

Richmond Journal of Global Law & Business

Volume 12 | Issue 3

Article 2

2013

An Examination of Foreign Corrupt Practices Act Issues

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Mike Koehler, *An Examination of Foreign Corrupt Practices Act Issues*, 12 Rich. J. Global L. & Bus. 317 (2013).

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AN EXAMINATION OF FOREIGN CORRUPT PRACTICES ACT ISSUES

Mike Koehler¹

This article provides an overview of 2012 Foreign Corrupt Practice Act enforcement and examines the top FCPA issues from the year. The goal of the article is to place FCPA enforcement in better context and provide readers a more informed base in analyzing enforcement trends, assessing enforcement agency rhetoric and policy positions, and in sifting through the mounds of information disseminated by FCPA Inc.

INTRODUCTION	318
I. 2012 FCPA ENFORCEMENT OVERVIEW.....	318
A. DOJ FCPA Enforcement Statistics	319
B. SEC FCPA Enforcement Statistics.....	322
C. Aggregate FCPA Enforcement Statistics	324
II. TOP FCPA ISSUES FROM 2012	326
A. Corporate vs. Individual Prosecutions	326

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This article is part of a continuing series of yearly analysis by the author of FCPA enforcement data and related issues. For 2011, see Mike Koehler, *The Foreign Corrupt Practices Act Under the Microscope*, 15 U. PA. J. BUS. L. 1 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191149. For 2010, see Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. Tol. L. REV. 99 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1971021. For 2009, see Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1599725.

1. Corporate Non-Prosecution and Deferred Prosecution Agreements	326
2. General Lack of Individual Prosecutions	333
3. The DOJ's Failures in Individual Prosecutions ..	334
a. <i>Africa Sting Cases</i>	335
b. <i>O'Shea Case</i>	344
B. <i>The Origins and Prominence of the Enforcement Theory Impacting Pharmaceutical and Medical Device Companies</i>	346
C. <i>Substantively Insignificant Events Became Top Stories Simply Because They Occurred</i>	355
1. FCPA Guidance	355
a. <i>Background</i>	356
b. <i>Overview</i>	358
c. <i>Grading The Guidance</i>	361
d. <i>Despite the Guidance, Much About FCPA Enforcement Remains Opaque</i>	368
e. <i>Despite the Guidance, FCPA Reform Remains a Viable Issue</i>	370
2. Morgan Stanley's So-Called Declination	372
3. Wal-Mart's Potential FCPA Exposure	377
a. <i>The New York Times Articles</i>	377
b. <i>Issues Raised by Wal-Mart's Scrutiny</i>	383
c. <i>Do the Issues Even Matter?</i>	386
d. <i>The Impact of Wal-Mart's Scrutiny</i>	388

INTRODUCTION

Part I of this article provides an overview of FCPA enforcement in 2012 and discusses enforcement trends. Part II of this article identifies the top FCPA issues from 2012 and examines the following issues: (A) the wide gap between corporate and individual FCPA enforcement actions, relevant data points that help explain the gap, and recent setbacks when the Department of Justice is held to its burden of proof in individual actions; (B) the origins and prominence of a key FCPA enforcement theory that yielded a high percentage of FCPA enforcement actions in 2012; and (C) how substantively insignificant events in 2012 became top stories simply because they occurred. This examination of top FCPA issues should provide readers an informed base in analyzing enforcement trends, assessing enforcement agency rhetoric and policy positions, and in sifting through the mounds of information disseminated by FCPA Inc.

I. 2012 FCPA ENFORCEMENT OVERVIEW

Part I of this article examines various aspects of FCPA enforcement in 2012. After providing Department of Justice ("DOJ") and Se-

curities and Exchange Commission (“SEC”) enforcement data, this section demonstrates how certain enforcement trends from prior years carried into 2012.

A. DOJ FCPA Enforcement Statistics

As demonstrated in Table I, in nine corporate FCPA enforcement actions² in 2012, the DOJ collected approximately \$142 million in criminal fines.

TABLE I - 2012 DOJ CORPORATE FCPA ENFORCEMENT ACTIONS

Company	Fine	Resolution Vehicle ³	Origin ⁴	Related Individual Action ⁵
Marubeni Corp. ⁶	\$54.6 million	DPA	Foreign Law Enforcement Investigation ⁷	No

² Corporate FCPA enforcement statistics in this article use the “core” approach. The core approach focuses on corporate conduct at issue regardless of whether the conduct at issue involves a DOJ or SEC enforcement action or both (as is frequently the case), regardless of whether the corporate enforcement action involves a parent company, a subsidiary or both (as is frequently the case), and regardless of whether the DOJ and/or SEC bring any related individual enforcement actions (as is occasionally the case). For additional information on this method of quantifying FCPA enforcement, see *What is an FCPA Enforcement Action?*, FCPA PROFESSOR (Jan. 7, 2013), <http://www.fcprofessor.com/what-is-an-fcpa-enforcement-action>.

³ DPA refers to deferred prosecution agreements and NPA refers to non-prosecution agreements. To learn more about these agreements in the FCPA context, see Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1705517.

⁴ Refers to the event(s) which initially prompted the scrutiny that resulted in the FCPA enforcement action.

⁵ Refers to employees of the corporate entity resolving the FCPA enforcement action.

⁶ Press Release, Dep’t of Justice, Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$54.6 Million Criminal Penalty (Jan. 17, 2012), available at <http://www.justice.gov/opa/pr/2012/January/12-crm-060.html>.

⁷ *E.g.*, Russell Gold & Charles Fleming, *In Halliburton Nigeria Probe, A Search for Bribes to a Dictator*, WALL ST. J. (Sept. 29, 2004), available at [.http://online.wsj.com/article/0,,SB109641320921730668-email,00.html](http://online.wsj.com/article/0,,SB109641320921730668-email,00.html) (noting that the investigation into the Bonny Island conduct began in 2003, when Georges Krammer, a former executive at Technip, was charged with embezzlement in an unrelated matter and informed a French magistrate of various Bonny Island conduct); see

Smith & Nephew Inc. ⁸	\$16.8 million	DPA	Industry Sweep ⁹	No
BizJet Int'l Sales and Support Inc. / Lufthansa Technik AG ¹⁰	\$11.8 million	DPA / NPA	Voluntary Disclosure ¹¹	No

also Press Release, Dep't of Justice, *supra* note 6 (Marubeni was an agent for the four-company TSKJ joint venture to help TSKJ obtain and retain contracts to build liquefied natural gas facilities on Bonny Island, Nigeria. TSKJ was comprised of Technip S.A., Snamprogetti Netherlands B.V., Kellogg Brown & Root Inc. (KBR), and JGC Corporation. The Marubeni enforcement action in 2012 followed FCPA enforcement actions against all TSKJ joint venture members.)

⁸ Press Release, Dep't of Justice, Medical Device Company Smith & Nephew Resolves Foreign Corrupt Practices Act Investigation (Feb. 6, 2012), *available at* <http://www.justice.gov/opa/pr/2012/February/12-crm-166.html>.

⁹ Press Release, Smith & Nephew, Smith & Nephew Reaches Settlement with U.S. Government (Feb. 6, 2012), *available at* <http://www.smith-nephew.com/news-and-media/news/smith-and-nephew-reaches-settlement-with-us-gover/>; *see* Homer Moyer, *Industry Sweeps*, FCPA PROFESSOR (Jan. 25, 2012), <http://www.fcraprofessor.com/industry-sweeps> (noting that industry sweeps “are investigations that grow out of perceived FCPA violations by one company that enforcement agencies believe may reflect an industry-wide pattern of wrongdoing.” The pharmaceutical / medical devices industry sweep is believed to have originated with Johnson & Johnson (“J&J”). For information on the Johnson & Johnson enforcement action, *see* Deferred Prosecution Agreement with Johnson & Johnson, Department of Justice (Jan. 14, 2012), <http://www.justice.gov/criminal/fraud/fcpa/cases/deputy-inc/04-08-11deputy-dpa.pdf> (“J&J has cooperated and agreed to continue to cooperate with the Department in the Department’s investigations of other companies and individuals in connection with business practices overseas in various markets.”).

¹⁰ Press Release, Dep't of Justice, Bizjet International Sales and Support Inc., Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$11.8 Million Criminal Penalty (Mar. 14, 2012), <http://www.justice.gov/opa/pr/2012/March/12-crm-321.html>.

¹¹ U.S. v. BizJet Int'l, Deferred Prosecution Agreement, No. 1:12-CR-61CVE (N.D. Ok. Mar. 14, 2012), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/bizjet/2012-03-14-bizjet-deferred-prosecution-agreement.pdf>. A voluntary disclosure generally refers to a situation in which a company on its own (often through internal audits or internal reporting mechanisms) learns of conduct that might implicate the FCPA. 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 disclosure, but general securities law issues such as materiality may be relevant even though few instances of conduct implicating the FCPA rise to the level of materiality. For additional “carrots” relevant to a company’s decision to voluntarily disclose, *see* Koehler, *supra* note 3. For potential conflicts of interests in the voluntary disclosure process, *see* *Voluntary Disclosures and the Role of FCPA Counsel*, FCPA PRO-

Biomet Inc. ¹²	\$17.3 million	DPA	Industry Sweep ¹³	No
Data Systems & Solutions LLC ¹⁴	\$8.8 million	DPA	DOJ Subpoena ¹⁵	No
Orthofix International NV ¹⁶	\$2.2 million	DPA	Voluntary Disclosure ¹⁷	No
The NORDAM Group Inc. ¹⁸	\$2 million	NPA	Voluntary Disclosure ¹⁹	No
Pfizer H.C.P. Corp. ²⁰	\$15 million	DPA	Voluntary Disclosure ²¹	No

FESSOR (Dec. 1, 2009), <http://www.fcprofessor.com/voluntary-disclosures-and-the-role-of-fcpa-counsel>.

¹² Press Release, Dep't of Justice, Third Medical Device Company Resolves Foreign Corrupt Practices Act Investigation (Mar. 26, 2012), *available at* <http://www.justice.gov/opa/pr/2012/March/12-crm-373.html>.

¹³ See BIOMET, INC., Quarterly Report (10-Q) (Nov. 31, 2011), <http://www.sec.gov/Archives/edgar/data/351346/000119312512012104/d247526d10q.htm> (providing information regarding the SEC's investigation).

¹⁴ Press Release, Dep't of Justice, Data Systems & Solutions LLC Resolves Foreign Corrupt Practices Act Violations and Agrees to Pay \$8.82 Million Criminal Penalty (June 18 2012), *available at* <http://www.justice.gov/opa/pr/2012/June/12-crm-768.html>.

¹⁵ U.S. v. Data Systems & Solutions, LLC, Deferred Prosecution Agreement, No. 1:12-CR-262 (E.D. Va. June 18, 2012), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/data-systems/2012-06-18-data-systems-dpa.pdf>.

¹⁶ U.S. v. Orthofix Int'l, Deferred Prosecution Agreement, (E.D. Tex. July 15, 2012), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/orthofix/2012-07-10-orthofix-dpa.pdf>.

¹⁷ *Id.*

¹⁸ Press Release, Dep't of Justice, The Nordam Group Inc. Resolves Foreign Corrupt Practices Act Violations and Agrees to Pay \$2 Million Penalty (July 7, 2012), *available at* <http://www.justice.gov/opa/pr/2012/July/12-crm-881.html>.

¹⁹ Letter from Denis McInerney, Chief of Fraud Section, Dep't of Justice, to Carlos Ortiz, LeclairRyan (July 6, 2012), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/nordam-group/2012-07-17-nordam-mpa.pdf>.

²⁰ Press Release, Dep't of Justice, Pfizer H.C.P. Corp. Agrees to Pay \$15 Million Penalty to Resolve Foreign Bribery Investigation (Aug. 7, 2012), *available at* <http://www.justice.gov/opa/pr/2012/August/12-crm-980.html>.

²¹ U.S. v. Pfizer H.C.P. Corp., Deferred Prosecution Agreement, No. (D.D.C. Aug. 7, 2012), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/pfizer/2012-08-07-pfizer-dpa.pdf>.

Tyco Int'l Ltd. ²²	\$13.7 million	Plea / NPA	Voluntary Disclosure ²³	No
TOTAL	\$142.2 million			

B. SEC FCPA Enforcement Statistics

Table II illustrates that in eight corporate FCPA enforcement actions in 2012, the SEC collected approximately \$118 million in settlement amounts.

TABLE II - 2012 SEC CORPORATE FCPA ENFORCEMENT ACTIONS

Company	Settlement Amount	Origin	Related Individual Action
Smith & Nephew Plc ²⁴	\$5.4 million	Industry Sweep ²⁵	No
Biomet Inc. ²⁶	\$5.5 million	Industry Sweep ²⁷	No
Orthofix Int'l NV ²⁸	\$5.5 million	Voluntary Disclosure ²⁹	No

²² Press Release, Dep't of Justice, Subsidiary of Tyco International Ltd. Pleads Guilty, Is Sentenced for Conspiracy to Violate Foreign Corrupt Practices Act (Sept. 24, 2012), available at <http://www.justice.gov/opa/pr/2012/September/12-crm-1149.html>.

²³ Letter from Denis McInerney, Chief of Fraud Section, Dep't of Justice, to Martin J. Weinstein, Willkie Farr & Gallagher, LLP (Sept. 20, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/tyco-intl/2012-09-20-tyco-intl-mpa-sof.pdf>.

²⁴ Press Release, Sec. & Exch. Comm'n, SEC Charges Smith & Nephew PLC with Foreign Bribery (Feb. 6, 2012), available at <http://www.sec.gov/news/press/2012/2012-25.htm>.

²⁵ Press Release, Smith & Nephew, Smith & Nephew Reaches Settlement with US Government (Feb. 6, 2012), available at <http://www.smith-nephew.com/news-and-media/news/smith-and-nephew-reaches-settlement-with-us-gover/>.

²⁶ Press Release, Sec. & Exch. Comm'n, SEC Charges Medical Device Company Biomet with Foreign Bribery (Mar. 26, 2012), available at <http://www.sec.gov/news/press/2012/2012-50.htm>.

²⁷ See LVB Acquisition, INC. & BIOMET, INC, *supra* note 13.

²⁸ Press Release, Sec. & Exch. Comm'n, SEC Charges Orthofix International With FCPA Violations (July 10, 2012), available at <http://www.sec.gov/news/press/2012/2012-133.htm>.

²⁹ U.S. v. Orthofix Int'l, Deferred Prosecution Agreement, (E.D. Tex. July 15, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/orthofix/2012-07-10-orthofix-dpa.pdf>.

Pfizer Inc. / Wyeth LLC ³⁰	\$45.1 million	Voluntary Disclosure ³¹	No
Tyco Int'l Ltd. ³²	\$13.1 million	Voluntary Disclosure ³³	No
Oracle Corp. ³⁴	\$2 million	Voluntary Disclosure ³⁵	No
Allianz SE ³⁶	\$12.4 million	SEC Investigation Following Whistleblower Tip ³⁷	No
Eli Lilly and Co. ³⁸	\$29.4 million	Industry Sweep ³⁹	No
TOTAL	\$118 million		

Separately analyzing DOJ and SEC FCPA enforcement data in Tables I and II above is informative, as the DOJ and SEC are separate law enforcement agencies, triggering different issues in enforcement.⁴⁰

³⁰ Press Release, Sec. & Exch. Comm'n, SEC Charges Pfizer with FCPA Violations (Aug. 7, 2012), available at <http://www.sec.gov/news/press/2012/2012-152.htm>.

³¹ U.S. v. Pfizer H.C.P. Corp., Deferred Prosecution Agreement, (D.D.C. Aug. 7, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/pfizer/2012-08-07-pfizer-dpa.pdf>.

³² Press Release, Sec. & Exch. Comm'n, SEC Charges Tyco for Illicit Payments to Foreign Officials (Sept. 24, 2012), available at <http://www.sec.gov/news/press/2012/2012-196.htm>.

³³ Letter from Denis McInerney to Martin J. Weinstein, *supra* note 23.

³⁴ Press Release, Sec. & Exch. Comm'n, SEC Charges Oracle Corporation with FCPA Violations Related to Secret Side Funds in India (Aug. 16, 2012), available at <http://www.sec.gov/news/press/2012/2012-158.htm>.

³⁵ *Id.*

³⁶ Press Release, Sec. & Exch. Comm'n, SEC Charges Germany-Based Allianz SE with FCPA Violations (Dec. 17, 2012), available at <http://www.sec.gov/news/press/2012/2012-266.htm>.

³⁷ *In the Matter of Allianz SE*, Securities and Exchange Commission, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities and Exchange Act of 1934, Exchange Act Release No. 68448 (Dec. 17, 2012), available at <http://www.sec.gov/litigation/admin/2012/34-68448.pdf>.

³⁸ Press Release, Sec. & Exch. Comm'n, SEC Charges Eli Lilly and Company with FCPA Violations (Dec. 20, 2012), available at <http://www.sec.gov/news/press/2012/2012-273.htm>.

³⁹ Press Release, Eli Lilly, Lilly Reaches Agreement with U.S. Securities and Exchange Commission (Dec. 20, 2012), available at <http://newsroom.lilly.com/releasedetail.cfm?ReleaseID=728165>.

⁴⁰ As evident from Tables I and II, *supra*, there is substantial overlap between the DOJ and SEC's FCPA enforcement programs. FCPA enforcement typically involves related and coordinated DOJ enforcement for criminal FCPA violations (whether anti-bribery violations or books and records and internal control violations) and by the SEC for civil FCPA violations (whether anti-bribery violations or books and records and internal control violations). Enforcement from 2012 fitting this pattern includes Smith & Nephew, Biomet, Orthofix, Pfizer and Tyco. The overlap, however, between the DOJ and SEC's FCPA enforcement programs is not complete. As a general matter, the SEC has jurisdiction over "issuers" (companies

Moreover, the aggregate analysis of DOJ and SEC FCPA enforcement data provides a comprehensive view of FCPA enforcement.

C. Aggregate FCPA Enforcement Statistics

In 2012, twelve unique corporate FCPA enforcement actions occurred: five (Smith & Nephew, Biomet, Orthofix, Pfizer, and Tyco) involved both a DOJ and SEC component, four (Marubeni, BizJet/Lufthansa, Data Systems & Solutions, and NORDAM Group) involved only a DOJ component, and three (Oracle, Allianz, and Eli Lilly) involved only an SEC component.

The total DOJ and SEC settlement amounts for these enforcement actions was approximately \$260 million. The average settlement amount in the twelve corporate FCPA enforcement actions was approximately \$21.7 million; the median was approximately \$17.3 million. Two enforcement actions (Pfizer and Marubeni) represented 44% of the \$260 million in settlements. The range of enforcement actions was, on the high end, \$60.1 million (Pfizer), and on the low end, \$2 million (Oracle and NORDAM Group).

– domestic and foreign – with shares registered on a U.S. exchange or otherwise required to make filings with the SEC). In other words, the SEC generally does not have jurisdiction over private companies or foreign companies that are not issuers. Thus, certain FCPA enforcement actions from 2012, such as Marubeni, BizJet / Lufthansa, Data Systems & Solutions and NORDAM Group did not have an SEC component. As a general matter, the DOJ has criminal jurisdiction over “issuers,” “domestic concerns,” (i.e. any business entity with a principal place of business in the U.S. or organized under U.S. law), and non-U.S. companies and persons to the extent a bribery scheme involved conduct “while in the territory of the U.S.” In addition, the DOJ has a higher burden of proof in a criminal prosecution. As a result, and given the DOJ’s prosecutorial discretion, certain FCPA enforcement actions in 2012 such as Oracle, Allianz and Eli Lilly only included an SEC component. As to the DOJ’s discretion, the DOJ has stated that it, “has declined to prosecute both individuals and corporate entities in numerous cases based on the particular facts and circumstances presented in those matters, taking into account the available evidence.” *See* DEP’T OF JUSTICE & SEC. & EXCH., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 75 (Nov. 2012), available at <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> [hereinafter RESOURCE GUIDE]. Based on information in the DOJ and SEC authored Resource Guide, it appears that factors motivating a declination include voluntary disclosure and cooperation, effective remedial measures, and small improper payments. *Id.* at 77-79. In addition, the DOJ has separately 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 DOJ Declines to Get Specific in Declination Responses*, FCPA PROFESSOR (Oct. 12, 2011), <http://www.fcpaprofessor.com/doj-declines-to-get-specific-in-declination-responses>.

Six of the twelve enforcement actions were, in whole or in part, against pharmaceutical or medical device companies (Smith & Nephew, Biomet, Orthofix, Pfizer, Tyco, and Eli Lilly).⁴¹ These six enforcement actions represented 65% of the \$260 million in settlements.⁴² Part II of this article details the origins and prominence of the FCPA enforcement theory that yielded the high percentage of FCPA enforcement actions against such companies in 2012.

Year-to-year FCPA enforcement statistics, and the arbitrary cutoffs associated with such statistics, may be of marginal value given the many non-substantive factors that can influence the timing of an actual FCPA enforcement.⁴³ Enforcement trends, however, are not subject to such arbitrary cutoffs, and FCPA enforcement in 2012 saw the continuation of certain observable trends. Such trends include corporate voluntary disclosures as the basis for a substantial number of FCPA enforcement actions, the extensive use of alternative resolution agreements (non-prosecution and deferred prosecution agreements) to resolve corporate enforcement actions, and the lack of individual prosecutions in most corporate FCPA enforcement actions.⁴⁴ These latter two trends are also prominent FCPA issues from 2012 and are discussed in more detail in Part II of this article.

Regarding corporate voluntary disclosures as the basis for a substantial number of FCPA enforcement actions, as indicated above in Tables I and II, of the twelve corporate enforcement actions from 2012, six enforcement actions (BizJet/Lufthansa, Orthofix, NORDAM Group, Pfizer, Tyco, and Oracle) or 50% resulted from voluntary corporate disclosures.⁴⁵

⁴¹ See *supra* Tables I and II.

⁴² *Id.*

⁴³ Because FCPA enforcement actions involving a DOJ and SEC component are typically announced on the same day, and because the DOJ and SEC are separate enforcement agencies, FCPA enforcement is commonly delayed while one agency waits for the other to finish its investigation of the conduct at issue and its negotiation resolutions with a company. Additional non-substantive factors that can influence the timing of an FCPA enforcement action, although far from an exclusive list, include DOJ and SEC staffing issues (including employee departures or leaves) as well as securing corporate board approval for resolving an FCPA enforcement action.

⁴⁴ See Mike Koehler, *The Foreign Corrupt Practices Act Under the Microscope*, 15 U. PA. J. BUS. L. 1, 1-2 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191149 (discussing FCPA enforcement trends in 2011).

⁴⁵ For a more complete discussion of the pros, cons, and controversy surrounding FCPA voluntary disclosures see *id.*; see also Samuel Rubinfeld, *Study Says Voluntary Disclosure Doesn't Change FCPA Penalties*, WALL ST. J. (Sept. 6, 2012, 11:03 AM), <http://web.archive.org/web/20120906201507/http://blogs.wsj.com/corruption-currents/2012/09/06/study-says-voluntary-disclosure-doesnt-change-fcpa-penalties/> (containing the comments of Professor Kevin Davis, co-author of a study that

II. TOP FCPA ISSUES FROM 2012

Part II of this article identifies the prominent FCPA issues from 2012 and critically examines: (A) the wide gap between corporate and individual FCPA enforcement actions, relevant data points that help explain the gap, and recent setbacks when the DOJ is held to its burden of proof in individual actions; (B) the origins and prominence of a key FCPA enforcement theory that yielded a high percentage of FCPA enforcement actions in 2012; and (C) how substantively insignificant events in 2012 became top stories simply because they occurred.

A. *Corporate vs. Individual Prosecutions*

FCPA enforcement in 2012, once again, demonstrated the wide gap between corporate and individual FCPA enforcement actions. This section highlights the gap, provides relevant data points that help explain the gap, and highlights recent setbacks when the DOJ is held to its burden of proof in individual actions.

1. *Corporate Non-Prosecution and Deferred Prosecution Agreements*

For most of the FCPA's history, the DOJ had two choices when faced with conduct that might implicate the FCPA: prosecute or do not prosecute. In 2004, the DOJ used, for the first time in the FCPA context, a third option— a non-prosecution agreement (“NPA”).⁴⁶ NPAs and related deferred prosecution agreements (“DPAs”)—together, “alternative resolution vehicles”—are one of the more obvious reasons for the general upward trend in FCPA enforcement. For instance, Mark Mendelsohn, former 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.”⁴⁷ Likewise, an Organization for Economic Co-operation and Development (“OECD”) Report stated, “It seems quite clear that the use of

found, “[w]e cannot rule out the possibility that voluntary disclosure does result in some form of leniency [. . .] but the fact that we could not find any evidence of the benefits of voluntary disclosure suggests that current enforcement practices are not creating clear incentives.”) The complete study is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116487. See generally Koehler, *supra* note 3.

⁴⁶ See Press Release, Dep't of Justice, InVision Technologies, Inc. Enters Into Agreement with the United States (Dec. 6, 2004), available at http://www.justice.gov/opa/pr/2004/December/04_crm_780.htm.

⁴⁷ Mark Mendelsohn *On the Rise of FCPA Enforcement*, 24 CORP. CRIME REP. 35 (Sept. 10, 2010), available at <http://www.corporatecrimereporter.com/mendelsohn091010.htm>.

these agreements is one of the reasons for the impressive FCPA enforcement record in the U.S.”⁴⁸

Since 2004, these alternative resolution vehicles have been used to resolve, in whole or in part, approximately 83% of corporate FCPA enforcement actions.⁴⁹ As demonstrated in Table I, in 2012, NPAs or DPAs were used in connection with 100% of corporate FCPA enforcement actions.

Despite extensive use, such alternative resolution vehicles are controversial because they do not result in any actual prosecuted charges against the company entering into the agreement and are not subject to any meaningful judicial scrutiny.⁵⁰ Moreover, there is no data to suggest that resolving alleged instances of corporate criminal liability through NPAs or DPAs achieves any deterrent effect. For instance, the OECD report observed, “their actual deterrent effect has not been quantified.”⁵¹ Likewise, a Government Accountability Office (“GAO”) study found, in addition to the absence of any meaningful judicial scrutiny, that:

DOJ cannot evaluate and demonstrate the extent to which DPAs and NPAs—in addition to other tools, such as prosecution—contribute to the department’s efforts to combat corporate crime because it has no measures to assess their effectiveness. Specifically, DOJ intends for these agreements to promote corporate reform; however, DOJ does not have performance measures in place to assess whether this goal has been met.⁵²

The GAO report concluded, “while DOJ has stated that DPAs and NPAs are useful tools for combating and deterring corporate crime, without performance measures, it will be difficult for DOJ to demon-

⁴⁸ Org. for Econ. Co-operation and Dev. [OECD], *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States*, 20 (Oct. 2010), available at <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/UnitedStatesphase3reportEN.pdf> [hereinafter OECD Phase 3]; see also *The Problem With FCPA Enforcement? Look No Further Than BizJet / Lufthansa Technik*, FCPA PROFESSOR (Apr. 12, 2012), <http://www.fcprofessor.com/the-problem-with-fcpa-enforcement-look-no-further-than-bizjet-lufthansa-technik>.

⁴⁹ *DOJ Prosecution Of Individuals – Are Other Factors At Play?*, FCPA PROFESSOR (Jan. 29, 2013), <http://www.fcprofessor.com/doj-prosecution-of-individuals-are-other-factors-at-play-2>.

⁵⁰ See Koehler, *supra* note 3 (discussing the increase in NPAs and DPAs and various criticisms of NPAs and DPA in the FCPA context).

⁵¹ OECD Phase 3, *supra* note 48, at 20.

⁵² U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-110, CORPORATE CRIME DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 20 (2012), available at <http://www.gao.gov/new.items/d10110.pdf>.

strate that these agreements are effective at helping the department achieve this goal.”⁵³

Use of such alternative resolution vehicles to resolve alleged corporate criminal liability in the FCPA context presents two distinct, yet equally problematic public policy issues. The first is that such vehicles, because they do not result in any actual charges filed against a company—and thus do not require the company to plead to any charges—allow egregious instances of corporate conduct to be resolved too lightly without adequate sanctions and without achieving maximum deterrence.⁵⁴ 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.⁵⁵ Thus, use of NPAs or DPAs contribute to “over-prosecution” of business conduct⁵⁶ while at the same time allowing “under-prosecution” of egregious instances of corporate bribery.

The 2012 FCPA enforcement action against BizJet/Lufthansa is instructive as to both of these issues. As to “under-prosecution,” the BizJet criminal information alleges misconduct by several executives including Executive A (a senior executive at BizJet from 2004 to 2010 who “was responsible for the operations and finances of BizJet”); Executive B (a senior executive at BizJet from 2005 to 2010 whose duties included “oversight of BizJet’s efforts to obtain business from new customers and to maintain and increase business with existing customers”); and Executive C (a senior finance executive at BizJet from 2004 to 2010 who “was responsible for overseeing BizJet’s accounts and finances and the approval of payment of invoices and of wire and check

⁵³ *Id.* at 28.

⁵⁴ See e.g., Gretchen Morgenson & Louise Story, *As Wall Street Policies Itself, Prosecutors Use Softer Approach*, N.Y. TIMES (July 7, 2011), 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”).

⁵⁵ For an extended discussion of this dynamic, see Koehler, *supra* note 3 (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*, *supra* note 47.

⁵⁶ See e.g., Reynolds Holding, *Settlements Feed U.S. Prosecutor Overreach*, REUTERS BREAKING VIEWS (Sept. 19, 2011, 10:03 AM), <http://www.trust.org/trustlaw/news/breakingviews-settlements-feed-us-prosecutor-overreach>.

requests”).⁵⁷ The information further alleges that in November 2005, “at a Board of Directors meeting of the BizJet Board, Executive A and Executive B discussed with the Board that the decision of where an aircraft is sent for maintenance work is generally made by the potential customer’s director of maintenance or chief pilot, that these individuals are demanding \$30,000 to \$40,000 in commissions, and that BizJet would pay referral fees in order to gain market share.”⁵⁸

Despite senior executive misconduct and apparent knowing acquiescence by the Board of Directors, BizJet was allowed to resolve its FCPA scrutiny through a deferred prosecution agreement and, should it abide by the terms and conditions of the agreement, the company will not be required to plead guilty to anything.⁵⁹

As to “over-prosecution,” the DOJ release states that BizJet’s “indirect parent company, Lufthansa Technik AG” also “entered into a [non-prosecution] agreement with the DOJ in connection with the unlawful payments by BizJet and its directors, officers, employees and agents.”⁶⁰ The release stated: “The DOJ has agreed not to prosecute Lufthansa Technik provided that Lufthansa Technik satisfies its obligations under the agreement for a period of three years.”⁶¹ The question remains, for what would the DOJ prosecute Lufthansa. There is no mention of Lufthansa Technik in the BizJet criminal information and there is absolutely no articulated factual basis in the Lufthansa Technik NPA for any charges.⁶² The NPA could be the most opaque, bare-bones NPA in the history of FCPA NPAs. It merely states that the DOJ will “not criminally prosecute” the entity “for any crimes” related to violations of the FCPA’s anti-bribery provisions arising from or related to the conduct described in the BizJet criminal information and DPA, even though there is no mention whatsoever of Lufthansa in the DPA. All that is apparent from the DOJ’s resolution documents is that BizJet was an indirect subsidiary of Lufthansa. If that is the sole basis for the DOJ’s prosecution (through an NPA) of Lufthansa, it is

⁵⁷ See U.S. v. Bizjet Int’l Sales and Support, Inc., No. 12-CR-61-CVE (N.D.O.K. Mar.14, 2012), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/bizjet/2012-03-14-bizjet-information.pdf>.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See Press Release, Dep’t of Justice, Bizjet International Sales and Support Inc., Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$11.8 Million Criminal Penalty, *available at* <http://www.justice.gov/opa/pr/2012/March/12-crm-321.html>.

⁶¹ *Id.*

⁶² See Letter from Denis McNerny, Chief of Fraud Section, Dep’t of Justice, to Jay Holtmeier, Esq., Wilmer Cutler Pickering Hale and Dorr LLP (Dec. 21, 2011) (regarding Lufthansa Technik AG), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/lufthansa-technik/2011-12-21-lufthansa-npa.pdf>.

troubling as it establishes strict criminal liability for parent company entities.

Despite the controversy surrounding the use of NPAs and DPAs, the DOJ continues to champion use of such vehicle to resolve alleged instances of corporate crime. Indeed, a notable development in 2012 was Assistant Attorney General Lanny Breuer's passionate defense of such resolution vehicles. Speaking before the New York City Bar Association, Breuer defended the DOJ's use of such agreements and stated that they "have had a truly transformative effect on particular companies and, more generally, on corporate culture across the globe."⁶³ Breuer continued:

The result has been, unequivocally, far greater accountability for corporate wrongdoing – and a sea change in corporate compliance efforts. Companies now know that avoiding the disaster scenario of an indictment does not mean an escape from accountability. They know that they will be answerable even for conduct that in years past would have resulted in a declination. Companies also realize that if they want to avoid pleading guilty, or to convince us to forego bringing a case altogether, they must prove to us that they are serious about compliance. [. . .] One of the reasons why deferred prosecution agreements are such a powerful tool is that, in many ways, a DPA has the same punitive, deterrent, and rehabilitative effect as a guilty plea: when a company enters into a DPA with the government, or an NPA for that matter, it almost always must acknowledge wrongdoing, agree to cooperate with the government's investigation, pay a fine, agree to improve its compliance program, and agree to face prosecution if it fails to satisfy the terms of the agreement. All of these components of DPAs are critical for accountability. Perhaps most important, whether or not a corporation pleads guilty . . . or enters into a DPA with the government, the company must virtually always publicly acknowledge its wrongdoing. And it must do so in detail. This often has significant consequences for the corporation, and it prevents companies from explaining away their resolutions by continuing to deny that they did anything wrong.⁶⁴

⁶³ See Press Release, Dep't of Justice, Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association (Sept. 13, 2012), *available at* <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html>.

⁶⁴ *Id.*

It was clear from Breuer's speech that the DOJ feels constrained by the historical prosecute-or-do-not-prosecute system. He explained, "Prosecutors faced a stark choice when they encountered a corporation that had engaged in misconduct – either indict, or walk away."⁶⁵ However, there is absolutely nothing wrong with this choice. Bringing criminal charges against a person (natural or legal) should not be easy. It should be difficult. Our founding fathers recognized this as a necessary bulwark against an all-powerful government, and there is no legal or policy reason warranting a change from such a fundamental and long-standing principle.

Breuer's speech also highlighted how the "Arthur Anderson" effect continues to guide DOJ policy (i.e. that indicting a company may result in a corporate death sentence). As Breuer elaborated:

I personally feel that it's my duty to consider whether individual employees with no responsibility for, or knowledge of, misconduct committed by others in the same company are going to lose their livelihood if we indict the corporation. In large multi-national companies, the jobs of tens of thousands of employees can be at stake.⁶⁶

However, the "Arthur Anderson" effect is a fallacy and was effectively debunked by Gabriel Markoff in a 2012 article titled "Arthur Anderson and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century."⁶⁷ Relying on enforcement action data, Markoff found "that—much in opposition to the warnings of extreme collateral consequences that are continually repeated in both the popular and academic literature—no publicly traded company went out of business as the result of a federal criminal conviction in the years 2001 to 2010."⁶⁸

The DOJ, as evidenced by Breuer's speech, is clearly troubled, and with good reason, by traditional notions of corporate criminal liability. However, rather than seek substantive solutions to this issue on a statute by statute basis, such as a compliance defense to the FCPA, or more comprehensively, Breuer instead defended an alternate reality that is equally problematic for the reasons stated above. In-

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132242.

⁶⁸ See *Arthur Anderson And The Myth Of The Corporate Death Penalty*, FCPA PROFESSOR (Aug. 23, 2012), <http://www.fcprofessor.com/arthur-anderson-and-the-myth-of-the-corporate-death-penalty>.

deed, Breuer effectively conceded in his speech that alternative resolution vehicles facilitate over-prosecution, stating, “[Companies] know that they will be answerable even for conduct that in years past would have resulted in a declination.”⁶⁹

In analyzing whether NPAs or DPAs represent over-prosecution, a suitable proxy is comparing the number of individual prosecutions that follow corporate NPAs or DPAs with individual prosecutions that follow actual criminal charges against a company. The hypothesis is that the later represents a higher quality FCPA enforcement action whereas the former represents a lower quality FCPA enforcement action. A compelling data point is that since NPAs and DPAs were first introduced to the FCPA context, only 6.5% of corporate enforcement actions resolved solely with an NPA or DPA have resulted in related criminal charges of company employees.⁷⁰ In stark contrast, 83% of corporate enforcement actions that were the result of a criminal indictment or resulted in a guilty plea by the corporate entity have resulted in related criminal charges of company employees.⁷¹

By supporting the use of NPAs and DPAs, Breuer advocated an enforcement environment that insulates the DOJ’s enforcement theories from judicial scrutiny in all but the rarest of circumstances. It is not hard to see why the DOJ favors such an alternate reality. Such a system makes its job easier and places the DOJ in the role of prosecutor, judge and jury all at the same time. Indeed, former U.S. Attorney General Alberto Gonzales stated, as relevant to NPAs and DPAs, “two important truths” from his time as Attorney General:

One, the FCPA gives prosecutors tremendous discretion in defining its scope, and, thus, tremendous leverage in charging decisions. Two, corporations do not like to be investigated by the Justice Department or the SEC for violations of the FCPA. It’s bad for business. So, these cases often settled, charges were dropped in exchange for either non-prosecution or deferred prosecution agreements. In an ironic twist, the more that American companies elect to settle and not force the DOJ to defend its aggressive interpretation of the Act, the more aggressive DOJ has become in its interpretation of the law and its prosecution decisions.⁷²

⁶⁹ See Press Release, Dep’t of Justice *supra* note 63.

⁷⁰ See *DOJ Prosecution Of Individuals – Are Other Factors At Play?*, *supra* note 49.

⁷¹ *Id.*

⁷² See *Prepared Remarks by Former Attorney General Alberto R. Gonzales*, WALLER (May 2012), <http://www.wallerlaw.com/portalsresource/lookup/wosid/cp-base-4>

In addition to insulating the DOJ's enforcement theories from judicial scrutiny in all but the rarest of circumstances and allowing the DOJ to play prosecutor, judge and jury all at the same time, NPAs and DPAs also benefit the private bar to which DOJ enforcement attorneys typically run after government service. However, the alternate reality of NPAs and DPAs harms other stakeholders and undermines the rule of law and justice, and for this reason the alternative resolution vehicles ought to be abolished.

2. *General Lack of Individual Prosecutions*

The DOJ has long recognized that a corporate fine-only enforcement program is not effective and does not adequately deter future FCPA violations. For instance, in 1986, John Keeney, the Deputy Assistant Attorney General for the DOJ Criminal Division, submitted written responses in the context of Senate hearings concerning a bill to amend the FCPA. He stated:

If the risk of conduct in violation of the statute becomes merely monetary, the fine will simply become a cost of doing business, payable only upon being caught and in many instances, it will be only a fraction of the profit acquired from the corrupt activity. Absent the threat of incarceration, there may no longer be any compelling need to resist the urge to acquire business in any way possible.⁷³

Likewise, in 2010, Hank Walther, Deputy Chief DOJ Fraud Section, stated that a corporate fine-only FCPA enforcement program allows companies to calculate FCPA settlements as the cost of doing business.⁷⁴

In recent years, the DOJ has consistently stated that prosecution of individuals is a "cornerstone" of its FCPA enforcement strat-

13102/media.name=/TAP%20-%20Speech%20to%20LCJ%20by%20Judge%20Gonzales%202012%2005.pdf.

⁷³ See *Business Accounting and Foreign Trade Simplification Act: Joint Hearing on S. 430 Before the Subcomm. on International Finance and Monetary Policy and the Subcomm. on Sec. of the Comm. on Banking, Housing, and Urban Affairs*, 99th Cong. 2 (June 10, 1986) (Response of John C. Keeney, Deputy Assistant Att'y Gen. of the United States, Criminal Division, to written questions of Sen. D'Amato), available at <http://babel.hathitrust.org/cgi/pt?id=pst.000011974079;page=root;seq=4;view=1up;size=100;orient=0>.

⁷⁴ See Aruna Viswanatha, *Targeting Executives in FCPA Cases Can Lead to Industry-Wide Probes*, MAIN JUSTICE (June 23, 2010), <http://www.mainjustice.com/justanticorruption/2010/06/23/targeting-executives-in-fcpa-cases-can-lead-to-industry-wide-probes/>.

egy,⁷⁵ and in November 2012, Breuer stated: “If you look at the FCPA over the past 4 years, you’ll see we really have been vigorous about holding individuals accountable.”⁷⁶

However, the DOJ’s rhetoric is hollow. Since 2008, approximately 75% of corporate DOJ FCPA enforcement actions have not (at least yet) resulted in any related DOJ charges against company employees. In 2012, as indicated in Tables I and II, 100% of corporate FCPA enforcement actions have not (at least yet) resulted in any related DOJ charges against company employees. In my 2010 Senate FCPA testimony, I noted that the absence of individual FCPA charges in most corporate FCPA enforcement actions causes one to legitimately wonder whether the conduct giving rise to the corporate enforcement action was engaged in by ghosts.⁷⁷ Others have also rightly asked the “but nobody was charged” question.⁷⁸

However, as I stated in my Senate testimony, there is an equally plausible reason why no individuals have been charged in connection with many corporate FCPA enforcement actions.⁷⁹ The reason has to do with the quality and legitimacy of the corporate enforcement action in the first place and the above data point concerning NPAs, DPAs and individual prosecutions is telling. In other words, perhaps the more appropriate question is not “but nobody was charged,” but rather do NPA and DPAs always represent provable FCPA violations.

3. *The DOJ’s Failures in Individual Prosecutions*

Although FCPA individual prosecutions are rare, when they do occur, the DOJ has less than an admirable record when held to its burden of proof by individual defendants. Bringing criminal charges and marshaling the full resources of the government against an individual is an awesome power that the DOJ possesses. Because that power alters the lives of real people and their families, sidetracks real

⁷⁵ See Prepared Address to the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 19, 2009), available at <http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf>.

⁷⁶ See Elizabeth Murphy, *Breuer: Fight against Corruption One of ‘Main Struggles’ of Our Time*, MAIN JUSTICE (Nov. 5, 2012, 9:44 PM), <http://www.mainjustice.com/2012/11/05/breuer-fight-against-corruption-one-of-main-struggles-of-our-time/>.

⁷⁷ See Mike Koehler, *Prepared Statement of Professor Mike Koehler Before the Subcomm. on Crime and Drugs of the U.S. S. Comm. on the Judiciary - ‘Examining Enforcement of the Foreign Corrupt Practices Act’* (Nov. 30, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1739134.

⁷⁸ See James Stewart, *Bribery, but Nobody Was Charged*, N.Y. TIMES (June 24, 2011) http://www.nytimes.com/2011/06/25/business/25stewart.html?pagewanted=1&_r=2&.

⁷⁹ See Koehler, *supra* note 77.

careers, empties real bank accounts in mounting a defense, and causes often irreversible damage to real reputations, it ought to be exercised with real discipline and prudence. While it is unrealistic, and probably not desirable from a policy perspective, to expect the DOJ to win 100% of its FCPA prosecutions against individuals when held to its burden of proof, given the above dynamics, it is both realistic and desirable to expect the DOJ to win a *very high* percentage of its FCPA prosecutions against individuals.⁸⁰ In 2012, the DOJ fell short of this desirable objective, raising the question—what percentage of DOJ FCPA losses is acceptable?

a. Africa Sting Cases

The most spectacular failure of the DOJ when held to its burden of proof occurred in the “Africa Sting” cases. In January 2010, DOJ announced criminal charges against 22 executives and employees of companies in the military and law enforcement products industry for engaging in a scheme to pay bribes to the minister of defense of an African country.⁸¹ However, there was no actual involvement from any minister of defense. Rather, FBI agents—assisted by Richard Bistrong who had already pleaded guilty to real, unrelated FCPA offenses—posed as representatives of a Gabonese minister. While it was not the first use of proactive, undercover investigative techniques in an FCPA investigation, it was certainly the largest and most dramatic use of such techniques in the FCPA’s history. The full force of the government’s surveillance capabilities were used against individuals from mostly small private companies located across America.

In announcing the criminal charges, Assistant Attorney General Breuer called the manufactured case a “turning point” in the DOJ’s FCPA enforcement program and otherwise trumpeted that the charges represented the “largest single investigation and prosecution against individuals in the history of DOJ’s enforcement of the

⁸⁰ To be sure, the DOJ has experienced some recent success in individual FCPA prosecutions when held to its burden of proof. For instance, and although an appeal is pending, in August 2011, the DOJ secured jury trial convictions of Joel Esquenazi and Carlos Rodriguez based on FCPA and related charges that the defendants participated in a scheme to pay bribes to employees of Haiti Teleco (an alleged state-owned telecommunications company). See Press Release, Two Telecommunications Executives Convicted by Miami Jury on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti, Dep’t of Justice (Aug. 5, 2011), *available at* <http://www.justice.gov/opa/pr/2011/August/11-crm-1020.html>.

⁸¹ See Press Release, Dep’t of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), *available at* <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html>.

FCPA.”⁸² All but one of the charged individuals was arrested at the industry’s leading trade show in Las Vegas. In a sophomoric statement Breuer said, “This is one case where what happened in Vegas doesn’t stay in Vegas.”⁸³ In a press release that foreshadowed the conduct of the FBI agents involved in the sting operation, the FBI stated that the undercover operation was like a “ruse [that] played out with all the intrigue of a spy novel.”⁸⁴ A good spy novel often involves sex, drugs, and criminals, and the FBI’s conduct in carrying out the manufactured case touched upon all such subjects causing FBI agents to openly wonder who would portray them when Hollywood made a movie about the case.⁸⁵

The Africa Sting cases were assigned to Judge Richard Leon in the U.S. District Court for the District of Columbia, who immediately expressed strong skepticism of the DOJ’s enforcement theory and the difficulties of trying such a large group of defendants and accordingly decided that the defendants would be tried in four separate groups.⁸⁶ The first Africa Sting trial started in May 2011 and involved four defendants.⁸⁷ At the close of the DOJ’s case, Judge Leon dismissed a substantive FCPA charge against one defendant, dismissed another substantive FCPA charge against another defendant, and dismissed the money laundering count against all defendants.⁸⁸ In July 2011, Judge Leon declared a mistrial as to all remaining counts against all defendants.⁸⁹

At this point, prudence might have suggested a reevaluation of the DOJ’s “turning point” prosecution. However, the DOJ quickly announced that it would retry the remaining charges against the first group of defendants.⁹⁰ In addition, the DOJ plowed ahead against the

⁸² *Id.*

⁸³ See John Smith, *FBI Stung After Sting Involving Corrupt Foreign Practices*, LAS VEGAS REV. J. (Feb. 29, 2012), <http://www.lvrj.com/news/fbi-stung-after-sting-involving-corrupt-foreign-practices-140838393.html?ref=393>.

⁸⁴ See *Corporate Corruption—A Historic Takedown*, FBI (Jan. 26, 2010), http://www.fbi.gov/news/stories/2010/january/fcpa_012610.

⁸⁵ See Del Wilber, *Racy, Vulgar Texts Hurt Justice Department’s Largest Sting Operation Targeting Foreign Bribery*, WASH. POST (Feb. 13, 2012), http://www.washingtonpost.com/local/crime/racy-vulgar-texts-hurtjustice-departments-largest-sting-operation-targeting-foreignbribery/2012/02/02/gIQAJZYtBR_story.html.

⁸⁶ See *First Africa Sting Trial Results in Mistrial*, FCPA PROFESSOR (July 8, 2011), <http://www.fcpaprofessor.com/first-africa-sting-trial-results-inmistrial>.

⁸⁷ *Id.*

⁸⁸ See *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>.

⁸⁹ See *First Africa Sting Trial Results in Mistrial*, *supra* note 86.

⁹⁰ *Id.*

second group of six defendants, and the second trial in the manufactured case began in September 2011.⁹¹ At the close of the DOJ's case in December 2011, Judge Leon dismissed the conspiracy charge against all defendants.⁹² One defendant, facing only that conspiracy charge, was exonerated by Judge Leon's decision.⁹³ The trial proceeded, the charges went to the jury, the jury deliberated, and in January 2012, the jury found two defendants not guilty.⁹⁴ As for the remaining three defendants, the jury was unable to reach a decision and once again Judge Leon declared a mistrial as to all remaining counts.⁹⁵

It is rare for a jury foreman to go public after a stint of public service, but what happened next may have changed the direction in DOJ's "turning point" prosecutions. Soon after Judge Leon declared a mistrial in the second Africa Sting trial, the jury foreman authored a guest post that was published on my FCPA Professor website.⁹⁶ The jury foreman, a nonpracticing attorney, described numerous facets of the trial and the jury's deliberations, including its assessment of the government's witnesses. The foreman explained that the jury almost unanimously saw the prosecution witnesses to be evasive and combative, stating:

The very low view of their credibility was also based on the concerns of many jurors related to the nature of the sting operation. Though, in the end, I am not sure the credibility concerns were an important aspect of this case because the jury had the most difficult time ascertaining the state of mind and intent of the defendants.⁹⁷

The foreman thought "a number of jurors were troubled by the nature of the FBI sting operation" and was of the opinion that the underlying

⁹¹ See *Africa Sting Development—“Mr. Giordanella You Are Excused . . . You Are Free to Go,”* FCPA PROFESSOR (Dec. 22, 2011), <http://www.fcprofessor.com/africa-sting-development-mr-giordanella-you-are-excused-you-are-free-to-go>.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See *Africa Sting—Caldwell and Godsey Not Guilty—Jury Still Out As To Other Defendants*, FCPA PROFESSOR (Jan. 30, 2012), <http://www.fcprofessor.com/africa-sting-caldwell-and-godsey-not-guilty-jury-still-out-as-to-otherdefendants>.

⁹⁵ See *Judge Leon Declares Mistrial As To Remaining Africa Sting Defendants*, FCPA PROFESSOR (Jan. 31, 2012), <http://www.fcprofessor.com/judge-leon-to-declare-mistrial-as-to-remaining-africa-sting-defendants>.

⁹⁶ See *A Guest Post From the Africa Sting Jury Foreman*, FCPA PROFESSOR (Feb. 6, 2012), <http://www.fcprofessor.com/a-guest-post-from-the-africa-sting-jury-foreman>.

⁹⁷ *Id.*

view of the jury was that “the defendants had acted in good faith and the FBI/DOJ in bad faith.”⁹⁸

The jury foreman concluded the FCPA Professor post by stating:

The government has the option to try [the defendants on which the jury hung] again. As a taxpayer, I sincerely hope they will instead dismiss the charges. The evidence simply does not exist, even if they get their witnesses to behave better under cross, to convict. This is a case that makes one wish that a supermajority was sufficient to acquit. Prolonging this prosecution is a waste of government resources. At some point in the deliberations, I described this sting and prosecution as a quarterback sneak. Although I came to regret that analogy for the frequency with which it was recalled in the jury room, I think it apt. The FBI and DOJ designed a play to get the ball just across the goal line. Unfortunately, in the ensuing pileup, no camera angle shows the ball with clarity and it is anyone’s guess as to whether they scored.⁹⁹

Two weeks later, on February 21, 2012, the DOJ moved to dismiss with prejudice the criminal charges against all of the remaining Africa Sting defendants.¹⁰⁰ The DOJ’s filing stated that “continued prosecution of this case is not warranted under the circumstances.”¹⁰¹

The next day, Judge Leon granted the DOJ’s motion to dismiss, stating:

This appears to be the end of a long and sad chapter in the annals of white collar criminal enforcement. Unlike takedown day in Las Vegas, however, there will be no front page story in the New York Times or the Post for that matter tomorrow reflecting the government’s decision today to move to dismiss the charges against the remaining defendants in this case. Funny, isn’t it, what sells newspapers. The good news, however, is that for these defendants, agents, prosecutors, defense counsel and the court we can get on with our professional and

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See *Game Over—DOJ Moves to Dismiss Africa Sting Cases*, FCPA PROFESSOR (Feb. 21, 2012), <http://www.fcpaprofessor.com/game-over-doj-moves-to-dismiss-africa-sting-cases>.

¹⁰¹ See *Government’s Motion to Dismiss, U.S. v. Amaro Goncalves*, No. 09-CR-335-RJL (D.D.C. Feb. 21, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/goncalvesa/2012-02-21-goncalvesa-government-motion-to-dismiss.pdf>.

personal lives without the constant strain and burden of three to four more eight-week trials hanging over our heads. I for one hope this very long, and I'm sure very expensive, ordeal will be a true learning experience for both the department and the FBI as they regroup to investigate and prosecute FCPA cases against individuals in the future. Two years ago, at the very outset of this case, I expressed more than my fair share of concerns on the record regarding the way this case has been charged and was being prosecuted. Later, during the two trials that I presided over, I specifically commented again on the record regarding the government's very, very aggressive conspiracy theory that was pushing its already generous elasticity to its outer limits. Of course, in the second trial that elastic snapped in the absence of the necessary evidence to sustain it. In addition, in that same trial, I expressed on a number of occasions my concerns regarding the way this case had been investigated and was conducted especially vis-a-vis the handling of Mr. Bistrong. I even had an occasion, sadly, to chastise the government in a situation where the government's handling of the discovery process constituted sharp practices that have no place in a federal courtroom. Notwithstanding all of this water over the dam, and there has been a lot of water, I'm happy to see and I applaud the [D]epartment for having the wisdom and courage of its convictions to face up to the limitations of its case as revealed in the past 26 weeks of trial and the courage to do the right thing under the circumstances. Having served at the higher levels of the [D]epartment, I know that that was not an easy decision. They never are, when so much has been invested, and the agents and the prosecutors are so convinced of the righteousness of their position. I for one however am confident this will be in the end a positive, if not painful, lesson that results in better prosecutions of individuals in the future under the FCPA. As for the defendants, I hope the healing process is a swift one and that they get back to their normal lives in the very near future. Finally, I would be remiss if I did not comment on the tireless and spirited effort by the defense counsel from all over the country who came here to try these very lengthy and complicated cases under difficult circumstances and some even pro bono. Their hard work and effective advocacy are a testament to how strong our criminal defense bar is nationwide. And so

without further adieu I grant the government's motion to dismiss. The defendants are excused.¹⁰²

The DOJ's "turning point" FCPA prosecution, the "largest single investigation and prosecution against individuals in the history of DOJ's enforcement of the FCPA," failed spectacularly.¹⁰³ The prosecution damaged the defendants' lives, sidetracked their real careers, emptied their real bank accounts in mounting a defense, and damaged their real reputations. The press release issued by defendant Lee Tolleson's attorneys after Judge Leon's dismissal best captures the human element of the Africa Sting cases:

Lee Tolleson and his family are elated at this unnecessary and worthless nightmare is now over with the Government dismissing the multi count indictment with prejudice. Lee was a victim of a scheme by the Government, which was the mother of all gigantic taxpayers' waste of dollars, to entrap him and others by faking an overseas business scam. The prosecutors were testing the Foreign Corrupt Practices Act by setting up a sting to raise a national awareness of the law, but the little guy suffers. The Government went to great expense to attempt to sucker many businesses into a fake business deal in Gabon, West Africa. The Government pinned its entire investigation on a despicable character, Bistrong, who manipulated Federal Agents throughout the investigation, in order to save his soul for his misdeeds. Ultimately, the Government finally did the right thing today and should think twice about going after honest business people in the future. Now, where does Lee go to get back his good name back? He is from a small Arkansas town with a GED and has a home school education. His family has been devastated financially by this process. Two things have kept him grounded; his faith in God and his family.¹⁰⁴

Judge Leon dealt a further embarrassing setback to the DOJ tied to the Africa sting cases when he rejected the DOJ's recommendation of no jail time for Richard Bistrong. Instead Judge Leon sen-

¹⁰² Transcript of Judge Leon's Remarks Dismissing the Indictments with Prejudice for Amaro Goncalves and 15 Co-Defendants, U.S. v. Amaro Goncalves, No. 09-CR-335-RJL (D.D.C. Feb. 21, 2012), *available at* <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=24634&libID=24603>.

¹⁰³ See Press Release, Dep't of Justice, *supra* note 81.

¹⁰⁴ *Africa Sting*, FCPA PROFESSOR (Feb. 22, 2012), <http://www.fcpaprofessor.com/africa-sting-a-long-and-sad-chapter-in-the-annals-of-white-collar-criminal-enforcement%E2%80%9D>.

tenced the conductor of the manufactured sting to 18 months in prison followed by three years of supervised release.¹⁰⁵

In the aftermath of its spectacular Africa Sting failure, a DOJ spokesperson merely stated that the DOJ's "FCPA enforcement efforts are broader than one case."¹⁰⁶ This statement of course is true, but it is also true that the Africa Sting case was not the only DOJ FCPA individual prosecution that failed in 2012 or recent years.¹⁰⁷

¹⁰⁵ See *A Final Embarrassing Setback For The DOJ Related To The Africa Sting Cases*, FCPA PROFESSOR (Aug. 1, 2012), <http://www.fcprofessor.com/a-final-embarrassing-setback-for-the-doj-related-to-the-africa-sting-cases>. As indicated above, Bistrong was not charged in connection with the Africa Sting case. Rather, he pleaded guilty to real-world conduct including conspiring with others: (i) to obtain for his employer [Armor Holdings] United Nations body armor contracts (valued at \$6 million) by causing his employer to pay \$200,000 in commissions to an agent while knowing that the agent would pass along a portion of that money to a United Nations procurement officer to cause the officer to award the contracts; (ii) to obtain for his employer, a \$2.4 million pepper spray contract with the National Police Services Agency of the Netherlands by paying a Dutch agent approximately \$15,000 while knowing that the agent would pass along some of that money to a procurement officer with the Police Services Agency to influence the contract; and (iii) to obtain for his employer (although it was never obtained), a contract to sell fingerprint ink pads to the Independent National Elections Commission of Nigeria by making kickback payments to a commission official indirectly through an intermediary company; see also *Plea Agreement*, U.S. v. Bistrong, No. CR 10-21 (D.D.C. 2010), available at <http://www.scribd.com/doc/37880877/Richard-Bistrong-Plea-Agreement>.

¹⁰⁶ See Leslie Wayne, *Bribery Case Falls Apart, and Tactics Are Doubted*, N.Y. TIMES (Feb. 23, 2012), <http://www.nytimes.com/2012/02/24/business/fbi-bribery-case-falls-apart-and-raises-questions.html?pagewanted=all>.

¹⁰⁷ The Africa Sting case and the O'Shea cases were merely the most recent examples of DOJ failures in individual FCPA prosecutions. Other examples include the DOJ's prosecution of Si Chan Wooh and Lindsey Manufacturing and its executives.

In 2007 Si Chan Wooh, an employee of SSI International, a wholly owned subsidiary of Schnitzer Steel, was criminally charged and pleaded guilty to conspiring to violate the FCPA by making cash payments to officers and employees of foreign, government-owned steel production companies to induce employees of those companies to do business with, and provide preferential sales terms to, Schnitzer Steel. U.S. v. Si Chan Wooh, No. Cr 07-244-MO (D. Or. 2007), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/woohs/06-27-07wooh-information.pdf>; see also *Petition to Enter Plea of Guilty*, Certificate of Counsel, and Order Entering Plea at 1-6, U.S. v. Si Chan Wooh, (D. Or. 2007) (No. CR 07-244-KI), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/woohs/2011-10-14-woohs-motion-to-dismiss.pdf>; see also *Writer's Cramp at the DOJ?*, FCPA PROFESSOR (Feb. 3, 2012), <http://www.fcprofessor.com/writers-cramp-at-the-doj>. However, in 2011 "the Justice Department informed Wooh's counsel that a Federal Bureau of Investigation agent assigned to the investigation of Schnitzer and its

employees had written a letter to a high-ranking prosecutor in Washington saying Wooh should not have been charged in connection with the case.” *Writer’s Cramp at the DOJ?*, FCPA PROFESSOR (Feb. 3, 2012), <http://www.fcprofessor.com/writers-cramp-at-the-doj> (quoting Joe Palazzolo, *DOJ Drops Bribery Charges Against Whistleblower in Schnitzer Steel Case*, WALL ST. J. (Oct. 18, 2011), <http://blogs.wsj.com/corruption-currents/2011/10/18/doj-drops-bribery-charges-against-whistleblower-in-schnitzer-steel-case/?user=welcomed&mg=id-wsj>). In October 2011, the DOJ moved to dismiss the case “out of prosecutorial discretion in the interests of justice and the efficient use of government resources.” *Id.*

In 2010, the DOJ charged Lindsey Manufacturing Co., a small private company in California, and two of its executives, company CEO Keith Lindsey and Steve Lee, the company’s CFO, with FCPA offenses for their alleged roles in a conspiracy to pay bribes to Mexican government officials at the Comision Federal de Electricidad (“CFE”), an alleged state-owned utility company. First Superseding Indictment, *U.S. v. Enrique Aguilar*, (C.D. Cal. 2010) (No. 10-1031(A)-AHM), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/aguilare/10-21-10aguilar1st-supersed-indict.pdf>. Various pre-trial defense motions were unsuccessful, and the defendants proceeded to trial. In May 2011, Lindsey, Lee, and Lindsey Manufacturing were found guilty of various FCPA charges after a five-week jury trial, and the DOJ called the verdict an “important milestone” in its FCPA enforcement efforts, as Lindsey Manufacturing was the first company ever to be tried and convicted of FCPA offenses. See Press Release, Dep’t of Justice, *California Company, Its Two Executives and Intermediary Convicted By Federal Jury* (May 10, 2011), available at <http://www.justice.gov/opa/pr/2011/May/11-crm-596.html>. The milestone was short-lived, however, as Judge Howard Matz (C.D. Cal.), after months of post-trial legal wrangling, vacated the convictions and dismissed the indictment after finding numerous instances of prosecutorial misconduct. See *Milestone Erased*, FCPA PROFESSOR (Dec. 1, 2011), <http://www.fcprofessor.com/milestone-erased-judge-matz-dismisses-lindsey-convictions-says-that-dr-lindsey-and-mr-lee-were-put-through-a-severe-ordeal-and-that-lindsey-manufacturing-a-small-once-highly-respected-ente>. In the words of Judge Matz, the instances of misconduct were so varied and occurred over such a long time “that they add up to an unusual and extreme picture of a prosecution gone badly awry.” *U.S. v. Enrique Aguilar*, No. CR 10-01031(A)-AHM (C.D. Cal. Dec. 1, 2011) (order granting motion to dismiss), at 5, available at <http://www.scribd.com/doc/74445224/Judge-Matz-Ruling-Vacating-Lindsey-Convictions>. Judge Matz specifically cited the following missteps: “The 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 order, engaged in questionable behavior during closing argument and even made misrepresentations to the Court.” *Id.* at 2. In a striking close to his opinion, Judge Matz stated: “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 of the investigation and trial were immense, but the emotional drubbing [Lindsey and Lee] absorbed was even worse. As for [Lindsey Manufacturing], the very survival of that small, once highly respected enterprise has been placed in jeopardy.” *Id.*

Also relevant to the issue of the DOJ being held to its burden of proof in individual FCPA prosecutions is the 2012 conclusion to the enforcement actions against various former executives of Control Components Inc. In short, soon after the trial court judge issued a pro-defendant jury instruction relating to knowledge of foreign official, the DOJ, on the brink of being held to its ultimate burden of proof at trial on “foreign official” and other FCPA elements, offered plea agreements to the defendants to substantially reduced charges. *See Checking in On the Carson Case*, FCPA PROFESSOR (May 31, 2012), at 3; *see also Edmonds Pleads Guilty as Trial Nears*, FCPA PROFESSOR (June 18, 2012), <http://www.fcpaprofessor.com/edmonds-pleads-guilty-as-trial-nears>. The defendants (Stuart Carson, Hong Carson, David Edmonds, and Paul Cosgrove), likely mindful of the high costs of testing their innocence, did what most rationale, risk averse actors in their position would do – they agreed to plead guilty. S. Carson was sentenced to four months in prison, H. Carson was sentenced to three years probation, Edmonds was sentenced to four months in prison and Cosgrove was sentenced to thirteen months of home detention. *See Carson Sentencing Issues*, FCPA PROFESSOR (Nov. 12, 2012), <http://www.fcpaprofessor.com/carson-sentencing-issues>; *see also Friday Roundup*, FCPA PROFESSOR (Dec. 21, 2012), <http://www.fcpaprofessor.com/friday-roundup-63>; *see also Friday Roundup*, FCPA PROFESSOR (Sept. 14, 2012), <http://www.fcpaprofessor.com/friday-roundup-54>.

As relevant to the above action, in January 2013, Bienert, Miller & Katzman, the law firm that represented Cosgrove issued a press release that stated: “BMK and counsel for three other defendants . . . conducted a worldwide investigation and developed evidence suggesting the government’s evidence was incomplete, the court documents indicate. Ultimately, most companies bought CCI valves because they were the best in the world (not because of bribes); most of the supposed ‘public officials’ denied receiving any bribes; and, in most cases, the alleged improper payments were never actually made, according to court records. Further, through an aggressive litigation and motion strategy, counsel were able to obtain jury instructions that highlighted the government’s heavy burden of proof at trial. For example, the trial court agreed with defense counsel that the government was obligated to prove defendants’ knew they were dealing with ‘foreign officials,’ something that would have been extremely difficult for the government to prove. The supposed bribery recipients worked for companies that appeared to operate like private companies in the United States, making it very unlikely that the defendants realized they were dealing with ‘government officials.’ BMK and other defense counsel raised several other issues that brought the government’s ability to obtain a conviction, or defend an appeal, into serious doubt. These motions called into question whether the alleged bribe recipients were even ‘public officials’ as intended by the FCPA; whether the Travel Act even applied to the case; and, whether defendants were entitled to millions of pages of documents that had been withheld from them by CCI, their former employer. Each of these issues likely would have been decided for the first time on an appeal in this case.” *BMK Obtains*

b. *O'Shea Case*

In November 2009, the DOJ issued a press release when John Joseph O'Shea was arrested and criminally charged with FCPA and related offenses. The release stated, "the indictment alleges that while acting as the general manager of a Texas business unit of a U.S. subsidiary of [ABB Ltd.], O'Shea arranged and authorized payments to multiple officials at [Comision Federal de Electricida ("CFE")— a utility allegedly owned or controlled by the Mexican government] in exchange for lucrative contracts."¹⁰⁸ O'Shea proceeded to trial, and in January 2012, following the DOJ's case, Judge Lynn Hughes (S.D. Texas) dismissed the FCPA charges against O'Shea.¹⁰⁹ In doing so, Hughes stated the problem for the government was that the key witness against Mr. O'Shea knew "almost nothing."¹¹⁰

As evident from the case record, this was not the only deficiency in the DOJ's case. Judge Hughes was also troubled by the DOJ's "foreign official" position and its lack of preparation as to the unique attributes of CFE supporting its position that employees of CFE were "foreign officials" under the FCPA.¹¹¹ During a hearing, Judge Hughes stated the DOJ "is supposed to know before it brings the indictment that it can prove that it is a governmental entity . . . in fact you should have to convince the grand jury of it."¹¹² Judge Hughes further commented that "it does trouble me, although I don't think it's relevant to this motion, that the Government did not present evidence on governmental status on which a reasonable grand jury could have relied."¹¹³ The subsequent exchange between the DOJ's Chuck Duross and Judge Hughes followed:

Duross: I believe, Your Honor, that we presented evidence that it was a state owned company.

Non-Prison Resolution for Client in Criminal FCPA Case, PRWEB (Jan. 17, 2013), <http://www.prweb.com/releases/prweb2013/1/prweb10293064.htm>.

¹⁰⁸ See Press Release, Dep't of Justice, Former General Manager of Texas Business Arrested for Role in Alleged Scheme to Bribe Officials at Mexican State-Owned Electrical Utility (Nov. 23, 2009), available at <http://www.justice.gov/opa/pr/2009/November/09-crm-1265.html>.

¹⁰⁹ See *O'Shea Not Guilty of Substantive FCPA Charges*, FCPA PROFESSOR (Jan. 17, 2012), <http://www.fcpaprofessor.com/oshea-not-guilty-of-substantive-fcpa-charges>.

¹¹⁰ *Failure of Proof: US v. O'Shea*, LAW 360 (Feb. 13, 2012, 1:15 PM), <http://www.law360.com/articles/306032/failure-of-proof-us-v-o-shea>.

¹¹¹ *Did "Foreign Official" Impact the O'Shea Acquittal?*, FCPA PROFESSOR (July 11, 2012), <http://www.fcpaprofessor.com/did-foreign-official-impact-the-oshea-acquittal>.

¹¹² *Id.*

¹¹³ *Id.*

Court: The statue is more subtle than that. I'm not saying you couldn't have done it or they wouldn't have indicted him.

Duross: The statute says an instrumentality of a foreign government. I think in fairness, Your Honor, it is not a stretch to think that a company that is created by, owned by and operated by a foreign government, could be considered an instrumentality. I think in the sharps relief of a trial in which we are going to be challenged on those issues, we needed to have been more prepared and we were not.

Court: I don't know what was presented to the Grand Jury, but as I observed several days ago, the Government should have been prepared before they brought the charges to the Grand Jury. It's something you have to prove. And you shouldn't indict people on stuff you can't prove.¹¹⁴

O'Shea, a married grandfather with two children and 35 years of business experience, "lost his job, savings and home while fighting to prove his innocence."¹¹⁵ After Judge Hughes's decision, O'Shea's counsel stated, "Deflecting blame for bribery in corruption-ridden countries onto unknowing executives is both Cervantian and unfair."¹¹⁶

The DOJ's FCPA losses in 2012 and in recent years when held to its burden of proof, would have been troubling even if, for instance, all of the losses were based on a single issue, such as an aggressive interpretation of the same FCPA substantive element. However, such a common thread was not present in the recent string of DOJ losses. Rather, and more problematic, the DOJ's losses were for a variety of reasons: apparent jury resentment of a bad-faith sting operation, aggressive legal theories, insufficient evidence, and numerous instances of prosecutorial misconduct. Moreover, the losses were not merely adverse jury verdicts, but rather instances in which judges took the unusual step of refusing to allow the trial or specific charges to proceed after the DOJ's case; a judge issuing a rare post-verdict dismissal because of prosecutorial misconduct; DOJ dismissing a case after the defendant had pleaded guilty; and DOJ dismissing several cases before the trials even occurred. If there is a common theme in the recent DOJ

¹¹⁴ *Id.*

¹¹⁵ See Dane Schiller, *After Losing Everything, Mexico Bribery Suspect Acquitted*, HOUS. CHRON. (Jan. 17, 2012) <http://www.chron.com/news/houston-texas/article/After-losing-everything-Mexico-bribery-suspect-2580556.php>.

¹¹⁶ *Id.*

losses in FCPA enforcement actions, it is this: DOJ's aggressive theories and tactics, when subjected to scrutiny, failed.

Against this backdrop, it would be prudent for DOJ to take a step back and contemplate the future direction of its FCPA enforcement program. However, it appears that DOJ's recent spectacular failures have not yielded such a result. The head of DOJ's FCPA unit stated as much:

I know there is a lot of commentary out there about what this [DOJ's recent FCPA setbacks] portends for the FCPA program [and] certain law enforcement techniques. I would caution everybody not to draw too much from that. In terms of pursuing cases moving forward, I don't think a lot is going to change.¹¹⁷

The substance of the DOJ's statement is akin to a company found to be in violation of the FCPA stating that "not a lot is going to change" about its future foreign business practices. The DOJ would not tolerate such a cavalier stance from a company, and such a cavalier stance should not be tolerated from a law enforcement agency.

To borrow from Justice Potter Stewart's classic reasoning in *Jacobellis v. Ohio*, I do not know what level of DOJ FCPA losses is acceptable and the answer may be indefinable, "but I know it when I see it," and the number and magnitude of DOJ's recent FCPA losses is unacceptable.¹¹⁸

Another prominent story from 2012 was the number of enforcement actions against pharmaceutical or medical device companies. The next section of this article details the enforcement theory at issue in those actions.

B. The Origins and Prominence of the Enforcement Theory Impacting Pharmaceutical and Medical Device Companies

The FCPA was enacted in 1977 after several years of Congressional investigation, deliberation and consideration of the so-called foreign corporate payments problem.¹¹⁹ Congress learned of a wide variety of corporate payments to a wide variety of foreign recipients for

¹¹⁷ See Kevin Gray, *U.S. Prosecutor Says Tough Tactics to Remain in Bribery Fight*, THOMPSON REUTERS NEWS & INSIGHT (Mar. 1, 2012), http://newsandinsight.thomsonreuters.com/Legal/News/2012/03_-_March/U_S__prosecutor_says_tough_tactics_to_remain_in_bribery_fight/.

¹¹⁸ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

¹¹⁹ For an overview of the legislative history leading up to the FCPA's enactment, see Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185406.

a wide variety of reasons.¹²⁰ Congress could have legislated as to the wide range of foreign corporate payments discovered; yet, in passing the FCPA, Congress intended to capture only a narrow category of such payments to a narrow category of foreign recipients.¹²¹

In passing the FCPA, Congress was primarily concerned with the foreign policy implications of foreign government leaders being accountable to U.S. corporations because of improper payments.¹²² As a member of Congress stated, “Surely the public expects more than to have foreign policy made in the board rooms of United Brands or Lockheed.”¹²³ The United Brands scandal principally involved payments to Oswaldo Lopez Arellano, the President of Honduras, while the Lockheed scandal principally involved payments to Japanese Prime Minister Tanaka, Prince Bernhard (the Inspector General of the Dutch Armed Forces and the husband of Queen Juliana of the Netherlands), and Italian political parties.¹²⁴ Other foreign corporate payments which also prompted Congressional concern and further motivated Congress to enact the FCPA included: Gulf Oil, which principally involved contributions to the political campaign of the President of the Republic of Korea; Northrop, involving payments to a Saudi Arabian general; Exxon, involving contributions to Italian political parties; Mobil Oil, similarly involving contributions to Italian political parties; and Ashland Oil, which principally involved payments to Albert Bernard Bongo, the President of Gabon.¹²⁵

As highlighted above, FCPA enforcement actions against pharmaceutical and medical device companies comprised 50% of corporate FCPA enforcement actions in 2012.¹²⁶ Like many enforcement actions in this era of FCPA enforcement, these actions had nothing to do with the type of foreign recipients Congress had in mind when it passed the FCPA. Rather, pharmaceutical and medical device companies were the subject of FCPA scrutiny because of an aggressive and dubious FCPA enforcement theory—a theory that has never been subjected to judicial scrutiny. The enforcement theory is that employees—such as physicians, nurses, mid-wives, lab personnel, etc—of certain foreign health care systems are “foreign officials” under the FCPA and thus occupy a status equal to traditional bona fide government officials.

The prominence of this enforcement theory in 2012 is best demonstrated by Table III, which details every corporate FCPA en-

¹²⁰ *See id.* at 1003.

¹²¹ *See id.*

¹²² *Id.* at 938-43.

¹²³ *Id.* at 942.

¹²⁴ *Id.* at 934-35.

¹²⁵ Koehler, *supra* note 111, at 934-35.

¹²⁶ *See supra* note 41.

forcement action in 2012 along with the alleged “foreign official” per the DOJ or SEC resolution documents.

TABLE III – THE “FOREIGN OFFICIALS” OF 2012¹²⁷

Enforcement Action	Alleged “Foreign Official”
Marubeni	<p><i>DOJ</i></p> <p>As in prior Bonny Island bribery enforcement actions, the “foreign officials” were Nigeria LNG Limited (“NLNG”) officers and employees. NLNG is majority owned by multinational oil companies, and Nigerian National Petroleum Corporation (“NNPC”) owns 49% of NLNG. “[T]hrough 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 EPC contracts.” In addition, the Marubeni enforcement action (like the prior enforcement actions) generically refers to the other Nigerian government officials.¹²⁸</p>
Smith & Nephew	<p><i>DOJ</i></p> <p>“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.”¹²⁹</p> <p><i>SEC</i></p> <p>“Greece has a national health care system wherein most Greek hospitals are publicly-owned and operated. Healthcare providers, including doctors, who work at publicly-owned hospitals are government employees, providing healthcare services in their official capacities. The public doctors in Greece are “foreign officials” as that term is defined in the FCPA”¹³⁰</p>

¹²⁷ This table is based on information from the DOJ or SEC’s 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. *Certain of the enforcement actions in the table technically only involved 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.*

¹²⁸ U.S. v. Marubeni, No. 12-CR-022 (S.D. Tex. Jan. 17, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/marubeni/2012-01-17-marubeni-information.pdf>.

¹²⁹ U.S. v. Smith & Nephew, Inc., No. 1:12-CR-30-RBW (D.D.C. Feb. 6, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/smith-nephew/2012-02-06-s-n-information.pdf>.

¹³⁰ Complaint, U.S. Sec. & Exch. Comm’n, No. 1:12-cv-00187 (D.D.C. Feb. 6, 2012), available at <http://www.sec.gov/litigation/complaints/2012/comp22252.pdf>.

BizJet / Lufthansa	<p><i>DOJ</i></p> <p>Foreign government customers, including the Mexican Federal Police, the Mexican President's Fleet [the air fleet for the President of Mexico], Sinaola [the air fleet for the Governor of the Mexican State of Sinaloa], the Panama Aviation Authority, and other customers.</p> <p>The foreign officials are identified as follows: Official 1 – “a Captain in the Mexican Federal Police;” Official 2 – “a Colonel in the Mexican President's Fleet;” Official 3 – “a Captain in the Mexican President's Fleet;” Official 4 – “employed by the Mexican President's Fleet;” Official 5 – “a Director of Air Services at Sinaloa;” and Official 6 – “a chief mechanic at the Panama Aviation Authority.”¹³¹</p>
Biomet	<p><i>DOJ</i></p> <p>“Argentina has a public healthcare system wherein approximately half of hospitals are publicly owned and operated. Health care providers (“HCPs”) who work in the public sector are government employees, providing health care services in their official capacities. Therefore, such HCPs in Argentina are ‘foreign officials’ as that term is defined in the FCPA.”</p> <p>“Brazil has a socialized public healthcare system that provides universal health care to all Brazilian citizens, and the majority of hospitals are publicly-controlled. HCPs who work in the public sector are government employees, providing health care services in their official capacities. Therefore, such HCPs in Brazil are ‘foreign officials’ as that term is defined in the FCPA.”</p> <p>“China has a national healthcare system wherein most Chinese hospitals are publicly owned and operated. HCPs who work at publicly-owned hospitals are government employees, providing health care services in their official capacities.”¹³²</p> <p><i>SEC</i></p> <p>“[P]ublic doctors employed by public hospitals and agencies in Argentina, Brazil, and China.”¹³³</p>

¹³¹ U.S. v. Bizjet International Sales & Support, Inc., No. 12-CR-61-CVE (N.D. Okla. Mar. 14, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/bizjet/2012-03-14-bizjet-information.pdf>.

¹³² U.S. v. Biomet, Inc., No. 1:12-cr-80-RBW (D.D.C. Mar. 26, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/biomet/2012-03-26-biomet-information.pdf>.

¹³³ Complaint, U.S. Sec. & Exch. Comm'n, No. 1:12-cv-00454 (D.D.C. Mar. 26, 2012), available at <http://www.sec.gov/litigation/complaints/2012/comp22306.pdf>.

Data Systems & Solutions	<p><i>DOJ</i></p> <p>Ignalina Nuclear Power Plant (“INPP”) is described as a “state-owned nuclear power plant in Lithuania and an ‘agency’ and ‘instrumentality’ of a foreign government</p> <p>The INPP employees are described as follows: Official 1 (the Deputy Head of the Instrumentation & Controls Department at INPP with influence over the award of contracts); Official 2 (the Head of Instrumentation & Controls Department at INPP with influence over the award of contracts); Official 3 (the Director General at INPP with influence over the award of contracts); Official 4 (the Head of International Projects Department at INPP with influence over the award of contracts); and Official A (the lead software engineer at INPP with influence over the award of contracts).¹³⁴</p>
Orthofix	<p><i>DOJ</i></p> <p>“Instituto Mexicano del Seguro Social (“IMSS”) was a social-service agency of the Mexican government that provided public services to Mexican workers and their families. IMSS was created in 1943 by order of the Mexican president, who continued to select IMSS’s head, and subsequent changes to IMSS programs were made by acts of Mexico’s legislature. IMSS provided health care services to tens of millions of people, including workers, their families, and pensioners, at hospitals that IMSS owned and operated throughout Mexico. Mexico’s government funded IMSS through taxation and compulsory contributions.”</p> <p>“Mexican Official 1 – a deputy administrator of Magdalena de las Salinas (a hospital in Mexico City that IMSS owned and controlled); Mexican Official 2 – the purchasing director of Magdalena de las Salinas; Mexican Official 3 – the purchasing director of Lomas Verdes (a hospital in the State of Mexico that IMSS owned and controlled); Mexican Official 4 – a sub-director of IMSS”¹³⁵</p> <p><i>SEC</i></p> <p>“IMSS hospital employees [IMSS, the Mexican government-owned medical care and social services provider]; certain IMSS officials”¹³⁶</p>
NORDAM Group	<p><i>DOJ</i></p> <p>NPA refers to “customers in China including state-owned and -controlled entities, including airlines created, controlled, and exclusively owned by the People’s Republic of China.”¹³⁷</p>

¹³⁴ U.S. v. Data Sys. & Solutions LLC, No. 1:12-CR-262 (E.D. Va. June 18, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/data-systems/2012-06-18-data-systems-information.pdf>.

¹³⁵ *Id.*

¹³⁶ Complaint, U.S. Sec. & Exch. Comm’n vs. Orthofix Int’l N.V., Civ. No. __ (E.D. Tex. July 10, 2012), available at <http://www.sec.gov/litigation/complaints/2012/comp-pr2012-133.pdf>.

¹³⁷ Letter from Denis McInerney to Carlos F. Ortiz, *supra* note 19.

Pfizer / Wyeth	<p><i>DOJ</i></p> <p>“The manufacture, registration, distribution, sale, and prescription of pharmaceuticals were highly-regulated activities throughout the world. While there were multinational regulatory schemes, it was typical that each country established its own regulatory structure at a local, regional, and/or national level. These regulatory structures generally required the registration of pharmaceuticals and regulated labeling and advertising. Additionally, in certain countries, the government established lists of pharmaceuticals that were approved for government reimbursement or otherwise determined those pharmaceuticals that might be purchased by government institutions. Moreover, countries often regulated the interactions between pharmaceutical companies and hospitals, pharmacies, and healthcare professionals. In those countries with national healthcare system, hospitals, clinics, and pharmacies were generally agencies or instrumentalities of foreign governments, and, thus, many of the healthcare professionals employed by these agencies and instrumentalities were foreign officials within the meaning of the FCPA.”</p> <ul style="list-style-type: none"> - Croatian Official (a citizen of the Republic of Croatia who held official positions on government committees in Croatia and had influence over decisions concerning the registration and reimbursement of Pfizer products marketed and sold in the country); - Russian Official 1 (a citizen of the Russian Federation who was a medical doctor employed by a public hospital who had influence over the Russian government’s purchase and prescription of Pfizer products marketed and sold in the country); - Russian Official 2 (a citizen of the Russian Federation who was a high-ranking government official who held official positions on government committees in Russia and had influence over decisions concerning the reimbursement of Pfizer products marketed and sold in the country); - Russian Official 3 (a citizen of the Russian Federation who had influence over decisions concerning the treatment algorithms involving Pfizer products marketed and sold in the country). - In addition to the above “foreign officials,” the information refers to “numerous [other] government officials, including physicians, pharmacologists and senior government officials, who were employed by foreign governments or instrumentalities of foreign governments, including in Bulgaria, Croatia, Kazakhstan, and Russia.”¹³⁸ <p><i>SEC</i></p> <p>“Foreign officials, including doctors and other healthcare professionals employed by foreign governments” in Bulgaria, China, Croatia, Czech Republic, Italy, Kazakhstan, Russia, and Serbia.</p> <p>“Foreign officials, including doctors and other healthcare professionals employed by foreign governments” in Indonesia, Pakistan, China, and Saudi Arabia.¹³⁹</p>
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¹³⁸ U.S. v. Pfizer H.C.P. Corp, No. __ (D.D.C. Aug. 7, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/pfizer/2012-08-07-pfizer-info.pdf>.

¹³⁹ Complaint, U.S. Sec. & Exch. Comm’n, No. __ (D.D.C. 2012), available at <http://www.sec.gov/litigation/complaints/2012/comp-pr2012-152-wyeth.pdf>.

Tyco	<p><i>DOJ</i></p> <p>The information alleges: that Saudi Aramco (“Aramco”) was a Saudi Arabian oil and gas company that was wholly-owned, controlled, and managed by the government, and an “agency” and “instrumentality” of a foreign government; that Emirates National Oil Company (“ENOC”) was a state-owned entity in Dubai and an “agency” and “instrumentality” of a foreign government; that Vopak Horizon Fujairah (“Vopak”) was a subsidiary of ENOC based in the U.A.E. and an “agency” and “instrumentality” of a foreign government; and that the National Iranian Gas Company (“NIGC”) was a state-owned entity in Iran and an “agency” and “instrumentality” of a foreign government.</p> <ul style="list-style-type: none"> - “employees of end-customers in Saudi Arabia, the U.A.E., and Iran, including to employees at Aramco, ENOC, Vopak, and NIGC” - General references to payments customers, including government customers, in China, India, Thailand, Laos, Indonesia, Bosnia, Croatia, Serbia, Slovenia, Slovakia, Iran, Saudia Arabia, Libya, Syria, the United Arab Emirates, Mauritania, Congo, Niger, Madagascar, and Turkey. - “designers at design institutes owned or controlled by the Chinese government” - “publicly-employed healthcare professionals” in China - “a former employee of Banjarmasin provincial level public water company (PDAM) [Indonesia] and two payments to the project manager for PDAM Banjarmasin in connection with the Banjarmasin Project”, employees of PLN [a state-owned electricity company in Indonesia] - “employees of a public utility owned by the Government of Vietnam” - “a security officer employed by a government-owned mining company in Mauritania” - publicly employed health care providers in Saudi Arabia¹⁴⁰ <p><i>SEC</i></p> <p>Similar to the DOJ’s allegations above. In addition, the SEC complaint alleges the following additional foreign officials:</p> <ul style="list-style-type: none"> - an employee of an instrumentality of the Turkish government - an employee of a government-controlled entity in Malaysia - representatives of a company majority-owned by the Egyptian government - public health care providers in Poland¹⁴¹
Oracle	<p><i>SEC</i></p> <p>General reference in the complaint to “Indian government end-users,” Indian “government customers” and a contract with India’s Ministry of Information Technology and Communication.¹⁴²</p>

¹⁴⁰ See Letter from Denis McInerney to Martin Weinstein, *supra* note 23.

¹⁴¹ Complaint, U.S. Sec. & Exch. Comm’n v. TYCO Int’l LTD., No. __ (D.D.C. 2012), *available at* <http://www.sec.gov/litigation/complaints/2012/comp-pr2012-196.pdf>.

¹⁴² Complaint, U.S. Sec. & Exch. Comm’n v. Oracle Corp., No. CV-12-4310 (N.D. Cal. 2012), *available at* <http://www.sec.gov/litigation/complaints/2012/comp-pr2012-158.pdf>.

Allianz	SEC "[E]mployees of state-owned entities in Indonesia" ¹⁴³
Eli Lilly	SEC Chinese "government-employed physicians" "[G]overnment health officials in a Brazilian state" Payments to "a small charitable foundation that was founded and administered by the head of one of the regional [Poland] government health authorities" Russian "government officials or others with influence in the government," "the Cypriot entities were owned by an individual associated with the distributor controlled by the member of the upper house of Russia Parliament," "the beneficial owner of [the relevant] entity was the General Director of the government-owned distributor." ¹⁴⁴

In addition to the enforcement theory that employees of certain foreign health care systems are "foreign officials" under the FCPA, another prominent enforcement theory in 2012, as suggested by Table III, was that employees of alleged state-owned or state-controlled enterprises ("SOEs") are "foreign officials" under the FCPA and thus again occupy a status equal to traditional bona fide government officials. Of the twelve corporate enforcement actions in 2012, five (42%) involved, in whole or in part, employees of alleged SOEs. These entities ranged from oil and gas companies to nuclear power plants to airlines. This enforcement theory was not unique to 2012, but has become a prominent FCPA enforcement theory over the past few years. For instance, in 2011, 81% of corporate FCPA enforcement actions involved, in whole or in part, employees of alleged SOEs.¹⁴⁵ In 2010, 60% of corporate FCPA enforcement actions involved, in whole or in part, employees of alleged SOEs.¹⁴⁶ In 2009, 66% of corporate FCPA enforcement actions involved, in whole or in part, employees of alleged SOEs.¹⁴⁷

There is no case law precedent regarding this FCPA enforcement theory;¹⁴⁸ however, the issue of whether employees of alleged

¹⁴³ See *In the Matter of Allianz SE*, *supra* note 37.

¹⁴⁴ Complaint, U.S. Sec. & Exch. Comm'n v. Eli Lilly & Co, No. CV-02045 (D.D.C. 2012), available at <http://www.sec.gov/litigation/complaints/2012/comp-pr2012-273.pdf>.

¹⁴⁵ See Koehler, *supra* note 44.

¹⁴⁶ See Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. TOL. L. REV. 99, 108-19 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1971021.

¹⁴⁷ See Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 410-14 (2010).

¹⁴⁸ For a discussion of trial court decisions regarding this enforcement theory, see Koehler, *supra* note 44. These trial court challenges relied in part on my declaration which detailed the FCPA's extensive legislative history relevant to the "foreign official" issue. See Declaration of Professor Michael Koehler, available at

SOEs are “foreign officials” under the FCPA is currently the focus of an appeal pending in the Eleventh Circuit.¹⁴⁹

Returning to the FCPA enforcement theory that employees of certain foreign health care systems are “foreign officials” under the FCPA, although 2012 was not the first year in which the enforcement agencies advanced this theory,¹⁵⁰ it was prominent in 2012 in serving as the foundation for a significant number of corporate enforcement actions. However, a useful data point in examining the legitimacy and validity of this enforcement theory is found in analyzing the number of criminal charges filed against individuals based on this theory. Despite extracting numerous corporate FCPA settlements based on the enforcement theory that various employees of certain foreign health care systems are “foreign officials” under the FCPA, the DOJ has *never* charged an individual in connection with this theory. This is meaningful because individuals, as opposed to business organizations, are more likely to contest DOJ charges and hold the DOJ to its high burden of proof.

In short, the enforcement theory that various employees of certain foreign health care systems are “foreign officials” under the FCPA

<http://www.scribd.com/doc/49310598/U-S-v-Stuart-Carson-el-al-Declaration-of-Professor-Michael-Koehler>. 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. 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. In 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. 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 include such definitions or concepts in the bill that ultimately became the FCPA.”

¹⁴⁹ See *Historic “Foreign Official” Appeals Filed*, FCPA PROFESSOR (May 10, 2012), <http://www.fcpaprofessor.com/historic-foreign-official-appeals-filed>.

¹⁵⁰ See *The Origins and Prominence of a Theory*, FCPA PROFESSOR (Sept. 13, 2012), <http://www.fcpaprofessor.com/the-origins-and-prominence-of-a-theory>.

is a dubious and aggressive enforcement theory.¹⁵¹ It has never been subjected to judicial scrutiny, yet it is a prominent enforcement theory in this era of FCPA enforcement.

The final section of this article highlights certain events that became top stories in 2012 simply because they occurred.

C. Substantively Insignificant Events Became Top Stories Simply Because They Occurred

On certain occasions, a substantively insignificant event occurs, but the fact that it even occurred represents its significance. The year 2012 witnessed several such events relevant to the FCPA and its enforcement, including the long-awaited issuance of FCPA guidance, Morgan Stanley's so-called declination, and the feeding frenzy associated with Wal-Mart's potential FCPA exposure. Each event is critically analyzed below and placed in the proper context.

1. FCPA Guidance

When Assistant Attorney General Breuer announced in November 2011 that the DOJ intended to issue FCPA guidance in 2012,¹⁵² predicting when the guidance would be issued became an amusing FCPA Inc. parlor game.¹⁵³ When the guidance, "A Resource Guide to the U.S. Foreign Corrupt Practices Act" (the "Guidance"), was issued in November 2012,¹⁵⁴ FCPA Inc. participants en masse published client alerts trumpeting the release of the Guidance.¹⁵⁵ Yet, the clear consensus was that the Guidance offered little in terms of actual new substance to those previously knowledgeable about the FCPA and

¹⁵¹ In the United States, approximately 20% of hospitals are owned by state or local governments. See *United States: Hospitals by Ownership Type, 2010*, STATEHEALTHFACTS.ORG, <http://www.statehealthfacts.org/profileind.jsp?ind=383&cat=8&rgn=1> (last visited Apr. 27, 2013). In addition, approximately 150 more medical centers are run by the Veterans Health Administration. See *Where Do I Get the Care I Need?*, U.S. DEP'T OF VETERAN AFFAIRS, <http://www.va.gov/health/findcare.asp> (last visited Apr. 27, 2013).

¹⁵² See Lanny A. Breuer, Assistant Attn'y 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>.

¹⁵³ See e.g., Catherine Dunn, *The Wait Continues for FCPA Guidance from DOJ*, CORP. COUNS. (Nov. 9, 2012), http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202577792246&The_Wait_Continues_for_FCPA_Guidance_from_DOJ&slreturn=20130020153049.

¹⁵⁴ See RESOURCE GUIDE, *supra* note 40.

¹⁵⁵ See *Guidance Roundup*, FCPA PROFESSOR (Nov. 16, 2012), <http://www.fcraprofessor.com/guidance-roundup> (summarizing approximately 50 law firm client alerts regarding the Guidance).

its enforcement. Before discussing the substance of the Guidance, this section first sets forth relevant background concerning its release.

a. Background

As part of the FCPA's 1988 amendments, Congress encouraged the DOJ to issue FCPA guidance.¹⁵⁶ A relevant House Report stated, "In order to enhance compliance with the provisions of the FCPA [the FCPA amendment being considered] establishes a procedure for the [DOJ] to issue guidance describing examples of activities that would or would not conform with the [DOJ's] present enforcement policy regarding FCPA violations."¹⁵⁷ The Sixth Circuit noted, in rejecting an FCPA private right of action, that the 1988 amendments "clearly evince[d] a preference for compliance in lieu of prosecution."¹⁵⁸ However, in response to Congress's suggestion, the DOJ determined in 1990 that "no guidelines are necessary."¹⁵⁹

In 2002, the OECD, in its Phase 2 Report of the U.S., encouraged the U.S. to issue FCPA guidance. In pertinent part, the OECD Report stated:

Despite the abundance of articles and commentaries on [the FCPA], there is only limited amount of authoritative or official guidance available on compliance with the twenty five-year statute. [. . .] Much of the authority or guidance regarding the Act comes from speeches from DOJ and SEC officials, DOJ opinions, DOJ and SEC complaints, settlements that have been filed, and informal discussions of issues between companies' counsel and the DOJ or the SEC. [. . .] The status of these various sources of information is however not always clear: there could be merit in regrouping and consolidating them in a single guidance document.¹⁶⁰

The OECD Phase 2 report concluded with a recommendation:

In the view of the lead examiners, the time has come to explore the need for further forms of guidance, mainly to assist new players [. . .] on the international scene, and to provide a valuable risk management tool to guide com-

¹⁵⁶ See 15 U.S.C. § 78dd-1(d) (1998).

¹⁵⁷ H.R. REP. NO. 100-40, pt. 2 (1987).

¹⁵⁸ *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1029 (6th Cir. 1990).

¹⁵⁹ Anti-bribery Provisions, 55 Fed. Reg. 28,694 (July 12, 1990).

¹⁶⁰ See Org. for Econ. Co-operation and Dev. [OECD], Report on Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions 8 (Oct. 2002), available at <http://www.justice.gov/criminal/fraud/fcpa/docs/oeed-Phase-2-report.pdf>.

panies through some of the pitfalls which might arise in structuring international transactions involving potential exposures.¹⁶¹

In 2010, the OECD, this time in its October 2010 Phase 3 Report of the U.S., reiterated their previous recommendation, stating, “The evaluators recommend that the United States consider consolidating and summarizing [all relevant sources of FCPA information] to ensure easy accessibility, especially for [companies] which face limited resources.”¹⁶²

Despite Congress suggesting FCPA guidance in 1988, and repeated OECD recommendations for guidance in 2002 and 2010, the DOJ refused to issue guidance. For instance, in the aftermath of a November 2010 Senate FCPA hearing, Senator Amy Klobuchar asked the DOJ, “Do you believe companies could comply with more certainty with the FCPA if they were provided with more generally-applicable guidance from the Department in regards to situations covered by the FCPA that are not clear cut or fall into ‘gray’ area?”¹⁶³ The DOJ response was that it “believes it provides clear guidance with respect to FCPA enforcement through a variety of means” and it then listed the same general categories of information the OECD identified in 2002 as being deficient.¹⁶⁴

The enforcement agencies state in the November 2012 Guidance that it was partially issued to respond to the OECD’s Phase 3 recommendations.¹⁶⁵ However, the DOJ’s above response *after* the OECD Phase 3 recommendations calls this motivation into question.

Another likely motive for issuing the Guidance was the enforcement agencies’ desire to forestall the introduction of an actual FCPA reform bill. As to this issue, the following background is relevant. After the November 2010 Senate FCPA hearing, FCPA reform gained steam heading into a June 2011 House hearing. The House hearing evidenced bi-partisan support for certain aspects of FCPA reform, and at the conclusion of the hearing Chair James Sensenbrenner stated that his committee would draft an FCPA reform bill.¹⁶⁶ Against

¹⁶¹ *Id.* at 10.

¹⁶² See OECD Phase 3, *supra* note 48, at 29-30.

¹⁶³ See *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. (2010), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg66921/pdf/CHRG-111shrg66921.pdf>.

¹⁶⁴ *Id.*

¹⁶⁵ See RESOURCE GUIDE, *supra* note 40, at 8.

¹⁶⁶ See *Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary House of Representatives*, 112th Cong. 112-47 (2011), available at http://judiciary.house.gov/hearings/printers/112th/112-47_66886.PDF.

this backdrop, in November 2011, only then did Assistant Attorney General Breuer announce the DOJ's intention to issue FCPA guidance.¹⁶⁷ Those on Capitol Hill who were inclined to introduce an actual FCPA reform bill said that they would await the DOJ's FCPA guidance before introducing such a bill.¹⁶⁸ That the Guidance was issued very soon after the November 2012 presidential election, during a lame duck Congress, suggests that the issuance and the timing of the Guidance was in part political. Regardless of the enforcement agencies' motivations in issuing the Guidance when they did, it is telling that it took over a year from the time of Breuer's announcement to issue the Guidance. After all, both the DOJ and SEC have specific FCPA units, and both enforcement agencies have indicated, in various ways and in various settings, that the FCPA is a clear and unambiguous statute.

While the Guidance is a useful resource guide for which the enforcement agencies deserve credit, it should have occurred a long time ago, leaving people to wonder what if the Guidance had been issued two, ten, or even twenty-four years ago.

b. Overview

The Guidance represents the DOJ and SEC's interpretations of the FCPA and the agencies' "enforcement approach and priorities."¹⁶⁹ The Guidance begins with the enforcement agencies' positions on the FCPA's anti-bribery records and internal control provisions.¹⁷⁰ It then looks at other related areas of substantive law, such as the Travel Act and Dodd-Frank's whistleblower provisions.¹⁷¹ Next, the Guidance sets forth principles of enforcement which cover, among other topics, opening an FCPA investigation, bringing FCPA charges, voluntary disclosure, effective compliance programs, and types of FCPA resolutions.¹⁷² The Guidance is supplemented throughout the text by eighteen hypotheticals (including sub-parts), which range from jurisdictional issues to gifts, travel and entertainment; facilitation payments; successor liability; and third party due diligence; as well as twelve vignettes (information set apart from the text), which discuss a range of issues from issuer status to obtaining and retaining business;

¹⁶⁷ See Lanny A. Breuer, *supra* note 152.

¹⁶⁸ See, e.g., Christopher M. Matthews, *Rep. Scott Hopeful for FCPA Guidance*, Wall St. J. (Feb. 8, 2012), available at <http://blogs.wsj.com/corruption-currents/2012/02/08/rep-scott-hopeful-for-fcpa-guidance/>.

¹⁶⁹ See RESOURCE GUIDE, *supra* note 40, at foreword.

¹⁷⁰ See *id.* at 10.

¹⁷¹ See *id.* at 48, 82.

¹⁷² See *id.* at 52-63.

as well as numerous other issues such as charitable donations and routine government action.

Although the Guidance is a meaty 130 pages, there is less actual guidance in the document than one might initially think. For instance, introductory material, blank pages and a table of contents account for 35 pages; the FCPA statute itself and footnotes account for 30 pages; and a summary of previously issued guidelines, such as the DOJ's Principles of Federal Prosecution of Business Organizations, the U.S. Sentencing Guidelines, the DOJ's FCPA Opinion Procedure program, or other substantive laws account for 20 pages. The portions of the Guidance that can accurately be described as guidance represent little new substantive information to those previously knowledgeable about the FCPA. Indeed, in a press conference introducing the Guidance, Assistant Attorney General Breuer said that the Guidance "does not represent a change in policy."¹⁷³

Moreover, the Guidance provides the following qualification as to the actual guidance in the document:

[The Guidance] is non-binding, informal, and summary in nature, and the information contained herein does not constitute rules or regulations. As such, it is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, that are enforceable at law by any party, in any criminal, civil, or administrative matter. [. . .] It does not in any way limit the enforcement intentions or litigating positions of [the DOJ, the SEC] or any other U.S. government agency.¹⁷⁴

Nevertheless, the Guidance is undeniably a useful resource of the enforcement agencies' FCPA policies and positions. Robert Khuzami, the SEC Enforcement Division Director, stated that the Guidance provides a "unique opportunity" for the enforcement agencies to "communicate directly" with the business community regarding its FCPA enforcement policies and positions.¹⁷⁵

This is indeed the greatest utility of the Guidance. Prior to the Guidance, the FCPA had a certain "luncheon law" aspect to it, where FCPA Inc. would host and attend high-priced events at which enforcement agency officials would speak to private audiences.¹⁷⁶ FCPA Inc. would then filter and convey the information to actual or prospective

¹⁷³ See *The Guidance Press Conference*, FCPA Professor (Nov. 15, 2012), <http://www.fcpaprofessor.com/the-guidance-press-conference>.

¹⁷⁴ See RESOURCE GUIDE, *supra* note 40, at aii.

¹⁷⁵ See *The Guidance Press Conference*, *supra* note 173.

¹⁷⁶ See *Addressing the "Luncheon Law" Nature of the FCPA*, FCPA PROFESSOR (Nov. 15, 2011), <http://www.fcpaprofessor.com/addressing-the-luncheon-law-nature-of-the-fcpa>.

business clients, and the enforcement agencies were willing participants in this dynamic and certain former FCPA enforcement officials had their professional profiles enhanced by it.

While the Guidance will not completely stop this dynamic, it means that this dynamic will not be the primary source of FCPA information as it once was. With the Guidance, any businessperson in the world can now print off a single document and read unfiltered information regarding the enforcement agencies' policies at their desk. In short, the Guidance is a useful resource of the enforcement agencies' FCPA policies and positions because it collects in one document information that was previously scattered.

Another use of the Guidance is that it can serve as a measuring stick for future enforcement agency activity. Jeffrey Knox, Deputy Chief of the DOJ Fraud Section, stated that the legal community can have faith that the enforcement agencies will act consistently with the Guidance.¹⁷⁷ Many will be watching. In this regard the following Guidance statements are noteworthy because past FCPA enforcement actions, in whole or in part, have seemingly run counter to the statements.

- “[T]he FCPA does not cover every type of bribe paid around the world for every purpose . . .”¹⁷⁸
- “The corrupt intent requirement [of the FCPA] protects companies that engage in the ordinary and legitimate promotion of their business while targeting conduct that seeks to improperly induce officials into misusing their positions.”¹⁷⁹
- “[A]s a practical matter, an entity is unlikely to qualify as an instrumentality [of a foreign government] if a government does not own or control a majority of its shares.”¹⁸⁰
- “Successor liability does not [. . .] create liability where none existed before. For example, if an issuer were to acquire a foreign company that was not previously subject to the FCPA’s jurisdiction, the mere acquisition of that foreign company would not

¹⁷⁷ Stacy M. Sprekel, *FCPA Regulators Speak on Newly Released FCPA Guidance and Reiterate Unwavering Commitment to FCPA Enforcement*, Morrison & Foerster (Nov. 20, 2012), <http://www.mofo.com/files/Uploads/Images/121120-FCPA-Guidance.pdf>.

¹⁷⁸ See RESOURCE GUIDE, *supra* note 40, at 14.

¹⁷⁹ *Id.* at 15.

¹⁸⁰ *Id.* at 21.

retroactively create FCPA liability for the acquiring issuer.”¹⁸¹

- “The ‘in reasonable detail’ qualification [of the FCPA’s books and records provisions] was adopted by Congress ‘in light of the concern that such a standard, if unqualified, might connote a degree of exactitude and precision which is unrealistic.’ [. . .] The term ‘reasonable detail’ is defined in the statute as the level of detail that would ‘satisfy prudent officials in the conduct of their own affairs.’ Thus, as Congress noted when it adopted this definition, ‘[t]he concept of reasonableness of necessity contemplates the weighing of a number of relevant factors, including the costs of compliance.’”¹⁸²
- “[The FCPA’s internal control provisions] define ‘reasonable assurances’ as ‘such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.’ The Act does not specify a particular set of controls that companies are required to implement. Rather, the internal controls provisions gives companies the flexibility to develop and maintain a system of controls that is appropriate to their particular needs and circumstances.”¹⁸³
- “Companies may not be able to exercise the same level of control over a minority-owned subsidiary or affiliate as they do over a majority or wholly owned entity. Therefore, if a parent company owns less than 50% of a subsidiary or affiliate, the parent is only required to use its best efforts to cause the minority-owned subsidiary or affiliate to devise and maintain a system of internal accounting controls consistent with the issuer’s own obligations under the FCPA.”¹⁸⁴

c. *Grading the Guidance*

The Guidance does not represent the law despite comments from the DOJ that one of its objectives in issuing the Guidance was to outline the law’s content.¹⁸⁵ Congress declares the law and courts interpret the law. The Guidance only represents DOJ and SEC interpre-

¹⁸¹ *Id.* at 28.

¹⁸² *Id.* at 39.

¹⁸³ *Id.* at 40.

¹⁸⁴ *Id.* at 43.

¹⁸⁵ See Sprenkel, *supra* note 177.

tations of the FCPA and its enforcement policies and procedures.¹⁸⁶ Steven Tyrrell, former Chief of the DOJ's Fraud Section during a period of FCPA enforcement escalation, said that the Guidance is "more of a scrapbook of past DOJ and SEC successes than a guide book for companies who care about playing by the rules."¹⁸⁷

Although one would *not* get the impression from reading the Guidance, in certain instances the courts have rejected, in whole or part, what the enforcement agencies say in the Guidance. In this way, the Guidance is an advocacy piece, not a well-balanced portrayal of the FCPA, as it is replete with selective information, half-truths, and some information that is demonstratively false.

Jurisdiction

The Guidance sets forth expansive jurisdictional theories for anti-bribery violations against various foreign actors. Missing from the Guidance, however, is discussion of the DOJ's unsuccessful case against Pankesh Patel, a United Kingdom national who was criminally charged in the Africa Sting case.¹⁸⁸ Among other charges, the DOJ alleged that Patel violated the FCPA's anti-bribery provisions by sending a DHL package from the U.K. to the U.S. containing a purchase agreement in furtherance of the alleged bribery scheme.¹⁸⁹ At the close of the DOJ's case, in what is believed to be the first ever judicial ruling regarding FCPA jurisdiction over foreign actors, Judge Leon rejected the DOJ's "novel interpretation" and granted Patel's motion for acquittal.¹⁹⁰ Instead of discussing or citing this first and only instance of judicial scrutiny, the Guidance cites resolved enforcement actions against foreign actors that were not subjected to any meaning-

¹⁸⁶ See RESOURCE GUIDE, *supra* note 40, at aiv.

¹⁸⁷ Joe Palazzolo, *U.S. Attempts to Clarify Antibribery Law*, Wall St. J. (Nov. 14, 2012), <http://online.wsj.com/article/SB10001424127887324735104578118850181434228.html>.

¹⁸⁸ See Sarah R. Wolff & Leonard E. Hudson, *Following Jurisdictional Victory for UK Citizen, FCPA Africa Sting Case Ends in Mistrial*, REED SMITH - GLOBAL REG. ENFORCEMENT L. BLOG (July 11, 2011), <http://www.globalregulatoryenforcementlawblog.com/2011/07/articles/securities-litigation/following-jurisdictional-victory-for-uk-citizen-fcpa-africa-sting-case-ends-in-mistrial/>. See generally *Indictment, United States v. Patel*, No. 09-CR-338-RJL (D. D.C. Dec. 11, 2009), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/patelp/12-11-09patel-indict.pdf>.

¹⁸⁹ *Indictment*, *supra* note 188, at 9.

¹⁹⁰ See *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>.

ful judicial scrutiny, in what amounts to self-styled prosecutorial common law.¹⁹¹

Obtain or Retain Business

The most disturbing portion of the Guidance concerns the “obtain or retain business” element of the FCPA. The Guidance asserts that the FCPA was amended in 1998 to conform to the OECD Anti-Bribery Convention and these amendments “expanded the FCPA’s scope to: . . . include payments made to secure ‘any improper advantage.’”¹⁹²

By way of background, in 1977, the House and Senate passed different versions of bills that would ultimately become the FCPA.¹⁹³ The House bill did not contain a “business purpose” test, but the Senate bill did. The December 1977 Conference Report stated that:

The House amendment was similar to the Senate bill; however, the scope of the House amendment was not limited by the ‘business purpose’ test. . . . The conferees clarified the scope of the [payment] prohibition by requiring that the purpose of the payment must be to influence any act or decision of a foreign official (including a decision not to act) or to induce such official to use his influence to affect a government act or decision so as to assist an issuer in obtaining, retaining or directing business to any person.¹⁹⁴

The notion that the FCPA’s 1998 amendments conformed the FCPA to the OECD Convention and expanded its scope to include payments made to secure an improper advantage is false.

Indeed, the DOJ’s position on this issue was rejected by both the trial court and appellate court in *U.S. v. Kay*, a case involving payments to Haitian “foreign officials” for the purpose of reducing customs duties and sales taxes owed by a company to the Haitian government.¹⁹⁵ The trial court decision stated

The OECD Convention had asked Congress to criminalize payments made to foreign officials “in order to obtain or retain business or other improper advantage in the conduct of international business.” Congress again de-

¹⁹¹ See Michael Levy, *Prosecutorial Common Law*, FCPA Professor (Mar. 16, 2011), <http://www.fcprofessor.com/prosecutorial-common-law>.

¹⁹² See RESOURCE GUIDE, *supra* note 40, at 4.

¹⁹³ See H.R. Rep. No. 94-831 (1977).

¹⁹⁴ *Id.* at 12.

¹⁹⁵ *U.S. v. Kay*, 200 F.Supp.2d 681, 682 (S.D. Tex. 2002).

clined to amend the “obtain or retain business” language in the FCPA.¹⁹⁶

Although the Fifth Circuit overruled the trial court’s decision to grant the defendants’ motion to dismiss, the appellate court likewise echoed the trial court concerning the FCPA’s 1998 amendments, stating “When Congress amended the language of the FCPA, however, rather than inserting ‘any improper advantage’ immediately following ‘obtaining or retaining business’ within the business nexus requirement (as does the Convention), it chose to add the ‘improper advantage’ provision to the original list of abuses of discretion in consideration for bribes that the statute proscribes.”¹⁹⁷

The Guidance rightly discusses *Kay*, the only case law of precedent on the FCPA’s “obtain or retain business element,” and accurately states that payments outside the context of foreign government procurement “could” fall within the meaning of the FCPA.¹⁹⁸ However, the Guidance discussion is downright disturbing given its selective discussion of *Kay*. For instance, the Guidance does not mention that the Fifth Circuit specifically rejected the DOJ’s broad interpretation of the “obtain or retain business” element.¹⁹⁹

If the government is correct that anytime operating costs are reduced the beneficiary of such advantage is assisted in getting or keeping business, the FCPA’s language that expresses the necessary element of assisting in obtaining business would be unnecessary, and thus surplusage – a conclusion that we are forbidden to reach.²⁰⁰

The court also stated that there will be instances in which payments merely increase the profitability of an existing company and thus presumably do not assist the payor in obtaining or retaining business.²⁰¹

The Guidance also does not mention the two other times in FCPA history that the enforcement agency’s position that payments outside the context of foreign government procurement violated the FCPA came under judicial scrutiny. The first occurred in 1990, when a court granted Alfredo Duran’s motion for acquittal in an FCPA action alleging payments to officials of the Dominican Republic in order to obtain the release of two aircrafts seized by the government.²⁰² The

¹⁹⁶ *Id.* at 686 n. 6.

¹⁹⁷ *United States v. Kay*, 359 F.3d 738, 745 (5th Cir. 2004).

¹⁹⁸ *See* RESOURCE GUIDE, *supra* note 40, at 13.

¹⁹⁹ *See Kay*, 359 F.3d at 744.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *See United States v. Duran*, No. 89-802-CR-KEHOE (S.D. Fla. Apr. 17, 1990) (granting Duran’s Motion for Judgment of Acquittal), available at <http://www.scribd.com/doc/92621550/USA-v-Pou-Et-Al-Judgment-of-Acquittal-Alfredo-Duran>.

second occurred in 2002, when a court granted Eric Mattson and James Harris' motion to dismiss an SEC FCPA action based on alleged goodwill payments to an Indonesian tax official.²⁰³

The Guidance boldly states that payments made to secure favorable government treatment regarding taxes, customs, and licensing or "to obtain government action to prevent competitors from entering a market. . . all satisfy the business purpose test."²⁰⁴ However, the above information indicates something much different when the enforcement agencies are held to their burdens of proof. In an interesting twist, the Guidance even cites in a footnote the most relevant legislative history on this issue – House Report No. 95-460.²⁰⁵ House Report No. 95-460 states that the bill, which would become the FCPA, does not "reach payments made to secure permits, licenses, or the expeditious performance of similar duties of an essentially ministerial or clerical nature which must of necessity be performed in any event."²⁰⁶ The Guidance again opts for citation to self-styled prosecutorial common law, rather than faithfully summarizing *Kay* or mentioning other similar cases when discussing the "obtain or retain business" element

Foreign Official

The Guidance's discussion of the "foreign official" element of an FCPA anti-bribery violation is likewise deficient and disturbing. For starters, even though the Guidance contains eighteen hypotheticals and twelve vignettes, the Guidance does not contain any hypotheticals concerning the important "foreign official" element of an FCPA anti-bribery violation.

The DOJ's position on this important FCPA element has become so discombobulated that it was probably easiest to take a pass. The Guidance, for instance, states that the FCPA "covers corrupt payments to low-ranking employees and high-level officials alike."²⁰⁷ However, it fails to discuss the DOJ's 2012 Opinion Procedure Release, which focuses not on an individual's status, but duties, such as

²⁰³ See Securities Exchange Comm'n v. Mattson, No. H-01-3106 (S.D. Tex. Sept. 6, 2002), available at <http://www.scribd.com/doc/83019022/SEC-v-Eric-Mattson-and-James-Harris>.

²⁰⁴ See RESOURCE GUIDE, *supra* note 40, at 13.

²⁰⁵ See *id.* at 111 n. 160.

²⁰⁶ H.R. Rep. No. 95-460, at 9 (Sept. 28, 1977), available at <http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf>.

²⁰⁷ See RESOURCE GUIDE, *supra* note 40, at 20.

whether an individual has control over the levers of governmental power, in determining whether an individual is a “foreign official.”²⁰⁸

Moreover, the Guidance also creates a situation where the government now has two “instrumentality” positions. In pertinent part, the FCPA guidance states that “an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares, . . . [but] there are circumstances in which an entity would qualify as an instrumentality absent 50% or greater foreign government ownership.”²⁰⁹ The Guidance then lists the Alcatel-Lucent enforcement action, as an example in which the enforcement agencies asserted that Telekom Malaysia Berhad was a state-owned and controlled entity, even though the Malaysian Ministry of Finance actually owned less than 50% of the shares, because the Ministry of Finance was a “special shareholder” with apparent veto power over major expenditures and control over important operational decisions.²¹⁰

This stance on instrumentality conflicts with a recent rule promulgated by the SEC, which co-authored the Guidance, in connection with Section 1504 of Dodd-Frank. Section 1504 defines “foreign government” to mean a “department, agency or instrumentality of a foreign government, or a company owned by a foreign government, as determined by the Commission.”²¹¹ The SEC stated that, “the final rules clarify that a company owned by a foreign government is a company that is at least majority-owned by a foreign government.”²¹²

The Guidance also selectively references “foreign official” information. In one instance, for example, the Guidance discusses “foreign official” jury instructions.²¹³ Yet missing from the discussion is any reference of the Carson enforcement action in which the judge included in the jury instructions a section titled “knowledge of status of foreign official.” This instruction stated:

The payment or gift at issue [. . .] was to (a) a person the defendant knew or believed was a foreign official or (b) any person and the defendant knew that all or a portion of such money or thing of value would be offered, given, or promised (directly or indirectly) to a person the defen-

²⁰⁸ See DEPT. OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT REVIEW - OPINION PROCEDURE RELEASE, No. 12-01, at 7 (2012), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2012/1201.pdf>.

²⁰⁹ See RESOURCE GUIDE, *supra* note 40, at 21.

²¹⁰ See *id.* at 21.

²¹¹ See SECURITIES & EXCHANGE COMM’N, DISCLOSURE OF PAYMENTS BY RESOURCE EXTRACTION ISSUERS, RIN 3235-AK85, 7 (2012), available at <http://www.sec.gov/rules/final/2012/34-67717.pdf>.

²¹² *Id.* at 101.

²¹³ See RESOURCE GUIDE, *supra* note 40, at 20.

dant knew or believed to be a foreign official. Belief that an individual was a foreign official does not satisfy this element if the individual was not in fact a foreign official.²¹⁴

Also missing from Guidance “foreign official” jury instruction discussion is how Judge Hughes instructed the jury in the DOJ’s failed prosecution of O’Shea. Judge Hughes included, as part of the “foreign official” jury instruction,

The Commission [the Mexican utility at issue] is not an integral part of a foreign government’s public function merely because it is government owned. It must be exercising a public governmental function. An official of a public agency does not perform a governmental function when his agency operates in his area substantially as a private agency — as its private agency competitors do, without preferences, subsidies or other privileges. [. . .] To the extent that a part of the Commission operates a business on substantially the same terms as private companies, its officers in that part are not public officials.²¹⁵

Other misleading “foreign official” information is included in the Guidance. Consistent with its prosecutorial common law approach, the Guidance states that the “DOJ and SEC have pursued cases involving instrumentalities since the time of the FCPA’s enactment” and that the “second-ever FCPA case charged by the DOJ” involved bribes to executives of the Mexican national oil company.²¹⁶ Missing from this discussion or associated citations, however, is the fact that the jury found George McLean not guilty.²¹⁷ Next, the Guidance refers to the ABB case involving payments to officials of “a state-owned and controlled electricity commission,”²¹⁸ while failing to mention the DOJ’s failed prosecution of O’Shea, who was employed with ABB. The Guidance also references the Haiti Teleco case involving payments to employees of Haiti’s “state-owned and controlled telecommunications company”²¹⁹ without mentioning that Haiti’s Prime Min-

²¹⁴ See *Checking in on the Carson Case*, FCPA PROFESSOR (Mar. 8, 2012), <http://www.fcpaprofessor.com/checking-in-on-the-carson-case>.

²¹⁵ See *Did ‘Foreign Official’ Impact the O’Shea Acquittal*, FCPA PROFESSOR (July 11, 2012), <http://www.fcpaprofessor.com/did-foreign-official-impact-the-oshea-acquittal>.

²¹⁶ See RESOURCE GUIDE, *supra* note 40, at 20-21.

²¹⁷ See *U.S. v. McClean*, Doc. No. H-82-224-07 (S.D. Tex. 1985), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/crawford-enterprises/1985-05-17-crawford-enterprises-judgment-mcleang.pdf>.

²¹⁸ See RESOURCE GUIDE, *supra* note 40, at 21.

²¹⁹ See *id.*

ister has publically said, “Teleco has never been and until now is not a state enterprise” or that that the case had not been fully resolved.²²⁰

d. Despite the Guidance, Much About FCPA Enforcement Remains Opaque

At the Guidance press conference, Assistant Attorney General Breuer stated that the DOJ strives to be “transparent” as to its FCPA enforcement program.²²¹ Breuer characterized the Guidance as a bold manifestation “of [the DOJ’s] transparent approach to enforcement” in subsequent public comments.²²²

However, much about FCPA enforcement remains opaque despite enforcement agency claims that the Guidance evidences FCPA enforcement transparency. For instance, the DOJ admits to a historical practice of secret FCPA enforcement in a particularly revealing footnote.²²³ Elsewhere, the Guidance hints at non-prosecution agreements with individuals to resolve FCPA scrutiny that never have been made public.²²⁴

In addition, the Guidance states that the

DOJ has declined to prosecute both individuals and corporate entities in numerous cases based on the particular facts and circumstances presented in those matters, taking into account the available evidence. To protect the privacy rights and other interests of the uncharged and other potentially interested parties the DOJ has a long-standing policy not to provide, without the party’s consent, non-public information on matters it has declined to prosecute.²²⁵

Charles Duross, current Chief of the DOJ’s FCPA Unit, subsequently stated that the DOJ “decline[s] on a regular basis, but we don’t publicize it.”²²⁶ Transparency is a fundamental tenant of the rule of law and the Guidance demonstrates that FCPA enforcement frequently falls short of this basic goal.

²²⁰ See e.g., *Stunning Haiti Teleco Development*, FCPA PROFESSOR (Aug. 29, 2011), <http://www.fcprofessor.com/stunning-haiti-teleco-development>.

²²¹ See *The Guidance Press Conference*, *supra* note 173.

²²² See *id.*

²²³ See GUIDANCE, *supra* note 40, at 118 n. 379 (“Historically, DOJ had, on occasion, agreed to DPAs with companies that were not filed with the court. That is no longer the practice of DOJ.”).

²²⁴ *Id.* at 75.

²²⁵ *Id.*

²²⁶ *FCPA Chief Duross to Corporate Crime Defense Lawyers: Don’t BS US*, CORP. CRIME REP. (Nov. 15, 2012), <http://www.corporatecrimereporter.com/news/200/fcpadurossbrockmeyer11152012/>.

Much of the buzz surrounding the Guidance concerns six anonymous examples of matters DOJ and SEC apparently declined to pursue, including a discussion of the facts they considered when declining those particular matters.²²⁷ Contrary to the buzz, this is not first time, nor most detailed instance, of the DOJ publicly disclosing FCPA declination decisions.

In the context of 1983 FCPA reform hearings, for example, a House Committee wanted to better understand and assess the DOJ's FCPA enforcement program. To this end, the House Committee requested a variety of information from the DOJ, including its closed FCPA cases. The DOJ responded with "summaries of all closed investigations of alleged FCPA violations" detailing eighty-three investigations, summarized in eighteen pages.²²⁸ More recently, the DOJ provided information concerning its FCPA declination decisions in follow-up answers to questions asked at the June 2011 House FCPA hearing.²²⁹ The information DOJ provided to Congress then is substantively similar to the declination information in the Guidance.

Aside from not being as revolutionary as observers may think, the Guidance declination examples raise more questions than answers. For instance, in three of the examples, it is not even clear based on the information provided that the FCPA was violated.²³⁰ For instance, Example 1 in the Guidance at most indicates that a company received competitor bid information from a third party with connections to a foreign government and discovered various FCPA red flags during an internal investigation.²³¹ Example 4 at most shows that a customs agent engaged by a company's foreign subsidiary made small bribe payments without any discussion of whether the company or its foreign subsidiary possessed the requisite knowledge under the FCPA's third-party payment provisions.²³² Example 5 at most illustrates that a company, in connection with its acquisition of a foreign

²²⁷ See RESOURCE GUIDE, *supra* note 40, at 77-79.

²²⁸ See generally, DEPT. OF JUSTICE, FCPA CASES CLOSED (1983), available at <http://www.scribd.com/doc/114564132> (summarizing cases that the DOJ declined to pursue).

²²⁹ See DOJ Declines to Get Specific In Declination Responses, FCPA PROFESSOR (Oct. 12, 2011), <http://www.fcprofessor.com/doj-declines-to-get-specific-in-declination-responses>.

²³⁰ See, e.g., WILMERHALE, FOREIGN CORRUPT PRACTICES ACT ALERT: DOJ AND SEC ISSUE MUCH ANTICIPATED FCPA GUIDANCE 9 (2012) ("It is also disappointing that some of the examples do not make clear that the conduct met each of the elements of a statutory violation, since the concept of a declination is supposed to be reserved for instances in which the offense is chargeable but the government declines in its own discretion to bring a case.").

²³¹ See RESOURCE GUIDE, *supra* note 40, at 77-78.

²³² See *id.* at 78.

company, learned of potential improper payments without any discussion of whether the foreign company was subject to the FCPA's jurisdiction.²³³ Moreover, in all of the Guidance's examples, the factors motivating the declination decision—such as voluntary disclosure and cooperation, effective remedial measures, and small improper payments—are often found in instances in which FCPA enforcement actions *were brought*.

The Guidance's discussion of these so-called declinations once again raises the pressing question of how the enforcement agencies actually define a "declination." The DOJ has never offered a definition, but they appear to be advocating an expansive definition, perhaps in an effort to portray a fair and balanced FCPA enforcement program. In the criminal context, however, the term "declination" should be reserved for instances in which the DOJ concludes that it can prove beyond a reasonable doubt all the necessary elements of a cause of action yet decides not to pursue the action. Under this definition, many of the Guidance declination examples can be compared to a police officer declining to issue a speeding ticket when the driver was not speeding. This is not a declination. This is what the law commands, and such reasoning applies in the FCPA context as well.

e. Despite the Guidance, FCPA Reform Remains a Viable Issue

Despite issuance of the Guidance and the belief of certain civil society organizations that the Guidance "renders moot" any FCPA reform,²³⁴ FCPA reform remains a viable issue, with practitioners and scholars alike continuing to call for FCPA reform post-Guidance.²³⁵

Indeed what the FCPA needs at this critical juncture is not non-binding enforcement agency guidance, but limited structural reform. Certainly there were some FCPA reform measures, such as abolishing non-prosecution and deferred prosecution agreements, which could have been accomplished through a policy change in the Gui-

²³³ See *id.* at 78-79.

²³⁴ See *Civil Society Organizations Welcome Justice Department and SEC Anti-Corruption Guidance*, FACT COALITION (Nov. 14, 2012), <http://www.financialtaskforce.org/2012/11/14/civil-society-organizations-welcome-justice-department-and-secs-anti-corruption-guidance/>.

²³⁵ See Thomas O. Gorman & McGrath, William P., *FCPA Enforcement: Moving Toward a New Era of Compliance*, 40 SEC. REG. L. J. 342 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=22018312202277; Paul F. Enzinna, *The Foreign Corrupt Practices Act: Aggressive Enforcement and Lack of Judicial Review Create Uncertain Terrain for Businesses*, MANHATTAN INST. FOR POLICY RESEARCH, Jan, 2013, No. 17, at 1, available at http://www.manhattan-institute.org/html/ib_17.htm#notes; Joseph W. Yockey, *Choosing Governance in the FCPA Reform Debate*, 38 J. OF CORP. L. 325 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2202277.

dance.²³⁶ However, other FCPA reform measures, like amending the statute, can only be accomplished through Congressional action and Presidential signature. One such amendment I have long advocated for is a compliance defense, where a company's pre-existing compliance policies and procedures and good-faith efforts to comply with the FCPA are relevant as a matter of law when a non-executive employee or agent acts contrary to those policies and procedures, in violation of the FCPA.²³⁷

At the Guidance press conference, Assistant Attorney General Breuer repeated the DOJ's opposition to such a defense, calling it "dangerous" and a "race to the bottom."²³⁸ The DOJ's opposition to a compliance defense contrasts with several former Attorney Generals and other former high-ranking DOJ officials who have publicly supported a compliance defense.²³⁹ The DOJ's opposition is further contrasted with the fact that several countries that are signatories to the OECD Anti-Bribery Convention, including the United States, have compliance-like defenses in their domestic FCPA-like laws.²⁴⁰

The Guidance contains much discussion on how enforcement agencies purport to reward pre-existing FCPA compliance policies and procedures when making internal charging and other discretionary decisions.²⁴¹ Noticeably missing from the Guidance, however, is any acknowledgment that the enforcement agencies' current position as to FCPA compliance policies and procedures works. In fact, the Guidance surprisingly acknowledges that the current system is *not* working, as it cites survey data that "64% of general counsel whose companies are subject to the FCPA say there is room for improvement in their FCPA training and compliance programs."²⁴²

The DOJ and SEC recognize in the Guidance that "positive incentives" can drive compliant behavior.²⁴³ However, the enforcement agencies current incentive – that such compliance policies and procedures can only lessen the impact of legal exposure – is not the best incentive.

²³⁶ See GET RID OF CORPORATE DEFERRED AND NON PROSECUTION FCPA AGREEMENTS, 26 CORP. CRIME REP. 14 (2012), available at <http://www.corporatecrimereporter.com/koehler03262012.htm>.

²³⁷ See Mike Koehler, *Revisiting An FCPA Compliance Defense*, 2012 WISC. L. REV. 609, 609-10, available at <http://wisconsinlawreview.org/wp-content/files/13-Koehler.pdf>.

²³⁸ See *The Guidance Press Conference*, *supra* note 173.

²³⁹ See Koehler, *supra* note 237, at 651.

²⁴⁰ See *id.* at 611.

²⁴¹ See RESOURCE GUIDE, *supra* note 40, at 56-65.

²⁴² See *id.* at 62.

²⁴³ See *id.* at 59.

An FCPA compliance defense is the best incentive for more robust corporate compliance as it can help reduce improper conduct and thus best advance the FCPA's objective of reducing bribery. In this way, a compliance defense is not a "race to the bottom," but a "race to the top." Such a defense can, among other things, allow the enforcement agencies to better allocate limited prosecutorial resources to cases involving corrupt business organizations and the individuals who actually engaged in the improper conduct, thereby increasing the deterrent effect of FCPA enforcement actions.

2. *Morgan Stanley's So-Called Declination*

Another event made into a prominent story in 2012, largely as a result of a herd mentality that has impacted the nature and quality of certain FCPA reporting, was Morgan Stanley's so-called declination.

In April 2012, the DOJ and SEC announced a joint enforcement against Garth Peterson, a former managing director for Morgan Stanley's real estate business in China.²⁴⁴ The conduct at issue concerned an alleged corrupt real estate investment scheme between Peterson and a Chinese official with whom he had a personal friendship.²⁴⁵ In the DOJ action, Peterson agreed to plead guilty to a one-count criminal information for "conspiring to evade internal accounting controls that Morgan Stanley was required to maintain under the FCPA."²⁴⁶ In the SEC action, Peterson was charged with, among other things, violating the FCPA's anti-bribery and internal controls provisions.²⁴⁷ He agreed to a settlement requiring him to, among other things, pay approximately \$250,000 in disgorgement and relinquish his interest in the real estate.²⁴⁸

What catapulted the Peterson enforcement action to a prominent story in 2012 was not the above conduct, but rather the DOJ's statement declining to criminally prosecute Morgan Stanley for Peterson's conduct. Specifically, the DOJ stated:

After considering all the available facts and circumstances, including that Morgan Stanley constructed and

²⁴⁴ See Press Release, Sec. Exchange Comm'n, SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud (Apr. 25, 2012), available at <http://www.sec.gov/news/press/2012/2012-78.htm> [hereinafter SEC Press Release].

²⁴⁵ *Id.*

²⁴⁶ Press Release, U.S. Dep't of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), available at <http://www.justice.gov/opa/pr/2012/April/12-crm-534.html> [hereinafter DOJ Press Release].

²⁴⁷ SEC Press Release, *supra* note 244.

²⁴⁸ *Id.*

maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials, the Department of Justice declined to bring any enforcement action against Morgan Stanley related to Peterson's conduct. The company voluntarily disclosed this matter and has cooperated throughout the department's investigation.²⁴⁹

The DOJ's declination statement created much buzz and FCPA Inc. participants en masse published client alerts carrying forward the DOJ's statement, touting Morgan Stanley's so-called declination, and using the opportunity to market FCPA compliance services.²⁵⁰ The DOJ's self-described Morgan Stanley declination in April 2012 occurred in the midst of a vibrant FCPA reform debate, including discussion of amending the FCPA to include a compliance defense, and while FCPA Inc. was awaiting FCPA guidance. Keen observers noted the timing, with one law firm client alert stating:

[D]eclination was [possibly] motivated by the enforcement agencies' desire to respond to entreaties from companies and business groups to demonstrate the value of compliance efforts. The Peterson case comes as the DOJ and SEC are drafting long-awaited public guidance on the statute, in the wake of concerns that the implementing regulations for the Dodd-Frank whistleblower provisions gave short shift to corporate compliance efforts.²⁵¹

At a Chief Legal Officer Leadership forum, a general counsel candidly stated:

If you're of a cynical frame of mind like I am, though [of Morgan Stanley's so-called declination], I will tell you that I suspect that this announcement by the Justice Department had as much to do with the effort that the U.S. Chamber of Commerce has been mounting over the last 18 months to try to get Congress to amend the Foreign

²⁴⁹ DOJ Press Release, *supra* note 246.

²⁵⁰ See, e.g., *Morgan Stanley Gets Cooperation Credit in FCPA Settlement: The De Facto "Adequate Procedures" Defense*, ARENT FOX (May 4, 2012), <http://www.arentfox.com/newsroom/alerts/morgan-stanley-gets-cooperation-credit-fcpa-settlements-de-facto-%E2%80%9Cadequate> (stating that Morgan Stanley's so-called declination "shows the government is ready to give a corporation credit for 'adequate procedures' in evaluating any potential FCPA violation").

²⁵¹ Lucinda A. Low et al., *Avoiding FCPA Prosecution For Employee Conduct*, STEPTOE CLIENT ALERT (May 25, 2012), <http://www.steptoec.com/publications-8218.html>.

Corrupt Practices Act as it does with Morgan Stanley's good conduct.²⁵²

Indeed, Morgan Stanley's counsel publicly stated that part of its advocacy in its discussions with the enforcement agencies was to convince them to publicly send a message on compliance, and that the Morgan Stanley/Peterson situation provided an "ideal case to do so."²⁵³ The DOJ embarked on a marketing blitz after its self-described Morgan Stanley declination. In September 2012, Assistant Attorney General Breuer stated,

Because Morgan Stanley voluntarily disclosed Peterson's misconduct, fully cooperated with our investigation, and showed us that it maintained a rigorous compliance program, including extensive training of bank employees on the FCPA and other anti-corruption measures, we declined to bring any enforcement action against the institution in connection with Peterson's conduct. That is smart, and responsible, enforcement.²⁵⁴

The same talking points were also the basis for an October 2012 speech by Breuer in which he stated:

Because Morgan Stanley voluntarily disclosed Peterson's misconduct, fully cooperated with our investigation and showed us that it maintained a rigorous compliance program, including extensive training of bank employees on the FCPA and other anti-corruption measures, we declined to bring any enforcement action against the institution in connection with Peterson's conduct. Prosecutors need to be smart about how they use their discretion in the FCPA context, as in every context. And, as we did in the Peterson case, we always attempt to strike an appropriate balance between vigorous and responsible enforcement.²⁵⁵

Morgan Stanley's FCPA compliance program may have been robust, however, the DOJ's use of Morgan Stanley so-called declination to champion its policy position that a compliance defense is not

²⁵² Larry Boyd, *Session Transcript: Larry Boyd EVP, Secretary & General Counsel Ingram Micro, Inc.*, ARGYLE J. (May 3, 2012), <http://www.argylejournal.com/functions/general-counsel/session-transcript-larry-boyd-evp-secretary-general-counsel-ingram-micro-inc/>.

²⁵³ See *Morgan Stanley's FCPA Declination and the Benefit of Effective Compliance 2012*, DAVIS POLK (Oct. 9, 2012), <http://www.davispolk.com/Morgan-Stanleys-FCPA-Declination-and-the-Benefit-of-Effective-Compliance-10-09-2012/>.

²⁵⁴ Lanny A. Breuer, *supra* note 152.

²⁵⁵ *Id.*

needed was completely off-base.²⁵⁶ The more likely reason Morgan Stanley was not prosecuted for Peterson's actions is because there was no basis to hold Morgan Stanley liable even under lenient *respondeat superior* standards. This is clear from an analysis of the original source documents and indeed the enforcement agencies own statements.

The original source documents evidence the following as to Peterson's involvement in a real estate investment scheme with Chinese Official 1. According to the DOJ's criminal information:

- "Peterson and Chinese Official 1 had a close personal relationship before Peterson joined Morgan Stanley."²⁵⁷
- A shell company used to facilitate the scheme was owned 47% by Chinese Official 1 and 53% by Peterson and a Canadian Attorney.²⁵⁸
- "Without the knowledge or consent of his superiors at Morgan Stanley, Peterson sought to compensate Chinese Official 1";²⁵⁹ and
- "Peterson concealed Chinese Official 1's personal investment [in certain properties] from Morgan Stanley"²⁶⁰
- "Peterson used Morgan Stanley's past, extensive due diligence [as to certain of the investment properties] to benefit his own interests and to act contrary to Morgan Stanley's interests."²⁶¹

Additional original source documents filed in the Peterson case also shed further light on information relevant to Morgan Stanley's so-called declination. In its sentencing submission, the DOJ stated that Peterson "repeatedly and explicitly lied to his Morgan Stanley supervisors and co-workers" concerning the conduct at issue and that "each of Peterson's [Morgan Stanley required FCPA certifications] was but another lie that lulled his employer into trusting Peterson."²⁶² In his

²⁵⁶ See, e.g., Complaint at 12, Sec. & Exch. Comm'n v. Peterson, No. 12-224 (E.D.N.Y. 2012), available at <http://www.sec.gov/litigation/complaints/2012/comp-pr2012-78.pdf>.

²⁵⁷ See generally Charges at 12, U.S. v. Peterson, Cr. No. 12-224 (E.D.N.Y. 2012) available at <http://www.justice.gov/criminal/fraud/fcpa/cases/petersong/petersong-information.pdf>.

²⁵⁸ *Id.* at 5.

²⁵⁹ *Id.* at 13.

²⁶⁰ *Id.* at 14.

²⁶¹ *Id.* at 15.

²⁶² Plaintiff's Sentencing Memo at 5, 8, U.S. v. Peterson, No. 12-224 (E.D.N.Y. 2012) available at <http://www.scribd.com/doc/103148647/DOJ-Sentencing-Memo-Garth-Peterson>.

sentencing submission, Peterson stated that he and the Chinese Official had a close relationship prior to joining Morgan Stanley and that the Chinese Official was a close friend—in many ways a father figure to him—who he helped in order to repay the Chinese Official for giving him help throughout his career.²⁶³ Peterson also asserted that his attempt to influence the “father figure” Chinese Official in the investment project giving rise to the enforcement action was an attempt to recoup an investment for his mother.²⁶⁴ Even Morgan Stanley’s counsel specifically said that Peterson was acting “for his own benefit” and that Morgan Stanley had the advantage of facts because Peterson had “personal interests in the transactions” at issue and that he acted for “his own benefit” not Morgan Stanley’s.²⁶⁵

Consistent with these allegations and assertions, Assistant Attorney General Breuer himself stated that Peterson “actively sought to evade Morgan Stanley’s internal controls in an effort to enrich himself and a Chinese government official.”²⁶⁶ Kara Brockmeyer, Chief of the SEC Enforcement Division’s FCPA Unit, likewise characterized Peterson as a “a rogue employee who took advantage of his firm and its investment advisory clients, Peterson orchestrated a scheme to illegally win business while lining his own pockets and those of an influential Chinese official.”²⁶⁷ Even the presiding judge in Peterson’s case also noted that “it is likely that [Morgan Stanley] would be considered a victim” of Peterson’s conduct.²⁶⁸

Notwithstanding this information, the DOJ continues to sell its Morgan Stanley “declination” and predictably profiled it in the November 2012 Guidance.²⁶⁹ The DOJ’s decision to not criminally charge Morgan Stanley based on Peterson’s conduct was not a declination, rather it was what the law commanded. It is a sorry state of affairs indeed to praise the DOJ for acting in a way the law commands. Certain observers and commentators recognized Morgan Stanley’s so-called declination for what it was.²⁷⁰ However, most did not and sim-

²⁶³ See Defendant’s Sentencing Memo at 10, *U.S. v. Peterson*, No. 12-224 (E.D.N.Y. 2012), available at <http://www.scribd.com/doc/103148964/Garth-Peterson-Sentencing-Memo>.

²⁶⁴ *Id.* at 24.

²⁶⁵ See *Morgan Stanley’s FCPA Declination and the Benefit of Effective Compliance 2012*, *supra* note 253.

²⁶⁶ DOJ Press Release, *supra* note 246.

²⁶⁷ See SEC Press Release, *supra* note 244.

²⁶⁸ *U.S. v. Peterson*, 859 F.Supp. 2d 477, 479 (E.D.N.Y. 2012).

²⁶⁹ See RESOURCE GUIDE, *supra* note 40, at 61.

²⁷⁰ See Lucinda A. Low et al., *Avoiding FCPA Prosecution For Employee Conduct*, STEPTOE CLIENT ALERT (May 25, 2012), <http://www.steptoec.com/publications-8218.html> (“[T]he element of personal benefit derived by Peterson from his conduct is likely significant. [. . .] Such benefits call into question whether Peterson was re-

ply drank the DOJ's "Kool-Aid" evidencing a herd mentality that has impacted the nature and quality of certain FCPA reporting.

3. *Wal-Mart Potential FCPA Exposure*

Wal-Mart's potential FCPA exposure was yet another event made into a prominent story in 2012. High-profile instances of FCPA scrutiny focus attention on the law and its enforcement across a broad spectrum. In the spring of 2012, arguably the most high-profile instance of scrutiny in the FCPA's thirty-five year history occurred as Wal-Mart's alleged conduct in Mexico dominated the news cycle. Wal-Mart's scrutiny has been instructive in many ways at a key point in time for the FCPA, and this section uses Wal-Mart's potential FCPA exposure as a prism to further critically examine the current FCPA enforcement environment. This section addresses (i) whether Congress intended in passing the FCPA to capture the type of payments at issue in Wal-Mart; (ii) what FCPA case law instructs as to the payments; (iii) whether what Congress intended or what courts have concluded even matters; and (iv) the impact of Wal-Mart's scrutiny on the company, as well as industry peers.

a. *The New York Times Articles*

Even though Wal-Mart disclosed FCPA scrutiny in a December 2011 SEC filing,²⁷¹ to the casual observer and many major media outlets, it seemed that Wal-Mart's FCPA scrutiny began on April 21, 2012, when the *New York Times* ran a front-page article titled "Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle."²⁷² The *Times* article was both unremarkable and remarkable.

The unremarkable portion of the *Times* article was that a foreign subsidiary of a multi-national company operating in a FCPA high-risk jurisdiction allegedly made payments to "foreign officials" to facilitate the issuance of certain licenses or permits. The *Times* article

ally acting for the benefit of his employer, a key requirement for corporate vicarious liability. Moreover, it seems clear that the government believes Morgan Stanley was ultimately duped by its employee and entered into transactions in good faith, without knowledge of the personal benefits being derived, despite their controls." See also Michael Volkov, *Corruption, Crime & Compliance*, VOLKOV (Jan. 6, 2013), <http://corruptioncrimecompliance.com/2013/01/five-biggest-fcpa-stories-of-2012/> ("contrary to many commentators, I have never thought the Morgan Stanley case was as significant as others have written. It is a case which is limited by its facts to the actions of a 'rogue' employee.").

²⁷¹ See Wal-Mart, Quarterly Report (Form 10-Q) (Dec. 6, 2011).

²⁷² See generally David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES (Apr. 21, 2012), <http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?pagewanted=all>.

focused on Wal-Mart's largest foreign subsidiary, Wal-Mart de Mexico, and suggested that Wal-Mart Mexico "orchestrated a campaign of bribery to win market dominance" and "paid bribes to obtain permits in virtually every corner" of Mexico.²⁷³ A former Wal-Mart Mexico real estate department executive described how the payments "targeted mayors and city council members, obscure urban planners, low-level bureaucrats who issues permits – anyone with the power to thwart Wal-Mart's growth."²⁷⁴ According to the article, the former executive said the payments "bought zoning approvals, reductions in environmental impact fees and the allegiance of neighborhood leaders."²⁷⁵ According to the *Times*, the idea behind the payments "was to build hundreds of new stores so fast that competitors would not have time to react" and the payments "accelerated growth . . . got zoning maps changed . . . made environmental objections vanish" and that "permits that typically took months to process magically materialized in days."²⁷⁶ Many of the payments were funneled through "trusted fixers, known as 'gestores.'"²⁷⁷ According to the *Times*, Wal-Mart Mexico "had taken steps to conceal [the payments] from Wal-Mart's headquarters in Bentonville, Ark.," and Wal-Mart Mexico's chief auditor altered reports sent to Bentonville discussing various problematic payments.²⁷⁸

By terming a portion of the *Times* article unremarkable, this does not mean to suggest that such payments will not attract scrutiny by the DOJ or SEC. The payments have already attracted scrutiny from the enforcement agencies and Wal-Mart will likely be under FCPA scrutiny for years to come. Rather, the unremarkable portion of the *Times* article, in addition to what is stated above, is that Wal-Mart is now one of approximately one-hundred companies the subject of FCPA scrutiny. Indeed a subsequent *Times* article in November 2012 regarding Wal-Mart's potential exposure, albeit one which received significantly less attention than the April 2012 article, rightly noted

²⁷³ See *id.*

²⁷⁴ See *id.*

²⁷⁵ See *id.*

²⁷⁶ See *id.*

²⁷⁷ See *id.* See also Associated Press, *Wal-Mart Bribery Allegations Put Focus on Mexican Middlemen Used to Grease Bureaucratic Wheels*, CBS NEWS (Apr. 24, 2012), http://www.cbsnews.com/8301-202_162-57419686/wal-mart-bribery-allegations-put-focus-on-mexican-middlemen-used-to-grease-bureaucratic-wheels/ (explaining that stores often "funnel a portion of the fees they charge clients to corrupt officials to smooth the issuance of permits, approvals and other government stamps" and in Mexico "where laws on zoning rules, construction codes and building permits are vague or laxly enforced, the difference between opening a store quickly and having it held up for months may depend on using a gestor.").

²⁷⁸ Barstow, *supra* note 272.

that Wal-Mart's investigation "was uncovering the kinds of problems and oversights that plague many global corporations."²⁷⁹

The remarkable aspects of the *Times* article include the conduct or lack thereof of Wal-Mart and its top executives upon learning of its Mexican subsidiary's conduct. Even in 2005, most business leaders, audit committees, and boards tended to overreact to potential FCPA issues and often reflexively launched broad internal investigations. The payment issues at Wal-Mart Mexico, however, apparently resulted in the opposite at Wal-Mart's corporate headquarters. The *Times* article stated that in 2005:

Wal-Mart dispatched investigators to Mexico City, and within days they unearthed evidence of widespread bribery. They found a paper trail of hundreds of suspected payments totaling more than \$24 million. They also found documents showing that Wal-Mart de Mexico's top executives not only knew about the payments, but had taken steps to conceal them from Wal-Mart's headquarters in Bentonville, Arkansas.²⁸⁰

According to the *Times*, Wal-Mart's lead investigator, a former FBI agent, "recommended that Wal-Mart expand the investigation," but "Wal-Mart's leaders shut it down."²⁸¹ The article states, "in one meeting where the bribery case was discussed, H. Lee Scott, Jr., then Wal-Mart's chief executive, rebuked internal investigators for being overly aggressive."²⁸² The *Times* article also contains several internal documents including law firm Willkie Farr & Gallagher's 2005 "investigative work plan," which called for tracing all payments to anyone who helped Wal-Mart Mexico obtain permits for the previous five years.²⁸³ The *Times* stated that:

Willkie Farr recommended the kind of independent, spare-no-expenses investigation major corporations routinely undertake when confronted with allegations of serious wrongdoing by top executives. Wal-Mart's leaders rejected this approach. Instead, records show, they decided Wal-Mart's lawyers would supervise a far more limited 'preliminary inquiry' by in-house investigators.²⁸⁴

²⁷⁹ Stephanie Clifford & David Barstow, *Wal-Mart Inquiry Reflects Alarm on Corruption*, N. Y. TIMES (Nov. 15, 2012), http://www.nytimes.com/2012/11/16/business/wal-mart-expands-foreign-bribery-investigation.html?pagewanted=all&_r=0.

²⁸⁰ Barstow, *supra* note 272.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ See Barstow, *supra* note 272.

In 2006, Wal-Mart again considered a full investigation of the conduct in Mexico but that, in the end, the company largely delegated responsibility for the investigation to its subsidiary Wal-Mart Mexico.²⁸⁵ Another remarkable aspect of the *Times* investigation revealed how Eduardo Castro-Wright, who was the CEO of Wal-Mart Mexico during a critical time period at issue, was known to be involved in the Mexican payments, but nevertheless thereafter was promoted by Wal-Mart.²⁸⁶

Notwithstanding whatever may have occurred within Wal-Mart in 2005 and 2006 upon learning of potentially problematic payments, the subsequent November 2012 *Times* article suggests that Wal-Mart was pro-actively seeking to understand its FCPA risks long before the front-page *Times* article in April 2012.²⁸⁷ According to the *Times*, Wal-Mart's internal review began in Spring 2011 when Jeffrey Gearhart, Wal-Mart's general counsel, learned of an FCPA enforcement action against Tyson Foods (like Wal-Mart, a company headquartered in Arkansas).²⁸⁸ According to the *Times*, "the audit began in Mexico, China and Brazil, the countries Wal-Mart executives considered the most likely source of problems" and Wal-Mart hired professional accounting and legal firms to conduct the audit.²⁸⁹

The *Times* explosive April 2012 front-page article was followed by another front-page article in December 2012 titled, "*The Bribery Aisle: How Wal-Mart Used Payoffs to Get Its Way in Mexico.*"²⁹⁰ Based on travel to dozens of towns and cities in Mexico, gathering tens of thousands of documents related to Wal-Mart de Mexico permits, and interviewing scores of government officials and Wal-Mart employees, the article, in pertinent part, stated:

The *Times*'s examination reveals that Wal-Mart de Mexico was not the reluctant victim of a corrupt culture that insisted on bribes as the cost of doing business. Nor did it pay bribes merely to speed up routine approvals. Rather, Wal-Mart de Mexico was an aggressive and creative corrupter, offering large payoffs to get what the law otherwise prohibited. It used bribes to subvert democratic governance – public votes, open debates, transparent procedures. It used bribes to circumvent regulatory safe-

²⁸⁵ See *id.*

²⁸⁶ *Id.*

²⁸⁷ See generally Clifford & Barstow, *supra* note 281.

²⁸⁸ See *id.*; Press Release, Dep't of Justice, Tyson Foods Inc. Agrees to Pay \$4 Million Criminal Penalty to Resolve Foreign Bribery Allegations (Feb. 10, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-crm-171.html>.

²⁸⁹ See Clifford & Barstow, *supra* note 281.

²⁹⁰ Barstow, *supra* note 272.

guards that protect Mexican citizens from unsafe construction. It used bribes to outflank rivals. Through confidential Wal-Mart documents, The Times identified 19 stores sites across Mexico that were the target of Wal-Mart de Mexico's bribes. The Times then matched information about specific bribes against permit records for each site. Clear patterns emerged. Over and over, for example, the dates of bribe payments coincided with dates when critical permits were issued. Again and again, the strictly forbidden became miraculously attainable. Thanks to eight bribe payments totaling \$341,000, for example, Wal-Mart built a Sam's Club in one of Mexico City's most densely populated neighborhoods, near the Basilica de Guadalupe, without a construction license, or an environmental permit, or an urban impact assessment, or even a traffic permit. Thanks to nine bribe payments totaling \$765,000, Wal-Mart built a vast refrigerated distribution center in an environmentally fragile flood basin north of Mexico City, in an area where electricity was so scarce that many smaller developers were turned away.²⁹¹

The majority of the article focuses on alleged bribe payments – approximately \$200,000 in all – to build a Wal-Mart de Mexico store in Teotihuacan, a city home to several historical treasures.²⁹² The article's allegations focus on a changed zoning map, various permits and licenses needed for construction, town council approval, potential donations to Mexico's National Institute of Anthropology and History (INAH – the official guardian of Mexico's cultural treasures), and offers of money to neighborhoods to expand its cemetery, pave a road, build a handball court, pay for paint and computers for a school, and build a new office building.²⁹³

Like the April 2012 *Times* article, the article also focused on the conduct of business leaders at corporate headquarters. The *Times* article stated that, “[d]espite multiple news accounts of possible bribes, Wal-Mart's leaders in the United States took no steps to investigate Wal-Mart de Mexico.”²⁹⁴ The article also quotes a Wal-Mart spokesman as saying that while executives in the United States were aware of the controversies surrounding the Teotihuacan store, “none of the [Wal-Mart employees interviewed], including people responsible

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

for real estate projects in Mexico during [the relevant time period] recall any mention of bribery allegations related to the store.”²⁹⁵

While the December 2012 *Times* article provided more factual detail than the original April 2011 article, from an FCPA perspective, the issues largely remain the same. In short, Wal-Mart dominated the news cycle at various points in 2012, not because it joined a list of approximately one-hundred companies the subject of FCPA scrutiny—a fact known by informed observers since December 2011—but rather, because of the conduct or lack thereof of Wal-Mart and its top executives upon learning of potential FCPA issues. Against this backdrop, it is useful to view the Wal-Mart story as a corporate governance sandwich with the FCPA merely as a condiment.

In response to the April 2012 *Times* article, Wal-Mart noted, among other things, that many of the alleged violations were over six years old and that “in a large global enterprise such as Wal-Mart, sometimes issues arise despite our best efforts and intentions.”²⁹⁶ A Wal-Mart statement further stated that, “When [problematic issues arise], we take them seriously and act quickly to understand what happened. We take action and work to implement changes so that the issue doesn’t happen again. That’s what we’re doing today.”²⁹⁷ In response to the December 2012 *Times* article, Wal-Mart stated:

Over the past 20 months, we have made significant improvements to our compliance programs around the world and have taken a number of specific, concrete actions with respect to our processes, procedures and people. Over the past several months we have:

- Established several new compliance positions around the world;
- Directed more than 300 third-party legal and accounting experts who have dedicated in excess of 79,000 hours to this effort;
- Conducted more than 85 in-country visits and more than 1,000 interviews of market personnel;
- Spent more than \$35 million on new processes and procedures; and

²⁹⁵ *Id.*

²⁹⁶ Sam Mamudi, *Wal-Mart: Checking into Mexican corruption claims*, MARKETWATCH (Apr. 21, 2012), <http://www.marketwatch.com/story/wal-mart-checking-into-mexican-corruption-claims-2012-04-21?siteid=rss&rss=1>.

²⁹⁷ *Id.*

- Conducted training sessions attended by more than 19,000 associates.²⁹⁸

b. Issues Raised by Wal-Mart's Scrutiny

In the midst of media feeding frenzies and a divisive company serving as a political punching bag, it may appear old-fashioned to pause and analyze what type of payments Congress intended to capture in passing the FCPA and how courts have interpreted the FCPA in the rare instances FCPA enforcement theories have been subjected to judicial scrutiny. Wal-Mart's FCPA scrutiny, like most other instances of FCPA scrutiny, raises two distinct and important questions that can be asked about most instances of FCPA scrutiny in this new era of FCPA enforcement.

The first and easiest question is, given the DOJ and SEC's current enforcement theories, *can* the Mexican payments in connection with permitting, licensing and inspection issues expose Wal-Mart to an FCPA enforcement action? The answer is likely yes, and in the past few years the enforcement agencies have brought several corporate FCPA enforcement actions premised on payments to obtain foreign licenses, permits and the like.²⁹⁹

The second, more important question is whether Congress, in passing the FCPA, intended to capture payments occurring outside the context of foreign government procurement and involving ministerial and clerical acts by foreign officials. The answer from the FCPA's legislative history is no.

In the mid-1970's Congress learned of a variety of foreign corporate payments to a variety of recipients for a variety of reasons. Congress accepted and acknowledged that it was capturing only a narrow range of foreign payments when it passed the FCPA.³⁰⁰ For instance, the relevant Senate Report stated:

The statute covers payments made to foreign officials for the purpose of obtaining business or influencing legisla-

²⁹⁸ David Tovar, Walmart Vice Pres. Corp. Comm., Walmart Statement in Response to December 17 New York Times Article About Allegations of Corruption in Mexico (Dec. 17, 2012), *available at* <http://news.walmart.com/news-archive/2012/12/17/walmart-statement-in-response-to-new-york-times-article-about-allegations-of-corruption-in-mexico>.

²⁹⁹ See, e.g., Koehler, *supra* note 3.

³⁰⁰ See Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L. J. 929, 931 (2012). See also Declaration of Professor Michael Koehler in Support of Defendants' Motion to Dismiss Count One Through Ten of the Indictment, U.S. v. Carson, Case No. SA CR 09-00077-JVS (C.D. Cal. Feb. 22, 2011), *available at* <http://www.scribd.com/doc/49310598/U-S-v-Stuart-Carson-el-al-Declaration-of-Professor-Michael-Koehler>.

tion or regulations. The statute does not, therefore, cover so-called 'grease payments' such as payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties. [. . .] The committee has recognized that the bill would not reach all corrupt payments overseas.³⁰¹

Likewise, the relevant House Report stated:

The bill's coverage does not extend to so-called grease or facilitating payments. [. . .] The language of the bill is deliberately cast in terms which differentiate between such payments and facilitating payments, sometimes called 'grease payments'. For example, 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 expeditious performance of similar duties of an essentially ministerial or clerical nature which must of necessity be performed in any event. While payments made to assure or to speed the proper performance of a foreign official's duties may be reprehensible in the United States, the committee recognizes that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments. As a result, the committee has not attempted to reach such payments. [. . .] The committee fully recognizes that the proposed law will not reach all corrupt payments overseas.³⁰²

Of particular note to the Wal-Mart payments, Representative Robert Eckhardt (D-TX, a Congressional leader on the foreign payments issue) stated on the House floor merely a month prior to the FCPA's passage that,

Payments to a [foreign official with ministerial or clerical duties] for instance, to complete a form that ought, in equity, to be completed, to give everybody equal treatment, to move the goods off a dock which he will not move without a tip, a mordida, I think, as they call it in the Spanish language, a facilitating payment, or a grease payment, would not constitute a foreign bribe.³⁰³

³⁰¹ S. REP. NO. 95-114, at 7 (1977).

³⁰² H.R. REP. NO. 95-640, at 4-8 (1977).

³⁰³ See 123 CONG. REC. 36306 (daily ed. Nov. 1, 1977) (statement of Rep. Eckhardt).

Consistent with this Congressional intent, the FCPA specifically excluded from the definition of “foreign official” “any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical” when it passed in December of 1977.³⁰⁴ This was the FCPA’s original, albeit indirect, facilitation payment or grease exception. When Congress amended the FCPA in 1988, it, among other things, changed the definition of foreign official by removing this indirect facilitation payment exception from the “foreign official” definition and creating the stand-alone facilitation payment exception currently found in the statute.³⁰⁵ The relevant House Report indicated that Congress did not seek to disturb Congress’s original intent, stating:

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 a much greater impact on foreign policy.³⁰⁶

Even if a payment does not meet the FCPA’s facilitation payments exception, the “obtain or retain business” element, among others, must also be met in order for there to be a violation of the FCPA’s anti-bribery provisions. The enforcement theory likely to be at issue in Wal-Mart has been subjected to judicial scrutiny at least four times. As highlighted above in connection with Guidance discussion of the “obtain or retain business” element: (i) in 1990, a trial court granted Alfredo Duran’s motion for acquittal after the DOJ’s evidence in an FCPA action alleging payments to officials of the Dominican Republic in order to obtain the release of two aircraft seized by the government;³⁰⁷ (ii) in 2002, a trial court granted David Kay and Douglas Murphy’s motion to dismiss a DOJ indictment in an FCPA action

³⁰⁴ See The Foreign Corrupt Practices Act of 1977, 91 Stat. 1494, § 103(b).

³⁰⁵ See 15 U.S.C. § 78dd-1(b).

³⁰⁶ 132 CONG. REC. H2946 (daily ed. May. 20, 1986) (statement of Rep. Dingell & Wirth).

³⁰⁷ See Judgment of Acquittal, *United States v. Duran*, Case No. 89-802-CR-KE-HOE (S.D. Fla. Apr. 17, 1990), available at <http://www.scribd.com/doc/92621550/USA-v-Pou-Et-Al-Judgment-of-Aquittal-Alfredo-Duran>. See also Indictment, *United States v. Duran*, Case No. 89-802-CR-KEHOE (S.D. Fla. Nov. 21, 1989), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/pouj/1989-11-21-pouj-indict-%28pouj-durana-guaschj%29.pdf>.

based on allegations that the defendants made improper payments to Haitian foreign officials for the purpose of reducing customs duties and sales taxes owed to the government;³⁰⁸ (iii) in 2002, a trial court granted a motion to dismiss brought by Eric Mattson and James Harris in an SEC case based on alleged goodwill payments to an Indonesian tax official for a reduction in a tax assessment;³⁰⁹ and (iv) on appeal in the Kay case, the Fifth Circuit held that making payments to a foreign official to lower taxes and custom duties in a foreign country can provide an unfair advantage to the payer over competitors and thereby assist the payer in obtaining and retaining business. Nevertheless, the Fifth Circuit empathically stated that not all such payments to a foreign official outside the context of directly securing a foreign government contract violate the FCPA, it merely held that such payments “could” violate the FCPA.³¹⁰

In short, the enforcement theory that payments to a foreign official outside the context of foreign government procurement fall under the FCPA’s anti-bribery provisions has been subjected to judicial scrutiny four times, and the enforcement agencies lost three of those cases, with the fourth case, the 5th Circuit’s decision in *Kay*, being equivocal. Wal-Mart’s alleged payments logically implicate a key portion from the *Kay* ruling:

There are bound to be circumstances in which such a cost reduction does nothing other than increase the profitability of an already-profitable venture or ensure profitability of some start-up venture. Indeed, if the government is correct that anytime operating costs are reduced the beneficiary of such advantage is assisted in getting or keeping business, the FCPA’s language that expresses the necessary element of assisting is obtaining or retaining business would be unnecessary, and thus surplusage—a conclusion that we are forbidden to reach.³¹¹

c. Do the Issues Even Matter?

In this era of FCPA enforcement, when nearly all corporate settlements are negotiated behind closed doors in Washington D.C., and when NPAs and DPAs are used to resolve nearly every instance of corporate FCPA scrutiny in the absence of meaningful judicial scrutiny, it

³⁰⁸ See *United States v. Kay*, 200 F.Supp.2d 681, 681-82 (S.D.Tex. 2002).

³⁰⁹ See Memorandum and Order, *Sec. and Exchange Comm’n v. Mattson*, Civil Action No. H-01-3106 (S.D. Tex. Sept. 6, 2002), available at <http://www.scribd.com/doc/83019022/SEC-v-Eric-Mattson-and-James-Harris>.

³¹⁰ *United States v. Kay*, 359 F. 3d 738, 740 (2004).

³¹¹ *Kay*, 359 F.3d. at 760.

seems a bit old-fashioned to consider Congressional intent and relevant case law implicated by the Wal-Mart payments. However, the rule of law demands such an analysis.

A logical and practical question thus becomes: does Congressional intent and relevant case law even matter in this new era of FCPA enforcement when enforcement agencies are not held to their burden of proof in corporate enforcement actions and there is no meaningful judicial scrutiny of such actions? As silly and shocking as it may sound, the answer is no, it will not matter if Wal-Mart's payments are the type Congress intended to capture in passing the FCPA, nor will it matter what relevant case law instructs as to the payments.

Sure, Wal-Mart's counsel can make legal and factual arguments behind closed doors in Washington D.C. However, to truly challenge the DOJ in an instance of FCPA scrutiny and hold the DOJ to its high burden of proof at trial, the company must first be criminally indicted, which few corporate leaders are willing to let happen. It is simply easier, more certain, and more cost-efficient to resolve FCPA scrutiny, notwithstanding the enforcement theories or the existence of valid and legitimate defenses. This dynamic is facilitated by the existence of the "carrots" and "sticks" relevant to resolving FCPA enforcement actions. Namely, cooperation and acceptance of responsibility are rewarded, but mounting a legal defense based on the law and facts is not cooperation or acceptance of responsibility, and is thus punished. Indeed, in the FCPA's thirty-five year history, it is believed that only two corporate defendants have held the DOJ to its high burden of proof at trial. Even though the DOJ's ultimate record in those two instances is 0-2,³¹² Wal-Mart will not become the third company in FCPA history to hold the DOJ to its burden of proof.

In the aftermath of the *Times* articles, there was extensive commentary and criticism that Wal-Mart's conduct would result in FCPA liability. One of the most notable instances involved comments made by business mogul Donald Trump, on CNBC's Squawk Box program, during which he called the FCPA a "horrible law."³¹³ However,

³¹² See *One Win, One Loss*, FCPA PROFESSOR (May 16, 2011), <http://www.fcpaprofessor.com/one-win-one-loss>; *Milestone Erased: Judge Matz Dismisses Lindsey Convictions, Says that "Dr. Lindsey and Mr. Lee Were Through a Sever Ordeal" and that Lindsey Manufacturing, a "Small, Once Highly Respected Enterprise. . . Placed in Jeopardy,"* FCPA PROFESSOR (Dec. 1, 2011), <http://www.fcpaprofessor.com/milestone-erased-judge-matz-dismisses-lindsey-convictions-says-that-dr-lindsey-and-mr-lee-were-put-through-a-severe-ordeal-and-that-lindsey-manufacturing-a-small-once-highly-respected-ente>.

³¹³ See Martin Gould, *Trump Slams FCPA Law, Killing American Business*, NEWSMAX (May 15, 2012), <http://www.newsmax.com/Newsfront/Trump-bribery-for-eign-business/2012/05/15/id/439104> (linking to video of Donald Trump on CNBC's Squawk Box).

Trump, like many others commenting on the *Times* articles, conflated the issues and failed to understand the two distinct and important questions that can be asked about many instances of FCPA scrutiny, including Wal-Mart's. First, Wal-Mart's alleged conduct in Mexico, and perhaps similar conduct in other countries, can expose the company to an enforcement action *given the DOJ's and SEC's current enforcement theories*. Second, and more importantly, *Congress did not intend in passing the FCPA to capture payments to foreign officials occurring outside the context of foreign government procurement and involving ministerial and clerical acts*, and the enforcement agencies have an overall losing record on this enforcement theory when subjected to judicial scrutiny.

The answers to these questions do not make the FCPA a "horrible law," but rather suggest that FCPA enforcement has, in many cases, gone off the rail, and many solutions lie not in the statute itself, but in addressing the policies which facilitate such enforcement in this new era.

d. The Impact of Wal-Mart's Scrutiny

Notwithstanding the old fashioned issues rooted in the rule of law discussed above, the fact remains that Wal-Mart's FCPA scrutiny has already, and will continue to impact the company, as well as industry peers.

Investor Reaction

Perhaps the most immediate and tangible impact of Wal-Mart's FCPA scrutiny was investor reaction and the decline in its stock price following the April 2012 *Times* article. On the last trading day before the *Times* article, Wal-Mart's stock closed at \$62.45.³¹⁴ The first trading day after the *Times* article, the stock dropped 4.7% and continued on a downward trend for a few days eclipsing billions of dollars in shareholder value.³¹⁵ Investors were spooked by the intense media coverage and were likely paranoid by some of the wildly speculative comments, including that Wal-Mart could face approximately \$13 billion in ultimate fine and penalty amounts.³¹⁶

³¹⁴ See *Wal-Mart Probe of Possible Briber in Mexico May Prompt Executive Departures*, TELEGRAM (Apr. 23, 2012), <http://www.telegram.com/article/20120423/NEWS/120429851/1237>.

³¹⁵ See Judy Greenwald, *Wal-Mart FCPA Compliance Investigations Could Result in Fines, Penalties Litigation*, BUS. INS. (Nov. 25, 2012), http://www.businessinsur.com/article/20121125/NEWS07/311259975#full_story.

³¹⁶ See Eric Platt, *How A Walmart Bribery Fine Could Spiral Up Over \$13 Billion*, BUSINESS INSIDER (Apr. 23, 2012), http://articles.businessinsider.com/2012-04-23/markets/31385329_1_new-location-international-results-stores. The largest com-

However, it did not take long for Wal-Mart's stock to recover its value. As of this writing, Wal-Mart's stock price is \$79.86 per share³¹⁷ demonstrating that, absent certain limited exceptions, when a company discloses or is otherwise reported to be under FCPA scrutiny, other than a potential temporary decline in a company's stock often based on misinformed doomsday scenarios, the market cares little about FCPA scrutiny and realizes how diluted FCPA enforcement has become in this current era. Indeed, commenting on the rapid rise in Wal-Mart's stock price after the *Times* induced dip, a *Forbes* commentator stated, "My 30 years of experience in the markets has repeatedly shown to me that whenever a company is accused of violations of FCPA, headlines are always scary, but in the end, the downdraft in the stock invariably becomes a buying opportunity."³¹⁸

Lengthy and Costly World-Wide Review

Although investors ultimately yawned at Wal-Mart's FCPA scrutiny, the fact remains such scrutiny will result in a gray cloud hanging over the company for several years. Typically, FCPA scrutiny lasts between two to four years from the point of first disclosure to any enforcement action. In some cases, such as Pfizer's 2012 FCPA settlement, this time period can be between six and eight years.³¹⁹ Wal-Mart is likely to spend hundreds of millions of dollars in professional fees and expenses during this pre-enforcement action phase.³²⁰

Even though FCPA conduct is often highly localized and results from the actions of specific employees facing geographically specific business conditions, the DOJ and SEC will surely be interested in

bined U.S. fine and penalty amount in FCPA history is \$800 million. Press Release, 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), available at <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>.

³¹⁷ *Wal-Mart Stores, Inc. Stock Quote & Summary Data*, NASDAQ, <http://www.nasdaq.com/symbol/wmt> (last visited May 16, 2013).

³¹⁸ Nigam Arora, *Mexican Bribery Gave Me A Chance To Make Money In Wal-Mart*, *FORBES* (May 17, 2012), <http://www.forbes.com/sites/greatspeculations/2012/05/17/mexican-bribery-gave-me-a-chance-to-make-money-in-wal-mart/4/>.

³¹⁹ See e.g., *Of Note From the Pfizer Enforcement Action*, FCPA PROFESSOR (Aug. 9, 2012), <http://www.fcpaprofessor.com/of-note-from-the-pfizer-enforcement-action> (noting the eight year time period from Pfizer's disclosure until resolution of the enforcement action).

³²⁰ For instance, Avon has reportedly spent approximately \$280 million in pre-enforcement action professional fees and expenses since becoming the subject of FCPA scrutiny in 2008. See Samuel Rubinfeld, *Avon Begins FCPA Settlement Talks*, *WALL ST. J.* (Aug. 1, 2012), <http://blogs.wsj.com/corruption-currents/2012/08/01/avon-begins-fcpa-settlement-talks/>.

Wal-Mart's conduct in other jurisdictions besides Mexico. Among other potential areas of inquiry, the enforcement agencies are likely to take a keen interest in how Wal-Mart obtained foreign licenses or permits in other FCPA high-risk jurisdictions. Companies subject to FCPA scrutiny often initiate such lengthy and costly reviews to demonstrate to the enforcement agencies cooperation and a commitment to compliance, mindful that the agencies themselves will soon ask the "where else" question. Indeed, it was soon learned that Wal-Mart's review has expanded beyond Mexico to also include Brazil, China, South Africa, and India.³²¹ Given the expansive enforcement theories discussed above concerning license, permit and related issues, it is highly likely that Wal-Mart will learn of additional instances over the past decade in which someone in its organization made payments similar to the Mexican payments giving rise to its initial FCPA scrutiny.

FCPA Related Civil Suits

Even though courts have held that the FCPA does not contain a private right of action,³²² Wal-Mart's FCPA scrutiny has resulted in a flood of private shareholder lawsuits that will impact the company. Consistent with recent trends in this new era of FCPA enforcement, various plaintiff law firms announced investigations of Wal-Mart, its board, and its executives within days of the April 2012 *Times* article.³²³ Approximately ten days later, civil suits that generally tracked the *Times* article began to pour in as shareholders brought derivative claims against various officers and directors, alleging breach of fiduciary duty as well as shareholder class actions suits to recover for loss in company stock (notwithstanding the stock issues discussed above).³²⁴ At present, at least twelve shareholder suits have been filed against Wal-Mart and/or its officers and directors in the wake of the *Times* article. Even though such suits in the FCPA context rarely survive the motion to dismiss stage, it is not uncommon for companies to settle such claims for millions of dollars, a sum that often represents mere nuisance value for the companies, but a handsome pay day for the plaintiff's firm.³²⁵

³²¹ See Clifford & Barstow, *supra* note 279.

³²² See *Lamb v. Phillip Morris Inc.*, 915 F.2d 1024, 1024 (6th Cir. 1990).

³²³ See e.g., *Kendall Law Group Investigates Wal-Mart Stores, Inc.*, BUSINESSWIRE (Apr. 23, 2012), <http://eon.businesswire.com/news/eon/20120423005443/en/walmart/walmart/wmt>.

³²⁴ See e.g., Stephanie Clifford, *Pension Plan Sues Wal-Mart Officials Over Failures*, N.Y. TIMES (May 3, 2012), http://www.nytimes.com/2012/05/04/business/pension-plan-sues-wal-mart-over-bribery-case.html?_r=2.

³²⁵ *Nice Pay Day, But What Did You Accomplish?* FCPA PROFESSOR (Sep. 20, 2012), <http://www.fcprofessor.com/nice-pay-day-but-what-did-you-accomplish>.

Retail Industry Sweep

As demonstrated in Table I, industry sweeps often serve as the foundation for FCPA enforcement actions. Wal-Mart is clearly not the only company subject to the FCPA that needs licenses and permits when doing business in Mexico or other countries. Thus, it is not surprising that its exposure caused much angst among other retailers and resulted in a sweep of the retail industry. According to a Reuters report, “other retail companies have also since reported to U.S. agencies suspicions of their own potential violations, which in turn has the Justice Department and SEC considering a sweep of the entire industry.”³²⁶

On one level, industry sweeps represent effective law enforcement. Yet on another level, industry sweeps have the potential to turn into boundless enforcement agency fishing expeditions, the cost of which are borne by the companies subject to the sweep. The effects of such boundless sweeps raise a host of legal and policy issues when their origins are based on disputed enforcement theories that the agencies have an overall losing record when subjected to judicial scrutiny.

CONCLUSION

This article has examined and placed in better context prominent FCPA issues from 2012. By doing so, readers should have a more informed base to analyze FCPA enforcement trends, to assess enforcement agency rhetoric and policy positions, and to sift through the mounds of information disseminated by FCPA Inc.

³²⁶ See Aruna Viswanatha, *Exclusive: U.S. Weighs Retail Sweep After Wal-Mart Bribery Scandal*, REUTERS (July 26, 2012), <http://www.reuters.com/article/2012/07/27/us-usa-retail-bribery-idUSBRE86P1TZ20120727>.

