

ARTICLES

THE FOREIGN CORRUPT PRACTICES ACT UNDER THE MICROSCOPE

By Mike Koehler*

For most of the Foreign Corrupt Practices Act's history, key decisions concerning its scope and enforcement were made behind closed doors around conference room tables in Washington, D.C. The FCPA took on a life of its own and, in many instances, the statute came to mean whatever the DOJ or SEC could get putative corporate FCPA defendants (mindful of the consequences of actual prosecuted charges) to agree to behind those closed doors. However, as the enforcement agencies continued to push the envelope on enforcement theories and practices, and as the DOJ brought more individual FCPA enforcement actions, including through manufactured sting operations, business entities and individuals alike began to openly fight back. While many FCPA enforcement decisions and procedures remain opaque, 2011 witnessed the most intense year of public scrutiny in the FCPA's history. This Article (i) provides an overview of 2011 FCPA enforcement and discusses certain problematic enforcement trends, and (ii) highlights how in 2011 the FCPA was subjected to the most meaningful public scrutiny in its history. FCPA enforcement trends and scrutiny demonstrate that as the FCPA nears its thirty-fifth year, basic legal and policy questions remain as to the purpose, scope, and effectiveness of the FCPA.

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INTRODUCTION

For most of the Foreign Corrupt Practices Act’s (“FCPA”) history, key decisions concerning its scope and enforcement were made behind closed doors around conference room tables in Washington, D.C. The FCPA took on a life of its own and, in many instances, the statute came to mean whatever the Department of Justice (“DOJ”) or the Securities and Exchange Commission (“SEC”) could get putative corporate FCPA defendants (mindful of the consequences of actual prosecuted charges) to

agree to behind those closed doors.¹ However, as the enforcement agencies continued to push the envelope on enforcement theories and practices, and as the DOJ brought more individual FCPA enforcement actions, including through manufactured sting operations, business entities and individuals began to openly fight back. While many FCPA enforcement decisions and procedures remain opaque, 2011 witnessed the most intense year of public scrutiny in the FCPA's history.

Part I of this Article contains an overview of 2011 FCPA enforcement and highlights four enforcement trends: (i) the magnitude and quantity of enforcement actions against foreign companies and foreign nationals and how this contributes to a U.S. foreign bribery surplus; (ii) reliance on corporate voluntary disclosures in bringing enforcement actions and how this contributes to a thriving and growing FCPA industry; (iii) extensive use of alternative resolution vehicles in resolving enforcement actions and how this contributes to both under-prosecution of egregious instances of corporate bribery and over-prosecution of business conduct; and (iv) the lack of individual prosecutions in most corporate FCPA enforcement actions and how this reflects on the quality of the related corporate enforcement action.

Part II of this Article highlights that in 2011, the FCPA was subjected to the most meaningful public scrutiny in its history. This scrutiny of the FCPA and FCPA enforcement came from multiple directions: Congress, the judiciary, and others such as academics, the press, and public interest groups. The FCPA is a fundamentally sound statute that was passed by Congress in 1977 to prohibit certain payments to a narrow category of recipients comprised of traditional foreign government officials performing official or public functions. However, this scrutiny demonstrates that as the FCPA nears its thirty-fifth year, basic legal and policy questions remain as to the purpose, scope, and effectiveness of the FCPA and FCPA

* Assistant Professor, Southern Illinois University School of Law. Professor Koehler's FCPA expertise and views are informed by a decade of legal practice experience at a leading international law firm. The issues covered in this Article, current as of January 16, 2012, assume the reader has sufficient knowledge and understanding of the FCPA as well as FCPA enforcement (including the role of the DOJ and SEC in enforcing the FCPA and the resolution vehicles typically used to resolve FCPA inquiries). Interested readers can learn more about these topics, and others, by reading Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907 (2010). The author's FCPA Professor website (<http://www.fcpaprofessor.com>) is also a useful resource for FCPA developments and analysis. See Mike Koehler, *FCPA 101*, FCPA PROFESSOR, <http://www.fcpaprofessor.com/fcpa-101> (last visited Dec. 1, 2012) (answering frequently asked questions regarding the Foreign Corrupt Practices Act).

1. See generally Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907 (2010) [hereinafter *Façade*] (discussing the implications of this enforcement dynamic).

enforcement.

I. FCPA ENFORCEMENT OVERVIEW—2011

FCPA enforcement in 2011 was mild compared to 2010, when the DOJ and SEC combined collected approximately \$1.8 billion in corporate fines, penalties, and disgorgement in FCPA or FCPA-related enforcement actions.² As demonstrated in the chart below, in eleven corporate FCPA enforcement actions in 2011, the DOJ collected approximately \$355 million in criminal fines. Including the approximately \$149 million forfeiture Jeffrey Tesler (the U.K. agent at the center of the Bonny Island, Nigeria bribery scheme) agreed to in his 2011 plea agreement,³ the DOJ's FCPA enforcement program in 2011 collected approximately \$504 million.

Table I - 2011 DOJ Corporate FCPA Enforcement Actions

Company	Fine	Resolution Vehicle
Maxwell Technologies ⁴	\$8 million	DPA
Tyson Foods ⁵	\$4 million	DPA

2. See Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. TOL. L. REV. 99, 101-04 (2011) (detailing \$1.27 billion in DOJ corporate FCPA and FCPA-related enforcement actions in 2010 and \$530 million in SEC corporate FCPA enforcement actions in 2010).

3. Press Release, U.S. Dep't of Justice, UK Solicitor Pleads Guilty for Role in Bribing Nigerian Government Officials as Part of KBR Joint Venture Scheme (Mar. 11, 2011), <http://www.justice.gov/opa/pr/2011/March/11-crm-313.html>. As noted in the DOJ's release, Tesler was a former consultant to Kellogg, Brown & Root, Inc. ("KBR") and its joint venture partners in connection with certain engineering, procurement and construction contracts to build liquefied natural gas facilities on Bonny Island, Nigeria. *Id.* KBR, the other joint venture partners, and certain other companies and individuals previously resolved FCPA (or related) enforcement actions based on the same Bonny Island conduct. Mike Koehler, *Bonny Island Bribery Statistics*, FCPA PROFESSOR (Jan. 26, 2012), <http://www.fcpaprofessor.com/bonny-island-bribery-statistics>. For instance, the JGC of Japan enforcement action from 2011 (the largest in terms of DOJ fine amounts from 2011) was based on Bonny Island conduct. *Id.*

4. Press Release, U.S. Dep't of Justice, Maxwell Technologies Inc. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$8 Million Criminal Penalty (Jan. 31, 2011), <http://www.justice.gov/opa/pr/2011/January/11-crm-129.html>.

5. Press Release, U.S. Dep't of Justice, Tyson Foods Inc. Agrees to Pay \$4 Million Criminal Penalty to Resolve Foreign Bribery Allegations (Feb. 10, 2011), <http://www.justice.gov/opa/pr/2011/February/11-crm-171.html>.

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JGC of Japan ⁶ (Japanese Company)	\$218.8 million	DPA
Comverse Technology ⁷	\$1.2 million	NPA
Johnson & Johnson ⁸	\$21.4 million	DPA
Tenaris ⁹ (Luxembourg Company)	\$3.5 million	NPA
Cinergy Telecommunications ¹⁰	N/A	N/A
Armor Holdings ¹¹	\$10.2 million	NPA
Bridgestone ¹² (Japanese Company)	\$22 million ¹⁵	Plea
Aon Corp. ¹⁴	\$1.8 million	NPA

6. Press Release, U.S. Dep't of Justice, JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$218.8 Million Criminal Penalty (Apr. 6, 2011), <http://www.justice.gov/opa/pr/2011/April/11-crm-431.html>.

7. Press Release, U.S. Dep't of Justice, Comverse Technology Inc. Agrees to Pay \$1.2 Million Penalty to Resolve Violations of the Foreign Corrupt Practices Act (Apr. 7, 2011), <http://www.justice.gov/opa/pr/2011/April/11-crm-438.html>.

8. Press Release, U.S. Dep't of Justice, Johnson & Johnson Agrees to Pay \$21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations (Apr. 8, 2011), <http://www.justice.gov/opa/pr/2011/April/11-crm-446.html>.

9. Press Release, U.S. Dep't of Justice, Tenaris S.A. Agrees to Pay \$3.5 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act (May 17, 2011), <http://www.justice.gov/opa/pr/2011/May/11-crm-629.html>.

10. Press Release, U.S. Dep't of Justice, Florida Telecommunications Company, Two Executives, an Intermediary, and Two Former Haitian Government Officials Indicted for Their Alleged Participation in Foreign Bribery Scheme (July 13, 2011), <http://www.justice.gov/opa/pr/2011/July/11-crm-910.html>. Unlike the vast majority of business organizations subject to FCPA scrutiny, Cinergy Telecommunications was criminally indicted and the charges against it remain pending. *Id.*

11. Press Release, U.S. Dep't of Justice, Armor Holdings Agrees to Pay \$10.2 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act (July 13, 2011), <http://www.justice.gov/opa/pr/2011/July/11-crm-911.html>.

12. Press Release, U.S. Dep't of Justice, Bridgestone Corporation Agrees to Plead Guilty to Participating in Conspiracies to Rig Bids and Bribe Foreign Government Officials (Sept. 15, 2011), <http://www.justice.gov/opa/pr/2011/September/11-crm-1193.html>.

13. Based on DOJ filings, it appears that approximately eighty percent of the \$28 million fine (for both FCPA violations and antitrust violations) was based on FCPA conduct. Mike Koehler, *Bridgestone Corporation Resolves FCPA (and Antitrust) Enforcement Action*, FCPA PROFESSOR (Sept. 16, 2011), <http://www.fcpaprofessor.com/category/bridgestone-corporation>.

Magyar Telekom / Deutsche Telekom ¹⁵ (Hungarian Company / German Company)	\$59.6 million; 4.4 million	DPA; NPA
<i>TOTAL</i>	\$355 million	

In 2011, the SEC brought thirteen corporate FCPA enforcement actions and collected approximately \$148 million in civil penalties, disgorgement, and prejudgment interest.

Table II - 2011 SEC Corporate FCPA Enforcement Actions

Company	Settlement Amount
Maxwell Technologies ¹⁶	\$6.3 million
Tyson Foods ¹⁷	\$1.2 million
IBM Corp. ¹⁸	\$10 million
Ball Corp. ¹⁹	\$300,000
Tenaris ²⁰	\$5.4 million

14. Press Release, U.S. Dep't of Justice, Aon Corporation Agrees to Pay a \$1.76 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act (Dec. 20, 2011), <http://www.justice.gov/opa/pr/2011/December/11-crm-1678.html>.

15. Press Release, U.S. Dep't of Justice, Magyar Telekom and Deutsche Telekom Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay Nearly \$64 Million in Combined Criminal Penalties (Dec. 29, 2011), <http://www.justice.gov/opa/pr/2011/December/11-crm-1714.html>.

16. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Maxwell Technologies for Long-Running Bribery Scheme in China (Jan. 31, 2011), *available at* <http://www.sec.gov/news/press/2011/2011-31.htm>.

17. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Tyson Foods With FCPA Violations (Feb. 10, 2011), <http://www.sec.gov/news/press/2011/2011-42.htm>.

18. Press Release, U.S. Sec. & Exch. Comm'n, IBM to Pay \$10 Million in Settled FCPA Enforcement Action (Mar. 18, 2011), <http://www.sec.gov/litigation/litreleases/2011/lr21889.htm>.

19. Ball Corp., Exchange Act Release No. 64123, 2011 WL 1099562 (ALJ Mar. 24, 2011) (cease-and-desist order), *available at* <http://www.sec.gov/litigation/admin/2011/34-64123.pdf>.

20. Press Release, U.S. Sec. & Exch. Comm'n, Tenaris to Pay \$5.4 Million in SEC's

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<i>(Luxembourg Company)</i>	
Rockwell Automation ²¹	\$2.7 million
Johnson & Johnson ²²	\$48.6 million
Comverse Technologies ²³	\$1.6 million
Armor Holdings ²⁴	\$5.7 million
Diageo ²⁵ <i>(United Kingdom Company)</i>	\$16.4 million
Watts Water Technologies ²⁶	\$3.8 million
Aon Corp. ²⁷	\$14.5 million
Magyar Telekom / Deutsche Telekom ²⁸ <i>(Hungarian Company / German Company)</i>	\$31.2 million

First-Ever Deferred Prosecution Agreement (May 17, 2011), <http://www.sec.gov/news/press/2011/2011-112.htm>.

21. Rockwell Automation Inc., Exchange Act Release No. 64380, 2011 WL 1663602 (ALJ May 3, 2011) (cease-and-desist order), available at <http://www.sec.gov/litigation/admin/2011/34-64380.pdf>.

22. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges J&J with Foreign Bribery (April 7, 2011), <http://www.sec.gov/news/press/2011/2011-87.htm>.

23. Press Release, U.S. Sec. & Exch. Comm'n, SEC Files Settled FCPA Case Against Comverse (Apr. 7, 2011), <http://www.sec.gov/litigation/litreleases/2011/lr21920.htm>.

24. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Armor Holdings, Inc. with FCPA Violations in Connection with Sales to the United Nations (July 13, 2011), <http://www.sec.gov/news/press/2011/2011-146.htm>.

25. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Liquor Giant Diageo with FCPA Violations (July 27, 2011), <http://www.sec.gov/news/press/2011/2011-158.htm>.

26. Watts Water Techs., Inc., Exchange Act Release No. 65555, 2011 WL 4860051 (ALJ Oct. 13, 2011) (cease-and-desist order), available at <http://www.sec.gov/litigation/admin/2011/34-65555.pdf>.

27. Press Release, U.S. Sec. & Exch. Comm'n, SEC Files Settled FCPA Charges Against Aon Corporation (Dec. 20, 2011), <http://www.sec.gov/litigation/litreleases/2011/lr22203.htm>.

28. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Magyar Telekom and Former Executives with Bribing Officials in Macedonia and Montenegro (Dec. 29, 2011), <http://www.sec.gov/news/press/2011/2011-279.htm>.

<i>TOTAL</i>	\$148 million

Combined DOJ and SEC FCPA enforcement in 2011 collected approximately \$652 million.²⁹

Although it is interesting to compare year-to-year enforcement statistics, such a comparison is of marginal value as many non-substantive factors can influence the timing of an FCPA enforcement action.³⁰ What is valuable to observe and analyze are FCPA enforcement trends and 2011 witnessed a continuation of several significant trends, including four discussed below.

29. This figure includes the \$149 million Jeffrey Tesler enforcement action. As evident from the DOJ and SEC charts above, there is substantial overlap between the DOJ and SEC's FCPA enforcement programs. FCPA enforcement actions 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 the SEC for civil FCPA violations (whether anti-bribery violations or books and records and internal control violations). Enforcement actions from 2011 that fit this pattern include: Maxwell Technologies, Tyson Foods, Comverse, Johnson & Johnson, Tenaris, Armor Holdings, Aon, and Magyar Telekom/Deutsche Telekom. The overlap, however, between the DOJ and SEC's FCPA enforcement programs is not complete. As a general matter, the SEC has jurisdiction only over "issuers" (both domestic and foreign companies with shares registered on a U.S. exchange and domestic and foreign companies otherwise required to make filings with the SEC). In other words, the SEC generally does not have jurisdiction over private companies. Thus, certain FCPA enforcement actions from 2010, such as Bridgestone, Cinergy Telecommunications and JGC of Japan, did not have an SEC component. As a general matter, the DOJ has jurisdiction over "issuers," "domestic concerns," (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 involve conduct "while in the territory of the U.S." Because the DOJ must satisfy a higher burden of proof in a criminal prosecution, and given the DOJ's prosecutorial discretion, certain FCPA enforcement actions in 2011 such as those involving Watts Water Technologies, Diageo, Rockwell Automation, Ball Corporation, and IBM, only included an SEC component. As to the DOJ's discretion, the DOJ has stated that it has declined prosecutions when, among other things, a single employee—and no other employee—was involved in the improper payments at issue, and the improper payments at issue involved minimal funds compared to the overall business revenues. See Mike Koehler, *DOJ Declines To Get Specific In Declination Responses*, FCPA PROFESSOR (Oct. 12, 2011), <http://www.fc paprofessor.com/doj-declines-to-get-specific-in-declination-responses> (analyzing DOJ rationale for declining to bring an enforcement action).

30. Because FCPA enforcement actions that involve both a DOJ and SEC component typically are 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 agency to finish its investigation. Additional non-substantive factors that can influence the timing of an FCPA enforcement action include, among other things, DOJ and SEC staffing issues (including employee departures or leaves), and securing corporate board approval for resolving an FCPA enforcement action.

A. Enforcement Actions Against Foreign Companies and Foreign Nationals

The first significant trend highlighted by the 2011 enforcement year is the magnitude and quantity of FCPA enforcement actions against foreign companies and nationals. Foreign companies may be subject to the FCPA's jurisdiction if the company is an "issuer" (i.e., it has shares listed on a U.S. exchange),³¹ or if the company, "while in the territory of the United States," generally engaged in conduct in furtherance of a bribery scheme.³² Foreign nationals can be subject to the FCPA's jurisdiction if the individual is an "officer, director, employee, or agent" of an "issuer"³³ or "domestic concern,"³⁴ or if the individual, "while in the territory of the United States," generally engaged in conduct in furtherance of a bribery scheme.³⁵

As indicated in Table I, approximately ninety percent of DOJ FCPA monetary collections in 2011 were against foreign companies or nationals. While less dramatic, as indicated in Table II, foreign issuers paid a significant portion (approximately thirty-six percent) of SEC FCPA monetary collections in 2011. Not only are the enforcement agencies targeting foreign companies, but foreign nationals as well. As indicated in Table III below, in 2011 the DOJ brought ten individual FCPA enforcement actions and nine of them were against foreign nationals.

Table III - 2011 DOJ Individual FCPA Enforcement Actions

Individual	Nationality
Washington Cruz ³⁶	U.S. Citizen
Amadeus Richer	German Citizen and Resident of Brazil
Uriel Sharef ³⁷	Dual Citizen of Israel and

31. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 (2006).

32. 15 U.S.C. § 78dd-3.

33. 15 U.S.C. § 78dd-1.

34. 15 U.S.C. § 78dd-2.

35. 15 U.S.C. § 78dd-3.

36. Press Release, U.S. Dep't of Justice, Florida Telecommunications Company, Two Executives, an Intermediary and Two Former Haitian Government Officials Indicted for Their Alleged Participation in Foreign Bribery Scheme (July 13, 2011), <http://www.justice.gov/opa/pr/2011/July/11-crm-910.html>. Both individuals are associated with Cinergy Telecommunications.

37. Press Release, U.S. Dep't of Justice, Eight Former Senior Executives and Agents of Siemens Charged in Alleged \$100 Million Foreign Bribe Scheme (Dec. 13, 2011), <http://www.justice.gov/opa/pr/2011/Dec/11-crm-910.html>.

Herbert Steffen	Germany German Citizen
Andres Truppel	Dual Citizen of Germany and Argentina
Ulrich Bock	Citizen of Germany
Stephan Singer	Citizen of Germany
Eberhard Reichert	Citizen of Germany
Carlos Sergi	Citizen of Argentina
Miguel Czysch	Citizen of Germany and Resident of Switzerland

As indicated in Table IV below, the SEC brought twelve individual FCPA enforcement actions in 2011, and all twelve were against foreign nationals.

Table IV - 2011 SEC Individual FCPA Enforcement Actions

Individual	Nationality
Paul Jennings ³⁸	Dual Citizen of the U.K. and the U.S.
Urief Sharef ³⁹	Dual Citizen of Israel and

www.justice.gov/opa/pr/2011/December/11-crm-1626.html. All individuals are associated with Siemens. In 2008, Siemens settled the largest enforcement action (in terms of fine or penalty amount) in FCPA history. Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008), <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>.

38. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Former CEO of Innospec for Role in Bribery Scheme (Jan. 24, 2011), <http://www.sec.gov/news/press/2011/2011-21.htm> (identifying Jennings as the CEO of Innospec, Inc., a company that resolved an FCPA enforcement action in 2010); Press Release, U.S. Sec. & Exch. Comm'n, SEC Files Settled Foreign Corrupt Practices Act Charges Against Innospec, Inc. for Engaging in Bribery in Iraq and Indonesia With Total Disgorgement and Criminal Fines of \$40.2 Million (Mar. 18, 2010), <http://www.sec.gov/litigation/litreleases/2010/lr21454.htm>.

39. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Seven Former Siemens Executives with Bribing Leaders in Argentina (Dec. 13, 2011), <http://www.sec.gov/litigation>

	Germany
Herbert Steffen	Citizen of Germany
Andres Truppel	Dual Citizen of Germany and Argentina
Ulrich Bock	Citizen of Germany
Stephan Singer	Citizen of Germany
Carlos Sergi	Citizen of Argentina
Bernd Regendantz	Citizen of Germany
Elek Straub ⁴⁰	Citizen of Hungary
Andras Balogh	Citizen of Hungary
Tamas Morvai	Citizen of Hungary

The DOJ and SEC's enforcement action against former Siemens' executives is noteworthy. In the 2008 FCPA enforcement action against Siemens, the enforcement agencies stated that for much of its operations "overseas, bribery was nothing less than standard operating procedure for Siemens" and that "a corporate culture [existed at Siemens] in which bribery was tolerated and even rewarded at the highest levels of the company."⁴¹ The DOJ's sentencing memorandum specifically stated that the company's compliance, legal, internal audit, and corporate finance departments all "played a significant role" in the conduct at issue.⁴²

n/litreleases/2011/lr22190.htm. All individuals are associated with Siemens.

40. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Magyar Telekom and Former Executives with Bribing Officials in Macedonia and Montenegro (Dec. 29, 2011), <http://www.sec.gov/news/press/2011/2011-279.htm>. All individuals are associated with Magyar Telekom.

41. See Press Release, U.S. Dep't of Justice, Transcript of Press Conference Announcing Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations (Dec. 15, 2008), <http://www.justice.gov/opa/pr/2008/December/08-opa-1112.html> (explaining Siemens' guilty plea and detailing the particulars of Siemens' conduct that allegedly violated the FCPA).

42. U.S. Dep't of Justice Sentencing Memorandum at 2, *United States v. Siemens Aktiengesellschaft*, No. 1:08-cr-00367-RJL (D.D.C. Dec. 12, 2008), *available at* <http://www>

For a number of years, the DOJ faced intense scrutiny as to why the most egregious corporate enforcement action in FCPA history did not result in any individual charges against company employees.⁴³ For instance, in May 2010 Senator Arlen Specter (then-chair of the Senate Judiciary Committee) asked DOJ Assistant Attorney General Lanny Breuer about the lack of individual prosecutions in the Siemens matter to which Breuer stated that the DOJ's investigation as to individuals remained open.⁴⁴ During a November 2010 hearing titled "Examination of the Foreign Corrupt Practices Act," Senator Specter again asked DOJ Deputy Assistant Attorney General Greg Andres whether anybody went to jail in the Siemens case.⁴⁵ Andres again stated that the investigation remained open.⁴⁶ During my testimony at the hearing, Senator Specter asked me to assist in detailing "egregious examples of individual conduct associated with the Siemens prosecution," and I provided to his office detailed information that could be gleaned from public sources.⁴⁷ The Siemens individual enforcement actions from 2011 will likely be difficult cases to prosecute as, among other things, all of the defendants are located outside of the U.S. and extradition battles are sure to follow. It remains to be seen whether the DOJ and SEC are actually committed to prosecuting the charged individuals or whether the charges were merely symbolic to assuage criticism.

Professor Brandon Garrett has demonstrated how the rise in corporate FCPA enforcement actions against foreign companies "bears a family resemblance" to trends in other substantive areas such as antitrust and environmental law.⁴⁸ However, the U.S. law enforcement interest in

justice.gov/criminal/fraud/fcpa/cases/siemens/12-12-08siemensvenez-sent.pdf.

43. See, e.g., Joe Palazzolo, *Siemens Charges Follow Heat From Critics*, CORRUPTION CURRENTS (Dec. 13, 2011, 1:30 PM), <http://blogs.wsj.com/corruption-currents/2011/12/13/siemens-charges-follow-heat-from-critics/> (discussing a congressional hearing in which Senator Specter and the author criticized the lack of individual prosecutions in high-profile cases).

44. See Mike Koehler, *Breuer-Siemens Investigation (As to Individuals) Remains Open*, FCPA PROFESSOR (May 10, 2010), <http://www.fcpaprofessor.com/breuer-siemens-investigation-as-to-individuals-remains-open> ("[I]ndividuals, executives and others who were involved [in the Siemens bribery scandal], remain exposed and the matter is not closed.").

45. See *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 6 (2010), [hereinafter *Examining Enforcement of the FCPA Hearing*], http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:66921.pdf.

46. *Id.*

47. See *id.* at 32-38 (using a chart to identify specific references of egregious individual conduct).

48. See Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775,

prosecuting such foreign companies and nationals for instances of alleged non-U.S. bribery can be debated. For example, can it truly be said that the U.S. Treasury is the best place for enforcement dollars when a *foreign* company allegedly bribes a *foreign* official?

Yet it is clear from this new era of FCPA enforcement that the enforcement agencies view their mission as global in nature and the agencies will not shy away from aggressive jurisdictional theories in pursuit of foreign bribery riches. For instance, the jurisdictional facts alleged in the \$95 million Magyar Telekom/Deutsche Telekom enforcement action to support FCPA anti-bribery charges against the Hungarian company and related charges against its German parent corporation were two e-mails that passed through or were stored on U.S. servers.⁴⁹ Likewise, the jurisdictional facts alleged in the \$219 million enforcement action against Japan's JGC Corporation were money flowing through U.S.-based accounts and the faxing or e-mailing of certain information into the U.S.⁵⁰ As Professor Garret observed, "litigation of jurisdiction is almost non-existent in [foreign] corporate prosecutions, because firms plead guilty rather than litigate such issues."⁵¹ However, foreign nationals individually charged with FCPA offenses are more likely to contest aggressive jurisdictional theories when faced with deprivation of their liberty. Indeed, a notable development from 2011, discussed in more detail in Part II of this Article, was judicial rejection of the DOJ's asserted jurisdiction in prosecution of a foreign national in the Africa Sting case.

Few question the U.S. foreign bribery surplus. After all, FCPA enforcement has become a reliable revenue source for the federal government during a period of budget restraints. Commenting on the increase in FCPA enforcement, the DOJ's former Assistant Chief for FCPA enforcement stated, "[t]he government sees a profitable program, and it's going to ride that horse until it can't ride it anymore."⁵² Indeed,

1837 (2011), available at <http://www.virginialawreview.org/content/pdfs/97/1775.pdf> (observing that, as in other areas, the rise in FCPA enforcement actions is a product of high-profile convictions and greater cooperation between DOJ and other countries).

49. See Information ¶¶ 24, 26, *United States v. Magyar Telekom, Plc.*, No. 1:11CR00597 (E.D. Va. Dec. 29, 2011), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/magyar-telekom/2011-12-29-information-magyar-telekom.pdf> (citing conduct that took place entirely in Macedonia with only minor connections to the United States).

50. See Information ¶ 20, *United States v. JGC Corp.*, No. 4:11-cr-00260 (S.D. Tex. Apr. 6, 2011), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/jgc-corp/04-6-11jgc-corp-info.pdf> (listing a Japanese corporation's overt acts with only minor connections to the United States).

51. Brandon Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1782 (2011).

52. Joseph Rosenbloom, *Here Come the Payoff Police*, AM. LAWYER, May 17, 2010, at 14.

Transparency International (“TI”), a leading civil society organization that focuses on corruption issues, made the following statement in encouraging other countries to strengthen the fight against corruption:

[P]rosecutors in the US, Germany and the UK announced a number of settlements of important foreign bribery cases in which the defendants agreed to pay fines amounting to many hundreds of millions of dollars. These settlements demonstrate the ability of prosecutors to resolve cases without interminable litigation. The settlement levels provide a sharp wake-up call to international business regarding the gravity of foreign bribery. They should also make clear to laggard governments that investing in adequate enforcement can have substantial returns.⁵³

With good reasons, return on investment is not a concept typically linked to justice and the rule of law.⁵⁴ However, TI’s statement (and those of other civil society organizations that champion “get tough on bribery” positions seemingly oblivious to the broader public policy implications in such an approach) helps facilitate a new “global arms race” in which bringing the highest quantity of bribery-related enforcement actions appears to be more important than the quality of the actions. Indeed, the OECD’s recent report on U.S. implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the “OECD Report”) contained the contradiction of praising the U.S. for its “high level” of enforcement, yet criticizing and questioning many of the policies and enforcement theories that yield the “high level” of enforcement.⁵⁵

Members of Congress are rightfully concerned about the U.S. crackdown on alleged instances of foreign bribery by foreign companies and nationals. During the 2010 Senate FCPA hearing, Senator Christopher Coons (D-DE), a former in-house attorney at a multinational company, stated:

I am interested in what might someday happen as our allies begin to join us, the Italians, the U.K. government, others, and then

53. FRITZ HEIMANN & GILLIAN DELL, PROGRESS REPORT 2010: ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION 9 (Transparency International 3d ed. 2010), available at http://www.transparency.cz/doc/2010Progress_Report_2nd_edition_10.9.10.pdf.

54. See, e.g., Monty Raphael, *Judiciary Must Be Hard-Wired Into UK Plea Bargaining*, THE LAWYER, Oct. 9, 2011, <http://www.thelawyer.com/judiciary-must-be-hard-wired-into-uk-plea-bargaining/1009709.article> (“If the driver for the criminal regulation of business is how big a return a country can derive from its investigations, such regulation will be bereft of integrity and, most importantly, predictability.”).

55. See Mike Koehler, *The OECD Report—Initial Observations*, FCPA PROFESSOR, (Oct. 21, 2010), <http://www.fcprofessor.com/the-oecd-report-initial-observations> (noting specific examples of contradictions contained within the OECD Report).

how we would begin to harmonize the actual enforcement. Today, we are the only nation that is extending an extraterritorial reach and going after the citizens of other countries, we may someday find ourselves on the receiving end of such transnational actions.⁵⁶

B. Reliance on Voluntary Disclosures in Bringing Enforcement Actions

The second enforcement trend highlighted by the 2011 enforcement year is the enforcement agencies' continued heavy reliance on corporate voluntary disclosures or other instances of public disclosure (such as prior foreign law enforcement investigations) in bringing FCPA enforcement actions.⁵⁷ In 2011, ninety-nine percent of the approximate \$504 million collected by the DOJ in FCPA enforcement actions was the result of such disclosures,⁵⁸ and ninety-seven percent of the approximate \$148 million collected by the SEC was the result of such disclosures.⁵⁹

Corporate voluntary disclosures are particularly noteworthy and represent the proverbial "elephant in the room" that is seldom subject to frank discussion.⁶⁰ To be sure, there are some "carrots" and "sticks" that

56. *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcommittee on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 23 (2010), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:66921.pdf.

57. Voluntary disclosure generally refers to the process by which a company on its own (often through internal audits or internal reporting mechanisms) learns of conduct that might implicate the FCPA and, after an internal investigation, the company's lawyers disclose the conduct that might implicate the FCPA to the enforcement agencies even though, in many cases, the enforcement agencies would likely not otherwise find out about the conduct. The FCPA does not require such disclosures, but general securities law issues such as materiality may be relevant. However, few instances of conduct implicating the FCPA rise to the level of materiality.

58. See Mike Koehler, *DOJ Enforcement of the FCPA—Year in Review*, FCPA PROFESSOR (Jan. 11, 2012), <http://www.fcpaprofessor.com/doj-enforcement-of-the-fcpa-year-in-review-2> (detailing each DOJ corporate FCPA enforcement action in 2011 including whether the enforcement action was the result of a voluntary disclosure or other instance of public disclosure such as previous foreign law enforcement investigations).

59. See Mike Koehler, *SEC Enforcement of the FCPA—Year in Review*, FCPA PROFESSOR (Jan. 10 2012), <http://www.fcpaprofessor.com/sec-enforcement-of-the-fcpa-year-in-review> (detailing each SEC corporate FCPA enforcement action in 2011 including whether the enforcement action was the result of a voluntary disclosure or other instance of public disclosure such as previous foreign law enforcement investigations).

60. This may be due to the fact that corporate voluntary disclosures involve potential conflict of interest issues for lawyers advising corporate clients on the voluntary disclosure decision. See Mike Koehler, *Voluntary Disclosures and the Role of FCPA Counsel*, FCPA PROFESSOR (Dec. 1, 2009), <http://www.fcpaprofessor.com/voluntary-disclosures-and-the>

encourage corporate voluntary disclosure. For instance, the DOJ's Principles of Federal Prosecution of Business Organizations state that whether an organization timely and voluntarily disclosed the alleged wrongdoing to the DOJ is a factor in determining how the DOJ will resolve the matter.⁶¹ Likewise, the advisory Sentencing Guidelines allow for a lower fine if a company "reported the offense to appropriate government authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct."⁶² However, whether these "carrots" are actually awarded to companies that voluntarily disclose to the enforcement agencies is the subject of much dispute and debate.⁶³

Moreover, the same "carrots" and "sticks" that may motivate FCPA voluntary disclosures are present in every DOJ and SEC investigation regardless of the substantive area of law at issue. Why then is corporate voluntary disclosure such a prominent feature of FCPA enforcement, but less prominent in other areas of law?

An answer may be that corporate voluntary disclosures feed a thriving and growing FCPA industry whose participants, both in the government and the private sector, have vested interests in seeing it continue.⁶⁴ The enforcement agencies favor and encourage self-reporting because it makes their jobs easier and is cost-effective from a budget and resource standpoint. Private-sector participants in FCPA industry—law firms, forensic accounting firms, investigative firms, etc.—have an interest in voluntary disclosures because, to state the obvious, voluntary disclosures lead to additional work. It is a well-known fact in the FCPA industry that voluntary disclosures, even as to conduct limited in scope, often prompt the enforcement agencies to ask the "where else" question that results in multi-year, global reviews of any company that voluntarily discloses. For

role-of-fcpa-counsel (discussing corporate voluntary disclosures and potential conflict of interest issues FCPA counsel faces in advising companies as to disclosure issues).

61. See U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-28.000 (2008) (providing a set of factors prosecutors should consider in determining whether to bring criminal charges against a business organization, or to negotiate a plea or other agreement such as a non-prosecution or deferred prosecution agreement).

62. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) (2011).

63. See, e.g., Nick Elliott, *Regulators Like Self-Reporting, Some Attorneys Aren't Sure*, CORRUPTION CURRENTS (Mar. 31, 2011, 3:22 PM), <http://blogs.wsj.com/corruption-currents/2011/03/31/regulators-like-self-reporting-some-attorneys-arent-sure/> (discussing the potential negative consequences of self-reporting).

64. See, e.g., Nathan Vardi, *The Bribery Racket*, FORBES, May 24, 2010, at 70-77 (detailing, based on comments from the DOJ's former FCPA chief, how the increase in FCPA enforcement is "good business for law firms . . . good business for accounting firms, it's good business for consulting firms, the media—and Justice Department lawyers who create the marketplace and then get [themselves] a job").

instance, the Tyson Foods enforcement action focused on conduct in Mexico involving one company subsidiary, which “comprised less than one percent of Tyson’s global net sales.”⁶⁵ Even though approximately eighty-five percent to ninety percent of Tyson’s sales were domestic, in resolving the enforcement action, Tyson “subjected to rigorous FCPA reviews” all of its wholly-owned production facilities, including those located outside of Mexico.⁶⁶

Commenting on this trend, FCPA practitioner Claudius Sokenu stated as follows:

What has caused the most angst is . . . the oppressive and dictatorial manner in which the government causes corporations to expend significant resources in conducting overly broad investigations that cost millions of dollars with little more than a hunch that potentially violative conduct is afoot. Time and time again, we see internal investigations that span dozens of countries in one company and the cost of doing those multi-country internal investigations, and the disruption to business, not to mention a corporation’s reputational damage. This can be significant. I think what is most needed is prosecutorial discretion from the SEC and Justice Department on what to investigate and the breadth of the investigation.⁶⁷

That the “where else” question is asked in the absence of any meaningful check or judicial oversight raises a host of problematic ethical and policy issues. For example, the enforcement attorneys who ask the “where else” question increase the demand for private-sector FCPA services and frequently leave government service for the FCPA private-sector.⁶⁸ FCPA counsel, to whom the “where else” question is posed, have little incentive to push-back as the “where else” question often leads to multi-year, multi-country billing bonanzas. Even if FCPA counsel were

65. Deferred Prosecution Agreement at 3, *United States v. Tyson Foods, Inc.*, No. 1:11-cr-00037-RWR (D.D.C. Feb. 10, 2011), available at http://www.justice.gov/criminal/ftaud/fcpa/cases/tyson-foods/02-10-11tyson_foods_dpa.pdf.

66. *Id.*

67. *Providing Excellent Service Through a Global Perspective*, METRO CORP. COUNSEL, June 2011, at 11.

68. The examples of DOJ or SEC FCPA enforcement attorneys leaving government service for the private FCPA bar are numerous. See, e.g., Mike Koehler, *Friday Roundup*, FCPA PROFESSOR (Jan. 6, 2012), <http://www.fcpaprofessor.com/friday-roundup-21> (describing various attorneys’ transition from the Department of Justice to white-collar defense practices in private practice, and in particular, Mark Mendelsohn’s move to Paul Weiss); Mike Koehler, *News Corp. Hires Mendelsohn . . . And More On The Revolving Door*, FCPA PROFESSOR (July 21, 2011), <http://www.fcpaprofessor.com/news-corp-hires-mendelsohn-and-more-on-the-revolving-door> (discussing further the transition from the public sector to private practice, and public policy implications).

inclined to push back on behalf of clients, cooperation in the government's investigation remains one influential factor in the enforcement agencies' charging decisions and ultimate fine and penalty amounts.⁶⁹

The predominance of corporate voluntary disclosures in this new era of FCPA enforcement has clearly contributed to the creation and growth of a vibrant industry and FCPA issues, no matter how limited in scope, often turn into a boondoggle for many involved.⁷⁰ Yet, corporate counsel and others making business decisions on behalf of a company need to understand that thoroughly investigating an issue, promptly implementing remedial measures, and effectively revising and enhancing compliance policies and procedures—internally, and without disclosure to the enforcement agencies—is a perfectly acceptable, legitimate, and legal response to FCPA issues in all but the rarest of circumstances.

C. *Extensive Use of Alternative Resolution Vehicles*

The third enforcement trend highlighted by the 2011 enforcement year is the extensive use of non-prosecution agreements (“NPAs”) and deferred prosecution agreements (“DPAs”) to resolve corporate FCPA enforcement actions. These alternative resolution vehicles do not result in any actual prosecuted charges against the company entering into the agreement and the vehicles are not subject to any meaningful judicial scrutiny.⁷¹ Such alternative resolution vehicles are used in other substantive areas of law, but the predominate use of such vehicles is to resolve FCPA inquiries.⁷² As detailed in Table I, in 2011, nine of the eleven DOJ corporate FCPA

69. See U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-28.000 (2008) (listing cooperation as a factor in charging decisions); U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) (2011), (listing cooperation as a factor in sentencing decisions).

70. For example, in 2008, Avon Products Inc. began an internal investigation as to FCPA issues in China and other countries. The investigation has blossomed into compliance reviews “in a number of other countries, selected to represent each of the Company's international geographic segments.” Avon Products, Inc., Quarterly Report (Form 10-Q) (Oct. 27, 2011). Avon, as of February 2011, has reportedly spent over \$150 million on its FCPA internal investigation, which is not yet complete. See Aruna Viswanatha, *Avon Spending on FCPA Investigation Tops \$150 Million*, MAIN JUSTICE (Feb. 24, 2011, 10:28 AM), <http://www.mainjustice.com/justanticorruption/2011/02/24/avon-spending-on-fcpa-investigation-tops-150-million/>.

71. See *Façade supra* note 1, at 933-39 (discussing the increase in NPAs and DPAs and various criticisms of NPAs and DPAs).

72. See GIBSON, DUNN & CRUTCHER LLP, 2011 YEAR-END UPDATE ON CORPORATE DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS (2012), <http://www.gibsondunn.com/publications/Documents/2011YearEndUpdate-CorporateDeferredProsecution-NonProsecutionAgreements.pdf> (discussing the use of NPAs and DPAs to resolve various enforcement actions, including FCPA enforcement actions).

enforcement actions (eighty-two percent) were resolved via an NPA or DPA.⁷³

The DOJ first used an alternative resolution vehicle in an FCPA enforcement action in 2004.⁷⁴ Since 2004, an NPA or DPA has been used to resolve forty-seven of the sixty-one (seventy-seven percent) core corporate DOJ FCPA enforcement actions.⁷⁵ It is clear that the DOJ's use of such vehicles in the FCPA context is one of the reasons for the increase in FCPA enforcement actions. Mark Mendelsohn, the former deputy chief of the DOJ's FCPA unit, stated that if the DOJ did not have the option of resolving FCPA enforcement actions with NPAs or DPAs, the DOJ "would certainly bring fewer cases."⁷⁶ Likewise, the OECD Report stated as follows: "It seems quite clear that the use of these agreements is one of the reasons for the impressive FCPA enforcement record in the U.S."⁷⁷

Use of such resolution vehicles to resolve alleged corporate criminal liability in the FCPA context and other areas present two distinct, yet equally problematic, public policy issues. First, resolution vehicles allow egregious instances of corporate conduct to be resolved too lightly. Because the government does not file actual charges to which a company must plead, such conduct is often resolved without adequate sanctions and without achieving maximum deterrence.⁷⁸ Indeed, it is notable to observe

73. Further, a notable development from 2011 is that the SEC used such a vehicle (a DPA) for the first time in an FCPA enforcement against Tenaris. See *Deferred Prosecution Agreement, U.S. Sec. & Exch. Comm'n v. Tenaris, S.A.*, (May 17, 2011), <http://www.sec.gov/news/press/2011/2011-112-dpa.pdf>. In January 2010, the SEC announced "a series of measures to further strengthen its enforcement program by encouraging greater cooperation from individuals and companies in the agency's investigations and enforcement actions." Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), <http://www.sec.gov/news/press/2010/2010-6.htm>. Among the measures was use of NPAs and DPAs.

74. See Press Release, U.S. Dep't of Justice, *InVision Technologies Inc. Enters into Agreement with the United States* (Dec. 6, 2004), http://www.justice.gov/opa/pr/2004/December/04_crm_780.htm (providing the key terms of the Department's agreement with InVision Technologies, Inc.).

75. See Mike Koehler, *DOJ Prosecution of Individual—Are Other Factors at Play?*, FCPA PROFESSOR (Sept. 22, 2011), <http://www.fcpaprofessor.com/doj-prosecution-of-individuals-are-other-factors-at-play> (analyzing FCPA enforcement actions as of September 2011).

76. Mark Mendelsohn *on the Rise of FCPA Enforcement*, CORP. CRIME REP., Sept. 13, 2010, at 15.

77. OECD WORKING GRP. ON BRIBERY IN INT'L BUS., UNITED STATES: PHASE 3 REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 2009 REVISED RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS (2010), available at <http://www.oecd.org/dataoecd/10/49/46213841.pdf>.

78. See e.g., Gretchen Morgenson & Louise Story, *As Wall Street Polices Itself*,

that seven of the top ten enforcement actions (in terms of fine and penalty amount) in the FCPA's history have been resolved with an NPA or DPA.⁷⁹ The second is that such vehicles, because of the same factors discussed above, nudge companies to agree to the vehicles for reasons of risk-aversion and efficiency, and not necessarily because the conduct at issue actually violates the FCPA.⁸⁰ Thus, use of NPAs or DPAs contributes to "over-prosecution" of business conduct,⁸¹ while at the same time allowing for "under-prosecution" of egregious instance of corporate bribery. For these reasons, it is in the public interest to abolish these resolution vehicles.

D. Lack of Individual Prosecutions

The fourth FCPA enforcement trend highlighted by the 2011 enforcement year is the continued lack of individual prosecutions in most corporate FCPA enforcement actions. In my 2010 Senate testimony, I stated that corporate fine-only FCPA enforcement is not effective and does not adequately deter future FCPA violations.⁸² Rather, what is key to achieving deterrence is prosecuting individuals to the extent the individual's conduct legitimately satisfies the elements of an FCPA anti-bribery violation.⁸³

Prosecutors Use Softer Approach, N.Y. TIMES, July 7, 2011, available at http://www.nytimes.com/2011/07/08/business/in-shift-federal-prosecutors-are-lenient-as-companies-break-the-law.html?_r=2&ref=gretchenmorgenson (detailing the rise in NPAs and DPAs and addressing, among other things, whether the agreements run the risk of "letting companies off too easily").

79. Richard A. Cassin, *With Magyar in New Top Ten, It's 90% Non-U.S.*, THE FCPA BLOG, (Dec. 29, 2011, 1:28 PM), <http://www.fcpablog.com/blog/2011/12/29/with-magyar-in-new-top-ten-its-90-non-us.html> (listing the top ten FCPA enforcement actions in terms of fine or penalty amount).

80. See *Façade*, *supra* note 1, at 924-29 (discussing the increase in NPAs and DPAs and various criticisms of NPAs and DPAs). Indeed, former DOJ FCPA chief Mark Mendelsohn stated that the "danger" of NPAs and DPAs "is that it is tempting for the [DOJ] or the SEC since it too now has these options available, to seek to resolve cases through DPAs or NPAs that don't actually constitute violations of the law." *Mark Mendelsohn on the Rise of FCPA Enforcement*, 24 CORP. CRIME REP. 35, 35 (Sept. 10, 2010).

81. See, e.g., Reynolds Holding, *Settlements Feed U.S. Prosecutor Overreach*, REUTERS BREAKINGVIEWS (Sept. 19, 2011, 10:03 AM), <http://www.trust.org/trustlaw/news/breakingviews-settlements-feed-us-prosecutor-overreach> (stating that settlements encourage federal prosecutors to overreach).

82. *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 14-15 (2010) (statement of Mike Koehler, Professor at Southern Illinois University School of Law).

83. *Id.*; see also James Stewart, *Bribery, But Nobody Was Charged*, N.Y. TIMES, June 24, 2011, at B1 ("[S]urely bribery, not to mention other forms of corporate wrongdoing, would be more effectively deterred if someone was actually held accountable for it.").

Nevertheless, FCPA enforcement largely remains corporate enforcement only. Of the eleven corporate FCPA enforcement actions brought by the DOJ in 2011, only three (twenty-seven percent) have resulted, at present, in related enforcement actions against company employees.⁸⁴ Likewise, of the thirteen corporate FCPA enforcement actions brought by the SEC in 2011, only two (fifteen percent) have resulted, at present, in related enforcement actions against company employees.⁸⁵

To be sure, the 2011 enforcement year ended with a bang as the DOJ and SEC charged several former foreign executives of Siemens and Magyar Telekom.⁸⁶ In addition, as demonstrated by the Siemens individual indictments, individual prosecutions can follow years after a related corporate FCPA enforcement action. However, the lack of individual prosecutions in the majority of corporate FCPA enforcement actions causes one to legitimately wonder whether the conduct serving as the basis for the corporate enforcement action was engaged in by ghosts.

On the other hand, an equally plausible reason for the lack of individual FCPA prosecutions in connection with corporate FCPA enforcement actions may be the quality of the corporate enforcement action. As detailed above, a significant majority of DOJ corporate FCPA enforcement actions are resolved via alternative resolution vehicles and, given the dynamics at play, companies are often nudged to agree to these vehicles for reasons of risk-aversion and efficiency and not necessarily because the conduct at issue actually violates the FCPA. Individuals, on the other hand, face a deprivation of personal liability in FCPA enforcement actions, and are more likely to force the DOJ to satisfy its high burden of proof as to all FCPA elements.

In support of this theory for the lack of related individual prosecutions in the majority of corporate FCPA enforcement actions is the following fact: Since the advent of alternative resolution vehicles in the FCPA context in 2004, only fifteen percent of corporate FCPA enforcement actions resolved with such vehicles have resulted in related charges against company employees or those affiliated with the company.⁸⁷ In the view of many, the current era of corporate criminal law enforcement “encourage[s] prosecutors to pursue what they can punish, not what the law prohibits,”⁸⁸ and “prosecutors start to believe that the law means whatever they have

84. Koehler, *supra* note 58.

85. Koehler, *supra* note 59.

86. *See supra* notes 36, 38, 39 (documenting enforcement actions against foreign executives).

87. Koehler, *supra* note 75.

88. Holding, *supra* note 81.

been able to get [corporate] defendants to agree to” in resolution documents.⁸⁹

Against this backdrop, perhaps a more appropriate question should be *not* why do so few DOJ corporate FCPA enforcement actions result in individual prosecutions, but rather, *do* many DOJ corporate FCPA enforcement actions actually evidence proof beyond a reasonable doubt that FCPA violations occurred?

As highlighted in Part I of this Article, FCPA enforcement in 2011 may have been mild compared to FCPA enforcement in 2010, but the continuation of observable trends raise several basic questions as the FCPA nears its thirty-fifth year.

As to the number, magnitude, and quantity of FCPA enforcement actions against foreign companies and nationals: What will be the impact of the enforcement agencies’ global mission of enforcing the FCPA against foreign companies and nationals often on aggressive jurisdictional theories? Is foreign bribery enforcement a desirable form of government investment and revenue? Will a focus on return of investment facilitate a new “global arms race” in which bringing the highest quantity of enforcement actions is more important than the quality of the actions?

As to the reliance on corporate voluntary disclosures in bringing FCPA enforcement actions: Does this dynamic feed a thriving and growing FCPA industry that has vested interests in seeing a continuation of aggressive and broad enforcement and inquiries?

As to the extensive use of alternative resolution vehicles to resolve FCPA enforcement actions: Do NPAs and DPAs contribute to “over-prosecution” of business conduct while at the same time allowing “under-prosecution” of egregious instances of corporate bribery?

As to the lack of individual prosecutions in most corporate FCPA enforcement actions: Is corporate bribery engaged in by ghosts or is a reason for the general lack of individual prosecutions in corporate FCPA enforcement actions due to the quality of the corporate enforcement action?

II. FCPA SCRUTINY—2011

The big story from 2011 is not that FCPA enforcement statistics decreased compared to 2010, but that the FCPA was subjected to the most meaningful public scrutiny in its history. Public scrutiny of the FCPA and FCPA enforcement came from multiple directions: Congress, the judiciary, and others such as academics, the press, and public interest groups. As

89. Michael Levy, *Prosecutorial Common Law*, FCPA PROFESSOR, (Mar. 16, 2011), <http://www.fcpaprofessor.com/prosecutorial-common-law>.

discussed below, this scrutiny reveals that as the FCPA nears its thirty-fifth year, basic legal and policy questions remain as to the purpose, scope, and effectiveness of the FCPA and FCPA enforcement.

A. Congressional Scrutiny

Historically, Congress has taken little interest in the FCPA since its last substantive reforms in 1988.⁹⁰ However, congressional interest in the FCPA and FCPA enforcement has rightfully grown as FCPA enforcement has increased over the past few years, as enforcement theories have become more aggressive, and as the competitiveness of U.S. business in the global marketplace has declined.

In June 2011, picking up where the Senate left off in late 2010 on FCPA reform,⁹¹ a House Judiciary Subcommittee held an FCPA hearing focused on a wide range of issues.⁹² In many ways, the hearing was similar to FCPA reform hearings twenty-five years ago, in that a common theme was whether the current FCPA enforcement environment harms U.S. business.

In opening the hearing, Chairman James Sensenbrenner (R-WI) noted that “the world was a very different place” when the FCPA was passed in 1977, but since then “the world has turned upside down . . . China has become a global manufacturing power, [and] [t]he nature of overseas business has changed.”⁹³ Placing FCPA enforcement in the context of the recent economic downturn, Sensenbrenner stated that “FCPA prosecutions should be effective and fair,” yet at the same time “predictable” so that the “rules of the road . . . [are] clear[]” so that “business can start moving again.”⁹⁴ In an opening statement, Robert Scott (D-VA) commented on the necessity of periodically reviewing laws to make sure they “remain fair and just.”⁹⁵ Representative Scott’s remark was similar to that made by William Brock (U.S. Trade Representative) in a 1981 *New York Times* opinion piece when he observed as follows:

90. The FCPA was also amended in 1998 to incorporate certain aspects of the OECD Convention into the FCPA. See Declaration of Prof. Michael J. Koehler in Support of Defendants’ Motion to Dismiss Counts One Through Ten of the Indictment at ¶ 17, *United States v. Stuart Carson*, No. 8:09-cr-00077-JVS (C.D. Cal. Feb. 21, 2011) [hereinafter *Koehler’s Carson Declaration*] (providing an overview of the FCPA’s legislative history).

91. See *Examining Enforcement of the FCPA Hearing*, *supra* note 45.

92. See *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 47 (2011) available at http://judiciary.house.gov/hearings/printers/112th/112-47_66886.pdf.

93. *Id.* at 1.

94. *Id.* at 2.

95. *Id.* at 4.

Just because the Foreign Corrupt Practices Act spotlights a sensitive subject . . . some people turn a blind eye to its shortcomings rather than risk being accused of being “soft on bribery.” That is too easy a way out. Retreating from controversy will not cure the law’s deficiencies. . . . As it is now, the act penalizes the innocent more predictably than the guilty, and along with both, our competitiveness in world trade.⁹⁶

Issues explored during the House hearing included: Clarifying the FCPA’s definition of “foreign official” and “instrumentality”; adding a compliance defense to the FCPA; successor liability issues; and DOJ decision-making in FCPA cases, including prosecutorial discretion and declination decisions.⁹⁷

The 2011 House hearing was much more contentious than the Senate’s 2010 FCPA hearing. The House hearing reflected the growing divide between the legitimate concerns of many as to this new era of FCPA enforcement and the enforcement agencies’ seemingly “circle the wagons” approach when it comes to FCPA reform or critique of its FCPA enforcement program. For instance, in closing the hearing, Chairman Sensenbrenner sternly told the DOJ witness that it “would behoove the [DOJ] to realize that this statute needs updating” because the current enforcement climate has caused U.S. business not to pursue legitimate business activity, thereby putting U.S. business at a significant disadvantage to foreign companies.⁹⁸

During the hearing, Chairman Sensenbrenner said that his Committee would be drafting an FCPA reform bill.⁹⁹ The force with which the statement was made gave the impression that a reform bill would soon follow the hearing. However, the much-anticipated reform bill was not introduced in 2011 and it is possible that Congress will delay introducing a reform bill until the DOJ issues its promised FCPA guidance in 2012.¹⁰⁰

96. Bill Brock, Editorial, *Shifting Gears on Bribes Abroad*, N.Y. TIMES, Aug. 16, 1981, at E19.

97. See *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112TH CONG. 3-4 (2011), available at http://judiciary.house.gov/hearings/printers/112th/112-47_66886.pdf.

98. *Id.* at 75.

99. *Id.*

100. In November 2011, Assistant Attorney General Lanny Breuer announced that in 2012 the DOJ hopes to “release detailed new guidance on the [FCPA’s] criminal and civil enforcement provisions.” Lanny A. Breuer, Assistant Attorney Gen., Address at the 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011), available at <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html>. DOJ guidance on the FCPA would be long-coming. The FCPA’s 1988 amendments required that the

Whenever an FCPA reform bill is introduced, and whatever its specific provisions, FCPA reform in 2012 is far from a sure thing. The topic is a political hot potato, particularly during an election season, and history instructs that substantive FCPA reform can drag on for many years.¹⁰¹

While 2011 did not witness a comprehensive FCPA reform bill, the year did witness certain FCPA reform bills introduced on Capitol Hill. However, the bills, even if enacted, will likely have limited scope and application.

Attorney General, “after consultation with the [SEC], the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with [the anti-bribery provisions] would be enhanced and the business community would be assisted by further clarification” of its various provisions.” Omnibus Trade and Competitiveness Act of 1988 § 5003(d), Pub. L. No. 100-418, 102 Stat. 1107, 1417 (codified as amended 15 U.S.C. § 78dd-1) (2012). Among other things, Congress requested that the Attorney General consider issuing guidelines as to “general precautionary procedures [companies] may use on a voluntary basis to conform their conduct to the Department of Justice’s present enforcement policy” *Id.* § 5003(d)(2). Following the 1988 Congressional mandate, the DOJ did issue a formal notice inviting all interested persons “to submit their views concerning the extent to which compliance with [the anti-bribery provisions] would be enhanced and the business community assisted by further clarification of the provisions of the anti-bribery provisions through the issuance of guidelines.” Anti-Bribery Provisions of the Foreign Corrupt Practices Act, 54 Fed. Reg. 40,918 (Oct. 4, 1989). However, the DOJ stated that “[o]nly 5 [sic] responses were received, and 3 [sic] of the responses were to the effect that guidelines were unnecessary.” Based on this information, it declined to issue FCPA compliance guidelines envisioned by Congress. ORG. FOR ECON. CO-OPERATION AND DEVELOPMENT, REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION (1999), available at <http://www.oecd.org/daf/bribery/internationalbusiness/anti-briberyconvention/2390377.pdf>. In July 1990, the DOJ stated as follows:

After consideration of the comments received, and after consultation with the appropriate agencies, the Attorney General has determined that no guidelines are necessary. . . . [C]ompliance with the [anti-bribery provisions] would not be enhanced nor would the business community be assisted by further clarification of these provisions through the issuance of guidelines.

Anti-Bribery Provisions, 55 Fed. Reg. 28,694 (July 12, 1990).

101. For instance, bills addressing the various substantive reforms in the FCPA’s 1988 amendments were first introduced in Congress in 1980 and reform stalled for many years. *See, e.g.*, Business Accounting and Foreign Trade Simplification Act, S. 2763, 96th Cong. (1980); Business Accounting and Foreign Trade Simplification Act, S. 708, 97th Cong. (1981); Business Accounting and Foreign Trade Simplification Act, S. 414, 98th Cong. (1983); Foreign Trade Practices Act of 1983, H.R. 2157, 98th. Cong. (1983); Business Accounting and Foreign Trade Simplification Act, S. 430, 99th Cong. (1985); Foreign Trade Practices Act of 1986, H.R. 4389, 99th Cong. (1986); Export Enhancement Act of 1986, H.R. 4708, 99th Cong. (1986); Omnibus Trade and Competitiveness Act of 1987, H.R. 3, 100th Cong. (1987); Trade, Employment, and Productivity Act of 1987, S. 539, 99th Cong. (1987); Omnibus Trade and Competitiveness Act of 1987, S. 1420, 100th Cong. (1987).

In November 2011, Representative Ed Perlmutter (D-CO) introduced H.R. 3531 (the “Foreign Business Bribery Prohibition Act of 2011”).¹⁰² Substantively similar to previous bills Perlmutter has introduced,¹⁰³ H.R. 3531 would authorize certain private causes of action for violations under the FCPA by foreign concerns that damage domestic business. The bill would likely have limited application, as it seeks to amend only the 78dd-3 prong of the FCPA that is applicable to conduct by “persons other than issuers or domestic concerns” and the prong that has the narrowest jurisdictional scope. Thus, the bill’s application would be limited to instances in which a foreign company (one without shares listed on a U.S. exchange) “while in the territory” of the U.S., makes use of an instrumentality of interstate commerce in furtherance of a foreign bribery scheme that harms U.S. business.

In December 2011, Representative Peter Welch (D-VT) introduced H.R. 3588 (“Overseas Contractor Reform Act”).¹⁰⁴ Substantively similar to a bill that unanimously passed the House in 2010,¹⁰⁵ H.R. 3588 states that “[i]t is the policy of the United States Government that no Government contracts or grants should be awarded to individuals or companies who violate the [FCPA]”¹⁰⁶ This is a sound policy statement and a debarment penalty for egregious instances of corporate bribery involving high-level executives or board participation is in the public interest. However, the problem with H.R. 3588, as with the previous bill, is its trigger for debarment—“any person found to be in violation of the [FCPA’s anti-bribery provisions] shall be proposed for debarment . . . within 30 days after the judgment finding such person to be in violation becomes final.”¹⁰⁷ Given the DOJ’s use of NPAs and DPAs, as well as its discretion in charging decisions, few companies in this new era of FCPA enforcement are, as strange as it may sound, ever “found to be in violation of the FCPA.”¹⁰⁸ For instance, as detailed in Table I above, in 2011, nine of the

102. H.R. 3531, 112th Cong. (2010), <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3531ih/pdf/BILLS-112hr3531ih.pdf>.

103. See Foreign Business Bribery Prohibition Act of 2009, H.R. 2152 111th Cong. (2009), <http://www.govtrack.us/congress/bill.xpd?bill=h111-2152> (using language similar to its successor, H.R. 3531, authorizing certain private rights of action under the FCPA for foreign violations damaging domestic businesses).

104. H.R. 3588, 112th Cong. (2011), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h112-3588>.

105. Overseas Contractor Reform Act, H.R. 5366, 111th Cong. (2010), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr5366eh/pdf/BILLS-111hr5366eh.pdf>.

106. H.R. 3588, 112th Cong. (2011), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h112-3588>.

107. *Id.*

108. *Id.*

eleven DOJ corporate FCPA enforcement actions (eighty-two percent) were resolved with an NPA or DPA.

Thus, Representative Welch's bill again represents impotent legislation and demonstrates that few members of Congress understand how the FCPA is actually enforced, or if they do, that creating the illusion of addressing a problem is more important than actually addressing a problem.

B. Judicial Scrutiny

During the past decade of the FCPA's resurgence, the DOJ has enforced the FCPA almost exclusively against cooperating corporate defendants after corporate voluntary disclosures. The role of the judiciary has largely been limited to sentencing the few individual defendants charged with FCPA violations. In many of those instances, judges significantly rejected the DOJ's sentencing recommendations.¹⁰⁹ Because of the SEC's "neither admit nor deny" settlement policy, it is even more rare for the judiciary to scrutinize the SEC's enforcement of the FCPA.¹¹⁰ However, one significant development from 2011, and one to follow in 2012, is Judge Jed Rakoff's (S.D.N.Y.) rejection of the SEC's settlement policy in a non-FCPA case, and how the Second Circuit will rule in the appeal.¹¹¹

Judicial scrutiny of FCPA enforcement in 2011 included several cases of first impression and focused on: "foreign official" issues; the FCPA's knowledge element; the DOJ's conduct in FCPA investigations and prosecutions; rulings in the Africa Sting cases, including as to jurisdictional issues; determining the victims of bribery; and use of the Travel Act to combat alleged commercial bribery.

109. See Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. TOL. L. REV. 99, 137-38 (2011) (highlighting instances in the Western District of Virginia, Central District of California, and Eastern District of Pennsylvania in which district judges rejected DOJ sentencing recommendations, and noting that this may signal "future judicial scrutiny regarding FCPA enforcement theories . . .").

110. See *Façade*, *supra* note 1, at 942-44 (elaborating on the SEC's "neither admit nor deny" policy and noting the general lack of judicial analysis of this policy).

111. See *Sec. & Exch. Comm'n v. Citigroup Global Mkts., Inc.*, 827 F. Supp. 2d, 336 (S.D.N.Y. 2011) (denying the settlement between the parties by noting, among other things, that the SEC's "neither admit nor deny" settlement policy is "hallowed by history, but not by reason" and stating that the policy "deprives the Court of even the most minimal assurance that the substantial injunctive relief it is being asked to impose has any basis in fact").

i. Foreign Official

For many years, a significant percentage of FCPA enforcement actions have been based on the prosecution theory that state-owned or state-controlled enterprises (“SOEs”)—even those with publicly-traded shares and/or minority foreign government investment—are “instrumentalities” of a foreign government and that SOE employees are therefore “foreign officials” under the FCPA’s anti-bribery provisions.¹¹²

As demonstrated by the below table, this trend continued in 2011 as approximately eighty percent of corporate FCPA enforcement actions involved, in whole or in part, employees of alleged SOEs. These enterprises and entities ranged from manufacturing companies, oil and gas companies, telecommunications companies, healthcare entities, engineering firms, liquor stores, and insurance companies. In 2011, a new minimum threshold was also advanced by the enforcement agencies for what constitutes an SOE. The Comverse Technologies enforcement action detailed below focused on individuals connected to Hellenic Telecommunications Organization S.A. (“OTE”). A review of OTE’s annual reports indicates that during the time period relevant to the enforcement action, the Greek government owned only between thirty-three percent and thirty-eight percent of OTE.¹¹³

112. See Koehler, *supra* note 2, at 108-16 (showing that approximately sixty percent of corporate FCPA enforcement actions in 2010 involved (in whole or in part) foreign officials who were employees of alleged SOEs); see also Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 410-12 (2010) (showing that approximately sixty-six percent of corporate FCPA enforcement actions in 2009 involved, in whole or in part, foreign officials who were employees of alleged SOEs).

113. Mike Koehler, “*Foreign Official*” *Limbo—The Bar Has Been Lowered*, FCPA PROFESSOR (Apr. 15, 2011), <http://www.fcpaprofessor.com/foreign-official-limbo-the-bar-has-been-lowered>. The largest category of investors in OTE during the relevant time period were international institutional investors.

*Table V - The “Foreign Officials” of 2011*¹¹⁴

Enforcement Action	Alleged “Foreign Official”
Maxwell Technologies	<p style="text-align: center;">DOJ¹¹⁵</p> <ul style="list-style-type: none"> • “Pinggao Group Co. Ltd. (formerly Pingdingshan High Voltage Switch-gear Works) (‘Pinggao Group’) was a state-owned manufacturer of electric-utility infrastructure in Henan Province, People’s Republic of China (‘PRC’ or ‘China’).” • “New Northeast Electric Shenygan HV Switchgear Co., Ltd. (‘Shenygan HV’) was a state-owned manufacturer of electric-utility infrastructure in Liaoning Province, PRC.” • “Xi-an XD High Voltage Apparatus Co., Ltd. a/k/a Xi’an Shinky High Voltage Electric Co., Ltd. (‘Xi-an XD’) was a state-owned manufacturer of electric utility infrastructure in Shaanxi Province, PRC.” • “[P]ayments . . . conveyed to officials of foreign

114. This table is based on information from the DOJ or SEC’s actual charging documents. As evident from the information in the table, in certain instances the enforcement agencies describe the “foreign official” with reasonable specificity; in other instances with virtually no specificity. Some of the enforcement actions in the table technically involved only FCPA books and records and internal control charges. However, actual charges in most FCPA enforcement actions hinge on voluntary disclosure, cooperation, collateral consequences, and other non-legal issues. Thus, even if an FCPA enforcement action is resolved without FCPA anti-bribery charges, the action remains very much about the “foreign officials” involved.

115. Information at 4, *United States v. Maxwell Techs., Inc.*, No. 3:11-cr-00329-JM (S.D. Cal. Jan. 31, 2011), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/maxwell/01-31-11maxwell-tech-info.pdf>.

	<p>governments employed by state-owned entities, including Pinggao Group, Shenyang HV, and Xi-an XD”</p> <p>SEC¹¹⁶</p> <ul style="list-style-type: none"> • Presumably the same as above, although the SEC complaint merely refers to “officials at several Chinese state-owned entities.”
Tyson Foods	<p>DOJ¹¹⁷</p> <ul style="list-style-type: none"> • “The Government of Mexico administers an inspection program, <i>Tipo Inspeccion Federal</i> (“TIF”), for meat-processing facilities. . . . The inspection program at each facility is supervised by an on-site veterinarian who is a government employee (“TIF veterinarian”) paid by the state, who ensures that all exports are in conformity with Mexican health and safety laws. Therefore, TIF veterinarians are foreign officials as defined by the FCPA” • “Wives of the TIF veterinarians.”

116. Complaint at 1, Sec. & Exch. Comm’n v. Maxwell Techs., Inc., No. 1:11-cv-00258 (D.D.C. Jan. 31, 2011), *available at* <http://www.sec.gov/litigation/complaints/2011/comp21832.pdf>.

117. Information at 3, United States v. Tyson Foods, Inc., No. 1:11-cr-00037-RWR (D.D.C. Feb. 10, 2011), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/tyson-foods.html>.

	<p style="text-align: center;"><i>SEC</i>¹¹⁸</p> <ul style="list-style-type: none"> • Same as above.
IBM Corp.	<p style="text-align: center;"><i>SEC</i>¹¹⁹</p> <ul style="list-style-type: none"> • “[G]overnment officials in South Korea and China.” • “The foreign government officials involved worked for sixteen South Korean government entities (‘SKGE’).”; “Chief of Operations for the Electronic Operations Division of SKGE 1”; “[M]anager of the government-controlled SKGE 2”; “. . .SKGE 3’s Director of Planning”; “SKGE 4 was a state-owned agency of the South Korea government . . . an employee of SKGE 4 responsible for reviewing personal computer procurement bids”; “. . .Director of SKGE 5’s information technology department”; • “. . .Government Officials of SKGE 6”; “. . .[K]ey decision makers at ten other SKGEs” • “. . .Chinese government officials”; employees of “government-owned or controlled customers in China”
Ball Corp.	<p style="text-align: center;"><i>SEC</i>¹²⁰</p>

118. Complaint at 1, Sec. & Exch. Comm’n v. Tyson Foods, Inc., No. 1:11-cv-00350-RMC (D.D.C. Feb. 10, 2011), available at <http://www.sec.gov/litigation/complaints/2011/comp21851.pdf>.

119. Complaint at 1, Sec. & Exch. Comm’n v. Int’l Bus. Machines Corp., No. 1:11-cv-00563 (D.D.C. Mar. 18, 2011), available at <http://www.sec.gov/litigation/complaints/2011/comp21889.pdf>.

120. Ball Corp., Exchange Act Release No. 64123, 2011 WL 1099562 (Mar. 24, 2011), available at <http://www.sec.gov/litigation/admin/2011/34-64123.pdf>.

	<ul style="list-style-type: none"> • “[E]mployees of the Argentine government to secure the importation of prohibited used machinery and the exportation of raw materials at reduced tariffs.” • “[G]overnment customs officials”
JGC of Japan	<p style="text-align: center;"><i>DOJ</i>¹²¹</p> <ul style="list-style-type: none"> • “The Nigerian National Petroleum Corporation (‘NNPC’) was a Nigerian government-owned company charged with development of Nigeria’s oil and gas wealth and regulation of the country’s oil and gas industry. NNPC was a shareholder in certain joint ventures with multinational oil companies. NNPC was an entity and instrumentality of the Government of Nigeria and its officers and employees were ‘foreign officials’ within the meaning of the FCPA” • “Nigeria LNG Limited (‘NLNG’) was created by the Nigerian government to develop the Bonny Island Project and was the entity that awarded the related . . . contracts. The largest shareholder of NLNG was NNPC, which owned 49% of NLNG. The other owners of NLNG were multinational oil

121. Information at 5, *United States v. JGC Corp.*, No. 4:11-cr-00260 (S.D. Tex. Apr. 6, 2011), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/jgc-corp/04-6-11jgc-corp-info.pdf>.

	<p>companies. Through the NLNG board members appointed by NNPC, among other means, the Nigerian government exercised control over NLNG, including but not limited to the ability to block the award of . . . contracts. NLNG was an entity and instrumentality of the Government of Nigeria and its officers and employees were ‘foreign officials’ within the meaning of the FCPA”</p> <ul style="list-style-type: none"> • “[B]ribes to officials of the executive branch of the Government of Nigeria, officials of NNPC, officials of NLNG, and others.”
Comverse Technologies	<p>DOJ¹²²</p> <ul style="list-style-type: none"> • “[I]ndividuals connected to OTE, including employees of OTE’s subsidiaries Cosmote, Cosmofon, and Cosmorom, in order to obtain purchase orders from those companies for Comverse Ltd. products and services” OTE is “Hellenic Telecommunications Organization S.A. . . . a telecommunications provider controlled and partially owned by the Greek government. The Greek government was OTE’s largest single shareholder and

122. Non-Prosecution Agreement at 7, U.S. Dep’t of Justice v. Comverse Tech. Inc., (Apr. 6, 2011), <http://www.justice.gov/criminal/fraud/fcpa/cases/rae-comverse/04-06-11comverse-mpa.pdf>.

	<p>maintained an interest in over one-third of OTE's issued share capital.”</p> <p style="text-align: center;">SEC¹²³</p> <ul style="list-style-type: none"> • Same as above.
Johnson & Johnson	<p style="text-align: center;">DOJ¹²⁴</p> <ul style="list-style-type: none"> • “Greece has a national healthcare system wherein most Greek hospitals are publicly owned and operated. Health care providers who work at publicly-owned hospitals (‘HCPs’) are government employees, providing health care services in their official capacities. Therefore, such HCPs in Greece are ‘foreign officials’ as that term is defined in the FCPA” • “Poland has a national healthcare system. Most Polish hospitals are owned and operated by the government and most Polish HCPs [health care providers] are government employees providing health care services in their official capacities. Therefore, most HCPs in Poland are ‘foreign officials’ as defined by the FCPA.” • “The national healthcare

123. Complaint, Sec. & Exch. Comm’n v. Converse Tech. Inc., No. 11-CV-1704-LDW (E.D.N.Y. Apr. 7, 2011), available at <http://www.sec.gov/litigation/complaints/2011/com-p21920.pdf>.

124. Information, United States v. Depuy, Inc. No. 1:11-cr-000999-JDB (D.D.C. Apr. 8, 2011), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/deputy-inc/04-08-11deputy-info.pdf>; Deferred Prosecution Agreement, U.S. Dep’t of Justice v. Johnson & Johnson, (Jan. 14, 2011), <http://www.justice.gov/criminal/fraud/fcpa/cases/deputy-inc/04-08-11deputy-dpa.pdf>.

	<p>system in Romania is almost entirely state-run. The healthcare system is funded by the National Health Care Insurance Fund ('CNAS'), to which employers and employees make mandatory contributions. Most Romanian hospitals are owned and operated by the government and most HCPs in Romania are government employees. Therefore, most HCPs in Romania are 'foreign officials' as defined by the FCPA.”</p> <p style="text-align: center;">SEC¹²⁵</p> <ul style="list-style-type: none"> • Same as above.
Tenaris	<p style="text-align: center;">DOJ¹²⁶</p> <ul style="list-style-type: none"> • Employees of OJSC O'ztashqineftgaz ("OA O") "a wholly owned subsidiary of Uzbekneftegaz, the state holding company of Uzbekistan's oil and gas industry." • Employees of Uzbekekspertiza JSC, "an Uzbekistani government agency." <p style="text-align: center;">SEC¹²⁷</p> <ul style="list-style-type: none"> • Same as above.

125. Complaint, Sec. & Exch. Comm'n v. Johnson & Johnson, No. 1:11-cv-00686 (D.D.C. Apr. 8, 2011), available at <http://www.sec.gov/litigation/complaints/2011/comp21922.pdf>.

126. Non-Prosecution Agreement, U.S. Sec. & Exch. Comm'n v. Tenaris, S.A., (May 17, 2011), <http://www.sec.gov/news/press/2011/2011-112-dpa.pdf>.

127. Deferred Prosecution Agreement, U.S. Sec. & Exch. Comm'n v. Tenaris, S.A., (Mar. 17, 2011), <http://www.sec.gov/news/press/2011/2011-112-dpa.pdf>.

Rockwell Automation	<p style="text-align: center;">SEC¹²⁸</p> <ul style="list-style-type: none"> • Employees of Chinese Design Institutes “which were typically state-owned enterprises that provided design engineering and technical integration services that can influence contract awards by end-user state-owned customers” and employees of “other state-owned companies.”
Armor Holdings	<p style="text-align: center;">DOJ¹²⁹</p> <ul style="list-style-type: none"> • “[P]rocurement official of the United Nations” <p style="text-align: center;">SEC¹³⁰</p> <ul style="list-style-type: none"> • Same as above.
Cinergy Telecommunications	<p style="text-align: center;">DOJ¹³¹</p> <ul style="list-style-type: none"> • “Telecommunications D’Haiti (‘Haiti Teleco’) was the Republic of Haiti’s state-owned national telecommunications company. Haiti Teleco was the only provider of non-cellular telephone service to and from Haiti. . . . Patrick Joseph was the Director General of Haiti Teleco. . . . During his tenure at Haiti Teleco, Patrick Joseph was a ‘foreign official’

128. *Rockwell Automation*, *supra* note 21.

129. Non-Prosecution Agreement, U.S. Dep’t of Justice, v. Armor Holdings, Inc., (July 13, 2011), <http://www.justice.gov/criminal/fraud/fcpa/cases/armor/07-31-11armor-holdings.pdf>.

130. Complaint, U.S. Sec. & Exch. Comm’n v. Armor Holdings, Inc., No. 1:11-cv-01271 (D.D.C. July 13, 2011), *available at* <http://www.sec.gov/litigation/complaints/2011/comp22037.pdf>.

131. Superseding Indictment, United States v. Washington Vasconez Cruz, No. 1:09-cr-2010-JEM, 2011 WL 7655991 (S.D. Fla. July 12, 2011).

	<p>. . . . Jean Rene Duperval was the Director of International Relations of Haiti Teleco. . . . During his tenure at Haiti Teleco, Duperval was a ‘foreign official’ Official VJ was the Governor of the Banque de la Republique d’Haiti (“Bank of Haiti”), the state-owned and state-controlled central bank of Haiti. . . . During his tenure at the Bank of Haiti, Official VJ was a ‘foreign official’”</p>
Bridgestone Corp.	<p>DOJ¹³²</p> <ul style="list-style-type: none"> • “[F]oreign government officials in Latin America and elsewhere” • “[E]mployees of state-owned entities . . . in Mexico and other Latin American countries;” employee at Petroleos Mexicanos (“PEME X”).
Diageo	<p>SEC¹³³</p> <ul style="list-style-type: none"> • “[V]arious government officials in India, Thailand, and South Korea” • “[H]undreds of Indian government officials responsible for purchasing or authorizing the sale of [Diageo’s] beverages.” • “[E]mployees of government liquor stores in and around New Delhi.” “[G]overnment

132. Information, United States v. Bridgestone Corp., No. 4:11-cr-00651 (S.D. Tex. Sept. 15, 2011), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/bridgestone/09-15-11bridgestone-information.pdf>.

133. Diageo plc, Exchange Act Release No. 64978, 2011 WL 3159087 (ALJ July 27, 2011) (cease-and-desist order), *available at* <http://www.sec.gov/litigation/admin/2011/34-64978.pdf>.

	<p>employees of the Indian military's Canteen Stores Department.”</p> <ul style="list-style-type: none"> • “[G]overnment officials in the North Region of India and in the State of Assam for the purpose of securing label registrations. . . .” • “[E]xcise officials to secure import permits and other administrative approvals.” • A “Thai government and/or political party official . . . [who] served as Deputy Secretary to the Prime Minister, Advisor to the Deputy Prime Minister, and Advisor to the Ministry of Agriculture and Cooperatives. The Thai Official also served on a committee of the ruling Thai Rak Thai political party, and as a member and/or advisor to several state-owned or state-controlled industrial and utility boards.” • South Korean customs officials, South Korean military officials, and other South Korean government officials
Watts Water Technologies	<p>SEC¹³⁴</p> <ul style="list-style-type: none"> • Employees of certain Chinese state-owned design institutes.
Aon	<p>DOJ¹³⁵</p> <ul style="list-style-type: none"> • “[G]overnment officials in

134. Watts Water Techs, Inc., Exchange Act Release No. 65555, 2011 WL 4860051 (ALJ Oct. 13, 2011) (cease-and-desist order), *available at* <http://www.sec.gov/litigation/admin/2011/34-65555.pdf>.

135. Non-Prosecution Agreement, U.S. Dep’t of Justice v. Aon Corp., (Dec. 20, 2011), <http://www.justice.gov/criminal/fraud/fcpa/cases/aon/2011-12-20-aon-final-executed-mpa.pdf>.

	<p>Costa Rica . . .”</p> <ul style="list-style-type: none"> • Employees of “Instituto Nacional De Deguros (‘INS’), Costa Rica’s state-owned insurance company” <p style="text-align: center;"><i>SEC</i>¹³⁶</p> <ul style="list-style-type: none"> • Same as above. In addition, officials from an “Egyptian government-owned company, the Egyptian Armament Authority (‘EAA’), and its U.S. arm, the Egyptian Procurement Office (‘EPO’); “Vietnam Airlines, a Vietnamese government-owned entity” • “BP Migas and Pertamina, two Indonesia state-owned entities in the oil and gas industry” • “Myanmar Airways (assured) and Myanmar Insurance (reinsured), two government-owned entities”; • “Biman Bangladesh Airways (assured) and Sudharan Bima Corporation (reassured), two government-owned entities” • “[T]he son of a former high-ranking government official in Bangladesh with several important political connections.”
Magyar Telekom / Deutsche	<i>DOJ</i> ¹³⁷

136. Complaint, *SEC v. Aon Corp.*, No. 1:11-cv-02256 (D.D.C. Dec. 20, 2011).

137. Information at 4, 6-7, *United States v. Magyar Telekom, Plc.*, No. 1:11CR00597 (E.D. Va. Dec. 29, 2011), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/magyar-telekom/2011-12-29-information-magyar-telekom.pdf>; see also Non-Prosecution Agreement, *U.S. Dep’t of Justice v. Deutsche Telekom AG*, No. 1:11CR-00597 (Dec. 29,

Telekom	<ul style="list-style-type: none"> • “Telekom Crne Gore A.D., n/k/a ‘Crnogorski Telekom,’ (‘TCG’) and its mobile company subsidiary were, respectively, the Montenegrin state-owned fixed line and cellular telecommunications companies. . . . Before MAGYAR TELEKOM acquired TCG, it was controlled by the Government of Montenegro. Accordingly, employees of TCG were ‘foreign officials’” • “Macedonian Political Party A and Macedonian Political Party B were political parties in the Macedonian governing coalition during 2005, among other times. Each party represented a traditional ethnic group in Macedonia. As such, Macedonian Political Party A and Macedonian Political Party B were each a ‘foreign political party’” • “Macedonian Official #1 was a high-ranking government official with responsibility related to telecommunications laws and regulations . . . and a leader of Macedonian Political Party A. As such, Macedonian Official #1 was a ‘foreign official’ and an official of a foreign political party” • “Macedonian Official #2 was a high-ranking government
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	<p>official with responsibility for telecommunications laws and regulations . . . and a leader of Macedonian Political Party B. As such, Macedonian Official #2 was a ‘foreign official’ and an official of a foreign political party”</p> <p style="text-align: center;">SEC¹³⁸</p> <ul style="list-style-type: none"> • Same as above.
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The year 2011 witnessed three judicial challenges to the enforcement theory that employees of alleged SOEs are “foreign officials” under the FCPA. These challenges relied in part on my declaration that was filed in February 2011 in connection with the below-described Carson enforcement action.¹³⁹ The Carson “foreign official” challenge was the first in the

138. See Complaint, Sec. & Exch. Comm’n v. Magyar Telekom, Plc, No. 11 CIV 9646 (S.D.N.Y. Dec. 29, 2011), available at <http://www.sec.gov/litigation/complaints/2011/comp22213-co.pdf>.

139. *Koehler’s Carson Declaration*, supra note 90, at 4, 6-7. In sum, the declaration states as follows:

There is no express statement or information in the FCPA’s legislative history describing the ‘any department, agency, or instrumentality’ portion of the ‘foreign official’ definition. Further, there is no express statement or information in the FCPA’s legislative history to support the DOJ’s expansive legal interpretation that alleged SOEs are ‘instrumentalities’ (or ‘departments’ or ‘agencies’) of a foreign government and that employees of SOEs are therefore ‘foreign officials’ under the FCPA’s anti-bribery provisions. However, there are several statements, events, and information in the FCPA’s legislative history that demonstrate that Congress did not intend the ‘foreign official’ definition to include employees of SOEs.

Id.

Among other things,

During its multi-year investigation of foreign corporate payments that preceded enactment of the FCPA, Congress was aware of the existence of SOEs and that some of the questionable payments uncovered or disclosed may have involved such entities. . . . [I]n certain of the competing bills introduced in Congress to address foreign corporate payments, the definition of ‘foreign government’ expressly included SOEs,” and Congress was provided a more precise definition of “foreign government” to include SOEs.

Id. It further states that:

However, despite being aware of SOEs, despite exhibiting a capability for drafting a definition that expressly included SOEs in other bills, and despite being provided a more precise way to describe SOEs, Congress chose not to

FCPA's history that made use of a detailed and complete overview of the FCPA's extensive legislative history on the "foreign official" element.¹⁴⁰

include such definitions or concepts in . . . the bill that ultimately became the FCPA

Id. The declaration was also relied upon in the Lindsey Manufacturing and O'Shea "foreign official" challenges discussed *infra* note 140 and 144.

140. Prior to the Carson "foreign official" challenge, there were two previous "foreign official" challenges. The first "foreign official" challenge in the FCPA's history is believed to be in the Nguyen enforcement action brought in the Eastern District of Pennsylvania in 2009. *See* Motion to Dismiss Superseding Indictment for Failure to State a Criminal Offense and for Vagueness at *2-4, *United States v. Nguyen*, No. 2:08-cr-00522-TJS, 2009 WL 3847470, (E.D. Pa. Nov. 9, 2009) (explaining the grounds for Defendants' "foreign official" challenge to the government's FCPA enforcement action). This challenge did not make extensive use of the FCPA's detailed legislative history relevant to the "foreign official" issue. In December 2009, U.S. District Court Judge Timothy Savage denied, without any analysis, the motion to dismiss in a one-paragraph order. Order Denying Motion to Dismiss for Mootness, *United States v. Nguyen*, No. 2:08-cr-00522-TJS (E.D. Pa. Dec. 3, 2009). The second "foreign official" challenge in the FCPA's history is believed to be the Joel Esquenazi enforcement action brought in the Southern District of Florida. Motion to Dismiss Indictment for Failure to State a Criminal Offense and for Vagueness, *United States v. Esquenazi*, No. 1:09-cr-21010-JEM (S.D. Fla. Nov. 2, 2010). The motion likewise did not contain a thorough analysis of the FCPA's extensive legislative history on the "foreign official" element and was part of a series of motions filed to dismiss the indictment, some of which were inflammatory and appeared to lack even facial merit, such as selective and vindictive prosecution, that alleged racism by the government. U.S. District Court Judge Jose Martinez denied the "foreign official" challenge in a cursory opinion devoid of substantive analysis, delivered approximately forty-eight hours after the DOJ's response brief. Order Denying Without Prejudice Motion in Limine as to Joel Esquenazi, No. 1:09-cr-21010-JEM (S.D. Fla. Nov. 16, 2010). The substance of the opinion was as follows:

The Court . . . finds that the Government has sufficiently alleged that Antoine and Duperval were foreign officials by alleging that these individuals were directors in the state-owned Haiti Teleco. Any factual arguments Defendant has on this point may be addressed at trial. . . . The Court also disagrees that Haiti Teleco cannot be an instrumentality under the FCPA's definition of foreign official. The plain language of this statute and the plain meaning of this term show that as the facts are alleged in the indictment Haiti Teleco could be an instrumentality of the Haitian government.

Order Denying Defendant Joel Esquenazi's (Corrected and Amended) Motion to Dismiss Indictment for Failure to State a Criminal Offense and for Vagueness at 2-3, *United States v. Esquenazi*, No. 1:09-cr-21010-JEM (S.D. Fla. 2010), ECF No. 309 (internal citations omitted). In August 2011, Esquenazi and co-defendant Carlos Rodriguez were found guilty of, among other things, FCPA offenses after a jury trial. Press Release, U.S. Dep't of Justice, 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 (Aug. 5, 2011), *available at* <http://www.justice.gov/opa/pr/2011/August/11-crm-1020.html>. Defendants are appealing their conviction to the Eleventh Circuit and this appeal will be the first time in the FCPA's history that the definition of "foreign official" will be squarely before a Circuit Court. *See infra* note 151 (explaining grounds on

Although the Carson “foreign official” challenge was filed before the below-described Lindsey Manufacturing “foreign official” challenge, the briefing schedule in the latter case resulted in an earlier judicial decision.

In April 2011, Judge Howard Matz (C.D. Cal.) held in an enforcement action involving Lindsey Manufacturing and its CEO and CFO (Keith Lindsey and Steven Lee) that “a state-owned corporation having the attributes of CFE (Comisión Federal de Electricidad, a Mexican utility) may be an ‘instrumentality’ of a foreign government within the meaning of the FCPA, and officers of such a state-owned corporation . . . may therefore be “foreign officials” within the meaning of the FCPA.”¹⁴¹

Judge Matz identified the following “non-exclusive list” of “various characteristics of government agencies and departments that fall within [the] description [of instrumentality]”:

[T]he entity provides a service to the citizens—indeed, in many cases to all the inhabitants—of the jurisdiction; [t]he key officers and directors of the entity are, or are appointed by, government officials; [t]he entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties, such as entrance fees to a national park; [t]he entity is vested with and exercises exclusive or controlling power to administer its designated functions; [and t]he entity is widely perceived and understood to be performing official (*i.e.*, governmental) functions.¹⁴²

As to the FCPA’s legislative history Judge Matz stated in dicta as follows:

The [C]ourt finds that the legislative history of the FCPA is inconclusive. Although it does not demonstrate that Congress intended to include *all* state-owned corporations within the ambit of the FCPA, neither does it provide support for Defendants’ insistence that Congress intended to *exclude* all such corporations from the ambit of the FCPA.¹⁴³

In early January 2012, Judge Lynn Hughes from the Southern District of Texas denied, without issuing a written decision, John Joseph O’Shea’s “foreign official” challenge in a case involving the same CFE entity at issue in the Lindsey enforcement action.¹⁴⁴

which defendants’ base their pending appeal).

141. Order Denying Defendants’ Motion to Dismiss at 2-3, *United States v. Noriega*, No. 2:10-cr-01031-AHM (C.D. Cal. Apr. 20, 2011), ECF No. 474.

142. *Id.* at 9.

143. *Id.* at 14.

144. Mike Koehler, *Friday Roundup*, FCPA PROFESSOR (Jan. 6, 2012),

In May 2011, Judge James Selna in the Central District of California concluded in an enforcement action involving various former employees of Controlled Components Inc. (the “Carson” enforcement action) that “the question of whether state-owned companies qualify as instrumentalities under the FCPA is a question of fact . . . [and that] [s]everal factors bear on the question of whether a business entity constitutes a government instrumentality”¹⁴⁵

According to Judge Selna, those factors include the following:

The foreign state’s characterization of the entity and its employees; the foreign state’s degree of control over the entity; the purpose of the entity’s activities; the entity’s obligations and privileges under the foreign state’s law, including whether the entity exercises exclusive or controlling power to administer its designated functions; the circumstances surrounding the entity’s creation; and the foreign state’s extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans).¹⁴⁶

Judge Selna stated that the above “factors are not exclusive, and no single factor is dispositive.”¹⁴⁷ Rather, Judge Selna said that the “chief utility [of the factors] is simply to point out that several types of evidence are relevant when determining whether a state-owned company constitutes an ‘instrumentality’ under the FCPA—with state ownership being only one of several considerations.”¹⁴⁸

Despite these factors, Judge Selna also stated as follows:

[M]ere monetary investment in a business entity by the government may not be sufficient to transform that entity into a governmental instrumentality. But when a monetary investment is combined with additional factors that objectively indicate the entity is being used as an instrument to carry out governmental objectives, that business would qualify as a governmental

<http://www.fcprofessor.com/friday-roundup-21>. However, on January 16, 2012, at trial after the close of the DOJ’s case, Judge Hughes granted O’Shea’s motion for acquittal and found him not guilty of all substantive FCPA charges. *See* Mike Koehler, *O’Shea Not Guilty of Substantive FCPA Charges*, FCPA PROFESSOR (Jan. 17, 2012), <http://www.fcprofessor.com/oshea-not-guilty-of-substantive-fcpa-charges> (explaining the district court’s reasoning behind granting Defendant’s Motion for Acquittal on all substantive FCPA charges).

145. Order Denying Defendants’ Motion to Dismiss at 5, *United States v. Carson*, No. 8:09-cr-00077-JVS (C.D. Cal. May 18, 2011), ECF No. 373.

146. *Id.*

147. *Id.*

148. *Id.*

instrumentality.¹⁴⁹

As to the FCPA's legislative history, Judge Selna found "that the statutory language of the FCPA is clear, that the statutory scheme is coherent and consistent, and that resort to the legislative history of the FCPA is unnecessary."¹⁵⁰

Far from adding certainty to the "foreign official" element of an FCPA anti-bribery violation, the trial court decisions in 2011 created more confusion and uncertainty concerning a key element of an important law governing international business transactions. In the minds of some, the "foreign official" challenges are over and the DOJ has prevailed, even if the trial court rulings have not completely endorsed various aspects of the DOJ's position. Yet, none of these decisions have precedential value and an important issue to monitor in 2012 is the Esquenazi/Rodriguez appeal to the Eleventh Circuit.¹⁵¹ This appeal will be the first time in the FCPA's history that "foreign official" will be squarely before a Circuit Court.

ii. Knowledge

The year 2011 also witnessed a rare appellate court FCPA decision in arguably the most complex and convoluted case in the FCPA's history. The case involves Frederic Bourke, who was a member of an investment consortium, and was criminally charged in 2005 along with others for making:

a series of corrupt promises, payments, and offers of payments to senior officials of the Government of Azerbaijan in order to enable the investment consortium . . . to purchase vouchers and options and to bid at auction for interests in SOCAR [Azerbaijan's national oil company] and other valuable Azeri State assets.¹⁵²

The case took several twists and turns as the FCPA substantive charges

149. *Id.* at 7.

150. *Id.* at 11–12.

151. See Mike Koehler, *Rodriguez Seeks Release Pending Historic Appeal*, FCPA PROFESSOR (Jan. 3, 2012), <http://www.fcprofessor.com/rodriguez-seeks-release-pending-historic-appeal> (explaining the grounds on which defendants base their pending appeal).

152. Indictment at 10, *United States v. Kozeny*, 493 F. Supp. 2d 693 (No. 1:05-cr-00518-SAS) (S.D.N.Y. June, 21 2007), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/kozenyv/05-12-05kozeny-indict.pdf>; see also Andrew Longstreth, *Azerbaijan Bribes Put One Mogul on Trial, Another in Exile*, AM. LAW., Oct. 9, 2009, http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202434399273&Azerbaijan_Bribes_Put_One_Mogul_on_Trial_Another_in_Exile&slreturn=20120928222426 (providing additional background on the case).

were originally dismissed on statute of limitations grounds,¹⁵³ the substantive charges were later reinstated,¹⁵⁴ and a superseding indictment was then filed in 2009 dropping the FCPA substantive charges.¹⁵⁵ Following a six-week jury trial before U.S. District Court Judge Shira Scheindlin (S.D.N.Y.) in 2009, Bourke was found guilty of conspiracy to violate the FCPA and the Travel Act, and making false statements to the FBI.¹⁵⁶ Bespeaking the complex nature of the case, in November 2009, Judge Scheindlin rejected the DOJ's ten year sentencing recommendation and instead sentenced Bourke to 366 days in prison.¹⁵⁷ In doing so, Judge Scheindlin stated: "After years of supervising this case, it is still not entirely clear to me whether Mr. Bourke was a victim, or a crook, or a little bit of both."¹⁵⁸

Bourke's appeal largely focused on whether he had sufficient knowledge of the bribery scheme, challenging the trial court's conscious avoidance jury instruction and other knowledge issues such as whether he acted "corruptly" and "willfully" and whether the trial court erred in failing to give a good faith jury instruction.¹⁵⁹

In December 2011, the Second Circuit affirmed Bourke's conviction. Its decision on conscious avoidance is noteworthy in terms of FCPA jurisprudence.¹⁶⁰ The court concluded that Bourke enabled himself to participate in a bribery scheme without acquiring actual knowledge of the specific conduct at issue and that there was ample evidence to support a conviction on a conscious avoidance theory.¹⁶¹ Among other things, the

153. See *United States v. Kozeny*, 493 F. Supp. 2d 693, 709 (S.D.N.Y. 2007) (dismissing substantive FCPA charges).

154. See *id.* at 714-15 (reinstating the claims against Bourke on the government's Motion for Reconsideration).

155. See Indictment, *United States v. Bourke*, No. 1:05-cr-00518-SAS (S.D.N.Y. May 26, 2009), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/kozenyv/05-26-09bourke2nd-supersed-indict.pdf>.

156. See Press Release, U.S. Dep't of Justice, Connecticut Investor Found Guilty in Massive Scheme to Bribe Senior Government Officials in the Republic of Azerbaijan (July 10, 2009), <http://www.justice.gov/opa/pr/2009/July/09-crm-677.html>.

157. See Transcript of Sentencing Hearing at 28, *United States v. Bourke*, No. 1:05-cr-00518-SAS (S.D.N.Y. Nov. 10, 2009), *aff'd sub nom.* *United States v. Kozeny*, 667 F.3d 122 (2d Cir. 2011), <http://www.justice.gov/criminal/fraud/fcpa/cases/kozenyv/11-10-09bourke-trans-hearing.pdf> (providing the court's reasoning behind rejection of the DOJ's recommendation, in favor of a lesser sentence).

158. *Id.* at 34.

159. See Mike Koehler, *Outlining Bourke's Appeal*, FCPA PROFESSOR (Aug. 11, 2010), <http://www.fcpaprofessor.com/outlining-bourkes-appeal> (reviewing Bourke's direct appeal to the Second Circuit and parallel Rule 33 motion to the Southern District of New York).

160. See *United States v. Kozeny*, 667 F.3d 122, 140 (2d Cir. 2011).

161. See *id.* at 133 (explaining the evidence used by the court to support a conviction on a conscious avoidance theory).

Second Circuit noted that Bourke “was aware of how pervasive corruption was in Azerbaijan generally,” that he knew of his co-defendants’ shady reputation, that he created advisory companies “to shield himself and other American investors from potential liability from payments made in violation of [the] FCPA,” and that he otherwise “avoided learning whether corrupt payments were made.”¹⁶²

As to whether conscious avoidance can be supported primarily by circumstantial evidence, the Second Circuit stated as follows:

It is not uncommon for a finding of conscious avoidance to be supported primarily by circumstantial evidence. Indeed, the very nature of conscious avoidance makes it unlikely that the record will contain directly incriminating statements. Just as it is rare to find direct record evidence of an employer stating, “I am not going to give you a raise because you are a woman,” it is highly unlikely a defendant will provide direct record evidence of conscious avoidance by saying, “Stop! I think you are about to discuss a crime and I want to be able to deny I know anything about it!”¹⁶³

The message to international investors from the Second Circuit’s *Bourke* decision should be clear—if a potential investment results in sleepless nights and fear of asking specific, direct questions because of the answers that might be received, there is probably a better use for the money. Moreover, the Second Circuit’s *Bourke* decision is likely to further motivate current enforcement agency scrutiny of the relationship between financial firms and sovereign wealth funds as well as private equity investments in emerging markets.¹⁶⁴

iii. DOJ Conduct

Following Judge Matz’s denial of the above-mentioned “foreign official” challenge in the Lindsey Manufacturing enforcement action, the defendants proceeded to trial and in May 2011, Lindsey Manufacturing, Keith Lindsey, and Steven Lee were found guilty of various FCPA charges after a five week jury trial.¹⁶⁵ The DOJ called the verdict an “important

162. *Id.*

163. *Id.* at 134.

164. *See, e.g.,* Dionne Searcey & Randall Smith, *SEC Probes Banks, Buyout Shops Dealing With Sovereign Wealth Funds*, WALL ST. J., Jan. 14, 2011, at C1 (detailing the SEC’s probe into whether banks and private equity firms violated the FCPA in their dealings with sovereign wealth funds).

165. Press Release, U.S. Dep’t of Justice, California Company, Its Two Executives and Intermediary Convicted by Federal Jury in Los Angeles on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico

milestone” in its FCPA enforcement efforts as Lindsey Manufacturing was the first company ever to be tried and convicted of FCPA offenses.¹⁶⁶

The milestone was short-lived, however, as Judge Matz, after months of legal wrangling, vacated the convictions and dismissed the indictment after finding numerous instances of prosecutorial misconduct.¹⁶⁷ In the words of Judge Matz, the instances of misconduct were so varied and occurred over such a long time period “that they add up to an unusual and extreme picture of a prosecution gone badly awry.”¹⁶⁸ Judge Matz specifically cited the following missteps:

[T]he Government team allowed a key FBI agent to testify untruthfully before the grand jury, inserted material falsehoods into affidavits submitted to magistrate judges in support of applications for search warrants and seizure warrants, improperly reviewed e-mail communications between one Defendant and her lawyer, recklessly failed to comply with its discovery obligations, posed questions to certain witnesses in violation of the Court’s rulings, engaged in questionable behavior during closing argument and even made misrepresentations to the Court.¹⁶⁹

Prosecutorial misconduct findings logically focus on specific actions by specific actors, and one reading of Judge Matz’s decision is that it will have little impact on future FCPA enforcement. Yet another plausible read is that Judge Matz’s decision was based, in part, on the quality of the DOJ’s case in the first instance. For example, in addition to criticizing the DOJ’s willful blindness instruction and other aspects of the DOJ’s trial positions, Judge Matz, in setting forth reasons why the DOJ’s conduct prejudiced the defendants, noted the “weakness” of the DOJ’s case and how it was “far from compelling.”¹⁷⁰ He stated as follows:

Dr. Lindsey and Mr. Lee were put through a severe ordeal. Charges were filed against them as a result of a sloppy, incomplete and notably over-zealous investigation, an investigation that was so flawed that the Government’s lawyers tried to prevent inquiry into it. In some instances motives, statements and conduct were attributed to them that were wholly unfounded or were obtained unlawfully The financial costs

(May 10, 2011), <http://www.justice.gov/opa/pr/2011/May/11-crm-596.html>.

166. *Id.*

167. Order Granting Motion to Dismiss, *United States v. Aguilar Noriega*, 831 F. Supp. 2d 1180, 1210 (C.D. Cal. 2011) (No. 2:10-cr-01031-AHM).

168. *Id.* at 1185.

169. *Id.* at 1182.

170. *Id.* at 1207. Post-trial motions as to sufficiency of the evidence and based on various FCPA elements were pending, but were rendered moot by Judge Matz’s decision.

of the investigation and trial were immense, but the emotional drubbing [that Lindsey and Lee] absorbed undoubtedly was even worse. As for [Lindsey Manufacturing], the very survival of that small, once highly-respected enterprise has been placed in jeopardy.¹⁷¹

Whatever impact Judge Matz's decision may have on FCPA enforcement in the future, this much is clear—the DOJ's record in corporate FCPA trials stands at 0-2.¹⁷²

iv. Africa Sting Rulings

In 2011, the DOJ's manufactured Africa Sting case, in which FBI agents posed as procurement officials representing the President of Gabon,¹⁷³ was also subjected to intense scrutiny and the results of that scrutiny were not positive for the DOJ.

Given the number of individuals charged, the defendants were separated into four groups for trial and the first Africa Sting trial was held

171. *Id.* at 1209.

172. See Mike Koehler, *One Win, One Loss*, FCPA PROFESSOR (May 16, 2011), <http://www.fcpaprofessor.com/one-win-one-loss> (summarizing the FCPA trial of Harris Corporation and its management). In 1990, Harris Corporation ("Harris") and its executives, John Iacobucci and Ronald Schultz, were criminally charged in connection with business conduct in Colombia. Specifically, the defendants were charged with making payments to influence officials to award government telecommunications contracts to Harris in violation of the FCPA. Harris, Iacobucci, and Schultz put the DOJ to its burden of proof and the criminal trial began in March 1991. At the close of the DOJ's case, Judge Charles Legge (N.D. Cal.) granted the defendants' motion for acquittal, concluding that no reasonable jury could convict the company or its executives of the charged counts.

173. Press Release, U.S. Dep't of Justice, *Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme* (Jan. 19, 2010), <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html>. The twenty-two individuals charged worked in the military and law enforcement products industry and the DOJ employed undercover law enforcement tactics, with the assistance of an individual who previously plead guilty to unrelated FCPA offenses, in charging the defendants. Per the DOJ's own admission, the "scheme was part of [an] undercover operation, with no actual involvement from any minister of defense." See generally Mike Koehler, *Africa Sting – The Charges*, FCPA PROFESSOR (Jan. 20, 2010), <http://www.fcpaprofessor.com/africa-sting-the-charges> (summarizing the indictments of the individuals implicated in the Africa Sting and their ensnarement by the FBI); see also Mike Koehler, *Africa Sting – "Individual 1" Identified . . . and Charged . . . In a Different Case*, FCPA PROFESSOR (Jan. 23, 2010), <http://www.fcpaprofessor.com/africa-sting-individual-1-identified-and-charged-in-a-different-case> (discussing FBI cooperator Richard Bistrong's indictment in a bribe scheme wholly separate from the Africa Sting); Del Quentin Wilber, *Off-Color Communique Taint FBI Sting in Court*, WASH. POST, Feb. 13, 2012, at A01 (describing indecent text messages between federal law enforcement agents and an informant, and defense attorneys' exploitation of the impropriety of the communications).

during the summer of 2011. In the first trial, Judge Richard Leon (D.D.C.) ordered, in a decision from the bench, what is believed to be the first-ever judicial ruling on the jurisdictional reach of the 78dd-3 prong of the FCPA.¹⁷⁴ This prong was added to the FCPA by the 1998 amendments and applies to “persons other than issuers or domestic concerns” and provides the following jurisdictional requirement: “while in the territory” of the U.S. the person corruptly made use of the mails or any means or instrumentality of interstate commerce in furtherance of a bribery scheme.¹⁷⁵ When listing reasons why FCPA enforcement has increased during the past decade, the 78dd-3 prong of the FCPA’s anti-bribery provisions is surely on the list as several recent enforcement actions have been based on increasingly aggressive enforcement theories that have been ripe for judicial scrutiny for many years.¹⁷⁶

During the first Africa Sting trial, Judge Leon granted defendant Pankesh Patel’s (a U.K. citizen) Rule 29 acquittal motion at the end of the DOJ’s case as to an FCPA substantive charge premised on his sending a DHL package—containing a purchase agreement in furtherance of the alleged corrupt scheme—from the U.K. to the U.S.¹⁷⁷ Calling the DOJ’s jurisdictional theory “novel” and noting that there was no case law to support it, Judge Leon dismissed the charge against Patel, as well as certain

174. See Mike Koehler, *Significant dd-3 Development in Africa Sting Case*, FCPA PROFESSOR (June 9, 2011), <http://www.fcpaprofessor.com/significant-dd-3-development-in-africa-sting-case> (quoting extensively from hearing transcript in which a skeptical Judge Leon questioned whether each act has to occur “while in the territory of the United States”).

175. 15 U.S.C. § 78dd-3 (2006).

176. See, e.g., Information, *United States v. DaimlerChrysler Auto. Russia* SAO, No. 1:10-cr-00064-RJL (D.D.C. Mar. 22, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/daimler/03-22-10daimlerrussia-info.pdf> (alleging that Daimler’s wholly-owned German-based subsidiary made improper payments to Russian government officials, that passed through the United States via interstate wires and sham companies established in the United States); Information, *United States v. Daimler Export and Trade Finance GmbH*, No. 1:10-cr-00065-RJL (D.D.C. Mar. 22, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/daimler/03-22-10daimlerexp-info.pdf> (alleging that Daimler’s wholly-owned German-based subsidiary made improper payments to Croatian government officials that passed through sham companies incorporated in the United States); Information, *United States v. DaimlerChrysler China Ltd.*, No. 1:10-cr-00066-RJL (D.D.C. Mar. 22, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/daimler/03-22-10daimlerchina-info.pdf> (alleging that Daimler’s wholly-owned Beijing-based subsidiary made improper payments to Chinese government officials that passed through the United States); Information, *United States v. SSI Int’l Far East, Ltd.*, No. 3:06-cr-00398-KI (D. Or. Aug. 22, 2008), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/ssi-intl/10-10-06ssi-information.pdf> (alleging that SSI’s wholly-owned South Korean-based subsidiary made improper payments to Chinese and Korean government officials that were authorized by U.S. officers at SSI).

177. Transcript of Trial, *United States v. Goncalves*, No. 1:09-cr-00335-RJL (D.D.C. June 6, 2011).

other charges against the other defendants.¹⁷⁸

The DOJ's jurisdictional defeat turned out to be just the beginning of its struggles in the Africa Sting case. In July 2011, Judge Leon declared a mistrial as to all remaining counts against Patel, Andrew Bigelow, John Benson Wier, and Lee Allen Tolleson after the jury was unable to reach a verdict.¹⁷⁹ However, the DOJ's difficulties did not stop with the first Africa Sting case. In the manufactured case's second trial, Judge Leon dismissed, among other charges, the DOJ's conspiracy charge against all defendants (John Mushriqui, Jeana Mushriqui, Patrick Caldwell, Stephen Giordanella, John Godsey, and Mark Morales) finding that the DOJ failed to produce "sufficient evidence to enable a rational trier of fact to conclude beyond a reasonable doubt that each of [the] six defendants participated in the overarching conspiracy charged"¹⁸⁰ Because the conspiracy charge was the only charge against Giordanella, he was exonerated as a result of Judge Leon's ruling.¹⁸¹ Additional Africa Sting trials are scheduled in 2012 and how the DOJ fares in those trials will be a significant story in 2012.

v. Victims of Bribery

If bribery is not a victimless crime, as many including the DOJ frequently state,¹⁸² then why do FCPA fines and penalties go directly into the U.S. Treasury with no apparent effort to identify and compensate the victims of FCPA violations? A judicial challenge in 2011 raised this interesting and legitimate issue.

In May 2011, Instituto Constarricense de Electricidad of Costa Rica ("ICE") petitioned for victim status of Alcatel-Lucent's wide-ranging bribery scheme.¹⁸³ The petition followed the December 2010

178. *Id.*

179. See Mike Koehler, *First Africa Sting Trial Results in Mistrial*, FCPA PROFESSOR (July 8, 2011), <http://www.fcprofessor.com/first-africa-sting-trial-results-in-mistrial> (noting the implications of a hung jury for the merits of the DOJ's case).

180. Transcript of Trial at 5, *United States v. Goncalves*, No. 1:09-cr-00335-RJL (D.D.C. Dec. 22, 2011).

181. *Id.* at 9.

182. See, e.g., Press Release, U.S. Dep't of Justice, California Company, Its Two Executives and Intermediary Convicted by Federal Jury in Los Angeles on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico (May 10, 2011), <http://www.justice.gov/opa/pr/2011/May/11-crm-596.html> ("Bribery is not a victimless crime"); see also Alexandra Wrage, *Paying the Fox to Buy New Chickens*, HUFFINGTON POST (July 15, 2011, 2:37 PM), http://www.huffingtonpost.com/alexandra-wrage/paying-the-fox-to-buy-new_b_647837.html (stating that "[c]ompensating the victims of corruption is a hot new topic" and that "[r]estitution to victims is hard not to like" but noting that the DOJ "does not attempt to compensate victims of bribery").

183. Petition for Relief Pursuant to 18 U.S.C. § 3771(d)(3) and Objection to Plea

announcement that Alcatel-Lucent and certain subsidiaries agreed to resolve a wide-ranging FCPA enforcement action, including conduct in Costa Rica involving payments to ICE officials.¹⁸⁴ Even though ICE acknowledged that “three disloyal and corrupt [ICE] Directors and two disloyal and corrupt employees” were the recipients of Alcatel Lucent’s bribe payments, it nevertheless claimed it was a victim because the corrupt activities of Alcatel-Lucent caused the company “massive losses” and “catastrophic harm.”¹⁸⁵ ICE argued that it was universally recognized that a victim includes an entity whose employees accept improper benefits to affect corporate decisions and that it was “nonsense” for an entity to be considered an active participant in a bribery scheme just because five of its 16,500 employees were implicated.¹⁸⁶ In opposition, the DOJ argued that given the “profound and pervasive corruption at the highest levels of ICE, the government does not believe it is appropriate to consider ICE a victim,” and that “it does not follow that the state-owned entity at which corruption was so pervasive in the tender process should now be permitted status as a victim or awarded restitution”¹⁸⁷

ICE’s petition was factually difficult from the start and it is not surprising that ICE did not prevail at the trial court level or in its writ of mandamus to the Eleventh Circuit.¹⁸⁸ Yet, ICE’s petition did succeed in

Agreement and Deferred Prosecution Agreement, *United States v. Alcatel-Lucent S.A.*, No. 1:10-cr-20907-MGC (S.D. Fla. dismissed May 31, 2011).

184. Press Release, U.S. Dep’t of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay \$92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010), <http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html>. The DOJ alleged that ICE was a “wholly state-owned telecommunications authority in Costa Rica responsible for awarding and administering public tenders for telecommunications contracts” and that ICE officers, directors, and employees were thus “foreign officials” under the FCPA. Information ¶ 13, *United States v. Alcatel-Lucent S.A.*, No. 1:10-cr-20907-MGC (S.D. Fla. Dec. 27, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-et-al/12-27-10alcatel-et-al-info.pdf>.

185. Petition for Relief Pursuant to 18 U.S.C. § 3771(d)(3) and Objection to Plea Agreement and Deferred Prosecution Agreement at ¶ 12, *United States v. Alcatel-Lucent S.A.*, No. 1:10-cr-20907-MGC (S.D. Fla. May 31, 2011).

186. Victim Instituto Constrarricense de Electricidad’s Memorandum of Law In Support of Petition for Relief Pursuant to 18 U.S.C. § 3771(d)(3) and Objection to Plea Agreement and Deferred Prosecution Agreement at 1, *United States v. Alcatel-Lucent S.A.*, No. 1:10-cr-20907-MGC (S.D. Fla. May 31, 2011).

187. Government’s Response to ICE’s Petition for Victim Status and Restitution at 3, 4, *United States v. Alcatel-Lucent S.A.*, No. 1:10-cr-20906-MGC (S.D. Fla. May 23, 2011).

188. See Order Denying Petition for Writ of Mandamus to the United States District Court for the Southern District of Florida at 2, *In re Instituto Constarricense de Electricidad*, No. 1:10-cr-20906-MGC (S.D. Fla. June 17, 2011) (holding that the “district court did not clearly err in finding that [ICE] . . . actually functioned as the offenders’ coconspirator” and that the district court did not “err in finding that ICE failed to establish that it was directly and proximately harmed by the offenders’ criminal conduct”).

raising victim issues in FCPA enforcement actions and caused those interested in bribery and corruption issues to ponder the valid and legitimate questions of victims a bit more closely.

vi. Travel Act

The FCPA is not the only tool the DOJ has used to charge alleged foreign bribery schemes. After all, application of the FCPA requires a “foreign official” and not all foreign bribery schemes involve a “foreign official.” With increasing frequency, the DOJ charges—often in conjunction with FCPA offenses—Travel Act violations when the conduct at issue lacks a “foreign official,” yet concerns allegations of foreign commercial bribery.

Enacted in 1961 prior to the FCPA, the Travel Act is part of the racketeering chapter of the U.S. criminal code and prohibits interstate and foreign travel or transportation in aid of racketeering enterprises.¹⁸⁹ Specifically, the Travel Act prohibits travel in interstate or foreign commerce or use of the mail or any facility in interstate or foreign commerce with intent to, among other things, carry on “any unlawful activity” which is defined to include bribery in violation of state law.¹⁹⁰ Approximately thirty states have laws that “generally prohibit giving anything of value to an individual for the purpose of influencing the individual’s conduct in work-related matters without the consent of the recipient’s employer or in breach of a duty.”¹⁹¹

California is one such state with a law prohibiting commercial bribery,¹⁹² and in the Carson enforcement action described above in connection with the “foreign official” challenges, the DOJ—in addition to FCPA charges based on alleged payments to employees of various SOEs—also charged Travel Act violations based on allegations of payments to employees of private companies in China and Russia.¹⁹³

189. 18 U.S.C. § 1952 (2006).

190. *Id.*

191. John Rupp & David Fink, *Foreign Commercial Bribery and the Long Reach of U.S. Law*, 6 BLOOMBERG LAW REPORTS-CORPORATE AND M&A LAW 3, Jan. 11, 2012, at 1, available at http://www.cov.com/files/Publication/6f93a9ee-340d-49b3-83fe-252d3ddc8ced/Presentation/PublicationAttachment/5af5fff4-f264-42f2-aace-2781d6869cd9/Foreign_Commercial_Bribery_and_the_Long_Reach_of_U.S._Law.pdf.

192. See CAL. PENAL CODE § 641.3 (Deering 2012) (providing that “any employee who solicits, accepts, or agrees to accept money . . . is guilty of commercial bribery”).

193. See, e.g., Indictment, United States v. Carson, No. SACR09-0077, 2011 U.S. Dist. LEXIS 154145 (Apr. 8, 2009), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/carsons/04-08-09carson-indict.pdf> (alleging additional charges based on payments to employees of private companies in China and Russia).

In June 2011, certain Carson defendants moved to dismiss the Travel Act charges.¹⁹⁴ Defendants' principal arguments were the following: (i) "In *Morrison v. National Australia Bank Ltd.* [. . .] the Supreme Court explained that unless Congress has clearly indicated that a statute applies extraterritorially, it does not" and that Travel Act application to the foreign bribery alleged in [the] case violate[d] *Morrison's* presumption against the extraterritoriality of U.S. law; and (ii) "[t]he government's recent application of th[e] fifty-year old statute against foreign commercial bribery, in the face of strong skepticism that it even applies, shows the enforcement of this statute is arbitrary."¹⁹⁵ As to this later issue, defendants argued that "[c]onsideration of the Travel Act in conjunction with the subsequently enacted FCPA also demonstrates that Congress did not intend that the Travel Act extend to foreign bribery."¹⁹⁶

The DOJ's principal arguments in opposition were the following: (i) "[b]ecause the majority of defendants' unlawful conduct was based in the United States, the statutes at issue [the Travel Act and California's commercial bribery statute] reach defendants' conduct without resort to extraterritorial application" since all of the defendants were U.S. citizens, served as executives at the company's California headquarters, and that a "significant portion of the four defendants' acts in furtherance of the conspiracy occurred either in the United States or through communications with individuals in the United States"; and (ii) "[a]lthough the Court need not consider the question of whether the Travel Act applies extraterritorially, the plain language of the statute, the legislative history, and the case law all indicate that the Travel Act does apply extraterritorially."¹⁹⁷

In August 2011, in a case of first impression, Judge Selna denied defendants' motion to dismiss.¹⁹⁸ In sum, Judge Selna concluded that: (i) "an extraterritorial analysis is unnecessary under *Morrison* because the criminal offense was completed domestically"; and (ii) "even if an extraterritorial analysis is implicated, the Travel Act counts are proper" ¹⁹⁹ As to the later issue, an issue of broader significance, Judge

194. Defendants' Notice of Motion and Motion to Dismiss Counts One, Eleven, Twelve and Fourteen of the Indictment; Memorandum of Points and Authorities in Support Thereof, *United States v. Carson*, No. 8:09-cr-00077-JVS (C.D. Cal. June 13, 2011).

195. *Id.* at 1-2.

196. *Id.* at 2.

197. Government's Opposition to Defendants' Motion to Dismiss Counts One, Eleven, Twelve and Fourteen of the Indictment, Memorandum of Points and Authorities at 1, 3, *United States v. Carson*, No. 8:09-cr-00077-JVS (C.D. Cal. July 18, 2011).

198. Order Denying Defendants' Motion to Dismiss Counts 1, 11, 12 and 14 of the Indictment, *United States v. Carson*, No. 8:09-cr-00077-JVS (C.D. Cal. Sept. 20, 2011).

199. *Id.* at 5.

Selna concluded that the “plain language of the Travel Act demonstrates Congress’s desire to reach conduct overseas.”²⁰⁰ As to defendants’ argument that subsequent enactment of the FCPA provided an inference that the Travel Act was not intended to apply extraterritorially, Judge Selna observed that “multiple criminal statutes can often be applied to the same criminal conduct” and he did “not discern any conflict between the Travel Act and the FCPA.”²⁰¹

As commentators have noted, with the recent passage of the U.K. Bribery Act, a law that contains FCPA-like provisions as well as provisions, unlike the FCPA, prohibiting commercial bribery, increased attention will be paid to foreign commercial bribery and the Carson Travel Act decision may motivate the DOJ in the future to bring purely commercial foreign bribery cases.²⁰²

From a litigation standpoint, FCPA followers had much to keep track of in 2011 and the past year was a refreshing change from most previous years during which the enforcement agencies’ conduct and prosecution theories were seldom the subject of meaningful judicial scrutiny. While it is tempting to score 2011 losses and victories (and to be sure, the DOJ had several victories in 2011, including jury trial verdicts against Joel Esquenazi and Carlos Rodriguez along with the record-setting sentence of Esquenazi),²⁰³ the past year demonstrates that subjecting FCPA enforcement actions to greater judicial scrutiny is in the public interest and that more corporate and individual FCPA defendants, despite motivating factors to the contrary,²⁰⁴ could benefit from mounting legal defenses and holding the enforcement agencies to its high burdens of proof in FCPA enforcement actions.

200. *Id.* at 9.

201. *Id.* at 11 n.9.

202. See Rupp & Fink, *supra* note 191, at 1 (“To be sure, foreign commercial bribery is not yet a primary focus of U.S. enforcement activity. . . . But a move by U.S. authorities to target commercial bribery robustly is . . . a distinct possibility.”).

203. Press Release, U.S. Dep’t of Justice, Executive Sentenced to 15 Years in Prison for Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti (Oct. 25, 2011), <http://www.justice.gov/opa/pr/2011/October/11-crm-1407.html>; Press Release, U.S. Dep’t of Justice, 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 (Aug. 5, 2011), <http://www.justice.gov/opa/pr/2011/August/11-crm-1020.html>.

204. See *Façade*, *supra* note 1, at 923-27 (describing the dynamics which result in little or no judicial scrutiny of most FCPA enforcement actions).

C. Other Scrutiny

FCPA scrutiny in 2011 was not limited to Congress and the judiciary. As FCPA enforcement has increased, and as enforcement theories have become more aggressive, the FCPA has rightly attracted interest from a variety of sources including academics, the press and public interest groups.

In July 2011, the FCPA made headlines around the world in connection with the News Corporation (“News Corp.”) scandal—specifically, allegations that News Corp. employees and agents provided cash or other things of value to London police officers to obtain non-public information that better allowed News Corp. entities to publish stories and thus sell more newspapers.²⁰⁵ Media coverage of News Corp.’s potential FCPA exposure shined a much needed light on the FCPA’s current era and raised two distinct, yet related, questions: (i) whether, given the enforcement agencies’ *current enforcement theories*, the London police officer payments could expose News Corp. to FCPA liability; and (ii) whether Congress *intended* the FCPA to apply to the numerous FCPA enforcement actions in this new era that have nothing to do with obtaining or retaining foreign government contracts.

The answer to the first question is a clear yes, as several FCPA enforcement actions have been based on payments to customs officials, tax officials, immigration officials and the like where the payments have nothing to do with “obtaining or retaining business” with a foreign government, but rather, the payments were alleged to have assisted the payor in “obtaining or retaining” business in the general sense.²⁰⁶

The answer to the second question is subject to much debate. The FCPA’s original definition of “foreign official” excluded “any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical.”²⁰⁷ This was the FCPA’s original (albeit indirect) facilitating payment exception. The relevant House Report states in pertinent part as follows:

[A] gratuity paid to a customs official to speed the processing of a customs document would not be reached by the bill. Nor would it reach payments made to secure permits, licenses, or the

205. See, e.g., Dominic Rushe & Jill Treanor, *James Murdoch Could Face Criminal Charges on Both Sides of the Atlantic*, THE GUARDIAN, July 8, 2011, <http://www.guardian.co.uk/media/2011/jul/08/james-murdoch-criminal-charges-phone-hacking> (reporting on News Corp.’s legal scrutiny in both the U.K. and U.S.).

206. See *Façade*, *supra* note 1, at 972-97 (discussing recent FCPA enforcement actions involving foreign licenses, permits, applications, certifications, and customs and tax duties).

207. *Koehler’s Carson Declaration*, *supra* note 90, at 90.

expeditious performance of similar duties of an essentially ministerial or clerical nature which must . . . be performed in any event.²⁰⁸

When Congress amended the FCPA in 1988, among other things, the definition of foreign official was amended by removing this indirect facilitating payment exception from the “foreign official” definition by creating a stand-alone facilitating payment exception currently found in the statute.²⁰⁹ In converting the FCPA’s de facto facilitating payment exception to an express facilitating payment exception, Congress did not seek to disturb its original intent. The relevant House Report states as follows:

The policy adopted by Congress in 1977 remains valid, in terms of both U.S. law enforcement and foreign relations considerations. Any prohibition under U.S. law against this type of petty corruption would be exceedingly difficult to enforce, not only by U.S. prosecutors but by company officials themselves. Thus while such payments should not be condoned, they may appropriately be excluded from the reach of the FCPA. U.S. enforcement resources should be devoted to activities that have much greater impact on foreign policy.²¹⁰

Many who commented on News Corp.’s potential FCPA exposure raised valid and legitimate concerns that the enforcement agencies have been “applying the law ever more broadly—to conduct that has little connection to obtaining government contracts or other government benefits, such as product approvals, permits or licenses”²¹¹ and that the enforcement agencies “have been attempting to extend their enforcement to include any payments that have nothing to do with foreign government procurement.”²¹²

Yet, the issue of whether current FCPA enforcement theories align with congressional intent in enacting the FCPA could be asked on a wide variety of issues.²¹³ Such questions have long been asked by those who

208. H.R. Rep. No. 95-640, at 8 (1977).

209. See 15 U.S.C. § 78dd-1(b) (2006) (providing an exception for payments intended to expedite or ensure routine governmental action).

210. H.R. REP. NO. 100-40, pt. 2, at 76-77 (1987).

211. David Rivkin Jr. & Lee Casey, *Payments and News-Gathering: The New First Amendment Threat*, WALL ST. J., July 20, 2011, at A19.

212. Editorial, *News and Its Critics*, WALL ST. J., July 18, 2011, <http://online.wsj.com/article/SB10001424052702303661904576451812776293184.html?mod=djkeyword>.

213. See, e.g., *Façade*, *supra* note 1 (discussing whether many current FCPA enforcement theories align with congressional intent); see also *Koehler’s Carson Declaration*, *supra* note 90, at 90 (providing an overview of legislative history relevant to the FCPA’s “foreign official” element).

devote their professional careers to the FCPA, but the News Corp. scandal, and its potential FCPA scrutiny, succeeded like no other episode in the FCPA's history in focusing broad attention to this new era of FCPA enforcement. As News Corp.'s potential FCPA exposure and other similar examples also make clear, as the FCPA nears its thirty-fifth anniversary, the statute seems to be used with increasing frequency by the enforcement agencies to address corporate ethics in general.²¹⁴

If an all-purpose corporate ethics statute is indeed the policy goal that the United States seeks to advance through FCPA enforcement, such a decision is best left to Congress to effectuate through a change in the statute, not for the enforcement agencies to effectuate through corporate charging decisions that are largely insulated from judicial scrutiny.²¹⁵

The current aggressive FCPA enforcement environment and calls for FCPA reform also prompted several bar organizations and civil society organizations to publicly weigh in on the issues. In October 2011, a proposed resolution supported by the current and incoming chairs of the American Bar Association's ("ABA") Criminal Justice Section was presented to ABA Section Council Members.²¹⁶ By its terms, the draft resolution calls for targeted FCPA reform in an effort to increase the statute's transparency and fairness and to remove specific areas of textual ambiguity.²¹⁷ For instance, the draft resolution calls on Congress to provide a definition for the term "instrumentality [of a foreign government]," to consider a UK Bribery Act-style compliance defense to protect companies against the difficult-to-control acts of rogue

214. For instance, the Tyson Foods FCPA enforcement action involved Mexican veterinarians lawfully employed at the company's Mexican plant who were responsible for certifying product for export. Non-business payments were allegedly made to the veterinarians. However, the charging documents do not give any detail as to how the payments sought to influence the veterinarians nor do the charging documents suggest that the product at issue was not qualified for export. In fact, Tyson's press release (a release the DOJ had to approve per the deferred prosecution agreement) states that there were no issues with the safety of the exported product. See Mike Koehler, *Tyson Foods Settle FCPA Enforcement Action Involving Mexican Veterinarians and Their No-Show Wives*, FCPA PROFESSOR (Feb. 11, 2011), <http://www.fcpaprofessor.com/tyson-foods-settles-fcpa-enforcement-action-involving-mexican-veterinarians-and-their-no-show-wives> (questioning whether the FCPA's "obtain or retain business" element still has significance).

215. See, e.g., *Morrison v. Nat'l Australia Bank*, 130 S. Ct. 2869, 2886 (2010) (stating that the court's function is to give a statute "the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve").

216. See Mike Koehler, *ABA Ponders FCPA Reform*, FCPA PROFESSOR (Nov. 8, 2011), <http://www.fcpaprofessor.com/aba-ponders-fcpa-reform> (reporting on the presentation of an ABA Resolution to reform the FCPA).

217. Resolution, American Bar Association, Criminal Justice Section, Report to the House of Delegates (on file with author).

employees/transaction partners, and to limit criminal liability based on theories of successor liability.²¹⁸ Although the draft resolution applauds the work done by DOJ and the SEC to ensure that anti-corruption laws are taken seriously and to lead the global push for greater anti-corruption compliance, it warns of the danger that because of the FCPA's loose drafting, it lends itself to being transformed from a criminal proscription carrying moral condemnation to a public welfare offense less likely to deter future misconduct.²¹⁹

However, the mere discussion of FCPA reform was opposed by many civil society organizations in 2011. Viewing FCPA reform from a simplistic either-you-are-against-bribery-or-for-bribery position, civil society groups have suggested that "for the U.S. to roll back any of its ground-breaking anti-bribery law at this critical juncture when the rest of the world is finally starting to match its standards, would be an abdication of its leadership role on this important issue."²²⁰

In September 2011, the George Soros-funded Open Society Foundations released a white paper titled *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act* ("Busting Bribery").²²¹ Positioned as a response to the U.S. Chamber of Commerce's October 2010 white paper titled *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*,²²² *Busting Bribery* asserted that the

218. *Id.* at 3-5.

219. *See id.* at 4 (describing how ABA proposal is "based on the basic criminal law principle that there should be no liability for a company that did not act in concert with the bad actor, and that, therefore, possessed no 'guilty mind'").

220. *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 80 (2011) (written testimony of Global Witness).

221. DAVID KENNEDY & DAN DANIELSEN, OPEN SOC'Y FOUNDS, BUSTING BRIBERY: SUSTAINING THE GLOBAL MOMENTUM OF THE FOREIGN CORRUPT PRACTICES ACT 39 (2011), available at <http://www.opensocietyfoundations.org/sites/default/files/Busting%2520Bribery2011September.pdf>. George Soros is the chairman of Soros Fund Management LLC. *Busting Bribery* asserts that corporations that resolve FCPA enforcement actions have a "bad or wrongful purpose," that current standards "simply do not permit successful prosecution of innocent, mistaken or unknowing persons" and that companies involved in an FCPA enforcement action are corrupt. *Id.* at 39 (internal quotation omitted). While misguided, if the Soros-funded Open Society Foundations believes in such statements, it is interesting to note that Soros Fund Management LLC invests in numerous FCPA violators or companies subject to FCPA scrutiny. *See* Mike Koehler, *Why Does George Soros Invest in So Many FCPA Violators?*, FCPA PROFESSOR (Dec. 7, 2011), <http://www.fcprofessor.com/why-does-george-soros-invest-in-so-many-fcpa-violators> (commenting on Soros Fund Management LLC's recent 13F filing, which documented investments in companies under FCPA scrutiny).

222. ANDREW WEISSMANN & ALIXANDRA SMITH, U.S. CHAMBER OF COMMERCE, INSTITUTE FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 7 (2010), available at <http://www.instituteforlegalreform>.

“FCPA is working as Congress intended and new legislation is neither necessary nor advisable.”²²³ Among other things, *Busting Bribery* stated that FCPA reform would “set back decades of progress in the global struggle against corruption” and that “FCPA prosecutorial overreach by the Department of Justice (DOJ) is a myth.”²²⁴

Yet *Busting Bribery* exhibited a poor understanding of how the FCPA is actually enforced, an inaccurate view of the FCPA’s legislative history, and glaring omissions as to basic corporate criminal liability principles.²²⁵ For instance, *Busting Bribery* asserted, in opposing an FCPA compliance defense, that such a defense “makes no sense when, as under the current FCPA, corporate criminal liability requires proof beyond a reasonable doubt that the company acted with actual knowledge and corrupt intent to influence a foreign government to gain an improper business advantage.”²²⁶ While it is true that the corrupt intent element must be met in order to convict a company of an FCPA offense, that corrupt intent element can be satisfied, and often is, by singular and isolated acts of any employee, even if the employee’s conduct is contrary to preexisting compliance policies and procedures.²²⁷

com/sites/default/files/restoringbalance_fcpa.pdf. Specifically, the Chamber’s FCPA proposals are as follows: “adding a compliance defense; limiting a company’s liability for the prior actions of a company it has acquired; adding a ‘willfulness’ requirement for corporate criminal liability; limiting a company’s liability for acts of a subsidiary; and defining a ‘foreign official’ under the statute.” See also Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609 (2012) (discussing FCPA compliance defense).

223. KENNEDY & DANIELSEN, *supra* note 221, at 8.

224. KENNEDY & DANIELSEN, *supra* note 221, at 5-6.

225. See Mike Koehler, *Off-Target*, FCPA PROFESSOR (Oct. 17, 2011), <http://www.fcpaprofessor.com/off-target> (discussing the shortcomings of the *Busting Bribery* report).

226. KENNEDY & DANIELSEN, *supra* note 221, at 6.

227. For instance, the only time in the FCPA’s history that a corporate FCPA charge was presented to a jury was in the Lindsey Manufacturing case in 2011. The relevant jury instruction stated as follows:

To sustain the charge of conspiracy to violate the Foreign Corrupt Practices Act (“FCPA”) or violation of the FCPA against Lindsey Manufacturing Company, the government must prove the following propositions: First, the offense charged was committed by one or more agents or employees of Lindsey Manufacturing Company; Second, in committing the offense, the agent or employee intended, at least in part, to benefit Lindsey Manufacturing Company; and Third, the acts by the agent or employee were committed within the authority or scope of his employment. For an act to be within the authority of an agent or the scope of the employment of an employee, it must deal with a matter whose performance is generally entrusted to the agent or employee by Lindsey Manufacturing Company. *It is not necessary that the particular act was itself authorized or directed by Lindsey Manufacturing Company.* If an agent or an

What is most striking about many of the opposition pieces written about FCPA reform is that while opponents of FCPA reform warn of a U.S. retreat on bribery and corruption issues should the FCPA be amended, opponents fail to address the fact that an amended FCPA, or revisions to FCPA enforcement policy, would actually align the FCPA with the many FCPA-like laws or enforcement policies of peer nations.²²⁸ For instance, one FCPA reform proposal is to amend the FCPA to include a compliance defense under which a company's preexisting compliance policies and procedures, and its good faith efforts to comply with the FCPA, would be relevant as a matter of law when a non-executive employee or agent acts contrary to those policies and procedures and in violation of the FCPA.²²⁹ Many OECD Convention countries that provide for some form of corporate criminal liability in their domestic law (and not all do) have compliance-like defenses in their domestic FCPA-like law.²³⁰ In addition, the United States is believed to be the only OECD Convention country that uses NPAs or DPAs to resolve instances of alleged corporate bribery.

That the United States enforces the FCPA out-of-step, in many ways, with its OECD Convention peer countries was the focus of a December 2011 white paper released by the International Business Transactions Committee of the Bar Association of New York City titled *The FCPA and Its Impact on International Business Transactions—Should Anything Be Done to Minimize the Consequences of the U.S.'s Unique Position on Combating Offshore Corruption* (the "New York Bar Report").²³¹ The

employee was acting within the authority or scope of his employment, Lindsey Manufacturing Company is not relieved of its responsibility because the act was illegal.

Jury Instructions at 17, *United States v. Aguilar Noriega*, 831 F. Supp. 2d 1180 (C.D. Cal. May 6, 2011) (No. 2:10-cr-01031-AHM).

228. The United States is not the only country with a law prohibiting bribery of foreign officials for a business purpose. Thirty-seven other countries (collectively representing two-thirds of the world's exports and ninety percent of foreign direct investment) have also adopted, like the United States, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention"). *Country Reports on the Implementation of the OECD Anti-Bribery Convention*, OECD, http://www.oecd.org/document/24/0,3746,en_2649_37447_1933144_1_1_1_37447,00.html (last visited Dec. 4, 2012).

229. See Koehler, *supra* note 222, at 611 (arguing that an FCPA compliance defense should be incorporated into the FCPA).

230. See Koehler, *supra* note 222, at 638-44 (documenting the compliance-like defenses available in other OECD member countries).

231. NEW YORK CITY BAR ASS'N, *THE FCPA AND ITS IMPACT ON INTERNATIONAL BUSINESS TRANSACTIONS—SHOULD ANYTHING BE DONE TO MINIMIZE THE CONSEQUENCES OF THE U.S.'S UNIQUE POSITION ON COMBATING OFFSHORE CORRUPTION?* 3 (2011), available at <http://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf>.

New York Bar Report analyzes the FCPA and FCPA enforcement, in part, from an economic perspective and explains:

There are three elements to the current approach to FCPA enforcement that are helpful in understanding the costs, risks and other constraints that the FCPA places on U.S.-regulated companies vis-à-vis their non-U.S. regulated competitors: (1) the U.S. enforcement agencies' expansive reading of the scope of the FCPA (both in terms of conduct and jurisdiction), (2) the limited checks on FCPA enforcement (whether judicial or otherwise) and (3) the massive size of the potential direct costs (e.g., fines, sanctions and defense and compliance costs) and indirect costs (e.g., reputational effects and "debarment" from current or future government business) of avoiding or defending an actual or threatened enforcement action.²³²

Noting the rise in FCPA enforcement and the "asymmetric approach to enforcement" between the U.S. and other OECD Convention countries, the New York Bar Report concluded as follows:

(1) the United States has pursued, and is currently pursuing, a virtually stand-alone approach to deterring foreign corruption, . . . (2) this approach places significant costs on companies that are subject to the FCPA as compared to their competitors that are not, . . . and, (3) if these circumstances are unlikely to change, . . . the United States should reevaluate its approach to the problem of foreign corruption.²³³

The report stated, among other things, that the "continued unilateral and zealous enforcement of the FCPA by the United States may not be the most effective means to combat corruption globally—in fact, in some circumstances it may *exacerbate* the problem of overseas corruption."²³⁴

CONCLUSION

The New York Bar Report concluded as follows: "While the task is daunting and the discomfort of admitting that the current approach has significant flaws is unavoidable, that does not mean that action should not be taken."²³⁵ This is a fitting end as well to this Article, which analyzed notable enforcement trends from the past year and chronicled the most intense year of public scrutiny in the FCPA's history. These trends and this

232. *Id.* at 3, 15.

233. *Id.* at 3.

234. *Id.* at 23.

235. *Id.* at 25.

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scrutiny demonstrate that as the FCPA's thirty-fifth year approaches, basic legal and policy questions remain as to the purpose, scope and effectiveness of the FCPA.