate liability under U.S. law generally.

   B. **Required Reading**


A Resource Guide to the U.S. Foreign Corrupt Practices Act

By the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission
This guide is intended to provide information for businesses and individuals regarding the U.S. Foreign Corrupt Practices Act (FCPA). The guide has been prepared by the staff of the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission. It is non-binding, informal, and summary in nature, and the information contained herein does not constitute rules or regulations. As such, it is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, that are enforceable at law by any party, in any criminal, civil, or administrative matter. It is not intended to substitute for the advice of legal counsel on specific issues related to the FCPA. It does not in any way limit the enforcement intentions or litigating positions of the U.S. Department of Justice, the U.S. Securities and Exchange Commission, or any other U.S. government agency.

Companies or individuals seeking an opinion concerning specific prospective conduct are encouraged to use the U.S. Department of Justice's opinion procedure discussed in Chapter 9 of this guide.

This guide is United States Government property. It is available to the public free of charge online at www.justice.gov/criminal/fraud/fcpa and www.sec.gov/spotlight/fcpa.shtml.
A RESOURCE GUIDE TO THE
U.S. FOREIGN CORRUPT PRACTICES ACT

By the Criminal Division of the U.S. Department of Justice and
the Enforcement Division of the U.S. Securities and Exchange Commission
FOREWORD

We are pleased to announce the publication of A Resource Guide to the U.S. Foreign Corrupt Practices Act. The Foreign Corrupt Practices Act (FCPA) is a critically important statute for combating corruption around the globe. Corruption has corrosive effects on democratic institutions, undermining public accountability and diverting public resources from important priorities such as health, education, and infrastructure. When business is won or lost based on how much a company is willing to pay in bribes rather than on the quality of its products and services, law-abiding companies are placed at a competitive disadvantage—and consumers lose. For these and other reasons, enforcing the FCPA is a continuing priority at the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC).

The Guide is the product of extensive efforts by experts at DOJ and SEC, and has benefited from valuable input from the Departments of Commerce and State. It endeavors to provide helpful information to enterprises of all shapes and sizes—from small businesses doing their first transactions abroad to multi-national corporations with subsidiaries around the world. The Guide addresses a wide variety of topics, including who and what is covered by the FCPA’s anti-bribery and accounting provisions; the definition of a “foreign official”; what constitute proper and improper gifts, travel and entertainment expenses; the nature of facilitating payments; how successor liability applies in the mergers and acquisitions context; the hallmarks of an effective corporate compliance program; and the different types of civil and criminal resolutions available in the FCPA context. On these and other topics, the Guide takes a multi-faceted approach, setting forth in detail the statutory requirements while also providing insight into DOJ and SEC enforcement practices through hypotheticals, examples of enforcement actions and anonymized declinations, and summaries of applicable case law and DOJ opinion releases.

The Guide is an unprecedented undertaking by DOJ and SEC to provide the public with detailed information about our FCPA enforcement approach and priorities. We are proud of the many lawyers and staff who worked on this project, and hope that it will be a useful reference for companies, individuals, and others interested in our enforcement of the Act.

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November 14, 2012
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Corporate bribery is bad business. In our free market system it is basic that the sale of products should take place on the basis of price, quality, and service. Corporate bribery is fundamentally destructive of this basic tenet. Corporate bribery of foreign officials takes place primarily to assist corporations in gaining business. Thus foreign corporate bribery affects the very stability of overseas business. Foreign corporate bribes also affect our domestic competitive climate when domestic firms engage in such practices as a substitute for healthy competition for foreign business.¹

—United States Senate, 1977
INTRODUCTION

Congress enacted the U.S. Foreign Corrupt Practices Act (FCPA or the Act) in 1977 in response to revelations of widespread bribery of foreign officials by U.S. companies. The Act was intended to halt those corrupt practices, create a level playing field for honest businesses, and restore public confidence in the integrity of the marketplace.²

The FCPA contains both anti-bribery and accounting provisions. The anti-bribery provisions prohibit U.S. persons and businesses (domestic concerns), U.S. and foreign public companies listed on stock exchanges in the United States or which are required to file periodic reports with the Securities and Exchange Commission (issuers), and certain foreign persons and businesses acting while in the territory of the United States (territorial jurisdiction) from making corrupt payments to foreign officials to obtain or retain business. The accounting provisions require issuers to make and keep accurate books and records and to devise and maintain an adequate system of internal accounting controls. The accounting provisions also prohibit individuals and businesses from knowingly falsifying books and records or knowingly circumventing or failing to implement a system of internal controls.

The Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) share FCPA enforcement authority and are committed to fighting foreign bribery through robust enforcement. An important component of this effort is education, and this resource guide, prepared by DOJ and SEC staff, aims to provide businesses and individuals with information to help them abide by the law, detect and prevent FCPA violations, and implement effective compliance programs.

The Costs of Corruption

Corruption is a global problem. In the three decades since Congress enacted the FCPA, the extent of corporate bribery has become clearer and its ramifications in a transnational economy starker. Corruption impedes economic growth by diverting public resources from important priorities such as health, education, and infrastructure. It undermines democratic values and public accountability and weakens the rule of law.³ And it threatens stability and security by facilitating criminal activity within and across
No problem does more to alienate citizens from their political leaders and institutions, and to undermine political stability and economic development, than endemic corruption among the government, political party leaders, judges, and bureaucrats.

— USAID Anti-Corruption Strategy
In 1998, the FCPA was amended to conform to the requirements of the Anti-Bribery Convention. These amendments expanded the FCPA’s scope to: (1) include payments made to secure “any improper advantage”; (2) reach certain foreign persons who commit an act in furtherance of a foreign bribe while in the United States; (3) cover public international organizations in the definition of “foreign official”; (4) add an alternative basis for jurisdiction based on nationality; and (5) apply criminal penalties to foreign nationals employed by or acting as agents of U.S. companies. The Anti-Bribery Convention came into force on February 15, 1999, with the United States as a founding party.

National Landscape: Interagency Efforts

DOJ and SEC share enforcement authority for the FCPA’s anti-bribery and accounting provisions. They also work with many other federal agencies and law enforcement partners to investigate and prosecute FCPA violations, reduce bribery demands through good governance programs and other measures, and promote a fair playing field for U.S. companies doing business abroad.

Department of Justice

DOJ has criminal FCPA enforcement authority over “issuers” (i.e., public companies) and their officers, directors, employees, agents, or stockholders acting on the issuer’s behalf. DOJ also has both criminal and civil enforcement responsibility for the FCPA’s anti-bribery provisions over “domestic concerns”—which include (a) U.S. citizens, nationals, and residents and (b) U.S. businesses and their officers, directors, employees, agents, or stockholders acting on the domestic concern’s behalf—and certain foreign persons and businesses that act in furtherance of an FCPA violation while in the territory of the United States. Within DOJ, the Fraud Section of the Criminal Division has primary responsibility for all FCPA matters. FCPA matters are handled primarily by the FCPA Unit within the Fraud Section, regularly working jointly with U.S. Attorneys’ Offices around the country.

DOJ maintains a website dedicated to the FCPA and its enforcement at http://www.justice.gov/criminal/fraud/fcpa/. The website provides translations of the FCPA in numerous languages, relevant legislative history, and selected documents from FCPA-related prosecutions and resolutions since 1977, including charging documents, plea agreements, deferred prosecution agreements, non-prosecution agreements, press releases, and other relevant pleadings and court decisions. The website also provides copies of opinions issued in response to requests by companies and individuals under DOJ’s FCPA opinion procedure. The procedures for submitting a request for an opinion can be found at http://www.justice.gov/criminal/fraud/fcpa/docs/frgncrpt.pdf and are discussed further in Chapter 9. Individuals and companies wishing to disclose information about potential FCPA violations are encouraged to contact the FCPA Unit at the telephone number or email address above.

Securities and Exchange Commission

SEC is responsible for civil enforcement of the FCPA over issuers and their officers, directors, employees, agents,
or stockholders acting on the issuer’s behalf. SEC’s Division of Enforcement has responsibility for investigating and prosecuting FCPA violations. In 2010, SEC’s Enforcement Division created a specialized FCPA Unit, with attorneys in Washington, D.C. and in regional offices around the country, to focus specifically on FCPA enforcement. The Unit investigates potential FCPA violations; facilitates coordination with DOJ’s FCPA program and with other federal and international law enforcement partners; uses its expert knowledge of the law to promote consistent enforcement of the FCPA; analyzes tips, complaints, and referrals regarding allegations of foreign bribery; and conducts public outreach to raise awareness of anti-corruption efforts and good corporate governance programs.

The FCPA Unit maintains a “Spotlight on FCPA” section on SEC’s website at http://www.sec.gov/spotlight/fcpa.shtml. The website, which is updated regularly, provides general information about the Act, links to all SEC enforcement actions involving the FCPA, including both federal court actions and administrative proceedings, and contains other useful information.

Individuals and companies with information about possible FCPA violations by issuers may report them to the Enforcement Division via SEC’s online Tips, Complaints and Referral system, http://www.sec.gov/complaint/tipscomplaint.shtml. They may also submit information to SEC’s Office of the Whistleblower through the same online system or by contacting the Office of the Whistleblower at (202) 551-4790. Additionally, investors with questions about the FCPA can call the Office of Investor Education and Advocacy at (800) SEC-0330.

For more information about SEC’s Whistleblower Program, under which certain eligible whistleblowers may be entitled to a monetary award if their information leads to certain SEC actions, see Chapter 8.

**Law Enforcement Partners**

DOJ’s FCPA Unit regularly works with the Federal Bureau of Investigation (FBI) to investigate potential FCPA violations. The FBI’s International Corruption Unit has primary responsibility for international corruption and fraud investigations and coordinates the FBI’s national FCPA enforcement program. The FBI also has a dedicated FCPA squad of FBI special agents (located in the Washington Field Office) that is responsible for investigating many, and providing support for all, of the FBI’s FCPA investigations. In addition, the Department of Homeland Security and the Internal Revenue Service-Criminal Investigation regularly investigate potential FCPA violations. A number of other agencies are also involved in the fight against international corruption, including the Department of Treasury’s Office of Foreign Assets Control, which has helped lead a number of FCPA investigations.

**Departments of Commerce and State**

Besides enforcement efforts by DOJ and SEC, the U.S. government is also working to address corruption abroad and level the playing field for U.S. businesses through the efforts of the Departments of Commerce and State. Both Commerce and State advance anti-corruption and good governance initiatives globally and regularly assist U.S. companies doing business overseas in several
important ways. Both agencies encourage U.S. businesses to seek the assistance of U.S. embassies when they are confronted with bribe solicitations or other corruption-related issues overseas.23

The Department of Commerce offers a number of important resources for businesses, including the International Trade Administration’s United States and Foreign Commercial Service (Commercial Service). The Commercial Service has export and industry specialists located in over 100 U.S. cities and 70 countries who are available to provide counseling and other assistance to U.S. businesses, particularly small and medium-sized companies, regarding exporting their products and services. Among other things, these specialists can help a U.S. company conduct due diligence when choosing business partners or agents overseas. The International Company Profile Program, for instance, can be part of a U.S. business’ evaluation of potential overseas business partners.24 Businesses may contact the Commercial Service through its website, http://export.gov/eac/, or directly at its domestic and foreign offices.25

Additionally, the Department of Commerce’s Office of the General Counsel maintains a website, http://www.commerce.gov/os/ogc/transparency-and-anti-bribery-initiatives, that contains recent articles and speeches, links to translations of the FCPA, a catalogue of anti-corruption resources, and a list of international conventions and initiatives. The Trade Compliance Center in the Department of Commerce’s International Trade Administration hosts a website with anti-bribery resources, http://tcc.export.gov/Bribery. This website contains an online form through which U.S. companies can report allegations of foreign bribery by foreign competitors in international business transactions.26 The Department of Commerce also provides information to companies through a number of U.S. and international publications designed to assist firms in complying with anti-corruption laws. For example, the Department of Commerce has included a new anti-corruption section in its Country Commercial Guides, prepared by market experts at U.S. embassies worldwide, that contains information on market conditions for more than 100 countries, including information on the FCPA for exporters.27

The Department of Commerce has also published a guide, Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies, which contains information about corporate compliance programs for businesses involved in international trade.28

The Departments of Commerce and State also provide advocacy support, when determined to be in the national interest, for U.S. companies bidding for foreign government contracts. The Department of Commerce’s Advocacy Center, for example, supports U.S. businesses competing against foreign companies for international contracts, such as by arranging for the delivery of an advocacy message by U.S. government officials or assisting with unanticipated problems such as suspected bribery by a competitor.29 The Department of State’s Bureau of Economic and Business Affairs (specifically, its Office of Commercial and Business Affairs) similarly assists U.S. firms doing business overseas by providing advocacy on behalf of U.S. businesses and identifying risk areas for U.S. businesses; more information is available on its website, http://www.state.gov/e/eb/cba/. Also, the Department of State’s economic officers serving overseas provide commercial advocacy and support for U.S. companies at the many overseas diplomatic posts where the Commercial Service is not represented.

The Department of State promotes U.S. government interests in addressing corruption internationally through country-to-country diplomatic engagement; development of and follow-through on international commitments relating to corruption; promotion of high-level political engagement (e.g., the G20 Anticorruption Action Plan); public outreach in foreign countries; and support for building the capacity of foreign partners to combat corruption. In fiscal year 2009, the U.S. government provided more than $1 billion for anti-corruption and related good governance assistance abroad.
The Department of State's Bureau of International Narcotics and Law Enforcement Affairs (INL) manages U.S. participation in many multilateral anti-corruption political and legal initiatives at the global and regional level. INL also funds and coordinates significant efforts to assist countries with combating corruption through legal reform, training, and other capacity-building efforts. Inquiries about the U.S. government’s general anti-corruption efforts and implementation of global and regional anti-corruption initiatives may be directed to INL on its website, http://www.state.gov/j/inl/c/crime/corr/index.htm, or by email to: anticorruption@state.gov. In addition, the U.S. Agency for International Development (USAID) has developed several anti-corruption programs and publications, information about which can be found at http://www.usaid.gov/what-we-do/democracy-human-rights-and-governance/promoting-accountability-transparency. Finally, the Department of State’s brochure “Fighting Global Corruption: Business Risk Management,” available at http://www.ogc.doc.gov/pdfs/Fighting_Global_Corruption.pdf, provides guidance about corporate compliance programs as well as international anti-corruption initiatives.

International Landscape: Global Anti-Corruption Efforts

In recent years, there has been a growing international consensus that corruption must be combated, and the United States and other countries are parties to a number of international anti-corruption conventions. Under these conventions, countries that are parties undertake commitments to adopt a range of preventive and criminal law measures to combat corruption. The conventions incorporate review processes that allow the United States to monitor other countries to ensure that they are meeting their international obligations. Likewise, these processes in turn permit other parties to monitor the United States’ anti-corruption laws and enforcement to ensure that such enforcement and legal frameworks are consistent with the United States’ treaty obligations. U.S. officials regularly address the subject of corruption with our foreign counterparts to raise awareness of the importance of fighting corruption and urge stronger enforcement of anti-corruption laws and policies.

OECD Working Group on Bribery and the Anti-Bribery Convention

The OECD was founded in 1961 to stimulate economic progress and world trade. As noted, the Anti-Bribery Convention requires its parties to criminalize the bribery of foreign public officials in international business transactions. As of November 1, 2012, there were 39 parties to the Anti-Bribery Convention: 34 OECD member countries (including the United States) and five non-OECD member countries (Argentina, Brazil, Bulgaria, the Russian Federation, and South Africa). All of these parties are also members of the OECD Working Group on Bribery (Working Group). The Working Group is responsible for monitoring the implementation of the Anti-Bribery Convention, the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, and related instruments. Its members meet quarterly to review and monitor implementation of the Anti-Bribery Convention by member states around the world. Each party undergoes periodic peer review.

The Phase 1 review includes an in-depth assessment of each country’s domestic laws implementing the Convention. The Phase 2 review examines the effectiveness of each country’s laws and anti-bribery efforts. The final phase is a permanent cycle of peer review (the first cycle of which is referred to as the Phase 3 review) that evaluates a country’s enforcement actions and results, as well as the country’s efforts to address weaknesses identified during the Phase 2 review. All of the monitoring reports for the parties to the Convention can be found on the OECD website and can be a useful resource about the foreign bribery laws of the OECD Working Group member countries.

The United States was one of the first countries to undergo all three phases of review. The reports and appendices can be found on DOJ’s and SEC’s websites. In its
Phase 3 review of the United States, which was completed in October 2010, the Working Group commended U.S. efforts to fight transnational bribery and highlighted a number of best practices developed by the United States. The report also noted areas where the United States’ anti-bribery efforts could be improved, including consolidating publicly available information on the application of the FCPA and enhancing awareness among small- and medium-sized companies about the prevention and detection of foreign bribery. This guide is, in part, a response to these Phase 3 recommendations and is intended to help businesses and individuals better understand the FCPA.37

U.N. Convention Against Corruption
The United States is a state party to the United Nations Convention Against Corruption (UNCAC), which was adopted by the U.N. General Assembly on October 31, 2003, and entered into force on December 14, 2005. The United States ratified the UNCAC on October 30, 2006. The UNCAC requires parties to criminalize a wide range of corrupt acts, including domestic and foreign bribery and related offenses such as money laundering and obstruction of justice. The UNCAC also establishes guidelines for the creation of anti-corruption bodies, codes of conduct for public officials, transparent and objective systems of procurement, and enhanced accounting and auditing standards for the private sector. A peer review mechanism assesses the implementation of the UNCAC by parties to the Convention, with a focus in the first round on criminalization and law enforcement as well as international legal cooperation. The United States has been reviewed under the Pilot Review Programme, the report of which is available on DOJ’s website. As of November 1, 2012, 163 countries were parties to the UNCAC.

Other Anti-Corruption Conventions
The Inter-American Convention Against Corruption (IACAC) was the first international anti-corruption convention, adopted in March 1996 in Caracas, Venezuela, by members of the Organization of American States. The IACAC requires parties (of which the United States is one) to criminalize both foreign and domestic bribery. A body known as the Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption (MESICIC) monitors parties’ compliance with the IACAC. As of November 1, 2012, 31 countries were parties to MESICIC.

The Council of Europe established the Group of States Against Corruption (GRECO) in 1999 to monitor countries’ compliance with the Council of Europe’s anti-corruption standards, including the Council of Europe’s Criminal Law Convention on Corruption. These standards include prohibitions on the solicitation and receipt of bribes, as well as foreign bribery. As of November 1, 2012, GRECO member states, which need not be members of the Council of Europe, include more than 45 European countries and the United States.

The United States has been reviewed under both MESICIC and GRECO, and the reports generated by those reviews are available on DOJ’s website.
THE FOREIGN CORRUPT PRACTICES ACT:

15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3, 78m, 78ff


(a) Prohibition

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentalities of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or
(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (g) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (g) of this section that—

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Guidelines by Attorney General

Not later than one year after August 23, 1988, the Attorney General, after consultation with the Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue—

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which issuers may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(e) Opinions of Attorney General

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by issuers concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by an issuer and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weight all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by an issuer under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the issuer, be made publicly available, regardless of whether the Attorney General responds to such a request or the issuer withdraws such request before receiving a response.

(3) Any issuer who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.
(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice’s present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice’s present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(f) Definitions

For purposes of this section:

(1)(A) The term “foreign official” means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term “public international organization” means—

(i) an organization that is 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.

(2) (A) A person’s state of mind is “knowing” with respect to conduct, a circumstance, or a result if—

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(3)(A) The term “routine governmental action” means only an action which is ordinarily and commonly performed by a foreign official in—

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term “routine governmental action” does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(g) Alternative Jurisdiction

(1) It shall also be unlawful for any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered pursuant to section 78f of this title or which is required to file reports under section 78o(d) of this title, or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of this subsection (a) of this section for the purposes set forth therein, irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term “United States person” means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. § 1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.


(a) Prohibition

It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or for any officer, director, employee, or agent of such domestic concern or any stockholder...
thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person; or

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (i) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (i) of this section that—

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Injunctive relief

(1) When it appears to the Attorney General that any domestic concern to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) or (i) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries
on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(c) Guidelines by Attorney General

Not later than 6 months after August 23, 1988, the Attorney General, after consultation with the Securities and Exchange Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue—

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which domestic concerns may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(f) Opinions of Attorney General

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by domestic concerns concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by a domestic concern and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by a domestic concern under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the domestic concern, be made publicly available, regardless of whether the Attorney General response to such a request or the domestic concern withdraws such request before receiving a response.

(3) Any domestic concern who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.
(g) Penalties

(1) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be fined not more than $2,000,000.

(2) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(3) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

(4) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(5) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a domestic concern, such fine may not be paid, directly or indirectly, by such domestic concern.

(h) Definitions

For purposes of this section:

(1) The term "domestic concern" means—

(A) any individual who is a citizen, national, or resident of the United States; and

(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

(2) Any 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.

(3) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if—

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(4) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in—

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(5) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(6) The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of—

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

(i) Alternative Jurisdiction

(1) It shall also be unlawful for any United States person to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs
(1), (2), and (3) of subsection (a), for the purposes set forth therein, irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, a “United States person” means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. § 1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

15 U.S.C. § 78dd-3 Prohibited foreign trade practices by persons other than issuers or domestic concerns

(a) Prohibition

It shall be unlawful for any person other than an issuer that is subject to section 78dd-1 [Section 30A of the Exchange Act] of this title or a domestic concern, or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person;

(b) Exception for routine governmental action

Subsection (a) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) of this section that—

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—
(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Injunctive relief

(1) When it appears to the Attorney General that any person to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

(4) All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(e) Penalties

(1)(A) Any juridical person that violates subsection (a) of this section shall be fined not more than $2,000,000.

(B) Any juridical person that violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(2)(A) Any natural person who willfully violates subsection (a) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person who violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a person, such fine may not be paid, directly or indirectly, by such person.

(f) Definitions

For purposes of this section:

(1) The term “person,” when referring to an offender, means any natural person other than a national of the United States (as defined in 8 U.S.C. § 1101) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof.

(2)(A) The term “foreign official” means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

For purposes of subparagraph (A), the term “public international organization” means—

(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.

(3)(A) A person’s state of mind is “knowing” with respect to conduct, a circumstance, or a result if—

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(4)(A) The term “routine governmental action” means only an action which is ordinarily and commonly performed by a foreign official in—
(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
(ii) processing governmental papers, such as visas and work orders;
(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
(v) actions of a similar nature.

(B) The term “routine governmental action” does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(5) The term “interstate commerce” means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of—

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

* * *


Periodical and other reports

(a) Reports by issuer of security; contents

Every issuer of a security registered pursuant to section 78l of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 78l of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.

(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange. In any registration statement, periodic report, or other reports to be filed with the Commission, an emerging growth company need not present selected financial data in accordance with section 229.301 of title 17, Code of Federal Regulations, for any period prior to the earliest audited period presented in connection with its first registration statement that became effective under this chapter or the Securities Act of 1933 [15 U.S.C. §§ 77a, et seq.] and, with respect to any such statement or reports, an emerging growth company may not be required to comply with any new or revised financial accounting standard until such date that a company that is not an issuer (as defined under section 7201 of this title) is required to comply with such new or revised accounting standard, if such standard applies to companies that are not issuers.

(b) Form of report; books, records, and internal accounting; directives

(1) The Commission may prescribe, in regard to reports made pursuant to this chapter, the form or forms in which the required information shall be set forth, the items or details to be shown in the balance sheet and the earnings statement, and the methods to be followed in the preparation of reports, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of separate and/or consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but in the case of the reports of any person whose methods of accounting are prescribed under the provisions of any law of the United States, or any rule or regulation thereunder, the rules and regulations of the Commission with respect to reports shall not be inconsistent with the requirements imposed by such law or rule or regulation in respect of the same subject matter (except that such rules and regulations of the Commission may be inconsistent with such requirements to the extent that the Commission determines that the public interest or the protection of investors so requires).

(2) Every issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall—
(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

(i) transactions are executed in accordance with management's general or specific authorization;

(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences; and

(C) notwithstanding any other provision of law, pay the allocable share of such issuer of a reasonable annual accounting support fee or fees, determined in accordance with section 7219 of this title.

(3)(A) With respect to matters concerning the national security of the United States, no duty or liability under paragraph (2) of this subsection shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives. Each directive issued under this paragraph shall set forth the specific facts and circumstances with respect to which the provisions of this paragraph are to be invoked. Each such directive shall, unless renewed in writing, expire one year after the date of issuance.

(B) Each head of a Federal department or agency of the United States who issues such a directive pursuant to this paragraph shall maintain a complete file of all such directives and shall, on October 1 of each year, transmit a summary of matters covered by such directives in force at any time during the previous year to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

(4) No criminal liability shall be imposed for failing to comply with the requirements of paragraph (2) of this subsection except as provided in paragraph (5) of this subsection.

(5) No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).

(6) Where an issuer which has a class of securities registered pursuant to section 78l of this title or an issuer which is required to file reports pursuant to section 78o(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2). Such circumstances include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located. An issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of paragraph (2).

(7) For the purpose of paragraph (2) of this subsection, the terms "reasonable assurances" and "reasonable detail" mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.

* * *


(a) Willful violations; false and misleading statements

Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title [Section 30A of the Exchange Act]), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Failure to file information, documents, or reports

Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78o of this title or any rule or regulation thereunder shall forfeit to the United States the sum of $100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such
failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) Violations by issuers, officers, directors, stockholders, employees, or agents of issuers

(1)(A) Any issuer that violates subsection (a) or (g) of section 78dd-1 [Section 30A of the Exchange Act] of this title shall be fined not more than $2,000,000.

(B) Any issuer that violates subsection (a) or (g) of section 78dd-1 [Section 30A of the Exchange Act] of this title shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(2)(A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 78dd-1 [Section 30A of the Exchange Act] of this title shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

(B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 78dd-1 [Section 30A of the Exchange Act] of this title shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of an issuer, such fine may not be paid, directly or indirectly, by such issuer.
I. Executive Summary

Background

This paper presents a series of amendments that would serve to improve the U.S. Foreign Corrupt Practices Act (“FCPA”). That statute was enacted by Congress and signed into law by President Carter in late 1977. Congress’s primary aim in enacting the FCPA was to prohibit U.S. companies and companies operating in the U.S. from paying bribes to foreign government officials, politicians, and political parties for the purpose of obtaining business opportunities abroad. Congress achieved this aim by making it a crime for U.S. citizens, domestic companies, and certain foreign companies and individuals to make corrupt payments, or offer anything of value, to foreign officials in return for business opportunity, broadly understood. These anti-bribery provisions have always been the centerpiece of the FCPA. But to promote the anti-bribery provisions, Congress further required that corporations with securities listed in the United States keep financial books and records that

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accurately reflect payments and maintain a system of internal accounting controls. The FCPA thus addressed foreign bribery by punishing its occurrence (the anti-bribery provisions) and providing for its detection and prevention (the books-and-records and internal controls provisions).

At the time of enactment, the FCPA was a significant departure from settled expectations in the American business and legal communities. Before the FCPA, no government had made it a crime to bribe officials of a foreign country. Many governments even allowed companies to count bribes paid to foreign officials as ordinary business expenses that the company could ultimately deduct for tax purposes. For approximately two decades, the FCPA stood alone, not only in criminalizing foreign bribery, but in requiring companies to maintain books and records and accounting controls that would help prevent and detect its occurrence.

Recent Enforcement Trends

The last decade has seen a marked increase in FCPA enforcement by both the Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”). Indeed, the last five years has seen nothing short of a boom in FCPA enforcement. More enforcement actions are being brought than ever before, fines and penalties have risen dramatically, and the government has shown an increased willingness to seek jail terms for individual defendants. Mark Mendelsohn, who spearheaded the recent growth in FCPA enforcement during his tenure in the DOJ’s Fraud Section, made this shift in focus clear in public statements earlier this year: “If you look at who we’re prosecuting, we’re prosecuting mid-level to senior level corporate officers and employees, CEOs, CFOs, heads of international sales.”

The size of FCPA settlements has also increased dramatically in recent years. The top ten FCPA settlements in terms of overall dollar amount total $2.8 billion. Five of the top ten FCPA settlements have occurred in 2010 alone. The remaining five have all occurred since 2007. An added sign of increased enforcement is that there are currently more open FCPA investigations pending resolution than at any other time since its inception. Both the DOJ and SEC have announced plans to augment their resources dedicated to FCPA enforcement, partly to handle the growing list of pending FCPA matters confronting the enforcement agencies.

In spite of this rise in enforcement and investigatory action, judicial oversight and rulings on the meaning of the provisions of the FCPA is still minimal. 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 seek favorable terms from the government rather than face the expense and uncertainty of a trial. Thus, the primary statutory interpretive function is still being performed almost exclusively by the DOJ Fraud Section and the SEC. Notably, these enforcement agencies have been increasingly aggressive in their reading of the law. The DOJ has expressed its approach primarily through its opinion releases, but also in its decisions as to what FCPA enforcement actions to pursue.\textsuperscript{6} Many commentators have expressed concern that the DOJ effectively serves as both prosecutor and judge in the FCPA context, because it both brings FCPA charges and effectively controls the disposition of the FCPA cases it initiates.\textsuperscript{7}

The recent prosecution and conviction of Frederic Bourke, a matter currently being reviewed by the U.S. Court of Appeals for the Second Circuit, is just one example of how far the DOJ has pressed the limits of enforcement.\textsuperscript{8} Bourke was convicted of conspiring to violate the FCPA based on certain investments he made with a business partner in Azerbaijan. Although Bourke’s business partner had been the one paying bribes to Azeri officials, and although Bourke denied any knowledge of the illicit payments, the government argued that Bourke had “consciously avoided” knowledge of his partner’s dealings, and so could not escape liability under the FCPA, even if he did not himself participate in the bribes. The government introduced circumstantial evidence to demonstrate that Bourke should have known that his business partner was paying bribes in Azerbaijan. The DOJ received a jury instruction that allowed the jury to convict Bourke based not on what he actually knew, but rather on what he “suspects.”\textsuperscript{9} This jury instruction reflects the expansive reading the DOJ has been giving to the FCPA’s knowledge requirement.

In the corporate setting, the DOJ’s aggressive pursuit of BAE Systems PLC is further indication of how far the DOJ is willing to expand the scope of FCPA enforcement.\textsuperscript{10} In early 2010, BAE, one of the largest defense contractors in the world, negotiated a global resolution of the U.S. and U.K. governments’ investigations into allegations of corruption at BAE.\textsuperscript{11} To resolve the U.S. inquiry, BAE agreed to plead guilty to a one-count

\textsuperscript{6} Mike Koehler, Compliance Lessons from an Active Year in FCPA Enforcement, 3(4) \textit{White Collar Crime Report}, February 15, 2008.

\textsuperscript{7} Kevin M. King and William M. Sullivan, Vigorous FCPA Enforcement Reflects Pursuit of Foreign Bribery, 5(3) \textit{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).


criminal information charging the company with conspiring to make false statements to various U.S. government agencies regarding its anti-corruption undertakings, and with failing to disclose hundreds of millions of dollars in commission payments related to arms sales.\(^{12}\) BAE also agreed to pay a $400 million criminal penalty to the U.S. to resolve the investigation.\(^ {13}\)

It is noteworthy that the questionable payments underlying the FCPA allegations appear to have been made almost entirely outside the United States.\(^ {14}\) As a result, the FCPA jurisdictional nexus for the case—which would require acts taken in the United States—was tenuous.\(^ {15}\) The DOJ nevertheless aggressively pursued the BAE investigation as an FCPA matter and ultimately obtained a costly settlement for BAE along with a felony plea.\(^ {16}\) The BAE case further underscores the highly aggressive stance the DOJ is taking to expand the FCPA net beyond its borders.

In addition to increased governmental enforcement, the last five years has seen a marked uptick in the quantity of follow-on civil litigation after an FCPA enforcement action.\(^ {17}\) In most of these cases, claimants assert that mismanagement and poor internal controls allowed the violative conduct to occur. Shareholders in securities class action lawsuits are also increasing their reliance on FCPA enforcement actions to claim they were misled by the directors and officers of the defendant company. Thus, as the frequency of enforcement actions grows, so too should we expect secondary civil litigation to increase.

Unfortunately for the business community, an active FCPA enforcement environment appears likely to continue: current incentives ensure that judicial oversight of FCPA cases will continue to be limited, and both the DOJ and SEC have continued to devote significant new resources to FCPA enforcement actions.\(^ {18}\) In addition, two new legislative developments are likely to reinforce the trend:

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\(^{13}\) Id.


\(^{15}\) Id.


\(^{18}\) 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 (Aug. 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.”); David Hechler, DOJ UNIT That Prosecutes FCPA to Bulk Up ‘Substantially,’ Corporate Counsel (Feb. 26, 2010), available at http://www.law.com/jsp/article.jsp?id=120244612530&pos=ataglance&src=EMCEmail&et=editorial&bu=Law.com&s=LAWCOM%20Newswire&cn=NN_20100226&kw=DOJ%20Unit%20That%20Prosecutes%20FCPA%20To%20Build%20Up%20Substantially%27 (noting that the DOJ’s top anti-corruption prosecutor indicated that the DOJ 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).
• The new Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”) contains a whistleblower bounty provision that seems likely to produce heightened whistleblower activity in connection with FCPA violations.19 Under these whistleblower provisions, whistleblowers can receive rewards of up to 30 percent of recoveries over $1 million.

• The new U.K. Bribery Act received Royal Assent on April 8, 2010. The U.K. Ministry of Justice recently released its timetable for the implementation of the Bribery Act, setting April 2011 as the effective date. The Bribery Act is widely viewed as more “far-reaching” than the FCPA in several key respects, including (i) the creation of a strict liability offense for companies and other commercial organizations that fail to prevent bribery, with the only defense being whether the organization instituted “adequate procedures” to prevent bribery; (ii) the absence of an express exception for facilitation payments; and (iii) the absence of an express affirmative defense for reasonable and bona fide business expenditures or for payments that are lawful in the jurisdiction in which the payment is made.

The existence of a more stringent anti-corruption law in the U.K. has led to speculation that U.S. enforcement authorities will apply even more pressure to companies through the FCPA so as not to be outdone in this area of traditional U.S. dominance. It will take time to determine whether fears of competitive enforcement policies are prescient or unfounded. And although it is unknown when active implementation of the Bribery Act provisions will commence, there can be no doubt that both the U.K. Bribery Act and the whistleblower provision of the Dodd-Frank Act suggest a more hostile enforcement environment going forward than the U.S. business community has yet seen.

The FCPA’s Impact on Business

The current FCPA enforcement environment has been costly to business. Businesses enmeshed in a full-blown FCPA investigation conducted by the U.S. government have and will continue to spend enormous sums on legal fees, forensic accounting, and other investigative costs before they are even confronted with a fine or penalty, which, as noted, can range into the tens or hundreds of millions.20 In fact, one noteworthy innovation in FCPA enforcement policy has been the effective outsourcing of investigations by the government to the private sector, by having companies suspected of FCPA violations shoulder the cost of uncovering such violations themselves through extensive internal investigations.21

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21 Assistant Attorney General Lanny Breuer, Prepared Address at the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009), available at http://www.justice.gov/criminal/po/speeches-testimony/documents/11-17-09agbreuer-remarks-fcpa.pdf (“We recognize the issues of costs to companies to implement robust compliance programs, to hire outside counsel to conduct in-depth internal investigations, and to forego certain business opportunities that are tainted with corruption. Those costs are significant and we are very aware of that fact. The cost of not being FCPA compliant, however, can be far higher.”).
From the government’s standpoint, it is the best of both worlds. The costs of investigating FCPA violations are borne by the company and any resulting fines or penalties accrue entirely to the government. For businesses, this arrangement means having to expend significant sums on an investigation based solely on allegations of wrongdoing and, if violations are found, without any guarantee that the business will receive cooperation credit for conducting an investigation.

There is also reason to believe that the FCPA has made U.S. businesses less competitive than their foreign counterparts who do not have significant FCPA exposure. For example, 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, references an estimate that the FCPA’s anti-bribery provisions have cost up to $1 billion annually in lost U.S. export trade.

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.

Of course, the solution to this problem is not to do away with the FCPA and permit American companies to engage in bribery alongside their foreign competitors. 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

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24 Id.
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 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. Such improvements, which are best suited for Congressional action, 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.

Specifically, this paper recommends the following reforms:

• Adding a compliance defense;
• Limiting a company’s liability for the prior actions of a company it has acquired;
• Adding a “willfulness” requirement for corporate criminal liability;
• Limiting a company’s liability for acts of a subsidiary; and
• Defining a “foreign official” under the statute.
II. FCPA—Overview of the Statute

The Central Provision of the FCPA

The central aim of the FCPA is to prohibit the payment of bribes to foreign officials for the purpose of obtaining or retaining business. See 15 U.S.C. §§ 78dd-1, dd-2 and dd-3. The act prohibits all covered companies, as well as their employees, directors, or agents from, among other things, making “use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of” a payment to a foreign official in order to influence a decision or secure business. “Covered” companies include all United States companies and many foreign companies.25

The term “corruptly” in the FCPA has been equated by both courts and the FCPA’s legislative history to the “inten[t] to induce the recipient to misuse his official position.” H.R. Rep. No. 95-640, at 8 (1977). And while a narrow exception exists for payments that merely accelerate the normal operations of government that do not involve discretion, there is no de minimis exception in the statute for any payment made corruptly. Further, liability attaches even for corrupt payments that are proposed, but not in fact made. See 15 U.S.C. §§ 78dd-1(b); see generally United States v. Kay, 359 F.3d 738, 756 (5th Cir. 2004) (noting the FCPA provides for “narrowly defin[ed] exceptions and affirmative defenses against a backdrop of broad applicability”).

Scope of Application to U.S. and Foreign Companies

The FCPA has extremely broad reach and applicability to American and even foreign organizations. Pursuant to 15 U.S.C. §78dd-2, the so-called “domestic concern” provision of the FCPA, every business entity either organized under United States law or with its primary place of business in the United States is subject to the FCPA.26 U.S. companies and citizens are subject to the FCPA regardless of where the act in furtherance of a “corrupt” payment takes place. See 15 U.S.C. § 78dd-1(g); id. § 78dd-2(i). In addition to liability for a company’s own actions, the government has interpreted the FCPA to ground liability on a U.S. parent corporation and its employees for “the acts of [a] foreign subsidiar[y] where they authorized, directed, or controlled the activity in question.”27 Of course, a parent corporation may also be liable where the corporate

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25 See infra Section II.B. and fn 3 for the circumstances under which a foreign company will be subject to the FCPA.

26 Other provisions of the FCPA extend its reach to foreign companies that issue securities within the United States, and any entity or individual that commits an act prohibited by statute on American soil. See 15 U.S.C. §§78dd-1, 78dd-3.

An “accurate” report is one that “fairly reflect[s] the transactions and dispositions of the assets of the issuer.” 15 U.S.C. § 78m(b)(2). The statute further defines “reasonable detail” as “such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.” 15 U.S.C. §78m(b)(7). Companies must make these accurate reports to the SEC on a periodic basis pursuant to 15 U.S.C. § 78o(d).


The FCPA also has two additional key provisions that apply to entities that have securities registered pursuant to 15 U.S.C. § 781 and who are required to file reports with the SEC pursuant to 15 U.S.C. § 78o(d). The first provision is known as the “books-and-records” provision, and requires such entities to “make and keep books, records and accounts which in reasonable detail accurately and fairly reflect the transactions and dispositions of the issuer.” 15 U.S.C. § 78m(b)(2)(A). The second provision is known as the “internal controls” provision, and requires such entities to “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that” transactions are executed with proper authorization of management, financial statements are prepared in accordance to proper accounting principles, and that the company “maintain(s) accountability” for assets. 15 U.S.C. § 78m(b)(2)(B).

These provisions give rise to criminal liability where there are “knowing” violations. See 15 U.S.C. § 78m(b)(4) & (5). Because a violation of these provisions does not necessarily require proof of a corrupt payment being made or contemplated, these rules are often invoked by the government to pursue cases where improper payments are suspected, but difficult to prove, or as a means to settle cases for a “lesser” charge. For example, the SEC brought charges for violations of the FCPA books-and-records provision against Oil States International where the company was suspected of having made hundreds of thousands of dollars in improper payments to employees of an energy company owned by the Venezuelan government.

Applicable Penalties

Violations of the FCPA have led to significant civil and criminal penalties. A company can be criminally fined up to $2 million per violation of the anti-bribery provisions (which could apply to each illegal payment), and culpable individuals can be subject to a criminal fine of up to $250,000 per violation (same), as well as imprisonment for up to

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28 An “accurate” report is one that “fairly reflect[s] the transactions and dispositions of the assets of the issuer.” 15 U.S.C. § 78m(b)(2). The statute further defines “reasonable detail” as “such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.” 15 U.S.C. §78m(b)(7). Companies must make these accurate reports to the SEC on a periodic basis pursuant to 15 U.S.C. § 78o(d).

29 The statute provides the same definition for “reasonable assurances” as for “reasonable detail.” See 15 U.S.C. §78m(b)(7); see supra fn 5.

30 See Oil States Int’l, Exchange Act Release No. 53732, 2006 WL 1113519 (Apr. 27, 2006), available at http://www.sec.gov/litigation/admin/2006/33-353732.pdf. As a practical matter, when the inaccuracy in the companies’ books and records is the mischaracterization of a bribe, then proving the existence of the bribe is required absent a plea or settlement.
five years for each violation. Violations of the books-and-records and internal control provisions that are deemed “willful” and not just “knowing” can result in a criminal fine of up to $25 million for a company and a criminal fine up to $5 million as well as imprisonment for up to 20 years for culpable individuals. Further, a defendant—whether a company or individual—can be required to pay twice the gross gains or losses if criminally convicted for an FCPA violation. Where the contract allegedly obtained through a bribe is significant, therefore, this provision can make the potential penalty prohibitive. In addition to these fines and penalties, the SEC may seek disgorgement of a company’s profits on contracts secured through improper payments.

It has also become common for the government to require appointment of an independent compliance monitor, at the company’s expense, for a period of time after the settlement (typically two to three years). The independent monitor can be charged with giving instructions or making recommendations to the company for FCPA compliance with which the company must comply, and the monitor has reporting duties to the government.

31 See 15 U.S.C. §§78dd-2(g), 78dd-3(e), 78ff.
33 18 U.S.C. §3571(c)
34 Disgorgement is an equitable concept that has existed in Exchange Act jurisprudence for decades, but the SEC has increasingly relied upon it in the years since the passage of Sarbanes-Oxley. It was first employed by the SEC in an FCPA case in 2004. See David C. Weiss, The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and The Evolving International Bribery Regime: Weighing Proportionality, Retribution, And Deterrence, 30 Mich. J. Int’l L. 471, 474, 485-88 (2009). There is no specific statutory authority for the SEC’s use of disgorgement as a penalty in the FCPA context. See id.
35 See infra the Alliance One case discussed in Section III.B.1.
III. Potential Reforms

The following are five potential reforms to the FCPA aimed at providing more certainty to the business community 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.

Adding The Compliance Defense Recognized By The United Kingdom

The FCPA does not 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, and such compliance systems can be taken into account at sentencing. 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. In September 2010, U.K.’s Ministry of Justice provided initial guidance on what may constitute such “adequate procedures.” The proposed guidance consists of the following six principles:

1. Risk Assessment (regular and comprehensive assessment of bribery-related risks to an organization).

36 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/cousa/foia_reading_room/usam/title9/28mcrm.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).


38 See Bribery Act of 2010, ch. 23, § 7(2) (U.K.).

39 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.
2. Top-Level Commitment (a commitment to preventing bribery clearly communicated by top-level management).

3. Due Diligence (due diligence policies and procedures covering all parties to a business relationship).

4. Clear, Practical and Accessible Policies and Procedures (ensuring that policies and procedures are readily accessible and enforceable throughout the organization).

5. Effective Implementation (ensuring that the policies and procedures are embedded throughout the organization).

6. Monitoring and Review (mechanisms to ensure compliance with relevant policies and procedures, and implementation of improvements where appropriate).

In 2001, the Italian government also passed a statute that proscribes foreign bribery. 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. To determine whether the model was effectively designed, the law requires consideration of the following factors:

1. Management of Resources (whether financial resources were managed in a way that discouraged crime).

2. Provision of Information to Management (whether the model required officers and employees to supply the supervisory body responsible for monitoring the model with the necessary information to ensure their compliance with it).

3. Disciplinary Measures (whether such measures necessary to sanction non-compliance were included in the model).

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41 See id.

42 See id.
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.43 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.44 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.45

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 the return on such an investment will be only to expose the company to increased

44 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).
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. 46

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

immediately following an acquisition or merger), 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.

1. 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. In that opinion, the DOJ provided advice to a company that was seeking to acquire a target company. In the course of pre-acquisition due diligence, the company discovered potential FCPA violations that had been previously committed by the target. The DOJ outlined a series of steps that the company could take to avoid successor liability for the target’s violations, including cooperation with DOJ and SEC investigations, disclosure of any additional violations, and institution of an FCPA compliance program at the target.

- 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, a 2006 speech given by then-Assistant Attorney General Alice Fisher, the head of the Criminal Division at the DOJ, underscored this philosophy: 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.

- 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.

48 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).


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. The investigation required the company to “retain external counsel and third-party consultants, including forensic accountants, as well as utilize internal resources, as appropriate, to conduct the FCPA and anti-corruption due diligence.” The company was also compelled to conduct an “examination of relevant [target company] records, including e-mail review and review of company financial and accounting records, as well as interviews of relevant [the target company’s] personnel and other individuals.” The opinion also set forth a rigid disclosure schedule: The company was required to meet with the DOJ within ten business days of closing to discuss the problematic documents from the data room and to investigate high-risk issues and report findings to the DOJ within 90 days of closing, followed by medium-risk issues (with disclosure within 120 days of closing) and low-risk issues (with disclosure within 180 days of closing). And the DOJ warned that even if the company took all of these steps and made all of the required disclosures, the DOJ would still hold the company liable for ongoing violations by the target company not uncovered during the first 180 days of due diligence, as well as prior violations by the target company disclosed to the DOJ to the extent that such violations were not “investigated to conclusion within one year of closing.”

The DOJ has thus leveraged the threat of successor liability into a means to achieve expansive internal controls. Opinion 08-02 is a harbinger of the increased threat posed by the FCPA to businesses contemplating mergers and acquisitions with companies that have foreign subsidiaries or offices. The dominant take-aways are that (1) to even qualify for such a “grace period” for successor liability an acquiring company must expend enormous resources on a complex and far-reaching internal investigation, and (2) even if a company expends such resources and honestly and diligently seeks to identify prior FCPA violations,

53 Id.
54 Id.
55 See id.
56 Id.
it may ultimately still be held liable for those violations. The DOJ also added a footnote in its opinion discouraging companies who would seek a release of liability from the DOJ from entering into confidentiality agreements for pre-closing documents, suggesting that companies may be penalized for their inability to provide the DOJ with a full accounting of their concerns.

That potential for so-called criminal successor liability which animated Opinion 08-02 is real. The following are two recent examples:

• 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.57 In 2010, the DOJ brought a criminal case against Alliance One on a successor liability theory; that is, subsidiaries of Dimon and SCC engaged in FCPA violations, subsequent to which the two parent companies formed Alliance One, and thus Alliance One is now liable for the prior actions of the Dimon and SCC subsidiaries.58 The DOJ ultimately entered a non-prosecution agreement with Alliance One, after the foreign subsidiaries of each pled guilty to multiple-count criminal informations; the agreement requires Alliance One to cooperate with the DOJ’s ongoing investigation and to retain an independent compliance monitor for a minimum of three years to oversee the implementation of a compliance program and to report back to the DOJ on its progress. (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 participated in a complex and far-reaching bribery scheme.59 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 2010.60 The DOJ ultimately reached a deferred prosecution agreement in connection with these charges; that agreement was between the DOJ, Snamprogetti, ENI and Saipem.61 The


60 See id.

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.

2. Federal Successor Liability Law

Successor liability law in the United States is a complex, multi-factor matter. The usual rationale for such liability was to avoid a company evading liability by simply reconstituting itself as another company. Thus, successor liability for corporations originated in state law as “an equitable remedy against formalistic attempts to circumvent contractual or statutory liability rules.”

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. 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) (determining that criminal successor liability was appropriate because the public policy of the state was that a corporation remain suable for its debts and obligations after dissolution).

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

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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). 64

There are few cases in which a federal court has had to consider the question of whether a corporation should be held criminally liable under a theory of successor liability. However, in most of these cases, courts have declined to permit criminal successor 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.

There are some exceptions, however. 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”), three or four 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.

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. We contend that it is not.

3. 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 with which it did not act in concert. 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 the government is currently applying. 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.

**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. 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

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65 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. Key*, 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.
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 more 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.

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.”

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, 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 bribes that occurred outside of the United States and that solely involved foreign entities; the DOJ’s

67 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 (“SSIIFE”), a Korean subsidiary of an American company, and individual employees of SSIIFE 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; 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.
jurisdictional hook for those bribes was that some of the money connected to the transactions had passed at some point through American bank accounts. 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.

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).

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. 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. And, it appears to be out of step with the government’s stated 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.”


69 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 (advocating for meaningful mens rea requirements as an essential protection against unjust convictions).

70 See infra footnote 65.

71 See H.R. Conf. Rep. 95-831, at 14 (1977). See also supra fn 66 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).

The SEC has provided no explanation for how it can hold a parent company liable for a subsidiary’s violations of the anti-bribery provisions—as distinct from the books-and-records and internal controls 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.

The following are two recent 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 payments to a third-party. The SEC further alleged that the agent subsequently passed portions of those payments to Egyptian Air Force officials in order to increase ACL’s chances to secure a contract to build a military depot in Cairo. 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. 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 over its employees and subsidiaries and from related violations of the books-and-records provisions (for which strict liability does attach pursuant to the statute)—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. 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. 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

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74 See id.


76 Id.
also acknowledged that DPC put a halt to the payments immediately upon learning of them.77

The theory espoused in these cases—that a parent company can be held civilly liable for violations of the anti-bribery provisions as if they themselves committed those violations—has not been put to the test in court. Instead, both companies reached settlements with the SEC. UIC’s settlement required the company to pay disgorgement and prejudgment interest totaling almost $350,000. DPC’s settlement agreement required DPC to retain an independent monitor for a period of three years, to disgorge approximately $2 million, and to make an additional payment of prejudgment interest of $750,000.78

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.

Clarifying 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,”79 or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.80 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 client conference an FCPA violation if the professor works at a university that receives public grants or is state run? What if the speaker works for a Chinese company that is owned in whole or 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

77 See id.

78 See id.

79 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).

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. And once an entity is defined as an instrumentality, all employees of the entity—regardless of rank, title or position—are considered “foreign officials.” 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.

The following are a few 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.”81 In the criminal information filed against Control Components, the DOJ stated summarily that “[t]he officers and 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.”82

- 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.”83 Baker ultimately settled with the SEC and the DOJ for $44.1 million; at the time, it was the largest FCPA-related settlement ever.84

- 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


82 Id.


some of its Chinese customers between 2000 and 2003. 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.” The companies in question were Chinese state-owned telecommunications entities. Lucent settled the action, agreeing to pay $1.5 million in fines and it also entered a non-prosecution agreement with the DOJ for the same conduct.

• KBR—In an action against American construction company KBR (formerly Kellogg, Brown & Root), the SEC and DOJ claimed that among the improper payments made by KBR were payments made to officers and employees of Nigeria LNG Limited. The government claimed that these officers and employees were “foreign officials” for purposes of the FCPA, despite the fact that 51% of Nigeria LNG Limited is owned by a consortium of private multinational oil companies, including Shell, Total, and Eni.

Given the potentially vast number of companies that may be categorized as “instrumentalities” of foreign governments due to the government’s expansive interpretation of the phrase, it should be no surprise that in recent years the DOJ and SEC have increasingly brought FCPA actions based on dealings with “foreign officials” at such companies. By one estimate, 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.

As these examples illustrate, the government has interpreted “instrumentality” in the FCPA to encompass entities that are directly owned by a

86 Id.
87 Id. at 411-13.
foreign government (the Control Components and Lucent Technologies cases), entities that are directly controlled by a foreign government (the Lucent Technologies case), entities that are controlled by members of a foreign government (the Baker Hughes case), and entities that are only partially owned by a foreign government (the KBR 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 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 too 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 is detrimental to American business interests. Without a clear understanding of what companies are considered “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.

For this reason, the FCPA should 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.”
IV. Conclusion

In recent years, concerns about the effects of the U.S. regulatory framework on American companies have been widely voiced in Congress, as has the concern about the lack of sufficient mens rea requirements in criminal statutes. Legal reforms in other countries, such as the new limitation on corporate liability for bribery in Britain and new corporate statutes in Italy, may help remove obstacles that currently hamper the competitiveness of American businesses and make Congress realize that such reforms are neither unprecedented nor pro business. They are simply appropriate. The time is ripe to amend the FCPA so as to make the statute more equitable, its criminal strictures clearer, and its effect on American business no more onerous than warranted.
Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act

September 2011

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Notes
Executive Summary

For more than three decades, the United States has been a global leader in the fight against corruption. The passage of the Foreign Corrupt Practices Act (FCPA) in 1977 drew a line in the sand: a culture of corruption was incompatible with sound international business practice. In the years since, largely at the behest of the United States, dozens of leading trading partners have adopted domestic legislation criminalizing corrupt foreign business practices in conformity with a number of multilateral treaties setting global anti-corruption standards. Through the globalization of anti-corruption regulation, the effort begun in 1977 to achieve a global business environment based on business merit and not bribes is finally coming to fruition. Support for good governance and the elimination of corruption has brought citizens to the streets in country after country. At no time since the passage of the FCPA has global support for the elimination of corrupt business practice been as strong. This is not the time to turn back.

Unfortunately, the U.S. Chamber of Commerce now proposes to do just that. In its brief Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act (2010), the Chamber proposes to change the Act in ways that would substantially undermine the possibility for successful enforcement of America’s anti-bribery commitments. The Chamber’s proposed amendments would also set back decades of progress in the global struggle against corruption. Since the adoption of the FCPA, many countries and international organizations have adopted similar regulations, such as the United Nations Convention Against Corruption, the Organization for Economic Cooperation and Development Anti-Bribery Convention, and national laws spreading across the
globe from Europe to Russia to China. By weakening the FCPA, the U.S. would send a signal to these entities that our commitment to combatting corruption has wavered, potentially stalling this global momentum.

The Chamber justifies its proposals as modest requests to protect American business from prosecutorial overreach. In fact, FCPA prosecutorial overreach by the Department of Justice (DOJ) is a myth. While the number of FCPA enforcement actions has increased, the average amount of fines obtained from corporate offenders has remained largely consistent and modest.\(^1\) The private sector is responsible for the most significant implementation of FCPA requirements and compliance remains the goal of criminal investigation and enforcement at every stage.\(^2\) Moreover, DOJ enforcement has not singled out American companies—indeed, as the Chamber Report recognized, the DOJ has sought to ensure a level playing field for American business by diligent enforcement of the FCPA in respect of foreign companies.\(^3\) In addition, the Chamber’s proposals would needlessly hamstring what has been a judicious and increasingly effective use of prosecutorial discretion to encourage compliance and isolate the most egregious violations.

- Often seen as the least concerning of the Chamber’s proposals, the creation of an affirmative defense of “compliance” to FCPA corporate criminal liability is actually potentially very dangerous. **Compliance is already taken into account at every stage in the investigation and resolution of FCPA violations.** In 1988, Congress amended the FCPA to eliminate liability based on a company’s failure to eliminate bribery which it had “reason to know” was taking place. A defense of “adequate” or “good faith” compliance makes no sense when, as under the current FCPA, corporate criminal liability requires proof beyond a reasonable doubt that the company acted with actual knowledge and corrupt intent to influence a foreign government to gain an improper business advantage. Creating a compliance defense to knowing and intentional violations of the FCPA would amount to eliminating criminal liability under the Act all together by permitting a “fig leaf” compliance program to insulate companies from their knowing and intentional wrongdoing.

- Eliminating successor corporate criminal liability for an acquiror for violations undertaken prior to acquisition by an acquiree would result in perverse incentives to avoid investigation of past FCPA violations by potential acquirees. Such a failure to investigate, while seeming to reduce acquisition costs in the short run, would likely expose the acquiring company to substantial unknown business risks and future enforcement where bribery remains undiscovered and therefore unaddressed. **Even if rarely imposed, the potential for successor liability remains**
important to prevent companies from escaping from liability through restructuring while preserving appropriate incentives for monitoring and compliance in the context of acquisitions.

- The Chamber asserts that it is necessary to add a “wilfullness” requirement to the mens rea standards for corporate criminal liability because of an alleged inequity with the standard applied for individual criminal liability. In fact, as interpreted and applied by the courts and the DOJ and the SEC, the applicable standards for criminal liability for both individuals and corporations are effectively equivalent. The Chamber’s intent appears to be to substantially reduce the scope of activity proscribed by the FCPA by absolving corporations of criminal responsibility for long-standing, pervasive, knowing and intentionally unlawful acts if they did not also have specific knowledge that their conduct was violating the FCPA. Seen in this light, the Chamber’s proposal looks much more like a license to commit pervasive and intentional bribery than a modest attempt to eliminate the risk of prosecutorial over-reach.

- The Chamber’s proposed elimination of civil liability under the FCPA for the corrupt activities of subsidiaries would offer a formal escape route from enforcement by elevating corporate form over substantive knowledge and intent while eliminating a significant incentive for parent companies to undertake appropriate oversight of the corrupt activity of their subsidiaries. Congress has long recognized that parent companies frequently engage in foreign bribery through the use of subsidiaries and that eliminating the risk of liability would encourage a head-in-the-sand management style of conscious disregard and deliberate ignorance to facilitate corrupt activity abroad. The Chamber’s arguments about the potential risk of prosecutorial over-reach are purely speculative. Eliminating the risk of civil liability, however, would substantially decrease the incentives for parent company to oversee FCPA compliance by their foreign subsidiaries and the effectiveness of the FCPA as a limit on corrupt corporate activity abroad.

- The Chamber’s effort to turn back the clock is most striking in the proposal to narrow the definition of “foreign official” at a time when the global trend is the other way—toward criminalizing bribery of both public officials and private actors. The Chamber’s proposed “clarifications” would seriously compromise the purposes of the FCPA to prevent intentional bribery in a world which organizes public authority in a wide variety of ways. Because the contours of public control over commercial life vary greatly in different contexts, legislative clarification would be destined to be both over and under inclusive. This is precisely the type of issue best left to sound administrative management and judicial review.
Contrary to the Chamber’s rhetoric, the global trends are toward increased international anti-corruption compliance, the FCPA is working as Congress intended and new legislation is neither necessary nor advisable. This is not the moment for the United States to abandon its decades-long leadership in the struggle to bend the culture of global business away from the scourge of corruption. Widespread corruption abroad imposes enormous costs on American business, damages the global business environment and undermines the integrity and effectiveness of governments. A culture of corruption raises the costs of penetrating foreign markets and undermines predictability and business confidence. It imposes particular hardships on small and medium sized American enterprises seeking to participate in the global economy. Fighting these obstacles to American business has required a long-term commitment by the U.S. government and by American companies to change the climate for global commercial activity and the culture of business-government relations in countries across the world.
I. Introduction

1. The Challenge: Improving the Global Climate for American Business

For more than three decades, the United States has been a global leader in the fight against corruption. Widespread corruption abroad imposes enormous costs on American business, damages the global business environment and undermines the integrity and effectiveness of governments. A culture of corruption raises the costs of penetrating foreign markets and undermines predictability and business confidence. It imposes particular hardships on small and medium sized American enterprises seeking to participate in the global economy. Fighting these obstacles has required a long-term commitment by the U.S. government and by American companies to change the climate for global commercial activity and the culture of business-government relations in countries across the world.

The most powerful buttress against corruption is the vigilance and determination of the private sector, for which participation in the global market should not come at the cost of business integrity. The business community has long recognized that it cannot fight corruption in the global economy
without the support of government. Legal requirements in home jurisdictions establish a floor, giving business concrete justifications for resisting demands for corrupt payments. Moreover, multilateral collaboration among governments in standard setting and enforcement is necessary to change the global culture of corruption. A sound global business environment requires a level playing field to ensure that corrupt practices do not simply migrate to the most permissive location. Our diplomatic support for global anti-bribery standards strengthens foreign public authorities in their own efforts to end the culture of corruption.

The passage of the Foreign Corrupt Practices Act in 1977 drew a line in the sand: a culture of corruption was incompatible with sound international business practice and an unacceptable basis for global economic growth. The FCPA represented an alliance between government and the American business community, driven by a shared recognition of the harms inflicted on American business by foreign corruption. The Act both raised the cost of corruption and encouraged sound business practice. By criminalizing the payment of bribes abroad, the FCPA strengthened the hand of American business in refusing the demands of corrupt foreign officials. By requiring that listed companies maintain records and file reports, the FCPA encouraged internal vigilance by leading business actors.

It was nevertheless clear from the start that victory over corruption would require more than a statute. It would require a long-term commitment to raise global standards, encourage private sector engagement and compliance, and support public sector reform in the developing world. In the years since passage of the FCPA, the struggle against bribery and corruption has been a shared project of Republicans and Democrats and a common project of American government and American business. It has also been a striking success for American diplomacy and multilateral engagement.

Since passage of the FCPA, the American fight against corruption has developed in three phases: global standard setting, private sector compliance, and careful enforcement. The United States has worked diligently to create a level playing field for business by encouraging the adoption of national anti-corruption measures and multinational obligations to criminalize bribery and corruption. Over the last decade, governments across the world have strengthened national anti-corruption legislation, creating a transnational network of overlapping laws supporting the fight against corruption. Leading global businesses have risen to the challenge, strengthening their own internal management systems to ensure compliance and say no to corruption. Over the last years, the United States has increased its enforcement activity, focusing on the most egregious behavior and encouraging a culture of compliance by American and foreign business alike.
2. A Legacy of Success: Global Standards, Private Sector Compliance, Judicious Enforcement

The FCPA initiated a trend. In the years since its passage, dozens of leading trading partners have joined the United States in criminalizing corrupt foreign business practice. The United States has been a strong supporter of multilateral efforts to raise standards, most notably the OECD Anti-Bribery Convention and the UN Convention Against Corruption. These multilateral efforts have in turn sped the adoption of national statutes with functionally equivalent prohibitions on corruption. It is noteworthy that several recent national statutes, including those in the United Kingdom and Italy, go beyond what the FCPA requires and hold business to stricter standards. American companies operating in the global economy today—like their counterparts abroad—are subject to a dense fabric of anti-corruption measures.

As the legal playing field has leveled, the private sector has largely risen to the challenge. Encouraged by the requirements of many statutes, including the FCPA, many American companies have developed best practice routines of internal monitoring and compliance, often reflected in enterprise-wide “zero tolerance” policies. By developing a more robust culture of compliance, the private sector is transforming the culture of transnational business. The leading professional services firms routinely assist companies in monitoring and compliance. Moreover, collaboration between government and business has been critical to this record of success, particularly as mainstream American business has increasingly come to see the need for anti-bribery policies as protection for themselves as well as for developing nations.

Building on these successes, American and foreign authorities have gradually begun to strengthen their enforcement activities, focusing on individuals and entities which have not gotten the message that making corrupt payments to government officials to gain an unfair business advantage is no longer a permissible business practice in today’s global economy. The FCPA provides for civil and criminal enforcement authority by the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ). For many years, criminal enforcement activity was modest. Indeed, from 1977 until 2000, the SEC and the DOJ together averaged only three FCPA prosecutions a year with minimal, if any, penalties.

As best practice compliance initiatives became more widespread in the business community and other jurisdictions adopted parallel statutes, the DOJ strengthened its
enforcement activity to target and isolate particularly bad actors and to encourage effective compliance. Sensible DOJ enforcement leading to compliance helps protect U.S. companies from prosecution abroad. The DOJ’s commitment to a level playing field for global business is clear: investigations have been brought against foreign and American entities. Indeed, the largest fines have been levied against foreign entities.16 Indeed, the largest fines have been levied against foreign entities.17

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Across the American legal system, it is routine for criminal enforcement to be targeted in such a way as to encourage compliance while focusing any punitive measures on the most egregious offenders. Resource management concerns affect all areas of criminal enforcement and it is now well understood that encouraging private sector compliance is the most cost effective way to reduce criminal activity in the business sector. In every field—from taxation and securities regulation to environmental protection—this requires the wise use of prosecutorial discretion coupled with careful guidance to business about behavior that may trigger criminal sanction. The most effective
approach is precisely the one adopted by the DOJ in relation to the FCPA. The standards set forth in a criminal statute are given meaning in a changing business environment through case by case investigation which generates public guidance for industry against the background of judicial review. Guidance may come from administrative opinions, from the negotiated outcomes of successful investigations or from judicial opinions.\textsuperscript{18}

The DOJ stepped up enforcement through a careful balance of administrative guidance, prosecutorial discretion and negotiated settlement in the shadow of judicial review. As in other fields, the DOJ is coupling its investigations with use of Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs) to encourage compliance rather than punish prior bad acts.\textsuperscript{19} This practice can be controversial because it runs the risk of letting entities off too easily and encourages a close working relationship between DOJ investigators and the targets of their investigations.\textsuperscript{20} In the FCPA context, it reflects a balanced judgment by the DOJ that compliance and self-monitoring are ultimately the surest route to effective enforcement.

This targeted enforcement activity is consistent with the letter and spirit of the 1988 amendments to the FCPA by which Congress narrowed the basis for criminal liability to those who \textit{knowingly} and \textit{corruptly} make payments to foreign officials.\textsuperscript{21} The Congressional objective was clear. By eliminating criminal liability for those with only a “reason to know” that a bribe would be passed to a foreign official,\textsuperscript{22} Congress focused prosecutors on those individual or corporate persons who make bribes \textit{knowingly} and with \textit{corrupt intent}. Doing so focused FCPA criminal liability on the most culpable and encouraged effective compliance by business—compliance which actually prevents knowing and intentional violations of the Act. Where specific knowledge and intent cannot be proven, the Act provides no basis for criminal liability.

The anti-corruption world is changing rapidly. There is a great need for flexibility to deal with the range of institutional and cultural situations in the global economy, the rapidly changing forms corruption takes over time, and the diverse compliance risks faced by businesses of different sizes in different sectors. In this area, one size will not fit all. When standards are formalized at too high a level, they can become a barrier to entry for small and medium-sized enterprises. Legislating formal defenses can likewise set the bar too low, frustrating the clear Congressional intent to criminalize knowing and corrupt bribery abroad. Precisely at such a moment, we should encourage the DOJ and the SEC, in consultation with the business community, to move forward prudently with their enforcement activities subject to the tempering hand of judicial review.

The United States has consistently provided leadership in setting standards and in developing the tools for robust voluntary compliance by the private sector in part through the wise exercise of prosecutorial discretion focused on leveling the global playing field.\textsuperscript{23} Strengthening the global culture of compliance requires a steady and
balanced collaboration between enterprise and government, identifying best practice, isolating bad actors, and aligning incentives for business and government to strengthen resistance to corruption in all its forms. The record of the DOJ is clear: investigation of violations by foreign and domestic businesses, negotiated resolution of investigations focused on effective compliance and a determination to prosecute the most egregious violators. Undertaken in the shadow of judicial review, FCPA enforcement has been notable for the very few instances in which companies have sought to appeal DOJ or SEC administrative action under the FCPA. The system is working precisely as Congress intended.
Dispelling the Myth of Excessive FCPA Enforcement

The recent increase in DOJ and SEC enforcement of the FCPA has been greatly exaggerated and in fact, emerges as appropriate in the context of the global fight on corruption. Recent enforcement has been tailored to encourage compliance while reserving penalties for only the most egregious corporate behavior. The DOJ has focused more directly on individuals making corrupt payments than on corporate entities and has been as robust in addressing violations by foreign entities as by American corporations. Indeed, some of the largest fines have been levied against foreign violators.

As multilateral obligations and national statutes have leveled the ground and private sector self-monitoring and compliance have increasingly become the norm, the DOJ has stepped up its enforcement activities. Placed in historical and comparative context, the uptick in enforcement activity over the last years has been rather modest. The beginning of a concerted effort to increase FCPA enforcement—both in terms of the number of enforcement actions and the size of the penalties sought—emerged only in 2003, as international and national anticorruption statutes became common.

Despite the vocal criticism of the fines and penalties that have accompanied the uptick in prosecution, it is important to note that two-thirds of the fines collected in 2010 derived from just three matters. Although the number of FCPA prosecutions has risen since 2007, the average fine per corporate proceeding has remained quite stable over the last decade with the exception of two cases resulting in particularly large settlements. Focusing on the number of enforcement actions can also be misleading. Totals often reflect enforcement actions against affiliated companies arising from a single action—or instances in which the same company is separately charged by the DOJ and SEC. Eliminating this double counting would reduce the number of corporate prosecutions initiated in 2010 from 47 to 20.
II. Three Decades of Multilateral Collaboration


When the FCPA was adopted in 1977, the costs of corruption were only beginning to be understood and appreciated. In many parts of the world, bribery was thought to be a routine cost of doing business. One occasionally heard that it could even increase economic efficiency by providing a simple way around complex and rigid bureaucracies.

In the 1990s, an enormous scholarly literature emerged chronicling the economic, political and cultural consequences of corruption. It became clear that corruption damages economic growth, reduces both domestic and foreign investment, slows business development and encourages the growth of an informal economy. Battling corruption became a priority for the leading international financial institutions and for the development community. The corrosive effects of corruption on the effectiveness and legitimacy of public authorities were understood to impede economic progress across the developing world.

We now know that corruption wreaks havoc on economic growth and undermines the integrity and effectiveness of business and government alike. Corruption damages both developing and developed country economies, increasing costs and reducing the efficiency and stability of world markets. Today, American businesses recognize not
only the negative effects of corruption on both development and enterprise, but the role of the private sector in stopping the spread of bribery and corruption.26

Corruption remains the scourge of economic development.27 Corruption weakens governments by undermining the rule of law and public confidence in government institutions.28 Corruption siphons public expenditures away from important social services such as health and education, reduces the productivity of public expenditures, and impedes governmental tax and tariff revenues.29

Corruption also threatens the global business environment.30 For businesses, the corrosive effects on multinationals and small to medium-sized enterprises alike are multi-faceted and complex. In addition to the direct cost of bribe payments, companies suffer reputational risk, the threat of extortion, increased cost of capital, distorted prices, unfair competition and decreased staff morale.31 In a corrupt environment, significant capital is expended in unproductive payments, resulting in financial loss to the company and significant lost development potential to the world. American business has learned that bribes “do not make good business sense.”32 Paying a bribe may provide a company with a particular service or set of goods, but the lack of a written contract leaves a company without a guarantee that the service will be performed or that the goods will in fact be awarded. In addition, the lack of record permits the possibility that in the next instance, the bribe amount could be raised.33 Corruption creates an uneven playing field for ethical actors, makes companies vulnerable to higher costs for transacting business, and represents a severe threat to corporate reputation.34 Failure to put in place active measures against corruption permits “employees and third parties to rationalize stealing from the company,” and the cost to a company of reputational damage due to revelations of corruption can be far higher than “merely” the financial cost of the immediate investigation. A company may lose shareholders, customers, and partners, as well as employees. Reputational loss may result in loss of business, if governments or civil society become suspicious of a company’s ethical track record.35

These costs are difficult to calculate with confidence. We do know that for all the strides we have made in the fight against corruption, there is still a long way to go. Corruption remains endemic and American business continues to suffer its costs. According Daniel Kaufman, during his tenure as Director of Global Governance at the World Bank Institute, a “conservative approach” to measuring bribery of public sector actor by private sector entities yields an estimate of US $1 trillion annually in corrupt payments.36 Corrupt payments themselves, as Kaufman noted, represent only one part of the overall problem of corruption. Embezzlement, theft of public assets, and private
sector bribery are also significant. The knock-on costs from lost efficiency, reputation and more are incalculable.

Moreover, American companies participating in the global economy continue to perceive corruption as a significant obstacle to business. In a 2009 survey by accounting firm Ernst & Young, one in four respondents reported that their company had experienced an incident of bribery or corruption over the course of 2007 and 2008 and 18% knew their company had lost business to a competitor who had paid a bribe. Twenty-three percent of respondents "knew that someone in their company had been solicited to pay a bribe to win or retain business." In a survey of more than 2,700 business executives in twenty-six countries in 2008, Transparency International found that nearly forty percent of polled business executives had been asked to pay a bribe when working with public institutions, and fifty percent estimated that corruption increased their project costs by at least ten percent. Transparency International found that eighty percent of the 91,500 individuals they surveyed believe political parties are corrupt or extremely corrupt. Bribes paid to politicians and officials in developing countries approach $20 to $40 billion every year, which is a figure equivalent to forty percent of official development assistance.

In short, the challenges which led to the FCPA remain with us. Robust anti-corruption efforts by business and government remain necessary. Unlike 1977, however, the network of legislation and the prospects for enforcement have expanded markedly, as has the compliance and self-monitoring practices of the business community. Progress is being made.


2.1 The First Step: The 1977 Foreign Corrupt Practices Act (FCPA)

The FCPA was adopted in part due to a scandal involving the aerospace company Lockheed bribing foreign officials to garner business and reflected widespread concern about the harmful effects of bribery and corruption by American companies operating abroad. The Senate statement accompanying the bill was unequivocal: “Corporate bribery is bad business.” In the ensuing years, the FCPA has twice been amended, most substantially in 1988, to sharpen its focus and align its requirements with multilateral commitments.

So long as the FCPA was the only significant national statute criminalizing foreign corruption and applied only to U.S. domestic concerns and issuers subject to SEC
regulation, the playing field for participation in the global economy was not level. In 1988, Congress directed the Executive Branch to encourage America’s most significant trading partners to enact similar legislation. The result was the OECD’s Convention on Combating Bribery of Foreign Public Officials, signed by thirty-three states in 1997 and ratified by the United States in 1998. As a consequence, the FCPA was again amended in 1998 to bring it into line with the requirements of the OECD convention. The most significant changes extended jurisdiction to cover foreign nationals or foreign corporations who act in furtherance of a prohibited payment while in US territory and to provide for the exercise of jurisdiction on the basis of the territoriality principle.

Taken together, the impact of these amendments is clear. The FCPA has been narrowed in focus and broadened in scope. On the one hand, only the most culpable are subject to criminal liability. The requirement that bribery be “knowing” narrows the FCPA relative to some other significant anti-bribery statutes, most notably the United Kingdom. At the same time, the jurisdictional reach of criminal enforcement was broadened to encompass foreign persons and entities when they act within the United States and to apply civil and criminal penalties to all employees or agents of U.S. businesses whether or not they are U.S. nationals. The resulting statute focuses enforcement on egregious conduct while encouraging the use of criminal enforcement power to encourage non-corrupt business practices by U.S. and foreign companies alike and to ensure a level playing field for American business globally.

2.2 Leveling the playing field: Multilateral Obligations and National Anti-Bribery Statutes

U.S. leadership in the struggle against corruption has been remarkably successful in global standard setting. In 1977, the FCPA stood alone as a national law criminalizing bribery and corruption. The statutory situation today could not be more different. Multilateral conventions committing countries to join the fight against corruption have been widely signed and ratified. More than one hundred countries, including many of our closest allies and most important commercial competitors, have signed the United Nations Convention Against Corruption, committing themselves to adopting implementing legislation criminalizing bribery.

American leadership has been crucial. The FCPA has been a model for legislation elsewhere. Its existence has made it more difficult for opponents of anti-corruption legislation in other countries to argue that they would be placing their own firms at a competitive disadvantage. The American government has provided steady and critical support for multilateral efforts to set global standards prohibiting bribery and corruption. The success of these efforts is visible in the strength and breadth of multilateral commitments to criminalize bribery and corruption and in the number and stringency of the national statutes passed since 1977.
The World Follows: Other Anti-Bribery Laws Passed after the FCPA

- Inter-American Convention Against Corruption, 1997
- OECD Anti-Bribery Convention, 1999
- Council of Europe Convention on Corruption (Criminal), 2002
- Council of Europe Convention on Corruption (Civil), 2003
- The UN Convention Against Corruption (UNCAC), 2005
- UK Bribery Act, 2010
- Russian Anti-Bribery Laws, amended 2011
- Chinese Anti-Bribery Laws, amended 2011

American efforts to develop multilateral treaty commitments to fight corruption first bore fruit in the 1990s. The most significant achievement was the conclusion of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (The OECD Convention) in 1997. A number of significant regional instruments were also concluded, including the Inter-American Convention Against Corruption, which came into force in 1997. Thirty-eight countries are now parties to the OECD Convention which sets global standards for anti-corruption legislation and commits signatories to passing domestic legislation that is the “functional equivalent” of that provided by its terms to ensure a harmonized playing field for global business. Crucially, the OECD Convention recognizes that good intentions and sound legislation are only the start. Defeating the culture of corruption requires an iterative process of peer monitoring to assess compliance and make recommendations for improvement. All thirty-eight countries have now passed anti-bribery laws and consented to OECD monitoring. The OECD Convention also provides for cooperation in investigations and proceedings and renders bribery an extraditable offense.

Then-Assistant Secretary of State for Economic and Business Affairs, Daniel K. Tarullo, credited several key trends supporting the State Department’s efforts to engender multilateral anti-corruption commitments, including the growing views of economists with regard to the detrimental effects of corruption on economic development
and democratic accountability; louder calls by developing countries for industrialized nations to limit bribery by their companies; support by U.S. business for anti-bribery policies; and increasing intolerance for bribery among members of the public.60

In 2003, the United Nations Convention Against Corruption (UNCAC) was signed, coming into force in 2005.61 UNCAC commits all signatories to adopting legislation outlawing the bribery of foreign public officials.62 The UNCAC has a far broader range of signatories (140 developed and developing countries including China)63 and content than the OECD Convention, although its requirements are generally less stringent in compelling harmonization. In addition to foreign bribery, UNCAC prohibits domestic bribery of public officials and recommends measures to prevent bribery in the public sector.64 It goes further than the FCPA in encouraging criminalization of both active and passive bribery.65 UNCAC has expansive provisions on mutual assistance in investigation and breaks new ground in global asset recovery.66

The State Department summarized the significance of these developments in 2003 in these words:

“Bribery and corruption tilt the playing field and create unfair advantages for those willing to engage in unethical or illegal behavior. Corrupt practices penalize companies that play fair and seek to win contracts through the quality and price of their products and services... Since [the enactment of the FCPA] the U.S. has been trying to level the playing field by encouraging other industrialized countries to take similar steps—and these efforts are finally paying off.”67

If it might once have been said that the FCPA threatened to place those subject to its terms at a competitive disadvantage, this is no longer the case. Often spurred by new multilateral commitments, dozens of countries, including our most important trading partners, have now passed anti-bribery statutes of their own.68 Moreover, Congress has narrowed and focused the FCPA through amendment. The result is a transnational regulatory framework which has leveled the legal playing field considerably while dispersing regulatory and prosecutorial exposure.

This global network of anti-bribery laws reflects a worldwide consensus that bribery damages governments and business enterprises alike. It has changed the rules of the game for global commerce. In many ways, the flurry of recent national and international legislation reflects the success of the US campaign against bribery. As the US State Department has recognized, a global network of enforcement is the most efficacious and enduring way to combat corruption in an era of globalization.69 Global business today is subject to the anti-corruption rules of multiple jurisdictions and no company operating transnationally can ignore the possibilities for liability under a variety of statutes. As in other fields of legal regulation, companies engaging in global eco-
omic activity must ensure compliance and manage the risks of exposure to multiple overlapping regulatory requirements.

Significantly, the American FCPA is no longer alone in criminalizing corrupt practices which occur outside American territory or which are committed by foreign individuals or business entities under some circumstances. The FCPA applies to all issuers listing with the SEC, to domestic concerns, regardless of where the violation takes place, and to foreign persons and companies whose activities have a link to or impact upon the American economy which “can be prosecuted for foreign bribery that has a connection to the US.” The extraterritorial character of the FCPA has been crucial in ensuring that the Act’s applicability does not prejudice American business. That other nations have joined us in extraterritorial enforcement has only contributed to this leveling effect. Many national statutes are silent on extraterritorial applicability, prohibiting bribery wherever it occurs, and relying on general rules of criminal procedure to determine the possibilities for extraterritorial prosecution. Others explicitly authorize extraterritorial applicability under various circumstances. The OECD Convention was cautious about the extraterritorial principle, although the OECD requirement of “functional equivalence” among anti-bribery statutes has permitted signatories, including the United States and the United Kingdom, to adopt explicit extraterritorial authorization for combating bribery and corruption. Perhaps most notably, the UK’s Bribery Act applies to acts taking place in whole or in part in the UK or committed by a UK national elsewhere, as well as making any company that “carries on a business or part of a business” in the UK subject to prosecution for the offense of failing to prevent bribery, regardless of where the bribery itself took place. As a result, American corporations and citizens doing business abroad may be subject to the anti-corruption legislation of other OECD countries for corrupt activities both within the territory of such countries and elsewhere.

Although the OECD and UN Conventions aimed to harmonize national anti-bribery legislation, national statutes continue to differ, often in important ways. Several national statutes prohibit activities not addressed by the FCPA. As a result, our FCPA is no longer the most restrictive national statute. Indeed, the only point on which the FCPA is broader than the OECD Convention is its inclusion of corrupt payments made to candidates for office or to political parties. In many situations, American businesses are now subject to anti-corruption standards more extensive than those contained in the FCPA. In this respect, further reducing the scope of the FCPA would not reduce the need for internal monitoring and compliance measures for many American businesses operating transnationally.

For example, unlike the FCPA, some more recent statutes, including that of the United Kingdom, prohibit receiving bribes (so-called “passive bribery”) as well as making bribes. Some, again including the United Kingdom, criminalize bribery directed at private parties as well as public officials. The FCPA excludes so-called “facilitation”
payments (small payments for routine and non-discretionary government action) from scrutiny.\textsuperscript{78} Although this approach has been followed in some places,\textsuperscript{79} the UK has no such exception.\textsuperscript{80} The FCPA also creates an affirmative defense for “reasonable and bona fide expenditure, such as travel and lodging expenses,” incurred by or on behalf of a foreign official and “directly related” to the “promotion, demonstration, or explanation of products or services” or “the execution or performance of a contract with a foreign government or agency thereof.”\textsuperscript{81} This defense has no parallel in the OECD Convention. The British statute also provides for no similar defense for hospitality or other bona fide expenses.\textsuperscript{82} In this area, the UK leaves a great deal of prosecutorial discretion in administering a legislative standard more restrictive than that of the FCPA.

Most importantly, the United Kingdom and Italy reject the approach taken by Congress when it narrowed the FCPA to capture only those corrupt payments made \textit{knowingly}. Both Britain and Italy establish offenses for individuals and entities which do not require knowledge.\textsuperscript{83}

In short, American leadership and multilateral standard setting work. The global playing field for business is being leveled. Businesses in the global economy are now subject to a variety of statutes prohibiting bribery and corruption. They differ in detail—some stricter, some less so—but the mosaic of legislation increasingly makes clear that transnational economic actors are subject to anti-corruption virtually everywhere that they do business. A less corrupt global business environment means greater competitiveness for American companies, easier access to global markets for small and medium-sized American companies and greater economic growth for all.

As the progenitor of this global trend, the FCPA remains a robust example of the importance of standard setting and enforcement. It remains the crucial global benchmark for fighting corruption. How it is interpreted and enforced by American business and American government are as important to the global anti-corruption efforts now as its existence on the statute books was three decades ago.
FCPA and Foreign Companies—Leveling the Playing Field

It is important to note that FCPA enforcement has not focused on American companies in ways which would put them at a disadvantage in the global economy. Reflecting the authorities’ commitment to leveling the playing field for transnational business, FCPA enforcement has increasingly focused on foreign entities. In 2010, the six largest penalties—accounting for 80% of the penalties collected—derived from matters involving non-U.S. corporations. Of the three largest penalties ever, two involved foreign enterprises. Of the twenty corporate matters brought in 2010, more than half involved non-U.S. companies, accounting for 94% of the penalties imposed in 2010. This emphasis on the activities of foreign companies belies the notion that increased FCPA enforcement has harmed U.S. companies relative to their foreign counterparts. Rather, careful enforcement by the United States against foreign and American business helps to establish a level playing field whose terms are guided by the best compliance practices of American business.
III. The Proposed Amendments: A Radical Reversal of More than 30 years of U.S. Policy Promoting Fair Competition through a Global Fight Against Corruption

Under the misleadingly innocuous title “Restoring Balance,” the U.S. Chamber Institute for Legal Reform has proposed six far-reaching amendments to the FCPA that each would significantly reduce the scope and efficacy of the FCPA while substantially undermining more than 30 years of successful U.S. leadership in promoting global anti-corruption standards reflected in the adoption of the OECD Anti-Bribery Convention, the UN Convention Against Corruption and national legislation modeled on (and in some cases more stringent than) the FCPA by all of the OECD countries and a number of our most important non-OECD trading partners (including China, Russia and Brazil). At the very moment when U.S.-championed cries for a global level playing field based on competitive merit and corruption-free governance are sweeping the world on the streets of transitional countries and emerging democracies and in the legislatures of all our major trading partners, Congressional action substantially weakening the FCPA would send a dangerous and destabilizing message to our trading partners,
foreign companies, foreign officials and emerging democratic movements around the world while undermining the crucial role the FCPA plays in helping U.S. companies to resist demands for bribes abroad as the price of access to foreign markets and opportunities.

In 1977, the FCPA was a ground-breaking and unique piece of legislation crafted in partnership with U.S. business to help promote competition-based market access by U.S. companies to foreign markets through the encouragement of a global business environment based on business merit and not bribes.85 Today, in large part due to the success of a strong 30-year commitment to anti-corruption by the U.S. government and U.S. businesses, the FCPA has become the model for the global proliferation of national anti-corruption legislation that attempts to reduce corrupt business practices while strengthening competition-based economic growth. In these circumstances, eroding the FCPA through limiting amendments would not reduce the need for U.S. companies to adopt bribery-free business practices and robust compliance and reporting mechanisms—in the current global regulatory environment, these are not just good global business practices, they are required by the laws of numerous foreign jurisdictions where U.S. companies are doing business.

Adoption of the proposed amendments could, however, have the significant unintended consequence of displacing U.S. leadership in the articulation of global anti-corruption norms while centering anti-bribery enforcement action under the array of foreign legislation to which U.S. companies operating abroad would remain subject in the administrative agencies and courts of foreign trading partners. While the Chamber Report makes a number of speculative claims about the risks of potential abuse of enforcement discretion by the DOJ and the SEC under the FCPA, the Chamber Report presents no actual evidence that these agencies are not achieving an appropriate balance between using their FCPA investigatory authority to assist U.S. companies to improve global business practices and FCPA compliance, on the one hand, and prosecuting the most egregious violations of the Act on the other.

The bottom line is that the FCPA is working and the world has taken notice. Today, not only U.S. companies, but the companies of virtually all our major trading partners are subject to anti-bribery legislation modeled on (and sometimes more stringent than) the FCPA.86 The DOJ and the SEC have shown care and prudence in the enforcement of the FCPA and have pursued egregious violations of the Act by U.S.
and foreign companies with equal vigor, creating no competitive disadvantage for U.S. companies.87 Through the judicious use of Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs), the DOJ and the SEC have helped numerous companies ferret out corruption among employees while improving compliance practices and reducing the risk of non-compliance in the future. Moreover, helping U.S. companies to establish good global business practices in conformity with the FCPA also helps U.S. companies to reduce the risk of non-compliance under foreign anti-bribery legislation.

In such circumstances, eroding the scope and efficacy of the FCPA by adopting the Chamber’s proposed amendments would be anything but “Restoring Balance” — it would (i) needlessly introduce rigidity and uncertainty into the FCPA by disturbing established FCPA enforcement practices characterized by reasonableness and prudent flexibility based solely on chimerical fears of potential prosecutorial abuse and over-reaching, (ii) undermine U.S. policy leadership in the global fight against corruption, and (iii) signal to the world a major reversal from the U.S.’s uncompromising commitment to the global promotion of business practices and public institutions free from corruption. In fact, Congressional adoption of the Chamber’s proposed amendments to the FCPA would reflect a radical retreat in the global fight against corruption.

1. Proposed Amendment: Creating a Statutory Compliance Defense

Compliance is already taken into account at every stage in the investigation and resolution of FCPA violations

At first blush, the Chamber’s suggestion of adding a statutory compliance defense to the FCPA has some intuitive appeal. After all, as the Chamber’s Report acknowledges, both the DOJ and the SEC regularly take a company’s compliance efforts into account at every stage of the enforcement process, from undertaking a preliminary investigation, to deciding whether to pursue an indictment or enter into a DPA or NPA, to determining appropriate measures for bringing a company into compliance, to determining whether to impose fines or other sanctions for proven violations of the Act. If the DOJ and the SEC are taking compliance into account already, why not formalize that practice in the statutory language of the FCPA?

The most direct answer is that an affirmative defense of “adequate” or “good faith” compliance is fundamentally inconsistent with the FCPA’s very high standards for corporate criminal liability which require prosecutors to prove that a company’s
prohibited acts be both “knowing” and “corruptly” undertaken with intent. The FCPA defines “knowing” as follows:

(2) (A) A person’s state of mind is “knowing” with respect to conduct, a circumstance, or a result if—
   (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
   (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

While the term “corruptly” is not expressly defined in the Act, the DOJ has issued a public statement interpreting the term as follows: “The person making or authorizing the payment must have a corrupt intent, and the payment must be intended to induce the recipient to misuse his official position to direct business wrongfully to the payer or to any other person.” These standards of liability were summarized in the Congressional Conference Report on the 1988 amendments to the Act:

Thus, the “knowing” standard adopted covers both prohibited actions that are taken with “actual knowledge” of intended results as well as other actions that, while falling short of what the law terms “positive knowledge,” nevertheless evidence a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the Act.

From these articulated and clearly-defined standards of corporate culpability under the FCPA, it becomes immediately apparent that an affirmative defense of “good faith” or “adequate” compliance is simply inappropriate. On the one hand, effective, “good faith” compliance is logically incompatible with the requirement under the Act that violations be undertaken with “actual knowledge” or “a conscious disregard or deliberate ignorance of known circumstances” and the requisite “corrupt” intent to induce a foreign official to misuse his official position to wrongfully obtain business or direct business to another. Any compliance program that knowingly permitted, facilitated, or consciously or deliberately turned a blind eye to corrupt, intentional violations of the FCPA must be either per se inadequate or not undertaken in good faith. On the other hand, the existence of a merely formal compliance program is irrelevant to the question
of whether knowing, intentional and corrupt behavior took place. Creating a “compliance defense” to knowing and intentional violations of the Act would amount to eliminating criminal liability under the Act all together by permitting a “fig leaf” compliance program to insulate companies from knowing and intentional wrong-doing.

The Chamber’s assertion that the existence of affirmative defenses for corporate compliance in the U.K. and Italian anti-bribery statutes creates a justification for the creation of an affirmative compliance defense under the FCPA is both inappropriate and misleading. With respect to the U.K. Bribery Act of 2010 (the “U.K. Act”), the affirmative defense of “adequate” compliance procedures is only available with respect to a new and very broad strict criminal liability offense created in the U.K. Act. In the U.K., a “commercial organization” may be held criminally liable for failure to prevent prohibited bribery by any person “who performs services” for such organization.92 In other words, under this provision of the U.K. Act, a company can be held liable for failure to prevent bribery conducted by employees or representatives without the company’s knowledge and without any corporate intent to make the bribes. No such offense exists under the FCPA, and the U.K. Act tellingly does not provide any affirmative defense of compliance for those offenses which include a mens rea requirement equivalent to the FCPA.93

Italian Legislative Decree No. 231 of 8 June 2001 (the “Italian Act”) creates administrative liability for companies resulting from offences committed by persons holding representative, administrative or managerial positions in the company so long as the criminal acts are in the interest of or otherwise benefit the company.94 Like the U.K. Act, there is no requirement in the Italian Act that the company have knowledge of the criminal activity or any intent to commit violations by its representatives in order to establish liability.95 Article 6 of the Italian Act creates an affirmative defense for failure to prevent the criminal activity of an employee or representatives if the company can demonstrate that prior to the criminal activity the company had established and effectively implemented a compliance program suitable to preventing the corporate crime at issue and overseen by an autonomous supervisory body that adequately performed its duties.96 Thus, as with the U.K. Act, the compliance defense under the Italian Act is provided in respect to corporate administrative liability for a company’s failure to prevent criminal acts by its representatives whether or not it had knowledge of such acts or intended them to be undertaken.
The U.K. and Italian approaches might be reasonable as a matter of regulatory policy, allowing a company to avoid liability for its failure to prevent a particular instance of criminal activity by an employee or representative about which it lacked knowledge if the company can establish that it had in place an otherwise effective compliance program adopted, implemented and administered in good faith. Despite the Chamber’s assertions to the contrary, there is no similar strict liability offense under the FCPA pursuant to which a company could be held responsible for acts of its employees or agents about which it had no knowledge or with respect to which it had not acted corruptly with “conscious disregard of known circumstances.” Since Congress eliminated corporate criminal liability for acts that a company “had reason to know” were unlawful in its 1988 amendments to the FCPA, the FCPA requires both knowledge and corrupt intent in order to hold a company liable for criminal acts by persons acting on the company’s behalf. As has been discussed already, an affirmative defense of “good faith” or “adequate” compliance is logically inconsistent with a liability standard that requires corporate violations to be both “knowing” and “corruptly” and intentionally undertaken. In this context, adopting the Chamber’s proposal to amend the FCPA to include an affirmative defense for corporate compliance in the face of knowing and intentional bribery would signal to our OECD partners a significant loosening of the applicable standards of conduct for corporations under the Act as well as a major shift in policy regarding the U.S. commitment to fighting global corruption.

The Chamber also suggests that companies will lack adequate incentives to implement appropriate compliance programs because of fear that the compliance program itself may subject them to liability under the FCPA without a formal statutory affirmative defense for compliance. This concern is simply not supported by the facts. The obligation to put in place appropriate mechanisms to ensure adequate reporting up the chain of command and compliance with applicable law has its roots in the most basic requirements of corporate law—the fiduciary duty of managers to act in good faith and in the best interests of the corporation in the oversight of a company’s operations. The fundamental fiduciary duty of due care and oversight requires company management to adopt appropriate reporting mechanisms reasonably designed to bring malfeasance by employees and representative to light as well as compliance mechanisms designed to ensure compliance with the company’s legal obligations under applicable law. While a Board’s decision as to the type and scope of reporting and compliance mechanisms necessary in particular circumstances, if undertaken in good faith and in the absence of a [“systematic or conscious disregard for known circumstances”], will insulate the board from liability, the fiduciary obligation to adopt appropriate compliance measures remains a legal obligation of the corporate law of every state.

This basic obligation to engage in good faith compliance is strengthened by the provisions of the U.S. Sentencing Guidelines which set forth guidance for judges, pros-
ecutors and companies with respect to corporate criminal liability and compliance, not only for the FCPA, but also for the numerous other federal statutes providing criminal sanctions for corporate acts. For example, the introductory comments to the section of the U.S. Sentencing Guidelines Manual dealing with corporate crimes suggest that the Guidelines are designed to provide “incentives for organizations to maintain internal mechanisms for preventing, deterring, detecting, and reporting criminal conduct.”

Under the Guidelines, a corporation’s criminal culpability and the possibility of sanction can be reduced by the existence of what the Guidelines call an “Effective Compliance and Ethics Program.” The Guidelines also define in significant detail the minimal requirements necessary to establish an “Effective Compliance and Ethics Program.”

While the U.S. Supreme Court in United States v Booker, 543 U.S. 220 (2005), determined that the U.S. Sentencing Guidelines were advisory and not binding on the courts, the Chamber has not put forth any evidence that either the DOJ or the federal courts are acting other than in conformity with the Guidelines in respect to the treatment of compliance efforts by companies in connection with FCPA investigations or prosecutions. In fact, as has been noted elsewhere, and acknowledged by the Chamber Report, DOJ and SEC practice suggests that compliance is taken into account at every stage of the investigation and prosecution process under the FCPA, including decision to enter into DPAs and NPAs in appropriate circumstances.

Finally, in large part due to efforts of the United States in promoting anti-bribery legislation abroad, both U.S. and foreign companies are subject to anti-bribery statutes substantially equivalent to and in some cases more stringent than the FCPA in numerous countries around the world in which they are doing business, including virtually all major trading partners. In other words, engaging in robust compliance practices is not a matter of business choice, such practices are an essential part of the requirements for doing business in the modern global economy.

In sum, appropriate reporting and compliance mechanisms are required as a matter of basic fiduciary duty, as part of the general obligation to comply with applicable law, as a significant method in accordance with the U.S. Sentencing Guidelines for reducing the risk of corporate criminal liability and sanction under federal law, and as an essential part of any effort to avoid criminal sanctions under the applicable anti-bribery laws of all OECD countries and most other major trading partners. Under such circumstances, it can hardly be said that the incentives to adopt adequate compliance mechanisms do not exist—good compliance practices are a necessary part of good global business.
2. Proposed Amendment: Eliminating Successor Liability for Pre-Acquisition Acts of an Acquired Company under the FCPA

Successor liability is rarely imposed, but it remains important to prevent companies from escaping from liability through restructuring.

Much of the rhetorical heat contained in the section of the Chamber’s Report dedicated to its proposal to eliminate successor liability for acquiring companies for the criminal acts of their acquirees is generated not from any issue peculiar to the FCPA, but rather from a strong ideological objection to successor liability in general. In describing the scope of its proposed amendment to the FCPA, the Chamber Report states: “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 ... historical violations [committed by its acquiree(s)].”\(^{104}\)

While the imposition of successor criminal liability is indeed quite rare, the potential for successor corporate criminal liability in appropriate circumstances is by no means new or unique.\(^{105}\) Moreover, there are good policy reasons for retaining the possibility of successor criminal liability in cases where eliminating such liability would substantially undermine the purposes of the criminal statute in question, even if successor liability is rarely applied in fact.\(^{106}\) The FCPA is just such a case and the DOJ and SEC actions in the \textit{Alliance One} case, described in the Chamber’s Report as an example of why successor liability is inappropriate, demonstrates precisely why successor liability is a crucial part of the FCPA enforcement framework.\(^{107}\)

In the \textit{Alliance One} case, Dimon Incorporated (Dimon) and Standard Commercial Corporation (SCC), two independent wholesale leaf tobacco merchants, each acting through foreign subsidiaries, engaged in systematic and sustained schemes of bribery of foreign officials to obtain contracts for tobacco purchases for resale.\(^{108}\) In the case of Dimon, the bribery schemes lasted for a period of eight years in Kyrgyzstan and four years in Thailand.\(^{109}\) In the case of SCC, the bribery scheme was conducted over four years in Thailand.\(^{110}\) Both companies were also charged with numerous other FCPA violations for prohibited acts in a number of other countries including Greece, China and Indonesia.\(^{111}\) Evidence was proffered in the case of both companies that the bribery schemes were undertaken by the subsidiaries \textit{at the direction of senior management at the parent company level}.\(^{112}\) In 2005, Dimon and SCC merged to form Alliance One International, Inc. (Alliance One).\(^{113}\)

Under the rule proposed by the Chamber, Alliance One could escape all liability for the knowing and intentional criminal acts of its predecessor companies (Dimon
and SCC) merely as a consequence of restructuring its corporate operations through a merger. This is not a case in which Alliance One sought to investigate or eliminate the criminal behavior of its predecessor companies after the merger. Nor was Alliance One the innocent victim of the unauthorized acts of low level employees in its foreign subsidiaries. Yet, precluding the DOJ and the SEC from pursuing successor criminal liability after a restructuring as the Chamber urges Congress to do would have precluded the investigation and prosecution of egregious and long-standing FCPA violations by Alliance One and its predecessors, thereby significantly reducing the effectiveness of the FCPA, while creating perverse incentives for companies to avoid liability through restructuring. It bears noting that even in the face of significant knowing and intentional violations of the FCPA by Alliance One as successor to Dimon and SCC, in addition to fines paid in connection with the guilty pleas of both subsidiaries and Alliance One, the DOJ also entered into a Non-Prosecution Agreement with Alliance One which focused on helping the company and its subsidiaries to improve internal compliance processes to reduce the risk of non-compliance in the future. Far from an example of prosecutorial over-reaching, the Alliance One case demonstrates that the current FCPA (including the availability of potential successor criminal liability) is an appropriate mechanism for punishing egregious and sustained bad acts from the past while creating an appropriate framework of incentives to encourage good corporate business practices for the future.

A similarly compelling case for successor criminal FCPA liability as an important mechanism for encouraging adequate pre-acquisition due diligence and post-acquisition compliance mechanisms can be made in the common circumstance where a potential acquiror is considering the acquisition of a company that may have engaged in FCPA violations. An excellent case in point is the one considered by the DOJ in its Opinion Release No. 08–02 (June 13, 2008) (hereinafter Halliburton case), which, like the Alliance One case, generates considerable critical commentary in the Chamber’s Report.

In the Halliburton case, Halliburton Company requested an opinion from the DOJ pursuant to the FCPA Opinion Release Procedure in a circumstance where it was engaged in competitive bidding for the acquisition of a U.K.-based company in the oil and gas industry that was traded on the London Stock Exchange and had operations in more than 50 countries, more than 4,000 employees and numerous national oil companies as customers (the Target). Due to peculiarities of U.K. law in competitive bidding situations, Halliburton had neither sufficient time nor sufficient access to information to complete its FCPA and anti-corruption due diligence on Target and it was precluded from making an offer conditional on the satisfactory completion of due diligence. In such circumstances, Halliburton sought assurance from the DOJ as to whether (i) it would be held liable under the FCPA for the acquisition of the Target, (ii) it would be liable for any FCPA liabilities of the Target prior to the acquisition and (iii) it would be...
held liable for any post-acquisition conduct by the Target before it was able to complete its FCPA due diligence, if such conduct is identified and disclosed to the DOJ within 180 days of the acquisition.\textsuperscript{118}

In Opinion Release No. 08–02 the DOJ describes a comprehensive post-acquisition plan of investigation, risk assessment, disclosure and cooperation put forward by Halliburton which indicates a significant, good faith effort to identify wrong-doing and to rectify it as soon as practicable, while also undertaking to create a new corporate culture of FCPA and anti-corruption compliance in the Target and throughout its operations.\textsuperscript{119} In response to Halliburton’s proposal, and recognizing that Halliburton was precluded by U.K. law from undertaking the due diligence it deemed appropriate prior to the acquisition, the DOJ opined that Halliburton would not be subject to FCPA successor liability (i) for merely acquiring the Target, (ii) for pre-acquisition conduct by the Target disclosed during the 180-day period following the closing, or (iii) for post-acquisition conduct of the Target disclosed during the 180-day period following the closing, in the latter two instances, provided that Halliburton implemented its post-closing and remediation plan, and that no Halliburton employee or agent knowingly played a role in the violations by the Target.\textsuperscript{120}

From the Halliburton case, one can see the crucial role that the potential for successor FCPA liability plays in encouraging companies to engage in appropriate pre- and post-acquisition due diligence and compliance activities. The case also demonstrates the usefulness of the Opinion Procedure for obtaining guidance as to appropriate corporate behavior in the context of a complex multinational acquisition as well as the flexibility the DOJ has shown in helping companies to fashion appropriate due diligence, compliance and risk management mechanisms without thwarting an otherwise advantageous acquisition.

To fully appreciate the benefits of successor FCPA liability, consider the perverse incentives for companies if successor liability were eliminated from the FCPA as proposed by the Chamber. Because under the Chamber’s proposal an acquisition would immunize an acquiring company from liability for the criminal acts of the acquired company, companies like Halliburton might decide not investigate the past FCPA violations of potential acquirees. Such a failure to investigate, while seeming to reduce acquisition costs in the short run, would likely expose the acquiring company to numerous unknown and potentially catastrophic business risks (especially if much of the acquired company’s business was procured by or relied upon bribes or corruption). In addition, the absence of a thorough pre-acquisition due diligence process may also significantly increase the risk of post-acquisition liability for the acquiring company under the FCPA (and other applicable foreign anti-bribery legislation) because without a clear picture of the corrupt practices of its acquiree at the time of the acquisition, the acquiring
company may fail to put in place necessary and appropriate reporting and compliance mechanisms to avoid future violations after the acquisition.

From this example, it becomes clear that adequate diligence both before and after an acquisition is not fundamentally about compliance with the FCPA, it’s about good business practice in a complex global business environment. Successor liability under the FCPA helps to prevent companies from seeking to avoid liability for their own past criminal behavior through corporate restructurings. At the same time, successor liability provides an additional incentive for companies to engage in levels of diligence both before and after an acquisition sufficient to be sure that when they make an acquisition they are not acquiring much more business risk and potential liability than they bargained for. It is also important to note that successor liability is a part of “best practice” anti-bribery legislation of our major trading partners, including the U.K. and Italy.\textsuperscript{121}

In sum, far from evidencing a problem with the FCPA or DOJ or SEC practice with respect to successor liability, the resolution of the \textit{Alliance One} case and the DOJ’s advice to Halliburton in Opinion Release No. 08–02 demonstrate that the system is functioning just as it was intended—providing appropriate mechanisms to prevent companies from escaping the consequences of criminal conduct through corporate restructuring, while at the same time providing incentives for companies to engage in appropriate levels of diligence both before and after acquisitions, thereby avoiding unnecessary and costly business and regulatory risk. Adopting the Chamber’s proposal to eliminate successor liability from the FCPA would disrupt this functional balance, while creating perverse incentives regarding due diligence and compliance that would neither serve the interests of U.S. business nor the purposes of the FCPA.

3. Proposed Amendment: Adding “Willfulness”

\textbf{As interpreted and applied by the courts and the DOJ and the SEC, the applicable standards for criminal liability for both individuals and corporations are effectively equivalent}

The Chamber’s proposal to add a “willfulness” requirement to establish corporate criminal liability under the FCPA is premised on an asserted unfairness in the legal treatment of corporations as opposed to individuals under the Act. As the Chamber’s Report puts the argument:

The omission [of a willfulness requirement for corporations] substantially extends the scope of corporate criminal liability—as opposed to individual criminal 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.\textsuperscript{122}

This is a misstatement of the \textit{mens rea} requirements for corporate criminal liability under the FCPA both as reflected the case law and in DOJ and SEC practice. As has been repeatedly stated, establishing corporate criminal liability under the FCPA requires prosecutors to prove beyond a reasonable doubt that the corporate defendant’s actions be both “knowing” and “corruptly” undertaken.\textsuperscript{123} The courts and the DOJ have interpreted “corruptly” to require that the defendant acted “knowingly and dishonestly, with the specific intent to achieve an unlawful result by influencing a foreign public official’s actions in one’s own favor.”\textsuperscript{124} Thus, the Chamber’s claim that corporations run the risk of criminal penalties under the FCPA of innocent, unknowing or mistaken violations of the Act is simply not accurate.

Moreover, the Chamber’s Report misstates the case law as to the legal meaning of the “willfulness” standard in the FCPA for individual defendants. In a long and carefully reasoned opinion, the U.S. Court of Appeals for the 5th Circuit in \textit{United States v. Kay} articulated the meaning of the “willfulness” standard in the FCPA.\textsuperscript{125} In \textit{Kay}, the Court begins its analysis of the “willfulness” requirement by recognizing that “willfulness” is not defined in the FCPA but derives rather from 15 U.S.C. § 78ff(c)(2)(A) which defines the applicable civil and criminal penalties for a broad range of federal statutes.\textsuperscript{126} In the absence of a statutory definition for “willfulness” the court looks to the common law interpretation of the term following the structure of analysis established by the United States Supreme Court for analyzing criminal willfulness in federal statutes in \textit{Bryan v. United States}, 524 U.S. 184 (1998).\textsuperscript{127} Following \textit{Bryan}, the court in \textit{Kay} articulates three different levels of interpretation for criminal willfulness in federal law—the first (lowest) level requires the defendant to have acted intentionally with knowledge of having committed an act which falls within the ambit of prohibited conduct under the applicable statute regardless of whether the defendant knew of the existence of the statute or that the conduct was wrongful; the second (intermediate) level requires the defendant to have known that his actions were in some way unlawful regardless of whether the defendant knew of the specific statute prohibiting the conduct; and the third (strictest) level, found to apply only in very rare circumstances involving complex statutes like the tax code, requires the defendant to know the terms of the specific statute and that he was violating the statute.\textsuperscript{128} Following the Second Circuit, which had also considered the meaning of the “willfulness” requirement under the FCPA, and the Supreme Court’s logic in \textit{Bryan} as to the rare circumstances in which the strictest “willfulness” standard should apply in connection with federal criminal statutes, the \textit{Kay} court held that the FCPA was not a “complex” statute within the meaning of \textit{Bryan} requiring the strictest standard of willfulness.\textsuperscript{129} Rather, the \textit{Kay} court held that a jury instruction requiring the
jury to find that the “Defendants acted corruptly, with an ‘unlawful end or result,’ and committed ‘intentional’ and ‘knowing’ acts with a bad motive” was sufficient to establish the “willfulness” required for a criminal conviction of an individual under the FCPA.130

A comparison of the established interpretation of the “willfulness” requirement for individual criminal liability under the FCPA with the *mens rea* requirements of “knowing” and “corrupt” acts for corporate criminal liability under the Act reveals that the standards are effectively equivalent. **Contrary to the Chamber’s suggestion, even absent a “willfulness” requirement for corporations, no parent company could be successfully charged with criminal violations of the FCPA for unlawful payments made by a subsidiary about which it had no actual knowledge and with respect to which it did not manifest the requisite corrupt “bad or wrongful purpose and intent to influence a foreign official to misuse his official position.”**131

Conversely, adopting the “willfulness” standard that is currently applied under the FCPA to individuals for corporate criminal liability would not, as the Chamber suggests, protect a corporation from being “charged with violations of the anti-bribery provisions, even if it was unaware that the FCPA could reach such payments,” because the FCPA “willfulness” standard does not require defendants to have knowledge of and intent to violate the specific provisions of the FCPA, but only knowledge that making payments to a foreign official to influence the official’s actions is in some way unlawful.133 In fact, as interpreted and applied by the courts and the DOJ and the SEC, the applicable standards for criminal liability for both corporations and individuals under the FCPA require that the defendant knowingly engage in acts proscribed by the Act with the bad or wrongful purpose and intent that those acts would induce a foreign official to misuse his or her official position. Despite the Chamber’s claims to the contrary, these standards simply do not permit successful prosecution of innocent, mistaken or unknowing persons, whether corporations or individuals, under the FCPA.

From this analysis, the real impact of the Chamber’s proposal becomes clear—to raise the criminal liability standard for corporations and individuals under the FCPA to require defendants to know the specific provisions of the FCPA and to have the specific intent to violate those provisions. In other words, for the addition of a “willfulness” requirement to have the effect the Chamber desires, it would be necessary to raise the standard to the strictest level of criminal willfulness articulated in *Bryan*. In explaining the very rare circumstances in which federal law requires criminal defendants to have knowledge and intent to violate specific statutory provisions, the Court states:

> [Those cases] involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct. As a result, we held that these statutes “carve out an exception to the traditional rule” that
ignorance of the law is no excuse and required the defendant to have knowledge of the law. The danger of convicting individuals engaged in apparently innocent activity that motivated our decisions [in those cases involving complex statutes] is not present here because the jury found that this petitioner knew that his conduct was unlawful.134

The two federal circuits that have considered the question of whether the FCPA was a “complex statute” requiring the strictest “willfulness” standard have found that it is not, reasoning that the conduct proscribed under the FCPA—the knowing bribery of a foreign official with the bad or wrongful intention of inducing a foreign official to misuse his or her official position for advantage—was not the sort of highly technical prohibition that posed a significant risk of being innocently or inadvertently violated.135 In other words, one doesn’t need to know the specific provisions of the FCPA to know that bribing a foreign official with the intent to obtain an unfair business advantage is wrongful and likely to be prohibited by some applicable law. This is the standard of “willfulness” that the courts and the DOJ/SEC have found is required by the FCPA for both individual and corporate criminal liability, and put in these clear terms, this standard presents no evidence of the extreme unfairness to corporations that the Chamber Report suggests.

Moreover, a brief examination of some of the cases that the Chamber Report cites in support of the alleged unfairness to corporations of the FCPA’s current *mens rea* standards and which, by implication, the addition of a “willfulness” requirement would correct, are quite telling in exposing just how extreme the Chamber’s conception of “willfulness” really is and what the impact of adopting such a standard in the FCPA would entail. For example, the Chamber strongly criticized the separate charges brought in the *Siemens* case against a Bangladeshi subsidiary of Siemens (“Siemens Bangladesh”) as evidence of the kind of unfairness and prosecutorial over-reaching which makes the addition of a “willfulness” standard to the FCPA for corporate criminal liability necessary.136 In particular, the Chamber Report suggests that prosecution of Siemens Bangladesh was inappropriate because all of the bribes were made by foreign entities outside the United States and Siemens Bangladesh did not know that making some of the bribes from U.S. bank accounts might subject it to liability under the FCPA.137 In fact, the DOJ charged and Siemens Bangladesh plead guilty to knowingly and intentionally making thirty-three illegal payments over the course of more than five years and amounting to more than $5,335,000 for the purpose of obtaining telecommunications business for other companies in the Siemens group.138 Moreover, the acts of Siemens Bangladesh were part of a pattern of bribery that, according to the DOJ, “was unprecedented in scale and geographic reach” involving “more than $1.4 billion in bribes to government officials in Asia, Africa, Europe, the Middle East and
As it can hardly be asserted under these facts that either Siemens or Siemens Bangladesh did not know that their sustained and pervasive pattern of bribery together with their systematic efforts to falsify corporate records to hide their bribery was wrongful and in violation of law (the current standard of *mens rea* and “willfulness” required under the FCPA), it becomes clear that the Chamber’s proposed addition of “willfulness” could only be meant to require that Siemens and Siemens Bangladesh would have to know and intend for their conduct to violate the specific provisions of the FCPA to be subject to liability. In other words, the Chamber’s proposed “willfulness” standard would insulate Siemens Bangladesh from criminal responsibility for its longstanding, pervasive, knowing and intentionally unlawful acts of bribery merely because it did not have specific knowledge that making bribes from U.S. bank accounts would violate provisions of the FCPA. Seen in this light, the Chamber’s proposal looks much more like a license to commit pervasive and intentional bribery with impunity rather than a modest attempt to eliminate the unfairness to corporations of the risk of possible prosecutorial over-reach.

The Chamber’s Report also singled out the *BAE* case as evidence of “[t]he government’s increasingly broad interpretation of the jurisdictional reach of the FCPA” in its discussion of the need for a “willfulness” standard. In *BAE*, BAE Systems plc, a U.K. corporation, plead guilty “to conspiring to defraud the United States by impairing and impeding its lawful functions, to make false statements about its Foreign Corrupt Practices Act (FCPA) compliance program, and to violate the Arms Export Control Act (AECA) and International Traffic in Arms Regulations (ITAR)” which false statements and failures to make disclosure to the U.S. government resulted in more than $200 million in ill-gotten gains to BAE. The Chamber Report suggests that the basis for charges in *BAE* “was the possible use of U.S. bank accounts to make improper payments,” which, in the context of a discussion of the “willfulness” standard must be meant to imply, as with Siemens Bangladesh, that it was unfair to prosecute BAE because it did not specifically know that making such payments from the U.S. would violate the FCPA. In fact, the charges in relation to the FCPA to which BAE plead guilty in the *BAE* case did not involve the unlawful payments themselves. Rather, BAE “knowingly and willfully failed to create sufficient compliance mechanisms to prevent and detect violations of the anti-bribery provisions of the FCPA” while making knowing and willful false statements to the U.S. government to the contrary.

The Chamber’s mischaracterization of the *BAE* case is instructive of its intention with regard its proposed “willfulness” standard. Since BAE was charged for and actually pleaded guilty to “knowingly and willfully making false statements to U.S. government agencies,” the “willfulness” standard the Chamber is proposing must be more strict than the one applied in *BAE* if the addition of such standard would have an impact on
the ability of the United States to prosecute companies such as BAE on similar facts in the future. Moreover, if the addition of the Chamber’s strict “willfulness” standard to the FCPA would limit the DOJ and the SEC from investigating and prosecuting pervasive and systematic corporate corruption on the scale evidenced in the Siemens and BAE cases, the Chamber’s proposed amendment can only be understood as an attempt to significantly circumscribe the scope of the FCPA and restrict the ability of the U.S. government to fight even the most extreme cases of corporate corruption. Once again, far from limiting the unfairness to corporations of unreasonable exercises of prosecutorial discretion, the Chamber’s proposal looks more like a license to bribe with impunity even in cases where there is no question as to a company’s intention to bribe and knowledge that its acts were wrongful or unlawful merely because the company did not also know it was violating the specific provisions of the FCPA.

Taken on its own, the primary beneficiaries of the Chamber’s proposed “willfulness” amendment would seem to be foreign corporations, like Siemens and BAE, that might be less likely to know the specific provisions of the FCPA than U.S. companies. When read together with the Chamber’s other proposed FCPA amendments including the elimination of successor liability and liability for the acts of subsidiaries, the Chamber’s broader agenda of significantly limiting the scope and efficacy of the FCPA with respect to both U.S. and foreign corporations becomes apparent.

4. Proposed Amendment: Eliminating a Parent Company’s Civil Liability under the FCPA for the Unlawful Acts of Its Subsidiary

Eliminating the risk of civil liability would substantially decrease the incentives for parent company to oversee FCPA compliance by their foreign subsidiaries

Just as the potential for successor corporate criminal liability provides an important incentive for an acquiring company to undertake thorough due diligence, the potential for a corporate parent to be held civilly liable for FCPA violations carried out by its subsidiaries provides a critical mechanism for incentivizing parent companies to adopt and effectively implement a group-wide anti-corruption compliance program. Such programs are designed to prevent FCPA violations by their controlled subsidiaries before such violations occur and to promptly detect, disclose and eliminate such violations that do occur. There is no doubt that Congress was aware when it adopted the FCPA that companies frequently use foreign subsidiaries to make corrupt payments to
foreign officials. As the House Committee on Interstate and Foreign Commerce noted in discussing the bill that came to be the FCPA:

The committee found it appropriate to extend the coverage of the bill to non-U.S. based subsidiaries because of the extensive use of such entities as a conduit for questionable and improper conduct. The committee believes this extension of U.S. jurisdiction to so-called foreign subsidiaries is necessary if the legislation is to be an effective deterrent to foreign bribery. Failure to include such subsidiaries would only create a massive loophole in this legislative scheme through which millions of bribery dollars will continue to flow.\footnote{144}

While the FCPA as finally adopted in 1977 did not extend direct liability to foreign subsidiaries, the House-Senate Conference in discussing the final Act made clear that a U.S. parent company, whether an issuer or a domestic concern under the Act, would remain liable for corrupt payments made indirectly through its foreign subsidiary.\footnote{145} As has been repeatedly stated, the predicate for liability under the anti-bribery provisions of the FCPA is “knowledge” and “corrupt” intent. In adopting a definition of “knowledge” in the 1988 amendments to the FCPA that eliminated liability for violations by subsidiaries about which it had “reason to know” while retaining a parent company’s liability for “conscious disregard” or “deliberate ignorance” of the unlawful activity of its subsidiaries,\footnote{146} Congress meant to address the “head-in-the-sand problem” to ensure that

Management officials could not take refuge from the Act’s prohibitions by their unwarranted obliviousness to any action (or inaction), language or other “signaling” device that should reasonably alert them of the “high probability” of an FCPA violation.\footnote{147}

Through these mechanisms, Congress preserved an incentive for parent companies to monitor and secure compliance by their foreign subsidiaries while seeking to protect parent companies from strict liability for violations by subsidiaries conducted wholly independently and without the parent’s knowledge or tacit acquiescence.

In the accounting and controls provisions of the FCPA Congress expressed a similar intent to require that parent companies remain vigilant over the acts of their subsidiaries. As the Senate Committee on Banking, Housing and Urban Affairs explained, a U.S. company which “looks the other way” in order to be able to raise the defense that they were ignorant of bribes made by a foreign subsidiary, could be in violation of \textsection{15 U.S.C. 78(m)(b)(2)} requiring companies to devise and maintain adequate accounting controls. Under the accounting section no off-the-
books accounting fund could be lawfully maintained, either by a U.S. parent or by a foreign subsidiary, and no improper payment could be lawfully disguised. 148

Significantly, Congress chose to hold parent companies liable for even unknowing violations of the books and records and accounting and control provisions of the FCPA by their foreign subsidiaries in recognition of the fact that without the prospect of such liability, the temptation for parent companies to “look the other way” might be too great. 149

It is in this context that the Chamber’s proposal to amend the FCPA to limit a parent company’s civil liability for the acts of a subsidiary must be assessed. It seems clear that Congress has repeatedly refused to eliminate liability of parent companies for FCPA violations conducted through subsidiaries in recognition of the fact that doing so would effectively insulate the vast bulk of foreign bribery from the reach of the Act. On the other hand, the Chamber is correct in suggesting that if the FCPA permitted a parent corporation to be liable for an act of bribery by a subsidiary of which it had no knowledge and in which it did not participate or acquiesce through “conscious disregard” or “deliberate ignorance” would eviscerate the knowledge and intent requirements of the Act.

The FCPA seeks to achieve a delicate balance between these two extremes whereby under the books and records and accounting and controls provisions of the Act a parent corporation is obligated to ensure that the books and records of its subsidiaries accurately reflect the disposition of corporate assets, including, if applicable, corrupt payments to foreign officials. If the parent consciously or deliberately fails to take any action to ensure proper and accurate reporting by its subsidiaries in accordance with the books and records and accounting and control provisions of the FCPA, to investigate “red flags” that might reasonably alert it to potential unlawful behavior by its subsidiaries or to take appropriate steps to eliminate corrupt payments being made by a subsidiary of which it becomes aware through such reporting, it may give rise to a reasonable inference that the parent indirectly participated in the subsidiary’s acts of bribery through its knowing acquiescence, conscious disregard or deliberate ignorance of its subsidiary’s unlawful actions. 150 It is important to note that in such a circumstance, it is the parent’s conscious acquiescence in the unlawful acts of its subsidiary through a deliberate failure of oversight that gives rise to its potential liability under the Act and not the acts of the subsidiary alone. Moreover, it would still be incumbent upon the government to establish that the parent’s failures and omissions were both knowing and corruptly undertaken in order for liability to attach under the anti-bribery provisions (as opposed to the books and records and controls provisions) of the Act.

While the Chamber’s Report asserts that 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,” it supports this assertion with only two case examples, neither of which justifies the disturbance of the balanced framework of “carrot” and “stick” incentives created by Congress in the FCPA to induce parent companies to secure the compliance of their foreign subsidiaries that would result if the Chamber’s proposed amendment on parent/subsidiary liability were adopted.

In the first case, In the Matter of United Industrial Corporation ("UIC"), the SEC charged UIC, a defense contractor, with violations of the books and records, the controls and the anti-bribery provisions of the FCPA in connection with a scheme of bribery undertaken by Thomas Wurzel, the CEO of one of UIC’s subsidiaries, to secure defense business for UIC in connection with a military aircraft depot in Cairo, Egypt. The SEC also brought a separate enforcement action against Thomas Wurzel directly for violations of the FCPA. The SEC’s allegations supporting UIC’s culpability under the Act included (i) a lack of meaningful controls to prevent or detect Wurzel’s illegal conduct, (ii) approval by UIC’s legal department of its subsidiary’s retention of the Egyptian agent through which the bribes were made without any due diligence and on the basis of a contract which did not comply with UIC’s stated FCPA compliance policy, (iii) approval by a UIC official of at least one substantial payment to the agent without investigation as to the purposes of the payment, (iv) the substantial financial benefit to UIC of the unlawful conduct and (v) the fact that Thomas Wurzel had a direct reporting line to UIC’s CEO and that UIC routinely listed Wurzel in its Forms 10-K and annual reports as “senior management” of UIC.

In the second case, In the Matter of Diagnostic Products Corporation (DPC), the SEC charged DPC, a producer and seller of diagnostic medical equipment, with violations of the books and records, controls and anti-bribery provisions of the FCPA in respect of a scheme of bribery conducted over an 11-year period involving improper commission payments made by a subsidiary of DPC to doctors and laboratory employees who controlled purchasing decisions at state-owned hospitals in China. A separate DOJ action was brought directly against DPC’s subsidiary DPC (Tianjin) Co. for FCPA violations for the same bribery scheme. While the Cease and Desist Order acknowledges that DPC did not become directly aware of the unlawful payments until November 2002 when accountants alerted it to Chinese tax issues with respect to the payments, there is some implication that the company’s failure to discover unlawful payments frequently paid in cash and consistently made over a period of 11 years could give rise to an inference of a deliberate lack of adequate controls or a “conscious disregard” of unlawful activity by its subsidiary.

Whether the charges brought by the SEC in the UIC or the DPC cases would have been sustained at trial is a matter of conjecture that only court action could definitively resolve. Nevertheless, attention to these cases reveals a number of important things.
First, the remedies undertaken in both cases could have been sustained under the books and records and adequate controls provisions of the FCPA regardless of any alleged violation of the anti-bribery provisions. Hence, it is unclear from these cases whether the anti-bribery charges were a significant basis for the SEC’s action or merely a make-weight addition to a complaint based primarily on the books and records and controls provisions that the Chamber concedes contemplate liability for violations of foreign subsidiaries regardless of knowledge or intent by the corporate parent. Second, in both cases, the SEC articulates a colorable claim that the parent company participated or knowingly acquiesced in the unlawful bribery scheme of its subsidiary, giving rise to possible liability under the anti-bribery provisions of the Act. Third, had the cases gone to trial, or had the defendant parent companies chosen to challenge the SEC action, the SEC would have been required to establish that the parent’s acts and omissions met both the knowledge and the corrupt intent requirements of the Act in order to subject the parent companies to liability under the Act. Finally, the remedies pursued by the SEC in both cases—an undertaking to cease and desist from further violations of the Act and disgorgement of the profits gained as a result of the unlawful bribes—suggest the SEC’s intention to induce the parent to secure compliance with the FCPA by it and its subsidiaries rather than punishment of the parent’s behavior.

Despite the Chamber’s citation of both of these cases to exemplify the need to limit a parent company’s liability for the acts of its subsidiary, in neither case was the parent company subjected to any civil or criminal penalty or fine. Rather, in the case of DPC, a criminal penalty was levied by the DOJ against DPC’s subsidiary DPC (Tianjin) Ltd., and in the case of UIC, a civil penalty was leveled by the SEC against Thomas Wurzel, the CEO of UIC’s subsidiary, who instigated the bribery scheme. With respect to the parent companies, the SEC pursued the equitable remedy of “disgorgement” authorized under the Securities Exchange Act of 1934 and used to divest wrong-doers of their ill-gotten gains and to induce compliance with the securities laws. Unlike a penalty, which is designed to punish, disgorgement is intended to prevent unjust enrichment by restoring the company to the financial position in which it would have been if the wrongdoing had not taken place.

Taken together, these cases suggest an effort by the SEC and the DOJ to implement Congress’s dual mandate in the FCPA of inducing appropriate oversight by parent corporations over the activities of their subsidiaries, while permitting enforcement actions to be brought against parent companies in circumstances where there is reason to suspect that the parent may be violating the FCPA through the use of its foreign subsidiaries. While reasonable people might differ on whether the exercise of prosecutorial discretion under the FCPA in any particular case is appropriate, absent a showing of persistent prosecutorial abuse, it is most appropriate to leave the resolution of any
such cases which might arise in future to the courts, rather than making a fundamental legislative change to the architecture of the FCPA. In this regard, the fact that large, multinational corporations such as UIC and DPC chose to settle rather than challenge the SEC’s charges under the FCPA may be a reflection of the companies’ recognition of the colorable nature of those charges and the substantial risk of a judgment of additional liability at trial. In any event, the Chamber has failed to establish that the speculative and unsubstantiated risk of civil liability by parent companies for the wholly independent acts of their subsidiaries outweighs the substantial risk, long recognized by Congress, that insulating parent companies from all liability for bribery undertaken by their foreign subsidiaries “would only create a massive loophole in this legislative scheme through which millions of bribery dollars will continue to flow.” Faced with such unequal risks, the prudent course for Congress would be to preserve the FCPA in its current form with respect to parent/subsidiary liability.

5. Proposed Amendment: Narrowing the Statutory Definition of “Foreign Official”

Public control over commercial enterprise varies greatly in different contexts and different countries, thus legislative clarification would be both over and under inclusive

As the Chamber correctly notes, not all knowing and corrupt payments intended to result in an undue advantage are prohibited by the FCPA. The FCPA, unlike anticorruption statutes in many other countries, does not prohibit bribery of private actors. The Act focuses on the knowing, intentional and corrupt bribery of foreign government officials, either directly or indirectly, for the purpose of exercising inappropriate influence on government policy or obtaining improper business advantage from a foreign government. This reflects the intention of Congress when it enacted the FCPA to focus on the harm done to our economy and to our foreign policy interests by the practice of bribing foreign governments. The FCPA’s definition of “foreign official” must be read in the context of the statute as a whole.

Accordingly, the FCPA limits the scope of the act in several crucial ways. As we have seen, the FCPA sets a high standard for mens rea, unlike the national anti-corruption statutes in the United Kingdom and elsewhere. Only payments made knowingly, intentionally, and corruptly are prohibited. Moreover, the purpose of the bribe must relate to the exercise of public authority. Specifically, the FCPA prohibits bribes directed to “foreign officials” for the purpose of
“(A) (i) influencing any act or decision of such foreign official in his official capacity,
(ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or
(iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.”\textsuperscript{167}

The Act also prohibits payments made to

“any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of

“(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directly business to, any person.”\textsuperscript{168}

The Act clearly exempts “facilitating or expediting payment[s] to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action”\textsuperscript{169} and provides an affirmative defense for payments which were “lawful under the written laws and regulations” of the foreign country whose officials received the payments and for “reasonable and bona fide expenditure[s], such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof.”\textsuperscript{170}
The FCPA’s definition of “foreign official,” tracks the approach taken by multilateral anti-corruption treaties and by the national statutes of other jurisdictions. In one way or another, all define “foreign official” broadly enough to permit appropriate administrative and prosecutorial discretion aimed at implementing the larger purpose of the legislation: prohibiting corrupt and illegal payments by people and organizations intended to improperly influence foreign government decision-making. The FCPA focuses on the nature of the entity to whom corrupt payments are made, prohibiting bribes directed to “any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.” The OECD defines “foreign public official” as any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization.

The United Kingdom focuses more directly on the function being performed than on the nature of the entity concerned, defining a foreign official in terms of the exercise of a “public function” on behalf of a country or territory outside the UK, a public agency, public enterprise, or public international organization, including “officers exercising public functions in state-owned enterprises.” In each of these cases, the definition is broad enough to permit interpretation in light of changing circumstances and the diverse forms through which public authority is exercised across the world.

More importantly, the developing trend is towards the criminalization of private commercial as well as public bribery, rendering it less important to determine with precision the class of persons to whom it is permissible to offer corrupt payments. Indeed, with the rise of national statutes applicable to both public and private bribery, it would be a risky compliance strategy for a business entity to focus its global compliance program on the classification of the beneficiaries of the corruption. This trend is visible in national statutes in the UK and elsewhere, as well as in the OAS treaty—to which the U.S. is a signatory.

The Chamber describes the potential prosecutorial reach of the FCPA in alarming terms. The hypothetical scenarios they sketch would indeed be alarming if the other limitations in the Act were disregarded. What, they ask, about paying a speaking fee to a foreign professor who works for a public university? Might a company face liability for making payments to any commercial entity with substantial public ownership, such as...
a foreign version of General Motors or A.I.G? The correct answer may well be yes if all of the requirements under the Act are satisfied. That is, if the payment to the professor was (i) unlawful under the law of the country involved, (ii) unable to qualify as a routine facilitative or expediting payment, and (iii) knowingly, intentionally and corruptly made for the prohibited purpose of influencing official action to obtain a business advantage. A similar analysis would apply in the case of a foreign commercial entity with substantial public ownership. Bribes knowingly and corruptly paid to such an entity for the prohibited purpose improperly influencing government decision-making for business advantage in violation of local law in circumstances which are neither routine nor reasonable and bona fide expenditures would be prohibited. But, when expressed in context, this hardly seems an example of unfairness to the corporate actors involved. As the Chamber acknowledges, case law has already begun to give guidance on the range of entities which may improperly influence official policy if offered corrupt payments for these prohibited purposes.177

The Chamber specifically proposes to restrict the scope of the FCPA by adopting a formal definition limiting the meaning of “instrumentality of a foreign government” to entities with a specific level of government ownership and restricting the meaning of “foreign official” to persons with a specific rank. Doing so would frustrate the purpose of the Act—and it would not benefit business which would continue to be subject to the much the broader functional definitions included in other national statutes. In a world which organizes public authority in a large variety of ways, drafting a rule arbitrarily limiting the types of foreign public “instrumentalities” to which the FCPA applies would seriously compromise the purpose of the Act to prevent intentional bribery which corrupts foreign officials and official decision-making. Because public authority is arranged very differently in different countries, entities controlled by the government, owned by the government, or associated with members of a foreign government may sometimes be more important in setting official policy than some official bodies. It is for this reason that the Act clearly includes payments to “any person,” whether that person is or is not an “official” which are made for the purpose of corrupting official decision-making. Since the contours of public control over commercial life vary greatly in different cultural contexts, any legislative clarification would be destined to be both over- and under-inclusive. This is precisely the type of issue best left to sound administrative management and judicial review.
IV. Conclusion: The Way Forward for American Leadership

Congress enacted the FCPA in the wake of the Watergate scandal after an SEC investigation revealed that American firms had paid over $300 million in questionable payments to foreign government officials.\textsuperscript{178} Congress felt that these events tarnished the image of the US abroad and impaired confidence in the financial integrity of American corporations.\textsuperscript{179} The America business community agreed. Bans on bribery, they felt, would improve the climate and culture of international business. The American foreign policy community was equally concerned that illegal political contributions to foreign governments and transnational bribery by some American firms threatened to undermine foreign governments and hinder the lawful pursuit of U.S. business interests abroad. The resulting statute set a worldwide example and inaugurated a global campaign to eliminate corruption in transnational business.

More than thirty years later, corruption has never been more stigmatized globally. Governments everywhere have adopted strong statutes prohibiting bribery and corruption. By supporting multilateral standard setting, harnessing the extraterritorial reach of the FCPA to hold foreign companies accountable, and cooperating with foreign enforcement agencies, the United States continues to make a powerful contribution to transforming global business culture. The private sector has responded by developing powerful practices of compliance and internal monitoring. The result is a more open and reliable climate for international economic activity. It is easier for enterprises to
resist demands for corrupt payments. Off the shelf compliance programs are available to strengthen internal controls by businesses of all sizes. It is easier for foreign governments to discipline their own officials where enterprises operating in their jurisdiction are prohibited from making bribes and required to maintain records demonstrating that they have not done so. The global campaign against corruption has not been a constraint on American economic performance—quite the opposite. It has improved the climate for global business and made it easier for American firms to participate in the global economy on an equal footing.

As the global campaign turns towards strengthened enforcement and the administrative routinization of anti-corruption commitments, it will be particularly important for American authorities, led by the DOJ and the SEC, to retain their traditional flexibility, their commitment to a level playing field, and their emphasis on private sector compliance and monitoring as the most effective tools in the battle against corruption. The Chamber’s misleading rhetoric notwithstanding, the global trends are all good, the FCPA is working and new legislation is not necessary.
Notes

1. The Chamber claims that the “top ten FCPA settlements ...total $2.8 Billion.” They neglect to mention that the average fine per corporate proceeding has barely risen in the last decade, with the exception of two cases with abnormally high settlements, Siemens and Halliburton/KBR. Shearman & Sterling LLP, Recent Trends and Patterns in FCPA Enforcement, FCPA Digest, at ix (Mar. 2009), available at http://www.shearman.com/files/upload/lt-030509-FCPA-Digest-Recent-Trends-and-Patterns-in-FCPA-Enforcement.pdf.

2. The DOJ has stated that their “goal is not simply to prosecute FCPA violations, but also to prevent corruption.” The DOJ’s FCPA prosecutions involve “systemic long-standing bribery schemes” and not merely the payment of a single isolated bribe of nominal sums. Greg Andres, Acting Deputy Assistant Attorney General, Foreign Corrupt Practices Act, before the U.S. House of Representatives, at 4, 9, Jun. 14, 2011, available at http://judiciary.house.gov/hearings/pdf/Andres06142011.pdf.


16. Lanny Breuer, Assistant Attorney General, speaking at the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009) at 6: “We will press for ever-increasing vigilance by our foreign counterparts to prosecute companies and executives in their own countries for foreign bribery...This is part of a long-term goal to ensure a level-playing field for U.S. companies,” available
at http://online.wsj.com/public/resources/documents/111709breuerremarks.pdf. See also, Alice Fisher, Assistant Attorney General, Remarks at the American Bar Association, National Institute on the Foreign Corrupt Practices Act, (Oct. 16, 2006) at 2: “By working with our international partners around the world, we are raising the bar on global anti-corruption enforcement... By enforcing the FCPA, and by encouraging our counterparts around the world to enforce their own anti-corruption laws, we are making sure that your competitors do not gain an unfair advantage when competing for business.”


18. Beyond the guidance provided by past decisions, or by statutory mandate, the DOJ provides an opinion procedure through which entities may request the DOJ’s opinion on proposed transactions or business conduct. Foreign and Corrupt Practices Act Opinion Procedure, 28 C.F.R. part 80 (Jul. 1, 1999) available at http://www.justice.gov/criminal/fraud/fcpa/docs/frgncrpt.pdf. See also, http://www.justice.gov/criminal/fraud/fcpa/opinion/.


20. Speaking in the context of financial regulation more broadly, Mary Ramirez, former assistant United States attorney and Professor at Washburn University School of Law stated: “If you do not punish crimes, there’s really no reason they won’t happen again. I worry and so do a lot of economists that we have created no disincentive for committing fraud or white-collar crime.” Quoted in Behind the Gentler Approach to Banks by U.S. The New York Times, Jul. 8, 2011, at 1.


23. There has also been a marked increase in cooperation among enforcement authorities in different countries. For example, when announcing the plea agreement in U.S. v. Stanley, No. 08-cr-597 (S.D. Tex. 2008), the DOJ declared that authorities in France, Switzerland, Italy, and the UK provided significant assistance to the U.S. government’s investigation. Press Release, Dept. of Justice, Former Officer and Director of Global Engineering and Construction Company Pleads Guilty.


29. Opportunities for corruption distort national public sector priorities. For example, where official opportunities to extract rent are lower in the health and education sectors, public investment will focus on areas with more political discretion, such as military expenditures or infrastructure construction. As a result, corruption can exacerbate public health crises and environmental degradation. It can be seen in unsafe roads and buildings, unregulated medicines, lack of access to clean water and the violation of human rights with impunity. See Paolo Mauro, Corruption and Growth, 110 QUART. J. ECON. 681 (1995).


34. In a 2008 survey, PriceWaterhouseCoopers found that 55% of respondents in a survey on anticorruption practices suggested that the most severe impact to their companies if corrupt practices were discovered would be to corporate reputation. PriceWaterhouseCoopers, *Confronting Corruption: The Business Case for an Effective Anti-Corruption Programme*, at 2 (Jan. 2008) available at http://www.pwc.com/th/en/publications/assets/confronting_corruption_printers.pdf.


38. A recent survey showed that 45 per cent of respondents did not enter a specific market or pursue a particular opportunity because of corruption risks. 39 per cent said their company lost

39. Ernst & Young, *Corruption or Compliance—Weighing the Costs: 10th Global Fraud Survey*, at 6 (2009).

40. Ernst & Young, *Corruption or Compliance—Weighing the Costs: 10th Global Fraud Survey*, at 6 (2009).

41. Transparency International, *Global Corruption Report 2009*, at xxv, available at http://www.transparency.org/publications/gcr. The problem was perceived to be worse in some areas. For example, more than sixty percent of executives in Egypt, Morocco, Nigeria and Pakistan reported being solicited for bribes.


ments and Practices Submitted to the Senate Banking, Housing and Urban Affairs Committee, reprinted in 353 Sec. Reg. & L. Rep. 36–41 (1976). The SEC report concluded that bribery of foreign officials was neither isolated nor rare and proposed strengthening the issuer’s requirements to maintain books and records that reflect accounting transactions and movements, as well as the requirement to devise and maintain appropriate systems of control by criminalizing the falsification of these records. The Activities of American Multinational Corporations Abroad, Hearings before the Subcomm. on International Economic Policy of the House Comm. on International Relations, 94th Cong. 37 (1975), microformed on CIS No. 76-H461-15 (Congress. Info. Serv.), at 40–147. On the SEC’s voluntary disclosure program, see Alejandro Posadas, Combating Corruption Under International Law, 10 DUKE J. COMP. & INT’L L. 345, 350 (2000).

46. The 1988 amendments narrowed the basis for criminal liability, eliminating liability for those who had only “reason to know” that a bribe would be made. For the original language, see Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 et seq. For the 1988 amendments, see Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100–418, 102 Stat. 1418, 1423–24 (1988). See also, H.R. Rep. No. 100–576 at 917 (1988) (Conf. Rep.), reprinted in 1988 U.S. Code Cong. & Admin. News 1547, 1950. Since 1988, only persons who make payments “knowing” that they will be used for a prohibited purpose are criminally liable under the Act. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(a)(3) The FCPA defines “knowing” as follows: “A person’s state of mind is “knowing” with respect to conduct, a circumstance, or a result if (i) Such person is aware of such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or (ii) Such person has a firm belief that such circumstance exists or that such result is substantially certain to occur. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(f)(2)(A). The Act provides, furthermore, that “When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.” Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(f) (2)(B).


53. Today, the FCPA’s elements require the following to pursue an anti-bribery charge:

A covered person with a nexus to U.S. commerce pays, offers, promises to pay, or gives money or “anything of value” or authorizes any of these actions directly to any foreign official or indirectly to another person while “knowing” it will be passed on to a foreign official, doing so corruptly, and intending to have that official use his/her influence with a foreign government or instrumentality thereof for the purpose of (a) Influencing any act or decision of such foreign official in his official capacity.” Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(a)(1)(A)(i); (b) Inducing that person to do or omit to do any act in violation of his or her lawful duty; (c) Securing any improper advantage; or (d) Inducing that person to use his or her influence with a foreign government to affect or influence any government act or decision, in order to assist such issuer in obtaining or retaining business for or with or directing business to, any person.” Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(a)(1)(B). The FCPA offers two possible affirmative defenses: either that the payment in question was “lawful under the written laws and regulations” of the foreign official’s country, Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(c)(1); or that it was a “reasonable and bona fide expenditure.” Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(c)(2). It also provides for an exception for “facilitation payments” meaning those payments made “to expedite or to secure the performance of a routine governmental action” by a foreign official. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(b). This provision has been read to apply only to “relatively minor, ministerial acts, where the payment is made simply to speed up a result which would have been obtained eventually anyway.” William M. Hannay, Corp. Compl. Series: FCPA, § 1:21 (Thomson Reuters 2010-2011). Enforcement power is shared between the DOJ and SEC, with the latter having investigative, injunctive, and civil enforcement powers over companies registered with the SEC or acting on their behalf 15 U.S.C. § 78u, while the former may conduct criminal investigations and prosecutions for willful violations of either section of the FCPA and has civil enforcement power over companies not subject to US jurisdiction. U.S. Atty Manual, 9-47.110, -47.130, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/47mcrm.htm.


67. Key goals of U.S. international anticorruption policy include implementation and enforcement of the OECD Bribery Convention by all signatories and hemispheric partners; “nurture stability in democratic institutions and strengthen the rule of law in transitional economies;” “promote global and regional anticorruption norms and initiatives that deter and punish corruption;” “engage the business community to join the U.S. and other governments in promoting corporate governance, transparency, and integrity in business operations.” U.S. Dept. of State, Fighting Global Corruption: Business Risk Management, at 11-12, no. 10731 (2001–2003).

68. All 38 signatories of the OECD Convention now have anti-bribery statutes functionally equivalent to the FCPA, including Germany, Italy, UK and Canada. See, StGB §311–8, 299–302, 108e & 108b and OwiG §29a, 30 & 130; Act. 300 (2000) and Italian Lgs. Decree no. 231/2001; Bribery Act (2010) c.23; Corruption of Public Officials, S.C. 1998, c.34, respectively. Moreover, China, India, Russia and Singapore, although not members of the OECD, have also adopted anti-bribery statutes, PRC Criminal Code, Art. 385 & 389, Prevention of Corruption Act, 1988 (No. 49 of 1988); Federal Law No. 97-FZ (May 5, 2011); Prevention of Corruption Act (chapt. 241), 1960, respectively. The United Nations Convention Against Corruption has itself been ratified by more than 100 nations,


71. Most notably in the recent case of *B v. The Commissioner of the Independent Commission Against Corruption (FACC6/2009)*, the Hong Kong Court of Final Appeal has confirmed that through the concept of agency, Hong Kong law has extraterritorial reach despite the absence of express language in the Prevention of Bribery Ordinance (chpt. 201). Similarly, Japanese criminal sanctions do not, as a general rule, apply to activities unrelated to Japan. However, the Unfair Competition Prevention Act, Art. 21(6), 1998 [No. 47 of 1993] applies the Penal Code provision on extra-territorial effect *mutatis mutandis* to certain offences under the UCPA.


73. Indeed, the OECD Working Group on Bribery chided Belgium for failure to treat bribery and corruption committed by foreign officials extra-territorially, Working Group on Bribery in International Business Transactions, Belgium, Phase 2 Report, Recommendation 4.c (2005), available at http://www.oecd.org/document/45/0,3746,en_2649_34859_44570477_1_1_1_1,00.html. Other countries, including Japan, Australia, Korea and Belgium have extended their jurisdictional exercise beyond their borders within the framework of the OECD’s “functional equivalent” requirement. OECD, *OECD Anti-Bribery Convention: National Implementing Legislation*, available at http://www.oecd.org/document/30/0,3343,en_2649_34859_2027102_1_1_1_1,00.html.


76. A number of countries, including South Africa and the UK, prohibit both active and passive bribery, creating offenses for both the purveyor and the recipient of any benefit or advantage. See, South Africa, Prevention and Combating of Corruption Act (2004) §3 (Act 12 of 2004) and United Kingdom Bribery Act (2010) §§ 1, 2, c.23. According to the OECD, the Italian law implementing the OECD Convention amended the Criminal Code by creating two new offenses: the offence of bribery of foreign public officials and the passive bribery offence for officials of the European Communities. As the OECD discussed, however, the existing provisions of the Italian Criminal Code already included penalties for domestic public officials for passive bribery. OECD Working Group on Bribery in International Business Transactions, Italy: Phase 1: Review of Implementation of the Convention and 1997 Recommendation, at 2-3, 5 (May 16, 2011).

77. Bribery Act (2010) §§ 1–5, c.23. Notably, the UK statute goes well beyond the FCPA to criminalize private as well as public sector bribery—penalizing bribery of “a person,” rather than only “foreign public officials.”


79. For example, comments by the Australian government on the bribery provisions of their criminal code indicate that their facilitation payments defense was based on the FCPA. Australia’s code permits a defense based on facilitation payments if all of the following conditions are met: (1) the benefit was minor; (2) the behavior that the benefit was given to obtain was minor, routine and non-discretionary; (3) there was a record made of the conduct (which included the value, of the benefit, the date, the identity of the foreign public official, the particular action that was expedited, and a signature); and (4) the record has been retained, or lost or destroyed by other circumstances; or the prosecution took place seven years after the conduct. Australia Criminal Code Amendment (Bribery of Foreign Officials) Act 1999, § 70.4 (1–2) (No. 43 of 1999).

80. Richard Alderman, Director of the UK Serious Fraud Office (“SFO”) has clarified that while companies need not expect that as of July 1, 2011 as the Bribery Act Comes into force, the SFO will immediately prosecute every company providing facilitation payments, the statute is meant to move companies toward a “zero tolerance” position on such expenditures. Alderman also stated that “corporations should come and talk to the SFO about these issues so that we can understand that their commitment is real. This also gives the corporate the opportunity to talk to us about the problems that they face in carrying on business in the areas in which they trade. It is important for us to know this in order to discuss with the corporate what is a sensible process.” Alderman stated that the following approach, authored by UK attorneys on thebriberyact.com fairly reflected the UK approach to these payments: “The SFO have informed us that when considering the activities of a company which continues to make small facilitation payments after 1 July 2011, the SFO will be looking to see: (1) whether the company has a clear issued policy regarding such payments; (2) whether written guidance is available to relevant employees as to the procedure they should follow when asked to make such payments; (3) whether such procedures are being followed by employees; (4) if there
is evidence that all such payments are being recorded by the company; (5) if there is evidence that proper action (collective or otherwise) is being taken to inform the appropriate authorities in the countries concerned that such payments are being demanded; (6) whether the company is taking what practical steps it can to curtail the making of such payments. If the answers to these questions are satisfactory then the corporate should be shielded from prosecution.” Quoted in: http://thebriberyact.com/2011/06/21/facilitation-payments-sfo-endorse-sfo-thebriberyact-com-six-step-solution/.


82. Nevertheless, the UK Guidance from the Ministry of Justice has clarified that the Government will weigh the decision to investigate such expenditures in light of the intent and the potential public interest served by prosecution. For example, in the case of a hospitality payment, “the prosecution would need to show that the hospitality was intended to induce conduct that amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. This would be judged by what a reasonable person in the UK thought.” UK MOJ, Bribery Act of 2010 Guidance, at 10, available at http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf.


86. See OECD, OECD Anti-Bribery Convention: National Implementing Legislation, http://www.oecd.org/document/30/0,3343,en_2649_34859_2027102_1_1_1_1,00.html.


95. In the case of those supervised by persons in representative, administrative, or managerial positions, liability is based on the “non-observance of the obligations of management or supervision.” Italian Lgs. Decree No. 231/2001, Art. 7(1).


98. Like the United States, several OECD countries treat compliance as an important factor to be considered in assessing liability. Like the United Kingdom, several OECD countries sometimes treat a compliance program as a defense to a requirement less stringent that the US standard of knowing and intentional corruption. In countries that prosecute lesser violations—for failure to take care, or failure to take reasonable precautions, for example—it is common and fitting to treat an appropriate compliance program as a defense or very significant mitigating factor. As discussed above, the UK permits a full defense of “adequate procedures” against the strict liability offence of failing to prevent bribery. Bribery Act (2010) § 7(2). In Italy, where corporations may be held administratively liable for offences of their representatives, directors, supervisors, and others, adequate and effective “organizational models” offer a full defense. Italian Lgs. Decree No. 231/2001, Art. 6–7. In Australia, the criminal code permits a defense of due diligence in one case of corporate criminal responsibility. A corporation is held criminally responsible if the “body corporate expressly, tacitly, or impliedly authorized or permitted” an employee, agent or officer to commit the offence of bribing a foreign public official while “acting within the actual or apparent scope of his/her employment or authority.” Authorization or permission may be established either through proof of the act being “expressly, tacitly, or impliedly authorized or permitted” by the board of directors or by a “high managerial agent;” or by the existence of a “corporate culture” which either “directed, encouraged, tolerated or led to non-compliance” or the non-existence of a corporate culture requiring compliance. If a high
managerial agent was involved but “the body corporate proves that it exercised ‘due diligence’ to prevent the conduct, authorization or permission in question,” then the provision does not apply. OECD Working Group on Bribery in International Business Transactions, Australia: Phase 2 Report, at 9 (Jan. 4, 2006), Australia Criminal Code 2002, A2002-51, §51 (3–4) (repub. 1 July 2011)). Chile’s standard of corporate liability was partially inspired by Italy. In Chile, prosecutors must establish the failure by the entity to “comply with its duties of management and supervision,” as one element of corporate criminal responsibility, placing the “burden of proof on prosecutors.” OECD Working Group on Bribery in International Business Transactions, Chile: Phase 1ter, at 9 (Dec. 2009). Corporate criminal responsibility for bribery may be found if the offence is “directly and immediately committed” in the interest of the legal entity or by the owners, controllers, responsible officers, executives, representatives, those “conducting activities of administration and supervision” or anyone under the supervision thereof if the offense “results from the breach of the legal person’s direction and supervisory functions.” If adequate organizational models based on minimum requirements listed in the law had been adopted prior to the offence, then the functions of supervision and direction will be considered to have been met. Chile Law 20, 393, Art. 3, qtd in. in OECD Working Group on Bribery in International Buiness Transactions, Chile: Phase 1 ter, at 16 (Dec. 2009) The OECD cautions that “having a code of conduct on paper will not be sufficient to avoid responsibilities. If prosecutors can prove that the code does not meet the minimum requirements...or that it is not implemented, the company can be responsible for the offense.” OECD Working Group on Bribery in International Business Transactions, Chile: Phase 1ter, at 7–8 (Dec. 2009). Existence of internal monitoring or a compliance program may be included as a factor in considering administrative liability in Germany for a corporation based on an administrative offence by a “responsible person,” but according to the OECD, “whether such measures are in place does not appear to go as far as constituting a defense thus preventing the establishment of the company’s liability.” OECD Working Group on Bribery in International Business Transactions, Germany: Phase 3, at 23 (Mar. 17, 2011) Administrative liability for legal persons may result either due to the criminal actions (such as bribery) of a “responsible person” (including a “broad range of senior managerial stakeholders”) or an administrative offence by such a person, including a “violation of supervisory duties.” In the case of a criminal act by a responsible person, the prosecutor must demonstrate either that the offence violated “duties of the legal entity” or that the legal entity “gained or was supposed to gain” a profit. In the case of the administrative offence, a corporation may be “punished for any breach of corporate duties when such a breach resulted from a failure by a corporate representative to faithfully discharge his/her duties of supervision.” The OECD notes that corporate liability may result not only through the actions of senior managers but less directly by “offences by lower-level personnel which result from a failure by a senior corporate figure” to adequately supervise them. OECD Working Group on Bribery in International Business Transactions, Germany: Phase 3, at 22 (Mar. 17, 2011). According to the OECD, Japanese law holds a legal person criminally responsible “based on the principle that the company did not exercise due care in the supervision, selection, etc. of an officer or employee to prevent the culpable act. The burden rests on the legal person to prove that due care was exercised. Where a legal person raises the defence, a person must be identified as having exercised due care, etc., and the court must determine whether it was exercised properly having regard to the nature of the legal person and the circumstances of the case.” OECD Working Group on Bribery in International Business Transactions, Japan: Phase 1, at 7 (May 2002). Summaries of these and other OECD countries’ “compliance-like” rules may be found in Mike Koehler,

99. See In re Caremark Int’l Derivative Litig., 698 A 2d 959 (Del. Ch. 1996) (setting forth standards of conduct for directors of Delaware corporations with regard to the establishment of reporting and compliance mechanisms sufficient to meet their fiduciary duty of oversight).


Effective Compliance and Ethics Program
(a) To have an effective compliance and ethics program, for purposes of subsection (f) of § 8C2.5 (Culpability Score) and subsection (c)(1) of § 8D1.4 (Recommended Conditions of Probation—Organizations), an organization shall—
   (1) exercise due diligence to prevent and detect criminal conduct; and
   (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.

(b) Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:
   (1) The organization shall establish standards and procedures to prevent and detect criminal conduct.
   (2) (A) The organization’s governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.
         (B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.
         (C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.
   (3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew,
or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.

(4) (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subparagraph (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.

(B) The individuals referred to in subparagraph (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization’s employees, and, as appropriate, the organization’s agents.

(5) The organization shall take reasonable steps—

(A) to ensure that the organization’s compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;

(B) to evaluate periodically the effectiveness of the organization’s compliance and ethics program; and

(C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization’s employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

(6) The organization’s compliance and ethics program shall be promoted and enforced consistently throughout the organization through

(A) appropriate incentives to perform in accordance with the compliance and ethics program; and

(B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.

(7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization’s compliance and ethics program.

(c) In implementing subsection (b), the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process.


105. *Rodriguez v. Banco Central*, 777 F. Supp. 1043, 1064 (D.P.R. 1991), aff’d 990 F.2d 7 (1st Cir. 1993) (in the RICO context, “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”); *R.C.M. Executive Gallery Corp. v. Rols Capital Co.*, 901 F. Supp. 630, 635 (S.D.N.Y. 1995) (finding the possibility for successor liability if the purchaser could be shown to have knowledge of a RICO violation at the time of the acquisition); *United States v. Alamo Bank of Texas*, 880 F.2d 828 (5th Cir. 1989) (finding successor liability for the acquirer for violations of the Bank Secrecy Act by an acquired company prior to the merger).


121. See UK MOJ, Bribery Act of 2010 Guidance, available at http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf, at 28 (discussing appropriate levels of diligence required in the context of an acquisition); Italian Lgs. Decree no. 231/2001, Art. 28 (stating that in the case of a corporate restructuring or merger, the successor entity “remains liable for the crimes committed prior to the date when the transformation came into effect.”).


124. United States v. Kay, 513 F.3d 432 (5th Cir. 2007), reh den, reh en banc, den 513 F.3d 461 (5th Cir. 2008), cert den; Kay v. United States, 2008 U.S. LEXIS 6775 (U.S., Oct. 6, 2008). See also, Stichting Ter Behartiging Van de Belanden Van Oudaandeelhouders, in Het Kapitaal Van Saybolt Intl B.V. v. Schreiber, 327 F.3d 173, 183 (2d Cir. 2003) (concluding “that the word ‘corruptly’ in the FCPA signifies, in addition to the element of ‘general intent’ present in most criminal statutes, a bad or wrongful purpose and an intent to influence a foreign official to misuse his official position.”); U.S. Dept. of Justice, Lay-Persons Guide to FCPA, available at http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf (last visited July 31, 2011) (interpreting the “corruptly” requirement of the FCPA to mean “The person making or authorizing the payment must have a corrupt intent, and the payment must be intended to induce the recipient to misuse his official position to direct business wrongfully to the payer or to another person.”).

125. United States v. Kay, 513 F.3d 432 (5th Cir. 2007).

127. United States v. Kay, 513 F.3d 432 (5th Cir. 2007).


130. United States v. Kay, 513 F.3d 432 (5th Cir. 2007). See also, Het Kapitaal Van Saybolt Int’l B.V. v. Schreiber, 327 F.3d 173, 181 (2d Cir. 2003) (“Knowledge by a defendant that it is violating the FCPA—that it is committing all the elements of an FCPA violation—is not itself an element of the FCPA crime. Federal statutes in which the defendant’s knowledge that he or she is violating the statute is an element of the violation are rare; the FCPA is plainly not such a statute.”).


145. See Foreign Corrupt Practices, H.R. Conf. Rep. No. 94–831, 95th Cong., 1st Sess., at 14 (Dec. 6, 1977) (“The conferees intend to make clear that any issuer or domestic concern which engages in bribery of foreign officials indirectly through any person or entity would itself be liable under the bill.”).


150. See Edward Brodsky, Foreign Subsidiaries and the Foreign Corrupt Practices Act, Bus. Crimes Bul. 5, 6 (Mar. 1995) (“a foreign subsidiary will not insulate a parent from FCPA liability if the parent authorizes, directs or otherwise participates in an unlawful payment by the subsidiary. Such liability could even arise if the parent became aware of the improper payment and did nothing to stop it, since the prosecutor might argue that the parent implicitly authorized the payment.”).


152. The relationship between the liability of the subsidiary and that of the parent can be useful in encouraging compliance. For example, in U.S. v. AGCO Ltd., No. 1:09-cr-249-RJL (D.C. Cir. 2009), the DOJ charged the wholly-owned subsidiary with conspiracy to commit fraud rather than the parent. As a result of the parent’s cooperation, the DOJ charged only the UK subsidiary, bringing only conspiracy charges rather than charging substantive FCPA or wire fraud violations. See https://secure.traceinternational.org/compendium/view.asp?id=62.


162. See SEC v. First City Financial Corp., 890 F.2d 1215, 1230 (Dist. D.C. 1989); see also, SEC v. Patel, 61 F.3d 137, 139 (1st Cir. 1995).


164. In cases where corporations believe that the charges brought by the DOJ or the SEC are an abuse of enforcement discretion, there is always recourse to the courts. See, e.g., U.S. v. Bourke, S2 05 Cr. 518 SAS (S.D.N.Y. Jul. 1, 2009), a case which the Chamber Report suggests was such an abuse of discretion currently on appeal in the U.S. Court of Appeals for the Second Circuit. See Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act, Chamber Institute for Legal Reform (Oct. 2010), at 3.


166. “The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is...not only...unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. It short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency.... Corporate bribery also creates severe
foreign policy problems for the United States. The revelation of improper payments invariably tends to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations.”


170. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1(c); -3(c)


173. More specifically, a foreign official is defined as any individual who “(a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), (b) exercises a public function—(i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or (ii) for any public agency or public enterprise of that country or territory (or subdivision), or (c) is an official or agent of a public international organization.” *Bribery Act* (2010) § 6(5), available at http://www.legislation.gov.uk/ukpga/2010/23/crossheading/bribery-of-foreign-public-officials.

174. UK MOJ, *Bribery Act of 2010 Guidance*, available at http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf. *US v. Carson* found that employees of state-owned companies could be ‘foreign officials’ under the FCPA; whether a state-owned company constitutes an ‘instrumentality’ under the FCPA will be determined on a case-by-case basis. Factors that would warrant consideration in these cases include: (i) the foreign state’s characterization of the entity and its employees, (ii) the foreign state’s degree of control over and extent of ownership of the company, (iii) the purpose of the entity’s activities, and (iv) the company’s obligations and privileges under

175. This reflects the fact that both the OECD Convention and UNCAC define “foreign public official” broadly. UNCAC defines “foreign public official” as “any person holding a legislative, executive, administrative, or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise.” A public official is defined as “any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority; (ii) an other person who performs a public function, including for a public agency or public enterprise, or provides a public services, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a ‘public official’ in the domestic law of a State Party.” For certain measures, public official may be defined as “any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party.” United Nations Convention Against Corruption, Art. 2(a)-(b), Oct. 31, 2003, G.A. Res. 58/4, U.N. Doc. A/RES/58/422. The OECD Commentary clarifies that exercising a “public function” includes “any activity in the public interest, delegated by a foreign country” and that a “public enterprise” includes “any enterprise, regardless of its legal form, over which a government or governments, may, directly or indirectly, exercise a dominant influence.” OECD, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Art. 1(12), 1(14). In addition, the Commentaries indicate that in “special circumstances, public authority may in fact be held by persons...not formally designated as public officials. Such persons, though their de facto performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials.” OECD, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Art. 1(16).

176. UNCAC recommends that States Parties criminalize “the promise, offering, or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity for a private sector entity...in order that he or she, in breach of his or her duties, act or refrain from acting” or the “solicitation or acceptance” of such advantages. United Nations Convention Against Corruption, Art. 21, Oct. 31, 2003, G.A. Res. 58/4, U.N. Doc. A/RES/58/422. The UK Bribery Act makes it an offence to “offer, promise, or give a financial or other advantage to another person” when the intent is to induce or reward improper activity or when the individual offering the advantage “knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.” Bribery Act (2010) §§ 1(1–3).

177. *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, U.S. Chamber Institute for Legal Reform (Oct., 2010). The cases cited by the Chamber involved large-scale payments and privileges provided to employees of state-owned or state-controlled enterprises for purposes of retaining or gaining business. To include employees of state-owned or state-controlled enterprises within the definition of foreign official when payments are made with a corrupt intent for the purposes of gaining or retaining a business advantage fits both the intended scope and
purposes of the FCPA and more recent legislation, including the UK Bribery Statute. According to the Guidance on the U.K. Statute, this includes "officers exercising public functions in state-owned enterprises" in its foreign official definition. UK MOJ, Bribery Act of 2010 Guidance, at 11, available at http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf.; U.S. v. Control Components, Inc., No. SACR09-00162 (C.D. Cal. Jul. 28, 2009) (Criminal fine, organizational probation, and compliance monitoring imposed after CCI entered a guilty plea regarding payments of "approximately $4.9 million in corrupt payments to officers and employees of state-owned customers," including electric, petroleum, and nuclear power companies in China as well as oil and nuclear power companies in Malaysia, Korea, and the United Arab Emirates for the purposes of gaining or retaining business for CCI, as well as providing false information to investigators and destroying relevant documents); US v. Kellogg, Brown & Root LLC, H-09-071 (S.D. Tex. filed Feb. 11, 2009) (Plea agreement regarding decade-long scheme of bribery of Nigerian government officials, including members of the executive branch of the Nigerian government, officials of the government-owned petroleum company, and officials of a company functionally controlled by the Nigerian government, for purposes of securing government contracts); Complaint, SEC v. Halliburton Company and KBR, Inc., Civil Action No. 4:09–399 (Feb. 11, 2009) (Related charges by the SEC of violating anti-bribery, books and records, and internal controls provisions of FCPA, resulting in $177 million disgorgement by KBR Inc. and Halliburton); United States v. Baker Hughes Services International Inc., No. H-07-129 (S.D. Tex. filed Apr. 11, 2007); SEC v. Baker Hughes Incorporated and Roy Fearnley, H-07-1408 (S.D. Tex, filed Apr. 26, 2007) (Investigations by both the SEC and the DOJ resulting in a final judgment, a guilty plea on FCPA charges, a DPA, and a multi-million dollar fine including admissions by BHSI of paying approximately $4.1 million in bribes to an intermediary in the belief that funds would be transferred to the Kazakh state-owned oil company Kazakhoil for the purposes gaining oil contracts in Kazakhstan); In Re Lucent Technologies (2007); Complaint, S.E.C. v. Lucent Technologies, C.A. No. 07–2301, (D.D.C. Dec. 21, 2007) (NPA signed with the DOJ acknowledging improperly recorded and inadequately monitored expenditures by Lucent for travel and entertainment for Chinese government officials, including managers in state-owned telecommunications companies, provided for the purposes of seeking or retaining business; fines included $1,000,000 by the DOJ and $1.5 million in civil penalties by the SEC).


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WHY DOES THE UNITED STATES REGULATE FOREIGN BRIBERY: MORALISM, SELF-INTEREST, OR ALTRUISM?

KEVIN E. DAVIS*

INTRODUCTION

Why does the United States regulate bribery of foreign public officials? Don’t U.S. authorities have more than enough corruption to tackle at home without worrying about the misdeeds of public officials in far-off lands?

There are several plausible answers to these questions. One is moralism, the idea that legislation such as the Foreign Corrupt Practices Act1 (FCPA) is designed to make a moral statement, to send the message that corrupt practices are morally blameworthy no matter where they take place. A second, more cynical answer is that U.S. regulation is motivated by self-interest. Bribery is a relatively expensive way to obtain favors from foreign officials. Consequently, it is in the United States’ economic interest to tie its firms’ hands by preventing them from paying bribes for favors that they might otherwise be able to obtain by less costly and more legitimate means. Anti-corruption legislation can also serve the political interests of the United States. Prohibition of bribery can help maintain the image of the United States in foreign countries by preventing its firms

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from being associated with tainted foreign public officials, or at
least making it possible for the U.S. government to disassociate
itself from those firms by taking legal action against them. A third
possibility is altruism, the idea that the United States should help
foreign countries combat corruption as part of a broader commit-
tment to promoting their economic and political development.

The legislative history of the FCPA suggests that moralism and
self-interest played the most significant roles in shaping the original
Act and its 1988 Amendments. Since then, altruism has played a
more prominent role in shaping the FCPA and other initiatives
aimed at foreign bribery. There is arguably some tension between
self-interest and altruism as guides to enforcing the FCPA. In Part I,
this essay traces the motivations for enacting the FCPA as expressed
in the legislative history and examines how those motivations
evolved over time as the FCPA was amended. Part II discusses the
potential tension between self-interest and altruism and several
ways in which that tension might be resolved.

I.
THE MOTIVATIONS BEHIND THE FCPA
AND ITS AMENDMENTS

A mix of moralism and self-interest motivated the initial enact-
ment of the FCPA. The FCPA was passed in direct response to evi-
dence uncovered in the course of investigations sparked by the
Watergate scandal. The Watergate Special Prosecutor uncovered ev-
dence that major U.S. corporations had made illegal contributions
to Richard Nixon’s re-election campaign and to other political
figures from secret “slush funds.” A subsequent Securities and Ex-
change Commission (SEC) investigation revealed that the illegal
campaign contributions were, in some instances, also used as chan-
nels for “questionable or illegal foreign payments.” These findings,
together with other information uncovered by a number of con-
gressional hearings and a special Presidential Task Force, led to

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3. SEC Report on Questionable and Illegal Corporate Payment and Practices,
   (CCH) at 3 (May 19, 1976) [hereinafter SEC Report].
4. See Prohibiting Bribes to Foreign Officials: Hearing on S. 3133, S. 3379 and S.
   3418 Before the S. Comm. on Banking, Hous. & Urban Affairs, 94th Cong. 43 (1976)
   [hereinafter Richardson Letter] (letter from Elliot Richardson, Secretary of Com-
   merce and Chairman of Task Force on Questionable Corporate Payments Abroad,
   to Senator William Proxmire); The Activities of American Multinational Corporations
   Abroad: Hearings Before the Subcomm. on Int’l Econ. Policy of the H. Comm. on Int’l
   Relations, 94th Cong. 1–3 (1975); Multinational Corporations and United States Foreign Pol-
the drafting of several bills and, ultimately, the Foreign Corrupt Practices Act of 1977. This background has led many scholars to characterize the FCPA as an expression of “post-Watergate morality,” a self-conscious effort to restore confidence in American business and the free market system.

The House Report on the bill that eventually became the FCPA made these moralistic motivations explicit:

The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. . . . [I]t rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business.7

The moral statement embodied in the FCPA was clearly intended for foreign as well as domestic audiences.8 At the time, the United States was still embroiled in the Cold War and had recently lost ground to the Communists in Vietnam and Angola.9 Taking a

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The idea that Congress intended the FCPA to make a moral statement is consistent with the fact that the drafters rejected a proposal backed by both President Ford and the SEC to eschew criminalization in favor of simply requiring disclosure of foreign bribery. It also explains why proponents of the legislation were able to override claims that a criminal prohibition would be “essentially unenforceable.” Whatever its merits as a means of deterrence, a disclosure requirement does not make the same kind of moral statement as criminalization. Disclosure regimes deter by enabling embarrassment, by triggering naming and shaming. They work by exposing wrongdoers to condemnation by customers, suppliers, peers, and the public at large. What disclosure does not entail is explicit denunciation by the state; under a disclosure regime, denunciation is outsourced to society as a whole. By contrast, criminal prohibition is the most potent form of denunciation known to


10. H.R. REP. No. 95-640, at 5. In a similar vein, see S. REP. No. 95-114, at 3 (1977) (“Foreign governments friendly to the United States in Japan, Italy, and the Netherlands have come under intense pressure from their own people. The image of American democracy abroad has been tarnished.”), and Richardson Letter, supra note 4, at 42 (discussing “[t]he problem of adverse effect on foreign relations”).

11. Compare H.R. REP. No. 95-640, at 6 (“After carefully considering all the testimony adduced, the committee concluded that [foreign bribery] should be outlawed rather than legalized through disclosure.”), with Richardson Letter, supra note 4, at 61–65 (proposing a disclosure-based regime and rejecting criminalization). See SEC Report, supra note 3, at 57–66 (proposing a disclosure-based regime).

12. Richardson Letter, supra note 4, at 65 (“[T]he President has decided to oppose, as essentially unenforceable, legislation which would seek broad criminal proscription of improper payments made in foreign jurisdictions.”).
law, regardless of whether the prohibition is enforced. To the extent that the purpose of the legislation that became the FCPA was to make an immediate moral statement, criminalization made much more sense than a simple disclosure requirement.

Although the primary motivation behind the enactment of the FCPA may have been moralism, Congress was not completely oblivious to the FCPA’s potential impact on U.S. economic interests. The House Report took the position that U.S. businesses would not be placed at a competitive disadvantage if they refused to pay bribes, citing evidence of firms that managed to compete successfully in export markets without paying bribes. This view was consistent with the SEC’s tentative finding (based on data provided by participants in its voluntary disclosure program) that cessation of questionable or illegal foreign payments “will not seriously affect the ability of American business to compete in world markets.”

There were even suggestions that the FCPA would have positive economic effects for the United States. The House Report noted evidence that “in a number of instances, payments have been made not to “outcompete” foreign competitors, but rather to gain an edge over other U.S. manufacturers.” In addition, the SEC made it clear that it viewed undisclosed questionable foreign payments as bad for business. The SEC took the position that information about such payments was generally material to investors because it bore upon both the quality of the company’s business and the attendant risks.

Economic self-interest played a more significant role in the 1988 Amendments to the FCPA. Those Amendments were motivated by concerns about the burden the FCPA imposed on U.S. exporters and issuers of securities. Tellingly, they were enacted as

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13. Id. at 61 (“[Legislation criminalizing foreign bribery] would represent the most forceful possible rhetorical assertion by the President and the Congress of our abhorrence of such conduct.”).
16. H.R. REP. No. 95-640, at 5 (testimony of Former SEC Chairman Hills, partially quoting Former Secretary of Commerce Richardson).
17. SEC Report, supra note 3, at 57–59 (describing the proposed action’s primary aim as restoring integrity of corporate disclosure and accountability systems). For criticism of the SEC’s approach to the problem, see Richardson Letter, supra note 4, at 53–56 (concluding that “[SEC disclosure] is, arguably, not an appropriate mechanism to deal with the full array of national concerns caused by the problem of questionable payments”).
19. See H.R. REP. No. 100-576, at 916 (1988) (Conf. Rep.) (citing “unnecessary concern among exporters about the scope of the Act” and “unnecessary and
part of the Omnibus Trade and Competitiveness Act of 1988. The 1988 Amendments limited the scope of criminal liability for violation of the accounting standards by imposing a knowledge requirement. They also created exceptions and affirmative defenses to liability for certain payments to foreign public officials: namely, reimbursements for expenses incurred in connection with promotional activities, payments that were lawful under the law of the foreign official’s country, and payments for routine governmental action. The 1988 Amendments also created a procedure for the Department of Justice (DOJ) to issue general guidelines and advisory opinions and directed it to provide guidance on its enforcement policy to “potential exporters and small businesses that are unable to obtain specialized counsel.”

Last but not least, the 1988 Amendments directed the Executive Branch to negotiate with members of the Organisation for Economic Co-operation and Development (OECD) with a view to concluding an international agreement on foreign bribery. This provision was in direct response to concerns that the FCPA placed U.S. firms at a competitive disadvantage relative to firms from countries without similar legislation. It had long been recognized that unilateral action by the United States would not be able to deter all foreign bribery, simply because it would be impossible for U.S. law enforcement officials to obtain evidence from, or otherwise assert jurisdiction over, all the relevant actors. Accordingly, at more or less the same time that Congress began considering domestic legislation to regulate foreign bribery, the Executive Branch began to press for international agreements on criminalization of foreign

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23. Id. § 5003(c)(4) (codified as amended at 15 U.S.C. §§ 78dd-1(d)–(e), 78dd-2(e)–(f)).


25. See id. § 5003(d) (2) (A) (ii) (requiring the President to report to Congress on actions that might be taken in the event that negotiations failed to “eliminate any competitive disadvantage of United States businesses”).

26. See, e.g., Richardson Letter, supra note 4, at 22.
bribery. The 1988 Amendments marked a renewed emphasis on these international efforts and a tactical shift away from pursuit of a global agreement toward advocacy focused in a single forum, the OECD. These efforts ultimately bore fruit in the form of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

The FCPA was amended in 1998 to conform to the requirements of the OECD Convention. At one point the House Report described the Amendments as an effort to “improve the competitiveness of American business and promote foreign commerce.” Consistent with the hypothesis that they were motivated by self-interest, the 1998 Amendments extended the FCPA to cover acts committed by foreign nationals while in the United States and increased the penalties applicable to foreign nationals employed by or acting as agents of U.S. companies. Moreover, the benefits of the advisory opinion procedure created by the 1988 Amendments were not extended to foreign actors who were not US “issuers.” However, the 1998 Amendments also extended the scope of the FCPA as applied to U.S. nationals in various respects. For example, it made it possible to prosecute U.S. businesses and nationals for action that took place wholly outside the United States. Consequently, it is difficult to interpret these Amendments as being motivated exclusively by self-interest.

In fact, the legislative history to the 1998 Amendments marked the debut of the altruistic idea that the FCPA might serve as a tool

27. Id. at 56–57 (summarizing U.S. efforts to encourage regulation of questionable payments through the OECD, the General Agreement on Tariffs and Trade, and the United Nations).


31. Compare 15 U.S.C. § 78dd-1(c) (providing for DOJ advisory opinions to issuers upon request), and § 78dd-2(f) (providing for DOJ advisory opinions to domestic concerns upon request), with § 78dd-3 (appearing to be silent with respect to whether the DOJ will make advisory opinions for persons and business entities other than issuers or domestic concerns). See Foreign Corrupt Practices Act Opinion Procedure, 28 C.F.R. § 80.4 (2009) (requiring that request for an opinion be submitted by an issuer or domestic concern).

for promoting political and economic development. This idea began to circulate widely in the late 1980s and early 1990s, a period marked by growing acceptance of the view that corruption tends to inhibit democratization and economic development. The U.S. Department of State deployed the altruistic and moral justifications for anti-bribery legislation to great effect in urging other countries to enact their own legislation criminalizing foreign bribery. The conclusion of the OECD Convention marked the success of those strategies where previous appeals to U.S. trading partners’ economic self-interest had failed.

The State Department’s altruistic talking points are reflected in the legislative history of the 1998 Amendments, including pronouncements from both Congress and the Executive Branch. The Senate Report that accompanied the 1998 Amendments described the enactment of the FCPA as a declaration that U.S. companies “should act ethically in bidding for foreign contracts and should act in accordance with the U.S. policy of encouraging the development of democratic institutions and honest, transparent business practices.” The House Report stated, “International bribery and corruption continue to be problems worldwide. They undermine the goals of fostering economic development, trade liberalization, and achieving a level playing field throughout the world for businesses.” In his signing statement, President Clinton declared, “The United States has led the effort to curb international bribery. We have long believed bribery is inconsistent with democratic values, such as good governance and the rule of law. It is also contrary to basic principles of fair competition and harmful to efforts to promote economic development.”

The Obama administration has made it clear that anti-corruption law is a central part of its development policy. President Obama has described the promotion of broad-based economic
growth as one of the central pillars of his Global Development Policy.\footnote{See Press Release, The White House, Office of the Press Secretary, Fact Sheet: U.S. Global Development Policy (Sept. 22, 2010), available at http://www.whitehouse.gov/the-press-office/2010/09/22/fact-sheet-us-global-development-policy.} When the President introduced that Policy in an address to the United Nations, he explicitly characterized U.S. anti-corruption initiatives as means of promoting economic growth in the developing world: “We also know that countries are more likely to prosper when governments are accountable to their people. So we are leading a global effort to combat corruption, which in many places is the single greatest barrier to prosperity, and which is a profound violation of human rights.”\footnote{President Barack Obama, Remarks by the President at the Millennium Development Goals Summit in New York, New York (Sept. 22, 2010) (transcript available at http://www.whitehouse.gov/the-press-office/2010/09/22/remarks-president-millennium-development-goals-summit-new-york-new-york).}

An important theme running through statements made by both the Clinton and Obama administrations is that promoting development is consistent with U.S. economic interests. In this vein, there have been several official statements that the motivation for anti-corruption initiatives is a form of enlightened self-interest. The House Report for the 1998 Amendments stated bluntly that “[t]he goal of the United States is the promotion of stronger, more reliable, and transparent foreign legal regimes that, in turn, make for more reliable and attractive investment climates.”\footnote{H.R. REP. NO. 105-802, at 10.} Similarly, in the speech announcing his Global Development Policy, President Obama categorized development “not only as a moral imperative, but a strategic and economic imperative.”\footnote{In this speech, the President cited this linkage as being “recognized” by his National Security Strategy. President Barack Obama, supra note 40. See, e.g., PRESIDENT OF THE UNITED STATES, NATIONAL SECURITY STRATEGY 37–38 (May 2010) [hereinafter NATIONAL SECURITY STRATEGY], available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf. Interestingly, President Obama’s cover letter to the National Security Strategy characterized support for anti-corruption activities as part of an effort to “advocate for and advance the basic rights upon which our Nation was founded,” and added that “[o]ur commitment to human dignity includes support for development, which is why we will fight poverty and corruption.” Id. at ii.}
ment policy guided by economic self-interest, narrowly defined, would permit U.S. firms to pay whatever it takes to foreign public officials in order to meet and defeat competition from firms that are beyond the reach of U.S. law. If anything, a purely self-interested enforcement policy would involve prosecuting only foreign firms so as to give U.S. firms a competitive advantage. Altruism, by contrast, seems to demand vigorous proactive enforcement against both domestic and foreign firms in order to overcome the limitations and indifference of local anti-corruption institutions. This tension between self-interest and altruism is arguably greater than any tension between moralism and self-interest because the purposes of making a moral statement are satisfied by even weakly enforced criminal sanctions.

There are several ways in which the potential tension between self-interested and altruistic implementation of the FCPA might be resolved. One way is to challenge the idea that enforcement of the FCPA is contrary to the economic interests of U.S. firms.43 Another way is to challenge the claim that vigorous and proactive enforcement of the FCPA serves the interests of countries in which corrupt foreign officials are located. A final approach involves introducing respect for popular sovereignty as a value that should constrain altruistic initiatives.

The first approach to resolving the tension between altruism and self-interest is to make the argument that bribery is an inherently bad way of doing business. If only because of the difficulty of enforcing corrupt agreements, bribery is often an expensive and unreliable way of obtaining the services of foreign public officials.44 Since corrupt transactions are beyond the scope of the law, there is no guarantee that corrupt officials will deliver what they have been paid for, and even when they do initially deliver on their promises, there is little to stop them from trying to renegade. According to this argument, a legitimately awarded government contract is probably cheaper to obtain and less likely to be revoked than a corruptly procured one. Consequently, U.S. firms collectively have an interest in deterring bribery. On the other hand, this argument cannot be pushed too far. Some “services” cannot be obtained from foreign public officials without paying a bribe: authorization to construct a plant in violation of local environmental protection laws might be

43. The arguments in this paragraph are developed at greater length in Kevin E. Davis, Self-Interest and Altruism in the Deterrence of Transnational Bribery, 4 AM. L. & ECON. REV. 314 (2002).
44. Id. at 335.
An example. Strictly speaking, it is in the United States’ economic interest to permit its firms to pay for these kinds of services.

An alternative way of reconciling altruism and self-interest is to appeal to the idea of enlightened self-interest. This is what the Clinton and Obama administrations have done in emphasizing the links between the democratization and development of foreign countries, on the one hand, and U.S. economic and political interests on the other. In an age of global interdependence there may be little distinction between pursuing self-interest and promoting the development of foreign countries on the brink of becoming either trading partners or terrorist training sites.\textsuperscript{45} The Arab Spring—especially as it has unfolded in Egypt—has given new credibility to the idea that corruption can destabilize countries in which the United States has significant strategic interests.\textsuperscript{46}

Other approaches to the tension between altruism and self-interest challenge the idea that altruism demands vigorous enforcement of the FCPA. Although there is a broad consensus that overseas corruption is a problem, there is less of a consensus about the extent to which aggressive enforcement of the FCPA represents the best solution to that problem.\textsuperscript{47}

One important concern is that efforts by the United States and other jurisdictions to punish payment of bribes to foreign public officials may discourage multinational firms from doing business in countries where corruption is endemic, thereby threatening the

\textsuperscript{45} President Obama’s National Security Strategy states:
Development is a strategic, economic, and moral imperative. We are focusing on assisting developing countries and their people to manage security threats, reap the benefits of global economic expansion, and set in place accountable and democratic institutions that serve basic human needs. Through an aggressive and affirmative development agenda and commensurate resources, we can strengthen the regional partners we need to help us stop conflicts and counter global criminal networks; build a stable, inclusive global economy with new sources of prosperity; advance democracy and human rights; and ultimately position ourselves to better address key global challenges by growing the ranks of prosperous, capable and democratic states that can be our partners in the decades ahead.

\textit{National Security Strategy, supra note 42, at 15.}

\textsuperscript{46} See, e.g., Stuart Levey, Fighting Corruption After the Arab Spring: Harnessing Countries’ Desire to Improve their Reputations for Integrity, FOREIGN AFFAIRS, June 16, 2011, \url{http://www.foreignaffairs.com/articles/67895/stuart-levey/fighting-corruption-after-the-arab-spring} (“From Tunisia to Yemen, the corruption of Middle Eastern regimes has played a significant role in motivating the Arab Spring.”).

\textsuperscript{47} This and the following paragraphs draw heavily on Kevin E. Davis, \textit{Does the Globalization of Anti-Corruption Law Help Developing Countries?}, in \textit{INTERNATIONAL ECONOMIC LAW, GLOBALIZATION AND DEVELOPING COUNTRIES} 283, 283–306 (Julio Faúndez & Celine Tan eds., 2010).
prospects for development of those countries. OECD survey data and anecdotal evidence suggest that multinational firms are well aware of the FCPA and are making meaningful efforts to comply with it and similar legislation in other countries. Likewise, statistical analyses of cross-border trade and investment flows suggest that enactment of the FCPA and similar legislation in OECD countries has reduced imports and foreign direct investment into countries that are perceived to have high levels of corruption. Small firms, or firms from jurisdictions that do not have legislation equivalent to the FCPA, may make up for reduced business from U.S. multinationals. Nonetheless, there are solid grounds for believing that aggressive enforcement of the FCPA will reduce trade and investment flows to countries with high levels of corruption.

Is it a good thing for U.S. law to discourage firms from doing business with highly corrupt countries? Such a regime creates a collective incentive for inhabitants of countries prone to corruption to control corruption in the hopes of attracting foreign firms. In the optimistic scenario, local actors will be willing and able to respond to that incentive but there is no guarantee that such optimism is warranted. Meanwhile, the lost trade and investment might reduce opportunities for economic growth and poverty reduction.

A second concern about using the FCPA to combat corruption in foreign countries can be labeled “institutional displacement.” The concern here is that reliance on U.S. institutions as substitutes for local anti-corruption institutions will, over time, inhibit the development of the local institutions. In other words, U.S. institutions may displace local ones. As a theoretical matter this concern arises even in situations in which U.S. institutions are clearly more effective in combating corruption than local institutions. Even then, the net impact of relying on U.S. institutions might be negative if their operation tends to inhibit the long-term development of

48. Spalding, supra note 8, at 351 (“In countries where bribery is perceived to be relatively common, the present enforcement regime goes beyond the deterrence of bribery, and ultimately deters investment.”).


52. Id.
local institutions. For example, if American forensic accountants can be relied on to investigate cases of transnational bribery involving public officials from Country X, there will be little benefit to Country X in building up local forensic accounting capacity. Why is this a problem? The fear is that if the institutions in Country X had not been displaced by the American ones, they would have improved over time to the point where they performed better than the U.S. ones.

There are at least two theoretical reasons to take the possibility of displacing local institutions seriously. The first relies on Hirschman’s well-known analysis of the trade-offs sometimes entailed in permitting the clients of an organization to “exit” its sphere of influence as opposed to relying on their “voice” to motivate organizational change.\(^\text{53}\) Suppose that victims of corruption could rely on the FBI, the DOJ, and U.S. courts to investigate, prosecute, and adjudicate complaints of bribery and to levy criminal or civil sanctions. In that case, why would those victims invest any effort in complaining about or pressing for the improvement of local anti-corruption institutions? This may not be a problem if the U.S. institutions are perfect substitutes for local institutions. But suppose that the U.S. institutions only serve the needs of a subset of the local population, perhaps only people—such as foreign investors—who are victimized by transnational bribery as opposed to purely localized corruption. Suppose that the local prosecutors and courts would serve both constituencies. Suppose further that the voices of victims of local corruption are too weak to prompt change and the guardians of local institutions are indifferent to the prospect of losing jurisdiction over cases involving transnational bribery. In these circumstances it is quite plausible that permitting U.S. institutions to respond to corruption will retard the development of local institutions.

A second reason for suggesting that displacement by U.S. institutions can inhibit the development of local institutions relies on the idea of learning-by-doing.\(^\text{54}\) The premise of the learning-by-doing argument is that local institutions improve by gaining experience, rather than as a result of pressure from vocal constituents. The intuition is that professionals such as judges, lawyers, police officers, and accountants—as well as the organizations to which they belong—may need to cut their teeth on at least a few cases before they can be expected to perform at the same levels as more


\(^{54}\) Davis, supra note 47, at 295–96.
experienced foreign institutions. On this view, lack of expertise or integrity on the part of local legal institutions may be consequences, rather than causes, of their disuse. To the extent that victims of corruption can rely on foreign lawyers, prosecutors, courts, and police forces to respond to their claims, local institutions will face diminished opportunities to acquire the requisite experience. This is sub-optimal whenever the long-term benefits of enhancing the quality of local institutions would outweigh the costs borne by victims who are poorly served while local institutions are in the process of acquiring expertise. Again, the conclusion is that limiting the role that U.S. institutions play in combating corruption may, over time, better serve the interests of local actors.

Of course, it is always possible that local institutions will respond to the threat of competition (“exit” in Hirschman’s terminology) by improving their performance. Another possibility is that the performance gap between local and U.S. institutions will be so great that neither the effects of “voice” nor learning-by-doing can close the gap.

A third possibility is that U.S. institutions serve as complements to local institutions, not substitutes. In other words, the greater the extent to which U.S. institutions are involved in combating political corruption, the greater the benefits a country will derive from local institutions’ anti-corruption efforts. In this case, the involvement of U.S. institutions will lead to more rather than less activity for local institutions. In this scenario the flip sides of the arguments set out above suggest that voice and learning-by-doing will tend to improve the quality of local institutions. For example, the fact that U.S. institutions are willing to investigate financial flows passing through the U.S. financial system and to assist in recovering misappropriated funds will tend to increase the benefits to local actors of initiating proceedings against corrupt actors and, by extension, of building local institutions capable of initiating such proceedings. The competence of these local institutions may very well increase as they attract the critical attention of local constituencies and accumulate experience.

A final way to reconcile the tension between self-interest and altruism in enforcement of the FCPA is to refer to a third value: respect for the sovereignty of foreign countries.55 The drafters of

55. Steven R. Salbu has repeatedly criticized the enactment of the FCPA on account of concerns about interfering with the sovereignty of foreign countries. See Steven R. Salbu, Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village, 24 YALE J. INT’L L. 223, 251–55 (1999); Steven R. Salbu, The Foreign Corrupt Practices Act as a Threat to Global Harmony, 20 MICH. J. INT’L L. 419,
the FCPA implicitly rejected the idea that its mere enactment would be offensive to countries in which recipients of prohibited payments were based.\textsuperscript{56} But respect for sovereignty also provides a basis for arguing about how the FCPA ought to be enforced. Specifically, taking concerns about sovereignty into account suggests that enforcement priorities should be shaped by actors based in the jurisdiction most affected by corrupt activity. These actors typically will not be U.S. prosecutors. Consequently, while respect for sovereignty will not necessarily weigh against enforcement of the FCPA, it will often weigh in favor of reactive, rather than proactive enforcement.

CONCLUSION

The U.S. government has always expressed a mix of reasons for regulating the practices covered by the FCPA, but the mix has changed over time. The idea of using the FCPA to promote foreign countries’ economic development has become more prominent in recent official statements than it was when the legislation was initially drafted. This idea is potentially in tension with another idea reflected in the FCPA’s legislative history: namely, that the FCPA should serve to promote the economic interests of the United States. The ways in which that tension is resolved will have significant implications for the future of the FCPA.


\textsuperscript{56}. \textit{See Foreign Payments Disclosure: Hearings on H.R. 15481, S. 3664, H.R. 13870 and H.R. 13953 Before the Subcomm. on Consumer Prot. and Fin. of the Comm. on Interstate and Foreign Commerce}, 94th Cong. 89 (1976). Hon. Gerald L. Parsky, Assistant Secretary of the Treasury for International Affairs, stated:

Any attempt to apply a U.S. criminal statute to acts consummated abroad would involve an extraterritorial application of U.S. law. While there are no absolute legal prohibitions on such extraterritorial application, attempts by the United States to apply our anti-trust and export control laws in a similar way have created substantial problems in the past. The application of our laws abroad often conflicts with foreign laws or practices and is looked upon as an unwarranted intrusion into the sovereignty of other states. . . . It can be expected that similar reactions would be forthcoming in the present instance. \textit{Id.}