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A Snapshot of the Foreign Corrupt Practices Act

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This article, part of an annual series, provides a snapshot of the Foreign Corrupt Practices Act (“FCPA”) and related developments from 2014 and will be of value to anyone who seeks an informed base of knowledge regarding the FCPA and related legal and policy issues. Specifically, this article uses FCPA enforcement action data and other top FCPA or related developments to highlight noteworthy issues from 2014 such as: numerous enforcement statistics; the wide spectrum of FCPA enforcement actions; the gap between corporate and individual FCPA enforcement; the problematic surge in SEC administrative actions to resolve alleged instances of FCPA scrutiny; and judicial scrutiny of FCPA and related enforcement theories.

Introduction

This article, part of an annual series, provides a snapshot of the Foreign Corrupt Practices Act and related developments from 2014 and will be of value to anyone who seeks an informed based of knowledge regarding the FCPA and related legal and policy issues. Although this article is primarily about the FCPA and its enforcement, reference is also made to other notable non-FCPA developments in 2014 to best appreciate the many controversial aspects of FCPA enforcement.

Part I of this article highlights various FCPA enforcement statistics — both corporate and individual enforcement actions — from 2014 and places the statistics in the proper historical perspective.

Part II of this article uses FCPA enforcement action data to highlight noteworthy issues from 2014. Specifically, the following issues are discussed: (i) the wide spectrum of FCPA allegations — from multi-million dollar payments in connection with large infrastructure projects to \$4 payments — and how the breadth of such allegations send confusing compliance messages to those subject to the FCPA; (ii) the wide gap between corporate and individual FCPA enforcement and a relevant data point that helps explain the gap as well as the significant policy issues which flow from the gap; and (iii) the problematic surge in SEC administrative actions to resolve alleged instances of FCPA scrutiny.

Part III of this article highlights other top FCPA or related developments from 2014. Specifically, the following issues are discussed: (i) judicial scrutiny of FCPA enforcement agency theories, including the first case of precedent regarding the FCPA’s important “foreign official” element; and (ii) judicial scrutiny of enforcement theories related to FCPA enforcement and how non-FCPA legal developments should cause pause as to certain FCPA enforcement theories.

I. 2014 FCPA Enforcement Overview

Part I of this article highlights various FCPA enforcement statistics — both

corporate and individual enforcement actions — from 2014 and places the statistics in the proper historical perspective.

A. DOJ Corporate FCPA Enforcement

As demonstrated in Table I, the DOJ collected approximately \$1.25 billion in settlement amounts in seven corporate FCPA enforcement actions¹ in 2014.

Table I — 2014 DOJ Corporate FCPA Enforcement Actions

Company	Fine	Resolution Vehicle ²	Origin ³	Related Individual Action ⁴
Alstom Entities ⁵	\$772.3 million	Plea / Plea / DPA / DPA ⁶	Foreign Law Enforcement Investigation ⁷	Yes (as to a portion of the alleged conduct) ⁸

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1. Corporate FCPA enforcement statistics in this article use the “core” approach. The core approach focuses on unique instances of corporate conduct regardless of whether the conduct at issue involves a DOJ or SEC enforcement action or both (as is frequently the case), regardless of whether the corporate enforcement action involves a parent company, a subsidiary or both (as is frequently the case), and regardless of whether the DOJ and/or SEC bring any related individual enforcement actions (as is occasionally the case). For additional information on this method of quantifying FCPA enforcement, see *What is an FCPA Enforcement Action?*, FCPA PROFESSOR (Jan. 7, 2013), <http://www.fcpaprofessor.com/what-is-an-fcpa-enforcement-action>. This method of computing FCPA statistics is consistent with the DOJ’s approach. See *Friday Roundup*, FCPA PROFESSOR (Mar. 22, 2013), <http://www.fcpaprofessor.com/friday-roundup-72> (quoting DOJ’s FCPA Unit Chief). This approach is also a commonly accepted method used by other scholars in other areas. See, e.g., Michael Klausner & Jason Hegland, *SEC Practice In Targeting and Penalizing Individual Defendants*, HARVARD LAW SCH. FORUM ON CORP. GOVERNANCE AND FIN. REGULATION (Sept. 3, 2013), <http://blogs.law.harvard.edu/corpgov/2013/09/03/sec-practice-in-targeting-and-penalizing-individual-defendants/>.
 2. DPA refers to a deferred prosecution agreement and NPA refers to a non-prosecution agreement. To learn more about these agreements in the FCPA context, see Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1705517.
 3. Refers to the event or events which initially prompted the scrutiny that resulted in the FCPA enforcement action. See *id.* at 911.
 4. Refers to employees of the corporate entity resolving the FCPA enforcement action. See Koehler, *supra* note 3, at 924-25.
 5. Press Release, *Alstom Pleads Guilty and Agrees to Pay \$772 Million Criminal Penalty to Resolve Foreign Bribery Charges*, U.S. DEP’T OF JUSTICE (Dec. 22, 2014), <http://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery> (last updated Dec. 29, 2014).
 6. *Id.* The enforcement action involved a criminal information against Alstom S.A. resolved via a plea agreement; a criminal information against Alstom Network Schweiz AG resolved via a plea agreement; a criminal information against Alstom Power Inc. resolved via a DPA; and a criminal information against Alstom Grid Inc. resolved via a DPA.
 7. *Issues to Consider From the Alstom Action*, FCPA Professor (Jan. 2, 2015), <http://www.fcpaprofessor.com/issues-to-consider-from-the-alstom-action>.
 8. The Alstom enforcement action alleged conduct in Indonesia, Saudi Arabia, Egypt, the Bahamas, and Taiwan. The Indonesia conduct also served as the basis for several individual

Company	Fine	Resolution Vehicle ²	Origin ³	Related Individual Action ⁴
Avon Entities ⁹	\$67.6 million	Plea / DPA	Voluntary Disclosure	No
Dallas Airmotive Inc. ¹⁰	\$14 million	DPA	Related Investigation ¹¹	No
Bio-Rad Laboratories, Inc. ¹²	\$14.4 million	NPA	Voluntary Disclosure	No
Hewlett-Packard Co. Entities ¹³	\$76.7 million	Plea / DPA / NPA ¹⁴	Foreign Law Enforcement Investigation ¹⁵	No

enforcement actions. *See, Current and Former Alstom Employees Charged in Connection With Payments in Indonesia*, FCPA PROFESSOR (April 24, 2013), <http://www.fcpaprofessor.com/current-and-former-alstom-employees-charged-in-connection-with-payments-in-indonesia>.

9. Press Release, U.S. Dep't of Justice, Avon China Pleads Guilty to Violating the FCPA By Concealing \$8 Million In Gifts To Chinese Officials (Dec. 17, 2014), <http://www.justice.gov/opa/pr/avon-china-pleads-guilty-violating-fcpa-concealing-more-8-million-gifts-chinese-officials> (last updated Dec. 18, 2014).
10. Press Release, *Dallas Airmotive Inc. Admits Foreign Corrupt Practices Act Violations and Agrees to Pay \$14 Million Criminal Penalty*, U.S. DEPT OF JUSTICE (Dec. 10, 2014), <http://www.justice.gov/opa/pr/dallas-airmotive-inc-admits-foreign-corrupt-practices-act-violations-and-agrees-pay-14> (last updated Dec. 10, 2014).
11. The enforcement action is believed to be causally related to prior FCPA enforcement actions against other aircraft maintenance companies. *See Dallas Airmotive Inc., the Latest Aircraft Maintenance Company to Resolve a FCPA Enforcement Action*, FCPA PROFESSOR (Dec. 12, 2014), <http://www.fcpaprofessor.com/dallas-airmotive-inc-the-latest-aircraft-maintenance-company-to-resolve-an-fcpa-enforcement-action>.
12. Press Release, *Bio-Rad Laboratories Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$14.35 Million Penalty*, U.S. DEPT OF JUSTICE (Nov. 3, 2014), <http://www.justice.gov/opa/pr/bio-rad-laboratories-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-1435> (last updated Nov. 4, 2014).
13. Press Release, *Hewlett-Packard Russia Agrees to Plead Guilty to Foreign Bribery*, U.S. DEPT OF JUSTICE, (April 9, 2014), <http://www.justice.gov/opa/pr/hewlett-packard-russia-agrees-plead-guilty-foreign-bribery> (last updated Dec. 16, 2014).
14. The enforcement action involved a criminal information against HP Russia resolved via a plea agreement; a criminal information against HP Poland resolved via a DPA; and an NPA with HP Mexico.
15. The enforcement action appears to have been the result of a previous German and Russian law enforcement investigation. *See H-P Under Scrutiny*, FCPA PROFESSOR (April 16, 2010), <http://www.fcpaprofessor.com/h-p-under-scrutiny>.

Company	Fine	Resolution Vehicle ²	Origin ³	Related Individual Action ⁴
Marubeni Corp. ¹⁶	\$88 million	Plea	Related Investigation ¹⁷	No
Alcoa World Alumina LLC ¹⁸	\$209 million ¹⁹	Plea	Related Civil Lawsuit ²⁰	No
TOTAL	\$1.25 billion			

B. SEC Corporate FCPA Enforcement

As demonstrated in Table II, in seven corporate FCPA enforcement actions in 2014 the SEC collected approximately \$327 million in settlement amounts.

Table II — 2013 SEC Corporate FCPA Enforcement Actions

Company	Settlement Amount	Resolution Vehicle	Origin	Related Individual Action
Avon ²¹	\$67.4 million	Settled Civil Complaint	Voluntary Disclosure	No

16. Press Release, *Marubeni Corporation Agrees to Plead Guilty to Foreign Bribery Charges and to Pay An \$88 Million Dollar Fine*, U.S. DEP'T OF JUSTICE (March 19, 2014), <http://www.justice.gov/opa/pr/marubeni-corporation-agrees-plead-guilty-foreign-bribery-charges-and-pay-88-million-fine> (last updated Sept. 15, 2014).

17. The enforcement action was related to the April 2013 FCPA enforcement action against various current and former employees of Alstom. See *Current And Former Alstom Employees Charged In Connection With Payments In Indonesia*, FCPA PROFESSOR (Apr. 24, 2013), <http://www.fcpaprofessor.com/current-and-former-alstom-employees-charged-in-connection-with-payments-in-indonesia>.

18. Press Release, U.S. Dep't of Justice, *Alcoa World Alumina Agrees to Plead Guilty to Foreign Bribery and Pay \$223 Million in Fines and Forfeiture* (Jan. 9, 2014), <http://www.justice.gov/opa/pr/alcoa-world-alumina-agrees-plead-guilty-foreign-bribery-and-pay-223-million-fines-and> (last updated Sept. 15, 2014).

19. *Id.* In addition, the company agreed to pay an administrative forfeiture of \$14 million.

20. See Alan Katz, *Alcoa Pays \$384 Million to Resolve Bahrain-Bribery Probe*, BLOOMBERG BUS. (Jan. 9, 2014, 9:01 PM), <http://www.bloomberg.com/news/articles/2014-01-09/alcoa-pays-384-million-to-resolve-foreign-bribery-probe>. The enforcement action resulted from a 2008 civil lawsuit between Alba and Alcoa.

21. Press Release, SEC Charges Avon With FCPA Violations, U.S. SEC. AND EXCH. COMM'N (Dec. 17, 2014), <http://www.sec.gov/news/pressrelease/2014-285.html#VJOLUV4CB>.

Company	Settlement Amount	Resolution Vehicle	Origin	Related Individual Action
Bruker Corp. ²²	\$2.4 million	Administrative Cease and Desist Order	Voluntary Disclosure	No
Bio-Rad Laboratories, Inc. ²³	\$40.7 million	Administrative Cease and Desist Order	Voluntary Disclosure	No
Layne Christensen Co. ²⁴	\$5.1 million	Administrative Cease and Desist Order	Voluntary Disclosure	No
Smith & Wesson Corp. ²⁵	\$2 million	Administrative Cease and Desist Order	Related Individual Enforcement Action ²⁶	No
Hewlett-Packard Co. ²⁷	\$34 million	Administrative Cease and Desist Order	Foreign Law Enforcement Investigation ²⁸	No

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22. Press Release, *SEC Charges Massachusetts-Based Scientific Instruments Manufacturer with FCPA Violations*, U.S. SEC. AND EXCH. COMM'N (Dec. 15, 2014), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543708934#.VI9cnyvF91Y>.
23. Press Release, *SEC Charges California-Based Bio-Rad Laboratories With FCPA Violations*, U.S. SEC. AND EXCH. COMM'N (Nov. 3, 2014), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543347364#.VGK-ifnF91Z>.
24. Press Release, *SEC Charges Texas-Based Layne Christensen Company With FCPA Violations*, U.S. SEC. AND EXCH. COMM'N (Oct. 27, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543291857#.VGK_BfnF91Z.
25. Press Release, *SEC Charges Smith & Wesson With FCPA Violations*, U.S. SEC. AND EXCH. COMM'N (Jun. 28, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542384677#.VGK_1_nF91Z.
26. *See Stung By The Sting – Smith & Wesson Resolves FCPA Scrutiny That Originated With The Africa Sting*, FCPA PROFESSOR (Jul. 29 2014), <http://www.fcpaprofessor.com/stung-by-the-sting-smith-wesson-resolves-fcpa-scrutiny-that-originated-with-the-africa-sting>. The enforcement action originated after a Smith & Wesson employee was criminally charged in the DOJ's manufactured Africa Sting enforcement action.
27. Press Release, *SEC Charges Hewlett-Packard With FCPA Violations*, U.S. DEP'T OF JUSTICE (Apr. 9, 2014), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541453075#.VGLAYvnF91Y>.
28. Koehler, *supra* note 16. The enforcement action appears to have been the result of a previous German and Russian law enforcement investigation.

Company	Settlement Amount	Resolution Vehicle	Origin	Related Individual Action
Alcoa Inc. ²⁹	\$175 million ³⁰	Administrative Cease and Desist Order	Related Civil Lawsuit ³¹	No
<u>TOTAL</u>	\$327 million			

Analyzing DOJ and SEC FCPA enforcement data separately in Tables I and II is useful and informative given that the DOJ and SEC are separate law enforcement agencies and different issues may arise in DOJ and SEC FCPA enforcement actions.³² On the other hand, analyzing DOJ and SEC FCPA enforcement data in the aggregate is also useful and informative in that it provides a more holistic view of FCPA enforcement.

29. Press Release, *SEC Charges Alcoa With FCPA Violations*, U.S. DEP'T OF JUSTICE (Jan. 9, 2014), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936#VGLA6fnF91Y>.

30. *See, id.* \$14 million of this amount was deemed satisfied by the payment of the forfeiture in the related DOJ action.

31. *See, Katz, supra* note 21. The enforcement action resulted from a 2008 civil lawsuit between Alba and Alcoa.

32. *See, A Resource Guide to the U.S. Foreign Corrupt Practices Act*, Criminal Div. of the U.S. Dep't of Justice and the Enft Div. of the U.S. Sec. and Exch. Comm'n (2012), *available at* <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>. As evident from Tables I and II, there is substantial overlap between the DOJ and SEC's FCPA enforcement programs. FCPA enforcement actions against issuers typically involve related and coordinated enforcement actions by the DOJ for criminal FCPA violations (whether anti-bribery violations or books and records and internal control violations) and by the SEC for civil FCPA violations (whether anti-bribery violations or books and records and internal control violations). Enforcement actions from 2014 fitting this pattern include: Avon, Bio-Rad, HP, and Alcoa. The overlap, however, between the DOJ and SEC's FCPA enforcement programs is not complete. As a general matter, the SEC has jurisdiction over "issuers" (companies – domestic and foreign – with shares registered on a U.S. exchange or otherwise required to make filings with the SEC). In other words, the SEC generally does not have jurisdiction over private companies or foreign companies that are not issuers. Thus, certain FCPA enforcement actions from 2014, such as Alstom, Dallas Airmotive, and Marubeni did not have an SEC component. As a general matter, the DOJ has criminal jurisdiction over "issuers," "domestic concerns," (i.e. any business entity with a principal place of business in the U.S. or organized under U.S. law), and non-U.S. companies and persons to the extent a bribery scheme involved conduct "while in the territory of the U.S." *Id.* at 11. In addition, the DOJ has a higher burden of proof in a criminal prosecution. As a result, and given the DOJ's prosecutorial discretion, certain FCPA enforcement actions in 2014 such as Bruker, Layne Christensen, and Smith & Wesson only included an SEC component. As to the DOJ's discretion, the DOJ has stated that it "has declined to prosecute both individuals and corporate entities in numerous cases based on the particular facts and circumstances presented in those matters, taking into account the available evidence." *Id.* at 75.

C. Aggregate Corporate FCPA Enforcement

In 2014, the DOJ and SEC together collected approximately \$1.6 billion in ten core corporate enforcement actions. The average settlement amount was approximately \$159 million and the median was approximately \$72 million. The range of settlements was, on the high end, \$772 million (Alstom), and on the low end, \$2 million (Smith & Wesson).

As in most years, certain FCPA enforcement actions significantly skewed 2014 FCPA enforcement statistics. For instance, one enforcement action (Alstom) represented approximately 48% of the total settlement amount and two enforcement actions (Alstom and Alcoa) represented approximately 72% of the total settlement amount.

A popular issue, or so it seems, is to analyze whether FCPA enforcement is up or down in any given year. Such year-to-year FCPA enforcement statistics, and the arbitrary cutoffs associated with them, are of marginal value however given that many non-substantive factors can influence the timing of an actual corporate FCPA enforcement action.³³

Nevertheless, and accepting year-to-year FCPA statistics for what they are, the issue remains: how best to analyze and interpret FCPA statistics over time? As demonstrated by the below tables, arguments can be made that corporate FCPA enforcement was down and up in 2014 compared to 2013 and prior years.

The below tables use the “core” approach and demonstrate that both DOJ and SEC corporate enforcement in 2013 were down from historical averages.³⁴

Table III — Corporate DOJ FCPA Enforcement Actions (2010 – 2014)

Year	Core Actions
2014	7
2013	7
2012	9

33. Because FCPA enforcement actions that involve both a DOJ and SEC component are typically announced on the same day, and because the DOJ and SEC are separate enforcement agencies, it is common for FCPA enforcement actions to be delayed while one agency waits for the other to finish its investigation of the conduct at issue and its negotiation of a resolution with a company. Additional non-substantive factors that can influence the timing of an FCPA enforcement action, although far from an exclusive list, include DOJ and SEC staffing issues (including employee departures or leaves) as well as securing corporate board approval for resolving an FCPA enforcement action. *Id.*

34. *Corporate FCPA Enforcement was Down in 2013, Or Was it Up, Or Was it Down?*, FCPA PROFESSOR (Jan. 9, 2014), <http://www.fcprofessor.com/corporate-fcpa-enforcement-was-down-in-2013-or-was-it-up-or-was-it-down>.

Year	Core Actions
2011	11
2010	17

Table IV — Corporate SEC FCPA Enforcement Actions (2010 – 2014)

Year	Core Actions
2014	7
2013	8
2012	8
2011	13
2010	19

However, if one analyzes corporate FCPA enforcement statistics based on settlement amounts, corporate FCPA enforcement by the DOJ was up in 2014 compared to prior years. In fact, the \$1.25 billion the DOJ collected in corporate FCPA enforcement actions in 2014 set an all-time record.

Table V— Corporate DOJ FCPA Enforcement Action Settlement Amounts (2010–2014)

Year	Settlement Amounts
2014	\$1.25 billion
2013	\$420 million
2012	\$142 million
2011	\$355 million
2010	\$870 million

As highlighted in the below chart, while settlement amounts in corporate FCPA enforcement actions by the SEC were up in 2014 compared to prior years, the aggregate \$327 million in corporate SEC FCPA settlements did not set an all-time record similar to DOJ FCPA enforcement in 2014.

Table VI — SEC FCPA Enforcement Action Settlement Amounts (2010 – 2014)

Year	Settlement Amounts
2014	\$327 million
2013	\$300 million
2012	\$118 million
2011	\$148 million
2010	\$530 million

What is the best way to analyze and interpret these statistics? Consider the following analogy. In year one, a city issues 100 speeding tickets and collects \$20,000 in fines on those tickets. In year two, a city issues ninety speeding tickets; however, because certain drivers were going really fast, the city collects \$25,000 in fines on those tickets. Was there less enforcement in year two compared to year one? It is assumed that most would say enforcement in year two was less than in year one, even though the city collected more money from speeding tickets in year two.

The same logic applies to year-to-year FCPA statistics, and for this reason it is more accurate and reliable to analyze FCPA enforcement statistics by focusing on unique instances of FCPA scrutiny (and not settlement amounts) and tracking enforcement actions using the “core” approach. Using this approach, corporate FCPA enforcement in 2014 was down compared to historical averages, and indeed, 2014 saw the second lowest number of core enforcement actions since 2007.

This point is best demonstrated by the below table which aggregates DOJ and SEC enforcement statistics over time and highlights notable circumstances which significantly skewed enforcement data statistics in any particular year.

Table VII — Corporate FCPA Enforcement Actions (2007 – 2014)

Year	Core Actions	Settlement Amounts	Of Note
2007	15	\$149 million	Six enforcement actions involved Iraq Oil for Food conduct; these enforcement actions comprised 40% of all enforcement actions and approximately 50% of the \$149 million amount.

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Year	Core Actions	Settlement Amounts	Of Note
2008	10	\$885 million	The \$800 million Siemens enforcement action comprised approximately 90% of the \$885 million amount.
2009	11	\$645 million	The \$579 million KBR / Halliburton Bonny Island, Nigeria enforcement action comprised approximately 90% of the \$645 million amount.
2010	21	\$1.4 billion	<p>Six enforcement actions, all resolved on the same day, involved various oil and gas companies use of Panalpina in Nigeria. Panalpina also resolved an enforcement action on the same day.</p> <p>Two enforcement actions (Technip and Eni / Snamprogetti) involved Bonny Island conduct. In other words, there were fourteen unique corporate enforcement actions in 2010. Of further note, the two Bonny Island enforcement actions, Technip (\$338 million) and Eni/Snamprogetti (\$365 million) comprised approximately 50% of the \$1.4 billion amount.</p>

Year	Core Actions	Settlement Amounts	Of Note
2011	16	\$503 million	The \$219 million JGC Corp. enforcement action involved Bonny Island conduct and comprised approximately 44% of the \$503 million amount.
2012	12	\$260 million	No enforcement actions significantly skewed the statistics.
2013	9	\$720 million	The \$398 million total enforcement action comprised approximately 55% of the \$720 million amount.
2014	10	\$1.6 billion	Two enforcement actions (Alstom - \$772 million and Alcoa - \$384 million) comprised approximately 72% of the \$1.6 billion amount.
TOTALS	104	\$6.23 billion	

D. Individual FCPA Enforcement

In 2014, the DOJ filed or announced FCPA criminal charges against ten individuals as highlighted below.

Table VII — 2014 DOJ Individual FCPA Enforcement Actions

Individual	Employer / Former Employer	Related Corporate Enforcement Action
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Dmitry Firtash Andras Knopp Suren Gevorgyan Gajendra Lal Periyasamy Sunderalingam ³⁵	Associated with DF Group	No
Benito Chinae Joseph DeMeneses ³⁶	Direct Access Partners	No
Joseph Sigelman Knut Hammarskjold Gregory Weisman ³⁷	PetroTiger Ltd.	No

In 2014, the SEC brought FCPA civil charges against two individuals as highlighted below. The enforcement action was notable in that it was the first SEC individual FCPA enforcement action since April 2012.³⁸

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35. In addition, K.V.P. Ramachandra Rao was also charged in the case, but not with FCPA offenses. See Press Release, *Six Defendants Indicted in Alleged Conspiracy to Bribe Government Officials in India to Mine Titanium Minerals*, U.S. DEPT OF JUSTICE (Apr. 2, 2014), <http://www.justice.gov/opa/pr/six-defendants-indicted-alleged-conspiracy-bribe-government-officials-india-mine-titanium> (last updated Sept. 15, 2014).
36. Press Release, *CEO and Managing Partner of Wall Street Broker-Dealer Charged with Massive International Bribery Scheme*, U.S. DEPT OF JUSTICE (Apr. 14, 2014), <http://www.justice.gov/opa/pr/ceo-and-managing-partner-wall-street-broker-dealer-charged-massive-international-bribery> (last updated Sept. 15, 2014).
37. Press Release, *Foreign Bribery Charges Unsealed Against Former Chief Executive Officers of Oil Services Company*, U.S. DEPT OF JUSTICE (Jan. 6, 2014), <http://www.justice.gov/opa/pr/foreign-bribery-charges-unsealed-against-former-chief-executive-officers-oil-services-company> (last updated Oct. 9, 2014).
38. “World Tour” for Saudi Officials Results in Individual SEC FCPA Enforcement Action, FCPA PROFESSOR (Nov. 18, 2014), <http://www.fcpaprofessor.com/world-tour-for-saudi-officials-results-in-individual-sec-fcpa-enforcement-action>.

Table VIII — 2014 SEC Individual FCPA Enforcement Actions

Individual	Employer / Former Employer	Related Corporate Enforcement Action
Stephen Timms and Yasser Ramahi ³⁹	Associated with FLIR Systems Inc.	No

The below tables provide a historical overview of DOJ and SEC individual FCPA enforcement actions between 2007 and 2014.

Table IV — DOJ Individual FCPA Enforcement Actions⁴⁰

Year	Individuals Charged With Criminal FCPA Offenses
2014	10
2013	12
2012	2
2011	10
2010	33
	(including 22 in the Africa Sting case)
2009	18
2008	14
2007	7

Table X — SEC Individual FCPA Enforcement Actions⁴¹

Year	Individuals Charged With Civil FCPA Offenses
2014	2
2013	0
2012	4
2011	12

39. Press Release, *SEC Sanctions Two Former Defense Contractor Employees for FCPA Violations*, U.S. SEC. AND EXCH. COMM'N (Nov. 17, 2014), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543472839#.VI9dwyvF91b>.

40. *A Focus on DOJ FCPA Individual Prosecutions*, FCPA PROFESSOR (Jan. 20, 2014), <http://www.fcpaprofessor.com/a-focus-on-doj-fcpa-individual-prosecutions-2>.

41. *A Focus on SEC FCPA Individual Prosecutions*, FCPA PROFESSOR (Jan. 22, 2014), <http://www.fcpaprofessor.com/a-focus-on-sec-fcpa-individual-actions-2>.

Year	Individuals Charged With Civil FCPA Offenses
2010	7
2009	5
2008	5
2007	7

With a proper foundation in FCPA statistics, both in 2014 and over time, this article next uses certain statistics and other information to highlight persistent and problematic issues associated with FCPA enforcement.

II. Issues Highlighted by the Statistics

Part II of this article uses FCPA enforcement action data to highlight noteworthy issues from 2014. Specifically, the following issues are discussed: (i) the wide spectrum of FCPA allegations — from multi-million dollar payments in connection with large infrastructure projects to \$4 payments — and how the breadth of such allegations send confusing compliance messages to those subject to the FCPA; (ii) the wide gap between corporate and individual FCPA enforcement and a relevant data point that helps explain the gap as well as the significant policy issues which flow from the gap; and (iii) the problematic surge in SEC administrative actions to resolve alleged instances of FCPA scrutiny.

A. The Wide Spectrum of FCPA Enforcement Actions

This section highlights the wide spectrum of FCPA allegations in 2014 and how the breadth of such allegations send confusing compliance messages to those subject to the FCPA.

At its relevant core, the FCPA’s anti-bribery provisions prohibit the offering or providing of anything of value, to a “foreign official,” in order to “obtain or retain business,” with corrupt intent.⁴² Against this statutory backdrop, the DOJ and SEC have stated in connection with official FCPA Guidance that they are “focused on bribes of consequence — ones that have a fundamentally corrosive effect on the way companies do business abroad” and “payments of real and substantial value that clearly represent an unambiguous intent to bribe a foreign official to obtain or retain business.”⁴³

42. 15 U.S.C. § 78dd-2(a) (1998).

43. *The Guidance Press Conference*, FCPA PROFESSOR (Nov. 15, 2012), <http://www.fcprofessor.com/the-guidance-press-conference>.

Certain allegations in 2014 FCPA enforcement actions surely fit the type of conduct that the enforcement agencies have articulated is the focus of their respective FCPA enforcement programs. For instance, both the Alstom and Marubeni enforcement actions concerned multi-million dollar alleged bribes to alleged Indonesian foreign officials in connection with large infrastructure projects.⁴⁴ Likewise, an enforcement action against an Alcoa entity concerned multi-million dollar alleged bribes to alleged senior officials of the Kingdom of Bahrain in order to obtain and retain a long-term alumina supply agreement.⁴⁵

On the other hand, many allegations in various 2014 FCPA enforcement actions seemed to run counter to the sensibly articulated focus of FCPA enforcement. For instance, the SEC brought two enforcement actions based primarily on alleged excessive travel and entertainment benefits provided to alleged “foreign officials.” In an enforcement action against Bruker Corp., the SEC found that “from 2005 through 2011, the Bruker China Offices paid approximately \$119,710 to fund 17 trips for Chinese government officials that were for the most part not related to any legitimate business purpose.”⁴⁶ Likewise, in an individual enforcement action, the SEC found that former employees of FLIR Systems Inc. “arranged expensive travel, entertainment, and personal items for foreign government officials in the Kingdom of Saudi Arabia in order to influence the officials to obtain new business for their employer . . . and to retain existing business for FLIR with the Saudi Arabia Ministry of Interior.”⁴⁷ In addition, the SEC’s enforcement action against Avon included allegations concerning handbags, payments “for meals and entertainment expenses under \$200 per occurrence,” and use of “corporate boxes at the China Open tennis tournament.”⁴⁸

The monetary threshold of an alleged bribe was also lowered by the enforcement agencies in 2014. Even though the Chief of the SEC’s Enforcement Division stated in connection with official FCPA Guidance that one purpose of the Guidance was to

44. See Press Release, *Alstom Pleads Guilty and Agrees to Pay \$772 Million Criminal Penalty to Resolve Foreign Bribery Charges*, U.S. DEP’T OF JUSTICE (Dec. 22, 2014), <http://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery> (last updated Dec. 29, 2014); Press Release, *Marubeni Corporation Agrees to Plead Guilty to Foreign Bribery Charges and to Pay an \$88 Million Fine*, U.S. DEP’T OF JUSTICE (Mar. 19, 2014), <http://www.justice.gov/opa/pr/marubeni-corporation-agrees-plead-guilty-foreign-bribery-charges-and-pay-88-million-fine> (last updated Sept. 15, 2014).

45. Press Release, *Alcoa World Alumina Agrees to Plead Guilty to Foreign Bribery and Pay Millions in Fines*, U.S. DEP’T OF JUSTICE (Jan. 9, 2014), <http://www.justice.gov/opa/pr/alcoa-world-alumina-agrees-plead-guilty-foreign-bribery-and-pay-223-million-fines-and> (last updated Sept. 15, 2014).

46. Bruker Corp., Exchange Act Release No. 73835, 2014 WL 7016166 (Dec. 15, 2014).

47. Stephen Timms and Yasser Ramahi, Exchange Act Release No. 73616, 2014 WL 6338805 (Nov. 17, 2014).

48. Complaint at 11-12, Sec. and Exch. Comm’n v. Avon Products, Inc., No. 14-CV-9956 (KPF) (S.D.N.Y. Dec. 17, 2014).

“clear up some myths about the type of conduct that gets prosecuted under the FCPA — that it is not the \$5 cup of coffee, or the one off \$50 gift to a public official, that companies need to be concerned about,” the SEC’s FCPA enforcement action against Layne Christensen Company included an allegation about a \$4 payment.⁴⁹ In the words of the SEC:

“Layne Christensen made more than \$10,000 in small payments to foreign officials through various customs and clearing agents that it used in Tanzania, Burkina Faso, Mali, Mauritania, and the [Democratic Republic of Congo]. These payments ranged from \$4 to \$1,700 and were characterized in invoices submitted by the agents as, among other things, “intervention,” “honoraires,” “commissions,” and “service fees.”⁵⁰

The above type of allegations were not unique to 2014, as other recent FCPA enforcement actions have included allegations about: perfume, dresses and handbags; a bottle of wine; a watch; a camera, kitchen appliances and business suits; television sets, laptops and appliances; and tea sets and office furniture allegedly provided to alleged foreign officials.⁵¹ Nevertheless, the 2014 allegations serve as a reminder that the enforcement agencies continue to send confusing compliance messages to those subject to the FCPA.

In addition to the enforcement agency policy statements highlighted above, the FCPA Guidance states:

“Devoting a disproportionate amount of time policing modest entertainment and gift-giving instead of focusing on large government bids, questionable payments to third-party consultants, or excessive discounts to resellers and distributors may indicate that a company’s compliance program is ineffective. A \$50 million contract with a government agency in a high-risk country warrants greater scrutiny than modest routine gifts and entertainment.”⁵²

In connection with the FCPA Guidance, the SEC stated that it was “interested in companies spending compliance dollars in the most sensible way” and hoped that the Guidance and the hypotheticals provided in it would help companies decide where they can “minimize investment and where they can maximize it.”⁵³ The DOJ similarly added that it wants compliance programs “to address real matters of

49. Koehler, *supra* note 44.

50. Layne Christensen Co., Exchange Act Release No. 73437, 2014 WL 5423780 (Oct. 27, 2014).

51. *Do Lanny Breuer And Robert Khuzami Actually Read FCPA Enforcement Actions?*, FCPA PROFESSOR (Dec. 13, 2012), <http://www.fcpaprofessor.com/do-lanny-breuer-and-robert-khuzami-actually-read-fcpa-enforcement-actions>. (Containing links to original source documents).

52. *A Resource Guide to the U.S. Foreign Corrupt Practice Act*, U.S. DEP’T OF JUSTICE AND SEC. EXCH. COMM. (2015), available at <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>.

53. *The Guidance Press Conference*, FCPA PROFESSOR (Nov. 15, 2012), <http://www.fcpaprofessor.com/the-guidance-press-conference>.

concern.”⁵⁴

Because few business organizations subject to the FCPA have \$50 million contracts with government agencies in high-risk countries — or even any business with government agencies — the end result of the above cursory and often non-determinative allegations in many FCPA enforcement actions is to induce risk-averse business organizations to act contrary to the sensible enforcement agency guidance and statements highlighted above.

In short, if the DOJ and SEC are genuine about their message that they are only “focused on bribes of consequence,” on payments of “real and substantial value,” and in companies spending compliance dollars in the “most sensible way,” there is something very easy and practical for the enforcement agencies to do: only allege conduct in an FCPA enforcement action that actually determines the ultimate outcome of the enforcement action.

B. The Wide Gap Between Corporate and Individual FCPA Enforcement

This section highlights the wide gap between corporate and individual FCPA enforcement and a relevant data point that helps explain the gap, as well as the significant policy issues which flow from the gap.

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

The enforcement agencies have long recognized that an FCPA enforcement program based solely on corporate fines is not effective and does not adequately deter future FCPA violations.⁵⁵

Such rhetoric continued in 2014 as the Assistant Attorney General of the DOJ’s Criminal Division stated:

“Corporations do not act, but for the actions of individuals. In all but a few cases, an individual or group of individuals is responsible for the corporation’s criminal conduct. The prosecution of culpable

54. *Id.*

55. *See, e.g.,* Mike Koehler, *A Foreign Corrupt Practices Act Narrative*, 22 MICH. ST. INT’L L. REV. 961, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2428555.

individuals — including corporate executives — for their criminal wrongdoing continues to be a high priority for the department.”⁵⁶

Likewise, the Director of the SEC’s Enforcement Division stated:

“[A]ctions against individuals have the largest deterrent impact. Individual accountability is a powerful deterrent because people pay attention and alter their conduct when they personally face potential punishment. And so in the FCPA arena as well as all other areas of our enforcement efforts, we are very focused on attempting to bring cases against individuals.”⁵⁷

However, as in prior years, the enforcement agencies rhetoric about individual FCPA enforcement actions remains hollow and there is a wide gap between corporate and individual FCPA enforcement actions.

As highlighted in Table I, of the seven DOJ corporate enforcement actions from 2014, six (86%) have *not*, at least yet, resulted in any related charges against employees of the corporate entity resolving the enforcement action. Likewise, as highlighted in Table II, of the seven SEC corporate FCPA enforcement actions from 2014, seven (100%) have *not*, at least yet, resulted in any related charges against employees of the corporate entity resolving the enforcement action.

The wide gap between corporate and individual FCPA enforcement actions in 2014 was not an anomaly. Indeed, since 2008 the DOJ has resolved sixty-seven corporate FCPA enforcement actions and fifty (75%) have *not*, at least yet, resulted in any DOJ charges against company employees.⁵⁸ Similarly, since 2008 the SEC has resolved seventy-two corporate FCPA enforcement actions and sixty (83%) have *not*, at least yet, resulted in any SEC charges against company employees.⁵⁹ The higher SEC figure compared to the DOJ figure is notable in that the SEC, as a civil law enforcement agency, has a lower burden of proof in an enforcement action.

To be sure, the DOJ and SEC have brought FCPA enforcement actions against individuals. Indeed, as highlighted in Table VII, the DOJ did charge ten individuals with FCPA violations in 2014. However, the DOJ individual actions followed a typical “clustering” approach in which just three “core” actions resulted in the ten individual prosecutions. Such an approach was consistent with prior years in that

56. Leslie R. Caldwell, Assistant Att’y Gen. of the Criminal Division, U.S. Dep’t of Justice, Remarks by Assistant Attorney General for the Criminal Division Leslie R. Caldwell at the 22nd Annual Ethics and Compliance Conference (Oct. 1, 2014), *available at* <http://www.justice.gov/opa/speech/remarks-assistant-attorney-general-criminal-division-leslie-r-caldwell-22nd-annual-ethics>.

57. Andrew Ceresney, Remarks at 31st International Conference on the Foreign Corrupt Practices Act, (Nov. 19, 2014), *available at* <http://www.sec.gov/News/Speech/Detail/Speech/1370543493598#VPiEJvnF-Sp>.

58. *A Focus On DOJ FCPA Individual Prosecutions*, FCPA PROFESSOR (Jan. 20, 2015), <http://www.fcpaprofessor.com/a-focus-on-doj-fcpa-individual-prosecutions-3>.

59. *A Focus on SEC FCPA Individual Actions*, FCPA PROFESSOR (Jan. 27, 2015), <http://www.fcpaprofessor.com/a-focus-on-sec-fcpa-individual-actions-3>.

since 2008 the DOJ has charged ninety-nine individuals with criminal FCPA offenses, yet 58% of the individuals have been in just five “core” actions and 78% of the individuals have been in just eleven “core” actions.⁶⁰ In other words, DOJ FCPA individual enforcement numbers are significantly skewed by a small handful of enforcement actions.

The same is true for SEC FCPA individual enforcement actions. As highlighted in Table VIII and discussed above, for the first time since April 2012, the SEC brought an individual FCPA enforcement action in November 2014. The two individuals charged were in the same “core” action. Such an approach was consistent with prior years in that since 2008 the SEC has charged thirty-five individuals with civil FCPA offenses, yet 60% of the individuals have been in just five “core” actions.⁶¹ In other words and like the DOJ statistics, SEC FCPA individual enforcement numbers are significantly skewed by a small handful of enforcement actions.

Against the backdrop of aggressive enforcement agency rhetoric about individual prosecutions, the wide gap between corporate and individual FCPA enforcement raises several significant legal and policy issues. For starters, it causes one to legitimately wonder whether the conduct giving rise to the corporate FCPA enforcement action was engaged in by ghosts. Indeed, others have rightly asked the “but why was nobody charged” question in connection with many corporate FCPA enforcement actions.⁶²

However, an equally plausible reason why no individuals have been charged in connection with most corporate FCPA enforcement actions may have to do with the quality and legitimacy of the corporate enforcement action in the first place. As highlighted in Table I, DOJ corporate FCPA enforcement actions are often resolved through deferred prosecution agreements or non-prosecution agreements. Indeed, since 2010, 86% of DOJ corporate FCPA enforcements actions have involved either an NPA or DPA.⁶³

NPAs and DPAs are not subject to any meaningful judicial scrutiny and are often agreed to by business organizations for reasons of ease and efficiency, and not necessarily because the conduct at issue violated the FCPA. Indeed, prior to becoming SEC Chair, Mary Jo White stated a “fear [that] the deferred prosecution [agreement] is becoming a vehicle to show results.”⁶⁴ Likewise, former DOJ Attorney

60. Koehler, *supra* note 59.

61. Koehler, *supra* note 60.

62. James B. Stewart, *Bribery, but Nobody Was Charged*, THE NEW YORK TIMES (June 24, 2011), available at <http://www.nytimes.com/2011/06/25/business/25stewart.html?pagewanted=1&r=2&>.

63. *DOJ Enforcement Of The FCPA – Year In Review*, FCPA PROFESSOR (Jan. 8, 2015), <http://www.fcpaprofessor.com/doj-enforcement-of-the-fcpa-year-in-review-5>.

64. *An Informed And Forceful Critique Of NPAs And DPAs By . . . Guess Who?*, FCPA PROFESSOR (Apr.

General Alberto Gonzales stated:

“It is ‘easy, much easier quite frankly’ for the DOJ to resolve FCPA inquiries with NPAs and DPAs; such resolution vehicles have ‘less of a toll’ on the DOJ’s budget and such agreements ‘provide revenue’ to the DOJ. It is all ‘unfortunate’ [Is this the end of the sentence? Unclear from quotation placement.]

“In an ironic twist, the more that American companies elect to settle and not force the DOJ to defend its aggressive interpretation of the [FCPA], the more aggressive DOJ has become in its interpretation of the law and its prosecution decisions.”⁶⁵

Perhaps most telling, Mark Mendelsohn (former chief of the DOJ’s FCPA Unit), has talked about the “danger” of NPAs and DPAs and how “it is tempting for the [Justice Department] or the SEC . . . to seek to resolve cases through DPAs or NPAs that don’t actually constitute violations of the law.”⁶⁶

Individuals charged with FCPA violations, on the other hand, face a deprivation of personal liberty, damage to their personal reputations, and personal financial consequences and are thus more likely to force the DOJ to satisfy its high burden of proof as to all FCPA elements. In other words, perhaps the more appropriate question is not “but why was nobody charged” in connection with most corporate FCPA enforcement actions, but rather do corporate NPAs and DPAs necessarily represent provable FCPA violations?

The following working hypothesis seeks to assess this question:

- Instances in which the DOJ brings actual criminal charges against a company or otherwise insists in the resolution that the corporate entity pleads guilty to FCPA violations, represent a higher quality FCPA enforcement action (in the eyes of the DOJ) and are thus more likely to result in related FCPA criminal charges against company employees.
- Instances in which the DOJ resolves an FCPA enforcement action solely with an NPA or DPA, represent a lower quality FCPA enforcement action and are thus less likely to result in related FCPA criminal charges against company employees given that an individual is more likely to put the DOJ to its high burden of proof.

The below statistics provide a compelling data point concerning the quality and

25, 2013), <http://www.fcpaprofessor.com/an-informed-and-forceful-critique-of-npas-and-dpas-by-guess-who>.

65. *Former Attorney General Alberto Gonzales Criticizes Various Aspects Of DOJ FCPA Enforcement*, FCPA PROFESSOR (Apr. 4, 2013), <http://www.fcpaprofessor.com/former-attorney-general-alberto-gonzales-criticizes-various-aspects-of-doj-fcpa-enforcement>.

66. *Mark Mendelsohn on the Rise of FCPA Enforcement*, 24 CORP. CRIME REP. 35 (Sept. 10, 2010), available at <http://www.corporatecrimereporter.com/mendelsohn091010.html>.

legitimacy of many corporate DOJ FCPA enforcement actions. Since NPAs and DPAs were first introduced to the FCPA context in December 2004, there have been eighty-three corporate DOJ FCPA enforcement actions.⁶⁷

- Fourteen of these corporate enforcement actions were the result of a criminal indictment or resulted in a guilty plea by the corporate entity to FCPA violations. Ten of these corporate enforcement actions (71%) resulted in related criminal charges of company employees.
- Fifty-three of these corporate enforcement actions were resolved solely with an NPA or DPA. In only five instances (9%) were there related criminal charges of company employees.
- A third type of corporate FCPA enforcement action is a hybrid action in which the resolution includes a guilty plea by some entity in the corporate family — usually a foreign subsidiary — and an NPA or DPA against the parent company. Since the introduction of NPAs and DPAs in the FCPA context there have been sixteen such corporate enforcement actions. In five of these actions (31%) there were related criminal charges of company employees.

The “but why was nobody charged?” question is also tempting to ask in connection with SEC FCPA enforcement given that 83% of corporate FCPA enforcement actions since 2008 have *not*, at least yet, resulted in any SEC charges against company employees. Yet, like with the DOJ figures, there may be an equally plausible reason why so few individuals have been charged in connection with most corporate SEC FCPA enforcement actions. The reason may have to do with the quality and legitimacy of the corporate enforcement action in the first place.

With the SEC, the issue is not so much NPAs or DPAs (even though the SEC has used such vehicles two times to resolve an FCPA enforcement action: a DPA with Tenaris in 2011 and a NPA with Ralph Lauren in 2013, neither of which resulted in any related charges against company employees). Rather, the issue seems to be the SEC’s neither admit nor deny settlement policy, as well as the SEC’s increased use of administrative actions (a topic discussed in greater detail in the next section). Indeed, a notable development from 2014 was the Second Circuit concluding in a non-FCPA case that challenged the SEC’s neither admit nor deny settlement policy that SEC settlements are not necessarily about the truth, but pragmatism.⁶⁸

Individuals in an SEC FCPA enforcement, even if only a civil action and even if frequently allowed to settle on neither admit nor deny terms or through an

67. *DOJ Prosecution Of Individuals – Are Other Factors At Play?*, FCPA PROFESSOR (Jan. 21, 2015), <http://www.fcpaprofessor.com/doj-prosecution-of-individuals-are-other-factors-at-play-4>.

68. *Sec. and Exch. Comm’n v. Citigroup Glob. Mkts., Inc.*, 752 F.3d 285, 295 (2nd Cir. 2014).

administrative process, have their personal reputation and finances at stake and are thus more likely than corporate entities to challenge the SEC and force it to satisfy its burden of proof as to all FCPA elements.

As to the problematic surge in SEC administrative actions used to resolve alleged instances of FCPA scrutiny discussed in greater detail below, it is worth highlighting here that since 2013 the SEC has used administrative actions to resolve nine corporate FCPA enforcement actions and in *none* of these actions have there been related SEC enforcement actions against company employees.⁶⁹ In other words, and like in the DOJ context, perhaps the more appropriate question is not “but why was nobody charged?” in connection with most SEC corporate FCPA enforcement actions, but rather do SEC corporate FCPA settlements necessarily represent provable FCPA violations?

The above statistics should prompt questions about the quality and legitimacy of many corporate FCPA enforcement actions and may explain the wide gap between corporate and individual FCPA enforcement. The wide gap between corporate and individual enforcement, whether in the FCPA context or more broadly, raises important legal and policy issues. Indeed, DOJ Attorney General Eric Holder stated in 2014:

“[T]he [DOJ] recognizes the inherent value of bringing enforcement actions against individuals, as opposed to simply the companies that employ them. We believe that doing so is both important — and appropriate — for several reasons:

First, it enhances accountability. Despite the growing jurisprudence that seeks to equate corporations with people, corporate misconduct must necessarily be committed by flesh-and-blood human beings. So wherever misconduct occurs within a company, it is essential that we seek to identify the decision-makers at the company who ought to be held responsible.

Second, it promotes fairness — because, when misconduct is the work of a known bad actor, or a handful of known bad actors, it’s not right for punishment to be borne exclusively by the company, its employees, and its innocent shareholders.

And finally, it has a powerful deterrent effect. All other things being equal, few things discourage criminal activity at a firm — or incentivize changes in corporate behavior — like the prospect of individual decision-makers being held accountable. A corporation may enter a guilty plea and still see its stock price rise the next day. But an individual who is found guilty of a serious fraud crime is most likely going to prison.”⁷⁰

69. Koehler, *supra* note 60.

70. Eric H. Holder, Jr., Att’y Gen., Attorney General Holder Remarks on Financial Fraud Prosecutions

Yet despite the above rhetoric, the statistics highlighted in this section speak for themselves and there is an undeniably wide gap between corporate and individual FCPA enforcement.

C. The Problematic Surge in SEC Administrative Actions

Prior FCPA year in reviews focused on NPAs and DPAs and the controversy associated with such alternative resolution vehicles.⁷¹ As highlighted in Table I, such resolution vehicles continued to be a prominent fixture of FCPA enforcement in 2014 and remain controversial. However, the more notable issue from 2014 was the surge in SEC administrative actions to resolve alleged instances of FCPA scrutiny.

Prior to discussing why this surge is problematic, some background information is necessary. SEC administrative actions in the FCPA context were rare prior to 2010, largely because the SEC could not impose monetary penalties in such proceedings absent certain exceptions not relevant to FCPA enforcement. However, the Dodd-Frank Wall Street Reform Act granted the SEC authority to impose civil monetary penalties in administrative proceedings in which the SEC staff seeks a cease-and-desist order.⁷²

Of further historical relevance to the recent surge of the SEC resolving most FCPA enforcement actions administratively, is that the SEC has had some notable struggles in recent years in the FCPA context and otherwise when put to its burden of proof in litigated actions or otherwise having to defend its settlement policies to federal court judges.⁷³ The SEC's response to this judicial scrutiny has been, as strange as it may sound, to bypass the judicial system altogether when resolving many of its enforcement actions including in the FCPA context.

As noted by FCPA practitioners:

“The use of administrative proceedings is noteworthy in an environment in which federal judges are increasingly questioning the merits of proposed settlements submitted by the SEC and

at NYU School of Law (Sept. 17, 2014), *available at* <http://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law>.

71. *See*, Koehler, *supra* note 56.

72. *See*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P 124 Stat. 1376, 1862 (2010).

73. For instance, Judge Shira Scheindlin (S.D.N.Y.) dismissed the SEC's FCPA enforcement against former Siemens executive Herbert Steffen. In another FCPA enforcement action, Judge Keith Ellison (S.D.Tex.) granted without prejudice Mark Jackson and James Ruelhens motion to dismiss the SEC's claims that sought monetary damages. In *SEC v. Gabelli*, the Supreme Court unanimously rejected the SEC's statute of limitations position. In FCPA enforcement actions against Tyco and IBM, Judge Richard Leon (D.D.C.) expressed concerns regarding the terms of the SEC's settlement and approved the settlements only after imposing additional reporting requirements on the companies. *See* Koehler, *supra* note 56.

defendants for approval. . . . As judicial review continues to inject uncertainty into the once perfunctory settlement approval process, the use of administrative proceedings to resolve FCPA violations may become a preferred forum for SEC settlements.”⁷⁴

Use of administrative proceedings have indeed become the SEC’s preferred forum for resolving alleged instances of FCPA scrutiny. As Table II highlighted, of the seven SEC corporate FCPA enforcement actions in 2014, six (86%) were resolved through SEC administrative orders.

This surge in administrative proceedings is problematic. While Congress’s grant of such authority to the SEC in 2010 was no doubt politically popular in the aftermath of the so-called financial crisis, it has directly resulted in less judicial scrutiny of SEC enforcement theories including in the FCPA context. In short, SEC administrative actions, not to mention SEC NPAs and DPAs, place the SEC in the role of regulator, prosecutor, judge and jury all at the same time.

Criticism of the SEC’s increased use of administrative proceedings grew in 2014. For instance, Judge Jed Rakoff, a notable trial court judge who sits in the influential Southern District of New York and long a critic of the SEC’s neither admit nor deny settlement policy, questioned the SEC’s reliance on administrative proceedings by rhetorically asking in an unrelated order “from where does the constitutional warrant for such unchecked and unbalanced administrative power derive.”⁷⁵

Judge Rakoff followed-up more forcefully in a speech in which he asked — “is the SEC becoming a law unto itself?”⁷⁶ In the speech Judge Rakoff discussed “some dangers that seem to lurk . . . in the SEC’s apparent new policy of bringing a greater percentage of its significant enforcement actions as administrative proceedings.”⁷⁷

In the words of Judge Rakoff:

“What has been the stated rationale for all these changes? Usually nothing more than a claim of greater efficiency.”

[...]

While a claim to greater efficiency by any federal bureaucracy suggests a certain chutzpah, it is hard to find a better example of what is sometimes disparagingly called “administrative creep” than this expansion of the S.E.C.’s internal enforcement power.

74. Paul R. Berger, et al., *The Total S.A. Action: Are Administrative Orders the SEC’s FCPA Resolution of Choice for the Future?*, 4 FCPA UPDATE 1, 2-3 (2013), available at <http://documents.lexology.com/2404f0e5-da6d-4bc2-bf04-c1980011e0db.pdf>.

75. *Judge Rackoff Offers a Few Final Zingers*, FRCP PROFESSOR (Aug. 6, 2014), available at <http://www.fcpaprofessor.com/judge-rakoff-offers-a-few-final-zingers>.

76. Jed S. Rackoff, *PLLA Securities Regulation Institute Keynote Address: Is the S.E.C. Becoming a Law Unto Itself?* (Nov. 5, 2014), available at <http://assets.law360news.com/0593000/593644/Sec.Reg.Inst.final.pdf>.

77. *Id.*

To be sure, an S.E.C. enforcement action brought internally is in some superficial respects more “effective and efficient” and more “streamlined” than a similar action brought in federal court, for the simple reason that S.E.C. administrative proceedings involve much more limited discovery than federal actions, with no provision whatsoever for either depositions or interrogatories. Similarly, at the hearing itself, the Federal Rules of Evidence do not apply and the S.E.C. is free to introduce hearsay. Further still, there is no jury, and the matter is decided by an administrative law judge appointed and paid by the S.E.C. It is hardly surprising in these circumstances that the S.E.C. won 100% of its internal administrative hearings in the fiscal year ending September 30, 2014, whereas it won only 61% of its trials in federal court during the same period.

But, although the informality and arguable unfairness of S.E.C. administrative proceedings might present serious problems for those defending such actions, you might suppose that federal judges would be delighted to have fewer complicated securities cases burdening their overcrowded dockets. The reason, though, that I suggest that the judiciary and the public should be concerned about any trend toward preferring the S.E.C.’s internal administrative forum to the federal courts is that it hinders the balanced development of the securities laws.”

In conclusion, Judge Rakoff stated:

“ . . . I would urge the S.E.C. to consider that it is neither in its own longterm interest, nor in the interest of the securities markets, nor in the interest of the public as a whole, for the S.E.C. to become, in effect, a law unto itself.”

Another vocal critic of the SEC’s increased use of administrative proceedings has been Russell Ryan, a former Assistant Director of the SEC’s Enforcement Division). Ryan has noted:

“[A] surge in administrative [SEC] prosecutions should alarm anyone who values jury trials, due process and the constitutional separation of powers. The SEC often prefers to avoid judicial oversight and exploit the convenience of punishing alleged lawbreakers by administrative means, but doing so is unconstitutional. And if courts allow the SEC to get away with it, other executive-branch agencies are sure to follow.”⁷⁸

The irony of the SEC’s increased use of resolution vehicles that bypass the judicial system is that they have occurred during the tenure of Chair White. As SEC Chair, White has extolled the virtue of trials and the adversarial system. For instance, in a speech titled “The Importance of Trials to the Law and Public Accountability,” White

78. Russell G. Ryan, *The SEC as Prosecutor and Judge*, WALL ST. J., Aug. 4, 2014, <http://www.wsj.com/articles/russell-g-ryan-the-sec-as-prosecutor-and-judge-1407195362>.

stated that trials “put our system of justice . . . on display for all to see” and observed:

“The public airing of facts, literally in open court, creates accountability for both defendants and the government. How we resolve disputes and how we decide the guilt or innocence of an accused are the true measure of our democracy.”⁷⁹

In the speech, White noted that trials are the “crown jewel” of our system of justice” and she focused on two “of the [more] important roles that trials play in our administration of justice: how they foster development of the law, and perhaps even more importantly how they create public accountability for both defendants and the government through the public airing of charges and evidence.” As to the former, White stated that “[t]rials allow for more thoughtful and nuanced interpretations of the law in a way that settlements and summary judgments cannot.”⁸⁰ As to the later, White stated:

“The death of trials would . . . remove a source of disciplined information about matters of public significance. . . . It would mean the end of an irreplaceable public forum and would mean that more of the legal order would proceed behind closed doors. And it would deprive us, as American citizens, of an important source of knowledge about ourselves and key issues of public concern.”⁸¹

Notwithstanding the lack of accountability and adverse effects on the development of law that SEC Chair White has articulated, administrative actions have clearly become the preferred way for the SEC to resolve alleged instances of FCPA scrutiny. Indeed, the SEC has vowed increased use of administrative proceedings to resolve FCPA enforcement actions⁸² and the SEC has generally rebutted criticisms of such proceedings by stating that the SEC’s “use of the administrative forum is eminently proper, appropriate, and fair to respondents.”⁸³ Many disagree and 2014 witnessed the beginning of constitutional challenges to the SEC’s use of the administrative process to resolve alleged violations of the securities law, an issue that will likely come into clearer focus in the years ahead.⁸⁴

79. Mary Jo White, Chair, 5th Annual Judge Thomas A. Flannery Lecture Washington D.C., *The Importance of Trials to the Law and Public Accountability* (Nov. 14, 2013), available at <http://www.sec.gov/News/Speech/Detail/Speech/1370540374908#.VPiytnF-So>.

80. *Id.*

81. *Id.*

82. *Friday Roundup*, FCPA PROFESSOR (Oct. 3, 2014), <http://www.fcpaprofessor.com/friday-roundup-138>.

83. Andrew Ceresney, Director, SEC Division of Enforcement: Remarks to the American Bar Association’s Business Law Section Fall Meeting (Nov. 21, 2014), available at <http://www.sec.gov/News/Speech/Detail/Speech/1370543515297#.VMUIVkfF98E>.

84. Peter J. Henning, *S.E.C. Faces Challenges Over The Constitutionality of Some of Its Court Proceedings*, N.Y. TIMES, Jan. 27, 2015, http://dealbook.nytimes.com/2015/01/27/s-e-c-faces-challenges-over-the-constitutionality-of-some-of-its-court-proceedings/?_r=0.

III. Other Top FCPA or Related Developments From 2014

Part III of this article highlights other top FCPA or related developments from 2014. Specifically, the following issues are discussed: (i) judicial scrutiny of FCPA enforcement agency theories including the first case of precedent regarding the FCPA's important "foreign official" element; and (ii) judicial scrutiny of enforcement theories related to FCPA enforcement and how non-FCPA legal developments should cause pause as to certain FCPA enforcement theories.

A. *Judicial Scrutiny of FCPA Enforcement Theories*

Because of the resolution vehicles used by the DOJ and SEC to resolve FCPA enforcement actions, there is very little judicial scrutiny of FCPA enforcement. However, 2014 did witness two instances of judicial scrutiny and this section provides a comprehensive analysis of a historic "foreign official" appellate court decision as well as judicial scrutiny of a long-standing SEC enforcement action.

1. *"Foreign Official"*

In the FCPA's approximate forty-year history there have been few judicial decisions of precedent. Indeed, the number of substantive FCPA appellate court decisions can be counted on one hand.⁸⁵ Thus, almost by definition, the Eleventh Circuit's decision in *United States v. Esquenazi*, a case of first impression regarding the FCPA's important "foreign official" element, was the top FCPA legal development of 2014. Prior to discussing *Esquenazi*, some background information is necessary.

At its relevant core, the FCPA's anti-bribery provisions prohibit the offering or providing of anything of value to a "foreign official" in order to "obtain or retain business."⁸⁶ 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."⁸⁷

The proper scope and meaning of the "foreign official" element is an issue of extraordinary practical significance to businesses and individuals subject to the FCPA. The FCPA's anti-bribery provisions prohibit certain business conduct with "foreign officials," but do not apply to conduct that does not involve a "foreign official." Thus, it would not violate the FCPA to offer or provide something of value to a private customer, but offering or providing the same to a "foreign official" could

85. See *United States v. Liebo*, 923 F.2d 1308 (8th Cir. 1991); *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004); *United States v. Kozeny*, 667 F.3d 122 (2d Cir. 2011).

86. 15 U.S.C. § 78dd-2(a) (1998).

87. *Id.* § 78dd-2(h)(2).

be a criminal FCPA violation. Consequently, drawing the line between individuals who qualify as “foreign officials” and those who do not is critically important in a wide range of international business transactions.

For most of the FCPA’s history the “foreign official” element presented little controversy as FCPA enforcement largely focused on payments to bona fide “foreign officials” such as political leaders and other foreign government regulatory officials such as tax and customs officials.⁸⁸ However, in this new era of FCPA enforcement, the “foreign official” element has led to much dispute and controversy as many FCPA enforcement actions have nothing to do with such recipient categories.

Rather, the alleged “foreign officials” in many FCPA enforcement actions are employees of alleged state-owned or state-controlled enterprises (“SOEs”). SOEs are generally profit seeking enterprises that have many attributes of private business such as publicly traded stock or other private investors. In addition, many SOEs do business outside of their “home jurisdiction” in other countries and employ nationals and non-nationals alike. Nevertheless, and not often transparent, a foreign government may hold an ownership interest in an SOE or exert some level of control (such as through appointment of directors or officers) over the business enterprise. Many of the world’s largest companies (often in the oil and gas industry) are considered SOEs and SOEs are found in most foreign countries and are most prevalent in certain Asian countries and the Middle East.

The enforcement theory that has gained prominence is that SOEs are “instrumentalities” of a foreign government and that employees of alleged SOEs are thus “foreign officials” under the FCPA and occupy a status similar to political leaders. For instance, in 2014, 60% of corporate FCPA enforcement actions involved, in whole or in part, employees of alleged SOEs ranging from power and electric companies, to hospitals and labs, to an oil and gas company, to an aluminum smelter.⁸⁹

Against this backdrop, in 2011 a federal jury criminally convicted Joel Esquenazi and Carlos Rodriguez (former executives of Florida-based Terra

88. See, e.g., *Postage Stamps, Sir Albert Henry, Flying Voters, and the FCPA*, FCPA PROFESSOR (Aug. 24, 2011), <http://www.fcpaprofessor.com/postage-stamps-sir-albert-henry-flying-voters-and-the-fcpa>.; Mike Koehler, *Foreign Military Sales Leads To FCPA Enforcement Action*, FCPA PROFESSOR (Oct. 3, 2013), <http://www.fcpaprofessor.com/foreign-military-sales-lead-to-fcpa-enforcement-action>.

89. *The “Foreign Officials” Of 2014*, FCPA PROFESSOR (Jan. 14, 2015), <http://www.fcpaprofessor.com/the-foreign-officials-of-2014>. In 2013, 55% of corporate enforcement actions involved, in whole or in part, employees of alleged SOEs; in 2012, 42% of corporate enforcement actions involved, in whole or in part, employees of alleged SOEs; in 2011, 81% of corporate enforcement actions involved, in whole or in part, employees of alleged SOEs; in 2010, 60% of corporate FCPA enforcement actions involved, in whole or in part, employees of alleged SOEs; and in 2009, 66% of corporate FCPA enforcement actions involved, in whole or in part, employees of alleged SOEs.

Telecommunications Corp. (“Terra”)) on various counts for their alleged roles in a scheme to pay bribes to alleged “foreign officials” at Haiti Telecom, an alleged SOE.⁹⁰ On appeal, defendants challenged, among other things, the trial court’s “foreign official” jury instruction and an issue presented to the Eleventh Circuit was, “[w]hether [defendants are] entitled to an acquittal because employees of Haiti Teleco were not ‘foreign officials’ within the meaning of FCPA simply because the National Bank of Haiti owned shares of Haiti Teleco and the Haitian government appoints board members and directors.”⁹¹

The appeal was historic in that it represented the first time in FCPA history in which an appellate court was presented the opportunity to scrutinize the prominent enforcement theory that employees of alleged SOEs are “foreign officials” under the FCPA. Because *Esquenazi* was a case of first impression, and given the previously highlighted prominence of the SOE “foreign official” theory as well as the general importance of the “foreign official” element of the FCPA’s anti-bribery provisions, an extended discussion of the Eleventh Circuit’s decision is warranted.

After summarizing the Eleventh Circuit’s decision affirming the defendants’ conviction in which the court defined the term “instrumentality” in the FCPA, the decision is next critically analyzed and the following issues will be discussed: (i) the Eleventh Circuit’s flawed legal reasoning; (ii) the practical compliance difficulties of applying the Eleventh Circuit’s “instrumentality” definition; and (iii) separating what was at issue in the Eleventh Circuit appeal vs. what was not at issue.

To state the obvious, the *Esquenazi* decision was based on the unique facts of the case and the specific question presented of whether Haiti Teleco employees were “foreign officials” under the FCPA simply because the National Bank of Haiti allegedly owned shares of Haiti Teleco and the Haitian government allegedly appointed board members and directors.

As to the relevant factual background, the Eleventh Circuit stated:

One of Terra’s main vendors was [Haiti Teleco]. Because the relationship of Teleco to the Haitian government was, and remains, at issue in this case, the government presented evidence of Teleco’s ties to Haiti. Former Teleco Director of International Relations Robert Antoine testified that Teleco was owned by Haiti. An insurance broker, John Marsha, testified that, when Messrs. Rodriguez and Esquenazi were involved in previous contract negotiations with Teleco, they sought political-risk insurance, a type

90. Press Release, *Two Telecommunications Executives Convicted By Miami Jury on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti*, U.S. DEP’T OF JUSTICE (Aug. 5, 2011), <http://www.justice.gov/opa/pr/2011/August/11-crm-1020.html> (last updated Sept. 15, 2014).

91. *Historic “Foreign Official” Appeals Filed*, FCPA Professor (May 10, 2012), <http://www.fcprofessor.com/historic-foreign-official-appeals-filed>.

of coverage that applies only when a foreign government is party to an agreement. In emails with Mr. Marsha copied to Messrs. Esquenazi and Rodríguez, Mr. Dickey called Teleco an “instrumentality” of the Haitian government.

An expert witness, Luis Gary Lissade, testified regarding Teleco’s history. At Teleco’s formation in 1968, the Haitian government gave the company a monopoly on telecommunication services. Teleco had significant tax advantages and, at its inception, the government appointed two members of Teleco’s board of directors. Haiti’s President appointed Teleco’s Director General, its top position, by an executive order that was also signed by the Haitian Prime Minister, the minister of public works, and the minister of economy and finance. In the early 1970s, the National Bank of Haiti gained 97 percent ownership of Teleco. From that time forward, the Haitian President appointed all of Teleco’s board members. Sometime later, the National Bank of Haiti split into two separate entities, one of which was the Banque de la Republique d’Haiti (BRH). BRH, the central bank of Haiti, is roughly equivalent to the United States Federal Reserve. BRH retained ownership of Teleco. In Mr. Lissade’s expert opinion, for the years relevant to this case, Teleco belonged “totally to the state” and “was considered . . . a public entity.”

Mr. Lissade also testified that Teleco’s business entity suffix, S.A.M., indicates “associate anonymous mixed,” which means the “Government put money in the corporation.” Teleco’s suffix was attached not by statute, but “de facto” because “the government consider[ed] Teleco as its . . . entity.” In 1996, Haiti passed a “modernization” law, seeking to privatize many public institutions. As a result, Haiti privatized Teleco sometime between 2009 and 2010. Ultimately, Mr. Lissade opined that, during the years relevant to this case, “Teleco was part of the public administration.” He explained: “There was no specific law that . . . decided that at the beginning that Teleco is a public entity but government, officials, everyone consider[ed] Teleco as a public administration.” And, he said, “if there was a doubt whatsoever, the [anti-corruption] law [that] came in 2008 vanish[ed] completely this doubt . . . by citing Teleco as a public administration” and by requiring its agents — whom Mr. Lissade said were public agents — to declare all assets to avoid secret bribes.⁹²

Based on the above circumstances, the Eleventh Circuit concluded that Haiti Teleco “would qualify as a Haitian instrumentality under almost any definition [the court] could craft,” and that the Haiti Teleco employees allegedly bribed were thus “foreign officials” under the FCPA.⁹³ Elsewhere, the court stated that it had “little

92. United States v. Esquenazi, 752 F.3d 912 (11th Cir. 2014).

93. *Id.*

difficulty concluding sufficient evidence supported the jury's necessary finding that Teleco was a Haitian instrumentality."⁹⁴

The Eleventh Circuit could have rendered its decision on this narrow issue. However, "mindful of the needs of both corporations and the government for [future] direction about what an instrumentality is,"⁹⁵ the Eleventh Circuit went further and attempted to define "instrumentality" as found in the FCPA. For starters, the Eleventh Circuit rightly acknowledged that:

"The FCPA does not define the term 'instrumentality,' and this Court has not either. For that matter, we know of no other court of appeals who has."⁹⁶

The Eleventh Circuit's statutory analysis next proceeded as follows:

"We begin, as we always do when construing statutory text, with the plain meaning of the word at issue. According to Black's Law Dictionary, an instrumentality is '[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body.' Webster's Third New International Dictionary says the word means 'something that serves as an intermediary or agent through which one or more functions of a controlling force are carried out: a part, organ, or subsidiary branch esp. of a governing body.' These dictionary definitions foreclose Mr. Rodriguez's contention that only an actual part of the government would qualify as an instrumentality—that contention is too cramped and would impede the 'wide net over foreign bribery' Congress sought to cast in enacting the FCPA."⁹⁷

The Eleventh Circuit next observed that "dictionary definitions" did not completely provide the answer to what is an "instrumentality" and the court next "turn[ed] to other tools to decide what 'instrumentality' means in the FCPA."⁹⁸ The court stated:

"In the FCPA, the company 'instrumentality' keeps is 'agency' and 'department,' entities through which the government performs its functions and that are controlled by the government. We therefore glean from that context that an entity must be under the control or dominion of the government to qualify as an 'instrumentality' within the FCPA's meaning. And we can also surmise from the other words in the series along with 'instrumentality' that an instrumentality must be doing the business of the government.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

What the defendants and the government disagree about, however, is what functions count as the government's business.

To answer that question, we examine the broader statutory context in which the word is used. In this respect, we find one other provision of the FCPA and Congress's relatively recent amendment of the statute particularly illustrative. First, the so-called 'grease payment' provision establishes an 'exception' to FCPA liability for 'any facilitating or expediting payment to a foreign official . . . the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official.' 'Routine governmental action' is defined as 'an action . . . ordinarily and commonly performed by a foreign official in,' among other things, 'providing phone service.' If an entity involved in providing phone service could never be a foreign official so as to fall under the FCPA's substantive prohibition, there would be no need to provide an express exclusion for payments to such an entity. In other words, if we read 'instrumentality,' as the defendants urge, to categorically exclude government-controlled entities that provide telephone service, like Teleco, then we would render meaningless a portion of the definition of 'routine governmental action.' [...] 'It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word.' Thus, that a government-controlled entity provides a commercial service does not automatically mean it is not an instrumentality. In fact, the statute expressly contemplates that in some instances it would.

Next, we turn to Congress's 1998 amendment of the FCPA, enacted to ensure the United States was in compliance with its treaty obligations. That year, the United States ratified the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention). In joining the OECD Convention, the United States agreed to 'take such measures as may be necessary to establish that it is a criminal offence under [United States] law for any person intentionally to offer, promise or give . . . directly or through intermediaries, to a foreign public official . . . in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.' 'Foreign public official' is defined to include 'any person exercising a public function for a foreign country, including for a . . . public enterprise.' The commentaries to the OECD Convention explain that: 'A "public enterprise" is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence.' The commentary further explains: 'An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant

market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.’ In addition to this, the OECD Convention also requires signatories make it a crime to pay bribes to agents of any ‘public international organization.’

To implement the Convention’s mandates, Congress amended the FCPA in 1998. The only change to the definition of ‘foreign official’ in the FCPA that Congress thought necessary was the addition of ‘public international organization.’ This seems to demonstrate that Congress considered its preexisting definition already to cover a ‘foreign public official’ of an ‘enterprise . . . over which a government . . . exercise[s] a dominant influence’ that performs a ‘public function’ because it does not ‘operate[] on a normal commercial basis . . . substantially equivalent to that of . . . private enterprise[s]’ in the relevant market ‘without preferential subsidies or other privileges.’ Although we generally are wary of relying too much on later legislative developments to decide a prior Congress’ legislative intent, the circumstances in this case cause us less concern in that regard. This is not an instance in which Congress merely discussed previously enacted legislation and possible changes to it. Rather, Congress did make a change to the FCPA, and it did so specifically to ensure that the FCPA fulfilled the promise the United States made to other nations when it joined the Convention. The FCPA after those amendments is a different law, and we may consider Congress’s intent in passing those amendments as strongly suggestive of the meaning of “instrumentality” as it exists today.

[...]

[S]ince the beginning of the republic, the Supreme Court has explained that construing federal statutes in such a way to ensure the United States is in compliance with the international obligations it voluntarily has undertaken is of paramount importance. ‘If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements.’ We are thus constrained to interpret ‘instrumentality’ under the FCPA so as to reach the types of officials the United States agreed to stop domestic interests from bribing when it ratified the OECD Convention.”⁹⁹

Based on the above analysis and rationale, the Eleventh Circuit articulated the below key language from the decision.

“An ‘instrumentality’ [under the FCPA] is an entity controlled by the government of a foreign country that performs a function the

99. *Id.*

controlling government treats as its own. Certainly, what constitutes control and what constitutes a function the government treats as its own are fact-bound questions. It would be unwise and likely impossible to exhaustively answer them in the abstract. Because we only have this case before us, we do not purport to list all of the factors that might prove relevant to deciding whether an entity is an instrumentality of a foreign government. For today, we provide a list of some factors that may be relevant to deciding the issue.

To decide if the government ‘controls’ an entity, courts and juries should look to the foreign government’s formal designation of that entity; whether the government has a majority interest in the entity; the government’s ability to hire and fire the entity’s principals; the extent to which the entity’s profits, if any, go directly into the governmental fisc, and, by the same token, the extent to which the government funds the entity if it fails to break even; and the length of time these indicia have existed.

[...]

We then turn to the second element relevant to deciding if an entity is an instrumentality of a foreign government under the FCPA — deciding if the entity performs a function the government treats as its own. Courts and juries should examine whether the entity has a monopoly over the function it exists to carry out; whether the government subsidizes the costs associated with the entity providing services; whether the entity provides services to the public at large in the foreign country; and whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function.”¹⁰⁰

With a comprehensive summary of the *Esquenazi* decision complete, a critical analysis of the decision of first impression is next warranted and the following issues are discussed: (i) the Eleventh Circuit’s flawed legal reasoning; (ii) the practical compliance difficulties of applying the Eleventh Circuit’s “instrumentality” definition; and (iii) separating what was at issue in the Eleventh Circuit appeal vs. what was not at issue.

2. The Eleventh Circuit’s Flawed Legal Reasoning

The Eleventh Circuit’s decision was flawed in at least two respects.¹⁰¹ First,

100. *Id.*

101. This section of the article largely mirrors the author’s amicus brief urging the Supreme Court to accept certiorari in *United States v. Esquenazi*. See <http://www.fcpaprofessor.com/professor-koehler-files-amicus-brief-urging-supreme-court-to-hear-foreign-official-challenge>. The Supreme Court declined the opportunity to hear the appeal. See <http://www.fcpaprofessor.com/professor-koehler-files-amicus-brief-urging-supreme-court-to-hear-foreign-official-challenge>.

contrary to the court's opinion, the FCPA's enacting legislative history indicates that Congress did not intend the term "foreign official" to include employees of SOEs. Second, instead of considering the relevant enacting FCPA legislative history, the Eleventh Circuit supported its conclusion with a flawed analysis of subsequent 1998 amendments to the FCPA.

As to the first flaw in the Eleventh Circuit's decision, the FCPA's extensive enacting legislative history indicates that Congress did not intend the "foreign official" element to include employees of SOEs. Enacted in 1977, the FCPA was the end result of more than two years of investigation and consideration by both the 94th and 95th Congresses of the so-called "foreign corporate payments problem." Between June 1975 and September 1977, approximately twenty different bills were introduced in the Senate or House to address the foreign payments issue, and Congress held numerous hearings during which representatives from DOJ, SEC, State Department, Defense Department, Commerce Department, and Treasury Department testified.¹⁰²

During its investigation and consideration of the foreign payments issue, Congress learned of a wide variety of payments to a broad range of recipients.¹⁰³ But instead of enacting a general anti-bribery statute that would have applied to payments made to both public officials and private parties, Congress chose to enact a more limited law and accepted that the FCPA would "not reach all corrupt payments overseas."¹⁰⁴ In short, Congress used the "foreign official" element of the FCPA to limit the reach of the statute and if an alleged payment scheme does not involve a "foreign official," no violation of the FCPA's anti-bribery provisions can occur.

Statements, events, and information in the legislative history indicate Congress's intent to exclude employees of SOEs from the definition of "foreign official." For instance, the payments that prompted Congressional scrutiny principally involved traditional foreign government officials such as the Prime Minister of Japan; the Inspector General of the Dutch Armed Forces; the husband of the Queen of the Netherlands; the President of Honduras; the President of Gabon; and Saudi Arabian military generals.¹⁰⁵ It was these types of payments — and the foreign policy issues

102. See Decl. of Professor Michael J. Koehler in Support of Defendants' Motion to Dismiss Counts One Through Ten of the Indictment, *United States v. Carson*, No. 8:09-cr-00077 (C.D. Cal. Feb. 21, 2011) (summarizing the bills and hearings which led to enactment of the FCPA).

103. See, e.g., SEC Rept., *Questionable and Illegal Corporate Payments and Practices* (May 12, 1976); Hearings Before the Subcomm. on Consumer Protection and Fin., H.R. 6118, 95th Congr., 1st Sess. (Apr. 20 & 21, 1977).

104. See, e.g., S. Rep. No. 95-114, at 11 (Dec. 7, 1977) as to S. 305 (May 2, 1977); H.R. Rep. No. 95-640 (Sept. 28, 1977) as to H.R. 3815 (Feb. 22, 1977).

105. See, e.g., Hearings Before the Subcomm. on Multinational Corporations, United States Senate, 94th Congr., 1st Sess. (May 16 & 19; June 9 & 10; July 16 & 17; and Sept. 12, 1975) ("Political

they created — that motivated Congress to pass the FCPA in 1977.¹⁰⁶

During its multi-year investigation and deliberation, Congress clearly was aware that SOEs existed and that some of the foreign payments may have involved employees of such enterprises. Indeed, some of the bills introduced to address the foreign payments issue in the Senate and the House during both the 94th and 95th Congresses included definitions of “foreign government” that expressly included SOEs.

However, none of those bills became law. For instance, in August 1976, S. 3741 was introduced in the Senate, and H.R. 15149 was introduced in the House. Both bills defined “foreign government” to include, among other things, “a corporation or other legal entity established or owned by, and subject to control by, a foreign government.”¹⁰⁷ Similarly, in June 1977, H.R. 7543 was introduced in the House and defined “foreign government” to include “a corporation or other legal entity established, owned, or subject to managerial control by a foreign government.”¹⁰⁸ The above-quoted language from S. 3741 and H.R. 15149 provoked a comment from an American Bar Association (“ABA”) committee, which informed Congress that the definition of “foreign government” in these bills was “somewhat ambiguous.”¹⁰⁹ The ABA committee suggested a “more precise definition of this aspect of the definition of ‘foreign government’” and proposed the following language: “a legal entity which a foreign government owns or controls as though an owner.”¹¹⁰

Even though Congress was obviously aware of SOEs and even though language in other bills addressing foreign payments expressly included SOEs, Congress chose not to include these definitions or concepts in the bill that ultimately became the FCPA in December 1977. In short, in enacting the FCPA, Congress specifically contemplated — but rejected — statutory language that would have included SOEs. Indeed, by rejecting the definitions that appeared in S. 3741 and H.R. 15149, Congress rejected the very ownership-and-control test the Eleventh Circuit articulated in *Esquenazi* to determine when individuals employed by SOEs may be

Contributions to Foreign Governments Hearings”); Hearings Before the Subcomm. on International Economic Policy, H.R., 94th Congr., 1st Sess. (June 5, July 17, 24, & 29, Sept. 11, 18, & 30, 1975).

106. See, e.g., Political Contributions to Foreign Governments Hearings at 1 (“This subcommittee is concerned with the foreign policy consequences of these payments by U.S. based multinational corporations. . . . It is time to treat the issue for what it is: a serious foreign policy problem.”); Hearings Before the Subcomm. on Consumer Protection, House of Representatives, 94th Congress, 2nd Sess. at 139 (Sept. 21 & 22, 1976) (“Foreign Payments Disclosure Hearing...problem with corporate bribery overseas is that it poses very significant problems for our own foreign policy”).

107. S. 3741, 95th Cong., 1st Sess. (Aug. 6, 1976); H.R. 15149, 95th Cong. 1st Sess. (Aug. 10, 1976).

108. H.R. 7543, 95th Cong., 1st Sess. (June 1, 1977).

109. H.R. 15149, 95th Cong., 1st Sess. Foreign Payments Disclosure Hearings (containing a Sept. 22, 1976 letter from the American Bar Association to Rep. John Murphy, Chairman of the House Subcomm. on Consumer Protection and Fin.).

110. *Id.*

considered “foreign officials” under the FCPA.

The second flaw in the Eleventh Circuit’s decision was that instead of considering the relevant enacting FCPA legislative history, the court supported its conclusion with a flawed analysis of subsequent 1998 amendments to the FCPA.

The Eleventh Circuit acknowledged that it was “wary of relying too much on later legislative developments to decide a prior Congress’ legislative intent” and specifically cited a prior Supreme Court warning that “the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.”¹¹¹ Nevertheless, the Eleventh Circuit relied heavily on the legislative history of the 1998 amendments to the FCPA—passed more than twenty years after enactment of the FCPA—to determine the meaning of critical terms that have always appeared in the FCPA. Even assuming post-enactment legislative history could theoretically be relevant to the issue presented in *Esquenazi*, the Eleventh Circuit’s reliance on the 1998 amendments was nevertheless flawed in at least two respects.

First, the 1998 amendments did not modify or address the component of the FCPA’s definition of “foreign official” at issue in the case. Prior to the FCPA’s 1998 amendments, the FCPA defined “foreign official” in pertinent part as:

“[A]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality . . .”¹¹²

The 1998 amendments to the FCPA modified that definition as follows:

“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.*”¹¹³

As highlighted by the italicized text, the FCPA’s 1998 amendments added unrelated language to make it clear that public international organizations were within the FCPA’s scope. The amendments did not modify the “foreign official” definition in any way that was relevant to the question presented to the Eleventh Circuit.

Second, the Eleventh Circuit erroneously concluded that the FCPA’s 1998 amendments fully conformed the FCPA to the OECD Convention. Having so concluded, the Eleventh Circuit reasoned that the FCPA’s “foreign official” element

111. *Esquenazi*, 752 F.3d 912 (citing *United States v. Price*, 361 U.S. 304, 313 (1960)).

112. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107, 1418.

113. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 3, 112 Stat. 3302, 3305 (emphasis added).

must include employees of SOEs because the OECD Convention’s “foreign public official” definition can include employees of a “public enterprise” under certain circumstances.¹¹⁴

However, the 1998 Amendments to the FCPA were not intended to and did not bring the FCPA into complete conformity with the OECD Convention. When it passed the 1998 amendments, Congress understood that, while the OECD Convention approximated the FCPA, the two were not identical. During Congressional hearings that led to the 1998 amendments, the OECD Convention was described as “closely model[ing]” the FCPA, being “very similar” to the FCPA; being “largely consistent” with the FCPA; and tracking the FCPA closely.¹¹⁵ None of those statements demonstrate Congress’s intent to establish complete conformity between the OECD Convention and the FCPA.

Regardless of Congress’s intent, as the Fifth Circuit previously stated in an unrelated FCPA decision, the OECD Convention and the FCPA, as modified by the 1998 amendments, remain different in significant respects.¹¹⁶

The erroneous assumption of equivalence between the OECD Convention and the FCPA is a critical flaw in the Eleventh Circuit’s analysis. Based on that false premise, the court inferred that Congress “considered its preexisting definition [of ‘foreign official’] already to cover” employees of SOEs. After all, the Eleventh Circuit reasoned, if the 1998 amendments were designed to conform the FCPA to the OECD Convention, and if the 1998 amendments did not modify the relevant portions of the definition of “foreign official,” then the definition of “foreign official” must have already conformed to the OECD Convention definition.

However, the Eleventh Circuit’s reasoning finds support in neither the FCPA’s enacting legislative history, the legislative history relevant to the 1998 amendments, nor accepted norms of statutory construction. Indeed, the Supreme

114. The OECD Convention’s inclusion of “public enterprise” in the definition of “foreign public official” is specifically qualified through Commentary 15 to the OECD Convention, which states, “An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.” OECD’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions cmt. 15, Dec. 17, 1997, 37 I.L.M. 1, 9. [hereinafter OECD Combating Bribery Convention]

115. *The International Anti-Bribery and Fair Competition Act of 1998: Hearing on H.R. 4353 Before the Subcomm. on Fin. And Hazardous Materials of the Comm. on Commerce*, 105th Cong. 5, 10-11 (1998).

116. See Kay, 359 F.3d at 754. For instance: (i) while the FCPA contains an express statutory exception for facilitating payments, the OECD Convention does not; (ii) while the FCPA prohibits certain corrupt payments to political parties, the OECD Convention does not; and (iii) while the FCPA requires that corrupt payments be for the purpose of “obtain[ing] or retain[ing] business,” the OECD Convention contains no such requirement. Compare 15 U.S.C. §§ 78dd-2(b), -2(a) (1998), with the OECD Combating Bribery Convention, *supra* note 115.

Court has warned against divining legislative intent from Congress's inaction.¹¹⁷ Furthermore, international agreements like the OECD Convention— which is not self-executing—may be given legal effect only insofar as Congress separately enacts legislation to implement them.¹¹⁸

In short, the scope of a key element of a top-priority federal criminal statute that applies to countless businesses and individuals engaged in international commerce should be determined by ordinary tools of statutory construction and not, as the Eleventh Circuit did, through a flawed legal analysis or a process of inference based on mistaken assumptions about a non-self-executing international agreement.

The above features of the Eleventh Circuit's *Esquenazi* decision were problematic itself, yet another problem with the court's "instrumentality" definition is the practical compliance difficulties that will result.

2. The Practical Compliance Difficulties of Applying the Eleventh Circuit's "Instrumentality" Definition

To review, the key holding of the *Esquenazi* decision was that an "instrumentality" under the FCPA is an "entity controlled by the government of a foreign country that performs a function the controlling government treats as its own."¹¹⁹ The Eleventh Circuit recognized that what "constitutes control and what constitutes a function the government treats as its own are fact-bound questions" and, without seeking to list all "factors that might prove relevant," the court did list "some factors that may be relevant" in deciding issues of control and function.¹²⁰

As to control, the Eleventh Circuit listed the following factors:

[T]he foreign government's formal designation of that entity; whether the government has a majority interest in the entity; the government's ability to hire and fire the entity's principals; the extent to which the entity's profits, if any, go directly into the governmental fisc, and, by the same token, the extent to which the government funds the entity if it fails to break even; and the length of time these indicia have existed.¹²¹

As to function:

[W]hether the entity has a monopoly over the function it exists to carry out; whether the government subsidizes the costs associated with the entity providing services; whether the entity provides

117. See *United States v. Craft*, 535 U.S. 274, 287 (2002).

118. *Bond v. United States*, 134 S. Ct. 2077, 2084 (2013) (a convention that is not self-executing "does not by itself give rise to domestically enforceable federal law" absent "implementing legislation passed by Congress" (quoting *Medellin v. Texas*, 552 U.S. 491, 505 n.2 (2008))).

119. *Esquenazi*, 752 F.3d at 925.

120. *Id.*

121. *Id.*

services to the public at large in the foreign country; and whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function.¹²²

The Eleventh Circuit's non-exhaustive and often vague factors as to the meaning of "instrumentality" present practical compliance difficulties for business organizations and individuals competing in good faith in the global marketplace. In short, those subject to the FCPA's anti-bribery provisions will have difficulty in finding answers to many of the factor-based questions.

The Eleventh Circuit apparently thought such answers would be easy to ascertain and stated:

We think it will be relatively easy to decide what functions a government treats as its own in the present tense by resort to objective factors, like control, exclusivity, governmental authority to hire and fire, subsidization, and whether an entity's finances are treated as part of the public fisc. Both courts and businesses subject to the FCPA have readily at hand the tools to conduct that inquiry (especially because the statute contains a mechanism by which the Attorney General will render opinions on requests about what foreign entities constitute instrumentalities [the so-called FCPA Opinion Procedure Release Program].¹²³

Once again however, the Eleventh Circuit's reasoning was flawed. It is difficult to envision how a general counsel or chief compliance officer of a company, charged with approving expenditures of things of value made in connection with a business purpose, will find answers to certain issues identified by the Eleventh Circuit as being relevant.

Does the Eleventh Circuit envision the following exchanges?

- *General Counsel / Chief Compliance Officer:* Pardon me individual at Company A, can you tell me how your principals are hired and fired?
- *General Counsel / Chief Compliance Officer:* Excuse me individual at Company B, but do your profits go directly into the government fisc? Does the government subsidize your operations? And if so, for how long?
- *General Counsel / Chief Compliance Officer:* By the way individual at Company C, does the public in your country generally perceive your company to be performing a governmental function?

As to the practical compliance challenges resulting from the Eleventh Circuit's "instrumentality" definition, FCPA practitioners have noted:

122. *Id.*

123. *Id.* at 925 n.8.

In practice, this analysis may be more difficult than the court allows because information on these factors is not always publicly available or easy to discern.¹²⁴

The boundaries between public and private entities are often blurred, particularly in developing countries where corruption risks are the target of heightened Justice Department scrutiny.¹²⁵

As companies long have known, it can be expensive and time consuming to make such determinations, particularly in countries such as Russia, China, and various countries in Central and Latin America and in Africa where information about companies and state ownership is less than transparent and objective.¹²⁶

Ten years ago, I would have been happy to bet anyone a doughnut that I could accurately define what a foreign official is. Now, with various court definitions and a lack of clarity from the DOJ, I fear I might actually lose my doughnut.¹²⁷

An irony of the Eleventh Circuit’s non-exhaustive, factor-based test for what constitutes an “instrumentality” under the FCPA is that the court itself recognized that it will be a “difficult task—involving divining the subjective intentions of a foreign sovereign, parsing history, and interpreting significant amounts of foreign law—to decide what functions a foreign government considers core and traditional.”¹²⁸ Moreover, the Eleventh Circuit recognized “there may be entities near the definitional line for ‘instrumentality’ that may raise a vagueness concern.”¹²⁹

A further irony of the Eleventh Circuit’s factor-based test which resorts to foreign government categorization and characterization of business enterprises is that the DOJ itself has rejected such an approach in issuing opinions under the FCPA Opinion Procedure Release Program. For instance, in Release 94-01 a company subject to the FCPA disclosed that its “foreign attorney has advised that under the

124. M. Witten et al., *Eleventh Circuit Adopts Broad Definition of Government “Instrumentality” Under FCPA*, WILMER HALE (May 22, 2014), <https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179872427>.

125. Wendy Wysong et al., *Eleventh Circuit Issues Much Anticipated Opinion Defining ‘Foreign Official’ Under FCPA*, CLIFFORD CHANCE 1, 3 (May 20, 2014), http://www.cliffordchance.com/briefings/2014/05/eleventh_circuitissuesmuchanticipatedopinio.html#.U30GwfldWiM.

126. Sean Hecker et al., *FCPA Update: U.S. Appellate Court Defines Government “Instrumentality” Under FCPA*, DEBEVOISE & PLIMPTON LLP 1, 7 (May 2014), http://www.debevoise.com/~media/files/insights/publications/2014/05/fcpa%20update/files/view%20fcpa%20update/fileattachment/fcpa_update_may2014.pdf.

127. Tom Webb, *FCPA Enforcement Critic to Become DoJ Fraud Section Chief*, GLOBAL INVESTIGATIONS REVIEW (Jan. 13, 2015), [http://globalinvestigationsreview.com/article/2277/?utm_source=Law+Business+Research&utm_medium=email&utm_campaign=5232111_GIR+Headlines&utm_content=\\$LINK_KEYWORD\\$&dm_i=1KSF,3454F,E9U8QV,B6280,1](http://globalinvestigationsreview.com/article/2277/?utm_source=Law+Business+Research&utm_medium=email&utm_campaign=5232111_GIR+Headlines&utm_content=$LINK_KEYWORD$&dm_i=1KSF,3454F,E9U8QV,B6280,1).

128. *Esquenazi*, 752 F.3d at 925, n.8.

129. *Id.* at 929.

nation's law, the individual [at issue] would not be regarded as either a government employee or a public official"¹³⁰ However, the DOJ stated that "the foreign attorney's opinion is not dispositive" and the DOJ "considered the foreign individual to be a 'foreign official' under the [FCPA]."¹³¹

As to the FCPA's Opinion Procedure Release Program referenced by the Eleventh Circuit, seemingly lost on the court is that it often takes months for a business organization to receive an answer from the DOJ. For this reason, among others, the FCPA Opinion Procedure Release Program has been routinely criticized. As noted in a 2010 review of FCPA enforcement by the OECD Working Group on Bribery in International Business Transactions:

So far, the FCPA Opinion Procedure has been used very little by the private sector to obtain DOJ advice on prospective transactions The non-governmental participants in the on-site meetings cited several reasons for the infrequent use of the Opinion Procedure. For instance, legal and private sector representatives felt that the Opinion Procedure is only useful in limited situations where the prospective fact situation is narrow and not going to change. They also find that the response time, which is 30 days after the request is complete, is too long in certain situations, such as entering joint ventures and mergers and acquisitions, where a company normally needs to make decisions relatively quickly The most pervasive concern of the private sector representatives was that availing themselves of the Opinion Procedure could expose them to potential enforcement actions by the DOJ, as well as provide competitors with information about their prospective international business activities.¹³²

In short, the Eleventh Circuit's non-exhaustive and often vague factors as to the meaning of "instrumentality" present practical compliance difficulties for business organizations and individuals competing in good faith in the global marketplace. Moreover, as even the Eleventh Circuit acknowledged, its factor-based test may raise constitutional vagueness questions. Indeed, by largely deferring to foreign government categorization and characterization of business enterprises, the Eleventh Circuit crafted an "instrumentality" definition with 193 potential different meanings.¹³³

130. Foreign Corrupt Practices Act Review: Opinion Procedure Release, No. 94-01, U.S. DEP'T OF JUSTICE (May 13, 1994), *available at* <http://www.justice.gov/criminal/fraud/fcpa/opinion/1994/9401.pdf>.

131. *Id.*

132. *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States*, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT 1, 29 (Oct. 2010), <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/UnitedStatesphase3reportEN.pdf>.

133. By most measures, there are 193 countries in the world.

Such a test as to a key element of an important criminal law raises several significant constitutional issues “because it vests domestic federal lawmaking in foreign governments and their officials.”¹³⁴ Among other practical problems for those subject to the FCPA is that finding foreign law may be difficult, and foreign government agencies or departments may have rulemaking power but may not publish rules in English.¹³⁵

In closing, the Eleventh Circuit’s *Esquenazi* decision of first impression regarding the FCPA’s important “foreign official” element was the top legal development of 2014. Yet, for the reasons discussed above, the Eleventh Circuit’s legal reasoning was flawed and its non-exhaustive, factor- based test presents several practical compliance difficulties.

Some commentators appeared perplexed why the meaning of “foreign official” in the FCPA’s anti-bribery provisions even matters. As stated by one commentator:

If your [sic] trying to figure out whether a company is a private company or an “instrumentality” of a foreign government under the Foreign Corrupt Practices Act you are already in trouble. To reach that point in the FCPA analysis you’ve already paid a bribe, or are thinking of paying a bribe. (If you’re just thinking about it; Don’t do it.) Otherwise you’ll end up in the position of Joel Esquenazi and Carlos Rodriguez.¹³⁶

Such comments are entirely off-base and not the main reason why the meaning of “foreign official” matters. To be sure, the meaning of “foreign official” mattered to Esquenazi and Rodriguez in the narrow context of their case and more broadly for the obvious rule of law reasons implicated in criminal law enforcement.

Stating that the meaning of “foreign official” matters only to those intent on engaging in bribery is like saying the drinking laws matter only to those intent on drunk driving. Sure, the drinking laws can certainly capture those engaged in drunk driving, yet the reality is the underlying activity—drinking—is legal and socially acceptable in most other situations.

The same is true when it comes to the meaning of “foreign official.” The FCPA’s anti-bribery provisions are generally implicated when anything of value is offered or provided to a “foreign official” in connection with a business purpose. Often the underlying activity—offering or providing anything of value in connection with a business purpose—is legal and socially acceptable in most situations. In fact, it is often called effective sales and marketing, wining and dining the customer, or

134. Paul J Larkin Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 HARV. J.L. & PUB. POL’Y 337, 346 (2015).

135. *Id.*

136. Doug Cornelius, *What is an “Instrumentality” under the FCPA*, COMPLIANCE BLDG., (May 21, 2014), <http://www.compliancebuilding.com/2014/05/21/what-is-an-instrumentality-under-the-fcpa/>.

maintaining good will. In other words, those competing in good faith in the global marketplace can legally provide anything of value to one category of person in connection with a business purpose, yet providing the same thing of value to a different category of person can be a crime.

In short, the *Esquenazi* decision expands regulation of business interactions with a “well-defined group of persons” (as correctly noted by the Fifth Circuit in *U.S. v. Castle*¹³⁷) to an ill-defined, practically boundless category of persons. Finally, in analyzing *Esquenazi* it is also important to understand what was not at issue before the Eleventh Circuit and what was at issue.

3. What Was At Issue in the Eleventh Circuit Appeal vs. What Was Not at Issue

What was not at issue in *Esquenazi* was whether the FCPA should incorporate SOE concepts. Indeed, if Congress wants to include SOEs in the FCPA, as it has in other laws passed before and after the FCPA, or wants to align the FCPA with the OECD Convention on the “foreign official” issue, Congress is clearly capable of doing just that.

Both before and after enactment of the FCPA, Congress has demonstrated its ability to draft and enact bills that expressly address SOEs and related concepts and it is axiomatic that when a particular term is explicitly included in other statutes, but is not included in the statute at issue, courts should presume that Congress did not intend to include that term in the statute at issue.¹³⁸

Congress has repeatedly enacted statutory definitions that expressly include SOEs, but the definition included in the FCPA does not. Under such circumstances, the absence of any mention of SOEs in the FCPA indicates Congress’s intent that employees of SOEs do not fall within the FCPA’s definition of “foreign official.” Indeed, if the Eleventh Circuit’s interpretation of the FCPA’s statutory language were correct, the express references to SOEs that appear in other statutes would be rendered entirely superfluous.

For instance, the Foreign Sovereign Immunities Act (“FSIA”) passed by Congress in 1976 (one year before the FCPA) expressly provides the following definition:

- (a) “foreign state” . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

137. *See, e.g.*, *United States v. Castle*, 925 F.2d 831, 836 (5th Cir. 1991). The *Castle* court’s statement was dicta and the court did not substantively address the meaning of the FCPA’s “foreign official” element.

138. *See, e.g.*, *Whitfield v. United States*, 543 U.S. 209, 216 (2005).

(b) An “agency or instrumentality of a foreign state” means any entity—(1) which is a *separate legal person, corporate or otherwise, and (2) which 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, and (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.*¹³⁹

Likewise, the Economic Espionage Act (“EEA”) passed by Congress in 1996 regulates certain conduct that “will benefit any foreign government, foreign instrumentality, or foreign agent” and expressly provides the following definition:

“[F]oreign instrumentality” means any agency, bureau, ministry, component, institution, association, or any legal, *commercial, or business organization, corporation, firm, or entity* that is substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government.¹⁴⁰

Similarly, the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), passed by Congress in 2010, required certain resource extraction companies to disclose information regarding payments for development of oil, natural gas, or minerals made to “foreign governments.” The law expressly includes the following definition of “foreign government”:

[T]he term “foreign government” means a foreign government, a department, agency, or instrumentality of a foreign government, or a *company owned by a foreign government*, as determined by the Commission.¹⁴¹

The quoted language of the above statutes, which expressly includes SOEs, would be rendered surplusage if the Eleventh Circuit’s interpretation of the FCPA were correct. Of course, courts hesitate to adopt constructions of statutes that render language unnecessary or inoperative and it is a “well-settled rule that all parts of a statute, if possible, are to be given effect,”¹⁴² and courts are “reluctant to treat statutory terms as surplusage in any setting.”¹⁴³

What was also not at issue in *Esquenazi* was whether the FCPA should be a comprehensive anti-bribery statute. Congress could have passed a comprehensive anti-bribery statute in 1977—as well as when the FCPA was amended in 1988 and 1998—and could still pass a comprehensive anti-bribery statute today if it chooses. However, it is undisputed that Congress has not done so and the FCPA’s anti-bribery provisions are qualified in many ways such as through the category of recipients of

139. 28 U.S.C. § 1603 (2013) (emphasis added).

140. 18 U.S.C. § 1839(1) (2013) (emphasis added).

141. 15 U.S.C. § 78m(q)(1)(B) (2014) (emphasis added).

142. *See, e.g.*, *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 513 (1981).

143. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

the alleged improper payments.

Indeed, should it choose, Congress could easily look to anti-corruption legislation enacted by several other OECD Convention signatory countries which expressly include SOEs and related concepts. For instance, the United Kingdom “Bribery Act” defines “foreign public official” to expressly include individuals who exercise a public function for any “*public enterprise*.”¹⁴⁴ Similarly, Canada’s “Corruption of Foreign Public Officials Act” defines “foreign public official” to expressly include a person who performs public duties or functions for a foreign state, including a person employed by a “*corporation*.”¹⁴⁵ Likewise, the relevant provisions of Australia’s Criminal Code Act expressly state that “foreign government body” includes “a foreign public enterprise,” and the Act then contains a detailed definition of “foreign public enterprise.”¹⁴⁶

What was at issue in *Esquenazi* was the basic and fundamental principle of ensuring that when the government marshals its full resources against individuals and deprives the individuals of their liberty, each element of the charge alleged is being applied consistent with Congressional intent in enacting the statute. After all, the DOJ (and SEC) should only enforce an FCPA statute that Congress actually intended to enact.

Notwithstanding what was at issue in *Esquenazi*, some have suggested:

For those who challenged the government’s legal interpretation of the term “instrumentality,” they need to pick and choose better places to challenge the FCPA and the government’s enforcement program.¹⁴⁷

Such commentary wholly discounts the ultimate outcome of other FCPA enforcement actions in which other individual defendants challenged, at the trial court level, the DOJ’s legal interpretation that SOE employees were “foreign officials” under the FCPA. For instance:

- A federal court judge granted, at the close of the DOJ’s case, John O’Shea’s motion for acquittal and found him not guilty of all substantive FCPA charges.¹⁴⁸ O’Shea’s lawyers opined that

144. Bribery Act 2010, c. 23, art. 6 (Eng.), available at <http://www.legislation.gov.uk/ukpga/2010/23/contents> (emphasis added).

145. Corruption of Foreign Public Officials Act, S.C. 1998, c 34, art 2 (Can.), available at <http://laws-lois.justice.gc.ca/eng/acts/C-45.2/page-1.html> (emphasis added).

146. *Criminal Code Act 1995* (Cth) div 70 (Austl.), available at <http://www.comlaw.gov.au/Details/C2014C00196> (emphasis added).

147. Michael Volkov, *Esquenazi: DOJ Wins Appeal on Instrumentality*, VOLKOV LAW GROUP LLC (May 19, 2014), <http://blog.volkovlaw.com/2014/05/esquenazi-doj-wins-appeal-on-instrumentality/>.

148. *O’Shea Not Guilty of Substantive FCPA Charges*, FCPA PROFESSOR (Jan. 17, 2012), <http://www.fcprofessor.com/oshea-not-guilty-of-substantive-fcpa-charges>.

the “foreign official” issue played a role in the ultimate outcome of the case.¹⁴⁹

- In the Carson “foreign official” challenge, the judge issued a pro-defendant jury instruction prior to trial concerning “knowledge of status of foreign official.”¹⁵⁰ Soon thereafter, the DOJ offered the defendants what can only be described as lenient plea deals that the risk adverse defendants accepted and the DOJ never had to prove its case.¹⁵¹
- In the Lindsey Manufacturing enforcement action, the judge ultimately dismissed the case after finding numerous instances of prosecutorial misconduct.¹⁵² Although the prosecutorial misconduct was seemingly unconnected to “foreign official” issues, post-trial motions concerning “foreign official” issues were pending at the time of dismissal.

Given the dearth of FCPA precedent and the importance of the “foreign official” issue, the *Esquenazi* decision generated much commentary. In the minds of some, the decision of first impression “puts to rest a major issue of contention” concerning the proper meaning of “foreign official.”¹⁵³ Others stated that the *Esquenazi* decision “would appear to curtail the on-going debate over what constitutes a government instrumentality and whether improper payments to state-owned entities could be a violation of the FCPA.”¹⁵⁴

Such commentary is curious as it is doubtful that there is another instance in which a key element of an important federal law is deemed resolved or settled because of one appellate court decision, not to mention a flawed decision.

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149. *Did “Foreign Official” Impact The O’Shea Acquittal*, FCPA PROFESSOR (Jul. 11, 2012), <http://www.fcpaprofessor.com/did-foreign-official-impact-the-oshea-acquittal>.
150. *Checking In On the Carson Case*, FCPA PROFESSOR (Apr. 19, 2012), <http://www.fcpaprofessor.com/checking-in-on-the-carson-case-2>.
151. *Carson Sentencing Issues*, FCPA PROFESSOR (Nov. 12, 2012), <http://www.fcpaprofessor.com/carson-sentencing-issues>; *Friday Roundup*, FCPA Professor (Feb 1, 2013), <http://www.fcpaprofessor.com/friday-roundup-67>.
152. *See Milestone Erased: Judge Matz Dismisses Lindsey Convictions, Says That “Dr. Lindsey and Mr. Lee Were Put Through a Severe Ordeal” and That Lindsey Manufacturing, a “Small, Once Highly Respected Enterprise . . . Placed in Jeopardy,”* FCPA PROFESSOR (Dec. 1, 2011), <http://www.fcpaprofessor.com/milestone-erased-judge-matz-dismisses-lindsey-convictions-says-that-dr-lindsey-and-mr-lee-were-put-through-a-severe-ordeal-and-that-lindsey-manufacturing-a-small-once-highly-respected-ente>.
153. Raymond Banoun et al., *Eleventh Circuit Defines “Instrumentality” Broadly Under the FCPA*, CADWALDER 1, 1 (May 2014), <http://www.cadwalader.com/uploads/newsletters/d031b31d3d3da94398c85d8a44292de7.pdf>.
154. Tara K. Giunta et al., *Appellate Court Clarifies FCPA “Instrumentality” Definition*, PAUL HASTINGS 1, 4 (May 19, 2014), <http://www.paulhastings.com/docs/default-source/PDFs/stay-current-esquenazi-client-alert.pdf>.

4. Long-Standing SEC Enforcement Action

While not an appellate court decision, another notable instance of judicial scrutiny of FCPA enforcement in 2014 was the conclusion of the SEC's long-standing FCPA enforcement action against Mark Jackson and James Ruehlen. By way of background, in 2012 the SEC charged Jackson (a former CEO of Noble Corporation, an oil and gas company) and Ruehlen (a current Director and Division Manager of a Noble subsidiary in Nigeria) with authorizing a customs agent to make payments on the company's behalf "to Nigerian government officials to influence or induce them to (1) favorably process false paperwork, (2) grant temporary import permits (TIPs) [for oil rigs] based on the false paperwork, and (3) favorably exercise or abuse their discretion in granting extensions to these illicit TIPs."¹⁵⁵

Jackson and Ruehlen mounted a defense and forced the SEC to prove its case, an occurrence which rarely happens in the FCPA context.¹⁵⁶ For approximately two years there was much legal wrangling as the trial court judge granted the defendants' motion to dismiss the SEC's claims that sought monetary damages while denying the motion to dismiss as to claims seeking injunctive relief. Even though the court granted the motion as to the SEC's monetary damage claims, the dismissal was without prejudice and the SEC was allowed to file an amended complaint. That is indeed what happened, and leading up to trial the SEC's case was consistently trimmed as the SEC attempted to meet its burden. Among other things, a portion of the SEC's claims were dismissed or abandoned on statute of limitations grounds and the trial court judge ruled, in an issue of first impression, that the SEC has the burden of negating the FCPA's facilitation payments exception to the anti-bribery provisions.¹⁵⁷

Leading up to trial, the judge denied the parties' motions for summary judgment, and in denying the SEC's motion the judge expressed much skepticism regarding the validity of the SEC's claims.¹⁵⁸ Among other things, the judge questioned the

155. Complaint at para. 1, Sec. and Exch. Comm'n v. Jackson, No. 4:12-CV-00563 (S.D. Tex. Feb. 4, 2012). The SEC's enforcement action against Jackson and Ruehlen was based on the same core conduct as the SEC's 2010 FCPA enforcement action against Noble Corp. in which the company, without admitting or denying the SEC's allegations, agreed to an injunction and payment of disgorgement and prejudgment interest of \$5,576,998. See *SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials*, SEC. AND EXCH. COMM'N (Nov. 4, 2010), <https://www.sec.gov/news/press/2010/2010-214.htm>.

156. *Will the SEC Be Put To Its Burden of Proof in the Jackson and Ruehlen Enforcement Action?*, FCPA PROFESSOR (Feb. 28, 2012), <http://www.fcpaprofessor.com/will-the-sec-be-put-to-its-burden-of-proof-in-the-jackson-and-ruehlen-enforcement-action>.

157. See, e.g., *July 3rd Friday Roundup*, FCPA PROFESSOR (Jul. 3, 2014), <http://www.fcpaprofessor.com/friday-roundup-127>; *March 28's Friday Roundup*, FCPA PROFESSOR (Mar. 28, 2014), <http://www.fcpaprofessor.com/friday-roundup-114>.

158. *"I Have Such Trouble Understanding The Facilitating Payment Exception"*, FCPA PROFESSOR (Dec. 9, 2014), <http://www.fcpaprofessor.com/i-have-such-trouble-understanding-the-facilitating->

SEC's ability to negate the facilitation payments exception and expressed concern about the SEC's position that the defendants violated the FCPA's books and records provisions because Noble Corp. booked the alleged improper payments in a special facilitating payments account based on the good faith belief that they were indeed facilitating payments.¹⁵⁹

On the brink of the SEC's first-ever FCPA trial, the parties agreed to settle. Without admitting or denying the SEC's allegations, the defendants, who were not required to pay any civil fine or other monetary sanction, consented to a final judgment permanently restraining and enjoining them from violating the FCPA's books and records provisions.¹⁶⁰

Even though the SEC's FCPA Unit Chief called the resolution "a very good settlement" for the SEC, the fact is on the brink of the SEC's first-ever FCPA trial, the SEC offered the defendants an extremely favorable settlement in what can only objectively be called a defense win.¹⁶¹

B. Judicial Scrutiny of Related Enforcement Theories

Given the general absence of substantive FCPA case law, one must often reference non-FCPA case law involving similar issues to best appreciate the many controversial aspects of FCPA enforcement. In 2014, two Supreme Court decisions and an appellate court decision touched upon issues relevant to FCPA enforcement.

1. Supreme Court Decisions

Even though the Supreme Court declined cert. in *Esquenazi*, the general issue of corruption was on the Supreme Court's docket in 2014. In *McCutcheon v. FEC*, the specific issue before the court was whether the aggregate limits on campaign contributions, which restrict how much money a donor may contribute in total to all political candidates or political committees, violated the First Amendment.¹⁶²

In a plurality opinion authored by Chief Justice Roberts and joined by Justices Scalia, Kennedy and Alito, the court held that such aggregate limits are valid under the First Amendment and in doing so dismissed the argument that such limits served the objective of combating corruption. The opinion recognized that "while preventing corruption or its appearance is a legitimate objective, Congress may

payment-exception.

159. *Id.*

160. *July 3rd Friday Roundup*, FCPA PROFESSOR (Jul. 3, 2014), <http://www.fcprofessor.com/friday-roundup-127>.

161. Phyllis Diamond, *More FCPA Cases in Pipeline, Brockmeyer Says; Some Administrative*, BLOOMBERG BNA (July 25, 2014), <http://www.bna.com/sec-enforcement-officer-n17179892900/>.

162. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1442 (2014).

target only a specific type of corruption ‘quid pro quo’ corruption.”¹⁶³ As to that type of corruption, the plurality opinion adopted a narrow view and stated: “[G]overnment regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. Ingratiation and access are not corruption.”¹⁶⁴

The plurality opinion further stated:

[S]pending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder’s official duties, does not give rise to such quid pro quo corruption. Nor does the possibility that an individual who spends large sums may garner influence over or access to elected officials or political parties.

The line between quid pro quo corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights.¹⁶⁵

A dissenting opinion authored by Justice Breyer and joined by Justices Ginsburg, Sotomayor and Kagan stated that the notion “that large aggregate contributions do not ‘give rise’ to ‘corruption’—is plausible only because the plurality defines ‘corruption’ too narrowly.”¹⁶⁶

The dissenting opinion viewed corruption more broadly and stated:

Corruption breaks the constitutionally necessary chain of communication between the people and their representatives. It derails the essential speech-to-government-action tie. Where enough money calls the tune, the general public will not be heard. Insofar as corruption cuts the link between political thought and political action, a free marketplace of political ideas loses its point.

Since the kinds of corruption that can destroy the link between public opinion and governmental action extend well beyond those the plurality describes, the plurality’s notion of corruption is flatly inconsistent with [basic constitutional rationales].¹⁶⁷

It is difficult to square the reasoning of the plurality opinion in *McCutcheon* with various aspects of FCPA enforcement. Corruption ought to be corruption, plain and simple and the same rules and principles governing corruption of a “foreign official” under the FCPA ought to apply to corruption of U.S. “officials.” Yet, as highlighted by *McCutcheon* there appears to be a double standard. Against the backdrop of the

163. *Id.* at 1450.

164. *Id.* at 1441.

165. *Id.* at 1450-51.

166. *Id.* at 1466.

167. *Id.* at 1467-68.

U.S. government bringing FCPA enforcement actions based on allegations that a company was seeking access to certain foreign officials or certain information or that company employees were seeking to ingratiate themselves with foreign officials through providing such items of value as a bottle of wine, flowers, karaoke bars or cigarettes—just remember, in the words of the Supreme Court, “ingratiation and access are not corruption.”

The *McCutcheon* decision was not the only Supreme Court decision from 2014 that touched upon issues relevant to FCPA enforcement. In *Daimler A.G. v. Bauman*, the Supreme Court sharply criticized an agency theory that has seemingly served as the basis for several corporate FCPA enforcement actions.

Prior to discussing the *Bauman* case it is useful to highlight certain background information. If one digs into certain corporate FCPA enforcement actions it would appear that legal liability seems to hop, skip, and jump around a multinational company. This of course would be inconceivable in other areas of law, such as contract liability or tort liability, absent an “alter ego” / “piercing the veil” analysis for the simple reason that this is what the black letter law commands.

However, with increasing frequency, the DOJ and SEC have advanced broad “agency” theories in which the acts of a subsidiary are attributed to a parent corporation *absent* any allegations to support an “alter ego” or “veil piercing” exception.¹⁶⁸ Philip Urofsky (a former high-ranking DOJ FCPA enforcement attorney) has been one of the more forceful critics of this trend and he rightfully noted:

[J]ust because a corporate FCPA enforcement action is resolved through an NPA rather than a DPA (or a guilty plea) does not excuse this approach—when the DOJ announces it will not prosecute but requires the company to admit to facts establishing a criminal violation of the law, it is stating, as a fact, that the company committed a crime. In such case, it is obligated to demonstrate, through the pleadings, in whatever form they are presented, that it could, in fact, prove each and every element of the offense.¹⁶⁹

It is against this relevant backdrop that the Supreme Court decided *Bauman*, to determine “the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States.”¹⁷⁰ Specifically, the complaint “alleged that during

168. See Attachment A of Letter from U.S. Dep’t of Justice to Thomas A. Hanusik (April 22, 2013), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/ralph-lauren/Ralph-Lauren.-NPA-Executed.pdf>.

169. *Like a Kid in a Candy Store*, FCPA PROFESSOR (Jan. 15, 2014), <http://www.fcpaprofessor.com/like-a-kid-in-a-candy-store>.

170. *Daimler AG v. Bauman*, 134 S. Ct. 746, 750 (2014).

Argentina’s 1976-1983 ‘Dirty War,’ Daimler’s Argentinian subsidiary, Mercedes-Benz Argentina (MB Argentina) collaborated with state security forces to kidnap, detain, torture, and kill certain MB Argentina workers, among them, plaintiffs or persons closely related to plaintiffs.” Damages for the alleged human rights violations were sought from Daimler, and U.S. jurisdiction “over the lawsuit was predicated on the California contacts of Mercedes-Benz USA, LLC (MBUSA), a subsidiary of Daimler incorporated in Delaware with its principal place of business in New Jersey.”¹⁷¹

“The question presented,” as described by the Supreme Court, was “whether the Due Process Clause of the Fourteenth Amendment preclude[d] the District Court from exercising jurisdiction over Daimler . . . given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint.”¹⁷² As noted by the court, the plaintiffs were seeking to hold “Daimler vicariously liable for MB Argentina’s alleged malfeasance” and it was noted that “MB Argentina was a subsidiary wholly owned by Daimler’s predecessor in interest.”¹⁷³

The Supreme Court’s decision was heavy on jurisdiction issues—including much discussion of general jurisdiction and specific jurisdiction—but as to the agency issue the court noted that “while plaintiffs ultimately persuaded the Ninth Circuit to impute MBUSA’s California contacts to Daimler on an agency theory, at no point, have they maintained that MBUSA is an alter ego of Daimler.”¹⁷⁴

The Court then stated:

In sustaining the exercise of general jurisdiction over Daimler, the Ninth Circuit relied on an agency theory, determining that MBUSA acted as Daimler’s agent for jurisdictional purposes and then attributing MBUSA’s California contacts to Daimler. The Ninth Circuit’s agency analysis derived from Circuit precedent considering principally whether the subsidiary “performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation’s own officials would undertake to perform substantially similar services.

This Court has not yet addressed whether a foreign corporation may be subjected to a court’s general jurisdiction based on the contacts of its in-state subsidiary. Daimler argues, and several Courts of Appeals have held, that a subsidiary’s jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to be its alter ego. The Ninth Circuit adopted a less rigorous test based on what it described as an “agency” relationship.

171. *Id.* at 751.

172. *Id.*

173. *Id.* at 752.

174. *Id.* at 758.

Agencies, we note, come in many sizes and shapes: “One may be an agent for some business purposes and not others so that the fact that one may be an agent for one purpose does not make him or her an agent for every purpose.” A subsidiary, for example, might be its parent’s agent for claims arising in the place where the subsidiary operates, yet not its agent regarding claims arising elsewhere. The Court of Appeals did not advert to that prospect. But we need not pass judgment on invocation of an agency theory in the context of general jurisdiction, for in no event can the appeals court’s analysis be sustained.

The Ninth Circuit’s agency finding rested primarily on its observation that MBUSA’s services were “important” to Daimler, as gauged by Daimler’s hypothetical readiness to perform those services itself if MBUSA did not exist. Formulated this way, the inquiry into importance stacks the deck, for it will always yield a pro-jurisdiction answer: “Anything a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do ‘by other means’ if the independent contractor, subsidiary, or distributor did not exist.” The Ninth Circuit’s agency theory thus appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate

. . . .

It was therefore error for the Ninth Circuit to conclude that Daimler, even with MBUSA’s contacts attributed to it, was at home in California, and hence subject to suit there on claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California.¹⁷⁵

Applying the verbiage in *Bauman* to the FCPA context, the notion that because a subsidiary’s services are important to a parent corporation—and thus the subsidiary is an agent of the parent corporation for purposes of imputing liability—stacks the deck, for it will always yield a pro-agency answer.

The *Bauman* decision is also relevant to FCPA enforcement for another reason. In the Supreme Court’s 2013 *Kiobel* decision (a non-FCPA case, but a case in which the logic and rationale of many justices had direct bearing on certain aspects of FCPA enforcement and indeed can be viewed as disapproval of certain aspects of FCPA enforcement), the court expressed concern about the “delicate field of international relations” of expansive U.S. jurisdiction over foreign actors.¹⁷⁶

Continuing with this concern, in *Bauman* the Supreme Court stated:

175. *Id.* at 758-62 (internal citations omitted).

176. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013).

[T]he transnational context of this dispute bears attention The Ninth Circuit . . . paid little heed to the risks to international comity its expansive view of general jurisdiction posed. Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case.

. . . .

The Solicitor General informs us . . . that “foreign governments’ objections to some domestic courts’ expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments.” . . . Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the “fair play and substantial justice” due process demands.¹⁷⁷

It is nothing short of remarkable that the U.S. government urged restraint of expansive jurisdictional theories in *Daimler* because such “unpredictable applications” of expansive jurisdiction “could discourage foreign investors” and result in other foreign policy difficulties, while at the same time advancing unpredictable, creative, and dubious jurisdictional theories against foreign actors in FCPA enforcement actions.¹⁷⁸

For instance:

- An FCPA enforcement action against French company Total S.A. (the third largest in FCPA history in terms of fine and penalty amount) was based on a single wire transfer (representing less than 1% of the alleged bribe payments at issue to Iranian officials) from a New York based account.¹⁷⁹
- An FCPA enforcement action against Japan-based JGC Corp. was based on the jurisdictional theory that certain alleged bribe payments to Nigerian officials flowed through U.S. bank accounts and that co-conspirators faxed or e-mailed information into the U.S. in furtherance of the bribery scheme.¹⁸⁰
- An FCPA enforcement action against Hungary-based Magyar Telekom was based on allegations that a company executive sent two e-mails to a Macedonian foreign official from his U.S. based e-mail address that passed through, was stored on, and transmitted from servers located in the U.S. and that certain electronic communications made in furtherance of the alleged

177. *Daimler AG*, 134 S. Ct. at 762-63.

178. *Id.* at 163.

179. Information at 9, *United States v. Total S.A.*, No. 1:13-cr-239 (E.D. Va. May 29, 2013), available at <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/06/12/2013-05-29-total-information-filed.pdf>.

180. Information at 13, *United States v. JGC Corp.*, No. 4:11-cr-00260 (S.D. Tex. April 6, 2011), available at <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/04/27/04-6-11jgc-corp-info.pdf>.

bribery scheme and the concealment of payments, including drafts of certain agreements and copies of certain contracts with intermediaries, were transmitted by company employees and others through U.S. interstate commerce or stored on computer servers located in the U.S.¹⁸¹

- An FCPA enforcement action against Luxembourg-based Tenaris was based on allegations that a payment to an agent in connection with the alleged bribery scheme of an Uzbekistan official was wired through an intermediary bank located in New York.¹⁸²

2. *Appellate Court Decision*

An appellate court decisions from 2014 also touched upon FCPA issues, specifically whether the FCPA contains a private right of action.

3. *Private Right of Action*

No doubt relevant to the Supreme Court's decision not to hear the *Esquenazi* case was that the issue presented was one of first impression that had not percolated in the appellate courts. A reason for the dearth of substantive FCPA case law is because certain appellate courts have held that there is no private right of action under the FCPA.¹⁸³ Therefore, DOJ and SEC enforcement actions present the only conceivable opportunities for judicial examination of the FCPA, yet as highlighted elsewhere in this article, most DOJ and SEC enforcement actions involve resolution vehicles that are not subjected to any meaningful judicial scrutiny.

In 2014, the Second Circuit concluded—consistent with prior appellate court decisions—that there is no private right of action under the FCPA.¹⁸⁴ The Second

181. Information at 9, *United States v. Magyar Telekom, Plc.*, No. 1:11-cr-00597 (E.D. Va. Dec. 29, 2001), available at <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/01/24/2011-12-29-information-magyar-telekom.pdf>

182. *Tenaris S.A. Agrees to Pay \$3.5 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act*, U.S. DEP'T OF JUSTICE (May 17, 2011), <http://www.justice.gov/opa/pr/tenaris-sa-agrees-pay-35-million-criminal-penalty-resolve-violations-foreign-corrupt>.

183. See *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1029 (6th Cir. 1990); *McLean v. International Harvester Co.*, 817 F.2d 1214, 1219 (5th Cir. 1987).

184. See *Republic of Iraq v. ABB AG*, 768 F.3d 145, 171 (2nd Cir. 2014) *cert. denied*, 135 S. Ct. 2836 (2015). The FCPA issue was a minor component of the Second Circuit's decision in the long-running civil RICO case in which Iraq sought recovery from a long list of defendants for their "alleged conspiracy with Iraq's then-president Saddam Hussein and Iraq's ministries to corrupt and plunder the Oil-for-Food Program, an international humanitarian program administered by the United Nations during the final years of Hussein's rule." Notwithstanding the fact that previous FCPA enforcement actions concerning the Oil for Food Program were largely books and records and internal controls cases only because the alleged bribe payments went to the government, not a particular foreign official as required under the anti-bribery provisions, and notwithstanding the fact that Iraq was a unique plaintiff to say the least, it nevertheless brought FCPA claims against the defendants on the theory that the FCPA allowed for a private right of action.

Circuit stated:

[P]rivate rights of action to enforce federal law must be created by Congress.” A federal statute may create a private right of action either expressly or, more rarely, by implication. In considering whether a statute confers an implied private right of action, “[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.” To discern Congress’s intent, “we look first to the text and structure of the statute.” To “illuminate” this analysis, we also consider factors enumerated in *Cort v. Ash*, which include the following:

First, is the plaintiff one of the class for whose especial benefit the statute was enacted, . . . —that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? In our analysis, we are mindful that “the Supreme Court has come to view the implication of private remedies in regulatory statutes with increasing disfavor.

. . . .

The antibribery provisions of the FCPA prohibit certain entities and persons from, inter alia, corruptly making payments to foreign officials for the purpose of influencing official action in order to obtain business. The text of the statute contains no explicit provision for a private right of action, although it does provide for civil and criminal penalties, and permits the Attorney General to seek injunctive relief. Because “[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others,” the structure of the statute, by focusing on public enforcement, tends to indicate the absence of a private remedy.

The *Cort v. Ash* factors also do not support recognition of a private right. The statute’s prohibitions focus on the regulated entities; the FCPA contains no language expressing solicitude for those who might be victimized by acts of bribery, or for any particular class of persons. “Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons.”

Nor does the legislative history of the FCPA demonstrate an intention on the part of Congress to create a private right of action. . . . [A] bill introduced by Senator Church in the 94th Congress included an express right of action for competitors of those who bribed foreign officials, that provision, however, was deleted by a committee of the Senate.

In the 95th Congress, which finally enacted the FCPA, a committee of the House of Representatives, in reporting out a bill that did not provide expressly for a private right of action, made a statement that the House “Committee intends that the courts shall recognize a private cause of action based on this legislation . . . on behalf of persons who suffer injury as a result of prohibited corporate bribery.” We have three main problems with the [Plaintiff’s] reliance on this statement, and other aspects of the FCPA’s legislative history, as justification for judicial implication of a private right of action in its favor.

First, the House committee’s statement was not repeated (and no endorsement of its substance was in any way suggested) in the reports of either the Senate committee considering the FCPA or the conference committee that reconciled the views of the House and Senate to produce the language of the FCPA as it was ultimately enacted. Indeed, in the debate on the conference committee report, one conferee stated that the question of whether “courts will recognize [an] implied private right of action . . . was not considered in the Senate or during the conference, and thus [it] cannot be said that any intent is expressed at all on this issue.”

Second, although the legislative history contains additional references to the desirability of a private right of action, they do not provide any clear indication of congressional intent to create one.

Third, we note that this case illustrates the wisdom of *Lamb*, which avoids the question of what class of parties the FCPA was designed to protect. Although we agree that the statute was primarily designed to protect the integrity of American foreign policy and domestic markets,” one might argue that it is principally the foreign governments whose processes might be corrupted. The [Plaintiff’s] claim highlights the obvious problem with the latter concern here: The foreign government supposedly to be “protect[ed]” by the FCPA was the entity that demanded the bribes in the first place.

Finally, we note that although it has been nearly a quarter of a century since *Lamb* was decided, and although Congress has more recently amended the FCPA Congress has not chosen to override *Lamb*. We conclude that there is no private right of action under the antibribery provisions of the FCPA . . . ¹⁸⁵

As indicated in the Second Circuit’s decision, there have been previous appellate court decisions addressing whether the FCPA has a private right of action. However, in *Lamb* the primary reason articulated by the Sixth Circuit for declining a private right of action was something that never happened – at least until 2012 when the DOJ/SEC issued FCPA Guidance. The Sixth Circuit stated:

185. *Id.* at 170-71 (internal citations omitted).

Recognition of the plaintiffs' proposed private right of action, in our view, would directly contravene the carefully tailored FCPA scheme presently in place. Congress recently expanded the Attorney General's responsibilities to include facilitating compliance with the FCPA. Specifically, the Attorney General must "establish a procedure to provide responses to specific inquiries" by issuers of securities and other domestic concerns regarding "conformance of their conduct with the Department of Justice's [FCPA] enforcement policy" Moreover, the Attorney General must furnish "timely guidance concerning the Department of Justice's [FCPA] enforcement policy . . . to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to [FCPA] provisions." Because this legislative action clearly evinces a preference for compliance in lieu of prosecution, the introduction of private plaintiffs interested solely in post-violation enforcement, rather than pre-violation compliance, most assuredly would hinder congressional efforts to protect companies and their employees concerned about FCPA liability.¹⁸⁶

Prior to *Lamb*, the Fifth Circuit addressed a private right of action, albeit in *dicta*, in *McLean v. Int'l Harvester Co.* in which the court stated: "[W]e find it inappropriate to imply a private cause of action from the statute. The statute on its face shows no congressional intent to create a private action. Moreover, no legislative history exists referring to such an intent."¹⁸⁷ This last observation by the Fifth Circuit was obviously false given the legislative history discussed by the Second Circuit in *Republic of Iraq*.

In short, the three appellate court decisions that address an FCPA private right of action are either: (1) based on a false premise (*McLean*); (2) based on a false premise at the time (*Lamb*); or (3) involved a unique and odd plaintiff (*Republic of Iraq*).

An FCPA private right of action does warrant further consideration.¹⁸⁸ For starters, courts have inferred private rights of action in many other provisions of the Securities and Exchange Act of 1934 ("34 Act")¹⁸⁹ and the FCPA is after all part of the '34 Act.

Moreover, contrary to the Second Circuit's reasoning in *Republic of Iraq*, several of the *Cort v. Ash* factors for implying a private of right would seem to be met in the FCPA context. Among the reasons Congress passed the FCPA was to level the playing field given how the discovered foreign corporate payments distorted free and

186. *Lamb*, 915 F.2d at 1029-30 (internal citations omitted).

187. *McLean*, 817 F.2d at 1219.

188. Indeed several bills have been introduced in Congress seeking to amend the FCPA to include a limited private right of action. See *FCPA Reform Bill Introduced (But Not That One)*, FCPA PROFESSOR, <http://www.fcprofessor.com/fcpa-reform-bill-introduced-but-not-that-one>.

189. See, e.g., *J. I. Case v. Borak*, 377 U.S. 426, 430-32 (1964).

fair competition.¹⁹⁰ Moreover, the SEC itself has stated on numerous occasions that FCPA enforcement is central to its mission of investor protection.¹⁹¹ An FCPA private right of action would further seem to be consistent with the underlying premise of the FCPA which is to reduce foreign bribery.¹⁹² Finally, “regulation of bribery directed at foreign officials cannot be characterized as a matter traditionally relegated to state control,” as even the *Lamb* court recognized.¹⁹³

At the very least, if there was an FCPA private right of action there would be substantially more case law of precedent concerning the FCPA’s provisions than currently exists.

Conclusion

This article provides a snapshot of FCPA and related developments from 2014 with the goal of providing value to anyone who seeks an informed based of knowledge regarding the FCPA and related legal and policy issues. The FCPA is one of the most important laws governing business conduct in the global marketplace as it affects all businesses and individuals engaged in international commerce. For this reason, and whether the specific issue is:

- FCPA enforcement statistics;
- The wide spectrum of FCPA enforcement actions and how the breadth of such actions sends confusing compliance messages to those subject to the FCPA;
- The wide gap between corporate and individual FCPA enforcement and the policy issues which flow from the gap;
- The problematic surge in SEC administrative actions to resolve alleged instance of FCPA scrutiny; or
- Judicial scrutiny of FCPA enforcement theories or those otherwise relevant to FCPA enforcement

The FCPA snapshot depicted in this article matters.

190. Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 975 (2012).

191. See *Investor Bulletin: The Foreign Corrupt Practices Act – Prohibition of the Payment of Bribes to Foreign Officials*, U.S. SEC. AND EXCH. COMM’N (Oct. 2011), available at <https://www.sec.gov/investor/alerts/fcpa.pdf>.

192. *Id.*

193. *Lamb*, 915 F.2d at 1030.