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Larry D. Thompson
University of Georgia School of Law, lthomps@uga.edu

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IN-SOURCING CORPORATE RESPONSIBILITY FOR ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT

Larry D. Thompson*

I. INTRODUCTION

The World Bank estimates that more than $1 trillion in bribes are paid each and every year to government officials who demand that they be given something extra simply for performing their public duties.1 Bribery supplants the rule of law with the rule of naked will—indeed, of naked greed—and turns many countries into kleptocracies.2 In the words of former Assistant Attorney General Lanny Breuer, “everyone—from the fruit stand owner in Tunisia, to the oil rig worker in Nigeria, to the punk rock musician in Russia—knows how pernicious corruption can be; and we in the United States are in a unique position to spread the gospel of anti-corruption, because there is no country that enforces its anti-bribery laws more vigorously than we do.”3 Former U.N. Secretary General Kofi Annan characterizes bribery as “an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organized crime, terrorism, and other threats to human security to flourish.”4 Public corruption “creates gaps in government structures that organized criminal groups and terrorist networks can exploit. In short, corruption is a ‘gateway crime.’”5 The problems of government and business corruption that are addressed by the Foreign Corrupt Practices Act (“FCPA”)6 therefore cannot be overstated.

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* Former Deputy Attorney General of the United States (2001–2003). The views and opinions set forth in this article are solely those of Mr. Thompson and not of any other person or organization. I am indebted to Charles J. Cooper and Brian S. Koukoutchos of Cooper & Kirk, PLLC for their assistance on this article. © 2014, Larry D. Thompson.


3. Id. at 1; see also id. at 2 (discussing work and successes of DOJ’s Kleptocracy Initiative in compelling corrupt foreign leaders to forfeit ill-gotten gains that are located within U.S. jurisdiction).


Compounding the problem of enforcing the FCPA is the daunting chasm between the size and complexity of global multinational corporations and the limited resources that America’s enforcement agencies, the Department of Justice (“DOJ”) and the Securities Exchange Commission (“SEC”), can bring to bear. The only way to level the playing field, at least a bit, is to enlist the businesses themselves in FCPA enforcement. That is, we must create an incentive structure that drives corporations to establish internal compliance programs and to root out foreign corruption within their own organizations. Only those businesses themselves have the resources to conduct the global investigations that the FCPA requires.

To accomplish this end, I believe that we need to do two things: first, we must give businesses clear and predictable guidance on what sort of compliance programs they must establish; second, we must give them powerful incentives to engage in self-investigation and self-reporting of the bribery they uncover or suspect. The incentives I suggest are two: (1) businesses must be assured that a strong compliance program and prompt and full self-disclosure will ensure that the company itself will not be subject to criminal prosecution under the FCPA, and (2) such self-disclosure will also prevent the company from being debarred from doing business with the federal government or being denied government permits or licenses necessary for the company’s operations.

In this article I first review our nation’s long-standing and active aversion to corporate corruption overseas, as principally embodied in the FCPA. I then explain how achievement of the FCPA’s goals is undermined by the uncertainty in current federal enforcement policies and the consequent ambivalence toward self-disclosure exhibited by multinational corporations. Finally, I argue that the only realistic way to make up the shortcomings in FCPA enforcement that flow from the Justice Department’s limited resources is to motivate corporations themselves to police corruption in their foreign subsidiaries by giving them a concrete incentive in the form of guaranteed immunity from corporate criminal liability, and by assuring them that the company will not be debarred from doing business with one of the largest of all potential clients—the United States government. This proposed policy of inducing corporations to be responsible for policing themselves in the public interest would be merely another instance of America’s historical practice of yoking the corporation to society’s plough.

II. AMERICAN LEADERSHIP IN ADDRESSING FOREIGN CORRUPTION

Although enactment of the FCPA was driven largely by the American conviction that “[c]orporate bribery is bad business,”7 subsequent international efforts to suppress bribery have recognized that the threat goes beyond capitalism and

7. Yockey, supra note 4, at 828 (quoting S. REP. No. 95-114, at 4 (1977)).
"jeopardizes 'sustainable development and the rule of law.'" As usual, the toxic effects of any international problem are always most acute in the underdeveloped portions of the world.

Corruption . . . has particularly negative effects on emerging economies. When a developing country's public officials routinely abuse their power for personal gain, its people suffer. At a concrete level, roads are not built, schools lie in ruin and basic public services go unprovided. At a more abstract, but equally important, level, political institutions lose legitimacy and people lose hope that they will ever be able to improve their lot.

"Companies that routinely engage in corrupt business practices abroad play an active role in helping maintain the 'ungoverned states' that 'continue to export poverty and serve as havens for all sorts of gangsters, pirates and terrorists.'"

As long as there has been anything approximating organized government, there have been apparatchiks with their hands held out, demanding that their palms be greased before public services are provided or the public's work gets done. Yet for more than two decades, the United States was alone in prohibiting the bribery of the officials of other nations. The FCPA was enacted in 1977 in the wake of an SEC report that more than 400 American companies—including many of the largest corporations in the nation—had made more than $300 million in "questionable payments" to foreign officials with whom they were doing business. At the time, many foreign governments saw the FCPA as yet another pointless and annoying instance of American economic imperialism, and widely dismissed it as naïve or even "quixotic." Indeed, in many nations, bribes paid to foreign officials were tax-deductible as a routine business expense. But the rest of the world slowly recognized that such corruption was bad for everyone's business: the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention") was ratified and took effect on February 15, 1999. Other
international efforts emerged from the Organization of American States, the United Nations, and the World Bank.16

The Justice Department has recently made enforcement of the FCPA its top priority—"second only to fighting terrorism."17 Between 2007 and 2009 the DOJ and the SEC brought roughly twice as many FCPA cases as they had in the statute's entire prior twenty-eight years of existence.18 And in 2010 there were more FCPA prosecutions than ever before, with fines regularly topping hundreds of millions of dollars.19 There are at least 200 FCPA investigations currently pending; plainly, FCPA enforcement is at its zenith and is unlikely to diminish in the foreseeable future.20 Last year former Assistant Attorney General Lanny Breuer gave a speech lauding the Justice Department's FCPA docket—more trials than in any year in the history of the Act—and the fact that the DOJ had just secured the longest prison sentence—fifteen years—ever imposed under the FCPA.21

Thus, FCPA enforcement has been nearing a fever pitch and nine-figure penalties are no longer novelties.22 For example, in December 2008, Siemens AG and several subsidiaries pled guilty to FCPA crimes and paid a total of $1.6 billion in fines to the U.S. and German governments for a scheme that involved more than $1.3 billion in bribes or other improper payments in at least ten different countries.23 To put that $1.6 billion fine in perspective, the highest previous FCPA sanction had been $44 million.24 In March 2010, BAE Systems plc, one of the world's largest defense contractors, entered a guilty plea under the FCPA and paid a $400 million criminal fine to the United States and a fine of $50 million to the United Kingdom's Serious Fraud Office on charges involving corrupt arms trafficking to Saudi Arabia.25 The following month, Daimler AG and its Chinese, Russian, and German national subsidiaries paid $185 million to settle FCPA charges involving payoffs in twenty-two countries—about half of that sum in criminal fines to the DOJ and half in disgorgement of profits to the SEC.26 In February of 2009, Kellogg Brown & Root LLC—the engineering subsidiary that Halliburton spun off in the wake of its prolonged and unwelcome time in the public spotlight—settled charges (involving allegations of a decade of bribing

16. Id.
17. Yockey, supra note 4, at 782 & n.2.
18. Id. at 783 n.3.
19. Id. at 783.
20. Id. at 783 & n.6.
21. See Breuer 2011 Address, supra note 9, at 1.
22. Yockey, supra note 4, at 783.
24. Yockey, supra note 4, at 791.
25. Tarun & Tomczak, supra note 23, at 226.
26. Id. at 227–28, 233.
Nigerian officials to garner $6 billion in construction contracts) with DOJ and SEC for $579 million.\textsuperscript{27}

In 2010, the OECD officially congratulated the United States for investigating and prosecuting more foreign bribery cases than any other signatory to the OECD Convention.\textsuperscript{28} And companies are not the only targets. Lanny Breuer, former chief of DOJ’s Criminal Division, announced in November of 2011 that his office’s admirable Kleptocracy Asset Recovery Initiative had filed complaints seeking forfeiture of $70 million from Teodoro Obiang Obiang Mangue, a minister for Equatorial Guinea and son of that nation’s president.\textsuperscript{29} It is little wonder that the FCPA has become perhaps “the most . . . feared statute[] for companies operating abroad.”\textsuperscript{30}

III. THE FCPA IS UNDERMINED BY THE ABIDING UNCERTAINTY AND OPACITY OF U.S. ENFORCEMENT PRACTICES

Despite this account of recent vigorous enforcement, my view is that the statute is feared less because of what is known about the FCPA’s power and the DOJ’s zeal to enforce it, than because of what is unknown about the scope of the FCPA’s prohibitions and how, when, and where the DOJ and SEC will choose to apply them. “Companies depend on predictability in the law so that they can clearly articulate for firm employees and agents how compliance is to be accomplished and engage in efficient business planning.”\textsuperscript{31} As a consequence, although some companies with bribery schemes led by their CEOs, like Halliburton, will (and should) see (and fear) the Justice Department coming, for many companies operating abroad the FCPA strikes with the ferocity and unpredictability of a tornado.\textsuperscript{32} The uncertainty of precisely what the FCPA forbids and allows harbors frightening potential for prosecutorial abuse and over-criminalization—topics that have preoccupied me, both as a private attorney and as Deputy Attorney General of the United States, for many years.\textsuperscript{33}

This uncertainty in the FCPA is particularly troubling when one is dealing not just with individuals, who have control over all their own actions, but also with

\textsuperscript{27} Yockey, supra note 4, at 791; Tarun & Tomczak, supra note 23, at 225. KBR’s former president and CEO, Albert Jack Stanley, also pled guilty and was sentenced to seven years in prison. Tarun & Tomczak, supra note 23, at 225.

\textsuperscript{28} Senate FCPA Hearing, supra note 1, at 4 (statement of Greg Andres, Acting Deputy Assistant Att’y Gen., Criminal Division).

\textsuperscript{29} See Breuer 2011 Address, supra note 9, at 3. Somehow, Mr. Obiang had amassed a fortune of $100 million on his government salary of less than $100,000 per year. Id.

\textsuperscript{30} Yockey, supra note 4, at 781.

\textsuperscript{31} Id. at 823.


\textsuperscript{33} See generally Larry D. Thompson, Keynote Speech: The Reality of Overcriminalization, 7 J.L. Econ. & Pol’y 577 (2011).
large corporations—artificial "persons" consisting of hundreds, or thousands, or even hundreds of thousands, of individuals for whom the corporation can be held accountable. With mere indictment, let alone conviction, capable of being a death sentence for a business entity—as we learned with Arthur Andersen and Drexel Burnham—this is very serious business. In fact, even the mere announcement of an FCPA criminal investigation casts a shadow on the corporation and the efficacy of its governing processes. Once upon a time, it was universally accepted that corporations could not be subjected to the criminal law because they were an artifice of man and had neither a conscience nor a soul. In the 17th century, Lord Coke opined that a corporation's existence "rests only in intendment and consideration of the law." Two centuries later, Mr. Chief Justice Marshall added that the corporation is a mere legal device, "an artificial being, invisible, intangible, and existing only in contemplation of law."

The application of criminal law to corporations has always struck me as profoundly misguided, but as I have written elsewhere, that train left the station long ago with the decision in New York Central & Hudson River Railroad Co. v. United States. Sometimes we gaze upon centuries-old precedents, like Marbury v. Madison, with veneration, but on other occasions ancient precedents look less like the distillation of the wisdom of the ages than an aberration where, by dint of syllogisms and sophistry, otherwise sound minds have learnedly deceived themselves. The Supreme Court's reflexive extension of the doctrine of respondeat superior from tort law to the criminal law in New York Central is redolent of the medieval era when the law barely—if at all—distinguished between civil torts and crimes, both of which were punishable by amercements (arbitrary fines) payable to the Crown. But there are some indications that the Supreme Court may be...
reaching the outer limits of its willingness to automatically impute an employee’s individual criminal liability to a corporate employer.\textsuperscript{42}

Unfortunately, the Justice Department’s FCPA enforcement policy shows no signs of a similar evolutionary trajectory. Although the DOJ continues to say that it “encourages . . . corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own,” it simultaneously warns that “the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct undertaken by its officers, directors, employees or agents.”\textsuperscript{43} “The existence of a corporate compliance program, even one that specifically prohibited the very conduct in question, does not absolve the corporation from criminal liability . . . .”\textsuperscript{44} Indeed, the Justice Department concedes that it provides no guidelines or requirements for what constitutes an acceptable compliance program,\textsuperscript{45} nor does DOJ offer clear guidance about the benefits to a corporation for doing the right thing.\textsuperscript{46} Unfortunately (and rather remarkably), despite the intricacies of the myriad ways in which one can run afoul of the FCPA, and despite an attempt to provide some general guidance as to how the federal government would enforce the criminal law with respect to crimes committed by a corporation,\textsuperscript{47} the Justice Department has never issued any implementing regulations for the FCPA.\textsuperscript{48}

Indeed, for a long time the DOJ largely ignored all pleas, from whatever source, that it issue guidance on how it would enforce the FCPA and how corporations could protect and internally police themselves with compliance programs.\textsuperscript{49} Despite the urging of both Congress and the federal Courts of Appeals\textsuperscript{50}—not to mention the OECD\textsuperscript{51}—the DOJ failed to provide meaningful


\textsuperscript{44} Id. § 9-28.800(B) (emphasis added).

\textsuperscript{45} Id.

\textsuperscript{46} \textit{Ethics Res. Ctr., The Federal Sentencing Guidelines for Organizations at Twenty Years 61} (2012), available at http://www.ethics.org/files/u5/fsgo-report2012.pdf (“Government officials have been exclaiming the importance of ECEPs in much the same way that parents urge kids to eat vegetables—‘they are good for you.’ This does not mean that the agencies for which these officials work are necessarily following the second part of the typical parental message; the part that offers an incentive—‘and if you do, you will get dessert.’”).


\textsuperscript{48} Blageff, \textit{supra} note 12, § 1.1.


\textsuperscript{50} See Koehler, \textit{supra} note 49, at 961 (discussing congressional 1988 amendments to the FCPA and the Sixth Circuit’s decision in \textit{Lamb v. Philip Morris, Inc.}, 915 F.2d 1024, 1029 (6th Cir. 1990)).

\textsuperscript{51} See id. at 962 (discussing the conclusion of the OECD’s official Phase Two Report on U.S. Enforcement under the OECD Convention that the FCPA suffered from the lack of official guidance on compliance “with the
guidance on the FCPA and left corporations to speculate about the benefits of establishing compliance programs and self-reporting violations of such internal controls. It was somewhat embarrassing for the United States, which after all had pioneered international law enforcement against bribery in 1977, to be lectured in 2002 by the OECD on the obvious proposition that official guidance would "provide a valuable risk management tool to guide companies through some of the pitfalls which might arise" in international commercial transactions.

In 2010, even greater dismay greeted the DOJ’s unfortunate dismissal of the Senate’s request for FCPA guidance, particularly as to what constitutes an adequate compliance program, or where the DOJ fixes the threshold for initiating an investigation of “any little conduct” or prosecuting “relatively minor things” where companies are not even “sure if it is a gray area or not.” Senator Klobuchar stated that she had heard from many corporate executives that they were “so afraid of what is going to happen if they disclose for minor things” that they “cannot sleep at night because they are worrying about this.”

This is not an academic point: the FCPA has neither a materiality requirement for what constitutes a corrupt practice nor a de minimis exception, so a $10 meal consisting of a cheeseburger, fries and a soda could easily suffice. One firm recently disclosed that it had spent $3.2 million to investigate $50,000 of “potentially” improper payments made by one of its minor foreign branches.


53. Koehler, supra note 49, at 962 & n.10. Unfortunately, in 2010 the DOJ defended the lack of authoritative FCPA guidance by listing the same general materials that the OECD had originally determined to be inadequate in 2002. See Koehler, supra note 49, at 962 & n.10.

54. Senate FCPA Hearing, supra note 1, at 6–7, 11–12. Unfortunately, in 2010 the DOJ defended the lack of authoritative FCPA guidance by listing the same general materials that the OECD had originally determined to be inadequate in 2002. See Koehler, supra note 49, at 962 & n.10.

55. Senate FCPA Hearing, supra note 1, at 6–7 (recounting that she had “heard from many very good standing companies in [her] State that they do not always know what behavior will trigger an enforcement action,” and asking how that could possibly comport with “the basic principles of due process”).

56. Id. at 21 (testimony of Andrew Weissmann, on behalf of the U.S. Chamber of Commerce).
accounted for about one-half of one percent of the company’s total annual revenue.\(^\text{57}\) Those costs of course fall on the shareholders, and the activity itself disrupts operations and distracts the company from business opportunities.\(^\text{58}\) The problem is not that corporations are extraordinarily or unreasonably risk-averse. Rather, it is that there is so much uncertainty in FCPA enforcement that the risk cannot even be intelligently evaluated.\(^\text{59}\) Thus, the uncertainty of the FCPA spawns massive and extraordinarily unfocused over-compliance, “includ[ing] mundane matters like companies engaging high-priced lawyers to analyze FCPA compliance risk for inviting certain foreign customers to trade shows, company golf outings, or providing various cultural versions of fruit baskets during holidays.”\(^\text{60}\) Yet at the 2010 Senate Hearing, the DOJ opposed even a rebuttable presumption that a small business dinner did not constitute a criminal bribe.\(^\text{61}\) One aspect of the uncertainty surrounding FCPA enforcement, therefore, is the lack of clear guidance on just what behavior would constitute a forbidden “corrupt practice.”

Another element of uncertainty arises from the lack of clarity on what companies can reasonably and realistically be expected to do to prevent (or, if they occur, to uncover, report and redress) corrupt practices by their employees. At the same Senate hearing discussed above, one witness urged the adoption of a “compliance program” affirmative defense, such as that contained in the U.K. statute,\(^\text{62}\) which mandates consideration by the court of the defendant company’s compliance program and whether the offending employee had evaded it.\(^\text{63}\) Another witness doubted that this would provide useful guidance, pointing out that an affirmative defense typically is not presented until there has been an indictment and perhaps even a trial, yet we know from the Arthur Andersen case that a criminal indictment can put the company’s very existence in jeopardy and cause the loss of thousands of jobs.\(^\text{64}\) What is needed is DOJ guidance in advance so that

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57. Yockey, supra note 4, at 823–24 & n.200.
58. Id. at 824. A Dow Jones survey reported that fifty-one percent of companies have delayed, and fourteen percent have cancelled, business ventures abroad due to uncertainty about FCPA enforcement. Id. at 824 & n.203; see also Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary, 112th Cong. 37 (2011) [hereinafter House FCPA Hearing] (testimony of George J. Terwilliger) (the “hidden effect is the cost imposed on our economic growth when companies forgo business opportunity out of concern for FCPA compliance risk. This hurts the creation of jobs and the ability of U.S. companies to compete with companies elsewhere that do not have to concern themselves with uncertainties of the terms and requirements of the FCPA”).
59. See House FCPA Hearing, supra note 58, at 37 (testimony of George J. Terwilliger) (“When faced with that uncertainty, companies sometimes forgo deals they could otherwise do, take a pass on contemplated projects, or withdraw from ongoing projects and ventures. Companies making such decisions are not doing so because they are generally risk-averse. They are doing so by the simple reasoning that the risk of non-compliance, as defined by the statute and those charged with its enforcement, cannot be calculated with sufficient certainty.”).
60. Senate FCPA Hearing, supra note 1, at 61 (prepared statement of Professor Mike Koehler).
61. Id. at 30–31 (formal written responses by the DOJ to Questions for the Record by Sen. Amy Klobuchar).
63. Senate FCPA Hearing, supra note 1, at 15 (statement of Andrew Weissmann).
64. Id. at 23 (statement of Michael Volkov).
a corporation can set up a compliance program that will both prevent misconduct by employees and shield the corporation from criminal indictment if the program is circumvented by individuals who ignore the corporation's training and compliance efforts. The Justice Department could provide such guidance today—it requires no further authorizing legislation from Congress.

I do not propose that any corporation found to have violated the FCPA necessarily receive credit for merely establishing an internal compliance program if, in a given incident, that program was clearly inadequate. Without regard to the question of the corporation's good faith in instituting an internal compliance regime, an anti-corruption program that fails to actually root out corruption is of no benefit to the wider society. Rewarding a corporation with reduced penalties for simply instituting some sort of compliance program that in fact failed to ensure compliance would give companies a perverse incentive to merely go through the motions.

That said, we must be realistic about what can be accomplished by even the most dedicated corporate managers. Not even a police state can ferret out every crime, let alone prevent all crimes in the first instance. Likewise, no multinational corporation with thousands of employees in dozens of countries around the globe can be expected to detect and punish every employee act that suborns the integrity of a foreign government official, let alone prevent every such act of corruption in advance. But, just as there are rules about compliance programs in investment firms and mortgage firms, minimum standards and guidelines for an acceptable and effective FCPA compliance program can be formulated and promulgated by the government. A company that implements them should be guaranteed some level of credit in the legal process—some set scale of discounts—for doing so, even if some employee somewhere manages to evade the compliance regime. If the company that employs that malefactor itself uncovers the wrongdoing and punishes and reports the wrongdoer, the company should be guaranteed that the corporation qua corporation will not become a criminal defendant, and that the company will not be barred from doing business with the U.S. federal government.

The Justice Department’s formal, written response to this onslaught of criticism was to suggest that any corporation in need of guidance could (1) formally seek an advisory opinion and (2) refer to the Department’s “Lay Person’s Guide to the FCPA,” available at the DOJ website. The Department also recommended that companies study more than a hundred summaries of non-prosecution agreements (“NPAs”) and deferred prosecution agreements (“DPAs”) compiled at the DOJ.

65. See id.
66. Id. at 24.
67. Id. at 27 (formal written responses by the DOJ to Questions for the Record by Sen. Christopher A. Coons). Mr. Andres from the DOJ also suggested that, to divine compliance and enforcement standards under the congressional FCPA, companies should study the “good practice” guidance issued by the OECD under its Convention. Id. at 7. It is unclear from the context if Mr. Andres intended this as a joke.
website. Yet the former head of FCPA enforcement himself has explained that those NPAs and DPAs are part of the problem. Mark Mendelsohn, who was the Deputy Chief of the DOJ Fraud Section and the person “responsible for overseeing all DOJ investigations and prosecutions under the FCPA” from 2005 to 2010, stated in an interview that the “danger” posed by NPAs and DPAs “is that it is tempting” for Justice Department attorneys “to seek to resolve cases through DPAs or NPAs that don’t actually constitute violations of the law.” Thus, the FCPA guidance currently offered by the Justice Department is less helpful because it may include coerced settlements that record instances where even DOJ itself was not sure that a violation of the FCPA actually occurred.

The Justice Department was adamant first, that it had absolutely no interest in even considering a self-disclosure amnesty or immunity program to incentivize corporations to self-police and self-report, and second, that it opposed any sort of formal compliance defense to the FCPA. Senator Klobuchar told Deputy Assistant Attorney General Andres of the Justice Department’s Criminal Division that although “I know you believe there is enough guidance for [U.S. corporations,] I do not think that they think that there is.”

The idea that clear guidance and concrete rewards are necessary to incentivize corporations to self-police and self-report would not appear to be a difficult notion to grasp. Former Federal Judge Stanley Sporkin, who is sometimes referred to as “the father of the FCPA,” is intimately familiar with foreign corruption from his years as General Counsel of the CIA and during his twenty years in the SEC’s enforcement division he was certainly “no shrinking violet when it [came] to enforcement matters.” But Judge Sporkin understands that without both clear guidance and assured benefits for self-reporting, there is no incentive for a company to police itself vigorously. Judge Sporkin has proposed a model system under which a participating company, in association with a major accounting firm or law firm, conducts an internal FCPA review for the previous five years; the company further agrees to disclose the results to the DOJ, the SEC, its investors, and the public. If any irregularities are found, the company would commit to

68. Id. at 27 (formal written responses by the DOJ to Questions for the Record by Sen. Christopher A. Coons).
69. Id. at 57 (prepared testimony of Professor Mike Koehler).
71. When asked directly what would happen if the DOJ could not do NPAs or DPAs but could choose only between bringing an indictment or not, Mr. Mendelsohn stated that the DOJ “would certainly bring fewer cases.” Id. (internal quotation marks omitted); see also id. at 60–61 (prepared statement of Professor Mike Koehler) (describing statements by other FCPA enforcement attorneys that the DOJ was pushing the statute far beyond anything Congress envisioned when it enacted the law).
72. Id. at 8 (statement of Greg Andres, Acting Deputy Assistant Att’y Gen. of the United States).
73. Id. at 26 (formal written responses by the DOJ to Questions for the Record by Sen. Christopher A. Coons).
74. Id. at 11 (emphasis added).
75. Id. at 17 (statement of Michael Volkov).
76. Id. (outlining and discussing Sporkin model).
eliminating them and imposing new necessary controls and then retain an FCPA monitor for five years to certify annually that the company was in compliance.\textsuperscript{77} Under those conditions, the SEC and the DOJ would agree not to bring an enforcement action against the company except in truly egregious cases where the company's business was built on bribery, rather than bribery being an anomaly in a company that was trying in good faith to abide by the FCPA.\textsuperscript{78} Whether Judge Sporkin's model is adopted or some other criteria are proposed, the two keys to incentivizing corporations to police and self-report are clear guidance on what the government expects from a compliance program and the government's unambiguous assurance to the company that rigorous adherence to such a program will be rewarded with a decision not to prosecute the corporation criminally.

It was apparent during the 2010 Senate Hearing that the DOJ was unperturbed by the uncertainty surrounding FCPA enforcement. Indeed, one could be forgiven for suspecting that at least some federal prosecutors favor that uncertainty.\textsuperscript{79} But we must never forget that uncertainty in the law is the antithesis of the rule of law. There is a reason that the Latin word for “uncertainty” is \textit{arbitrarius}.\textsuperscript{80} That some FCPA enforcement attorneys might relish and exploit the arbitrary enforcement of a federal criminal statute is not merely unseemly—it is illegitimate. The most fundamental of the legal protections in the \textit{Magna Carta}—and just about the only fragment of it that has not been repealed in the eight centuries since it was written at Runnymede—is that which provides that “[n]o free man shall be seized or imprisoned, ... except ... by ... the law of the land.”\textsuperscript{81} As Justice Hugo Black memorably explained:

\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Although it pains me, as a former U.S. Deputy Attorney General, to acknowledge that there are some prosecutors who are “stupid, malevolent, or a cowboy or cowgirl who just wants to try a case and does not want to be reasonable,” that is surely the case. Thompson, \textit{The Blameless Corporation}, supra note 39, at 1254; \textit{see also} Thompson, \textit{Keynote Speech: The Reality of Overcriminalization}, supra note 33, at 582 (“While I believe that most government officials are fair and high-minded in making these sorts of determinations [to prosecute], there are forces at work that can create a temptation for even the most sensible of these prosecutors to deviate sometimes” and there will always be some who wish to “make names for themselves through highly publicized prosecutions”). There is another pernicious incentive at work in this newly thriving anti-bribery complex: in the words of the man who headed the FCPA enforcement office during the 1980s, ramped-up FCPA enforcement in the last few years has been “‘good business for law firms, good business for accounting firms, good business for consulting firms, and DOJ lawyers who create the marketplace and then get a job’” when they exit the revolving doors for which Washington’s legal culture is so well known. \textit{See Senate FCPA Hearing}, supra note 1, at 61 (prepared statement of Professor Mike Koehler) (quoting Nathan Vardi, \textit{The Bribery Racket}, FORBES (June 7, 2010), http://www.forbes.com/global/2010/0607/companies-payoffs-washington-extortion-mendelsohn-bribery-racket.html). I want to stress that these problems afflict only a very small minority of federal prosecutors, but unfortunately it only takes one bad apple in one big prosecution to have a significant, deleterious effect on the justice system.

\textsuperscript{80} \textit{See} CASSELL'S \textit{NEW COMPACT LATIN DICTIONARY} 19 (1963).
\textsuperscript{81} CLAIRE BREAY, \textit{MAGNA CARTA: MANUSCRIPTS AND MYTHS} 52 (2002) (translating Article 39); \textit{see also id.} at 48 (“Almost the whole of the 1225 version of Magna Carta ... has since been repealed, as the aspects of medieval land tenure, taxation and administration which it sought to regulate have become obsolete. Only three clauses
The origin of the Due Process Clause is Chapter 39 of *Magna Carta*, which declares that "No free man shall be taken, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." As early as 1354 the words "due process of law" were used in an English statute interpreting *Magna Carta*, and by the end of the 14th century "due process of law" and "law of the land" were interchangeable. Thus the origin of this clause was an attempt by those who wrote *Magna Carta* to do away with the so-called trials of that period where people were liable to sudden arrest and summary conviction in courts and by judicial commissions with no sure and definite procedural protections and under laws that might have been improvised to try their particular cases. Chapter 39 of *Magna Carta* was a guarantee that the government would take neither life, liberty, nor property without a trial in accord with the law of the land that already existed at the time the alleged offense was committed. This means that the Due Process Clause gives all Americans, whoever they are and wherever they happen to be, the right to be tried by independent and unprejudiced courts using established procedures and applying valid pre-existing laws.82

The principle that one could be prosecuted only under a known, non-improvised, and existing statute was so fundamental to the Framers that it is one of the very few rights specified in the original Constitution—in the Ex Post Facto Clause of Article I, sec. 983—rather than added in the subsequent Bill of Rights.

IV. THE DOJ’S BELATED RELEASE OF FCPA GUIDANCE FALLS SHORT

Finally, in November of 2011 the Justice Department relented and then-Assistant Attorney General Lanny Breuer announced that the DOJ would be issuing FCPA guidance.84 A year later, just after the election, on November 16, 2012, the DOJ and the SEC released FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act ("FCPA Resource Guide").85 Its 130 pages appear impressive at first glance, but about two-thirds of that is routine recitation of background information: the introduction and table of contents consume thirty-five pages, the reprinting of the statute itself accounts for another thirty pages, and a summary of previously issued (and by definition inadequate) guidance and discussion of other statutes fleshes out yet another twenty pages.86 Furthermore, the reliability of the

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83. "No Bill of Attainder or ex post facto Law shall be passed." U.S. CONST. art. 1, § 9, cl. 3.
85. FCPA RESOURCE GUIDE, supra note 52.
FCPA Resource Guide is eviscerated by the disclaimer that appears on the very first page: This guide

[I]s non-binding, informal and summary in nature, and the information contained herein does not constitute rules or regulations. As such, it is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, that are enforceable at law by any party, in any criminal, civil, or administrative matter . . . . It does not in any way limit the enforcement intentions or litigating positions of the U.S. Department of Justice, the U.S. Securities and Exchange Commission, or any other U.S. government agency.87

Indeed, at the press conference called to announce the FCPA Resource Guide, Mr. Breuer disclaimed the presence of any new guidance in the document, insisting that it "'does not represent a change in policy.'"88 To be fair, the examples of prior enforcement actions and their surrounding circumstances that are provided in the guidance will no doubt be of some assistance to companies confronting those same factual scenarios in the future. Yet Steven Tyrrell, a former chief of the DOJ Fraud Section during a period of escalating FCPA enforcement, has dismissed the FCPA Resource Guide as "'more of a scrapbook of past DOJ and SEC successes than a guidebook for companies who care about playing by the rules.'"89 So, not much of a "resource" after all.

Moreover, the accuracy and comprehensiveness of the DOJ’s description of its past prosecutions, which are critical to the utility of the guidance, are very much in doubt, given the FCPA Resource Guide’s acknowledgment, in one of its final footnotes, that for thirty years the DOJ has agreed to DPAs that were never filed with any court—a practice that the DOJ now says it has abandoned.90

Given the almost wooden attitude of the Justice Department and the SEC, it is little wonder that companies who want to play by the rules find themselves in such a quandary:

[C]orporations that must decide whether to report voluntarily bribery conduct confront considerable uncertainty as to the benefits (in the form of reduced sanctions) of self-reporting and cooperation. While self-reporting corrupt payment activities results in indeterminate benefits, it does assure that law enforcement will know of the misconduct and, thus, in many instances, some sanction will be imposed. Whether a corporation should undertake a costly internal investigation, self-report its employees’ or agents’ FCPA bribery

87. FCPA RESOURCES GUIDE, supra note 52 (providing an explanation, prior to the beginning of the guide, on what the guide is intended to provide to businesses and individuals regarding the FCPA).
90. FCPA RESOURCES GUIDE, supra note 52, at 118 n.379.
conduct and cooperate fully with law enforcement is a highly contextual decision that is not invariably answered in the affirmative.91

V. THE DOJ UNFORTUNATELY LACKS THE RESOURCES TO ADEQUATELY ENFORCE THE FCPA AND THE ONLY SOLUTION IS TO INDUCE CORPORATIONS TO POLICE THEMSELVES

The best face that can be put on the situation is that the Justice Department itself does not understand its own need to provide meaningful guidance to help well-intentioned, would-be law-abiding corporations navigate the FCPA minefield. The Justice Department and the SEC have displayed great confidence in their abilities as they have ramped up FCPA enforcement in the last four years. They survey the landscape and see billions of dollars in penalties collected and profits disgorged; they see multinational corporations haunted by the fear of the DOJ’s Fraud Section turning an inquiring eye in their direction.

But this supposedly shining vision of FCPA enforcement prowess is a Potemkin village, because without corporations’ own internal policing and self-reporting, the FCPA can accomplish little.92 The best illustration of this fact is the DOJ’s favorite success story, trotted out in every congressional hearing and press release: Siemens AG.93 This is the FCPA’s crowning achievement: the parent company agreed to pay a $448.5 million fine and three of Siemens’ national subsidiaries each paid an additional $500,000 fine, for a total payment to the DOJ of $450 million.94 The case involved a six-year scheme, conducted in ten different nations, under which Siemens made $1.36 billion in illegal payments, including $805.5 million in bribes to foreign government officials, another $554.5 million for “unknown” but presumably nefarious purposes, and finally $341 million in direct payments to business agents and consultants for undisclosed purposes.95

But the Justice Department and the SEC did not root out all of this corruption by themselves. Transnational FCPA cases are among the most labor-intensive to investigate and among the hardest to prove.96 There are a multitude of dedicated, diligent, skilled professionals at the DOJ and the SEC, but they do not come close to having the resources to investigate a sprawling global conglomerate like Siemens AG.97 After German authorities conducted an initial raid at a Siemens office in Munich, it was Siemens itself that orchestrated and funded a gigantic

91. Tarun & Tomczak, supra note 23, at 154–155.
92. See Thompson, The Blameless Corporation, supra note 39, at 1255 (“We do not have enough FBI agents or SEC examiners to monitor all the instances of corporate wrongdoing that may be out there, so we must incent corporations to control and monitor their employees themselves through effective compliance programs.”).
93. See, e.g., Senate FCPA Hearing, supra note 1, at 9, 50, 53, 62–63 & n.31.
94. Tarun & Tomczak, supra note 23, at 223.
95. Id.
96. Id. at 156 n.17.
97. See id. at 215.
internal investigation, undoubtedly because it had to. Its global investigation involved thirty-four countries, 1,750 interviews, 800 high-level meetings, 1.5 million billable hours by accountants and lawyers, and the production and review of 167 million documents—all at a cost to Siemens (not to the DOJ or the SEC) of $1 billion. That billion-dollar price tag does not include the costs attributable to the disruption of Siemens’ business or its loss of other opportunities. Nor does it include the FCPA compliance monitor that Siemens agreed to pay for at a cost of $52 million over four years. Bear in mind that this is what a global investigation cost Siemens itself, which could be expected to be intimately familiar with its own far-flung operations. Overworked, outside investigators from the Justice Department would likely have spent most of their time studying cryptic organizational charts or loitering in myriad, fungible office building lobbies in three dozen different countries—haggard, jet-lagged and waiting for a ride to their hotel or their next meeting.

So what did Siemens get in exchange for its billion-dollar internal audit and the $450 million in fines it paid to the DOJ? The Justice Department applauded Siemens’ cooperation as extraordinary and advertised that it rewarded Siemens with an FCPA civil penalty 67% lower than Siemens would have paid if the DOJ had itself uncovered the corruption instead. Of course, due to the limits of the DOJ’s enforcement resources, that is a very big “if.” Moreover, the government’s arithmetic is off. It counts the $450 million penalty Siemens paid to the DOJ but wholly ignores the $350 million that Siemens had to disgorge to the SEC, which wipes out the supposed 67% discount on the FCPA civil fine. Nor does the DOJ figure factor in the $856 million Siemens had to pay to the office of the Berlin prosecutor as part of the plea arrangement worked out by all the different governments’ agencies. Indeed, for all of its plaudits on Siemens’ admirable cooperation, the Justice Department actually increased Siemens’ Federal Sentencing Guidelines Offense Level by two notches for “significant conduct outside [the] United States.” So Siemens spent more than $1 billion on its internal audit—to perform the government’s investigation—and was rewarded with having to pay only about $1.7 billion in fines and disgorged profits. Maybe not such a great deal after all.

I fear that Siemens might not have expended such riches and laid itself bare if it had understood in advance that it had so little to gain from its extraordinary cooperation. The federal government’s treatment of Siemens constitutes a cautionary tale for future corporate executives weighing the “benefits” of voluntarily

98. See id. at 213.
99. Id.; Yockey, supra note 4, at 824 n.200.
100. Yockey, supra note 4, at 825 n.207.
101. Tarun & Tomczak, supra note 23, at 224.
102. Id. at 224 (quoting Sentencing Memorandum, United States v. Siemens AG, No. 08-CR-367 (D.D.C. Dec. 12, 2008)).
disclosing potential FCPA violations. In the wake of Siemens, corporate legal advisors could perhaps be forgiven for advising their clients that the rewards for airing their dirty laundry before the DOJ do not outweigh the risk of nevertheless suffering onerous penalties.103 We cannot assess the full price for the DOJ’s policy because any internal corruption that corporate management discovers and terminates—but does not disclose—will, by its nature, remain unknown. The situation is much the same with respect to the DOJ’s other recent mega-fine FCPA cases—Daimler,104 Kellogg, Brown & Root,105 and BAE Systems.106 Despite what DOJ lauded as Daimler’s “excellent” internal investigation covering “dozens” of countries and costing tens of millions of dollars,107 the discount on Daimler’s FCPA fine, just like Siemens’s, was erased by the funds Daimler had to disgorge.108 I doubt that any dissatisfaction on the part of these firms’ executives and directors with their treatment by the DOJ was assuaged by the recognition that, insofar as the government could have imposed both the full fine and full disgorgement, the imposition of any fine less than the highest amount allowed by law could arguably be considered a DOJ “discount” for good behavior. Despite the extraordinary voluntary disclosures and exemplary cooperation of these four companies, three of them were nevertheless hit with fines that were within the range of their respective United States Sentencing Guidelines for their crimes.109 I would never minimize the harms inflicted by corruption, nor am I an apologist for Siemens, Daimler, or any other corporate defendant. Instead, my point is simply that this is not a viable incentive structure.

VI. DOJ’S INCENTIVE STRUCTURE FOR SELF-REPORTING FCPA VIOLATIONS IS DOOMED TO FAIL

Let us consider the two elephants in the FCPA enforcement room. First, it is beyond cavil that the Justice Department and the SEC cannot accomplish this level of FCPA enforcement with their own resources. They simply do not have a billion dollars to spend investigating a company for FCPA violations in thirty-four different countries. Without self-disclosure, much—and more likely most—of this corruption would never have been discovered, punished, and remedied. Second, it is equally beyond dispute that voluntary disclosure is what fuels FCPA enforce-

103. It is important to note that the enormous financial penalties were counterbalanced to some extent by the fact that Siemens was spared one of the most severe punishments available under the FCPA—Siemens was not debarred from doing business with the United States government. The role of debarment under the FCPA is discussed further in the next section below.
105. Yockey, supra note 4, at 791; Tarun & Tomczak, supra note 23, at 225.
106. Tarun & Tomczak, supra note 23, at 226.
107. Id. at 214, 228.
108. Id. at 235.
109. See id. at 224–25.
And an enforcement regime that depends on voluntary disclosure of violations itself depends, in turn, on transparent, predictable and reliable benefits for the corporation. "The four FCPA mega-settlements, along with the substantial tangible and intangible costs of global internal investigations, may lead other boards of directors to conclude"—as a rational business judgment—"that the uncertain benefits of voluntary disclosures, global investigations and continuing cooperation are outweighed by the enormous costs to the corporation and its shareholders. Corporations and their decision-makers should be able to expect a coordinated, transparent fine and sanction policy from the United States government." 111

Given (1) that rigorous enforcement of the FCPA advances the economic (not to mention moral) development of impoverished nations, combats terrorism and tyranny, and promotes the rule of law, and (2) that only the large global corporations themselves have the resources and expertise to police their global operations, they should be harnessed to the FCPA's plough. The horse pulling the plough simply needs to be offered the right carrot. I propose two carrots. First, if a corporation establishes a comprehensive, fully funded, adequately staffed and trained FCPA compliance program, then the rogue employee who circumvents it and violates the FCPA—and is caught and turned over to the authorities by his employer—should be deemed to be acting outside the realm of his corporate responsibilities 112 and the self-reporting corporation should not be held criminally liable for his misconduct. This would be an instance of a blameless corporation. 113

For this incentive to work, of course, the carrot must be large and appetizing—hence the absolute necessity for transparency and predictability in FCPA enforcement.

110. Senate FCPA Hearing, supra note 1, at 78 (testimony of Michael Volkov).
111. Tarun & Tomczak, supra note 23, at 235. There is nothing novel in this model of corporate decision-making. See, e.g., Jennifer Arlen & Reinier Kraakman, Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes, 72 N.Y.U. L. Rev. 687, 728–39 (1997); Louis Kaplow & Steven Shavell, Optimal Law Enforcement With Self-Reporting of Behavior, 102 J. Pol. Econ. 583, 583–84 (1994); Robert W. Tarun & Peter P. Tomczak, A Brief Comment on Placing the Foreign Corrupt Practices Act on the Tracks in the Race for Amnesty, 90 TAX. L. Rev. 183, 183–84 (2012); see also Stephen A. Fraser, Placing the Foreign Corrupt Practices Act on the Tracks in the Race for Amnesty, 90 TEX. L. Rev. 1009, 1022–23 (2012) ("Companies now question whether to cooperate in an investigation or to decline to report violative conduct. As such, practitioners have recognized that the value of these uncertain incentives may not outweigh the cost to shareholders and business reputation that self-disclosure of FCPA violations would entail. For some, this uncertainty appears to have created frustrations in counseling clients about their options upon discovery of conduct violative of the FCPA. Indeed, some advise their clients that there is no certain benefit to self-reporting this conduct, suggesting that the divide between the Fraud Section’s meaningful-credit model and the bar’s advice to FCPA clients is wide. This gap may be so severe that companies decline to report their conduct to the DOJ, despite the costs associated with this course, and may not receive contrary advice from their counsel. There is also good reason to believe that, in fact, conduct violative of the FCPA occurs and is unreported. Indeed, this may be a perfectly rational outcome.").
112. See Thompson, The Blameless Corporation, supra note 39, at 1254.
113. See id. at 1252–53; see also Thompson, Keynote Speech: The Reality of Overcriminalization, supra note 33, at 577–78.
The second carrot is that a genuinely cooperative, self-reporting company with a proper compliance program must be assured that it will not be debarred from contracting with the United States government or receiving the government permits required to run its operations. True, debarment has thus far not been employed as a sanction under the FCPA, but it could be. The sanction is provided for under current law, and the U.S. government needs to make it clear to the world’s corporations that it does not consider any corporation “too big” or “too important” to debar. If, instead of dangling the unspoken threat of debarment over government contractors as a sword of Damocles, the government expressly offered forbearance on this sanction in return for eager and effective corporate self-policing and self-reporting, it could be a very enticing carrot indeed, as decades of experience with Defense Department contractors have shown.

Proposing detailed guidelines for what constitutes an acceptable compliance program is not to be confused with making debarment an implicit threat that a corporation is wary of. 

Instead of dangling the unspoken threat of debarment, leaving the threat unspoken and encouraging corporations to entwine themselves with government contracts as a hedge against future debarment, or leaving policy-makers and the public in the dark about the role of the sanction in the DOJ’s strategies, the government needs to make it clear that debarment is of vital-importance to the operation of the government. It's made capturing more business and influence in Washington a central part of its business with the government. It’s made extracting more business and influence in Washington a central part of the settlement negotiations between the Justice Department and Siemens in the global corruption scandal discussed in the previous section of this article, it is apparent that the DOJ, at the very least, unilaterally took Siemens’s potential debarment into account when calculating the sanctions. See Department’s Sentencing Memorandum at 11, United States v. Siemens Aktiengesellschaft, No. 1:08-cr-00367-RJL (D.D.C. Dec. 12, 2008). Although the DOJ did not explicitly promise that Siemens would not be debarred due to its FCPA violations, the DOJ’s Sentencing Memorandum did note that DOJ had considered the risk of debarment as part of its computation of the sanctions. Id. The Justice Department specifically noted that one of the considerations that it took into account in its disposition of the case (along with its consideration of such mitigating factors as Siemens’s extraordinary cooperation in the investigation) was the DOJ’s “consideration of collateral consequences includ[ing] the risk of debarment and exclusion from government contracts.” Id. Thus, the DOJ used the risk of debarment as a justification for not making its punishment of Siemens tougher—and perhaps it also sent a not-too-subtle message to Siemens that debarment remained a possibility if Siemens’s internal reforms failed to live up to the DOJ’s expectations.

My strong suggestion is that the federal government bring this consideration to the surface and expressly include debarment as part of the negotiation process when it seeks to settle an FCPA prosecution of a corporation. It is beyond cavil that debarment is of vital—perhaps even paramount—importance to FCPA defendants such as Siemens. In that very case it was subsequently reported that “three years after Siemens AG reached a record foreign-bribery settlement with U.S. authorities, the German industrial conglomerate is capitalizing on business from an unexpected place—the U.S. government . . . Siemens today isn’t just benefitting from its ongoing business with the government. It’s making capturing more business and influence in Washington a central part of its U.S. strategy.” Vanessa Fuhrmans, Shrugging Off Bribery Case, Siemens Gains Favor in U.S., WALL ST. J. (Dec. 15, 2011), http://online.wsj.com/article/SB100014240529702038934045777098632947522176.html.

Thus, one could speculate that Siemens is trying to make itself into a contractor that the U.S. government cannot live without, thereby gaining a degree of immunity from any imposition in the future of the ultimate FCPA sanction of debarment. Rather than making corporations worry unnecessarily about debarment, leaving the threat unspoken and encouraging corporations to entwine themselves with government contracts as a hedge against future debarment, or leaving policy-makers and the public in the dark about the role of the sanction in the DOJ’s strategy, the settlement of FCPA prosecutions, I believe the better course would be to (1) remind corporations that debarment is part of the statutory arsenal for punishing FCPA defendants, (2) announce that no global corporation is too big or too important to be debarred, (3) make debarment an explicit and high-profile bargaining chip in settlement negotiations with FCPA defendants, and (4) expressly write into FCPA settlements that debarment will ensue if the defendant does not faithfully and vigorously reform itself.

114. Stevenson & Wagoner, supra note 10, at 776–78.
116. Stevenson & Wagoner, supra note 10, at 777 & nn.5–6. Although we cannot tell whether debarment was part of the settlement negotiations between the Justice Department and Siemens in the global corruption scandal discussed in the previous section of this article, it is apparent that the DOJ, at the very least, unilaterally took Siemens’s potential debarment into account when calculating the sanctions. Id. The Justice Department specifically noted that one of the considerations that it took into account in its disposition of the case (along with its consideration of such mitigating factors as Siemens’s extraordinary cooperation in the investigation) was the DOJ’s “consideration of collateral consequences includ[ing] the risk of debarment and exclusion from government contracts.” Id. Thus, the DOJ used the risk of debarment as a justification for not making its punishment of Siemens tougher—and perhaps it also sent a not-too-subtle message to Siemens that debarment remained a possibility if Siemens’s internal reforms failed to live up to the DOJ’s expectations.
program or sufficiently cooperative corporate self-reporting is beyond the scope of this article. There is no shortage of proposals worth considering, from those of Judge Sporkin briefly discussed above, to those of Robert Tarun, one of the leaders of the white collar defense bar who outlined some interesting ideas in the pages of this journal just two years ago.117 I do believe, however, that any compliance guidance must specifically address the problems of recidivism and of recently acquired subsidiaries. First, if a company has a seemingly adequate compliance program but is now self-disclosing FCPA violations for a third time, then it is apparent that it has not tried hard enough to eradicate its problem, and the corporation probably deserves to be closely examined. Second, when a U.S. company acquires a subsidiary, there is rarely time to perform full due diligence under the FCPA prior to closing the deal. Therefore, I support adoption of a rule that a company should be given a reasonable period of time to conduct a diligent audit of its new foreign subsidiary and that, if it uncovers and self-reports FCPA violations, the parent company should not be subject to criminal liability for the prior sins of its subsidiary.118

VII. HARNESSING CORPORATIONS TO ENFORCE THE FCPA IS BUT ANOTHER INSTANCE OF THE LONG HISTORY OF REQUIRING CORPORATIONS TO SHOULDER PUBLIC RESPONSIBILITIES

Some will no doubt criticize what I am proposing as inappropriate (and ineffective) “outsourcing” of FCPA enforcement to the very companies that are the subject of the statute. Such an objection has a certain facile appeal, but I believe it misapprehends the essential nature and purpose of the corporate entity itself. What I am proposing is not that we “outsourcing” FCPA enforcement to corporations, but rather that we motivate corporations to “in-source” the policing and reporting of bribery and related misconduct by their employees and agents—which ought to be their responsibility in the first place. As creatures of the law—artificial persons that exist “only in intendment and consideration of the law,” as Lord Coke put it119—corporations are obliged to conduct themselves as we command and to undertake the responsibilities we choose to impose upon them—including the duty to rigorously and vigilantly police their own behavior.

This is one of those instances where Holmes’ dictum that a page of history is

117. See Tarun & Tomczak, supra note 23.
118. See House FCPA Hearing, supra note 58, at 38 (testimony of George J. Terwilliger) (“I believe it is worthy to consider providing by statute a post-closing period of repose for companies involved in acquisitions during which they would be shielded from FCPA enforcement while undertaking a review of FCPA compliance in the acquired business and undertaking steps to remediate potential FCPA issues that are discovered as a result of that review. Providing that an acquiring company would have a period of time from the date of acquisition to conduct a thorough assessment, remediate existing misconduct and impose its compliance policies upon the acquired company is consistent with the core objectives of FCPA enforcement and presents no hazard to the fundamental objectives of the statute itself.”).
worth a volume of logic applies with full force. Since its inception in Roman law two millennia ago, the corporation has been understood as a legal entity licensed by the state to further public purposes. \(^{120}\) Whether chartered by an English king to explore and settle a distant continent or by an American state to build a canal or a railroad, a corporation was a means by which the sovereign enlisted private capital and expertise to achieve public ends. \(^{121}\) My thesis is that, from its earliest historical origins—or, as Blackstone would put it, from "time whereof the memory of man runneth not to the contrary" \(^{122}\) —corporations have been understood as more than purely private commercial enterprises with the sole purpose of maximizing their own profits. They are instead artificial bodies existing only in public law, organizations born of the broader community that owe responsibilities to that community. Throughout history, corporations have been charged by the states that chartered them with responsibilities that we would commonly assume to be governmental functions, such as tax collection, provision of public works and services, financing the public debt, providing diplomatic representation for the sovereign to foreign nations (at the corporation’s expense) and even mounting military expeditions or providing law enforcement services. \(^{123}\)

If such core state obligations can be—and historically have been—successfully imposed upon and fulfilled by private corporations, surely the enforcement of the FCPA can be accomplished by imposing on U.S. multinational corporations the “public” responsibility to self-police and self-report FCPA violations. If the public and commercial spheres could once be so easily mingled under the umbrella of the international corporate form during the age of empires, they can now just as easily be disentangled—and the bribery and baksheesh that now corrupt public services can be restrained by the very same corporate mechanism that once so successfully conjoined commerce and government. Times change and the needs of the public change; the corporation, which is but the creature of public will, can be adjusted accordingly.


\(^{121}\) The history of this subject, and its ramifications for modern corporation law, are explored in my forthcoming article. See Larry D. Thompson, The Responsible Corporation (2013) (unpublished manuscript) (on file with author).

\(^{122}\) Blackstone, supra note 120, at 460–61.

Multinational corporations enjoy the same vast resources and the same global reach now as they did two centuries ago. That is why Siemens can spend a billion dollars to investigate and root out corruption in thirty-four countries when the Justice Department cannot. Just as in the eighteenth century, in the twenty-first the corporate form can be employed to serve the public’s interests—particularly where those interests involve inducing the corporate “empire” to police itself in exchange for the promise of avoiding ruinous criminal liability. The privilege of modern multinational giants to be free of the risk of criminal liability under the FCPA can and should be conditioned on their willingness to implement the law in accordance with clear and predictable guidance, and on the effectiveness of that implementation.

I believe that, if provided with sufficiently transparent standards of conduct and sufficiently reliable benefits from rigorously policing their own behavior and conforming it to the FCPA—and exposing wrongdoing when they discover that some employee or subsidiary has violated the FCPA—the enlightened self-interest of corporations will furnish the will, and the resources, for effective enforcement of the FCPA. My confidence in this belief is fortified by the success of “insourcing” law enforcement responsibilities by other federal agencies.

VII. IN-SOURCING REGULATORY ENFORCEMENT WORKS FOR OTHER FEDERAL AGENCIES

A. The Department of Defense

In 1986, the Packard Commission124 reported a lack of confidence in the nation’s defense contractors and concluded that “no conceivable number of additional federal auditors, inspectors, investigators, and prosecutors can police [government procurement] fully, much less make it work more effectively. Nor have criminal sanctions historically proved to be a reliable tool for ensuring contractor compliance.”125 Therefore the Commission proposed putting the onus on the contractors to ensure compliance and to take prompt remedial action and make immediate disclosure to the Defense Department (“DOD”) when violations of contracting regulations occurred.126

The Defense Department’s disclosure program has been in operation for three decades, fueled by the presumption that there will be no debarment and no criminal prosecution of a corporation whose compliance and self-disclosure programs have met guidelines issued by the DOD. Those guidelines include a model agreement that the DOD enters into with cooperating companies, and provide a level of clarity and predictability of which companies contending with the FCPA

124. Formally known as the President’s Blue Ribbon Commission on Defense Management.
126. Id. at 888.
can only dream. The DOD policy does not constitute an outright amnesty: the government may still prosecute violators, and other penalties (such as civil fines) remain available where the government deems them warranted. Although far from perfect, the DOD policy has worked remarkably well in promoting self-policing corporate compliance. Most defense contractors have established detailed codes of conduct, provided confidential hotlines for employees to blow the whistle on violations, and recruited and trained adequate networks of compliance officers.

B. The Environmental Protection Agency

Much of what the DOD learned about the benefits and means for self-policing has migrated to the Environmental Protection Agency ("EPA") and formed the basis of its Audit Policy, formally entitled "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations." Civil penalties based on the gravity or severity of the spill or other environmental violation will be waived by the EPA if all nine of the Audit Policy's conditions are met. These conditions principally involve the company's voluntary discovery, prompt disclosure, expeditious correction or remediation, and the implementation of appropriate

127. See Fraser, supra note 111, at 1031.
128. See id. at 1031–32.
129. W. Jay DeVecchio & Devon Engel, EPA Suspension, Debarment, and Listing: What EPA Contractors Can Learn From the Defense Industry (and Vice Versa), 22 PUB. CONT. L. J. 55, 63–64 (1992). The DOD policy appears to be in the process of moving from one of inducing voluntary adoption of these corporate compliance programs to mandating that companies adopt such programs. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-591, DEFENSE CONTRACTING INTEGRITY: OPPORTUNITIES EXIST TO IMPROVE DOD'S OVERSIGHT OF CONTRACTOR ETHICS PROGRAMS (2009), http://www.gao.gov/products/GAO-09-591 ("Until recently, ethics programs and practices of defense contractors were self-policing. Given the significant sums spent to acquire goods and services, the Federal Acquisition Regulation (FAR) was amended twice starting in December 2007 to first mandate and later amplify contractor ethics program rules. Before FAR changes were finalized in December 2008, Congress required GAO to report in 2009 on the ethics programs of major defense contractors. This report (1) describes the extent that contractors had ethics programs before the finalization of the FAR rules that included practices consistent with standards now required by the FAR and (2) assesses the impact the new FAR rules have on Department of Defense (DOD) oversight of contractor ethics programs.") (discussing the highlights of the report in the pages before the actual report begins); see, e.g., Glen H. Sturtevant, New DoD Rule Makes Contractors Responsible for Compliance with Revolving-door Laws, LEXOLOGY (Feb. 24, 2012), http://www.lexology.com/library/detail.aspx?g=b053c5a3-accd-4aOb-9805-44a796d5cOb2 ("The Department of Defense (DoD) has issued a final rule requiring defense contractors bidding for contracts to represent that certain former DoD officials employed by the contractor are in compliance with post-employment restrictions, known as federal revolving-door laws."); Contractor Disclosure Program, U.S. DEPARTMENT DEF., OFF. INSPECTOR GEN., http://www.dodig.mil/programs/CD/index.html (last visited Nov. 25, 2013) ("National Defense Authorization Act (NDAA) for fiscal Year 2012, Section 818, requires Defense contractors report suspected electronic counterfeit parts or non-conforming parts to the government. Contractors should report through the submission of a contractor disclosure. All other reporting requirements remain in effect, to include entry into the Government-Industry Data Exchange Program (GIDEP) database, or similar programs."); see also 48 C.F.R. §§ 3.1003, 52.203–13 (2012) (discussing contractor code of business ethics and conduct).

measures to prevent recurrence of the violation. Furthermore, there will be no recommendation for criminal prosecution of entities that disclose their criminal violations and meet all the other standards.

C. The Department of Energy

Operators of nuclear facilities can have one hundred percent of their potential penalties mitigated if they disclose their own violations of worker safety, nuclear

131. Id. at 19625–26.
132. Id. at 19625. There have been recent stirrings within the EPA to consider defunding its audit policy in reaction to federal budget cutbacks, as revealed in the draft “Program Manager Guidance” that the EPA circulated to its regional offices in 2012:

Audit Policy/Self-Disclosures: The EPA Regions should consult with Headquarters before initiating any new work in response to self-disclosures. For FY 2013, the Audit Policy/Self Disclosure program is one of the areas where OECA will reduce its program work to a minimal national presence. OECA is working with the Regions to develop a plan for reducing work in this area to a level of minimal national coverage. Although the Audit Policy/Self-Disclosure program has yielded a significant number of annual disclosures, the environmental benefit from those disclosures is estimated to be significantly less than from traditional enforcement, and the disclosures have generally not focused on the highest priority areas.


Following a comment period for the EPA Regions, states, and tribes, OECA released its final programmatic guidance on April 24, 2012, with a modest change in tone. OECA now acknowledges that the Audit Policy helped EPA increase its understanding of environmental compliance, and that internal reviews of compliance have become more widely adopted by the regulated community, as part of good management.


Although the disclosure policy survived that particular threat, even the EPA’s mere consideration of the option of cutting back on the self-disclosure program strikes me as rather counter-intuitive: one would think that if a tight budget reduces a government agency’s enforcement resources, increased, rather than decreased, reliance on corporate self-policing and self-disclosure would be the sensible response. In any event, if the EPA ultimately finds its self-disclosure policy not to be cost-effective, its learning and experience should of course be folded into the ongoing conversation on this subject. But it would not change my fundamental conviction that it is absolutely essential to incentivize corporations to self-police and to self-disclose.
safety, and classified information security. The General Accounting Office has found that the system works remarkably well: over a ten-year period, voluntary self-reports of violations exceeded the Energy Department's own violation notices and enforcement letters by a factor of eighteen to one.3

D. The Federal Energy Regulatory Commission

The Federal Energy Regulatory Commission ("FERC") has also adopted a self-policing incentive program as part of its enforcement regime for regulating the market in electricity transmission. A company that self-reports a violation of FERC regulations can garner up to one hundred percent mitigation of the otherwise applicable civil penalty. Like the Department of Energy, FERC's self-policing and self-reporting policy generates more compliance than the agency's own inspections. In 2009, there were 122 self-disclosures compared to just ten FERC investigations.

VIII. Conclusion

All of this indicates a genuine basis for optimism that FCPA enforcement can likewise be in-sourced to corporations. Throughout history, corporations have been created at the sufferance of the state to serve the public's interests. We should expect no less from modern multinational corporations, and with the proper incentive structure I believe that we can motivate corporations to in-source FCPA compliance and thereby advance the noble ends of that statute while conserving untold billions in taxpayer resources that can then be devoted to other pressing public needs.

Indeed, the campaign against bribery will pay more dividends if we look to our own resources—including the corporate resources we can conscript through the incentives described in this article—than if we were to rely solely on foreign governments. To be sure, the OECD Convention has been ratified by more than three dozen nations, but if the governmental resources of the richest nation on the planet are insufficient to the task of ferreting out corruption in that nation's own chartered companies, it follows a fortiori that less wealthy nations will be even more overwhelmed. And that assumes that all (or even most) foreign nations actually want to reduce corruption—a dubious proposition at best. Providing law-enforcement assistance directly to foreign nations is not the most effective means of enhancing global anti-corruption enforcement. In a single five-year period—1993 through 1998—the U.S. provided nearly a billion dollars in "rule of

134. Id. at 2316.
135. Id. at 2318.
136. Id. at 2318–19.
law assistance” to countries throughout the world. The inherent shortcoming of that approach is evident from its very title: it is very, very difficult to enhance the rule of law, no matter how lavishly one hands out grants, in nations that simply do not have the will to clean up corruption and follow the rule of law. It is little wonder that the first two national efforts to curb bribery in international commerce came from the two nations—America and Great Britain—with the longest traditions of the rule of law.

Ginning up enthusiasm for wiping out corruption in the world’s kleptocracies is no mean feat when the kleptocrats remain in control. If America is serious about combatting global corruption in commerce, we must expect to shoulder most of the weight, but I believe that we can incentivize our corporations to bear some of that burden for us.

137. GEN. ACCOUNTING OFFICE, GAO-01-629, INTERNATIONAL CRIME CONTROL: SUSTAINED EXECUTIVE-LEVEL COORDINATION OF FEDERAL RESPONSE NEEDED 6 (2001), available at http://www.gao.gov/assets/240/232712.pdf. Some thirty-five federal entities have been involved in these programs, including seven cabinet departments and twenty-eight related agencies, bureaus and offices. Id.