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Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act

Amy D. Westbrook
Business and Transactional Law Center, Washburn University School of Law

ENTHUSIASTIC ENFORCEMENT, INFORMAL LEGISLATION: THE UNRULY EXPANSION OF THE FOREIGN CORRUPT PRACTICES ACT

*Amy Deen Westbrook**

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* Associate Professor and Director, Business and Transactional Law Center, Washburn University School of Law. I am grateful to Rick Levy for his helpful suggestions, to Carl Petterson for his research assistance, and to Brad Borden and Marc Miller for their advice. I would also like to thank my colleagues at Washburn University School of Law and the faculty at Stetson Law School for their input at faculty development presentations in the early stages of the Article. Finally, I would like to thank David A. Westbrook for his insightful comments and support. All mistakes are mine.

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I. INTRODUCTION

In 2010, the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) agreed to settle charges against: (1) the Dutch construction company Snamprogetti Netherlands B.V. for $365 million;[1] (2) the French construction and engineering firm Technip SA for $338 million;[2] (3) U.K. defense contractor BAE Systems PLC for $400 million;[3] (4) German automaker Daimler AG for $185 million;[4] and the global

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[1] Deferred Prosecution Agreement at 6, United States v. Snamprogetti Netherlands B.V., No. 4:10-cr-00460 (S.D. Tex. July 7, 2010); Press Release, U.S. Dep't of Justice, Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty (July 7, 2010), http://www.justice.gov/opa/pr/2010/July/10-crm-780.html. Along with its former parent ENI S.p.A. of Italy, Snamprogetti also agreed to pay $125 million in disgorgement of profits to the SEC. *See* SEC Charges Snamprogetti Netherlands, B.V. with Foreign Bribery and Related Accounting Violations and ENI, S.p.A. with Book and Records and Internal Control Violations, Litigation Release No. 21588 (July 7, 2010), http://www.sec.gov/litigation/litreleases/2010/lr21588.htm ("Snamprogetti and ENI will jointly pay $125 million to settle the SEC's charges . . . ."); *see also* Complaint, SEC v. ENI S.p.A., No. 4:10-cv-2414 (S.D. Tex. July 7, 2010) (alleging violations of the Foreign Corrupt Practices Act).

[2] Deferred Prosecution Agreement at 7, United States v. Technip S.A., No. 4:10-cr-439 (S.D. Tex. June 28, 2010); Press Release, U.S. Dep't of Justice, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty (June 28, 2010), http://www.justice.gov/opa/pr/2010/June/10-crm-751.html. Technip SA also agreed to pay $98 million in civil penalties. SEC Charges Technip with Foreign Bribery and Related Accounting Violations, Litigation Release No. 21578 (June 28, 2010), http://www.sec.gov/litigation/litreleases/2010/lr21578.htm (discussing amounts to be paid); *see also* Complaint, SEC v. Technip S.A., No. 4:10-civ.-02289 (S.D. Tex. June 28, 2010) (alleging foreign bribery and related violations).

[3] *See* Daniel Michaels & Cassel Bryan-Low, *BAE to Settle Bribery Case for More than $400 Million*, WALL ST. J., Feb. 6–7, 2010, at B1 (discussing details and background of the case); Press Release, BAE Sys. PLC, BAE Systems PLC Announces Global Settlement with United States Department of Justice and United Kingdom Serious Fraud Office (Feb. 5, 2010), http://www.baesystems.com/newsroom/newsReleases/autoGen_1101517013.html (providing details and the amount of the settlement). BAE Systems PLC will also pay approximately $47 million to the U.K. Serious Fraud Office. *See* Michaels & Bryan-Low, *supra*, at B1 (explaining that the company had to plead guilty and pay fine).

[4] Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Daimler AG with Global Bribery (Apr. 1, 2010), http://www.sec.gov/news/press/2010/2010-51.htm ("Daimler agreed to pay $91.4 million in disgorgement to settle the SEC's charges and pay $93.6 million in fines."). Daimler agreed to pay a penalty of $93.6 million to the DOJ. Sentencing Memorandum at 11, United States v. Daimler AG, No. 1:10-cr-00063-RJL (D.D.C. Mar. 24, 2010); Press Release, U.S. Dep't of Justice, Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay $93.6 Million in Criminal Penalties (Apr. 1, 2010), http://www.justice.gov/opa/pr/2010/April/10-crm-360.html. It also

freight forwarding company Panalpina World Transport (Holding) Ltd., along with six other companies in the oil services industry, for a total of $236.5 million.[5] In addition, U.S. Federal Bureau of Investigation (FBI) agents arrested over twenty executives and employees of U.S., United Kingdom (U.K.) and Israeli companies at a shooting, hunting, and outdoor trade (SHOT) show in Las Vegas in a sting operation dubbed "Catch-22."[6] In 2009, Halliburton Company and its former engineering and construction unit, Kellogg, Brown & Root, Inc. (KBR), both U.S. companies, settled with the DOJ and SEC for $579 million.[7] The German company Siemens AG agreed to pay $800 million in 2008.[8] These

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agreed to disgorge $91.3 million to the SEC. SEC v. Daimler AG, No. 1:10-cv-00473-RJL (D.D.C. Mar. 22, 2010); Press Release, U.S. Sec. & Exch. Comm'n, *supra* (alleging foreign bribery).

[5] Press Release, U.S. Dep't of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More than $156 Million in Criminal Penalties (Nov. 4, 2010), http://www.justice.gov/opa/pr/ 2010/November/ 10-crm-1251.html; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials (Nov. 4, 2010), http://www.sec.gov/news/press/2010/2010-214.htm [hereinafter Panalpina SEC Press Release]. In addition to Panalpina World Transport (Holding) Ltd., a Swiss company, and its U.S. subsidiary, Panalpina Inc., the SEC and the DOJ reached settlements with Pride International, Inc., Tidewater Inc., Transocean Inc., GlobalSantaFe Corporation, Noble Corporation, and Royal Dutch Shell PLC. *Id.*

[6] Evan Perez & Brent Kendall, *Twenty-Two Arrested in U.S. Bribery Probe*, WALL ST. J., Jan. 20, 2010, at A3; Press Release, U.S. Dep't of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), http://www.justice.gov/opa/pr/2010/January/10-crm-048. html; Ashby Jones, *More on 'Catch 22' – Plot Thickens in Huge FCPA Shakedown*, WALL ST. J. L. BLOG (Jan. 25, 2010, 6:05 PM), http://blogs.wsj.com/law/2010/01/25/more-on-catch-22-pl ot-thickens-in-huge-fcpa-shakedown.

[7] *See* SEC Charges KBR, Inc. with Foreign Bribery; Charges Halliburton Co. and KBR, Inc. with Related Accounting Violations—Companies to Pay Disgorgement of $177 Million; KBR Subsidiary to Pay Criminal Fines of $402 Million; Total Payments to be $579 Million, Litigation Release No. 20897A (Feb. 11, 2009), http://www.sec.gov/litigation/litreleases/20 09/lr20897a.htm; Press Release, U.S. Dep't of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009), http://www.justice.gov/opa/pr/2009/February/09-crm-112.html; *see also* Complaint, SEC v. Halliburton Co., No. 4:09-399 (S.D. Tex. Feb. 11, 2009) (alleging violations of the FCPA and federal securities laws). KBR's former Chief Executive Officer, Albert "Jack" Stanley, pleaded guilty in a related criminal case discussed *infra* Part III.D.*2*.

[8] Sentencing Memorandum at 10–11, United States v. Siemens AG, No. 1:08-cr-00367-RJL (D.D.C. Dec. 15, 2008); Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), http://www.justice.gov/opa/pr/20 08/December/08-crm-1105.html (discussing criminal fines); SEC Files Settled Foreign

days, violating a thirty-year-old U.S. statute known as the Foreign Corrupt Practices Act (FCPA or the Act)[9] comes at a steep price.

One might wonder why companies would expose themselves to such massive, and even personal, liabilities. After all, the FCPA was enacted back in 1977 to prohibit U.S. companies from bribing foreign officials, and to that end, requires such companies to keep accurate books and records.[10] This is a law that has been on the books, and enforced, for years[11]—so one would think that companies would have learned to comply. But while neither corruption nor the FCPA is new, the scope and substance of the Act have in effect been changed through a relatively recent radicalization of its enforcement, and a number of companies have been caught.[12] In short, the way that the Act has been enforced

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Corrupt Practices Act Charges Against Siemens AG for Engaging in Worldwide Bribery with Total Disgorgement and Criminal Fines of over $1.6 Billion, Litigation Release No. 20829 (Dec. 15, 2008), http://www.sec.gov/litigation/litreleases/2008/lr20829.htm; *see also* Complaint, SEC v. Siemens AG, No. 1:08-CV-02167 (D.D.C. Dec. 15, 2008) (alleging FCPA violations).

[9] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78a, 78dd-1, 78dd-2, 78ff, 78m, 78o (2006)), *amended by* Foreign Corrupt Practices Act Amendments of 1988, 15 U.S.C. §§ 78dd-1 to -3, 78ff (2006) and International Anti-Bribery and Fair Competition Act of 1998, 15 U.S.C. §§ 78dd-1 to -3, 78ff (2006).

[10] The FCPA anti-bribery provisions were incorporated into § 30A of the Securities and Exchange Act of 1934 (Exchange Act), and the financial reporting and internal controls provisions were incorporated into §§ 13(b)(2)(A) and (B) of the Exchange Act. Securities and Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78kk (2006)).

[11] Although passed in 1977, the FCPA is still not well-known among much of the practicing bar. The FCPA is seldom taught in U.S. law schools, so new graduates may lack the practical skills and issue-specific knowledge necessary to advise their global clients. *See* D. Alison von Rosenvinge, *Global Anti-Corruption Regimes: Why Law Schools May Want to Take a Multi-jurisdictional Approach*, 10 GERMAN L.J. 785, 785–86 (2009).

[12] *See* Margaret Ayres et al., *Anti-Corruption*, 43 INT'L LAW. 771, 771 (2009) (calling the FCPA a "top enforcement priority" of U.S. authorities); Roger M. Witten et al., *Prescriptions for Compliance with the Foreign Corrupt Practices Act: Identifying Bribery Risks and Implementing Anti-Bribery Controls in Pharmaceutical and Life Sciences Companies*, 64 BUS. LAW. 691, 691 (2009) (stating that FCPA enforcement "has reached historically high levels"); Press Release, U.S. Dep't of Justice, Fact Sheet: The Department of Justice Public Corruption Efforts (Mar. 27, 2008), http://www.usdoj.gov/opa/pr/2008/March/08_ag_246.html (explaining the current DOJ focus on FCPA enforcement).

lately has transformed the substantive law and shaken the business world.[13]

During the first twenty-eight years that the FCPA was in force, the SEC and the DOJ[14] typically initiated just two or three cases a year.[15] Fines, when assessed, seldom exceeded $1,000,000. Many cases came from voluntary disclosure by the companies themselves.[16] U.S. companies with operations abroad established FCPA compliance programs, both to educate their personnel on the prohibitions of the Act, and as mitigation if a violation occurred.[17]

Times have changed. The number of cases has increased.[18] In the current era of invigorated enforcement, the SEC and DOJ are

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[13] As discussed below, in the last few years there have been dozens of attorney and business-oriented programs attempting to help them work in the context of the new FCPA enforcement environment. *See, e.g.*, AM. CONFERENCE INST., 24TH NATIONAL CONFERENCE ON THE FOREIGN CORRUPT PRACTICES ACT, http://www.fcpaconference.com (last visited Oct. 17, 2010); LEGAL IQ, INT'L QUALITY & PRODUCTIVITY CTR., THE FOREIGN CORRUPT PRACTICES ACT (2009), http://www.iqpc.com/uploadedfiles/eventdesign/usa/September/10631004/assets/brochure.pdf; *Live Seminar—The Foreign Corrupt Practices Act 2010*, PRACTISING LAW INST., http://www.pli.edu/product/seminar_detail.asp?id=62198 (last visited Oct. 7, 2010).

[14] The FCPA is enforced by the SEC and the DOJ. *See* S. REP. NO. 95-114, at 11–12 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4109–10 (discussing the respective enforcement duties of the SEC and DOJ). The DOJ begins civil investigations of private companies, and either the DOJ or the SEC may begin a civil investigation of a publicly traded company. *See* Timothy W. Schmidt, Note, *Sweetening the Deal: Strengthening Transnational Bribery Laws Through Standard International Corporate Auditing Guidelines*, 93 MINN. L. REV. 1120, 1125 (2009). All criminal investigations, whether of publicly traded or private companies, are conducted by the DOJ. *Id.* The SEC may send a case on to the DOJ for criminal prosecution. S. REP. NO. 95-114, at 11–12. In an increasing number of cases, such as the arrests in Las Vegas in January 2010, the DOJ may also work together with the FBI. *See* William F. Pendergrast et al., *Recent FCPA Enforcement Activities*, STAYCURRENT (Paul, Hastings, Janofsky & Walker LLP), Nov. 2008, http://www.paulhastings.com/assets/publications/600.pdf?wt.mc_ID=600.pdf (discussing increased DOJ–FBI cooperation on FCPA investigations and increased FBI resources and training devoted to the FCPA).

[15] *See* Ethan S. Burger & Mary S. Holland, *Why the Private Sector Is Likely to Lead the Next Stage in the Global Fight Against Corruption*, 30 FORDHAM INT'L L.J. 45, 52 (2006); Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1449 (2008) (citing Eugene R. Erbstoesser et al., *The FCPA and Analogous Foreign Anti-Bribery Laws—Overview, Recent Developments, and Acquisition Due Diligence*, 2 CAP. MARKETS L.J. 381, 386 (2007)).

[16] *See* Huskins, *supra* note 15, at 1149 (explaining why companies self-report).

[17] ROBERT W. TARUN, THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK 235 (2010) (explaining that a corporate compliance program can be used to defend a company in the event of an FCPA investigation).

[18] *See* Witten, *supra* note 12, at 691–92 (noting that the number of FCPA cases has "skyrocketed").

bringing ten times as many cases as in prior years.[19] There are estimated to be a record 140 open FCPA investigations.[20] Fines are also increasing dramatically.[21] The settlement amounts dwarf previous records,[22] and the Snamprogetti Netherlands B.V., Technip SA, Daimler AG, BAE Systems PLC, Halliburton/KBR, Panalpina, and Siemens AG cases are not isolated examples.[23]

As discussed below, the FCPA has been amended twice in its history, but it has not received sustained attention from Congress,

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[19] *See id.* at 692 n.4 (reporting that thirty-seven FCPA enforcement proceedings were brought in 2008 and thirty-eight were brought in 2007).

[20] *See 2010 Mid-Year FCPA Update*, GIBSON DUNN (July 8, 2010), http://www.gibsondunn.com/Publications/Pages/2010Mid-YearFCPAUpdate.aspx (announcing that Assistant Attorney General Lanny Breuer confirmed 140 active FCPA investigations at the DOJ). Other estimates have placed the open investigations between 100 and 130 cases. *See* Paul R. Berger & Erin W. Sheehy, *FCPA Enforcement: The Latest from U.S. DOJ and SEC Representatives*, FCPA UPDATE (Debevoise & Plimpton LLP), Nov. 2009, at 3, http://www.debevoise.com/files/Publication/f461b32f-41ab-42a6-b4f9-4f5a87d40aaf/Presentation/PublicationAttachment/2ece53c0-c74e-4005-9c2a-6073ae75c018/FCPAUpdateNumber4.pdf (providing the remarks of Mark Mendelsohn, former Deputy Chief of the DOJ Criminal Division's Fraud Section, at the American Conference Institute's 22nd National Forum on the Foreign Corrupt Practices Act); *10 Minutes on Combating Corruption*, 10 MINUTES (PriceWaterhouseCoopers), Nov. 2009, at 1, http://www.pwc.com/en_US/us/10minutes/assets/pwc-10minutes-anticorruption.pdf; Phyllis Diamond, *Attorney Sees More Individuals Named in Ramped Up FCPA Enforcement Effort*, 41 Sec. Reg. & L. Rep. (BNA) No. 32, at 1495, 1495 (Aug. 10, 2009) (estimating the FCPA backlog at 120 cases); Thomas O. Gorman, *Trends in SEC Enforcement 2009*, 41 Sec. Reg. & L. Rep. (BNA) No. 27, at 1255, 1262 (July 6, 2009) ("At the beginning of 2009, there were over 100 open FCPA investigations."). Regardless of whether the number is 100 or 140, it is record-setting.

[21] *See* discussion *infra* Part IV.C.*1*.

[22] Eight of the ten highest monetary penalties in FCPA-related settlements were reached in 2010. *In New Top Ten, Eight Are Foreign*, FCPA BLOG (Nov. 5, 2010, 6:26 AM), http://www.fcpablog.squarespace.com/blog/tag/abb (listing the top ten settlements reached in FCPA cases). The previous record fine of $44 million was paid in 2007 by the U.S. oilfield services company Baker Hughes when it settled government allegations of improper payments in Kazakhstan. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Baker Hughes with Foreign Bribery and with Violating 2001 Commission Cease-and-Desist Order (Apr. 26, 2007), http://www.sec.gov/news/press/2007/2007-77.htm (providing total settlement amount); Press Release, U.S. Dep't of Justice, Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay $11 Million Criminal Fine as Part of Largest Combined Sanction Ever Imposed in FCPA Case (Apr. 26, 2007), http://www.justice.gov/opa/pr/2007/April/07_crm_296.html.

[23] *See, e.g.*, Karl Sidhu, *Anti-Corruption Compliance Standards in the Aftermath of the Siemens Scandal*, 10 GERMAN L.J. 1343, 1344 (2009) ("[T]he Siemens case cannot be regarded as exceptional to an extent that would justify incomparability with other companies.").

and it has been the subject of almost no formal rulemaking.[24] Moreover, the FCPA is seldom litigated; almost all actions are settled before going to trial.[25] Occasional SEC releases, and a very limited DOJ opinion procedure, provide scant interpretation of the Act.[26] As a result, companies that intend to comply with the FCPA must do so with no recent legislative, and little judicial or administrative, guidance.[27]

The lack of guidance to the regulated community is especially important now that the law has, in practical terms, changed. As discussed below, U.S. administrative agencies have used an expanded interpretation of the FCPA as the legal basis for their efforts to address both a global business boom and the subsequent global recession (and widespread allegations of regulatory failure).[28] To deal with these circumstances, the reach of the law has been greatly extended. But how far? The undeniable yet indefinite transformations of the meaning of the FCPA, and the new enthusiasm for its enforcement, have created uncertainty for practicing lawyers and their clients about what business practices are acceptable.

Considering the fact that the FCPA is designed to address a widely recognized ill—bribery—it might seem that a certain ambiguity regarding enforcement could be salutary. From this perspective, the practical meaning of the FCPA for companies doing business internationally might be something like: do not bribe, and do not do anything that looks like bribery. While appealing, this view of the problem is too simple. As discussed below, a great deal of ordinary and presumably beneficial business practice, including much that falls under the heading of good

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[24] *See* discussion *infra* Part II.B.

[25] *See* discussion *infra* Part V.B.

[26] *See* discussion *infra* Part V.C.

[27] *See* James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233, 1233–39 (2007) (outlining the dearth of guidance on and interpretation of the FCPA); Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 413 (2010) (noting the lack of useful guidance to those subject to the FCPA); Donald Zarin, *Introduction*, *in* THE FOREIGN CORRUPT PRACTICES ACT 2010, § 1-1, at 49 (PLI Corp. Law & Practice, Course Handbook Ser. No. 1814, 2010) (discussing "certain standards" of the FCPA).

[28] *See* discussion *infra* Part IV.C.

corporate citizenship, might be illegal under a sufficiently expansive reading of the FCPA. A recent Dow Jones Risk and Compliance survey found that 51% of companies had delayed a business initiative, and 14% had abandoned an initiative altogether, because of confusing anti-corruption laws.[29] Clear-cut instances of bribery are not the issue; rather, the issues are (1) who draws the lines between corruption and corporate relations, and (2) where those lines are drawn. At present, the lines are sketched by a disjointed collection of ad hoc and ex post decisions, and speculation on the part of the bar—hardly the way to run a railroad, much less a regulatory statute with criminal sanctions, where clarity is at a premium.

The Act's lack of clarity tends to frustrate its purpose. Regulatory statutes like the FCPA work, or fail to work, through compliance. Enforcement essentially provides incentives for compliance programs. Moreover, it is widely believed that a company that does not have a compliance system in place, and that is charged with corruption, will simply lose.[30] In other words, the intended and actual effect of a statute such as the FCPA is not so much to punish misbehavior, as to induce companies to construct compliance programs, thereby avoiding the misbehavior altogether. But what should an FCPA compliance program include? Given the present state of confusion about what the law actually requires, it is unclear how to design an efficient and effective compliance program. As a result, FCPA compliance

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[29] *See* Press Release, Dow Jones, Dow Jones Survey: Confusion About Anti-Corruption Laws Leads Companies to Abandon Expansion Initiatives (Dec. 9, 2009), http://fis.dowjones.com/risk/09survey.html.

[30] A so-called "burden-reversal paradigm" exists when a company cannot demonstrate an acceptable FCPA compliance program. For example, in the Baker Hughes case, although there was no proof that Baker Hughes bribed anyone, Baker Hughes could not prove that it did *not* bribe anyone. *See* Kevin Abikoff, Partner, Hughes Hubbard & Reed, Living with the U.S. Foreign Corrupt Practices Act (FCPA) in an Era of Enhanced Enforcement, Remarks at the Meeting of the International Law and Practice Section of the New York Bar Association (Jan. 28, 2009), *in* 22 INT'L L. PRACTICUM 3, 6 (2006) (calling it "bizarre" that a lack of due diligence and insufficient compliance records can be enough for the DOJ and SEC to prosecute); *see also* Phyllis Diamond, *SEC Enforcement Policies at Odds with Focus on Compliance, Attorney Says*, 42 Sec. Reg. & L. Rep. (BNA) No. 6, at 243, 243 (Feb. 8, 2010) (quoting Chicago attorney Randall D. Lehner of Ulmer & Berne LLP, who criticized the SEC for failing to "embrace the concept of reliance on the advice of a compliance official as a defense to fraudulent intent").

programs are likely to be overly expensive, and probably insufficiently effective.[31] Thus, as a practical matter, the FCPA's lack of clarity compromises the law's efficacy.

This Article examines the FCPA and the reasons, methods, results, and legal ramifications of the recent surge in its enforcement. Part II looks at the provisions of the FCPA. Part III will walk through the developments in the 2000s that impelled the surge. Part IV examines the types of enforcement actions being brought and pinpoints some ways in which the law is being changed through these actions. Part IV also looks at the institutional reorganization undertaken by the DOJ and SEC in connection with this enforcement. Part V discusses some of the problems that have resulted from the uncertainty and lack of guidance with respect to the FCPA. Part VI looks at possible analogies or precedents for this type of informal legal development by agency action. Part VII concludes the analysis and suggests ways in which these unruly efforts could be improved.

II. WHAT IS THE FCPA?

A. BACKGROUND

The FCPA was enacted "in the maelstrom of moral outrage at the political and corporate abuses" most strikingly revealed by the Watergate scandal, but that seemed to suffuse the United States in the 1970s.[32] More specifically, the impetus for passage came from reports of U.S. companies making "questionable" payments, i.e., bribes, both domestically and abroad.[33] In an effort to expose

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[31] It is possible that, confronted with an expensive program that is unlikely to be effective, companies may rationally decide to skimp on FCPA compliance programs. They may end up violating the Act, taking the risk that they will not be caught.

[32] H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 2–3 (1998) (discussing the political environment at the time the FCPA was adopted).

[33] *See* MARC I. STEINBERG & RALPH C. FERRARA, SECURITIES PRACTICE: FEDERAL AND STATE ENFORCEMENT § 2:31; Kenneth J. Bialkin, Foreign Corrupt Practices Act of 1977 and the Regulation of Questionable Payments (Aug. 7, 1978), *in* 34 BUS. LAW. 623, 623–24 (1979) (mentioning that the statute addresses foreign and domestic concerns); Comm. on Corporate Law and Accounting, Am. Bar Ass'n, *A Guide to the New Section 13(b)(2) Accounting Requirements of the Securities Exchange Act of 1934*, 34 BUS. LAW. 307, 308

and reduce corruption, the SEC conducted a far-reaching investigation and, in 1976, reported to Congress that more than 400 companies had admitted to making improper or illegal payments overseas.[34] The companies included over 117 prestigious Fortune 500 companies, in a variety of industries, and the amount of bribery involved was estimated to exceed $300 million.[35]

The FCPA was enacted in times not unlike the present.[36] The United States enjoyed a period of swift and global business expansion, while engaged in foreign wars. Domestic corporate and political scandals ensued, and the economy slowed dramatically. There was a widespread sense that institutional structures, not least in big business, were corrupt and weak.[37] The foreign bribery scandals of the late 1970s revealed "fundamental defects in corporate management practices," including the lack of control over agents, inadequate management risk calculation, and poor internal corporate communication.[38] In this environment, Congress acted.

In recognition of "the extent of improper payments to foreign officials,"[39] in 1977 Congress enacted the FCPA, amending the Securities Exchange Act of 1934.[40] The FCPA prohibits the bribery of foreign officials in order to obtain or retain business.[41] It applies to a wide variety of actors, including U.S. persons and

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(1978) [hereinafter *Guide to Section 13(b)(2)*] (describing the political atmosphere during the enactment of the FCPA).

[34] SEC. & EXCH. COMM'N, 94TH CONG., REP. OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 1 (Comm. Print 1976).

[35] H.R. REP. NO. 95-640, at 4 (1977), *available at* http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf.

[36] *See* Sam Singer, *The Foreign Corrupt Practices Act in the Private Equity Era: Extracting a Hidden Element*, 23 EMORY INT'L L. REV. 273, 274–75 (2009) (mentioning several similarities between the corporate landscape when the FCPA was drafted, and the situation in 2009).

[37] *See Guide to Section 13(b)(2)*, *supra* note 33, at 308 (noting cover-ups committed by corporate management and officers).

[38] Joan T.A. Gabel et al., *Letter vs. Spirit: The Evolution of Compliance into Ethics*, 46 AM. BUS. L.J. 453, 460 (2009).

[39] *Id.* at 459.

[40] Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78a, 78dd-1, 78ff, 78m, 78o (2006)) (amending section 13(b) of the Securities Exchange Act, 15 U.S.C. § 78m(b)).

[41] *See* 15 U.S.C. §§ 78dd-1, 78dd-2 (2006).

corporations, companies with publicly traded securities in the United States, and anyone who happens to be in U.S. territory.[42] The FCPA also includes accounting provisions that work in tandem with the anti-bribery provisions by prohibiting the kinds of "slush" funds that had enabled improper foreign payments.[43] Issuers are required to keep accurate books and records and to devise and maintain a system of internal accounting controls that provide reasonable assurances that their transactions and assets are properly maintained.[44]

Before the FCPA, the United States, like many other developed and developing countries, had numerous laws prohibiting bribery.[45] In passing the FCPA, however, the United States was the first country to enact legislation prohibiting its own persons from bribing foreign officials.[46] As discussed below, it was twenty years before a significant number of other countries, led by members of the Organization for Economic Cooperation and Development (OECD), began enacting similar measures.[47]

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[42] *Id.* § 78dd-2.

[43] *See* S. REP. NO. 95-114, at 7 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4105 ("The accounting standards in S. 305 are intended to operate in tandem with the criminalization provisions of the bill to deter corporate bribery."); Wallace Timmeny, *An Overview of the FCPA*, 9 SYRACUSE J. INT'L L. & COM. 235, 235 (1982) (describing the slush funds and the need for their regulation).

[44] *See* 15 U.S.C. § 78m(b)(1)(A) (2006); H.R. REP. NO. 95-640, at 4–6 (1977), *available at* http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf (explaining the purpose of and need for the FCPA and that corporate entities are required to comply with the FCPA or face criminal sanctions).

[45] For example, the Meat Inspection Act, 21 U.S.C. §§ 71–79, 33 U.S.C. § 447 (2006), the Grain Standards Act, 7 U.S.C. § 85 (2006), the Internal Revenue Code, I.R.C. § 162(c) (2006), the Federal Trade Commission Act, 15 U.S.C. § 45 (2006), and the Anti-Kickback Act, 41 U.S.C. §§ 51, 53, 54 (2006). *See* GEORGE C. GREANIAS & DUANE WINDSOR, THE FOREIGN CORRUPT PRACTICES ACT 12 (1982). This widespread prohibition is unsurprising because "the global norm or moral value of condemning bribery is in fact universal. . . . [A]ll major religions and ethical systems condemn bribery and corruption." Elizabeth Spahn, *International Bribery: The Moral Imperialism Critiques*, 18 MINN. J. INT'L L. 155, 202–03 (2009).

[46] *See* Arvind K. Jain, *Power, Politics and Corruption*, *in* THE POLITICAL ECONOMY OF CORRUPTION 3, 9 (Arvind K. Jain ed., 2001) (describing the FCPA as the oldest anti-bribery legislation).

[47] *See* Organization for Economic Cooperation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 112 Stat. 3302, 37 I.L.M. 1, *available at* http://www.oecd.org/dataoecd/4/18/38028044.pdf [hereinafter OECD Convention].

B. AMENDMENTS AND (LACK OF) IMPLEMENTING REGULATION

The FCPA has been amended twice to clarify and strengthen its provisions. In 1988 Congress added affirmative defenses to FCPA liability, narrowed the knowledge requirement, and urged other countries to adopt comparable anti-corruption legislation.[48] A second round of amendments in 1998[49] extended the FCPA's jurisdiction to reach more conduct that takes place outside the territorial boundaries of the United States,[50] expanded liability to include certain foreign corporations and foreign natural persons who violate the provisions of the FCPA while in the United States,[51] and "clarifie[d] the FCPA's prohibition against foreign payments made to secure 'improper advantages.'"[52] The 1998 measures implemented the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), which is discussed below in Part III.

In general, the FCPA has not been implemented through regulations. That said, there are minor exceptions. Regulations were required to establish the DOJ opinion procedure through which businesses may seek guidance about whether their proposed activity would fall afoul of the Act.[53] Those regulations were

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[48] Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107, 1415 (1988) (codified as amended at 15 U.S.C. §§ 78dd-1 to -3, 78-ff (2006)). For a summary of the provisions added in 1988, and the differences between the House and Senate versions of the 1988 amendments, see H.R. REP. NO. 100-576, pt. 1, at 916 (1988) (Conf. Rep.).

[49] International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified as amended at 15 U.S.C. §§ 78dd-1 to -3, 78-ff (2006)).

[50] *See* 15 U.S.C. §§ 78dd-1(g), -2(i) (2006) (prohibiting bribery committed outside U.S. territory by "U.S. persons" and by issuers, including officers, directors, employees, agents or shareholders acting on behalf of such issuers).

[51] *See id.* § 78ff(c) (subjecting foreign nationals who are agents or employees of U.S. issuers to criminal penalties under the FCPA); *id.* § 78dd-1(f) (broadening the definition of "foreign official" to include any officer of a public international organization).

[52] STEINBERG & FERRARA, *supra* note 33, § 2:31, at 2-84; Martin J. Weinstein & Allison C. George, *New OECD Treaty Fights Corruption*, NAT'L L.J., Mar. 1, 1999, at B5; Barbara Crutchfield George et al., *On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Toward the Reduction of Business Corruption*, 32 VAND. J. TRANSNAT'L L. 1, 11 (1999).

[53] 15 U.S.C. §§ 78dd-1(d), 78dd-2(e) (2006) (requiring attorney general guidelines and regulations for responding to inquiries).

promulgated soon after the Act was passed.[54] The SEC promulgated two brief rules in 1979 to prohibit falsification of, or making misleading statements relating to, an issuer's books and records.[55] But the minor exceptions prove the rule: the FCPA has not been implemented through specific, clear regulation. Unlike other key sections of the federal securities laws, the anti-bribery and accounting provisions of the FCPA have stood on the "vague" and unpredictable wording of the statute for over thirty years.[56] As the former general counsel of the SEC urged back in 2007, it is past time for stronger articulation, not just enforcement, of the FCPA, so that companies can comply effectively with the law.[57]

To understand the problems currently posed by the FCPA, it is necessary to walk through the basic structure of the Act. In the abstract, the FCPA is clear enough, and the next two sections (Part II.C and II.D) describe the basic elements. As described below in Part IV, however, the elements of the FCPA have become unclear in practice, and where the law now stands is uncertain.

C. ANTI-BRIBERY PROVISIONS OF THE FCPA

1. What Do the Anti-Bribery Provisions Prohibit? The FCPA prohibits the use of the mails or any means or instrumentality of interstate commerce:

- corruptly[58]

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[54] 28 C.F.R. §§ 80.1–.16 (1999).

[55] 17 C.F.R. §§ 240.13b2-1, -2 (1998).

[56] Doty, *supra* note 27, at 1233, 1239. Some legislation has been recently introduced that would alter the FCPA. The Foreign Business Bribery Prohibition Act of 2009, H.R. 2152, 111th Cong. (2009) (sponsored by Rep. Ed Perlmutter (D-CO)), would authorize certain private rights of action under the FCPA for violations by foreign concerns that damage domestic businesses. The Energy Security Through Transparency Act of 2009, S.1700, 111th Cong. (2009) (sponsored by Sen. Richard Lugar (R-IN)), would require certain issuers to disclose payments to foreign governments for the commercial development of energy resources. Neither bill has made it out of committee.

[57] Doty, *supra* note 27, at 1239–44.

[58] The purpose of the payment is relevant in determining whether there has been an FCPA violation. "Corruptly" in the context of the FCPA has been interpreted to mean "voluntarily [a]nd intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means." United States v. Liebo, 923 F.2d 1308, 1312 (8th Cir. 1991) (internal quotation mark omitted) (quoting trial court's jury instructions).

> • in furtherance of an offer, payment, promise to pay, or authorization of the payment or of any money, or offer, gift, promise to give, or authorization of the giving of anything of value
>
> • to any foreign official[, which includes] any foreign political party or official thereof, any candidate for foreign political office, or 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
>
> • for purposes of influencing any act or decision of such foreign official in his official capacity; inducing such foreign official to do or omit to do any act in violation of his lawful duty; securing any improper advantage; or 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 obtain or retain business for or with, or direct business to, any person.[59]

2. To Whom Do the Anti-Bribery Provisions Apply? The anti-bribery provisions of the FCPA apply to (i) "issuers,"[60] (ii) "domestic concerns,"[61] and (iii) "any person" who violates the provisions while in the territory of the United States, regardless of whether that person is a resident of or does business in the United States.[62] In applying to issuers, the Act extends to companies that offer registered securities in the United States or that are required to file periodic reports with the SEC, as well as their officers,

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[59] 15 U.S.C. § 78dd-1(a) (2006).

[60] *Id.* § 78dd-1.

[61] *Id.* § 78dd-2.

[62] *Id.* § 78dd-3. These provisions were added by the 1998 amendments to the FCPA discussed *infra* Part II.B.

directors, employees, agents, or stockholders acting on their behalf.[63] Domestic concerns include any company that has its principal place of business in the United States or that is organized under the laws of a state of the United States, as well as the company's officers, directors, employees, agents, and stockholders operating on its behalf.[64] Natural persons who are citizens, nationals, or residents of the United States also fall within the definition of domestic concern,[65] regardless of where they are located.[66] The third category of persons subject to the FCPA, in a provision added when the Act was amended in 1998,[67] includes non-U.S. individuals and companies, and the employees and agents of such companies, who violate the Act's provisions while in U.S. territory.[68]

Under the provisions of the Act, an issuer may be a non-U.S. company, and a U.S. issuer or domestic concern may face liability for the activities of non-U.S. subsidiaries or affiliates if such issuer or domestic concern knew that some or all of a payment it made would be "offered, given, or promised, directly or indirectly," to a foreign official in contravention of the Act.[69] As discussed below in Part IV, the current enforcement surge has included a number of cases in which non-U.S. persons have been charged with FCPA violations, resulting in considerable uncertainty about the scope of application of the Act.[70]

3. One Exception and Two Affirmative Defenses.

a. The "Grease" Payments Exception. The FCPA provides an exception to the prohibition on bribery for "facilitating or expediting payment[s] . . . to expedite or to secure the performance of a routine governmental action . . . ."[71] These are also known as

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[63] *See id.* § 78dd-1(a) (including issuers with a class of securities registered pursuant to 15 U.S.C. § 78l or required to file reports under 15 U.S.C. § 78o(d)).

[64] *Id.* § 78dd-2(h)(1)(B).

[65] *Id.* § 78dd-2(h)(1)(A) (defining domestic concern).

[66] ROGER M. WITTEN & KIMBERLY A. PARKER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT § 2.02 (2007).

[67] *See supra* note 51 and accompanying text.

[68] *See* 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a).

[69] *Id.* §§ 78dd-1(a)(3), -2(a)(3), -3(a)(3).

[70] Oliver J. Armas, *The U.S. Foreign Corrupt Practices Act—An Overview*, 22 INT'L L. PRACTICUM 31, 33–37 (2009).

[71] 15 U.S.C. §§ 78dd-1(b), -2(b), -3(b).

"grease" payments.[72] For purposes of the exception, "routine governmental action" means "only an action which is ordinarily and commonly performed by a foreign official . . . [and] . . . 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 . . . ."[73] Examples in the Act include obtaining a permit to do business in a foreign country, processing governmental papers such as visas, providing police protection or mail service, providing phone service, power and water supply, and loading and unloading cargo.[74]

The "grease payments" exception has been strictly interpreted. The FCPA does not identify a monetary amount for such facilitating payments, although to date all allowed payments have been less than $1,000.[75]

b. Affirmative Defenses: Lawfulness Under Foreign Law and "Reasonable and Bona Fide" Expenditures. There are also two affirmative defenses to charges of violating the FCPA anti-bribery prohibitions. The first applies if "the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations" of the foreign country.[76] To satisfy this requirement, the law in question "must be affirmatively stated and written; neither negative implication, custom, nor tacit approval" will suffice.[77] Since no country has written laws that expressly permit bribery, this defense is narrow.[78] Traditionally it has been useful only in the contexts of government officials who

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[72] Valerie Ford Jacob, *The Foreign Corrupt Practices Act and the Due Diligence Process*, *in* CONDUCTING DUE DILIGENCE IN M&A AND SECURITIES OFFERINGS 2009, at 163, 166 (PLI Corp. Law & Practice, Course Handbook Ser. No. 1746, 2009).

[73] 15 U.S.C. §§ 78dd-1(f)(3), -2(h)(4), -3(f)(4).

[74] *See id.* §§ 78dd-1(f)(3)(A)(i)–(v), -2(h)(4)(A)(i)–(v), -3(f)(4)(A)(i)–(v).

[75] David E. Dworsky, *Foreign Corrupt Practices Act*, 46 AM. CRIM. L. REV. 671, 684 (2009); *see also* Arthur F. Mathews, *Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The* Triton Energy/Indonesia *SEC Consent Decree Settlement*, 18 Nw. J. INT'L L. & BUS. 303, 315 (1998) (discussing amounts of facilitating payments).

[76] 15 U.S.C. §§ 78dd-1(c)(1), -2(c)(1), -3(c)(1).

[77] David Krakoff et al., *FCPA: Handling Increased Global Anti-Corruption Enforcement*, IN FOCUS: CORPORATE LITIGATION WHITE PAPER (Mayer Brown), 2008, at 3, http://www.mayerbrown.com/Publications/article.asp?id=6386.

[78] *See* TARUN, *supra* note 17, at 16 (describing instances of permissible bribery).

also lawfully engage in commercial activities, and for political contributions.[79]

Nevertheless, the "local law defense" was recently invoked by Frederic Bourke during his trial for FCPA violations in connection with an attempted investment in the state-owned oil company of Azerbaijan.[80] Bourke claimed that the payments he made to Azeri officials were lawful under the laws of Azerbaijan because they were self-reported and therefore no prosecution would ensue under Azeri law.[81] The court rejected Bourke's arguments, ruling that lack of prosecution did not mean that the bribes were legal under Azeri law.[82]

The second affirmative defense allows the payment, gift, offer, or promise of anything of value if it is a "reasonable and bona fide expenditure, such as travel and lodging expenses . . . 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."[83]

D. THE ACCOUNTING PROVISIONS OF THE FCPA

1. What Do the Accounting Provisions Require?

a. Books and Records. The FCPA requires issuers to keep certain books and records and to establish internal controls. The books and records provision requires issuers to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions" of their assets.[84] "Reasonable detail" is defined as "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."[85] As a result of these provisions,

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[79] *Id.*

[80] *See* United States v. Kozeny, 582 F. Supp. 2d 535, 537 (S.D.N.Y. 2008) (arguing that payments were legal under local law).

[81] *Id.* at 537, 539.

[82] *Id.* at 539.

[83] 15 U.S.C. §§ 78dd-1(c)(2), -2(c)(2), -3(c)(2) (2006).

[84] *Id.* § 78m(b)(2)(A).

[85] *Id.* § 78m(b)(7). Soon after the FCPA was enacted, the SEC issued a release with guidance about what factors would be considered when they evaluated an accounting system. Statement of Management on Internal Accounting Control, 44 Fed. Reg. 26,702, 26,705 (proposed May 4, 1979) (to be codified at 17 C.F.R. §§ 211, 229, 240, 249).

even small payments that are improperly recorded could violate the FCPA.[86]

In 1979, the SEC promulgated two rules to implement the books and records provisions.[87] Exchange Act Rule 13b2-1 prohibits any person from falsifying any book, record, or account subject to the FCPA.[88] Rule 13b2-1 would prevent a company from failing to record improper transactions, or from falsifying its records to conceal such transactions. Exchange Act Rule 13b2-2 prohibits issuers from making misleading statements to auditors and outside accountants who prepare the company's reports.[89] Rule 13b2-2 would prevent a company from manufacturing records that are quantitatively correct but that obscure the true purpose behind a particular payment.

b. Internal Accounting Controls. Under the FCPA's internal accounting controls provisions, issuers are required to "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances" that their transactions and assets are properly maintained.[90] "Reasonable assurances" is assessed using the same standard that is used for "reasonable detail" for the books and records provisions.[91] The internal accounting controls are intended to make sure that issuers use accepted methods of accounting when recording economic transactions,[92] although the Act does not specify what kind of internal controls system is required.

In a 1980 release, the SEC provided guidance about the factors it will consider when looking at the adequacy of a system of

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[86] Dworsky, *supra* note 75, at 675. Thus, the FCPA accounting provisions differ from other provisions of the federal securities laws not just because of their purpose (to support the anti-bribery provisions), but because of the standard used to evaluate the adequacy of disclosure: reasonableness instead of materiality.

[87] *See* 17 C.F.R. §§ 240.13b2-1, 240.13b2-2 (2010); *see also* DONALD R. CRUVER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT 14–17 (2d ed. 1999) (outlining the purpose of the FCPA books and records provisions, as implemented by the two SEC rules).

[88] *See* 17 C.F.R. § 240.13b2-1.

[89] *See id.* § 240.13b2-2.

[90] 15 U.S.C. § 78m(b)(2)(B)(i)–(iii).

[91] *Id.* § 78m(b)(7) ("[S]uch level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.").

[92] *See* CRUVER, *supra* note 87, at 17–19 (discussing the analysis that the Congress expects firms to undertake to determine what accounting controls are appropriate).

internal controls, including (1) the role of the board of directors; (2) communication of corporate procedures and policies; (3) assignment of authority and responsibility; (4) competence and integrity of personnel; (5) accountability for performance and compliance with policies and procedures; and (6) objectivity and effectiveness of the internal audit function.[93] Generally, the internal accounting controls provisions ensure that an issuer's transactions are executed with management's authorization and recorded as necessary to permit preparation of proper financial statements. They also make sure that "access to assets is allowed only with management's authorization," and that "the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences."[94]

2. To Whom Do the Accounting Provisions Apply? The accounting provisions of the FCPA apply only to issuers.[95] This includes mostly publicly traded companies (both U.S. and non-U.S.). It also includes most companies that issue American Depository Shares (ADRs) that are registered and traded on a U.S. exchange.[96]

The FCPA limits an issuer's responsibility for the books and records and internal accounting controls of U.S. or non-U.S. subsidiary companies in which it holds a 50% or less voting stake.[97] As discussed below in Part IV.C, the Act provides that, in such cases, the issuer is required only to "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 [the Act]."[98] "Such circumstances include the relative degree of the

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[93] *See* Statement of Management on Internal Accounting Control, 45 Fed. Reg. 40,135, 40,139 (proposed June 13, 1980) (to be codified at 17 C.F.R. §§ 211, 299, 240, 249). *See generally* Foreign Corrupt Practices Act of 1977, 46 Fed. Reg. 11,544 (Feb. 9, 1981) (stating SEC policy with regards to the accounting provisions of the FCPA).

[94] Armas, *supra* note 70, at 32.

[95] 15 U.S.C. § 78m.

[96] *See* Armas, *supra* note 70, at 31. It does not include companies whose shares are traded as unregistered, unsponsored ADRs that are not subject to the SEC's registration and reporting requirements. WITTEN & PARKER, *supra* note 66, § 2.02 n.5.

[97] 15 U.S.C. § 78m(6).

[98] *Id.*

issuer's ownership [stake]," and "the laws and practices governing the business operations of the country" where the subsidiary or affiliate is located.[99] If an issuer's majority-owned foreign subsidiary creates a false record or conceals an illicit payment, however, the issuer will be in violation of the FCPA.[100]

III. THE EVOLUTION OF THE FCPA

In response to a number of developments both domestically and in global business, the scope and reach of the FCPA has been increased, leading to a de facto change in the law. This section canvases the changing environment, and resulting evolution, of FCPA law.

A. INTERNATIONAL ANTI-CORRUPTION DEVELOPMENTS

When the FCPA was first enacted, the United States was unusual in its prohibition of foreign bribery.[101] U.S. companies subject to the FCPA complained that they were put at a competitive disadvantage against non-U.S. companies in seeking business abroad because non-U.S. companies could pay off local authorities to obtain business.[102] One oft-repeated factoid was the tax deduction, possible in some European jurisdictions, for bribes paid to foreign officials to obtain business abroad.[103] Although many complaints that the FCPA created competitive disadvantages for U.S. businesses were overstated, such

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[99] *Id.*

[100] TARUN, *supra* note 17, at 20–21 (discussing the SEC's 2000 prosecution of IBM Corporation, a U.S. issuer for payments made by its foreign subsidiary to a subcontractor, which in turn gave the money to foreign officials).

[101] *But see* Zarin, *supra* note 27, § 1:1, at 50 n.8 (discussing a criminal law in Sweden dealing with the bribery of foreign officials, and noting the possibility that the 1906 U.K. Prevention of Corruption Act may apply to a British company that bribes a foreign official).

[102] *See, e.g.*, Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational Corporations Are Liable for Foreign Bribery Under the Alien Tort Statute*, 31 MICH. J. INT'L L. 385, 405 (2010) (noting that the global response to foreign bribery was, in part, a reply to critics claiming "the FCPA would put American businesses at a competitive disadvantage").

[103] *See* Mark Pieth, *Testing the Convention*, OECD OBSERVER, Mar. 2007, at 7, *available at* http://www.oecdobserver.org/news/fullstory.php/aid/2161/Testing_the_convention.html (asserting that, in the past, writing off bribes was permitted in several OECD countries).

complaints were not entirely groundless, partially because for its first twenty years the Act stood alone. The United States prohibited foreign bribery; most other jurisdictions did not. In the last decade, however, international rules regarding foreign bribery have steadily evolved.

The 1997 OECD Convention[104] was a turning point in international anti-corruption efforts. The OECD Convention requires signatory countries to enact measures that are substantively similar to the prohibitions in the FCPA, such as a prohibition of bribery of foreign officials, the establishment of criminal and civil penalties for violations, an agreement to either extradite or prosecute their nationals who are accused by another signatory of bribery, and a requirement that companies implement books and records and accounting controls to support anti-bribery efforts.[105] In 2009, the OECD Council adopted two additional anti-bribery recommendations relating to tax measures[106] and reporting foreign bribery.[107] The recommendations also include an annex with "Good Practice Guidance" for implementing the measures.[108] At this time, some OECD anti-corruption efforts seem to offer more compliance guidance than the FCPA.

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[104] OECD Convention, *supra* note 47. Needless to say, the drafting and passage of the OECD Convention owed a great deal to U.S. efforts.

[105] *Id.* arts. 1–5, 8 (The Offence of Bribery of Foreign Officials, Responsibility of Legal Persons, Sanctions, Jurisdiction, Enforcement, and Accounting). The OECD Convention also includes provisions that enable signatories to monitor the implementation of treaty obligations to legislate and to enforce prohibitions on bribery and accounting requirements. *Id.* art. 12 (Monitoring and Follow-up). The OECD Convention does not, however, provide a way for signatories to enforce such obligations against one another. Andrea Dahms & Nicolas Mitchell, *Foreign Corrupt Practices Act*, 44 AM. CRIM. L. REV. 605, 624 (2007).

[106] On May 25, 2009, the OECD Council adopted a recommendation urging countries "to explicitly disallow the tax deductibility of bribes to foreign public officials." Org. for Econ. Cooperation & Dev. [OECD], *Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials*, at 1 (May 25, 2009), http://www.oecd.org/dat aoecd/18/15/43188874.pdf.

[107] On November 26, 2009, the OECD Council adopted a recommendation of further steps for countries to take to criminalize bribery of foreign public officials, establish channels for reporting foreign bribery, and implement additional accounting requirements. OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, arts. IV, V, VI, VII, IX and X (Nov. 26, 2009), http:// www.oecd.orcg/dataoecd/11/40/44176910.pdf.

[108] *See id.* at Annex 1 (offering guidance for implementation).

In addition to the OECD, the Organization of American States,[109] the Council of Europe,[110] the United Nations,[111] and the African Union[112] have adopted anti-corruption conventions with provisions similar to the FCPA. Multilateral development banks (MDBs) such as the World Bank Group made steady progress in the 2000s on controlling fraud and corruption in the development context.[113] Company associations such as the World Economic Forum have also taken initiatives to control corruption.[114]

Several international nongovernmental organizations (NGOs) exist to combat corruption. The best known is Berlin-based Transparency International, which is devoted to reducing corruption in the international commercial arena and is well-

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[109] The Inter-American Convention Against Corruption calls on all signatories to prohibit transnational bribery and strengthen anti-corruption regimes, as well as to cooperate with other states in their efforts against corruption. *See* Organization of American States, Inter-American Convention Against Corruption arts. II, VIII, Mar. 29, 1996, G.A.S.T.S. No. B-58, 35 I.L.M. 724 (prohibiting transnational bribery to prevent "corruption in the performance of public functions").

[110] In 1999, soon after the OECD Convention was adopted, the Council of Europe adopted conventions addressing criminal and civil penalties for corruption. Council of Europe, Criminal Law Convention on Corruption art. 5, Jan. 27, 1999, 38 I.L.M. 505, 507; Council of Europe, Civil Law Convention on Corruption, Nov. 4, 1999, E.T.S. No. 174, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm.

[111] In 2002, the United Nations adopted a convention against corruption. United Nations Convention Against Corruption art. 15, Dec. 9, 2003, 43 I.L.M. 37, 45–46. It calls on signatories to ban bribery, money laundering, trading influence, and embezzlement. *See id.* arts. 15–24 (including provisions relating to the criminalization of bribery of public officials).

[112] African Union, Convention on Preventing and Combating Corruption art. 4, July 11, 2003, 43 I.L.M. 5.

[113] *See* Press Release, MDBs Agree on Common Framework Against Corruption, The World Bank (Sept. 17, 2006), http://go.worldbank.org/TASFROPQA0 (describing measures taken to combat fraud and corrupt practices following a meeting of several MDBs). The World Bank's Office of Institutional Integrity continues to investigate bribery in its global investment programs, and has recently launched an effort to create an international network of anti-corruption investigators. Phil Thornton, *World Bank Initiates Anti-Corruption Network*, EMERGING MARKETS (Sept. 10, 2010), http://www.emergingmarkets.org/Article/2690718/World-Bank-initiaties-anti-corruption-network.html?keywords=Leonard+McCarthy.

[114] In 2004, the World Economic Forum established a Partnering Against Corruption Initiative (PACI). PACI 2008 Highlighting Achievers Survey, WORLD ECONOMIC FORUM (2008), http://www.weforum.org/en/initiatives/paci/HighlightingAchieversSurvey/2008Survey/index.htm.

known for its corruption indices.[115] Other NGOs actively working against corruption in international business transactions include TRACE International,[116] the International Chamber of Commerce Anti-Corruption Commission,[117] and Global Witness.[118]

By the mid-2000s, many countries had enacted anti-corruption legislation aimed at transnational business activity.[119] There are now anti-corruption laws similar to the FCPA in many other jurisdictions.[120] Germany, for example, actively enforces its OECD Convention-inspired anti-bribery legislation, notably in its initiation of the Siemens AG prosecution.[121] In April 2010, the United Kingdom, which had been harshly criticized for terminating its investigation into BAE Systems PLC,[122] enacted the Bribery Act. The Bribery Act criminalizes both offering and

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[115] *See About Transparency International*, TRANSPARENCY INT'L, http://www.transparency.org/about_us (last visited Oct. 22, 2010). Transparency International is a global network consisting of locally established national chapters which fight corruption in their national arena. *See id.* Transparency International "bring[s] together relevant players from government, civil society, business and the media to promote transparency in elections, in public administration, in procurement and in business." *Id.* Transparency International's "global network of chapters and contacts also use advocacy campaigns to lobby governments to implement anti-corruption reforms." *Id.*

[116] TRACE, http://www.traceinternational.org (last visited Oct. 22, 2010).

[117] *Anti-Corruption Commission*, INT'L CHAMBER OF COMMERCE, http://www.iccwbo.org/policy/anticorruption (last visited Oct. 22, 2010).

[118] *About Global Witness*, GLOBAL WITNESS, http://www.globalwitness.org/pages/en/about_us.html (last visited Oct. 22, 2010).

[119] *See* Abbott B. Lipsky, Jr., *Managing Antitrust Compliance Through the Continuing Surge in Global Enforcement*, 75 ANTITRUST L.J. 965, 966 (2009) (noting "near-universal" enforcement of anti-corruption measures). A similar surge in national and regional antitrust measures has also taken place, causing similar complexities which are discussed below in Part VI.E.

[120] Thirty-eight countries have FCPA-like laws, including all thirty-one OECD member states, plus Argentina, Brazil, Bulgaria, Estonia, Israel, Slovenia, and South Africa. *See Country Reports on the Implication of the OECD Anti-Bribery Convention*, OECD, http://www.oecd.org/document/24/0,3746,en_2649_37447_1933144_1_1_1_37447,00.html (last visited Oct. 21, 2010) (providing list of participants); *see also* Michael R. Pace, *Understanding the Foreign Corruption Dragnet*, *in* INVESTIGATIONS 2010: HOW TO PROTECT YOUR CLIENTS OR COMPANY 73, 76 (PLI Corp. Law & Practice, Course Handbook Ser. No. 1819, 2010).

[121] Siri Schubert & T. Christian Miller, *Siemens: Where Bribery Was Just a Line Item*, N.Y. TIMES, Dec. 20, 2008, at Sunday Business 1 (noting that U.S. involvement was based on the fact that Siemens's shares are traded on the New York Stock Exchange).

[122] *See* Ashish S. Joshi, *Britain's Fight Against the 'Silver Lance': A Radical Overhaul of the U.K.'s Bribery Laws*, CHAMPION, Feb. 2009, at 36, 36 (terming "ignominious" the U.K. decision to back down after pressure from Saudi Arabia).

accepting a bribe and holds companies whose compliance systems fail to prevent a bribe strictly liable.[123]

There have been far fewer measures against foreign bribery enacted in non-OECD countries. Key emerging economies such as China, India, and the former Soviet Union countries do not have laws comparable to the FCPA.[124] In addition, anti-bribery enforcement is slim or nonexistent in the developing countries that are signatories to the OECD Convention.[125] Generally speaking, however, governments in developed as well as developing countries have come to display "less tolerance of corrupt activity and a willingness to enter into international conventions to facilitate cross border investigations and enforcement actions with respect to corrupt activity."[126] Many of the large enforcement actions in the last few years, including the U.S. and German investigations of Siemens AG, the U.S. and U.K investigation of Innospec Inc. relating to the UN Oil-for-Food Program and alleged bribery of officials in Indonesia,[127] and the U.S., Russian, and

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[123] Bribery Act, 2010, c. 23, §§ 1, 2 (Eng.), *available at* http://www.justice.gov.uk/publications/bribery-bill.htm. The substantive provisions of the Bribery Act are expected to come into force in April 2011. House of Commons Hansard Ministerial Statements for 20 July 2010, WWW.PARLIAMENT.UK, http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100720/wmstext/100720m0001.htm (last visited Nov. 20, 2010); *see also* MINISTRY OF JUSTICE, CONSULTATION ON GUIDANCE ABOUT COMMERCIAL ORGANISATIONS PREVENTING BRIBERY (SECTION 9 OF THE BRIBERY ACT 2010), http://www.justice.gov.uk/consultations/docs/bribery-act-guidance-consultation1.pdf (last visited Nov. 20, 2010).

[124] Joseph P. Covington & Iris E. Bennett, *Signs of Life in International Anti-Bribery Enforcement—Recent Enforcement of Anti-Bribery Laws Outside the U.S. and Issues to Consider for a Multi-jurisdictional Defense Strategy* (Jenner & Block LLP), May 4, 2009, http://www.jenner.com/files/tbl_s20Publications\RelatedDocumentsPDFs1252\2499\covington%20%20bennett%20pdf.pdf (noting that China, former Soviet Union nations, and India do not have FCPA equivalents).

[125] *See* FRITZ HEIMANN & GILLIAN DELL, TRANSPARENCY INT'L, PROGRESS REPORT 2009: ENFORCEMENT OF THE OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 8 (2009), http://www.transparency.org/news_room/in_focus/2009/oecd_pr_2009 (listing degree of enforcement by each signatory). The report lists Argentina, Australia, Austria, Brazil, Bulgaria, Canada, Chile, Czech Republic, Estonia, Greece, Hungary, Ireland, Israel, Mexico, New Zealand, Poland, Portugal, Slovak Republic, Slovenia, South Africa, and Turkey as countries where there is "little or no enforcement" of anti-bribery measures. *Id.*

[126] Lewis D. Lowenfels & Alan R. Bromberg, *Analysis: Recent Trends and Developments under the Foreign Corrupt Practices Act*, SEC. L. DAILY, Mar. 16, 2009.

[127] *See* SEC Files Settled Foreign Corrupt Practices Act Charges Against Innospec, Inc. for Engaging in Bribery in Iraq and Indonesia with Total Disgorgement and Criminal Fines of $40.2 Million, Litigation Release No. 21454 (Mar. 18, 2010), http://www.sec.gov/litigation/lit

German probes of alleged bribes paid by Hewlett-Packard Company to win a contract in Russia,[128] have benefited from international regulatory cooperation, and that is likely to continue.

B. SARBANES–OXLEY ACT OF 2002

The Sarbanes–Oxley Act of 2002 (SOX)[129] was enacted in response to the Enron and World-Com accounting scandals and imposed significant additional reporting and certification requirements on issuers. SOX has contributed to increased FCPA enforcement because its reporting requirements expanded the amount of information to which the government has access.[130] Moreover, SOX requires that a company's financial statements be certified by top management,[131] and generally holds management and auditors responsible for the company's financial reporting system,[132] creating more exposure to liability for those individuals. SOX also protects whistleblowers who report fraud from retaliation.[133] Financial reporting practices and the U.S.

releases/2010/lr21454.htm; Complaint, SEC v. Innospec, Inc., No. 1:10-cv-00448 (D.D.C. Mar. 18, 2010).

[128] *See* David Crawford & Dionne Searcey, *U.S. Joins H-P Bribery Investigation*, WALL ST. J., Apr. 16, 2010, at B1 (explaining that the DOJ and SEC joined German and Russian authorities in investigating H-P).

[129] Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 and 18 U.S.C.).

[130] Schmidt, *supra* note 14, at 1133; *see also* Lucinda A. Low et al., *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, *in* THE FOREIGN CORRUPT PRACTICES ACT 2008: COPING WITH HEIGHTENED ENFORCEMENT RISKS 711, 716 (PLI Corp. Law & Practice, Course Handbook Ser. No. B-1665, 2008) (describing how the enactment of SOX has intensified ethics and compliance programs of U.S. listed companies); Sue Reisinger, *On Bended Knee: Companies Are Disclosing Overseas Bribes in Record Numbers, Is That Always Necessary?*, BUS. LITIG., July 2007, at 73, 74 (suggesting that SOX added requirements that led to numerous bribe allegations); Emma Schwartz, *Hiking the Cost of Bribery*, U.S. NEWS & WORLD REP., Aug. 13, 2007, at 31, 31 (describing how SOX provided incentives to disclose wrongdoing).

[131] 18 U.S.C. § 1350(a) (2006).

[132] *Id.* §§ 7241(a), 7262.

[133] *Id.* § 1514(a). *But see* Matt A. Vega, *The Sarbanes–Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 425 (2009) ("[SOX] should be read to protect whistleblowers who disclose FCPA violations by publicly held U.S. companies."); Drew A. Harker et al., *FCPA Whistleblowers: A Hole in SOX*, *in* THE FOREIGN CORRUPT PRACTICES ACT 2009: COPING WITH HEIGHTENED ENFORCEMENT RISKS 269, 274–77 (PLI Corp. Law & Practice, Course Handbook Ser. No. 1737, 2009) (noting that the anti-bribery provisions of the FCPA are not

regulatory environment were transformed by SOX. As a result, SOX likely contributed to increased information for FCPA investigations, and to companies reporting borderline transactions rather than risk SEC discovery and investigation later.[134]

C. UN OIL-FOR-FOOD PROGRAM

A large number of the recent and current prosecutions under the FCPA result directly from the investigation of corruption connected with the UN Oil-for-Food Program (OFFP). The OFFP was a humanitarian effort designed to allow the Iraqi government under Saddam Hussein to sell oil in exchange for food and medical supplies needed by the Iraqi population living under international sanctions.[135] Despite the worthy goals of the OFFP, it was plagued by corruption.[136] After it was discontinued, the OFFP was the subject of the largest international anti-corruption investigation ever conducted.[137] In 2005 a UN-commissioned international investigative body headed by former Chairman of the U.S. Federal Reserve Bank Paul Volcker[138] released a report naming 2253 companies as having made corrupt "kickback" payments of more than $1.8 billion to the Iraqi government.[139] The report has functioned as an enormous, ready-made list of FCPA

enumerated in the SOX statute). The 2010 Dodd–Frank Wall Street Reform and Consumer Protection Act, however, clearly provides incentives and protections for securities law violation whistleblowers. *See* discussion *infra* Part IV.A.

134 Reisinger, *supra* note 130, at 73.

135 *See* S.C. Res. 986, ¶¶ 1, 8, U.N. Doc. S/RES/986 (Apr. 14, 1995) (establishing the OFFP).

136 *See generally* INDEP. INQUIRY COMM. INTO THE UNITED NATIONS OIL-FOR-FOOD PROGRAMME, THE MANAGEMENT OF THE UNITED NATIONS OIL-FOR-FOOD PROGRAMME (2005), http://www.iic-offp.org/Mgmt_Report.htm (detailing extensive problems with the program management).

137 *See* Claudius O. Sokenu, *To Host or Not to Host: Approving Expenses for Travel and Entertainment Under the Foreign Corrupt Practices Act*, 40 Sec. Reg. & L. Rep. (BNA) No. 10, at 367, 367 (May 10, 2008) (calling the OFFP investigation "conceivably the largest international anti-corruption investigation ever").

138 The UN investigation also included four congressional committees, the DOJ, two U.S. Attorney's Offices, the SEC, the Manhattan District Attorney's Office, the Department of the Treasury's Office of Foreign Assets Control, and at least six foreign governments. *See id.* at 367–68.

139 *See* INDEP. INQUIRY COMM. INTO THE UNITED NATIONS OIL-FOR-FOOD PROGRAMME, MANIPULATION OF THE OIL-FOR-FOOD PROGRAMME BY THE IRAQI REGIME 1 (2005), *available at* http://www.iic-offp.org/documents/IIC%20Final%20Report%2027Oct2005.pdf.

investigations. Companies that have already settled with the DOJ and/or the SEC for FCPA violations related to the OFFP include not only Siemens,[140] but also AB Volvo,[141] Akzo Nobel N.V.,[142] Chevron Corporation,[143] the El Paso Corporation,[144] Flowserve Corporation,[145] Ingersoll-Rand Company,[146] Textron, Inc.,[147] and York International Corporation.[148] There may still be more OFFP cases investigated and prosecuted by the DOJ and SEC.[149]

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[140] Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Siemens AG in Worldwide Bribery (Dec. 15, 2008), http://www.sec.gov/news/press/2008/2008/294.htm (noting that Siemens paid kickbacks to Iraqi ministries in connection with sales of power stations and equipment to Iraq under the OFFP, earning over $1.1 billion in profits on those transactions).

[141] Press Release, U.S. Dep't of Justice, AB Volvo to Pay $7 Million Penalty for Kickback Payments to the Iraqi Government Under the U.N. Oil for Food Program (Mar. 20, 2008), http://www.usdoj.gov/opa/pr/2008/March/08_crm_220.html.

[142] Press Release, U.S. Dep't of Justice, Akzo Nobel Acknowledges Improper Payments Made by its Subsidiaries to Iraqi Government Under the U.N. Oil for Food Program, Enters Agreement with Department of Justice (Dec. 20, 2007), http://www.justice.gov/opa/pr/2007/December/07_crm_1024.html.

[143] SEC Files Settled Books and Records and Internal Controls Charges Against Chevron Corporation for Improper Payments to Iraq Under the U.N. Oil for Food Program—Company Agrees to Pay a Total of $30 Million, Litigation Release No. 20363 (Nov. 14, 2007), http://www.sec.gov/litigation/litreleases/2007/lr20363.htm.

[144] SEC Files Settled Books and Records and Internal Controls Charges Against El Paso Corporation for Improper Payments to Iraq Under the U.N. Oil for Food Program—Company Agrees to Pay $7.7 Million, Litigation Release No. 19991 (Feb. 7, 2007), http://www.sec.gov/litigation/litreleases/2007/lr19991.htm.

[145] Press Release, U.S. Dep't of Justice, Flowserve Corporation to Pay $4 Million Penalty for Kickback Payments to the Iraqi Government Under the U.N. Oil for Food Program (Feb. 21, 2008), http://www.justice.gov/opa/pr/2008/February/08_crm_132.html.

[146] Press Release, U.S. Dep't of Justice, Ingersoll-Rand Agrees to Pay $2.5 Million Fine in Connection with Payment of Kickbacks Under the U.N. Oil for Food Program (Oct. 31, 2007), http://www.justice.gov/opa/pr/2007/October/07_crm_872.html.

[147] Press Release, U.S. Dep't of Justice, Textron Inc. Agrees to $1.15 Million Fine in Connection with Payment of $600,000 in Kickbacks by its French Subsidiaries Under the United Nations Oil for Food Program (Aug. 23, 2007), http://www.justice.gov/opa/pr/2007/August/07_crm_646.html.

[148] Press Release, U.S. Dep't of Justice, Justice Department Agrees to Defer Prosecution of York International Corporation in Connection with Payment of Kickbacks Under the U.N. Oil for Food Program (Oct. 1, 2007), http://www.justice.gov/opa/pr/2007/October/07_crm_783.html.

[149] *See, e.g.*, *The Gallic Shrug*, FCPA BLOG (Apr. 7, 2010, 8:22 AM), http://www.fcpablog.com/blog/2010/4/7/the-gallic-shrug.html (tracking developments in OFFP investigation of Total SA).

D. RAPID GROWTH AND SUDDEN CONTRACTION OF THE ECONOMIC ENVIRONMENT

The speed and magnitude of the growth in global business opportunities during the economic boom of the mid-2000s also fueled FCPA enforcement.[150] As U.S. companies increasingly globalized, many smaller U.S. companies found themselves purchasing goods from overseas.[151] Even assuming that the rate of FCPA violations remained constant, more anti-bribery and accounting violations would have resulted from the sheer volume of funds that were pumped into world economies.[152] In addition, U.S. corporate officials found themselves in new geographies and new markets, "where business traditions and customs are far different than in the United States and OECD . . . markets."[153] This was particularly true as business with China increased in the 2000s.[154] The Chinese government's presence in many aspects of the economy considered private in the United States has meant that a surprising number and variety of persons qualify as foreign officials.[155]

The financial crisis following the "boom" in the mid-2000s occasioned heightened FCPA enforcement. As the pressure to obtain business, or simply maintain operational viability, became do-or-die for many companies with international operations,

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[150] *See, e.g.*, Mary Anne Pazanowski, *Growth in Foreign Business Opportunities Leads to More FCPA Cases, Attorneys Say*, 41 Sec. Reg. & L. Rep. (BNA) No. 28, at 1306, 1306 (July 13, 2009) (noting effects on medical device and pharmaceutical industries). From a historical perspective, the surge of bribery cases and enforcement in the wake of the mid-2000s boom is not surprising. Back in 1977, the SEC report to Congress that resulted in the original drafting of the FCPA noted that corrupt activity often follows expansion of corporate operations overseas. *See* CRUVER, *supra* note 87, at 2–5.

[151] *See* Diamond, *supra* note 20, at 1495–96 (noting pressure on executives in geographies and markets with customs different from those in the United States).

[152] *See 10 Minutes on Combating Corruption*, *supra* note 20, at 1 ("Though the FCPA was enacted over 30 years ago[,] . . . its active enforcement became imperative in the past decade, with emerging economies increasingly providing attractive business opportunities for multinational businesses.").

[153] *See* Diamond, *supra* note 20, at 1496 (quoting James Parkinson of Mayer Brown LLP).

[154] *See infra* Part IV.

[155] *See* Eric M. Pedersen, *The Foreign Corrupt Practices Act and Its Application to U.S. Business Operations in China*, 7 J. INT'L BUS. & L. 13, 32 (2008) (citing recent enforcement actions). As discussed below in Part IV, the number of official positions in China creates more chances for violation of the FCPA.

compliance with the FCPA's provisions seems to have suffered.[156] In addition, stimulus projects are often prone to corruption,[157] and budget cuts in some countries (and companies) may have decreased oversight and presumably compliance. The sudden halt in global growth also triggered consolidations, which have created FCPA issues.[158] Because of the speed at which some industries are consolidating, acquiring companies are discovering questionable payments or accounting practices both pre-[159] and post-merger,[160] creating significantly increased FCPA risk.[161]

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[156] *See* Michael J. Gilbert & Paul Huey-Burns, *Lessons for Business in an Era of Global Anti-Corruption Efforts*, N.Y. L.J., Feb. 6, 2009, at 4 (noting an international increase in crackdowns); PRICEWATERHOUSECOOPERS, FRAUD IN A DOWNTURN: A REVIEW OF HOW FRAUD AND OTHER INTEGRITY RISKS WILL AFFECT BUSINESS IN 2009, at 18 (2009), http://www.pwc.com/uk/pdf/fraud_in_a_downturn.pdf (urging business leaders to ensure compliance).

[157] Yin Wilczek, *Government Actions in Economic Turmoil Will Create FCPA Issues, DOJ Official Says*, 41 Sec. Reg. & L. Rep. (BNA) No. 36, at 1667, 1667 (Sept. 14, 2009) (quoting Mark Mendelsohn, former Deputy Chief of the DOJ's Criminal Division, speaking at an American Bar Association panel in Washington on FCPA initiatives).

[158] *See* Carolyn Lindsey, *More Than You Bargained For: Successor Liability Under the U.S. Foreign Corrupt Practices Act*, 35 OHIO N.U. L. REV. 959, 960 (2009) (noting "record levels" of FCPA-related fines and penalties in acquisition contexts).

[159] For example, in October 2007, five days before Statoil ASA's purchase of a Norsk Hydro ASA oil and gas subsidiary, questions arose regarding Libyan operations that Norsk Hydro ASA had acquired in an earlier takeover of a smaller petroleum company. David S. Krakoff, James T. Parkinson & Kristy L. Balsanek, *Foreign Corrupt Practices Act: FCPA Due Diligence in the Context of Mergers and Acquisitions*, 4 BLOOMBERG CORP. L.J. 101, 107 (2009). In June 1999, Norsk Hydro ASA inherited consultancy contracts involving Libyan oil fields through an acquisition of Saga Petroleum ASA. *See Norway's StatoilHydro Begins Operations, Announces Probe of Questionable Libya Contracts*, INT'L HERALD TRIBUNE (Oct. 1, 2007). Norsk Hydro ASA and Statoil ASA conducted investigations into the operations in question, and voluntarily reported them to Norwegian and U.S. authorities the weekend before the merger took place. SHEARMAN & STERLING LLP, FCPA DIGEST OF CASES AND REVIEW RELEASES RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977, at 326 (Philip Urofsky ed., 2010), http://www.shearman.com/files/upload/FCPA-Digest-Spring-2010.pdf. Norwegian authorities chose not to open an investigation; Norsk Hydro ASA continues to cooperate with U.S. authorities. *Id.* Other examples include General Electric Company's acquisition of InVision and Lockheed Martin's merger with Titan, which was derailed. Lindsey, *supra* note 158, at 969–72.

[160] For example, in 2007 eLandia International Inc. acquired Latin Node Inc., which had contracts to provide wholesale communications services using internet protocol technology, only to find out in post-closing discovery that Latin Node had violated the FCPA in obtaining contracts in Honduras and Yemen. Criminal Plea Agreement, United States v. Latin Node, Inc, No. 1:090CR-20239-PCH (S.D. Fla. Apr. 3, 2009) (stating that Latin Node would plead guilty to such charges). eLandia disclosed the findings to the DOJ, paid penalties of approximately $2 million, fired senior Latin Node management connected to the

E. REGULATORY FAILURES AND INCENTIVES

Finally, the surge in enforcement of the FCPA has been a response to the widespread perception of regulatory failure with regard to both the global financial crisis and to several U.S. scandals. U.S. government regulators, including the SEC, have been faulted for not predicting, avoiding, or dealing properly with the meltdown in the financial markets at the end of the decade.[162] To make matters worse, as the general economic situation worsened, a number of spectacular frauds were uncovered. In particular, the revelation of Bernard L. Madoff's $50 billion Ponzi

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payments, and dissolved Latin Node. TARUN, *supra* note 17, at 323–24. In 2008, Smith & Nephew, a U.K. medical device manufacturer, acquired the Swiss firm Plus Orthopaedics Holdings AG, in a deal that closed quickly because of competition from other bidders. After closing, Smith & Nephew discovered potential FCPA violations from "irregular sales practices" in Plus Orthopaedics's operations in Greece. Nick Huber, *Smith & Nephew Finds Suspect Sales Tactics at Plus Unit*, GUARDIAN, May 2, 2008, *available at* http://www.guardian.co.uk/business/2008/may/02/smithandnephew.pharmaceuticals.

[161] In order to deal with the risk of acquiring FCPA liability along with a target company, two companies requested DOJ Opinion Procedure Releases in 2008 before proposed mergers and received indications that the DOJ would not take enforcement action given the facts as presented. In June 2008 the DOJ issued Opinion Release No. 08-02, in which, in response to a request by Halliburton Company, it agreed to allow the company a post-acquisition grace period in which to discover and report FCPA violations. U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT OPINION PROCEDURE RELEASE NO. 08-02 (Jun. 13, 2008), http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf; *see also* James R. Doty, *Baker Botts Assists Client in Obtaining Groundbreaking FCPA Opinion Release from the Department of Justice Regarding International Mergers and Acquisitions Allowing a U.S. Company to Compete on a Level Playing Field*, *in* CORPORATE GOVERNANCE—A MASTER CLASS 2009, at 447, 451 (PLI Corp. Law & Practice, Course Handbook Ser. No. 1721, 2009) (quoting materials prepared by Andrew M. Baker, Michael J. Barta, and Michael G. Pattillo, Jr.). Although the Opinion Release represented the first grace period granted by the DOJ in the FCPA context, it was carefully limited to the "relatively unique" facts of the Halliburton acquisition. Claudius O. Sokenu, *DOJ Again Clarifies FCPA Due Diligence Expected in Business Combinations*, *in* WHITE COLLAR CRIME 2009: PROSECUTORS AND REGULATORS SPEAK 557, 559 (PLI Corp. Law & Practice, Course Handbook Ser. No. 1763, 2009). In practical terms it did little to clarify the application of the FCPA.

The DOJ's Opinion Release No. 08-01 also dealt with pre-acquisition due diligence and included an extensive list of the measures that the requestor had taken. U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT OPINION PROCEDURE RELEASE NO. 08-01 (Jan. 15, 2008), http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0801.pdf. However, the fact pattern set out by the unnamed Fortune 500 company that submitted the request was complicated. Krakoff, *supra* note 77, at 7. Like the Halliburton release, the DOJ response was of limited utility as substantive guidance.

[162] Catherine Rampell, *Lax Oversight Caused Crisis, Bernanke Says*, N.Y. TIMES, Jan. 4, 2010, at A1.

scheme[163] and R. Allen Stanford's $8 billion investment fraud, both of which the SEC had overlooked,[164] reduced the SEC's credibility considerably.[165]

With taxpayer funds deployed to bail out big banks, and shocking executive compensation packages on the front pages of the papers, the U.S. public increasingly has perceived large corporations as bad actors[166] and regulatory agencies as ineffective. In fact, one 2009 survey found that 55% of respondents viewed the SEC unfavorably, ranking the SEC below the Internal Revenue Service.[167] In such circumstances, it would be surprising if agencies did not seize on an area in which enforcement of the law is both popular and needed.[168] What better thing to do than prosecute multinational companies and their executives for corruption?

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[163] A Ponzi scheme, named for the famous fraudster Charles Ponzi, involves establishing an investment fund in which existing investors are paid using funds contributed by new investors. Like most pyramid schemes, it requires continuous growth in order to keep going. *See Ponzi Schemes—Frequently Asked Questions*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/answers/ponzi.htm (last visited Jan. 1, 2011) (describing Ponzi schemes).

[164] In August 2009 the SEC Inspector General submitted a highly critical 500-page report about the SEC's failure to detect Madoff's fraud. OFFICE OF INVESTIGATIONS, U.S. SEC. & EXCH. COMM'N, INVESTIGATION OF FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF'S PONZI SCHEME (2009), http://www.sec.gov/news/studies/2009/oig-509.pdf.

[165] *See* Marc Dorfman et al., *Top Ten Enforcement Developments of 2009*, 42 Sec. Reg. & L. Rep. (BNA) No. 11, at 469, 469 (Mar. 15, 2010) (commenting on the "fallout" from the lack of discovery of Madoff's scheme and the doubt created about the SEC's effectiveness).

[166] *See* Abikoff, *supra* note 30, at 4 ("[T]here is just a broad-based perception that corporate executives are bad guys . . . a widespread loss of confidence in the public markets . . . enhanced enforcement resources and maybe just a tiny bit of opportunism on the part of our regulators to make a name for themselves.").

[167] Bruce Carton, *Beleaguered SEC Seeks Fresh Start in 2010*, COMPLIANCE WEEK (Oct. 13, 2009), http://www.complianceweek.com/pages/beleaguered-sec-seeks-fresh-start-in-2010.html.

[168] For a discussion of the SEC focus on enforcement in order to rebuild its image, see generally Michael Bologna, *Regional Chiefs Say Specialized Units Will Aid Agency's Enforcement Efforts*, 42 Sec. Reg. & L. Rep. (BNA) No. 19, at 894, 894 (May 10, 2010) (describing development of specialized units as part of "effort to be more proactive" in enforcement); Yin Wilczek & Phyllis Diamond, *2010 Important for SEC Enforcers as Division Continues to Rebuild Reputation*, 42 Sec. Reg. & L. Rep. (BNA) No. 4, at 147, 147 (Jan. 25, 2010) (noting changes in SEC organization that were "announced to prevent the systematic shortcomings brought to light by its embarrassing failure to uncover [Madoff's Ponzi scheme]"); Mary L. Schapiro, *Testimony Before the Financial Crisis Inquiry Commission*, U.S. SEC. & EXCH. COMM'N, Jan. 14, 2010, http://www.fcic.gov/hearings/pdfs/2010-0114-Schapiro.pdf.

IV. THE INDEFINITE EXPANSION OF THE FCPA

A. MORE CASES

In this evolving environment, recent years have seen an "extraordinary upswing" in the number of FCPA actions brought by the DOJ and SEC.[169] As discussed above, the surge in cases can be attributed to various causes,[170] but regardless of the causes, the effect has been to extend the reach of the Act, and to increase the effective jurisdiction of the DOJ and SEC over international business.

FCPA prosecutions in the 1980s and 1990s were steady but slim, with a couple of actions a year.[171] In 2004, the DOJ and SEC together brought five FCPA cases.[172] Recently, however, there has been a "sea [c]hange" in enforcement and penalties.[173] Between 2007 and 2009 the DOJ and SEC brought sixty-four and forty-seven FCPA enforcement actions, respectively—almost twice as many as the total number of cases brought in the first twenty-eight years the statute was in force.[174] In 2009 alone, the DOJ

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[169] Abikoff, *supra* note 30, at 6; *see also* Russell Gold & David Crawford, *U.S., Other Nations Step Up Bribery Battle*, WALL ST. J., Sept. 12, 2008, at B1 (reporting rise in U.S. foreign corruption investigations and describing the Halliburton settlement); Kara Scannell & Thomas Catan, *U.S. Nears Deal in Bribery Case*, WALL ST. J., Oct. 15, 2010, at B1 (including tables showing that the United States has stepped up its pursuit of companies that violate the FCPA); *FCPA Autumn Review 2010*, MILLER CHEVALIER (Oct. 8, 2010), http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=42304 (noting the record-breaking pace of FCPA prosecutions and presenting data showing enforcement increasing between 2006 and 2010); Joe Palazzolo, *After Dodd-Frank, SEC Getting At Least One FCPA Tip a Day*, WALL ST. J. CORRUPTION CURRENTS BLOG (Sept. 30, 2010, 11:21 AM), http://blogs.wsj.com/corrupt tion-currents/2010/09/30/after-dodd-frank-sec-getting-at-least-one-fcpa-tip-a-day (noting an eight-fold increase in FCPA cases since 2004).

[170] *See* Gorman, *supra* note 20, at 1262 (suggesting that the surge comes from an increase in premerger reporting and OFFP cases).

[171] The exact number of actions is not readily available. Based on the author's own empirical research, the SEC averaged less than one case a year, and the DOJ averaged only two a year, between 1978 and 2004.

[172] *See 2010 Mid-Year FCPA Update*, *supra* note 20 (noting cases brought in 2004).

[173] Joel M. Cohen et al., *Under the FCPA, Who Is a Foreign Official Anyway?*, 63 BUS. LAW. 1243, 1247 (2008).

[174] *See 2009 Year-End FCPA Update*, GIBSON DUNN (Jan. 4, 2010), http://www.gibsondunn.com/publications/pages/2009Year-EndFCPAUpdate.aspx (charting actions brought by respective agencies); *see also* Witten et al., *supra* note 12, at 692 (finding ninety cases between 2006 and 2008).

brought twenty-six actions and the SEC initiated an additional fourteen prosecutions.[175] Case volume in 2010 again broke the record. By the end of the third quarter, the DOJ had brought twenty-eight actions and the SEC had brought twenty-one,[176] with reports estimating as many as 140 cases in the pipeline.[177] DOJ officials have stated that the level of enforcement of the FCPA is "at an all-time high and likely to remain there."[178]

The SEC and DOJ have been targeting whole sectors.[179] The oil and gas, technology, pharmaceuticals, and medical supplies industries have been "heavily hit by actions in the last few

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[175] Pace, *supra* note 120, at 76. *But see FCPA Autumn Review 2010*, *supra* note 169 (claiming that the DOJ brought twenty-one cases in 2009).

[176] *See FCPA Autumn Review 2010*, *supra* note 169 (charting cases).

[177] *See id.* (reporting that Assistant Attorney General Lanny Breuer confirmed 140 active FCPA investigations at the DOJ as of July 8, 2010); Berger, *supra* note 20, at 3 (acknowledging that the DOJ had 130 open FCPA investigations as of November 2009). Other estimates have placed the open investigations at between 100 and 120 cases. *See 10 Minutes on Combating Corruption*, *supra* note 20, at 1 (estimating that the DOJ and SEC collectively have a backlog of 120 FCPA cases); Diamond, *supra* note 20, at 1495 (same); Gorman, *supra* note 20, at 1212 (stating that at the beginning of 2009, the DOJ and SEC had over 100 open FCPA investigations). *But see* Koehler, *supra* note 27, at 404 (questioning whether the 100-plus cases widely reported to be in the pipeline are "taking longer to resolve, being resolved informally . . . or about to burst on the scene in 2010" (footnotes omitted)).

[178] *See* Armas, *supra* note 70, at 37 (discussing comments made by Mark Mendelsohn, former Deputy Chief of the Fraud Section at the DOJ); Dionne Searcey, *Watergate-Era Law Revitalized in Pursuit of Corporate Corruption*, WALL ST. J., Oct. 15, 2010, at B2 (noting that after record fines and prosecutions in recent years, the government crackdown on FCPA violations shows no signs of slowing).

[179] *See* Ayres et al., *supra* note 12, at 771 (calling industry-wide investigations an "emerging trend" of medical device and oil services companies); Pace, *supra* note 120, at 78 (identifying oil and gas, pharmaceuticals, and medical supplies as industries that have been singled out for FCPA investigations). To some extent, the industries selected for FCPA scrutiny simply include sectors with a history of doing business in countries where public officials expect—or even demand—bribes to carry out business. For many years, the NGO Transparency International has ranked countries and industries, based on the amount of corruption in their business environment. Transparency International publishes an annual "Corruptions Perceptions Index" that ranks more than 150 countries in terms of perceived levels of corruption. TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2009 (Oct. 4, 2010), http://www.transparency.am/docs3/Table_eng.pdf. In December 2008, Transparency International published a "Bribe Payers Index" which looks at the likelihood of firms in specific sectors to engage in bribery. *See* TRANSPARENCY INT'L, BRIBE PAYERS INDEX 2008, at 2 (2008), http://www.transparency.org/content/download/39275/622457 (reporting that the top five sectors in 2008 were public works contracts and construction, real estate and property development, oil and gas, heavy manufacturing, and mining).

years."[180] In 2007 and 2008, for example, eight companies and eight individuals from the oil and gas sector were named in FCPA actions, resulting in over $80 million in penalties.[181] Numerous pharmaceutical and life sciences companies were investigated between 2007 and 2010 for FCPA violations.[182] The technology,[183]

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[180] Abikoff, *supra* note 30, at 6; *see also* Armas, *supra* note 70, at 35–36 (breaking down recent FCPA cases by industry) .

[181] PRICEWATERHOUSECOOPERS, CORRUPTION CRACKDOWN: HOW THE FCPA IS CHANGING THE WAY THE WORLD DOES BUSINESS 14 (2009), http://www.pwc.com/en_US/us/foreign-corrupt-practices-act/publications/assets/pwc-corruption-crackdown-fcpa-2009.pdf.

[182] Witten et al., *supra* note 12, at 694; Michael Rothfeld, *Drug Firms Face Bribe Probe,* WALL ST. J., Oct. 5, 2010, at B1 (noting that a DOJ official told pharmaceutical industry executives in 2009 that investigating foreign bribery in their industry would be one of the DOJ's priorities in the next few years); *see, e.g.*, Press Release, U.S. Dep't of Justice, AGA Medical Corporation Agrees to Pay $2 Million Penalty and Enter Deferred Prosecution Agreement for FCPA Violations (June 3, 2008), http://www.justice.gov/opa/pr/2008/June/08-crm-491.htm; SEC Files Action Naming Officer of Immucor Inc. for Violating, and Aiding and Abetting Violations of, Books and Records and Internal Control Provisions of the Securities Exchange Act of 1934, Litigation Release No. 20316 (Sept. 28, 2007), http://www.sec.gov/litigation/litreleases/2007/lr20316.htm; SEC Files Settled Books and Records and Internal Accounting Controls Charges Against Former Chairman of Syncor International Corp., Litigation Release No. 20310 (Sept. 28, 2007), http://www.sec.gov/litigation/litreleases/2007/lr20310.htm.

[183] *See, e.g.*, Press Release, U.S. Dep't of Justice, Virginia Physicist Arrested for Illegally Exporting Space Launch Data to China and Offering Bribes to Chinese Officials (Sept. 24, 2008), http://www.justice.gov/opa/pr/2008/September/08-nsd-851.html; Press Release, Halliburton, Halliburton Announces Fourth Quarter Charge Related to Prospective Settlement of Foreign Corrupt Practices Act (FCPA) Investigations (Jan. 26, 2009), http://www.halliburton.com/public/news/pubsdata/press_release/2009/corpnws_012509.html; Press Release, U.S. Dep't of Justice, Former Officer and Director of Global Engineering and Construction Company Pleads Guilty to Foreign Bribery and Kickback Charges (Sept. 3, 2008), http://www.justice.gov/opa/pr/2008/September/08-crm-772.html [hereinafter DOJ Stanley Press Release]; Press Release, U.S. Dep't of Justice, Philadelphia Export Company and Employees Indicted for Paying Bribes to Foreign Officials (Sept. 5, 2008), http://www.justice.gov/opa/pr/2008/September/08-crm-782.html [hereinafter DOJ Nexus Press Release]; Press Release, U.S. Dep't of Justice, Former Pacific Consolidated Industries LP Executive Pleads Guilty in Connection with Bribes Paid to U.K. Ministry of Defence Official (May 8, 2008), http://www.justice.gov/opa/pr/2008/May/08-crm-394.html; Press Release, U.S. Dep't of Justice, Paradigm B.V. Agrees to Pay $1 Million Penalty to Resolve Foreign Bribery Issues in Multiple Countries (Sept. 24, 2007), http://www.justice.gov/opa/pr/2007/September/07_crm_751.html; Press Release, U.S. Dep't of Justice, *supra* note 8; Press Release, U.S. Dep't of Justice, Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines (Feb. 6, 2007), http://www.just ice.gov/opa/pr/2007/February/07_crm_075.html [hereinafter Vetco Press Release]; Press Release, U.S. Dep't of Justice, Westinghouse Air Brake Technologies Corporation Agrees to Pay $300,000 Penalty to Resolve Foreign Bribery Violations in India (Feb. 14, 2008), http://www.justice.gov/opa/pr/2008/February/08_crm_116.html [hereinafter DOJ Westinghouse Press Release].

telecommunications,[184] and freight forwarding[185] sectors have received additional scrutiny.[186] The November 2010 settlements with Panalpina and the six other companies[187] have been described by the Chief of the SEC's FCPA Unit as the "first sweep of a particular industrial sector in order to crack down on public companies and third parties who are paying bribes abroad."[188] In addition, the number of FCPA prosecutions is expected to continue increasing as a result of passage of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank) in July 2010.[189] Dodd–Frank provides for monetary incentives and protections for whistleblowers who report securities law violations to the SEC.[190] Some reports claim that the SEC has been receiving more than one FCPA tip a day since the Dodd–Frank whistleblower "bounty program" became law.[191]

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[184] *See, e.g.*, Press Release, U.S. Dep't of Justice, Former Alcatel CIT Executive Sentenced for Paying $2.5 Million in Bribes to Senior Costa Rican Officials (Sept. 23, 2008), http://www.justice.gov/opa/pr/2008/September/08-crm-848.html [hereinafter DOJ Alcatel Press Release]; Press Release, U.S. Dep't of Justice, Two Former Executives of Itxc Corp Plead Guilty and Former Regional Director Sentenced in Foreign Bribery Scheme (July 27, 2007), http://www.justice.gov/opa/pr/2007/July/07_crm_556.html; Press Release, U.S. Dep't of Justice, Lucent Technologies, Inc. Agrees to Pay $1 Million Fine to Resolve FCPA Allegations (Dec. 21, 2007), http://www.justice.gov/opa/pr/2007/December/07_crm_1028.html [hereinafter DOJ Lucent Press Release].

[185] This was connected to the investigation of companies with ties to Panalpina World Transport (Holding) Ltd. *See* Panalpina SEC Press Release, *supra* note 5 (detailing charges of improper payments to Nigerian customs officials).

[186] The DOJ has acknowledged the investigations of the oil and gas, medical devices, and freight-forwarding industries, and stated that such sector-wide investigations will continue. *See* Armas, *supra* note 70, at 37 (discussing comments made by Mark Mendelsohn, former Deputy Chief of the Fraud Section at DOJ).

[187] *See* discussion *supra* Part I.

[188] Panalpina SEC Press Release, *supra* note 5 (quoting SEC FCPA Unit Chief Cheryl Scarboro as saying that the FCPA Unit will continue to focus on industry-wide sweeps).

[189] Pub. L. No. 111-203, § 922(a), 124 Stat. 1376, 1841 (2010) (adding section 21F to the Securities Exchange Act entitled "Securities Whistleblower Incentives and Protections").

[190] The SEC has proposed new rules and forms to implement the new provisions. Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Release No. 34-63237 (proposed Nov. 3, 2010) (to be codified at 17 C.F.R. pts. 240, 249).

[191] Palazzolo, *supra* note 169 (noting as well that the SEC is opening a new whistleblower office).

B. MORE PROSECUTIONS OF INDIVIDUALS RATHER THAN CORPORATIONS

Until about three years ago, enforcement of the FCPA was usually a matter of imposing fines on corporations. Fines, as discussed below, raise the cost of doing business and place a black mark on a company's reputation. Individual liability, however, "catches the attention of senior executives as no $559 million fine ever could."[192] As government officials have explained, "It is our view that to have a credible deterrent effect, people have to go to jail."[193] Individual liability has been one of the most striking changes that the SEC and the DOJ have effected in their recent increased enforcement of the FCPA. In 2009, the SEC and the DOJ brought forty FCPA actions; nearly 70% of those actions targeted individuals.[194] 2009 was called "The Year of the Individual"[195] by FCPA experts, and 2010 seems to be on track to rival it.

Examples are numerous:

> • Frederic A. Bourke, Jr.: In July 2009, this investor was convicted of bribing Azerbaijan officials in a scheme to persuade the officials to privatize the State Oil Company in a rigged auction that only Bourke, investment organizer Viktor Kozeny, and their investment consortium would win.[196]

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[192] Abikoff, *supra* note 30, at 8.

[193] *Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007*, CORP. CRIME REP., Sept. 16, 2008, at 36(1); *see also FCPA Investigations—The Pitfalls and the Pendulum*, SEC. DOCKET (Nov. 10, 2010), http://www.securitiesdocket.com/2010/11/08/nov-10-webcast-fcpa-investigations-the-pitfalls-and-the-pendulum-2/ (remarks by Cheryl Scarboro, Chief, FCPA Unit, SEC) (noting the deterrent message of the SEC's current focus on individuals and stating that the trend is likely to continue).

[194] Pace, *supra* note 120, at 75.

[195] SHEARMAN & STERLING, *supra* note 159, at ii.

[196] Press Release, U.S. Dep't of Justice, Connecticut Investor Found Guilty in Massive Scheme to Bribe Senior Government Officials in the Republic of Azerbaijan (July 10, 2009), http://www.justice.gov/opa/pr/2009/July/09-crm-677.html. Bourke lost an estimated $8 million, along with other investors including former U.S. Senate Majority Leader George Mitchell and Columbia University. Koehler, *supra* note 27, at 407.

• Bobby J. Elkin, Jr., Baxter J. Myers, Thomas G. Reynolds, and Tommy L. Williams: In April 2010, these former employees of Dimon, Inc. (now Alliance One International, Inc.) settled FCPA charges stemming from bribes paid by Dimon's subsidiary to Kyrgyzstan government officials to be able to buy Kyrgyz tobacco.[197]

• Gerald and Patricia Green: The Los Angeles-area entertainment executives were convicted in September 2009 of conspiring with others to bribe the former governor of the Tourism Authority of Thailand to get lucrative film festival contracts, and in August 2010, they were each sentenced to six months in jail, followed by six months of home confinement.[198]

• Charles Paul Edward Jumet: The Virginia resident pleaded guilty to making payments to Panamanian officials to secure contracts for Ports Engineering Consultants Corporation in violation of the FCPA,[199] and was sentenced on April 19, 2010 to eighty-seven months in jail. This is the longest prison term ever imposed for an FCPA violation.[200]

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[197] SEC Files Anti-Bribery Charges Against Former Finance Executives and Senior Employees of Global Tobacco Company, Litigation Release No. 21509 (Apr. 29, 2010); *see also* Complaint, SEC v. Elkin, No. 1:10-cv-00661 (D.D.C. Apr. 28, 2010) (detailing allegations).

[198] Press Release, U.S. Dep't of Justice, Film Executive and Spouse Found Guilty of Paying Bribes to a Senior Thai Tourism Official to Obtain Lucrative Contracts (Sept. 14, 2009), http://www.justice.gov/opa/pr/2009/September/09-crm-952.html (detailing their September 2009 convictions); *Greens Get Six Months in Jail*, FCPA BLOG (Aug. 13, 2010, 8:18 AM), http://www.fcpablog.com/blog/2010/8/13/greens-get-six-months-in-jail.html (describing the sentences as among the most lenient in recent FCPA cases). The DOJ has filed a notice of appeal with respect to the sentences. *See, e.g.*, United States v. Green, No. 2:08-cr-000059-GW (C.D. Cal. Sept. 15, 2010).

[199] Press Release, U.S. Dep't of Justice, Virginia Resident Pleads Guilty to Bribing Panamanian Officials for Maritime Contract (Nov. 13, 2008), http://www.justice.gov/opa/pr/2009/November/09-crm-1229.html.

[200] Press Release, U.S. Dep't of Justice, Virginia Resident Sentenced to 87 Months in Prison for Bribing Foreign Government Officials (Apr. 19, 2010), http://www.justice.gov/opa/pr/2010/April/10-crm-442.html (discussing the case).

• Joseph Lukas, Nam Nguyen, Kim Nguyen, and An Nguyen: These executives and employees of Nexus Technologies, a Philadelphia-based export company, were indicted on September 4, 2008, for violating the FCPA by bribing Vietnamese officials in exchange for contracts to supply equipment and technology to government agencies there.[201]

• Christian Sapsizian: The former Alcatel executive and French citizen was sentenced on September 23, 2008 to thirty months in prison for violating the FCPA in connection with illegal payments to Costa Rican officials in return for a telecommunications contract with a government-owned entity.[202]

• Albert "Jack" Stanley: The former head of Halliburton Company's erstwhile subsidiary KBR, pleaded guilty on September 3, 2008 to conspiring to violate the FCPA in connection with payments made to Nigerian government officials to obtain engineering, procurement, and construction contracts.[203] He faces a fine of up to $10.8 million in restitution and seven years in prison.[204]

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[201] DOJ Nexus Press Release, *supra* note 183 (providing details of allegations against four individuals).

[202] DOJ Alcatel Press Release, *supra* note 184 (describing an "elaborate bribery scheme" to obtain a mobile telephone contract).

[203] DOJ Stanley Press Release, *supra* note 183. Stanley supposedly met with senior Nigerian government officials to arrange the illicit payments. *Id.*; *see also* Information ¶ 4, United States v. Kellogg Brown & Root LLC, No. 4:09-CR-00071-1 (S.D. Tex. Feb. 6, 2009) (providing allegations against Stanley and his company).

[204] DOJ Stanley Press Release, *supra* note 183. Stanley, like a number of other individuals found to be in violation of or conspiring to violate the FCPA, still awaited sentencing as of November 2010. *Jack Stanley, Free Until 2011*, FCPA BLOG (Sept. 22, 2010, 3:40 PM), http://www.fcpablog.com/blog/2010/9/22/jack-stanley-free-until-2011.html (reporting an eighth sentencing delay in Stanley's case); *see also* William F. Pendergast et al., *Quarterly FCPA Report: Third Quarter 2010*, STAYCURRENT (Paul, Hastings, Janofsky & Walker LLP), Sept. 2010, at 4–9, http://www.paulhastings.com/assets/publications/1729.pdf (listing recent developments in prosecutions of individuals under the FCPA); *Sentencing Watchlist*, FCPA BLOG (Dec. 4, 2009, 8:00 PM), http://www.fcpablog.com/blog/2009/12/4/sentencing-watch-list.html (listing individuals waiting to be sentenced).

• Jeffrey Tessler and Wojciech Chodan: A former salesperson and a consultant of a U.K. subsidiary of KBR were indicted in February 2009 on FCPA charges related to their participation in the Nigerian scheme.[205]

• James Tillery, Jim Bob Brown, and Jason Edward Steph: The former executives and consultants of Houston-based Willbros Group Inc. were charged in May 2008 with making illegal payments to Nigerian officials in connection with a natural gas pipeline system in the Niger Delta.[206] Jim Bob Brown and Jason Edward Steph were sentenced on January 28, 2010 to twelve and fifteen months in prison, respectively.[207] James Tillery, the former president of Willbros, was seized by the FBI in Lagos in August of 2010 but U.S. efforts to extradite Tillery, now a Nigerian citizen, have been complicated.[208]

• Twenty-two executives and employees of U.S., U.K., and Israeli companies: The January 2010 "Catch-22" sting at a Las Vegas shooting, hunting, and outdoor trade show resulted in the numerous arrests.[209]

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[205] Press Release, U.S. Dep't of Justice, *supra* note 1.

[206] *Novak Pleads Guilty*, FCPA BLOG (Nov. 12, 2009, 4:06 PM), http://www.fcpablog.com/blog/tag/paul-novak. Three employees from a German construction company based in Mannheim, Germany, also agreed to make the corrupt payments, which were funded through Willbros's subsidiary, Willbros West Africa Inc. (WWA). The company was also charged and paid a $32.3 million fine. *Id.*

[207] Press Release, U.S. Dep't of Justice, Former Willbros International Executives Sentenced to Prison for Their Roles in $6 Million Foreign Bribery Scheme (Jan. 28, 2010), http://www.justice.gov/opa/pr/2010/January/10-crm-102.html. A fourth man, Paul Novak, was also charged and awaits sentencing. Pendergast et al., *supra* note 204, at 7.

[208] *Tillery's 'Extraction,'* FCPA BLOG (Aug. 19, 2010, 2:28 PM), http://wwwfcpablog.com/blog/2010/8/19/tillerys-extraction.html; Davidson Iriekpen, *Nigeria: Willbros—Police Flout Court Order on Extradition*, ALLAFRICA.COM (Nov. 15, 2010), http://allafrica.com/stories/201011160718.html (describing the refusal of the Nigerian police to release Tillery despite a ruling from the Federal High Court that his arrest was unconstitutional).

[209] *See* Press Release, U.S. Dep't of Justice, *supra* note 6.

The charging of individuals, in addition to or even instead of companies, is a trend that is likely to continue.[210] Practitioners have predicted that the government will be "ratcheting up" enforcement actions against individuals who violate the FCPA, and seeking more severe penalties for those individuals.[211] Others have pointed out that, in almost all of the ongoing investigations, individuals are being scrutinized to determine whether they might be prosecuted for the corrupt payments that were made.[212] With the number of cases in the pipeline, this will represent a significant shift in the enforcement of the FCPA.[213]

C. (OVERLY) EXPANSIVE STATUTORY INTERPRETATION

Enforcement agencies have traditionally taken a "very broad view of each element" of the FCPA.[214] However, the DOJ and SEC have become significantly more expansive in their interpretation of the FCPA in the last few years. The SEC Enforcement Division, in particular, has been described as being in a "hyper-aggressive phase," in which it applies existing laws in "novel and creative ways" and uses a broad understanding of its legal authority, correspondingly broadening the scope of liability for the regulated community.[215] As one practitioner noted, "in

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[210] Other recent actions in which individuals have been charged with FCPA violations include: *SEC v. Turner*, No. 1:10-cv-01309 (D.D.C. Aug. 4, 2010); *SEC v. Summers*, No. 4:10-cv-02786 (S.D. Tex. Aug. 5, 2010); *SEC v. Benton*, No. 4:09-cv-03963 (S.D. Tex. Dec. 11, 2009); and *United States v. Diaz*, No. 09-cr-20346 (S.D. Fla. Apr. 22, 2009). *See also* Gorman, *supra* note 20, at 1255 (noting a continuing emphasis on FCPA enforcement); *FCPA Investigations—The Pitfalls and the Pendulum*, *supra* note 193 (including remarks of Cheryl Scarboro, Chief FCPA Unit, SEC, identifying enforcement against individuals as a trend that will continue).

[211] Lowenfels & Bromberg, *supra* note 126.

[212] *See* Abikoff, *supra* note 30, at 7–8 (discussing increased prosecution of individuals and the deterrence value of such prosecutions).

[213] As one practitioner has noted, the SEC is sending a message that "you will be prosecuted if you violate [the FCPA]. You won't be able to hide under the company's settlement." Diamond, *supra* note 20, at 1495 (internal quotation marks omitted). It is possible that prosecuting individuals will increase in the number of cases that make it to court and result in opinions that help interpret the Act. *See* Koehler, *supra* note 27, at 404 (noting that individuals involved in an FCPA enforcement action, faced with the possibility of prison, are more inclined to challenge the DOJ's untested interpretations).

[214] Lindsey, *supra* note 158, at 962.

[215] *See* Yin Wilczek, *Recent Cases Show SEC's Creative Use of Existing Law to Widen Enforcement Reach*, 41 Sec. Reg. & L. Rep. (BNA) No. 34, at 1583, 1583 (Aug. 24, 2009)

this environment, you need to anticipate that the SEC is going to pursue any legal theory that it feels is remotely supportable. To some extent, you have to expect the unexpected."[216] Another commented that "[w]hile the agency is asking Congress for new enforcement powers, it is also looking for ways to use old tools more aggressively."[217]

Concepts that are traditionally important in the FCPA, such as "foreign official," "obtain and retain business," "knowing," and "anything of value" are being reexamined. The "uncertain standards"[218] of the Act, combined with heavy and aggressive enforcement, have created a problem.

1. "Foreign Official."

a. Officer, Employee, Agency, or Instrumentality? Perhaps the most contentious point of FCPA interpretation is the concept of "foreign official." The FCPA defines "foreign official" as

> 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.[219]

To begin with, there is no definition of "officer" or "employee" in the Act, and no cases have shed authoritative light on the terms as used in the FCPA.[220] Some practitioners have suggested that the U.S. domestic bribery statute[221] or the Federal Tort Claims

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(citing a number of recent SEC "firsts" including actions involving credit default swaps, the SOX clawback provisions, and naked short selling).

[216] *Id.* (internal quotation marks omitted) (quoting Mark Schonfeld, Partner, Gibson Dunn & Crutcher LLP, who was discussing how unusual it is for the SEC to have so many novel enforcement actions, FCPA and others, at one time).

[217] *Id.* at 1584 (internal quotation marks omitted) (quoting Stephen Crimmins, Partner, K&L Gates LLP, who was discussing the SEC Enforcement Division's recent actions).

[218] *See* Zarin, *supra* note 27, § 1:1, at 53.

[219] 15 U.S.C. §§ 78dd-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A) (2006).

[220] Donald Zarin, *The Foreign Payments Provisions*, *in* THE FOREIGN CORRUPT PRACTICES ACT 2010, *supra* note 27, § 4:4.1, at 83.

[221] *See* 18 U.S.C. § 201(a)(1) (2006) (defining "public official").

Act[222] might provide guidance.[223] In practice, however, neither "officer" nor "employee" limits who may be deemed a "foreign official" in recent enforcement actions.

The meaning of "foreign official" is further obscured by the lack of authoritative guidance on what constitutes an "agency or instrumentality" of a foreign government.[224] The definition of foreign official does not explicitly include employees of foreign companies that are owned or controlled by those companies' governments, but the DOJ and SEC interpret "instrumentality" to include state-owned or controlled enterprises, making employees of such enterprises "foreign officials" for purposes of the FCPA.[225]

Again practitioners have resorted to analogies, in this case to the Foreign Sovereign Immunities Act of 1976 (FSIA),[226] which defines an "agency or instrumentality of a foreign state" as an entity that is "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof . . . ."[227] Such a majority-share-ownership test would be fairly easy to administer, and is consistent with enforcement of the FCPA

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[222] *See* 28 U.S.C. § 2671 (2006) (defining "employee of the government").

[223] *See* Zarin, *supra* note 220, § 4:4.1, at 83–84 (noting that cases decided under these statutes "offer the most instructive guidance").

[224] *See* Stacy Williams, *Grey Areas of FCPA Compliance*, CURRENTS: INT'L TRADE L.J., Winter 2008, at 14, 16 ("The meaning of the term 'instrumentality' is one of the most challenging aspects of FCPA compliance.").

[225] *See, e.g.*, Information at 5, United States v. Baker Hughes Servs. Int'l, Inc., No. H-07-129 (S.D. Tex. Apr. 11, 2007) ("Kazakhoil was controlled by officials of the Government of Kazakhstan and, as such, constituted an 'instrumentality' of a foreign government, and its officers and employees were 'foreign officials,' within the meaning of the FCPA, 15 U.S.C. § 78dd-2(h)(2)(A)."); *see also* Plea Agreement at 36–39, United States v. DPC (Tianjin) Co., No. CR 05-482 (C.D. Cal. May 20, 2005) (noting that DPC was charged with making payments totaling approximately $1.6 million to physicians and laboratory personnel employed by government-owned hospitals in China to influence their decisions to purchase the company's products); Press Release, U.S. Dep't of Justice, Former Alcatel Executive Pleads Guilty to Participation in Payment of $2.5 Million in Bribes to Senior Costa Rican Officials to Obtain a Mobile Telephone Contract (June 6, 2007), http://www.justice.gov/opa/pr/2007/June/07_com_411.html (noting that corrupt payments were made to officials of Instituto Costarrisence de Electricidad, Costa Rica's state-owned telecommunications authority).

[226] *See* 28 U.S.C. § 1603 (2006) (defining "agency or instrumentality of a foreign state").

[227] *Id.* § 1603(b).

against employees of state trading corporations,[228] railways,[229] or airlines.[230] However, the DOJ has long indicated that it takes a more expansive view of "agency or instrumentality"[231] that would include, for example, quasi-governmental bodies[232] and would look beyond simple share ownership to things like the role performed by the entity or the government's influence.[233]

The concept of agency or instrumentality is even less clear in the context of subsidiaries of subsidiaries. Would an entity owned by an entity that is in turn directly owned by a foreign state qualify?[234] *United States v. Kellogg, Brown & Root LLC* concerned bribes paid to officials of a Nigerian entity, Nigeria LNG Ltd. (NLNG), that was 49% owned by a Nigerian government-owned entity.[235] The government alleged that the Nigerian government controlled NLNG through appointment of board members.[236] Because Halliburton and KBR settled the charges, the question was not resolved.[237]

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[228] *See, e.g.*, Complaint at 1, SEC v. Lucent Techs., Inc., No. 1:07-CV-02301 (D.D.C. Dec. 21, 2007) (explaining that Lucent spent over $10 million on bribing employees of a state-controlled telecommunications business in China); DOJ Lucent Press Release, *supra* note 184 (same); Information at 5, United States v. Baker Hughes Services Int'l, Inc., No. H-07-129 (S.D. Tex. Apr. 11, 2007) (alleging payments to employees of a state-owned oil company).

[229] *See* Complaint, SEC v. Westinghouse Air Brake Techs. Corp., No. 08-CV-706 (E.D. Pa. Feb. 14, 2008) (alleging payments to Indian government employees to obtain business from the Indian National Railway); DOJ Westinghouse Press Release, *supra* note 183 (describing payments by a Westinghouse Indian subsidiary to a member of the Indian Railway Board).

[230] SEC Files Settled Enforcement Action Charging Con-way Inc. with Violations of the Foreign Corrupt Practices Act, Litigation Release No. 20690 (Aug. 27, 2008), http://www.sec.gov/litigation/litreleases/2008/lr20690.htm (alleging payments to employees of fourteen state-owned airlines that conducted business in the Philippines); Complaint, SEC v. Con-way Inc., No. 1:08-CV-01478 (D.D.C. Aug. 27, 2008) (same).

[231] *See* Zarin, *supra* note 220, § 4:4.2, at 88 (citing U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT, OPINION PROCEDURE RELEASE NO. 94-1 (May 13, 1994)).

[232] Complaint, SEC v. Siemens AG, No. 1:08-CV-02167 (D.D.C. Dec. 12, 2008) (characterizing a consultant working for a quasi-governmental unit as a government official).

[233] Zarin, *supra* note 220, § 4:4.2, at 86–91.

[234] Arguably such indirect ownership should fall outside the scope of agency or instrumentality. *See* Zarin, *supra* note 220, § 4:4.2, at 91.

[235] Information at 6–8, United States v. Kellogg Brown & Root, LLC, No. H-09-071 (S.D. Tex. Feb. 6, 2009).

[236] *Id.* at 7.

[237] *See supra* note 7 and accompanying text (discussing Halliburton's and KBR's settlements with the DOJ and SEC).

b. Employees of State-Owned Enterprises. The DOJ and SEC's "[a]ggressive and [u]ntested"[238] interpretations of the elements of foreign official in recent years have meant that nearly all employees of foreign state-owned enterprises (SOEs), including the SOE's subsidiaries, might be "foreign officials" under the FCPA.[239] Such interpretations have been particularly difficult for businesses in China, where government presence in the economy is pervasive.[240] As one practitioner put it, "We have found that our clients are frequently and particularly challenged in China, where there may be a governmental hand in many aspects of private life. That involvement may not be completely obvious to an outsider."[241] For example, because China has socialized medicine, doctors in most Chinese hospitals would be considered government officials for purposes of the Act.[242] In several recent cases, the definition of foreign official has expanded even further to include nurses, lab technicians,[243] and family members of employees.[244] In addition, Chinese officials have been traditionally known to be open to accepting money to get things done.[245] These factors, combined

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[238] Koehler, *supra* note 27, at 409–10 (emphasizing that the agencies' interpretation of "foreign official" has never been accepted by a court).

[239] As one practitioner noted, "anyone who receives at least a portion of their [sic] salary from the public fisc" may qualify, potentially including "government contractors that are working in some official capacity, such as providing security services at airports." Lindsey, *supra* note 158, at 962–63 & n.26 (citing two cases, one involving payments made to doctors and lab staff at state-owned hospitals in China, and the other involving payments made to employees of state-owned companies in China).

[240] *See* Eric M. Pedersen, *The Foreign Corrupt Practices Act and Its Application to U.S. Business Operations in China*, 7 J. INT'L BUS. & L. 13, 14 (2008) (noting that because of corruption and the fact that "the government still owns and manages the country's largest companies, compliance with the [FCPA] can be exceptionally challenging for U.S. corporations that conduct business operations in China" (footnote omitted)).

[241] *See* Abikoff, *supra* note 30, at 11.

[242] *Id.* at 26.

[243] *See* Diagnostic Prods. Corp., Exchange Act Release No. 51724, 2005 SEC LEXIS 1185, at *3 (May 20, 2005) (enjoining payments to doctors and laboratory staff at Chinese state-owned hospitals).

[244] *See, e.g.*, Press Release, U.S. Dep't of Justice, *supra* note 182 (discussing prohibited payments to hospital employees).

[245] *See* David Barboza, *For Bribing Government, Chinese Give the Best*, N.Y. TIMES, Mar. 14, 2009, at A4 (explaining the custom of giving gifts to government officials to curry favor in China). This is in spite of the fact that China is one of the few countries in the world that has the death penalty for bribery—and has used it. *See* David Lague, *China Pressured on*

with the sheer number of business opportunities in China, have caused a surge in FCPA actions related to activity in that country.[246]

c. Other "New" Foreign Officials. The global stimulus plan may also have created a new type of foreign official by giving government assistance to many large financial institutions and other companies. Government ownership has increased dramatically in many economies. For example, the Royal Bank of Scotland is now 68.4% owned by the U.K. government.[247] Fortis Bank is now almost entirely owned by the Government of Belgium and BNP Paribas,[248] which in turn is partially owned by the Government of France.[249] Are employees of these companies "foreign officials"? The uncertainty and expansion of the FCPA may make this an issue in an increasing number of financings.[250]

Other potential new "foreign officials" are sovereign wealth funds that made large cross-border investments in financial services providers and other companies during the economic crisis. Some of these funds are directly owned by their home country governments, and almost all enjoy close ties with their home governments. For example, the China Investment Corporation and the Government of Singapore Investment Corporation are closely connected with the Chinese[251] and Singaporean[252]

Death Penalty, INT'L HERALD TRIB., Aug. 15, 2005, at 1R (discussing pressure on Chinese government to drop the death penalty for nonviolent crimes like bribery).

[246] *See* Pazanowski, *supra* note 150, at 1307 (noting that the "greatest risk of prosecution under the FCPA is posed by China"). Practitioners predict a similar surge of cases to arise out of the Brazil Olympics. *See* John Pacenti, *Feds Raise Stakes in War Against Overseas Bribes*, BROWARD DAILY BUS. REV., Mar. 1, 2010, at A10 (noting that attorneys practicing FCPA law see the 2016 Brazil Olympics as a future opportunity for FCPA violations).

[247] *Equity Ownership Statistics*, ROYAL BANK OF SCOTLAND, http://www.investors.rbs.com/our_performance/equity.cfm (last visited Oct. 5, 2010).

[248] *About Us*, BNP PARIBAS FORTIS, http://www.fortisbank.com/en/general/brief.asp (last visited Oct. 5, 2010) (breaking down ownership interests).

[249] Scheherazade Daneshkhu, *French State Is BNP's Biggest Investor*, FIN. TIMES, Apr. 7, 2009, http://www.ft.com/cms/s/0/587b82a6-23b9-11de-996a-00144feabdc0,dwp_uuid=86c92008-1c23-11dd-8bfc-000077b07658.html?nclick_check=1.

[250] *See* Abikoff, *supra* note 30, at 27 (noting that "if you are doing a private placement" and trying to get investors "to invest in the offering, you may be dealing with a government official when you interact with one of those banks").

[251] *See About Us*, CHINA INVESTMENT CORP., http://www.china-inv.cn/cicen/about_cic/about.eic_overview.html (last visited Oct. 5, 2010) (disclosing that the China Investment

governments, respectively. Even funds such as Temasek Holdings, which "hold themselves out as independent and autonomous," would raise red flags if dominated by a single shareholder (in this case, the Government of Singapore).[253] In most cases, sovereign wealth funds will be deemed an "instrumentality" under the Act and so need to be treated carefully by, for example, securities firms.[254]

In addition, foreign officials do not actually have to be in foreign countries. With the increasing trend of opening non-U.S. customs facilities in U.S. ports, many foreign officials are placed in the United States. This can create confusion. For example, if a U.S. transportation company executive regularly takes a "local" non-U.S. customs official to lunch, and then the non-U.S. customs official lets that transportation company's trucks cut in line, then there may be an FCPA problem.[255]

Finally, in what may prove to be a controversial approach to the foreign-official element, the January 2010 "Catch-22" arrests at the Las Vegas trade show were based on an FBI sting in which, in fact, no foreign government official participated.[256] FBI agents posed as representatives of a government minister from an African country, and proposed a scheme in which the executives or employees would pay a 20% commission to win the business of outfitting a presidential guard with supplies.[257] In this case, prosecution under the Act has been based on a situation in which there was no foreign official.

Corporation is a "wholly state-owned company under the Company Law of the People's Republic of China").

[252] *See* GOV'T OF SINGAPORE INV. CORP., REPORT ON THE MANAGEMENT OF THE GOVERNMENT'S PORTFOLIO FOR THE YEAR 2009/10, at 28, http://gic.com.sg/data/ pdf/GIC_Report_2010.pdf (noting that the Government of Singapore Investment Corporation is "wholly owned by the Government of Singapore").

[253] Abikoff, *supra* note 30, at 27.

[254] TARUN, *supra* note 17, at 15.

[255] Chris Grenz, *Toeing the Line: Companies Work to Ensure Global Business Doesn't Violate Foreign Corrupt Practices Act*, KAN. CITY BUS. J., Nov. 17, 2006, at 15, *available at* http://kansascity.bizjournals.com/kansascity/stories/2006/11/20/focus1.html.

[256] *See* Press Release, U.S. Dep't of Justice, *supra* note 6 (stating that the only "sales agent" was an undercover FBI agent).

[257] *See id.* (discussing the FBI's sting).

d. Confusion and Resistance. Many recent FCPA enforcement actions have alleged corrupt payments to employees of state-owned or controlled enterprises, but neither the DOJ nor the SEC has provided guidance settling the matter.[258] Two 2010 DOJ Opinion Procedures Releases responded to company inquiries that involved the definition of foreign officials, but neither provided, or indeed intended to provide, general guidance.[259] As the definition remains unclear and expansive, there is some resistance among practitioners who point out that "[t]he DOJ and SEC have read the phrase 'instrumentality thereof' under the FCPA as allowing them to investigate and prosecute companies for FCPA violations despite a limited connection between their foreign customers or business partners and the applicable state government."[260]

The DOJ and SEC may now be reading "foreign official" in an expansive manner that is inconsistent with other definitions.[261] For example, in the OECD Anti-Bribery Convention, "foreign

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[258] *See* Cohen et al., *supra* note 173, at 1250 (commenting that there has not been sufficient "guidance so that companies may proactively determine whether their customers and business partners are instrumentalities of their respective governments"). However, DOJ officials did make several public statements about the definition in the late 1990s. *See id.* at 1254 ("[T]he DOJ provided comments . . . regarding one of the factors the DOJ was using to determine whether a foreign company was an 'instrumentality.' ").

[259] In its April 2010 Opinion Procedure Release 10-01, the DOJ responded to a requesting company that proposed to hire a foreign official in an arrangement in which a U.S. government agency and the foreign official's home government would control the selection, hiring, and compensation of the foreign official. The DOJ noted that it did not contemplate taking enforcement action in the situation described in the request. U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT OPINION PROCEDURE RELEASE NO. 10-01 (Apr. 19, 2010), http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1001.pdf. In September 2010 the DOJ considered whether a consultant, which was a U.S. partnership owned by a U.S. citizen, and which also provided services to a foreign government, would be a foreign official for purposes of the FCPA. U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT OPINION PROCEDURE RELEASE NO. 10-03 (Sept. 1, 2010), http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1003.pdf [hereinafter OPINION PROCEDURE RELEASE 10-03]. DOJ Opinion Procedure Release 10-03 stated that if the requesting company took certain specific steps, then the consultant would not be acting on behalf of the foreign government and would not qualify as a foreign official for purposes of its contract with the requesting company. *Id.* at 3. The DOJ also noted that the arrangement ran an increased risk of FCPA violations during the execution of the consultancy. *Id.* at 4.

[260] Cohen et al., *supra* note 173, at 1263–67 (questioning whether the FCPA's definition of "instrumentality" is unconstitutionally vague).

[261] *See id.* at 1255–56 (suggesting that some DOJ and SEC interpretations may be inconsistent with other U.S. laws).

public official" is defined 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 organisation."[262] A seemingly narrow interpretation of "foreign official" can also be found in the national laws promulgated by other OECD countries.[263]

The need for authoritative guidance on the definition of "foreign official" is growing. In 2009, DOJ and SEC interpretations of "foreign official" to include SOE employees "was at the core of 66% (six out of nine) of [their] actions against business entities."[264] The concept of "foreign official" is critical to the FCPA, and needs to be reviewed by the agencies or courts in a careful fashion.

2. "Offer, Payment, or Promise to Pay . . . Anything of Value."

a. Broadly Interpreted. The FCPA prohibition 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"[265] has also been broadly interpreted. The Act does not define, and no FCPA decisions have addressed, "anything of value."[266] In DOJ and SEC practice, however, it has not been restricted to actual payments of money, but has also included "a promise of some future consideration, like an interest in a company or something else that has not yet occurred . . . and . . . in-kind things like travel and medical expenses, . . . T-shirts,"[267] or even executive training programs at

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[262] OECD Convention art. I(4)(a), *supra* note 47.

[263] *See* Cohen et al., *supra* note 173, at 1255–56 (arguing that the interpretations of "foreign official" in other OECD countries do not support the broad view of the FCPA's reach).

[264] Koehler, *supra* note 27, at 412 (adding that since many of those actions included related actions against employees, the impact of this "tenuous and dubious legal interpretation" was far-reaching).

[265] 15 U.S.C. § 78dd-1(a) (2006).

[266] TARUN, *supra* note 17, at 10. One approach would interpret "thing of value" to include tangible and intangible benefits that an official subjectively believes to be of value. *See, e.g.*, 18 U.S.C. § 1954 (2006) (listing circumstances in which an official may be penalized for accepting a thing of value).

[267] Abikoff, *supra* note 30, at 4–5 (noting that in one case, buying a presidential candidate t-shirts to help support his reelection was considered an FCPA violation). The "T-shirt" case involved Titan Corporation's purchase of campaign t-shirts featuring the picture of the

U.S. universities.[268] In addition, in contrast to the majority of provisions of the securities laws, "[t]he materiality of the payment is irrelevant for FCPA liability to attach";[269] there is "no de minimis exception."[270]

b. Charitable Contributions. In 2004 Schering–Plough Corporation settled an FCPA enforcement action, paying civil penalties of $500,000 for violations of the books and records and internal control provisions, based on donations made by the company's Polish subsidiary to a local charity.[271] This was the first time that the FCPA was used in the context of a charitable donation.[272] The SEC charged that the payment was made to a charity to induce action on the part of a government official and so violated the FCPA.[273] Although the DOJ has issued two recent Opinion Procedure Releases responding to requests involving donations, the concept of charitable contributions under the FCPA remains unclear.[274]

President of Benin. *See* SEC Sues the Titan Corporation for Payments to Election Campaign of Benin President, Litigation Release No. 19107 (Mar. 1, 2005), http://www.sec.gov/litigation/litreleases/lr19107.htm.

[268] *See* Complaint at 1–2, SEC v. UTStarcom, Inc., No. CV-09-6094 (N.D. Cal. Dec. 31, 2009), http://www.sec.gov/litigation/complaints/2009/comp21357.pdf (alleging that UTStarcom paid for foreign officials to attend programs).

[269] Harker et al., *supra* note 133, at 272.

[270] TARUN, *supra* note 17, at 10.

[271] *See* Complaint at 1, SEC v. Schering–Plough Corp., No. 04CV00945, 2004 WL 2057340 (D.D.C. June 8, 2004), *available* at http://www.sec.gov/litigation/complaints/comp18740.pdf; Schering–Plough Corp., Exchange Act Release No. 49838 (June 9, 2004), http://www.sec.gov/litigation/admin/34-49838.htm.

[272] John P. Giraudo, *Charitable Contributions and the FCPA: Schering–Plough and the Increasing Scope of SEC Enforcement*, 61 BUS. LAW. 135, 136 (2005) ("The case of Schering–Plough . . . is the first occasion in which charitable donations have been found to violate the FCPA.").

[273] *Id.*

[274] In the sole 2009 FCPA Opinion Procedure Release, the DOJ responded to a U.S. medical device maker that wanted to introduce a product to a foreign government by donating samples valued at $1.9 million to government health centers, to be distributed to patients using objective criteria provided to the DOJ. U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT, OPINION PROCEDURE RELEASE NO. 09-01 (Aug. 3, 2009), http://www.justice.gov/criminal/fraud/fcpa/opinion/2009/0901.pdf. DOJ Opinion Procedure Release No. 09-01 stated that, based on the facts and circumstances described in the letter, the DOJ did not intend to take any enforcement action against the company because the donation of the medical devices would be to the foreign government, not individual foreign government officials, for use by patients according to specific guidelines that the company had described. *Id.* In 2010, a U.S. nonprofit company sought clarification from the DOJ with respect to a donation of funds to be

3. The Business Purpose Test. The requirement that the improper payment be made "to obtain or retain business" is also being expanded through DOJ and SEC enforcement. Historically, this element required a payment to be made in connection with securing or keeping a specific contract.[275] In *United States v. Kay*, the U.S. Court of Appeals for the Fifth Circuit found that the "obtain or retain business" element was ambiguous[276] but, based on the legislative history, could be interpreted to include more than just payments to acquire or retain government contracts.[277] In *Kay*, the court found that the FCPA could apply, but does not necessarily apply, to payments to a foreign official to reduce customs and tax liabilities if they assisted the payer, directly or indirectly, in obtaining or retaining business.[278] This apparent broadening of the business purpose element "energized" enforcement agencies and contributed to "an explosion in FCPA enforcement actions" relating to customs duties and tax payments.[279] In the current environment, "obtain or retain business" has been read even more broadly to include a payment made simply to obtain an improper business advantage. Accordingly, payments to reduce overall customs duties, obtain licenses, and waive regulations may now be considered to violate the FCPA, even if the payments are for the general advancement

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made by its Eurasian subsidiary. In July 2010, the DOJ issued Opinion Procedure Release 10-02, which discussed the fact that the funds in question would be donated by the Eurasian subsidiary to a local microfinance institution as a condition to the Eurasian subsidiary's conversion into a formal bank. *See* U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT OPINION PROCEDURE RELEASE NO. 10-02 (July 19, 2010), http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1002.pdf [hereinafter OPINION PROCEDURE RELEASE 10-02]. The DOJ concluded that it would recommend no enforcement action, but that conclusion was based on the extensive, multistage due diligence that the U.S. nonprofit undertook to complete before the funds were transferred, as well as the elaborate controls that would be put into place to prevent corrupt uses of the funds. *Id.*

[275] The 1998 amendments to the Act prohibited offering or paying anything of value in order to secure "any improper advantage" in obtaining or retaining business. *See supra* note 52 and accompanying text for a discussion of the 1998 Amendments.

[276] *See* United States v. Kay, 359 F.3d 738, 743–44 (5th Cir. 2004) (agreeing with the district court's holding that the language was ambiguous).

[277] *See id.* at 749–50 (stating that the legislative history shows that Congress meant to prohibit a wider range of payments than only payment to acquire government contracts).

[278] *Id.* at 755–56; *see also* TARUN, *supra* note 17, at 12 (explaining the holding in *Kay*).

[279] Koehler, *supra* note 27, at 393–94.

of the company and not a particular business opportunity.[280] In fact, some practitioners have noted that the agencies are currently using a definition of "obtaining or retaining business" that is so broad that a company charged with violating the anti-bribery provisions cannot successfully contend that a corrupt payment was not to obtain or retain business.[281]

4. Narrowing the Exceptions and Defenses.

a. Less "Grease" in the System. As the FCPA provisions have been expanded to catch more activities, the traditional exceptions and defenses to FCPA liability have narrowed. As discussed above in Part II.c.*3.a* the FCPA provides an exception to the bribery prohibition for facilitating or expediting payments to secure performance of a routine government action.[282] One of the most "notorious" areas of "long-standing ambiguit[y]"[283] in the FCPA, the grease payments exception is not only unclear,[284] but may conflict with the law of many other countries,[285] and even the law of the United States itself.[286]

There is little guidance regarding the acceptable amount, type, or purpose of such payments. In *Kay*, the Court affirmed a district court ruling that payments made to foreign tax and customs officials in order to evade customs duties and sales taxes could constitute a violation of the FCPA if there was a sufficient "business nexus."[287] The payments would not qualify for the exception if, for example, the bribery was intended to produce an effect such as tax savings that would constitute assisting in,

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[280] *See* Lindsey, *supra* note 158, at 963 (citing United States v. Kay, 513 F.3d 461 (5th Cir. 2007)).

[281] *See* Bruce Yannett, *The Foreign Corrupt Practices Act: An Overview*, *in* THE FOREIGN CORRUPT PRACTICES ACT OF 2010, *supra* note 27, at 733 (noting the difficulties that came with such a broad definition).

[282] 15 U.S.C. §§ 78dd-1(b), -2(b), -3(b) (2006).

[283] Vega, *supra* note 133, at 444.

[284] *See* H. Lowell Brown, *Exempt Transactions: Facilitating Payments*, *in* BRIBERY IN INTERNATIONAL COMMERCE § 5.2 (2009) (noting that the treatment of "grease payments" continues to be one of the most difficult areas of FCPA compliance).

[285] *See* Alexandra Wrage & Matthew Vega, *Small Bribes Buy Big Problems*, ACC DOCKET, Sept. 2007, at 102 (noting variance from country to country).

[286] U.S. criminal law provides no comparable exception. *See* 18 U.S.C. § 201 (2006) (addressing the bribery of public officials and witnesses).

[287] United States v. Kay, 359 F.3d 738, 754 (5th Cir. 2004).

obtaining, or retaining business.[288] Nevertheless, the ambiguity surrounding this exception combined with its increased enforcement makes compliance difficult. In 2008, for example, U.S. issuer Westinghouse Air Brake Technologies Corporation agreed to pay over $675,000 in fines and disgorgement of profits to the DOJ and SEC for improper payments made by a wholly owned Indian subsidiary to Indian railway officials for, inter alia, scheduling pre-shipping produce inspections and having certificates of product delivery issued.[289]

b. Less Travel and Entertainment. As discussed above in Part II.C.*3.b*, there is an affirmative defense permitting payment of reasonable and bona fide expenditures like travel and lodging expenses related to the promotion, demonstration, or explanation of products or services.[290] This defense enables companies to offer traditional small gifts as tokens of goodwill or to show hospitality to foreign officials.

The ability to take such measures, however, is hampered by the lack of clarity regarding the "boundaries of this amorphous affirmative defense."[291] No court has ever reviewed the reasonable and bona fide expenditures defense, and little guidance has been offered. The DOJ is now prosecuting some stand-alone travel, lodging, and entertainment cases,[292] though the choice of enforcement targets has been described as "seemingly random."[293]

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[288] *See id.* at 753 (discussing the limits of the grease payments exception); Jacob, *supra* note 72, at 167.

[289] DOJ Westinghouse Press Release, *supra* note 183 (noting $300,000 DOJ penalty, $89,000 in civil penalties, and disgorgement of profits of $288,000); SEC Sanctions Westinghouse Air Brake Technologies Corporation for Improper Payments to Indian Government Employees, Litigation Release No. 20457 (Feb. 14, 2008), http://www.sec.gov/litigation/litreleases/2008/lr20457.htm (providing details of the settlement); Letter from Steven Tyrrel, Chief, Fraud Section, U.S. Dep't of Justice, to Eric Dubelier, Esq., Reed Smith LLP (Feb. 8, 2008), http://www.justice.gov/criminal/fraud/fcpa/cases/docs/02-08-08wabtec-agree.pdf (summarizing the settlement).

[290] 15 U.S.C. §§ 78dd-1(c)(2), -2(c)(2), -3(c)(2) (2006) (providing the exception).

[291] Vega, *supra* note 133, at 446.

[292] Some examples are *In re Suncor International Corp. Securities Litigation*, 239 F. App'x 318 (9th Cir. 2007), *SEC v. GE InVision, Inc.*, No. C-05-0660 (N.D. Cal. Feb. 14, 2005), *SEC v. Titan Corp.*, No. 05-0411 (D.D.C. Mar. 1, 2005), *SEC v. Ingersoll-Rand Co.*, No. 1:07-CV-01955 (D.D.C. Oct. 31, 2000). *See also* Claudius O. Sokenu, *To Host or Not to Host: Approving Expenses for Travel and Entertainment Under the Foreign Corrupt Practices Act*, *in* WHITE COLLAR CRIME 2009: PROSECUTORS AND REGULATORS SPEAK, *supra*

Past DOJ enforcement suggests that the government viewed expenditures as reasonable and bona fide when the payments made were shown to be permissible under foreign law, when payments were made directly to a service provider rather than first passing through the hands of government officials, and when the company did not have current or immediately pending business before the governmental agency whose employees' expenses are being covered.[294]

Recently, however, the DOJ and SEC seem to have adopted a more aggressive approach to travel and entertainment cases, thereby narrowing the scope of the defense.[295] For example, in 2007, the government prosecuted a travel and entertainment case against Lucent Technologies, Inc.[296] The DOJ and SEC alleged that Lucent spent over $10 million in travel, lodging, entertainment, and related expenses for approximately 1000 employees of a Chinese state-owned enterprise to which Lucent was seeking to sell its equipment and services, or from which Lucent was seeking business.[297] The traveling state-owned enterprise employees, who qualify as foreign officials under the FCPA,[298] were identified as "decision makers" with respect to the awarding of new business for which Lucent was bidding or planned to bid.[299]

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note 161, at 569, 571 (discussing "one of the rare standalone travel and entertainment" cases).

[293] Vega, *supra* note 133, at 446.

[294] *See* Sokenu, *supra* note 292, at 574 (noting, however, that the SEC and DOJ had signaled concern that companies were improperly using the defense).

[295] *See* Yannett, *supra* note 281, at 738–39 (stating that the *Lucent* case signals a narrow interpretation of the defense).

[296] Complaint, SEC v. Lucent Techs. Inc., No. 1:07-cv-02301 (D.D.C. Dec. 21, 2007).

[297] *Id.*; *see also* Sokenu, *supra* note 292, at 571; SEC Files Settled Action Against Lucent Technologies Inc. in Connection with Payments of Chinese Officials' Travel and Entertainment Expenses; Company Agrees to Pay $1.5 Million Civil Penalty, Litigation Release No. 20414 (Dec. 21, 2007), http://www.sec.gov/litigation/litreleases/2007/lr20414.htm; DOJ Lucent Press Release, *supra* note 184 (alleging that Lucent spent millions on approximately 315 trips given to Chinese government officials).

[298] *See* 15 U.S.C. § 78dd-1(f)(1) (2006) (defining "foreign official").

[299] Complaint at 2, SEC v. Lucent Techs. Inc., No. 1:07-cv-02301 (D.D.C. Dec. 21, 2007).

A July 2008 DOJ Opinion Procedure Release shed little light on the defense.[300] The release addressed a nonprofit organization that proposed to pay for the expenses of Chinese journalists, employed by a state-owned media enterprise, in connection with travel to the organization's press event in China.[301] Based on the very particular facts presented by the requesting organization, the DOJ found that the proposed payments would fall within the FCPA's promotional expenditure defense.[302]

Like many elements of the FCPA, this affirmative defense is in flux. Certainly there is a difference between giving a foreign regulator a canvas bag with a company logo and sending him on a trip to a spa resort, but the placement of the line between them is unclear. Greater clarity is needed, because gifts, travel, lodging, and entertainment expenses for non-U.S. government officials present the most common FCPA issues for multinational companies.[303]

5. Expanding What Constitutes "Knowledge."

a. Knowledge in the Anti-Bribery Provisions. The FCPA prohibits not only direct payments to foreign officials, but also payments to third parties if they are made "while knowing" that some or all of the payment will be used for bribery in contravention of the FCPA.[304] The "while knowing" standard is the result of the 1988 amendments to the Act, discussed above in Part II.B, which removed broader "while knowing or having reason to know" language in the law enacted in 1977.[305]

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[300] U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT OPINION PROCEDURE RELEASE NO. 08-03 (July 11, 2008), http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0803.pdf.

[301] *Id.*

[302] *Id.*

[303] TARUN, *supra* note 17, at 119.

[304] 15 U.S.C. §§ 78dd-1(a)(3), -2(a)(3), -3(a)(3) (2006).

[305] The Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415 (1988) (codified at 15 U.S.C. §§ 78dd(1)–(3), 78ff (2006)); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 2, 112 Stat. 3302, 3302 (1998) (codified at 15 U.S.C. §§ 78dd(1)–(3), 78ff (2006)). Although the 1988 amendments narrowed the knowledge requirement by eliminating "reason to know," legislative history shows that Congress still intended knowledge to include "conscious disregard," "willful blindness," and "deliberate ignorance" of circumstances. H.R. REP. NO. 100-576, at 919–21 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1952–54.

To determine liability of a person for violations of an intermediary or third party that makes an improper offer, payment, or gift, then, the FCPA currently provides that a person will be liable for any violations caused by an intermediary if (i) such person is aware that the intermediary 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."[306] The FCPA goes on to allow that such knowledge is established if such person "is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist."[307] Given the fact that the FCPA imputes knowledge if facts indicate a "high probability" that prohibited conduct will result, and that conscious disregard of circumstances that should have alerted a company to a high probability of a violation will satisfy the standard, the knowledge requirement is often met.[308] Liability for the acts of intermediaries is at an all-time high in terms of importance: all eleven enforcement actions against companies in 2009 involved some type of foreign-agent conduct.[309]

In *In re Schering–Plough Corp.*, knowledge was alleged although the improper payments were made without the actual knowledge or approval of any of the company's employees in the United States.[310] An even more expansive interpretation was used in the prosecution of Frederic Bourke,[311] and the related FCPA judicial opinion, *United States v. Kozeny*,[312] shed some light on the

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[306] 15 U.S.C. §§ 78dd-1(f)(2), -2(h)(3), -3(f)(3).

[307] *Id.* §§ 78dd-1(f)(2)(B), 78dd-2(h)(3)(B), 78dd-3(f)(3)(B). "Simple negligence" or "mere foolishness" would not suffice. Dworsky, *supra* note 75, at 683; *see also* H.R. REP. NO. 100-576, at 919–20. "High probability" may be assessed using tools such as Transparency International's list of countries that are most corrupt, or based on the industry in which the company operates. *See supra* note 115 and accompanying text (discussing Transparency International).

[308] *See* Zarin, *supra* note 220, § 4:8:2, at 103–07 (finding little practical difference between "reason to know" and "knowledge"); Abikoff, *supra* note 30, at 5 (describing the standard as "constructive knowledge").

[309] *See* Koehler, *supra* note 27, at 402.

[310] *See* Schering–Plough Corp., Exchange Act Release No. 49838 (June 9, 2004), http://www.sec.gov/litigation/admin/34-49838.htm (basing allegations on failure to record payments).

[311] *See supra* Part III.B.

[312] United States v. Kozeny, 664 F. Supp. 2d 369, 385–86 (S.D.N.Y. 2009).

knowledge requirements. Bourke was convicted of conspiring to violate the FCPA even though he had no direct knowledge of the bribes made by Viktor Kozeny to foreign officials in Azerbaijan. In *Kozeny*, the jury found that the investment scheme's involvement with the oil industry, the common perception of corruption in Azeri business transactions, and Viktor Kozeny's questionable history meant that Bourke knew or should have known that bribery was taking place.[313] Thus the conviction was based on conscious avoidance of knowledge[314]—Bourke's "willful blindness" to a substantial probability that his investment funds would be used to make bribes.[315]

In recent years, the DOJ and SEC appear to have been using an understanding of "while knowing" that suggests a return to the broader, pre-1988 language of the Act:[316] "[t]he DOJ and SEC . . . now interpret the knowledge requirement so broadly that they have effectively eviscerated the 1988 statutory changes."[317] If so, then by interpreting the knowledge element in a way that expands the FCPA so dramatically, the DOJ and SEC may be frustrating the intent of Congress.[318] It remains to be seen whether the

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[313] *See id.* (discussing testimony and jury findings).

[314] *Id.* at 385–87; Indictment, United States v. Bourke, No. 05-CR-518, 2009 WL 3149538 (S.D.N.Y. May 26, 2009); *see also* United States v. Kozeny, 638 F. Supp. 2d 348, 352, 356–57 (S.D.N.Y. 2009) (denying the argument that intent is required and imputing knowledge of the conspiracy to the defendant based on testimony).

[315] Press Release, U.S. Dep't of Justice, *supra* note 196 (noting that Bourke "falsely stated that he was not aware" the bribes were taking place).

[316] Zarin, *supra* note 220, § 4:8, at 107 (contending that there is little practical difference between the current "knowledge" standard and the prior "reason to know" standard).

[317] Kenneth Winer & Gregory Husisian, *The 'Knowledge' Requirement of the FCPA Anti-Bribery Provisions: Effectuating or Frustrating Congressional Intent?*, WHITE-COLLAR CRIME, Oct. 2009, at 3.

[318] *See id.* ("Are the DOJ and SEC frustrating the intent of Congress by ignoring the reasons that Congress amended the FCPA?"). "The SEC, DOJ, and many commentators" might think it would be best if the knowledge requirement was satisfied by failure to conduct adequate due diligence or the failure to follow up on red flags (even if the defendant was not motivated by a purpose of avoiding knowledge of the corrupt payment). *Id.* But that is not the policy balance that Congress struck in the 1988 amendments. *See id.* (explaining that Congress limited the state-of-mind requirement). "The agencies should rethink their interpretation of the FCPA and enforce the knowledge requirement as Congress intended." *Id.* at 11.

Kozeny opinion, with its rare judicial interpretation, has clarified the requirement.[319]

b. Knowledge and Liability for Accounting Provisions Violations. The knowledge requirement for criminal liability for violations of accounting provisions works slightly differently from the knowledge requirement for violations of the anti-bribery provisions. For criminal liability to be imposed, the defendant must be found to "knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account."[320] The FCPA accounting provisions do not include any clarification of "knowing" for purposes of these sections. However, the legislative history of the FCPA indicates that the knowledge requirement in the accounting provisions is intended to preclude criminal liability for inadvertent violations, but would impose liability for willful blindness.[321]

In contrast, civil liability for a violation of the accounting provisions does not require knowledge.[322] So, for example, civil liability may arise for an issuer under the FCPA accounting provisions if its books fail to represent an improper payment adequately, even though the falsification occurred at a subsidiary with no evidence of involvement by the parent.[323]

Nevertheless, the SEC has been expanding the scope of liability in civil cases as well. In *SEC v. Nature's Sunshine Products Inc.*,[324] the SEC used a novel theory for individual liability and

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[319] *See generally* Kenneth Winer & Gregory Husisian, *Recent Opinion Sheds Light on the Relevance of Due Diligence to the FCPA's 'Knowledge' Requirement*, 41 Sec. Reg. & L. Rep. (BNA) No. 46, at 2150, 2150 (Nov. 23, 2009) (arguing that the opinion in Bourke's case correctly interprets the requirement and will lead to an interpretation consistent with Congress's intent).

[320] 15 U.S.C. § 78m(b)(5) (2006); Harker et al., *supra* note 133, at 272–73.

[321] *See* H.R. REP. NO. 100-576, at 916, 919–21 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1952–54 (suggesting that a "head in the sand" approach would violate the accounting provisions); *see also* Dworsky, *supra* note 75, at 678 ("[T]he 'knowing requirement is met by willful blindness.' "); CRUVER, *supra* note 87, at 33 (discussing the effects of the amendments).

[322] *See* SEC v. McNulty, 137 F.3d 732, 741 (2d Cir. 1998) ("[S]cienter is not an element of civil claims under those provisions.").

[323] Statement of Policy, Exchange Act Release No. 17500, 1981 WL 36385 (Jan. 29, 1981) (explaining that an issuer's responsibility for its subsidiaries depends on its percentage of ownership).

[324] No. 09-CV-0672 (D. Utah July 31, 2009).

relied on the defendants' status as control persons of the company.[325] The agency charged Chief Executive Officer Douglas Faggioli and Chief Financial Officer Craig Huff with violating the books and records and internal control provisions in connection with payments allegedly made by the company's Brazilian subsidiary to customs officers in that country.[326] The SEC charged them as "control persons" under section 20(a) of the Exchange Act of 1934 and thus did not allege that the two participated in or had personal knowledge of the underlying bribes or the way they were booked in the company's consolidated financial statements.[327] They merely had "supervisory responsibility" for maintaining the company's books to reflect its dealings in Brazil accurately.[328] This "no fault" remedy[329] substantially expands the FCPA.

D. CAPTURE OF MORE NON-U.S. PERSONS

1. Extraterritorial Jurisdiction Adds to the Uncertainty. Uncertainty regarding the application and enforcement of the FCPA is compounded by the fact that a prohibition on foreign bribery involves some exercise of extraterritorial regulation by the United States. The scope of U.S. jurisdiction over behavior beyond its borders is generally problematic. The recent expansive enforcement of the FCPA tests the boundaries of U.S. "jurisdiction to prescribe," its international legal right to regulate behavior outside its borders.[330] Questions of which country is the more

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[325] *See* Wilczek, *supra* note 157, at 1668 (stating that the case marked the first time the SEC used the control person theory of liability).

[326] Complaint at 8–9, SEC v. Nature's Sunshine Prods., Inc., No. 09-CV-0672 (D. Utah July 31, 2009).

[327] *Company, Execs Settle FCPA Charges Related to Alleged Payments to Customs*, 41 Sec. Reg. & L. Rep. (BNA) No. 32, at 1491, 1491 (Aug. 10, 2009). The two executives settled the charges, each paying a fine to the SEC. *Id.* at 1490–91. However, the ability to use a theory of control person liability may be limited to the Tenth Circuit, which does not require an affirmative pleading of culpable knowledge in section 20(a) actions. *See* Wilczek, *supra* note 215, at 1584 ("The Tenth Circuit's interpretation of section 20(a) does not require an affirmative pleading of a culpable knowledge . . . .").

[328] Complaint at 7–8, SEC v. Nature's Sunshine Prods., Inc., No. 09-CV-0672 (D. Utah July 31, 2009).

[329] *See* Dorfman et al., *supra* note 165, at 472 (listing the SEC's effort to impose liability on individuals not accused of wrongdoing as one of the top SEC developments in 2009).

[330] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401 (1986) (stating the existence of limitations on a state's jurisdiction to prescribe).

appropriate regulator,[331] the effects of the proscribed behavior in the United States,[332] the ability of U.S. courts to subject foreign persons to adjudicatory proceedings,[333] and the ability of the United States to enforce a judgment abroad[334] are all raised by the DOJ and SEC's conceptions of the boundaries of the FCPA.[335]

2. Non-U.S. Subsidiaries of U.S. Companies.

a. Expansion of the Anti-Bribery Provisions to More Non-U.S. Subsidiaries. Application of the FCPA to non-U.S. subsidiaries of U.S companies has been an issue throughout the history of the Act. When the FCPA was enacted, Congress was "acutely aware" that U.S. companies were using overseas subsidiaries to make improper payments.[336] Over thirty years later, the use of foreign subsidiaries by U.S. companies has become even more prevalent, and many of the SEC and DOJ enforcement actions in recent years have been brought in the context of a parent–subsidiary relationship.[337]

According to the DOJ, "U.S. parent corporations may be held liable for the acts of foreign subsidiaries where they authorized,

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[331] *See id.* § 421 (qualifying jurisdiction to adjudicate with reasonableness conditions).

[332] *See* Calder v. Jones, 465 U.S. 783, 788–89 (1984) (holding that jurisdiction over the petitioners was proper based on the effects of their action within the chosen forum).

[333] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421 (1986) (providing for jurisdiction to adjudicate in a variety of circumstances); *cf.* Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (holding that a federal court has jurisdiction over a party with minimum contacts with a state established).

[334] *See* Vega, *supra* note 133, at 51–52 (pointing out that the United States can only enforce a decision when it does not conflict with another state's sovereignty).

[335] It is technically possible for the FCPA to apply in the absence of any foreign conduct at all. A violation of the FCPA accounting provisions does not necessarily require foreign conduct; the SEC has brought several actions for violations of the accounting provisions based on purely domestic conduct. Dworsky, *supra* note 75, at 678 & n.44.

[336] Brown, *supra* note 32, at 19. In fact, the original House version of the Act specifically defined "domestic concerns" to include non-U.S. subsidiaries of U.S. companies. *See* H.R. REP. NO. 95-640, at 12 (1977), *available at* http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf (defining "domestic concern" to include foreign subsidiaries of U.S. companies). Although that provision was removed in a compromise with the Senate in 1977, the FCPA was intended to hold a U.S. parent company liable for corrupt payments made indirectly through its foreign subsidiary. *See* H.R. REP. NO. 95-831, at 14 (1977) (Conf. Rep.) (clarifying that companies that engage in bribery of foreign officials indirectly will be liable under the FCPA).

[337] *See generally* SHEARMAN & STERLING, *supra* note 159 (listing FCPA claims in the context of a parent–subsidiary relationship).

directed, or controlled the activity in question."[338] To establish a parent company's liability for the actions of a foreign subsidiary, there must be a showing that the U.S. parent had "knowledge" of the corrupt purpose of the payment.[339] As discussed above in Part IV.C, under the FCPA anti-bribery provisions, knowledge of conduct or a circumstance includes actual awareness of such conduct or circumstance, or a "firm belief that such circumstance exists or that such result is substantially certain to occur."[340]

The use of the FCPA to hold U.S. domestic concerns and issuers liable for the improper payments of their non-U.S. subsidiaries is increasing[341] as the DOJ and SEC interpret the standard for control of a non-U.S. subsidiary broadly.[342] Both the Siemens and Halliburton/KBR cases were triggered by the actions of non-U.S. subsidiaries, and many other recent cases demonstrate the government's increasing willingness to investigate improper payments made by non-U.S. subsidiaries of domestic concerns or issuers subject to the FCPA.[343]

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[338] U.S. DEP'T OF JUSTICE, LAY PERSON'S GUIDE TO THE FOREIGN CORRUPT PRACTICES ACT 1–3, http://www.justice.gov/criminal/fraud/fcpa/docs/lay_persons_guide.pdf.

[339] *See* 15 U.S.C. § 78dd-1(a)(3) (2006).

[340] *Id.* § 78dd-1(f). The FCPA goes on to explain 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." *Id.* § 78dd-1(f)(2)(B).

[341] There has also been at least one settled action in which constructive knowledge was attributed to a parent company based on an agency theory. *See* H. Lowell Brown, *Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents*, 41 LOY. L. REV. 279, 300–02 (1995) (citing United States v. Bank of New England, 821 F.2d 844 (1st Cir. 1987)); *see also* Plea Agreement at 4, United States v. DPC (Tianjin) Co., No. CR 05-482 (C.D. Cal. May 20, 2005) (asserting that the subsidiary was the agent of the parent).

[342] In fact, under the FCPA a parent company may be liable for the actions of the subsidiary, despite the absence of direct subsidiary liability. Brown, *supra* note 32, at 2.

[343] *See, e.g.*, Plea Agreement at 1–3, United States v. DPC (Tianjin) Co., No. CR 05-482 (C.D. Cal. May 20, 2005) (agreeing to plead guilty for violating the FCPA by allowing its foreign subsidiary to make improper payments); Diagnostic Prod. Corp., Exchange Act Release No. 51724 (May 20, 2005), http://www.sec.gov/litigation/admin/34-51724.pdf (finding the company in violation of FCPA because of improper payments made by its Chinese subsidiary); Syncor Int'l Corp., Exchange Act Release No. 46979 (Dec. 10, 2002), http://www. sec.gov/litigation/admin/34-46979.htm (assigning liability to Syncor International for payments that Syncor Taiwan made to physicians employed by hospitals owned by the legal authorities in Taiwan in exchange for their referrals of patients to medical imaging centers owned and operated by the defendant).

b. Non-U.S. Subsidiaries Under the Accounting Provisions. As discussed above in Part II.D.*1*, the accounting provisions are more specific with respect to the parent-company responsibility for non-U.S. subsidiaries. They provide that if the issuer holds 50% or less of the voting power with respect to the subsidiary firm, then the issuer must "proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances," to cause the subsidiary firm to comply with the FCPA books and records and internal accounting controls provisions.[344] Thus, compliance with the FCPA requirement is presumed if the issuer uses "good faith efforts to use such influence."[345] This standard notwithstanding, it is possible for courts to pierce the corporate veil and determine that "the parent so dominated the affairs of the subsidiary that the subsidiary is . . . [a] mere 'alter ego' of the parent."[346]

Now, however, the SEC appears to be willing to prosecute cases in which the parent's involvement in the affairs of the subsidiary falls far short of domination. For example, if the U.S. company consolidates the financial statements of its subsidiaries, and if a "subsidiary improperly recorded payments in its financial statements," that may violate the books and records obligations of the U.S. parent.[347] In addition, non-U.S. subsidiaries and joint ventures of U.S. companies present FCPA issues when there are U.S. persons on their boards of directors. In the current enforcement environment, such persons are at "tremendous risk" of FCPA liability if they are aware of corruption.[348]

3. Direct Enforcement Against Non-U.S. Persons. In the past few years, the DOJ and SEC have also been "extending [their] reach to sweep foreign citizens [and companies] into [their] net"[349] directly. In 2006, the DOJ took criminal action against a non-U.S. issuer for an FCPA violation for the first time with its prosecution

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[344] 15 U.S.C. § 78m(b)(6) (2006). The FCPA goes on to explain that "[s]uch 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." *Id.*

[345] *Id.*

[346] Brown, *supra* note 32, at 21.

[347] Lindsey, *supra* note 158, at 965 (citing Dow Chem., Exchange Act Release No. 12567 (Feb. 13, 2007), http://www.sec.gov/litigation/admin/2007/34-55281.pdf).

[348] Abikoff, *supra* note 30, at 10.

[349] Lowenfels & Bromberg, *supra* note 126.

of Statoil ASA for improper payments to Iranian officials.[350] In recent years, enforcing the FCPA against non-U.S. issuers or individuals is becoming more and more common. As discussed above, the SEC and DOJ have recently pursued actions against Snamprogetti (Italy), Netherlands B.V. (Netherlands), Alcatel-Lucent (France), Technip SA (France), Siemens AG (Germany), Daimler AG (Germany), and BAE Systems PLC (U.K.).[351] In fact, 2010 actions were dominated by non-U.S. companies.[352]

Non-U.S. natural persons are also being charged. For example, in July 2009 the DOJ charged Ousama Naaman, a Canadian national who was a resident of the United Arab Emirates and arrested in Germany, with "conspiracy to defraud the [UN] Oil for Food Program . . . and to bribe Iraqi government officials in connection with the sale of a chemical additive used in the refining of leaded fuel."[353] His FCPA violation is alleged to have been "on behalf of a publicly traded U.S. chemical company and its subsidiary."[354] In 2009, the DOJ brought charges against two U.K. citizens, Jeffrey Tesler and Wojciech Chodan, in connection with the Halliburton/KBR action.[355] The DOJ and SEC interpret the FCPA to apply to foreign persons in many circumstances.

Some of the FCPA actions against non-U.S. persons are based on broad assertions of jurisdiction. The DOJ and SEC have claimed jurisdiction over foreign issuers, and certain of their officers and employees, if the foreign issuers transfer money

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[350] *See* Statoil, ASA, Exchange Act Release No. 54599 (Oct. 13, 2006), http://www.sec.gov/litigation/admin/2006/34-54599.pdf (explaining FCPA charges for improper payments to Iranian officials).

[351] Thomas Catan, *Technip to Pay $338 Million to Settle U.S. Bribe Charges*, WALL ST. J., June 29, 2010, at B4 ("Technip joins a growing list of foreign companies hit with substantial fines for allegedly violating U.S. antibribery laws.").

[352] *See* SHEARMAN & STERLING, *supra* note 159, at v ("[*A*]*ll* of the FCPA enforcement actions announced to date in 2010 have involved non-U.S. Companies."); *In New Top Ten, Eight Are Foreign*, *supra* note 22 (noting that of the top ten FCPA-related settlements of all time, eight are from 2010 and eight are from non-U.S. companies).

[353] Press Release, U.S. Dep't of Justice, Canadian National Charged with Foreign Bribery and Paying Kickbacks Under the Oil for Food Program (July 31, 2009), http://www.justice.gov/opa/pr/2009/July/09-crm-757.html.

[354] *Id.*

[355] Press Release, U.S. Dep't of Justice, Two UK Citizens Charged by United States with Bribing Nigerian Government Officials to Obtain Lucrative Contracts as Part of KBR Joint Venture Scheme (Mar. 5, 2009), http://www.justice.gov/opa/pr/2009/March/09-crm-192.html.

through the United States. For example, in the 2008 case against Christian Sapsizian, the Alcatel executive charged with FCPA violations in connection with illegal payments in Costa Rica, the DOJ asserted jurisdiction based on the fact that Alcatel had registered and traded ADRs on the New York Stock Exchange,[356] and on the fact that the questionable payments were made using a wire transfer from Europe to Costa Rica that passed through Miami.[357] In the investigation into the U.K. company BAE Systems PLC, the DOJ asserted jurisdiction based on the suspicion that the bribes had been routed through U.S. banks.[358] In May 2010, the DOJ asked a federal court to stay a civil suit filed by Aluminum Bahrain B.S.C. (Bahrain) against trading company Sojitz Corporation (Japan)[359] because of the DOJ's pending FCPA probe of both parties.[360] In that case, the DOJ is asserting jurisdiction based on allegations that the alleged bribes "enhance[ed] [Sojitz's] position in the U.S. aluminum market."[361]

As currently applied, the FCPA reaches non-U.S. agents and employees of domestic concerns, and U.S. nationals living anywhere in the world, even if they have very little contact with the United States.[362] Since the 1998 amendments asserting jurisdiction over both U.S. and non-U.S. persons who commit violations while in U.S. territory, the DOJ has used the FCPA to

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[356] DOJ Alcatel Press Release, *supra* note 184 ("Alcatel was a French telecommunications company whose American depository receipts were traded on the New York Stock Exchange.").

[357] *See* Complaint at 2–6, United States v. Sapsizian, No. 06-3314-PRP (S.D. Fla. Dec. 5, 2006), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/docs/12-05-06sapsizian-complaint.pdf (describing the transfers).

[358] *See British Court Endorses Appeal in BAE Corruption Inquiry*, N.Y. TIMES (Apr. 24, 2008), http://www.nytimes.com/2008/04/24/business/worldbusiness/24iht-24bae.12311959.html (discussing the British court's decision to hear the BAE corruption case on appeal).

[359] Aluminum Bahrain B.S.C. v. Sojitz Corp., No. 4:09-cv-0432 (S.D. Tex. Dec. 18, 2009).

[360] *See* Yin Wilczek, *DOJ, in Surprising Detail, Asks to Intervene in Parties' Lawsuit, Citing FCPA Investigation*, 42 Sec. Reg. & L. Rep. (BNA) No. 23, at 1093, 1093 (June 7, 2010).

[361] Evan Perez, *U.S., Investigating Sojitz, Asks Court to Halt Bahrain's Civil Case*, WALL ST. J. (May 29, 2010), http://online.wsj.com/article/sb10001424052748703630304575270981375153068.

[362] *See* Lawrence B. Pedowitz et al., *Amendments to the FCPA for More Honest Competition Overseas*, BUS. CRIMES BULL., Mar. 1999, at 1 (explaining that U.S. companies are liable for the actions taken by their agents abroad under a principle of vicarious liability, regardless of the nationality of the agent).

prosecute non-U.S. persons who are neither U.S. residents nor doing business in the United States.[363]

As suggested above, the DOJ has also indicated that it could have jurisdiction over acts (and those who authorize those acts) that occur outside the United States based on their effects in the United States.[364] As a result of "the government's willingness to extend the extraterritorial reach of the statute, companies and individuals that often believe they are not subject to U.S. law find themselves under investigation in the United States."[365]

4. Prosecuting the Foreign Officials Themselves. The final striking development with respect to expansion by the DOJ and SEC of the jurisdictional reach of the FCPA is recent efforts to prosecute the foreign officials themselves. The FCPA explicitly covers the actions of the makers of the improper payments, and as discussed above, there has been considerable expansion in the interpretation of which persons are covered.[366] The DOJ and SEC have recently begun to prosecute the receivers of improper payments.

Such persons cannot be prosecuted under the FCPA itself, so the DOJ is using other laws, such as anti-money laundering statutes, to bring charges.[367] For example, on June 1, 2010, Robert Antoine, a former official of Telecommunications D'Haiti (Haiti

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[363] Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 AM. J. COMP. L. 593, 603–04 (2002). Note, however, that foreign officials who receive bribes from U.S. persons can neither be prosecuted under the FCPA, nor for conspiracy to violate the FCPA. *See, e.g.*, United States v. Blondek, 741 F. Supp. 116, 119–20 (N.D. Tex. 1990) (refusing to allow prosecution of foreign officials for FCPA violations or conspiracy to violate the FCPA). Thus, there is arguably no necessary territorial nexus between a corrupt act and the United States under the FCPA. *See* 15 U.S.C. §§ 78dd-1(g), -2(i) (2006) (providing alternative bases of jurisdiction for issuers and domestic concerns).

[364] DON ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT § 4:4.4, at 4–29 (1995). In some cases, it seems as though the DOJ is enforcing the FCPA regardless of whether any means of interstate commerce was used. *See* 15 U.S.C. §§ 78dd-1(g), -2(i) (explaining alternative bases of jurisdiction); *see also* Schroth, *supra* note 363, at 603 (explaining the minimal contact with the United States needed for prosecution under the FCPA).

[365] Lindsey, *supra* note 158, at 962.

[366] *See supra* Part IV.D.*3.*

[367] *See* Yin Wilczek, *Court Sentences Ex-Haiti Telecom Official to 48 Months in Jail over Bribery Scheme*, 42 Sec. Reg. & L. Rep. (BNA) No. 23, at 1108, 1108 (June 7, 2010) ("Prosecutors are pursuing foreign officials under the money laundering statute because foreign officials cannot be prosecuted under the [FCPA].").

Teleco), was sentenced to forty-eight months in prison for money laundering in connection with a scheme in which he took bribes from three U.S. telecommunications companies that sought access to Haiti Teleco.[368] Several other Haiti Teleco officials are also being prosecuted in the United States.[369] Similarly, following the conviction in January 2010 of Gerald and Patricia Green for bribing an official of the Tourism Authority of Thailand, the United States unsealed an indictment against Juthamas Siriwan, the former Thai Tourism Authority official, and her daughter, charging them with money laundering and conspiracy relating to the transportation of the bribes across state lines.[370] Practitioners have identified such prosecution of foreign officials as a "significant development, which both builds on and is contrary to previous FCPA practice."[371]

E. MUCH HEAVIER PENALTIES

1. Fines.[372] Over the past several years, the severity of FCPA fines[373] (or, more usually, settlements) has increased enormously.

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[368] *See id.* (describing Antoine's sentence).

[369] *See* Press Release, U.S. Dep't of Justice, Former Haitian Government Official Sentenced to Prison for His Role in Money Laundering Conspiracy Related to Foreign Bribery Scheme (June 2, 2010), http://www.justice.gov/opa/pr/2010/June/10-crm-639.html.

[370] TARUN, *supra* note 17, at 3; SHEARMAN & STERLING, *supra* note 159, at xi.

[371] SHEARMAN & STERLING, *supra* note 159, at x.

[372] As discussed above in Part IV.B, prison sentences for individuals convicted of FCPA violations have also increased, with a record setting eighty-seven-month sentence handed out in June 2010. *See supra* note 200 and accompanying text.

[373] Under the Act, criminal penalties for corporations can include fines of up to $2 million for each FCPA anti-bribery violation. *See* 15 U.S.C. §§ 78dd-2(g)(1)(A), 78ff(c)(1)(A) (2006). Accounting provision violations may trigger fines up to $25 million. *See* 15 U.S.C. § 78ff(a) (providing limit of $5 million for natural persons and $25 million for persons other than natural persons). Individuals may face criminal penalties of up to $100,000 and imprisonment for up to five years for violations of the anti-bribery provisions. 15 U.S.C. §§ 78dd-2(g)(2)(A), -3(e)(2)(A), 78ff(c)(2)(A). Individual fines may reach up to $5 million and imprisonment for up to twenty years for each accounting provision violation. *See* 15 U.S.C. § 78ff(a) (limiting fines imposed on natural persons to $5 million). Maximum penalties were raised to these levels by SOX. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1106, 116 Stat. 745, 810 (2002). Moreover, under the Alternative Fines Act, the actual fines may be much higher, up to twice the benefit the defendant sought to obtain by making the corrupt payment. U.S. DEP'T OF JUSTICE, *supra* note 338, at 5.

Civil actions can give rise to penalties "for a fine of up to $10,000 against any firm as well as any officer, director, employee, or agent of a firm, or stockholder acting on behalf of the firm, who violates the anti-bribery provisions." *Id.*

As mentioned in Part I above, 2008 and 2009 saw record-setting settlements with Siemens AG ($800 million) and Halliburton/KBR ($579 million). 2010 saw an increase in the number of "mega settlements,"[374] including BAE Systems PLC ($400 million), Technip ($400 million), Daimier AG ($200 million), Alcatel-Lucent ($200 million), and Snamprogetti/ENI ($330 million).[375]

During the first thirty years of the FCPA, the penalties assessed were significantly smaller. Even the (then) stunning penalties imposed in 2007 on U.S. oilfield services provider Baker Hughes Inc. for alleged improper payments in Kazakhstan ($44 million)[376] and three wholly owned subsidiaries of Vetco Gray International for payments to Nigerian Customs Services officials ($26 million),[377] and the 2005 penalty paid by Titan Corporation for campaign contributions to the president of Benin ($28.5 million),[378] are dwarfed by recent settlements. Each of 2007,[379] 2008, 2009, and 2010 have been record enforcement years for the FCPA.[380]

2. Disgorgement, Deferred Prosecution Agreements, and Monitors. One reason that recent enforcement actions have resulted in such large numbers is that FCPA settlements increasingly require disgorgement and deferred prosecution agreements with monitors.[381] Disgorgement is a new development: In addition to fines, a company is now often required "to disgorge

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> [I]n an SEC enforcement action, the court may impose an additional fine not to exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violation, or (ii) a specified dollar limitation . . . based on the egregiousness of the violation, ranging from $5,000 to $100,000 for a natural person and $50,000 and $500,000 for any other person.

Id. Other potential penalties include civil injunctions against domestic concerns, deferred prosecution agreements with the DOJ, disgorgement of profits, and debarment or suspension from various government agencies and contracts. *See* Dworsky, *supra* note 75, at 689–90 (listing potential penalties).

374 TARUN, *supra* note 17, at 2.

375 *See* SHEARMAN & STERLING, *supra* note 159, at viii.

376 *See* Press Release, U.S. Dep't of Justice, *supra* note 22.

377 Vetco Press Release, *supra* note 183.

378 Low et al., *supra* note 130, at 742.

379 *See* Sokenu, *supra* note 292, at 571 (discussing enforcement in 2007).

380 *See supra* Part I.

381 *See* Krakoff et al., *supra* note 77, at 4 (noting that the government's requirement of compliance monitors "carries significant costs for FCPA violators"). Companies may also face debarment from government contracting. *Id.* at 3.

the profits it received from having procured a contract by making a corrupt payment."[382] This can be a large amount of money. For example, in the Baker Hughes case, over half of the monetary penalty came from the disgorgement of profits.[383]

Also, instead of requiring a company to plead guilty, the DOJ increasingly uses deferred prosecution agreements.[384] For example, Flowserve Corporation was charged with FCPA violations in connection with its participation in the OFFP.[385] In February 2008, Flowserve agreed to pay $7 million in fines to the SEC and the DOJ, as well as $3.5 million in disgorged profits, and it entered into a deferred prosecution agreement.[386] Under that agreement, Flowserve will implement enhanced compliance policies and procedures and, if it follows the terms of the agreement for three years, the criminal information against it will be dropped.[387] The deferred prosecution enables the company "to avoid costly litigation and bad press."[388]

During the period of deferred prosecution,[389] a monitor may be appointed[390] "to review the internal workings of the company to see how anti-corruption training and procedures are being

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[382] Abikoff, *supra* note 30, at 7.

[383] *See* Press Release, U.S. Dep't of Justice, *supra* note 22 (breaking down the penalty amounts).

[384] Schmidt, *supra* note 14, at 1132 & n.80 (noting the increase in the use of deferred prosecution agreements and listing companies that have entered into such agreements). The SEC is also now "armed" with the authority to enter into deferred prosecution agreements. *FCPA Investigations—The Pitfalls and the Pendulum*, *supra* note 193, (remarks by Cheryl Scarboro, Chief of the SEC's FCPA Unit) (noting new powers for the SEC).

[385] Press Release, U.S. Dep't of Justice, *supra* note 145.

[386] *Id.*

[387] *Id.*

[388] Schmidt, *supra* note 14, at 1132.

[389] A deferred prosecution agreement usually lasts from three to five years. Abikoff, *supra* note 30, at 10 ("[T]he DOJ has been using the technique of deferred prosecution agreements that last from three to five years.").

[390] For example, compliance monitors were appointed in the cases of Willbros Group, AGA Medical Corporation, and Faro Technologies. *See* Press Release, U.S. Dep't of Justice, Willbros Group Inc. Enters Deferred Prosecution Agreement and Agrees to Pay $22 Million Penalty for FCPA Violations (May 14, 2008), http://www.justice.gov/opa/pr/2008/May/08_crm_417.pdf; Press Release, U.S. Dep't of Justice, *supra* note 182; Press Release, U.S. Dep't of Justice, Faro Technologies Inc. Agrees to Pay $1.1 Million Penalty and Enter Non-Prosecution Agreement for FCPA Violations (June 5, 2008), http://www.justice.gov/opa/pr/2008/June/08-crm-505.html.

implemented within the company."[391] A monitor is an external person who often sits on the board of the company.[392] Monitors report directly to the government, have the power to influence company policies and practices,[393] and are frequently costly.[394] Although penalties under the FCPA steadily increased in the first thirty years of the FCPA,[395] the level and nature of the fines and other measures imposed by FCPA enforcement in the last three years has been very different.

The increasing level of FCPA penalties has attracted criticism. One commentator noted that "companies find themselves getting extorted in foreign lands, only to get extorted again by Washington."[396] Others have alleged that the government continues to prosecute FCPA cases "for one very simple reason—it's lucrative."[397]

F. RESOURCES AND REORGANIZATION AT THE DOJ AND SEC

In August 2009, Robert Khuzami, Director of the SEC Division of Enforcement, announced a fundamental reorganization of the Division of Enforcement.[398] The SEC created five specialized units, including one that now focuses solely on the FCPA.[399] In a

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391 Abikoff, *supra* note 30, at 10.

392 Krakoff et al., *supra* note 77, at 4.

393 Pazanowski, *supra* note 150, at 1307.

394 Nathan Vardi, *The Bribery Law Racket*, FORBES, May 14, 2010, at 70, 72 (discussing the high costs of enforcement actions, including expensive government-mandated lawyers to monitor compliance).

395 Yannett, *supra* note 281, at 745.

396 Vardi, *supra* note 394, at 72.

397 Michael F. Perlis & Wrenn E. Chais, *Investigating the FCPA*, FORBES.COM (Dec. 8, 2009), http://www.forbes.com/2009/12/08/foreign-corrupt-practices-act-opinions-contributors-michael-perlis-wrenn-chais.html.

398 *See* John Herzfeld & Phyllis Diamond, *Khuzami Unveils Broad Reorganization of Enforcement Div'n, New Subpoena Powers*, 41 Sec. Reg. & L. Rep. (BNA) No. 32, at 1473, 1473 (Aug. 10, 2009) (noting plans to create five specialized units); Stephen Joyce, *Khuzami: New Processes, Structure Will Boost SEC Enforcement Abilities*, 42 Sec. Reg. & L. Rep. (BNA) No. 8, at 292, 292 (Feb. 17, 2010) (discussing Director Khuzami's speech about SEC progress implementing structural and organizational changes aimed at increasing its speed and strategic, smart, and successful use of resources).

399 *See* Robert Khuzami, Dir., Div. of Enforcement, Sec. & Exch. Comm'n, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009), http://www.sec.gov/news/speech/2009/spch080509rk.htm (noting that the FCPA unit will "focus on new and proactive approaches to identifying violations"); *see also* Herzfeld & Diamond,

speech to the New York Bar Association, Khuzami stated that more needed to be done to enforce the FCPA, and that SEC staff would be able to move faster on FCPA prosecutions.[400]

The expansion of the SEC's FCPA enforcement activities has been facilitated by increases in SEC budgets after accounting scandals at companies like Enron and WorldCom.[401] Some reports claim that the SEC hired hundreds of employees to enforce corporate compliance cases.[402]

Corporate compliance has become a heightened, and public, priority at the DOJ and FBI, too. The DOJ is committing more resources to FCPA enforcement.[403] In addition, a dedicated FBI unit, including eight full-time FBI investigators, has been tasked with FCPA violations.[404]

The growth in the number of federal personnel tasked with FCPA enforcement has made increased enforcement not only possible, but almost required, by the agencies involved.[405] A

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supra note 398, at 1473 (noting Director Khuzami's intention to establish five "specialized units" including an FCPA unit).

[400] *See* Khuzami, *supra* note 399 ("[S]taff will no longer have to obtain advance Commission approval in most cases to issue subpoenas; instead, they will simply need approval from their senior supervisor.").

[401] Giraudo, *supra* note 272, at 146. Between the passage of SOX in July 2002 and May 2004, Congress dramatically increased the SEC budget. *See id.* (explaining that Congress "more than doubled the SEC's budget"); *see also Fiscal 2005 Appropriations Request for the U.S. Securities and Exchange Commission: Hearing Before the Subcomm. on Commerce, Justice, State, and the Judiciary of the H. Comm. on Appropriations*, 108th Cong. (2004) (statement of William H. Donaldson, Chairman, U.S. Sec. & Exch. Comm'n), *available at* http://www.sec.gov/news/testimony/ts033104whd.htm (explaining that, because of budget increases from Congress in 2003, the Agency hired 847 new employees).

[402] Reisinger, *supra* note 130, at 74 (noting the "addition of 700 staffers to help enforce compliance laws"); *FCPA Investigations—The Pitfalls and the Pendulum*, *supra* note 193 (remarks by Cheryl Scarboro, Chief of the SEC's FCPA Unit) (estimating that there are between thirty and thirty-five SEC attorneys nationwide who are part of the FCPA Unit).

[403] Armas, *supra* note 70, at 37 (citing *FCPA Enforcement: Top Ten Trends for 2009*, WRAGEBLOG (Jan. 28, 2009), http://wrageblog.org/2009/01/28/fcpa-enforcement-top-tentr ends-for-2009/); *FCPA Investigations—The Pitfalls and the Pendulum*, *supra* note 193 (remarks by Jonathan Barr, Partner, Baker Hostetler) (noting that the DOJ has its own FCPA unit, for which it has hired additional trial attorneys, backed up by a new FBI FCPA squad).

[404] *Id.*; *see also* Reisinger, *supra* note 130, at 74 (explaining how the FBI "added a special four-person unit just to handle FCPA probes").

[405] Daniel Levin & Benjamin Kwak, *U.S. Authorities Possess Tools, Motivation to Continue to Push the Envelope in Investigating and Prosecuting Financial Crimes*, 42 Sec. Reg. & L. Rep. (BNA) No. 42, at 1058, 1060 (May 31, 2010) (noting the pressure on new personnel to

similar phenomenon was noted in the 1990s with respect to environmental enforcement: the EPA and the DOJ focused on environmental enforcement, measuring success on the basis of convictions and penalties.[406] The agencies then used those statistics to obtain a larger budget and hire more prosecutors. Such " 'new hires' must create still more prosecutions, feeding the vicious cycle that leads to next year's enforcement report and budget request."[407]

V. UNCERTAINTY AND THE LACK OF GUIDANCE

A. INCREASING AND UNRULY ENFORCEMENT TAKES A TOLL

Enforcement is transforming the FCPA. Unfortunately, neither Congress, nor the Judiciary, nor the Executive Branch has provided much of an explanation of what the law now requires. What little guidance exists comes from FCPA Opinion Procedure Releases and fully litigated cases, both rare.[408] To add to the uncertainty, the number of new personnel working in FCPA enforcement means that the Act will continue to be vigorously enforced.[409]

Of course, enforcement of a U.S. law to decrease global corruption is a good thing.[410] However, for purposes of the development of the law, and the ability of the persons subject to the law to comply, the expansion of the FCPA has been unruly. It

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bring cases to justify their existence, in addition to public and political pressure for prosecutions).

[406] *See* discussion *infra* Part VI.B. This should be distinguished from measuring success based on improvements in the environment.

[407] *Regulation Fair Warning Act: Hearing on H.R. 3307 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 104th Cong. 38 (1996) (statement of Roger J. Marzulla, Former Assistant Att'y Gen., Environment & Natural Resources Division, U.S. Dep't of Justice).

[408] *See* Giraudo, *supra* note 272, at 142 ("There is very little case history involving the accounting provisions of the FCPA [because] [u]sually cases . . . have been resolved prior to trial through settlement.").

[409] *See* Levin & Kwak, *supra* note 405 (explaining the increased personnel and the corresponding increase in enforcement).

[410] *But see* Gideon Parchomovsky & Peter Siegelman, *Bribes vs. Bombs: A Study in Coasean Warfare*, 29 INT'L REV. L. & ECON. 179, 179–81 (2009) (arguing that bribery may be an effective means of resolving disputes).

is not currently clear to anyone (attorneys, academics, businesses, even some regulators) what the FCPA covers and how to comply with it. Most particularly, it is not clear how to design a compliance program.[411] The need for guidance for compliance programs was persuasively laid out by James Doty, the former General Counsel of the SEC, in a 2007 article arguing for a "Reg FCPA":[412]

> The policy issue before us in the FCPA area is not whether the cases that are being charged and prosecuted can be brought consistent with the standards of the statute; rather, the issue is whether our law enforcement agencies should be left to devise their own, case-by-case interpretation of the FCPA, without the rigor of greater regulatory clarity and the benefits of more consistent administrative interpretation.[413]

In the intervening years, enforcement has surged, uncertainty has increased, and the DOJ and SEC have provided no additional guidance.

B. LACK OF LEGISLATIVE OR JUDICIAL GUIDANCE

The FCPA imposes uncertain liabilities, not least of all compliance costs, because the law, as written, does not adequately address many questions raised by contemporary business practice. As noted, the FCPA was last amended in 1998.[414] Global business, and the corporate compliance environment, have changed substantially since then. An entirely new law is not necessary; the framework of the FCPA appears sound. Indeed, as also discussed above, the FCPA has inspired the OECD and other conventions,

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411 Michael E. Clark, *Complying with the FCPA in Emerging Markets after SOX*, BUS. CRIMES BULL., Oct. 2007, at 1 (2007) (noting some of the factors that make FCPA compliance increasingly difficult).

412 Doty, *supra* note 27, at 1233, 1238–39.

413 *Id.* at 1233–34 (recommending that the SEC create a "Reg. FCPA" to bring clarity and consistency to FCPA interpretation and enforcement).

414 *See supra* notes 49–52 and accompanying text (discussing the 1998 amendments).

and domestic legislation around the world.[415] However, the FCPA needs to evolve in response to its environment. While such evolution need not be legislative, it needs to be done somehow.

Similarly, the practical meanings of the FCPA—what must a company do to ensure that its affiliated companies, its employees, and the company itself stay out of trouble?—are not clarified by the courts simply because there are few judicial opinions that review its provisions. In the "vast majority" of FCPA cases, the company settles with the DOJ or the SEC or both.[416] "Practically all" SEC enforcement actions for violations of the accounting provisions have been resolved through the consent process,[417] and nearly two-thirds of DOJ anti-bribery cases against individuals are settled with guilty pleas.[418] "In fact, no business entity has publicly challenged either enforcement agency in an FCPA case in the last twenty years."[419] Corporate settlements reached through deferred prosecution agreements and non-prosecution agreements are subject to little or no judicial scrutiny, respectively, and therefore the DOJ and SEC's aggressive enforcement theories have not been meaningfully reviewed.[420] Even the FCPA trials of individuals in 2009[421] were not enough to clarify the Act, and

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[415] *See supra* note 47 and accompanying text.

[416] Stuart H. Deming, *The Potent and Broad-Ranging Implications of the Accounting and Record-Keeping Provisions of the Foreign Corrupt Practices Act*, 96 J. CRIM. L. & CRIMINOLOGY 465, 500–01 (2006); Vega, *supra* note 133, at 443. *But see generally* Indictment, United States v. Kozeny, 664 F. Supp. 2d 369 (S.D.N.Y 2009) (No. 05-CR-518), 2009 WL 3149538; *Kozeny*, 664 F. Supp. 2d at 371, 397 (resulting in a criminal conviction for a scheme to bribe senior government officials in Azerbaijan).

[417] Marc I. Steinberg & Ralph C. Ferrara, 25 SECURITIES PRACTICE: FEDERAL AND STATE ENFORCEMENT § 2:31 (Supp. 2008). *But see* SEC v. World-Wide Coin Invs., Ltd., 567 F. Supp. 724 (N.D. Ga. 1983), the first fully litigated case based on violations of section 13(b)(2).

[418] *See 2008 Mid-Year FCPA Update*, GIBSON DUNN (July 7, 2008), http://www.gibsondunn.com/Publications/Pages/2008Mid-YearFCPAUpdate.aspx (indicating that 62% of cases are resolved by a guilty plea). This is not unusual in the overall context of fraud cases. The Corporate Fraud Task Force formed by President Bush in 2002 studied hundreds of corporate fraud convictions, 75% of which came from plea deals. Daphne Eviatar, *What's Behind the Drop in Corporate Fraud Indictments?*, AM. LAW. (Nov. 1, 2007), http://www.law.com/jsp/cc/PubArticlecc.jsp?id=1193821429242.

[419] Koehler, *supra* note 27, at 406 (citing FCPA BLOG, http://www.fcpablog.com, also written by Professor Koehler).

[420] *Id.*

[421] Frederic Bourke and Gerald and Patricia Green went to trial in the summer of 2009.

demonstrated that "even judges remain fuzzy as to the dividing line between aggressive business conduct and conduct that violates the FCPA."[422]

Without judicial opinions to interpret the law, key aspects of the FCPA remain uncertain.[423] So, for example, the murky definition of "foreign official"[424] persists, with numerous recent cases using an evidently expanded understanding of the term, but without a legally authoritative articulation.[425]

C. SCANT AGENCY GUIDANCE

Procedures exist through which the DOJ and SEC can provide general FCPA interpretation and guidance.[426] Such procedures are largely unused. The last time the SEC devoted an Opinion Release to clarifying its interpretation of the FCPA was in 1981, when the agency explained that enforcement action would not be taken for minor or unintentional errors in books and recordkeeping.[427]

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[422] Koehler, *supra* note 27, at 409.

[423] Even if the number of litigated cases were to increase, it would still be a long time before key FCPA sections were clear.

[424] Cohen et al., *supra* note 173, at 1245.

[425] *See supra* Part IV.C.*1*.

[426] There are several DOJ memoranda addressing guidelines for prosecuting corporations. They apply generally, and include interpretations of good corporate citizenship in order to guide prosecutors. *See, e.g.*, Memorandum from Eric Holder, Deputy Att'y Gen., Dep't of Justice, to All Component Heads and U.S. Att'ys (June 16, 1999), http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.pdf; Memorandum from Larry D. Thompson, Deputy Att'y Gen., Dep't of Justice, to Heads of Dep't Components and U.S. Att'ys (Jan. 20, 2003), http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm; Memorandum from Paul J. McNulty, Deputy Att'y Gen., Dep't of Justice, to Heads of Dep't Components and U.S. Att'ys, http://www.usdoj.gov/dag/ speeches/2006/mcnulty_memo.pdf. The most recent of these is the so-called Filip Memorandum. Mark J. Stein & Joshua A. Levine, *The Filip Memorandum: Does It Go Far Enough?*, N.Y. L.J., Sept. 11, 2008, at 4 (discussing the Filip Memorandum). An analysis of these more general memoranda is outside the scope of this Article.

[427] Statement of Policy, Foreign Corrupt Practices Act of 1977, Exchange Act Release No. 17500, 21 SEC Docket 1466 (Jan. 29, 1981) (stating that enforcement action would not be taken for minor or unintentional errors and that substantial deference would be given to reasonable judgments made by management with respect to the appropriate accountability system for the enterprise). A 1999 SEC Staff Accounting Bulletin relating to the doctrine of materiality did discuss the reasonableness standard in the books and records provisions, which helped clarify those provisions. SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150, 45,153 (Aug. 12, 1999) (explaining, among other things, that "reasonable assurance"

Much of what little practical guidance exists has been generated through an administrative procedure, the DOJ FCPA Opinion Procedure Releases. As mentioned above, these are required by the FCPA statute,[428] and rules were promulgated in 1979 to provide for a release procedure whereby an issuer or domestic concern can "obtain an opinion of the Attorney General as to whether certain specified, prospective—not hypothetical—conduct conforms with the [DOJ's] present enforcement policy regarding the anti-bribery provisions of the Foreign Corrupt Practices Act . . . ."[429] To obtain such an FCPA Opinion Procedure Release, a company must make a formal inquiry, along with a complete and, where possible, documented description of the proposed conduct.[430] Within thirty days, the DOJ is required to say whether the agency would take enforcement action against the particular conduct described.[431] FCPA Opinion Procedure Releases resemble SEC no-action letters, which have long been used to provide guidance to the business and investment sectors.[432] The FCPA Opinion Procedure Releases are generally narrow, limited to the specific facts presented, and are not legally binding precedent.[433]

The DOJ issues just a few FCPA Opinion Procedure Releases a year (three in 2008, one in 2009, three in 2010) and has issued a total of only fifty-five releases to date.[434] As noted above in Part IV.C, the FCPA Opinion Procedure Releases in the past few years

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and "reasonable detail" are not based on a "materiality" analysis). However, this was a small part of a much larger release, which includes a significant definition of materiality.

[428] 15 U.S.C. §§ 78dd-1(e), -2(f) (2006).

[429] Foreign Corrupt Practices Act Opinion Procedure, 28 C.F.R. §§ 80.1–.16 (2009). If the DOJ states that the action described in the letter conforms to its enforcement policy, then any subsequent action brought under the FCPA anti-bribery provision is subject to a rebuttable presumption that the requestor's conduct complies with the FCPA. *Id.* § 80.10.

[430] *Id.* §§ 80.2, 80.6, 80.7.

[431] *Id.* §§ 80.6, 80.8.

[432] *See No Action Letters*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/answers/noaction.htm (last modified Mar. 3, 2005) (explaining that no-action letters clarify whether the SEC staff would recommend enforcement action based on the circumstances described in the requestor's letter).

[433] *See* 28 C.F.R. §§ 80.11, 80.13 (narrowing the scope and limiting the effect of the opinion).

[434] See *Opinion Procedure Releases*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/fraud/fcpa/opinion/ (last visited Oct. 10, 2010) and *Review Procedure Releases*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/fraud/FCPA/review (last visited Oct. 10, 2010) for links to these releases.

have offered disappointingly little guidance. In 2007 the DOJ did use FCPA Opinion Procedure Releases to clarify some of the requirements of the FCPA.[435] Both FCPA Opinion Procedure Release 2007-01 and Release 2007-02 included some steps companies may take to avoid FCPA liability in the context of travel and lodging expenses for foreign officials.[436] In addition, two of the 2010 Opinion Procedure Releases included lists of prior Opinion Procedure Releases that dealt with the concepts in question (foreign officials and charitable contributions).[437] These efforts notwithstanding, the procedure has been "under-utilized."[438] More importantly, Opinion Procedure Releases are too specific to resolve the current general uncertainty.

There has been little other guidance. In March 2008 the DOJ issued new guidelines relating to the use of internal compliance monitors.[439] In addition, there have been several general letters regarding corporate prosecutions.[440] Finally, there is a DOJ general compliance memorandum, the *Lay Person's Guide to the FCPA*,[441] but it functions as more of an introduction and is not intended to provide legal clarification.

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[435] U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT OPINION PROCEDURE RELEASE No. 07-01 (July 24, 2007), http://www.justice.gov/criminal/fraud/fcpa/opinion/2007/0701.pdf [hereinafter OPINION PROCEDURE RELEASE 07-01] (noting that actions in the letter fall within an affirmative defense); U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT OPINION PROCEDURE RELEASE NO. 07-02 (Sept. 11, 2007), http://www.justice.gov/criminal/fraud/fcpa/opinion/2007/0702.pdf [hereinafter OPINION PROCEDURE RELEASE 07-02] (explaining that the actions in the letter are exempt based on 15 U.S.C. § 78dd-2(c)(2)(A) (2006)).

[436] *See* OPINION PROCEDURE RELEASE 07-01, *supra* note 435 (listing steps taken by companies); OPINION PROCEDURE RELEASE 07-02, *supra* note 435 (same).

[437] *See* OPINION PROCEDURE RELEASE 10-02, *supra* note 274 (discussing charitable contributions); OPINION PROCEDURE RELEASE 10-03, *supra* note 259 (discussing foreign officials).

[438] Doty, *supra* note 27, at 1238 (speculating that the reasons may include "the time involved and the perceived risk to the companies seeking advice").

[439] Memorandum from Craig S. Morford, Acting Deputy Att'y Gen., to Heads of Dep't Components 2 (Mar. 7, 2008), http://www.usdoj.gov/dag/morford-useofmonitorsmemo-03072008.pdf.

[440] *See supra* Part IV.C.*2*.

[441] *See* U.S. DEP'T OF JUSTICE, *supra* note 338 (providing general guidance and explanation of the FCPA).

VI. OTHER INSTANCES OF LAWMAKING THROUGH ENFORCEMENT

A. AGENCY ACTION

It is not unprecedented for the Executive Branch to alter the impact of a statute using enforcement, or lack thereof. Generally, administrative agencies play a special role in government. They are intended to fill spaces where neither the judiciary nor the legislature can govern effectively.[442] Made up of more than just politicians, and able to work closely with the stakeholders in the regulated industry, "agencies are designed to be responsive to changing circumstances and innovate when necessary."[443] Nevertheless, agencies should serve the rule of law and respect the value of process.[444] To those ends, they should reduce, not increase, uncertainty about what the law requires.

At least as currently enforced, the requirements of the FCPA are unusually uncertain.[445] This section of the Article briefly describes other instances in which enthusiastic enforcement, or decisions not to enforce, by departments and administrative

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[442] *Cf.* WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES 21 (3d ed. 2006) (mentioning administrative agencies' role in the framework of separation of powers and calling them the "headless fourth branch").

[443] Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2015 (2009).

[444] *Cf.* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 150–52, 154–55 (1938) (discussing the administrative process, where agencies make and enforce rules subject to judicial review). Of course, there is a question regarding whether a dramatic change of policy regarding enforcement would violate due process because of the inadequate notice to the regulated entities and, in some cases, potential retroactive effects. It is also unclear whether agencies which implement such changes in enforcement have an obligation to explain the changes that differ from other types of notice they are required to provide. *See generally* FCC v. Fox Television Stations, 179 S. Ct. 1800 (2009) (holding that the FCC's change in enforcement of its expletives policy did not require explanation as long as it was not arbitrary or capricious). In addition, with respect to such an explanation or clarification, courts have yet to clearly establish the relevance and validity of political considerations as a basis for an agency policy change. Compare Antonin Scalia, *Two Wrongs Make a Right: The Judicialization of Standardless Rulemaking*, REGULATION, July–Aug. 1977, at 38, 40–41, *available at* http://www.cato.org/pubs/regulation/regu/nl/vlnl_6.pdf, with Ernest Gellhorn & Ellen Robinson, *Rulemaking "Due Process": An Inconclusive Dialogue*, 48 U. CHI. L. REV. 201, 250–51 (1981) for contrasting opinions on the involvement of politics in these decisions. These questions of administrative law and procedures, though important, are outside the scope of this Article.

[445] *See supra* Part V.

agencies have changed a legal environment.[446] Extensive changes in enforcement can and have transformed other areas of law.[447] As the next subparts show, however, in most instances of lawmaking through enforcement the regulated community has had more guidance than has been the case in recent years with regard to FCPA enforcement.

B. CRIMINAL ENFORCEMENT OF ENVIRONMENTAL LAWS

The criminal enforcement of environmental statutes, particularly against individuals, surged in the mid-1980s and early 1990s.[448] In the early 1990s, the DOJ pursued individuals in over half of its environmental criminal cases.[449] This represented a dramatic change from the days when environmental enforcement consisted almost exclusively of civil fines levied on companies.[450] As with the expansion of FCPA enforcement, the Environmental Protection Agency (EPA) enforcement increase was partially attributable to an increase in personnel and therefore in its "criminal investigative capacity."[451] In contrast to the increased FCPA enforcement, however, the increase in EPA enforcement was accomplished by clear legislative and administrative actions. The criminal provisions of the Resource Conservation and Recovery Act (RCRA),[452] the Clean Water Act,[453] and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[454] had all been added or strengthened in

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[446] To use a familiar analogy: the volume of cases affected makes this a "forest," instead of a cluster of unusual enforcement "trees."

[447] Such transformation is what distinguishes the current expansion of the FCPA, and the examples discussed below, from instances of simple prosecutorial discretion.

[448] *See* James R. Moore, *Environmental Criminal Statutes: An Effective Deterrent?*, *in* CRIMINAL ENFORCEMENT OF ENVIRONMENTAL LAWS 137, 139 (ALI-ABA Course of Study ¶ 10.776, 1992).

[449] Thomas J. Kelly, Jr. & Nancy A. Voisin, *Enforcement Trends*, *in* CRIMINAL ENFORCEMENT OF ENVIRONMENTAL LAWS, *supra* note 448, at 21, 27 (quoting former Chief of DOJ Environmental Crimes Section Joseph G. Block as having remarked, "jail is the one cost of business you can't pass on to the consumer").

[450] *See* Moore, *supra* note 448, at 140 (comparing those days to now, when "fines are bigger," jail time is a threat, and individuals are more likely to be charged).

[451] *Id.* at 139.

[452] 42 U.S.C. § 6928(d) (2006).

[453] 33 U.S.C. § 1319(d) (2006).

[454] 42 U.S.C. § 9603(b) (2006).

the 1980s.[455] In 1990, felony provisions were added to the Clean Air Act[456] and Congress enacted the Pollution Prosecution Act of 1990, which provided for a substantial increase in the number of criminal agents at the EPA.[457] Also in contrast to FCPA enforcement, many environmental law cases go to trial, which provides substantial judicial interpretation for companies and their counsel.[458] Finally, in July 1991 the DOJ issued an environmental enforcement policy document to provide "guidance to federal prosecutors in their exercise of prosecutorial discretion with regard to potential environmental criminal cases."[459] This document also served to inform companies and their counsel about which factors the DOJ would consider in deciding whether to prosecute.[460] There has been no such guidance in the FCPA context.[461]

C. THE FEDERAL COMMUNICATIONS COMMISSION POLICY REGARDING "FLEETING" EXPLETIVES

Another agency that recently changed a longstanding enforcement policy is the Federal Communications Commission (FCC). In 2004 the FCC bowed to increasing executive and

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[455] Kelly & Voisin, *supra* note 449, at 24.

[456] 42 U.S.C. § 7413(c) (2006).

[457] Kelly & Voisin, *supra* note 449, at 24 (noting that the Act would increase the number of investigators from 65 to 200). "The Pollution Prosecution Act also increases the number of civil investigators and establishes the National Training Institute to train federal, state and local lawyers, inspectors and technical experts in the enforcement of federal environmental laws." *Id.* at 24 n.5.

[458] For judicial interpretation of the required intent for various environmental laws, see United States v. Dee, 912 F.2d 741, 745 (4th Cir. 1990); United States v. Hoflin, 880 F.2d 1033, 1038 (9th Cir. 1989); United States v. Greer, 850 F.2d 1447, 1452 (11th Cir. 1988); and United States v. Frezzo Bros., 546 F. Supp. 713, 720–21 (E.D. Pa. 1982), *aff'd*, 703 F.2d 62 (3d Cir. 1983).

[459] Moore, *supra* note 448, at 143 (referring to a DOJ memorandum entitled "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator," http://www.justice.gov/enrd/3058.htm).

[460] Moore, *supra* note 448, at 143 (listing measures that criminal prosecutors should consider).

[461] *But see supra* note 426 and accompanying text (citing DOJ memoranda with guidelines for prosecuting corporations).

congressional pressure[462] and changed its enforcement policy to impose fines on broadcasters for airing "fleeting" expletives.[463] Although the FCC had been allowing such language for nearly thirty years, it changed its policy and began sanctioning isolated uses of sexual and excretory words.[464] The reasons for the change were varied, but likely included the public pressure that the FCC had received following several high-profile incidents of vulgar language on television.[465]

In its review of the change of policy, the Second Circuit found that the FCC had not presented a reasoned explanation for the change, and struck down the new FCC policy[466] using section 706 of the Administrative Procedure Act.[467] Section 706 provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[468]

In *FCC v. Fox Television Stations, Inc.*, however, the Supreme Court reversed the Second Circuit, and upheld the FCC's new enforcement policy.[469] The Court examined and accepted the FCC's justifications for the change, including "technological

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[462] *See* Stephen Labaton, *Powell to Step Down at F.C.C. After Pushing for Deregulation*, N.Y. TIMES, Jan. 22, 2005, at A1 (noting the FCC's aggressive enforcement period under Chairman Powell).

[463] *See* Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975, 4980 (2004) [hereinafter *Golden Globe Order*] (changing policy regarding fleeting expletives).

[464] 3 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 26:28 (2009) (citing Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007)).

[465] *See* Jim Rutenberg, *Few Viewers Object as Unbleeped Bleep Words Spread on Network TV*, N.Y. TIMES, Jan. 25, 2003, at B7 (discussing incidents during the Golden Globes and a football game); Kelefa Sanneh, *During Halftime Show, a Display Tailored for Video Review*, N.Y. TIMES, Feb. 2, 2004, at D4 (discussing a "wardrobe malfunction" during a Super Bowl halftime show).

[466] *Fox Television*, 489 F.3d at 458.

[467] Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701–706 (2006)).

[468] 5 U.S.C. § 706(2)(A) (2006).

[469] *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1819 (2009). The Court decided only the administrative law issue, and remanded the case back to the Second Circuit for consideration of the constitutional issue. *See id.* (remanding to determine whether the FCC policy violates the First Amendment). In July 2010, the Second Circuit deemed the new FCC policy unconstitutional. Fox Television Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010).

advances" and a desire to prevent more use of offensive language.[470] In the opinion, Justice Scalia held that an agency must recognize that it is changing policy, and found that the FCC had done so.[471] Thus, the FCC had given enough of a reasoned decision when changing the fleeting expletives policy to avoid being deemed "arbitrary and capricious" under the Administrative Procedure Act.[472]

And this is how the FCC decision to increase enforcement differs in a key respect from the increased enforcement under the FCPA: the FCC articulated its change. In 2004, the agency issued a number of orders explaining that it was modifying its past practice regarding fleeting expletives and would begin to sanction broadcasters for even one utterance of certain expletives.[473] In addition, Congress passed, and the President signed into law, stronger measures relating to broadcast indecency.[474]

D. FEDERAL ENERGY REGULATORY COMMISSION GUIDANCE

In 2005, in response to the Enron collapse and the California energy crisis, Congress passed the Energy Policy Act of 2005[475] which granted the Federal Energy Regulatory Commission (FERC) additional powers, including the power to determine remedies for violations of the statues, orders, rules, and regulations that FERC administers.[476] Shortly after receiving the new authority, FERC issued guidance on what constitutes an effective compliance

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[470] FCC v. Fox Television Stations, Inc., 129 S. Ct. at 1812–13.

[471] *Id.* at 1811–12.

[472] *Id.* at 1819; *see also* Albert W. Vanderlaan, Note, *Sending a Message to the Other Branches: Why the Second and Third Circuits Properly Used the APA to Rule on Fleeting Expletives and How the New FCC Can Undo the Damage*, 34 VT. L. REV. 447, 484 (2009) ("Justice Scalia and the four Justices who joined him believed that the arbitrary and capricious standard of the APA was indeed a low threshold for an independent agency to overcome.").

[473] *See Golden Globe Order*, *supra* note 463, at 4978–80 (discussing changes).

[474] *See* Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, § 2, 120 Stat. 491, 491 (2006) (strengthening broadcast indecency laws through, among other things, increasing penalties for obscene, indecent, and profane broadcasts).

[475] Energy Policy Act of 2005, Pub. L. No. 109-58, § 1284, 119 Stat. 594, 980 (2005).

[476] *Id.*

program.[477] Three years later, FERC promulgated a revised Policy Statement on Enforcement with additional guidance on compliance programs, including a detailed list of factors that FERC will consider when determining whether a penalty should be imposed against an organization.[478] Further, FERC has expanded its No-Action Letter Process,[479] provided an Enforcement Hotline,[480] and promised to hold workshops[481] "to provide additional guidance regarding the elements that FERC expects to see in 'vigorous compliance programs.' "[482]

E. SOME AGENCIES DO ALTER ENFORCEMENT WITHOUT NOTICE: ANTITRUST AND LABOR

There are, of course, other areas of law in which enforcement waxes and wanes according to national sentiment, the administration in the White House, or even specific persons in charge of the agency. For example, U.S. antitrust enforcement has increased noticeably in recent years. There has been a "breathtaking"[483] increase in the criminal penalties imposed for antitrust violations,[484] along with record levels of individual

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[477] FED. ENERGY REG. COMM'N, DOCKET NO. PL06-1-000, POLICY STATEMENT ON ENFORCEMENT 1 (Oct. 20, 2005) (discussing the factors that FERC will consider in determining remedies).

[478] FED. ENERGY REG. COMM'N, DOCKET NO. PL08-3-000, REVISED POLICY STATEMENT ON ENFORCEMENT 20–26 (May 15, 2008).

[479] *Enforcement: Staff Guidance, No-Action Letters*, FED. ENERGY REG. COMM'N, http://www.ferc.gov/enforcement/staff-guid/no-action-letters.asp (last modified July 22, 2010).

[480] *Enforcement: Staff Guidance, Enforcement Hotline*, FED. ENERGY REG. COMM'N, http://www.ferc,gov/enforcement/staff_guid.asp (last modified July 22, 2010).

[481] *See, e.g.*, *FERC: Calendar of Events*, FED. ENERGY REG. COMM'N, http://www.ferc.gov/EventCalendar/EventDetails.aspx?ID=4062&CalType=%20&CalendarID=116&Date=07/08-2008&View=Listview (last visited Sept. 29, 2010) (listing information regarding July 2008 compliance workshops).

[482] REBECCA WALKER, CONFLICTS OF INTEREST IN BUSINESS AND PROFESSIONS § 8:17 (2010).

[483] Lipsky, *supra* note 119, at 977.

[484] 2000–2008 total fines topped $2 billion. Scott Hammond, Deputy Asst. Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program, Speech Before the ABA Section of Antitrust Law 10–11 (Mar. 26, 2008), http://www.usdoj.gov/atr/public/speeches/232716.pdf; *see, e.g.*, Kevin O'Connor, Assoc. Att'y Gen., U.S. Dep't of Justice, Remarks Prepared for Delivery at Press Conference Regarding Air Cargo (June 26, 2008), http://www.justice.gov/

incarcerations.[485] Factors contributing to this increase include statutory penalties, revised Antitrust Guidelines, aggressive employment of investigative tools, assistance and coordination offered by foreign authorities, and increased presentation of collateral federal offenses.[486]

Much like the FCPA, the global antitrust enforcement surge has been fueled by new laws in a number of jurisdictions, combined with the emergence of a global support network for competition law enforcement, featuring over 100 bilateral and multilateral antitrust cooperation agreements.[487] Also like the FCPA, the current "intensification" and "forceful expansion" of global antitrust law enforcement has created unique challenges for regulators and businesses.[488] However, criticism of such changes in antitrust enforcement has been sharp.[489] It is not a model that the DOJ and SEC should adopt in the FCPA context.

Another agency known for substantial enforcement policy changes as a result of political circumstances is the National Labor Relations Board (NLRB). With each change of party in the White House, the NLRB has changed its agenda and level of enforcement, and, in some cases, the actual substance of its decisions.[490]

After the Clinton Administration, for example, the Bush II-era NLRB shifted and began seeking sharply fewer injunctions against

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archive/aag/speeches/2008/aag-speech-0806267.html (noting that total fines in air transportation industry had reached $1.2 billion).

[485] Hammond, *supra* note 484, at 3.

[486] *Id.* at 3–4.

[487] *See* Lipsky, *supra* note 119, at 971 ("As scores of new competition agencies have been created, and as literally thousands of new enforcement officials have received their commissions, the proliferating nodes of antitrust enforcement activity have evolved a wide variety of methods for cooperation and interaction—all in the name of more effective enforcement.").

[488] *Id.* at 965 (predicting that the surge of enforcement will create compliance challenges for business).

[489] *Cf.* 3 FREDERICK K. GRITTNER & MARK A. ROTHSTEIN, WEST'S FEDERAL ADMINISTRATIVE PRACTICE § 3001 (3d ed. 2002) ("[A]ntitrust law enforcement varies depending on the political party of the president then in office.").

[490] *See* Fisk & Malamud, *supra* note 443, at 2013, 2015 ("[The NLRB] has oscillated between extremes with every change of controlling political party . . . ."). This is made possible in part by the fact that it relies only on adjudication, instead of rulemaking, to set its priorities and policies. *Id.* at 2017.

unfair labor practices.[491] This reversal of policy was accomplished "through discretionary enforcement practice . . . entirely beyond the reach of judicial review and largely beyond the view of public or congressional oversight."[492] Now, however, the NLRB has pushed to apply the old rules to new activity.[493] Moreover, additional changes are expected under the Obama Administration, likely without additional rulemaking.[494] Like administrative enforcement of the FCPA, the NLRB strategy of aggressive and under-explained enforcement is not conducive to coherent policy and undermines the act in question.[495]

Of course, inadequate agency explanation of changes in interpretation or enforcement of other laws does not mean that the public does not need guidance on what the FCPA requires. Assuming they wish to provide guidance, agencies have a variety of tools at their disposal. Formal rulemaking processes, less formal guidance documents, or other such tools would facilitate FCPA compliance by the business community. Such

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[491] *Id.* at 2031.

[492] *Id.* In fact, the NLRB General Counsel had even issued a memorandum about the new enforcement policy of the Bush II Board which made no mention of such a shift in enforcement. Memorandum from Arthur F. Rosenfeld, Gen. Counsel, NLRB, to all Reg'l Dirs., Officers-in-Charge and Resident Officers, Utilization of Section 10(j) Proceedings (Aug. 9, 2002), http://www.nlrb.gov/shared_files/GC%20Memo/2002/gc02-07.html.

[493] Fisk & Malamud, *supra* note 443, at 2013, 2068–77. Two new areas include e-mail and union organization activity, Guard Publ'g Co., 351 N.L.R.B. 1110, 1110 (2007), and the application of labor law to graduate students and teaching assistants. Brown Univ., 342 N.L.R.B. 483, 483 (2004); N.Y. Univ., 332 N.L.R.B. 1205, 1205 (2000); Boston Med. Ctr. Corp., 330 N.L.R.B. 152, 152 (1999).

[494] David J. Murphy & Robert Bonsall, *The "New" Obama National Labor Relations Board: Attack, Retreat or Both*, *in* 38TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 261, 271 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. 802, 2009) (noting that the NLRB is expected to change the rules in many areas of labor law, including union recognition, employer–employee relations, and employee rights to act independently).

[495] *See, e.g.*, PRESIDENT'S COMM. ON ADMIN. MGMT., ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 36 (1937) (also known as THE BROWNLOW REPORT) (remarking that the mixture of executive and judicial functions of independent regulatory commissions create difficulties maintaining coherence across individual adjudications); Merton C. Bernstein, *The NLRB's Adjudication-Rule-making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 618 (1970) ("[A] rule will be a more compact, readily found, more easily mastered presentation than doctrine developed in scattered cases."); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 972 (1965) (suggesting that failure to employ rulemaking power may compromise an agency's purpose).

interpretations and implementation details can be enormously helpful to the public.[496] The expansion or alteration of existing legislation through uncoordinated and fact-specific enforcement actions that is taking place now is counterproductive. Although effective at energizing the business community, it is an unruly and uncertain method of regulation.

VII. CONCLUSION: TIME FOR REGULATION

Members of the business community and their counsel are struggling to adapt to the "new" FCPA. The U.S. Chamber of Commerce's Institute for Legal Reform has commissioned a paper arguing for changes to and clarifications of the Act.[497] The sheer volume of books and programs is striking.[498] As mentioned above in Part I, James Doty, former General Counsel of the SEC, argued back in 2007 that "[a]ggressive enforcement, based on an expansive interpretation of a vague statute, a little-used DOJ opinion process, and the temptation perhaps to assume that more draconian criminal enforcement is better, have all led to a lack of predictability in law enforcement and, in the author's view, some incorrect application of" the FCPA.[499] Nevertheless, companies are working to understand the new standards and to create effective compliance systems.

Which brings us to the central problem with the FCPA's current indefinite state: how to comply?[500] More specifically, and

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[496] *But see* Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 398–403 (2007) (arguing that more informal guidance documents impose distinctive losses on regulatory beneficiaries).

[497] ANDREW WEISSMANN & ALIXANDRA E. SMITH, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT (2010), *available at* http://www.jenner.com/files/tbl_s20Publications/RelatedDocumentsPDFs1252/3324/Restoring%20Balance_Proposed%20Amendments%20to%20the%20Foreign%20Corrupt%20Practices%20Act.pdf. The paper recommends that the FCPA be amended by, (1) adding a compliance defense; (2) limiting a company's liability for the prior actions of a company it has acquired; (3) adding a "willfulness" requirement for corporate criminal liability; (4) limiting a company's liability for acts of a subsidiary; and (5) defining a "foreign official" under the statute. *Id.* at 7, 11–27.

[498] There have been dozens of practitioner-oriented publications and presentations in the last few years. *See supra* note 13.

[499] Doty, *supra* note 27, at 1239.

[500] One strategy that has been suggested is to hire a former FCPA prosecutor when he or she leaves the government for private practice. When Mark Mendelsohn, who served more

practically, how to design a compliance program? Unless simple yet effective compliance programs can be easily implemented, there is little reason to believe the countless companies doing business transnationally will be able to ensure that their agents and subsidiaries comply with the Act. But, given the substantive uncertainty regarding key aspects of the law, there is no way to implement an "off the shelf" compliance program. Consequently, substantial official guidance is needed.

New authoritative guidance does not necessarily require congressional action.[501] In many regulated industries, the details of enforcement, and hence the real substantive "teeth" of the law, are left to the agencies to specify. The DOJ and SEC should clarify, in general terms that reflect the contemporary global business environment, what the FCPA requires. In April 2010, Stanley Sporkin, known as a "father of the FCPA" because of his instrumental role in its enactment, urged the SEC to develop a program to help companies avoid violations and develop better compliance programs in light of the increased prosecutions.[502]

While the DOJ and SEC can and should clarify the law, the FCPA Opinion Procedure Releases are not the best vehicle. Like no-action letters, FCPA Opinion Procedure Releases are by design particularistic rather than general, and reactive rather than standard-setting. What is needed here is something much more general and forward looking. Particularly useful would be official

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than five years as the DOJ deputy chief of the criminal fraud section, left government service, the competition to hire him was described as a "feeding frenzy . . . because the FCPA is particularly vague . . . [and] [i]t has been up to the Justice Department — and specifically to Mr. Mendelsohn — to interpret the law." Nathan Koppel, *Bribery Prosecutor to Join Firm*, WALL ST. J., Apr. 14, 2010, at B4.

[501] The Senate held a hearing on the enforcement of the FCPA on November 30, 2010. *See Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. (2010), http://judiciary.senate.gov/hearings/hearing.cfm?id=4869 (including the official hearing notice). The witness list included: (1) Greg Andres, Deputy Assistant Attorney General, Criminal Division, Department of Justice; (2) Mike Koehler, Assistant Professor of Business Law, Butler University; (3) Andrew Weissmann, Partner, Jenner & Block, LLP; and (4) Michael Volkov, Partner, Mayer Brown LLP. *Id.*

[502] *See* Malini Manickavasagam, *Sporkin Encourages SEC to Take Proactive Approach in Enforcing FCPA*, 42 Sec. Reg. & L. Rep. (BNA) No. 16, at 728, 728 (Apr. 19, 2010) (encouraging the SEC and DOJ to "fashion sanctions that deter future wrongdoing, without being oppressive").

clarification from the agencies that indicates what is acceptable ("safe harbor") conduct. In the FCPA context, such general guidance would allow companies to design business procedures that keep them within the law, as they operate through various associations in complex environments.

Whatever administrative form the DOJ or the SEC chooses, however, at least the following "top ten" questions should be addressed:

(1) Who is a foreign official under the FCPA?

(2) What constitutes an "agency or instrumentality" of a foreign government? Is a second tier (subsidiary of a subsidiary) entity still an agency or instrumentality? Is an entity that has been "bailed out" by a government an agency or instrumentality?

(3) Who is an officer or employee of a foreign government or of agency or instrumentality? Are all employees of state-owned enterprises foreign officials?

(4) Does "anything of value" include charitable contributions? Does anything of value include payments made to persons other than the foreign official?

(5) To what extent does securing an overall business advantage constitute "obtaining or retaining business" for purposes of the Act?

(6) What constitutes knowledge under the anti-bribery provisions? Is it constructive knowledge? Can it be satisfied by circumstantial evidence like the reputation of the intermediary or the country where business is being done?

(7) What kinds of facilitating payments would qualify for the "grease payments" exception to the Act?

(8) Can "reasonable and bona fide expenditures" include entertainment or travel not directly related to the business or product in question?

(9) When can the FCPA be used to prosecute a parent corporation for a subsidiary's anti-bribery violation?

(10) Can the FCPA be used to launch prosecution of the non-U.S. citizens who received the bribes themselves?

The FCPA, in its battle against global corruption and for clear accounting of corporate assets, is a law which is substantively well-suited to the challenges of the 2010s. However, used inconsistently, and developed on a case-by-case basis at incredible speed, the FCPA is a blunt and uneven tool. The SEC and the DOJ both have the authority and the knowledge to sharpen the tool, and should do so.