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The SEC and the Foreign Corrupt Practices Act: Fighting Global Corruption Is *Not* Part of the SEC's Mission

BARBARA BLACK*

In recent years, as both the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have stepped up their enforcement efforts, the Foreign Corrupt Practices Act (FCPA) has been the subject of harsh criticism. Although critics have identified a variety of flaws in both the law and its enforcement, no one has seriously questioned a basic policy choice: why an agency whose mission is to protect investors is charged with civil enforcement of the FCPA's anti-bribery provisions. Congress conferred this authority on the SEC in 1977 despite the SEC's statements that it did not fit within its mission. For over twenty years, the SEC brought few actions involving allegations of foreign bribery and supported congressional efforts to consolidate enforcement in DOJ. By contrast, the SEC began to enforce the FCPA in the early 2000s with increasing enthusiasm. It has set up a specialized unit and publicized its large settlements, without ever providing an explanation of how enforcing the foreign bribery provision relates to the SEC's mission "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."

I first review the legislative history, the "quiet" years prior to the early 2000s, and the SEC's aggressive enforcement since then. Next I review academic literature, first, to see if there is a theory to explain the SEC's behavior and, second, to explore the problems of multi-goal agencies. My central argument is that, since combating global corruption is not part of the SEC's mission, enforcement of the FCPA should be consolidated in DOJ. Finally, in Dodd-Frank § 1502 (conflict minerals reporting requirement), Congress made the same mistake: it gave the SEC a power that it does not want and that diverts scarce resources from its core mission.

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* Charles Hartsock Professor of Law and Director, Corporate Law Center, University of Cincinnati College of Law. This paper was prepared for the 2011–2012 *Ohio State Law Journal* Symposium, "The FCPA at Thirty-Five and Its Impact on Global Business," held on March 16, 2012. My understanding of these issues benefited from discussions with Jo Ann Harris, Bradford Mank, and Celia Taylor. Excellent research assistance was provided by Michelle James, UC Law '13 and John Wolfenden, UC Law '12.

I. INTRODUCTION

Recently the Office of Investor Education and Advocacy of the Securities and Exchange Commission (SEC) posted on its website an "Investor Bulletin: The Foreign Corrupt Practices Act—Prohibition of the Payment of Bribes to Foreign Officials."[1] The bulletin provided a concise description of the statute, its enforcement and penalties and explained that it was providing this information "as a service to investors."[2] It did not explain, however, why it thought this was information that investors would find important or useful. This bulletin highlights the conundrum of the SEC's enforcement of the Foreign Corrupt Practices Act (FCPA).

The FCPA, enacted in 1977, has two separate and distinct provisions. The anti-bribery provision prohibits reporting companies from paying bribes to foreign officials to assist in obtaining or retaining business.[3] The accounting provisions require reporting companies to maintain accurate books and records and have a system of adequate internal controls.[4] The SEC and the Department of Justice (DOJ) share enforcement power; the SEC has the authority to enforce the provisions civilly,[5] and DOJ has the authority to bring criminal actions.[6]

Congress gave the SEC civil authority to enforce the statute's anti-bribery provision despite the SEC's statements that the provision did not fit within its mission. Although the SEC routinely brings actions to enforce the accounting provisions, it brought few actions involving allegations of foreign bribes for

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[1] *The Foreign Corrupt Practices Act—Prohibition of the Payment of Bribes to Foreign Officials*, INVESTOR.GOV (Oct. 4, 2011), http://www.investor.gov/news-alerts/investor-bulletins/foreign-corrupt-practices-act-prohibition-payment-bribes-foreign-offi.

[2] *Id.*

[3] Securities Exchange Act of 1934 (Exchange Act) § 30A(a), 15 U.S.C. § 78dd-1(a) (2006).

[4] Exchange Act § 13(b)(2)(A)–(B), 15 U.S.C. § 78m(b)(2)(A)–(B) (2006).

[5] Exchange Act § 21(d), 15 U.S.C. § 78u(d) (2006).

[6] 15 U.S.C. §§ 78dd-1 to -3, 78ff (2006). DOJ also has civil anti-bribery enforcement authority over domestic concerns subject to the FCPA. *Id.* § 78ff.

over twenty years and indeed supported Congressional efforts in the 1980s to consolidate enforcement of the anti-bribery provision in DOJ. In recent years, however, the SEC has aggressively enforced the FCPA, including the creation of a specialized unit devoted to FCPA cases, and has publicized its large settlements. Yet the SEC has never explained how enforcing the anti-bribery provision relates to the SEC's mission "to protect investors, maintain, fair, orderly, and efficient markets, and facilitate capital formation."[7]

My principal argument is that the SEC should devote its attention to those activities that are central to its mission, in particular, its mission to protect investors from securities fraud. The paper proceeds as follows:

Part II describes the circumstances surrounding the enactment of the FCPA and the "quiet years" before the SEC stepped up its enforcement efforts in the early 2000s.[8] I examine the SEC's own statements about the FCPA and its support for proposals to consolidate enforcement of the anti-bribery provision in DOJ. This history makes clear that while the SEC viewed the FCPA's accounting provisions as central to its campaign to improve corporate accountability and governance, the SEC demonstrated little interest in enforcing the anti-bribery provision and never asserted that it was related to the SEC's mission.

Part III describes the new era of aggressive enforcement beginning in the early 2000s and intensifying under the terms of SEC Chairmen Christopher Cox and Mary Schapiro. While the SEC proudly announces its large-dollar amount FCPA settlements, it has not offered a convincing explanation about how these enforcement actions relate to its mission.

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[7] *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, SEC. & EXCHANGE COMMISSION, http://www.sec.gov/about/whatwedo.shtml (last modified July 30, 2012). The SEC frequently refers to itself as the "investor's advocate" and emphasizes its investor protection mission. *See, e.g.*, Mary L. Schapiro, Chairman, Sec. & Exch. Comm'n, Address to the Council of Institutional Investors (Apr. 6, 2009), *available at* http://www.sec.gov/news/speech/2009/spch040609mls.htm (stating that the SEC is "the only federal agency dedicated to looking out for investors").

[8] Statistics about SEC enforcement actions (both judicial and administrative), unless attributed to another source, are from a self-constructed database compiled by reviewing Litigation Releases and Accounting and Auditing Enforcement Releases posted on the SEC website from 1978 through December 31, 2011, supplemented with Westlaw and Lexis searches. SEC FCPA ACTIONS DATABASE (on file with author). If an action named multiple defendants, it was counted as one action; if the SEC simultaneously filed a judicial and an administrative action against the same defendants, it was counted as two actions. *Id.* The SEC FCPA Actions Database includes not only actions where the SEC alleges a § 30A violation, but also those where the factual allegations refer to foreign bribery, even though the alleged violations are only the accounting provisions. *Id.* The SEC itself identifies the latter as FCPA cases in its press releases. *E.g.*, Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Willbros Group and Former Employees with Foreign Bribery (May 14, 2008), *available at* http://www.sec.gov/news/press/2008/2008-86.htm.

Part IV first reviews the academic literature that offers theories to explain agency behavior and finds that it does not provide a convincing explanation for the SEC's about-face. After reviewing recent literature on multiple-goal agencies, I argue that the SEC should redirect its energies to its core mission of investor protection. It is finally time to consolidate enforcement of the FCPA in DOJ.

Finally, Congress should refrain from tasking the SEC with additional responsibilities unrelated to its core mission. The history of the FCPA serves as a cautionary tale. In the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Congress charged the SEC with promulgating rules to implement the "conflict minerals" provision that requires reporting companies to disclose whether they manufacture products using "conflicts minerals" from the Democratic Republic of Congo or contiguous countries.[9] As a result, the SEC has already expended countless hours of staff time in drafting regulations on a politically sensitive issue for which the SEC has no expertise.

II. ENACTMENT OF THE FCPA AND THE "QUIET YEARS"

A. *The Enactment of the FCPA*

The enactment of the FCPA in 1977 is a testament to the force of Stanley Sporkin, the SEC's Director of Enforcement at the time.[10] The SEC had only a few years earlier reorganized the Enforcement Division to centralize most of its enforcement activity in the D.C. office instead of in the SEC's regional offices, thus allowing the division, for the first time, to pursue coordinated enforcement efforts on a national scale.[11] In addition to possessing a larger enforcement staff, Mr. Sporkin had tremendous energy, an inquiring mind, and training as an accountant. During the Watergate investigation, officers of major U.S. corporations testified about corporate political contributions to President Nixon's re-election campaign.[12] Mr. Sporkin has recalled: "After hearing the

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[9] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502(a), 124 Stat. 1386, 2213 (2010).

[10] JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET 540 (3d. ed. 2003) ("No history of the Securities and Exchange Commission would be complete without noting the competence and ingenuity of the [SEC]'s Enforcement Division under its second director, Stanley Sporkin.").

[11] Daniel M. Hawke, *A Brief History of the SEC's Enforcement Program 1934–1981*, SEC HISTORICAL SOCIETY, 25 (Sept. 25, 2002), http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/papers/2000/2002_0925_enforcementHistory.pdf (stating that the questionable payments program demonstrated that the SEC could advance a national agenda in ways not previously possible).

[12] For a full account, see Promotion of the Reliability of Financial Information and Prevention of the Concealment of Questionable or Illegal Corporate Payments and Practices, Exchange Act Release No. 15,570, 16 SEC Docket 1143, 1144 (Feb. 15, 1979) (setting forth background and enactment of FCPA); and SELIGMAN, *supra* note 10, at 539–48.

testimony, several accounting questions immediately sprang to my mind. How did a publicly traded corporation record such an illegal transaction? What, if any, information did the outside auditors have?"[13] He initiated an SEC informal inquiry that revealed instances of illegal and questionable payments that were disguised on the corporate books and records.[14] The SEC's informal inquiry turned into a formal SEC investigation that uncovered evidence of bribes to officials of foreign governments made by many of the nation's leading corporations.[15] Indeed, because of the volume of cases, the SEC instituted what subsequently became a standard enforcement tool—a voluntary disclosure program that required corporations to conduct an independent investigation to determine the scope of the activity, disclose publicly their improper payments, and agree to remediation efforts.[16]

To the SEC, the issue was the "integrity and reliability of the corporate books and records"[17]:

> The almost universal characteristic of the cases reviewed to date by the [SEC] has been the apparent frustration of our system of corporate accountability which has been designed to assure that there is a proper accounting of the use of corporate funds and that documents filed with the [SEC] and circulated to shareholders do not omit or misrepresent material facts. Millions of dollars of funds have been inaccurately recorded in corporate books and records to facilitate the making of questionable payments. Such falsification of records has been known to corporate employees and often to top management, but often has been concealed from outside auditors and counsel and outside directors.
>
> Accordingly, the primary thrust of our actions has been to restore the efficacy of the system of corporate accountability and to encourage the boards of directors to exercise their authority to deal with the issue.
>
> To this end we have sought independent review of past disclosure in our enforcement actions and in our voluntary disclosure program; we have requested the auditing profession to review its procedures and to make

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[13] Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on Its Twentieth Birthday*, 18 NW. J. INT'L L. & BUS. 269, 271 (1998); *see also* SELIGMAN, *supra* note 10, at 539–48 (describing the SEC's early questionable payments investigations).

[14] Sporkin, *supra* note 13, at 271.

[15] *See* U.S. SEC. & EXCH. COMM'N, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 1–57 (1976), *reprinted in Special Supplement*, Sec. Reg. & L. Rep. (BNA) No. 353 (May 19, 1976) [hereinafter SEC REPORT] (describing the SEC's activities, analyzing public information that was disclosed as a result of these activities, and discussing responses of the private sector to the identified problems).

[16] SEC REPORT, *supra* note 15, at 6–12; Sporkin, *supra* note 13, at 273.

[17] SEC REPORT, *supra* note 15, at 3; *see also* Sporkin, *supra* note 13, at 274 ("[W]hat was necessary was a simple law that would require corporations to keep accurate books and records.").

> suggestions for dealing with the problem and we have asked the New York Stock Exchange and others to consider helping us strengthen the ability and resolve of the boards of our major corporations to act independently of operating management.[18]

The questionable payments scandal thus marked the beginning of the SEC's campaign to improve corporate accountability. To that end, the SEC proposed legislation that would:

1. Prohibit falsification of corporate accounting records;
2. Prohibit the making of false and misleading statements by corporate agents to auditors; and
3. "[R]equire management to establish and maintain its own system of internal accounting controls designed to provide reasonable assurances that corporate transactions are executed in accordance with management's general or specific authorization; and that such transactions as are authorized are properly reflected on the corporation's books and records in such a manner as to permit the preparation of financial statements in conformity with generally accepted accounting principles . . . ."[19]

The SEC, however, expressed no views on "whether there should be a general statutory prohibition against the making of certain kinds of foreign payments."[20] This was a question beyond the scope of the SEC's authority and expertise because it "presents a broad issue of national policy with important implications for international trade and commerce, the appropriateness of application of United States law to transactions by United States citizens in foreign countries, and the possible impact of such legislation upon the foreign relations of the United States."[21] Indeed, in written testimony submitted to the Senate Banking Committee on the proposed legislation, SEC Chairman Roderick Hills made clear that:

> [The SEC] would prefer not to be involved in civil enforcement of [the anti-bribery] prohibitions since they embody separate and distinct policies from those underlying the federal securities laws. The securities laws are designed primarily to insure disclosure to investors of all the relevant facts concerning corporations which seek to raise their capital from the public at large. The [anti-bribery] prohibitions . . . , on the other hand, would impose substantive

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[18] SEC REPORT, *supra* note 15, at a–b.
[19] *Id.* at 58–59.
[20] *Id.* at 61.
[21] *Id.* at 61–62.

> regulation on a particular aspect of corporate behavior. . . . [T]he enforcement of such provisions does not easily fit within the [SEC]'s mandate.[22]

Despite the SEC's disclaimer, however, Congress determined to give the SEC the power to bring civil enforcement actions against reporting companies for violations of § 30A, the anti-bribery provision, as well as violations of § 13(b)(2), the books and records and internal controls provisions (collectively, the "accounting provisions"), in large part because of the SEC's early leadership on the issue and its development of expertise in foreign investigations.[23] The Senate Report gave three additional reasons:

1. "If this investigative responsibility were to be assigned solely to the Justice Department . . . that agency would have to duplicate the investigative capability already in the SEC at a greater cost to the Government."[24]
2. "The committee believes this division of responsibility will result in a stronger enforcement effort compared to an exclusive assignment to the Justice Department. It is often difficult to assemble the degree of evidence required in a criminal action, but enough evidence may exist to enable the SEC to halt a continuation of the corrupt practices through an injunctive action."[25]
3. "The committee believes that, by assigning to the SEC enforcement responsibilities for the new prohibition, it will strengthen the [SEC]'s ability to enforce compliance with the existing requirements of the securities laws, and with the new accounting provisions recommended by the [SEC] . . . ."[26]

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[22] *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearing on S. 305 Before the Comm. on Banking, Hous., & Urban Affairs*, 95th Cong. 124–25 (1977) (statement of Roderick Hills, Chairman, U.S. Sec. & Exch. Comm'n); *see also id.* at 111 ("[W]e do not seek nor entirely wish to have the responsibility for stopping these kinds of payments. Because our role in this area is mostly disclosure . . . I hope that over the course of time, the [SEC's] role doesn't change from disclosure to the regulating of corporate conduct.").

[23] S. REP. NO. 95-114, at 11–12 (1977), *reprinted in* 1997 U.S.C.C.A.N. 4098. For a critical contemporary view, see Russell B. Stevenson, Jr., *The SEC and Foreign Bribery*, 32 BUS. LAW. 53, 70 (1976) ("The 'improper payments' controversy focuses the spotlight once more on the almost painful tension between the SEC's view of its proper role in the world—the protection of investors through the medium of disclosure and the regulation of securities markets—and the pressures on it as the only effective agency in the field to do something about corporate management.").

[24] S. REP. NO. 95-114, at 11–12 (1977), *reprinted in* 1997 U.S.C.C.A.N. 4098.

[25] *Id.* at 12.

[26] *Id.*

Congress may also have been concerned that DOJ, as part of the executive branch, might be less enthusiastic about enforcing the FCPA because of foreign policy concerns.[27]

B. *The Corporate Accountability Campaign*

SEC Chairman Harold M. Williams[28] made clear that from the SEC's standpoint the accounting provisions were far more significant than the anti-bribery provision.[29] Indeed, the SEC made few public statements about the anti-bribery provision and expressed little interest in enforcing it. In its first release, which simply provided a brief description of the FCPA's provisions, it noted that "[a] number of inquiries have been received by the staff which relate to the scope of the Act and the applicability of its criminal provisions to specific factual situations."[30] In response, the SEC stated that it "does not intend to render interpretive advice on the applicability of the Act's proscriptions to particular factual situations."[31]

Instead, the SEC remained focused on corporate accountability. The accounting provisions were described as "a measure to foster managerial integrity,"[32] because there was "increasing attention to, and interest in, the effectiveness of internal accounting controls"[33] as a result of the improper payments scandals. As part of its message of corporate accountability, the SEC began to emphasize corporate governance and advocated practices—independent directors and an independent audit committee to exercise oversight

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[27] *See* SELIGMAN, *supra* note 10, at 548 (describing efforts made by Ford administration to remove jurisdiction over questionable payment sanctions from the SEC).

[28] Harold M. Williams was the SEC Chairman from April 18, 1977 until March 1, 1981. *SEC Historical Summary of Chairmen and Commissioners*, SEC. & EXCHANGE COMMISSION, http://www.sec.gov/about/sechistoricalsummary.htm (last modified Aug. 28, 2012) [hereinafter SEC, *Historical Summary*].

[29] Harold M. Williams, Chairman, U.S. Sec. & Exch. Comm'n, Foreign Investment in the United States 20 (June 19, 1979), *available at* http://www.sec.gov/news/speech/1979/061979williams.pdf; *see also* Harold M. Williams, Chairman, U.S. Sec. & Exch. Comm'n, The Role of the SEC in Overseeing the Accounting Profession 40–43 (Mar. 13, 1980), *available at* http://www.sec.gov/news/speech/1980/031380williams.pdf (stating the accounting provisions were the most important of the FCPA).

[30] Notification of Enactment of Foreign Corrupt Practices Act, Exchange Act Release No. 14,478, 14 SEC Docket 180, 183 (Feb. 16, 1978).

[31] *Id.*

[32] Daniel L. Goelzer, *The Accounting Provisions of the Foreign Corrupt Practices Act—The Federalization of Corporate Recordkeeping and Internal Control*, 5 J. CORP. L. 1, 4 (1979). Mr. Goelzer was Executive Assistant to SEC Chairman Williams at the time. *Id.* at 1.

[33] 1979 SEC ANNUAL REPORT 30; *see also* Goelzer, *supra* note 32, at 6 (describing the improper payments as "symptoms of weak corporate accountability and governance mechanisms which transcended the disclosure requirements of the securities laws").

over management and the role of the auditor as an independent gatekeeper[34]—that were not fully achieved until after another era of corporate scandals (Enron, Worldcom, etc.) that resulted in the enactment of the Sarbanes-Oxley Act of 2002.[35] Chairman Williams gave numerous speeches on corporate accountability throughout his tenure.[36] He frequently laid out a vision of the corporate board consisting principally of independent directors and with independent nominating, compensation, and audit committees,[37] and the oversight function performed by the auditor.[38]

The organized corporate bar, recognizing that the SEC was moving beyond its traditional focus on disclosure and materiality,[39] reacted with alarm. An influential ABA committee issued a report describing the accounting provisions as "the most extensive application of Federal law into internal corporate affairs since passage of the 1933 and 1934 Acts"[40] and the statutory language as "simplistic and vague."[41] The report predicted "at least the possibility that the new statute will create extensive new liabilities for corporate managements,

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[34] Goelzer, *supra* note 32, at 33 (noting that the SEC's General Counsel suggested that the accounting provisions could be the basis for requiring corporations to have audit committees and management review of audit controls).

[35] Sarbanes-Oxley Act of 2002 (SOX), Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, & 29 U.S.C.).

[36] Other Commissioners also gave numerous speeches on corporate accountability. *See, e.g.*, John R. Evans, Comm'r, U.S. Sec. & Exch. Comm'n, The Audit Committee and the Internal Auditor: Strengthening Corporate Accountability 4–5 (Nov. 19, 1979), *available at* http://www.sec.gov/news/speech/1979/111979evans.pdf (addressing confusion about what the FCPA accounting provisions require of managers, internal auditors, and audit committees).

[37] Harold M. Williams, Chairman, U.S. Sec. & Exch. Comm'n, Corporate Accountability—One Year Later 23, 26–28 (Jan. 18, 1979), *available at* http://www.sec.gov/news/speech/1979/011879williams.pdf.

[38] Harold M. Williams, Chairman, U.S. Sec. & Exch. Comm'n, Current Problems in Financial Reporting and Internal Controls 21 (Oct. 9, 1978), *available at* http://www.sec.gov/news/speech/1978/100978williams.pdf; Harold M. Williams, Chairman, U.S. Sec. and Exch. Comm'n, The Accounting Profession: Responses to an Environment of Change 13 (Jan. 9, 1979), *available at* http://www.sec.gov/news/speech/1979/010979williams.pdf; Harold M. Williams, Chairman, U.S. Sec. & Exch. Comm'n, The Accounting Profession and the Challenges Ahead 11–12 (Jan. 21, 1981), *available at* http://www.sec.gov/news/speech/1981/012181williams.pdf. He repeatedly stressed the importance of private initiatives by the profession, although two D.C. corporate attorneys described Williams as "a sheep dressed in wolf's clothing." SELIGMAN, *supra* note 10, at 550.

[39] Goelzer, *supra* note 32, at 5.

[40] Comm. on Corporate Law & Accounting, *A Guide to the New Section 13(b)(2) Accounting Requirements of the Securities Exchange Act of 1934*, 34 BUS. LAW. 307, 308 (1978).

[41] *Id.* at 309.

auditors, and corporate counsel, and have sweeping though unintended effects on the working relationships among them."[42]

In February 1979, the SEC adopted two rules to implement the accounting provisions.[43] The adopting release did not alleviate the corporate bar's anxiety. Although the SEC noted commenters' concerns about the breadth of the rules, it rejected calls to include materiality and scienter limitations as inconsistent with the goal of corporate accountability. It also sought to reassure:

> [T]hat the concern expressed with respect to inadvertent and inconsequential errors is unwarranted. The statute does not require perfection but only that books, records and accounts "*in reasonable detail*, accurately and fairly reflect the transactions and dispositions of the assets of the issuer" (emphasis added). In addition, the legislative history reflects that "standards of reasonableness" are to be used in applying this provision.[44]

C. *Push Back*

By the early 1980s, it was clear that corporate resistance to both the accounting and the anti-bribery provisions of the FCPA had not abated. One critic noted that "[t]he Senate Banking Committee demanded a strong criminal statute making bribery punishable by a prison term. The [SEC] demanded greater authority to regulate accounting and bookkeeping practices. So, in the spirit of true Washington compromise, a law was produced that combined the worst of both worlds."[45]

1. *Accounting Provisions*

In March 1981, the General Accounting Office (GAO) released the results of a survey of 250 Fortune 1000 industrial firms that showed widespread

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[42] *Id.* at 308.

[43] 17 C.F.R. § 240.13b2-1 (2004) (prohibiting falsification of corporate records); 17 C.F.R. § 240.13b2-2 (2004) (prohibiting officers and directors from making materially false or misleading statements to accountants in connection with an audit or preparation of SEC filings); *see also* Promotion of the Reliability of Financial Information and Prevention of the Concealment of Questionable or Illegal Corporate Payments and Practices, Exchange Act Release No. 15,570, 16 SEC Docket 1143, 1149 (Feb. 15, 1979).

[44] Promotion of the Reliability of Financial Information and Prevention of the Concealment of Questionable or Illegal Corporate Payments and Practices, Exchange Act Release No. 15,570, 16 SEC Docket 1143, 1151 (Feb. 15, 1979).

[45] *Business Accounting and Foreign Trade Simplification Act: Hearing on S. 708 Before the Subcomm. on Sec. and the Subcomm. on Int'l Fin. & Monetary Policy of the Comm. on Banking, Hous., & Urban Affairs*, 97th Cong. 82 (1981) (statement of Sen. John H. Chafee, Member, Comm. on Banking, Hous., & Urban Affairs). Senator Chafee requested that an article, "No Wonder No Exports" by William Brock, U.S. Trade Representative, which appeared in the Washington Post on May 20, 1981, be included in its entirety in the hearing transcript. *Id.* at 81.

dissatisfaction with the accounting provisions and, in particular, that "business believes compliance is unreasonable without a materiality standard."[46] The GAO recommended that the SEC provide business with further guidance.[47]

The SEC provided assurances that enforcement would not be heavy-handed and encouraged private sector initiatives to improve corporate accountability.[48] For example, in June 1980, the SEC withdrew two proposed rules that would have required management to make a statement on internal accounting control and would have required the company's auditor to report on the management's statement.[49] While it stated that it was withdrawing the proposal in part because of significant private sector initiatives, it also noted the substantial opposition to the proposed rules because of concerns about government over-reaching.[50]

Finally, in January 1981, Chairman Williams made a speech in which he acknowledged the widespread anxiety about the accounting provisions that may have resulted in "overly-burdensome compliance systems."[51] Williams also recognized "meaningful developments within the private sector . . . in the area of corporate accountability": independent directors, audit committees, internal auditors, and the experience factor.[52] Accordingly, he set forth an official statement of SEC policy in which he emphasized that "reasonable business decisions" would be afforded deference and that inadvertent mistakes would not give rise to enforcement actions.[53] Moreover, a company should not "be enjoined for a falsification of which its management, broadly defined, was not

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[46] U.S. GEN. ACCOUNTING OFFICE (GAO), AFMD-81-34, IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS tit. p. (1981).

[47] *Id.* at iii. It also recommended that Congress limit criminal penalties for violations of the accounting provisions to "knowing and willful falsification of corporate books and records." *Id.*

[48] In its 1980 Annual Report, the SEC noted that it had "devoted a great deal of study . . . to comments by corporations and their auditors" about difficulties in complying with the accounting provisions. 1980 SEC ANNUAL REPORT, at viii.

[49] *See* Statement of Management on Internal Accounting Control, Exchange Act Release No. 15,772, 17 SEC Docket 421, 421 (Apr. 30, 1979) (proposal) (*withdrawn in* Statement of Management on Internal Accounting Control, Exchange Act Release No. 16,877, 20 SEC Docket 310, 310 (June 6, 1980)). These were predecessors to the SOX § 404(a) and (b) requirements.

[50] Statement of Management on Internal Accounting Control, Exchange Act Release No. 16,877, 20 SEC Docket 310, 310–11 (June 6, 1980).

[51] *See* Harold M. Williams, Chairman, U.S. Sec. & Exch. Comm'n, The Accounting Provisions of the Foreign Corrupt Practices Act: An Analysis 2 (Jan. 13, 1981), *available at* http://www.sec.gov/news/speech/1981/011381williams.pdf; *see also* Stephen J. Friedman, Comm'r, U.S. Sec. & Exch. Comm'n, The Accounting Provisions of the Foreign Corrupt Practices Act 1 (Feb. 25, 1981), *available at* http://www.sec.gov/news/speech/1981/022581friedman.pdf (stating that controversy over accounting provisions was "a source of deep concern" at the SEC).

[52] Williams, *supra* note 51, at 19–20.

[53] *Id.* at 4.

aware and reasonably should not have known."[54] The SEC described this statement as an "unprecedented step" taken in response to the anxiety within the business and professional communities.[55]

2. *Anti-Bribery Provision*

The 1981 GAO survey also reported that the business community believed that the anti-bribery prohibition was vague, ambiguous, and imposed a competitive disadvantage on them.[56] Although the GAO acknowledged that DOJ had in place a procedure to obtain guidance, the GAO did not believe that it effectively addressed the statute's ambiguities. Accordingly, it recommended that DOJ and the SEC develop alternative ways to address them,[57] advice that was not followed.

In 1980, the SEC, for the first and only time, sought comments on the impact and operation of the anti-bribery provision in order "to understand and evaluate any questions or concerns which may have arisen since [the statute's] enactment."[58] In the release it emphasized again that its interest in improper corporate payments stemmed from concern about "weaknesses in the corporate accountability mechanisms which undergird the disclosure requirements of the federal securities laws."[59] With respect to the anti-bribery provision, it observed that "it has been publicly reported that U.S. corporations are experiencing difficulty in conducting their operations as a result of questions concerning the applicability of the new antibribery prohibitions."[60] Because the SEC had no empirical evidence concerning the law's impact on U.S. businesses, it issued the release to obtain information. The SEC also invited comment on its policy that it would not give advice concerning the applicability of the FCPA to particular transactions.[61]

The SEC received only fourteen comment letters.[62] This was, the SEC decided, "too sparse to permit a fair and comprehensive analysis to be made at this time with respect to the impact and operation of the bribery prohibitions."[63] The SEC also announced that, as a matter of prosecutorial discretion, it would

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[54] *Id.* at 3.

[55] 1980 SEC ANNUAL REPORT, at ix.

[56] GAO, *supra* note 46, at i.

[57] *Id.* at iii.

[58] Impact of the Antibribery Prohibitions in Section 30A of the Securities Exchange Act of 1934, Exchange Act Release No. 16,593, 19 SEC Docket 691, 691 (Feb. 21, 1980).

[59] *Id.* at 692.

[60] *Id.* at 693.

[61] *Id.* at 694–95.

[62] Statement of Commission Policy Concerning Section 30A of the Securities Exchange Act of 1934, Exchange Act Release No. 17,099, 20 SEC Docket 1258, 1262 (Aug. 28, 1980).

[63] *Id.* at 1263.

take no enforcement action alleging violations of the anti-bribery provision if the issuer had obtained assurances from DOJ that it would not take any enforcement action.[64] Both the apparent lack of interest on the part of the business community and the SEC's exercise of prosecutorial discretion may reflect the fact that the SEC had brought only two enforcement actions to date.[65]

3. *The 1981 Hearing*

In response to business concerns, the Senate Banking Committee held a hearing to consider amending the FCPA, at which DOJ[66] and GAO[67] testified in support of consolidating enforcement of the anti-bribery provision in DOJ. The SEC did not oppose the consolidation, stating that "[t]he [SEC]'s primary mission is disclosure to investors, not substantive regulation of commercial transactions."[68] The committee, in fact, did make this recommendation,[69] but Congress did not act upon it.

D. *The Quiet Years*

After Chairman Williams stepped down in 1981, the SEC devoted little attention to either the accounting or the anti-bribery provisions of the FCPA.[70] Instead, Chairman John Shad[71] focused on capital formation issues,[72] and the Enforcement Division returned to core enforcement priorities and insider

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[64] *Id.* at 1265. The SEC subsequently reaffirmed this policy. Statement of Commission Policy Concerning Section 30A of the Securities Exchange Act of 1934, Exchange Act Release No. 18,255, 23 SEC Docket 1457, 1458 (Nov. 12, 1981).

[65] *See* Katy Industries, Litigation Release No. 8519, 1978 WL 207973 (Aug. 30, 1978); Ralph M. Parsons Co., Litigation Release No. 8493, 1978 WL 207948 (Aug. 4, 1978).

[66] *Business Accounting and Foreign Trade Simplification Act: Hearing on S. 708 Before the Subcomm. on Sec. and the Subcomm. on Int'l Fin. & Monetary Policy of the Comm. on Banking, Hous., & Urban Affairs*, 97th Cong. 80 (1981) (statement of Edward C. Schmutls, Deputy Att'y Gen., U.S. Dep't of Justice).

[67] *Id.* at 136 (statements of Sen. John Heinz, Member, Comm. on Banking, Hous., & Urban Affairs and Donald L. Scantlebury, Dir., Accounting & Fin. Mgmt. Div., Gen. Accounting Office).

[68] *Id.* at 278 (statement of John S. R. Shad, Chairman, U.S. Sec. & Exch. Comm'n); *see also id.* at 287 ("Section 30A has not been an important part of the [SEC]'s enforcement authority.").

[69] S. REP. NO. 97-209, at 11 (1981).

[70] *See* Marc I. Steinberg, *The Securities and Exchange Commission's Administrative, Enforcement, and Legislative Programs and Policies—Their Influence on Corporate Internal Affairs*, 58 NOTRE DAME L. REV. 173, 174 (1982) (stating that after Williams' tenure, the SEC retreated from corporate accountability issues).

[71] John Shad was the SEC Chairman from May 6, 1981 until June 18, 1987. SEC, *Historical Summary*, *supra* note 28.

[72] Anne M. Khademian, *The Securities and Exchange Commission: A Small Regulatory Agency with a Gargantuan Challenge*, 62 PUB. ADMIN. REV. 515, 520 (2002).

trading.[73] SEC Commissioners and senior officials did not make major speeches addressing any aspect of the FCPA. In fact, the only reference in a Commissioner's speech during this period was a speech on June 9, 1983 by John Evans, in which he described the anti-bribery provision as based on a national policy unrelated to the objectives of the federal securities laws.[74] The Enforcement Division routinely brought actions for violations of the accounting provisions, but only a very few of them involved alleged violations of the anti-bribery provision.[75] The SEC expressed only intermittent interest in

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[73] Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. ON REG. 149, 199 (1990).

[74] John R. Evans, Comm'r, U.S. Sec. & Exch. Comm'n, Developments in the Regulation of Accounting and Financial Disclosure Under the Federal Securities Acts 10–11 (June 9, 1983), *available at* http://www.sec.gov/news/speech/1983/060983evans.pdf (describing another proposed amendment to consolidate enforcement).

[75] The SEC's Annual Report for fiscal year 1981 reports that the SEC brought five injunctive actions under § 13(b)(2), one of which also alleged violations of anti-bribery provisions. 1981 SEC ANNUAL REPORT 62. The Annual Report for fiscal year 1982 reports that ten cases were brought under the accounting provisions of the FCPA. 1982 SEC ANNUAL REPORT, at vi. The Annual Report for fiscal year 1983 reports twelve such actions. 1983 SEC ANNUAL REPORT 2. In fiscal year 1984, ten actions were brought to enforce the accounting provisions of the FCPA; the Annual Report for fiscal year 1984 simply reports that "[m]any cases concerning financial disclosure by reporting companies also involve enforcement of the accounting provisions of the Foreign Corrupt Practices Act." 1984 SEC ANNUAL REPORT 3. From 1985 through 1997, Annual Reports contain language stating that "[m]any of these [financial disclosure] cases also involve violations of the accounting provisions of the Foreign Corrupt Practices Act." *See, e.g.*, 1985 SEC ANNUAL REPORT 3. In September 1998, an SEC attorney stated that, as of that date, the SEC had brought four actions under the anti-bribery provision and over 300 actions under the accounting provisions. *Hearing on the International Anti-Bribery and Fair Competition Act of 1998 Before the Subcomm. on Fin. & Hazardous Materials of the Comm. on Commerce*, 105th Cong. (statement of Paul V. Gerlach, Assoc. Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n), *available at* http://www.sec.gov/news/testimony/testarchive/1998/tsty1198.txt (For the cases identified as FCPA actions, see Triton Energy Corp., Litigation Release No. 15,396, 1997 WL 348996 (June 26, 1997); Triton Energy Corp., Litigation Release No. 15,266, 1997 WL 94191 (Feb. 27, 1991); Ashland Oil, Inc., Litigation Release No. 11,150, 1986 WL 1166868 (July 8, 1986); Sam P. Wallace Co., Litigation Release No. 9414, 1981 WL 31107 (Aug. 13, 1981); and Katy Industries, Inc., Litigation Release No. 8519, 1978 WL 207973 (Aug. 30 1978)). My own research uncovered an additional six cases during that time period that involved allegations of foreign bribery, although only violations of the accounting provisions were alleged. *See* Montedison, Litigation Release No. 15,164, 1996 WL 673757 (Nov. 21, 1996); Bradley & Assoc., Inc., Litigation Release No. 29,270, 1991 WL 294262 (June 3, 1991); Tesoro Petroleum Corp., Litigation Release No. 9236, 1980 WL 21973 (Nov. 20, 1980); Int'l Sys. & Controls Corp., Litigation Release No. 8815, 1979 WL 174272 (July 9, 1979); Ralph M. Parsons Co., Litigation Release No. 8493, 1978 WL 207948 (Aug. 4, 1978); Page Airways, Inc., Litigation Release No. 8372, 1978 WL 198184 (Apr. 13, 1978).

strengthening corporate accountability and did not adopt any regulations or make any major policy statements relating to corporate governance.[76]

In 1983, the Senate Banking Committee again held a hearing that addressed the consolidation of enforcement within DOJ.[77] Like his predecessor, SEC Chairman Shad testified that "[t]he [SEC]'s primary mission is disclosure, not substantive regulation of commercial transactions. Therefore, repeal of section 30A or consolidation of that requirement within the Justice Department would not impair the SEC's ability to administer the securities laws."[78]

Once again, the Senate Committee recommended consolidation of enforcement of the anti-bribery provisions in DOJ;[79] once again, Congress took no action.[80] Even though Congress amended other provisions of the FCPA in 1988[81] and again in 1998,[82] it has not again seriously considered consolidation.

The 1998 amendments implemented a treaty that established international standards governing foreign corrupt practices.[83] While there were predictions

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[76] The SEC did not propose any rules or issue any interpretive guidance until 1988, when it returned to the issue of corporate accountability and proposed a rule, in response to the Treadway Commission, that would require registrants to include a report of management's responsibilities in their annual reports. Report of Management's Responsibilities, Exchange Act Release No. 25,925, 53 Fed. Reg. 28,009 (July 26, 1988). The SEC did not adopt this proposal, and corporate accountability appeared not to be on the SEC agenda until 1991, when the SEC Annual Report described "[s]ignificant congressional interest in management reports," including a bill (not enacted) that would have required an SEC "study of registrants' compliance with the accounting and internal controls provisions." 1991 SEC ANNUAL REPORT 63.

[77] *Business Accounting and Foreign Trade Simplification Act: Hearing on S. 708 Before the Subcomm. on Int'l Fin. & Monetary Policy and the Subcomm. on Sec. of the Comm. on Banking, Hous., & Urban Affairs*, 98th Cong. (1983).

[78] *Id.* at 49 (statement of John S. R. Shad, Chairman, U.S. Sec. and Exch. Comm'n).

[79] S. REP. NO. 98-207, at 11 (1983).

[80] Consolidation of the anti-bribery provision in DOJ was also proposed in 1986. *See Business Accounting and Foreign Trade Simplification Act: Joint Hearing on S. 430 Before the Subcomm. on Int'l Fin. & Monetary Policy and the Subcomm. on Sec. of the Comm. on Banking, Hous., & Urban Affairs*, 99th Cong. 63 (1986).

[81] *See generally* Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 102 Stat. 1415.

[82] International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3304, 3306.

[83] The Annual Report for fiscal year 1990 reported that SEC staff participated in discussions at the Organization for Economic Co-operation and Development (OECD) regarding the establishment of international standards governing foreign corrupt practices. 1990 SEC ANNUAL REPORT 23. The Annual Report for fiscal year 1994 discussed the SEC's participation, at the direction of Congress, in efforts of the OECD to address the issue of illicit payments. 1994 SEC ANNUAL REPORT 26. The Annual Report for fiscal year 1996 reported that the SEC "contributed to international and U.S. government initiatives to battle corruption and promote practical ways to combat bribery by publicly held companies." 1996 SEC ANNUAL REPORT 33. The SEC, with the Departments of State and Justice, also worked with the OECD Working Group on Bribery to address foreign bribery through accounting

by the time of the 1998 amendments that SEC enforcement might pick up,[84] in fact, the SEC brought no FCPA actions in fiscal year (FY) 1998, FY 1999, and FY 2000.

III. THE ERA OF AGGRESSIVE SEC ENFORCEMENT OF THE FCPA

A. *The SEC: FY 2001 Through FY 2006*

Although the SEC did not signal any change in enforcement policy,[85] the SEC began to enforce the FCPA in earnest in the early 2000s. Beginning with FY 2001, the SEC instituted FCPA proceedings on a regular basis although, through FY 2006, the number of actions in each year remained in the single digits.[86] The SEC began also to highlight selected FCPA actions in SEC Annual Reports as significant enforcement actions.[87]

The SEC also significantly increased monetary sanctions in FCPA cases. In its settlement with ABB Ltd., in July 2004, the SEC employed, for the first time in the FCPA context, the remedial tool that became the SEC's primary remedy—disgorgement of illicit profits ($5.9 million).[88] In addition, the $10.5 million penalty imposed was considerably larger than previous penalties,[89]

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and auditing requirements. *Id.* Finally, the Annual Report for fiscal year 1998 reported that on November 10, 1998, President Clinton signed into law amendments to the FCPA that implemented a treaty negotiated by OECD. 1998 SEC ANNUAL REPORT 87. The SEC had testified in support of these changes. *Id.*

[84] Kathleen A. Lacey & Barbara Crutchfield George, *Expansion of SEC Authority into Internal Corporate Governance: The Accounting Provisions of the Foreign Corrupt Practices Act (A Twentieth Anniversary Review)*, 7 J. TRANSNAT'L L. & POL'Y 119, 146 (1998).

[85] Harvey Pitt was the SEC Chairman from August 2001 until February 2003; William Donaldson was the SEC Chairman from February 2003 until June 2005. SEC, *Historical Summary*, *supra* note 28. Stephen Cutler was the SEC's Director of Enforcement from October 2001 until April 2005. *Enforcement Director Stephen M. Cutler to Leave Commission*, SEC. & EXCHANGE COMMISSION, http://www.sec.gov/news/press/2005-56.htm (last modified Apr. 13, 2005). A search of the SEC website does not show that any of them made any public statements about the FCPA during this period. *See generally Speeches and Public Statements*, SEC. & EXCHANGE COMMISSION, http://www.sec.gov/news/speech.shtml (last visited Oct. 3, 2012).

[86] *See* SEC FCPA ACTIONS DATABASE, *supra* note 8 (revealing the number of actions each year from 2001 through 2006 as seven (FY 01), four (FY 02), four (FY 03), four (FY 04), seven (FY 05), and six (FY 06)).

[87] *See, e.g.*, 2003 SEC ANNUAL REPORT 21 (discussing *In re* Am. Rice Inc.; SEC v. Syncor Int'l Corp.); 2001 SEC ANNUAL REPORT 4–5 (discussing SEC v. Int'l Bus. Machs. Corp.).

[88] SEC Sues ABB Ltd. in Foreign Bribery Case, Litigation Release No. 18,775, 2004 WL 1514888 (July 6, 2004) [hereinafter SEC Sues ABB Ltd. in Foreign Bribery Case].

[89] Previously the largest civil penalty was $500,000. SEC Files Settled Enforcement Action Against Schering-Plough Corporation for Foreign Corrupt Practices Act Violations,

although the significance of this is diminished by the fact that payment was deemed satisfied by two affiliates' payment of criminal fines in parallel DOJ proceedings, in part because of ABB's cooperation with the SEC staff (including self-reporting).[90] Imposition of larger penalties was consistent with a more aggressive enforcement policy generally at the SEC; beginning in 2003, the SEC began levying larger penalties in corporate fraud cases.[91] A survey reports, however, that FCPA cases settle for larger amounts than SEC settlements overall in the post-SOX era.[92]

B. *The Cox and Schapiro Years*[93]

In FY 2007, under the tenure of Chairman Christopher Cox, the SEC not only stepped up its enforcement of the FCPA, but also publicized its FCPA actions, a trend that has continued under the tenure of SEC Chairman Mary Schapiro. In each of the five most recent fiscal years, the SEC has brought FCPA actions in the double-digits,[94] and an SEC press release in October 2008 described FCPA cases as a "growth" area.[95]

Besides the increase in the number of cases, the size of the sanctions also increased significantly, as SEC Enforcement Directors frequently boasted.[96] In

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Litigation Release No. 18,740, 2004 WL 1268036 (June 9, 2004); SEC Obtains $500,000 Penalty Against Syncor International Corporation for Violating the Anti-Bribery Provisions of the Foreign Corrupt Practices Act, Litigation Release No. 17,887, 2002 WL 31757645 (Dec. 10, 2002).

[90] SEC Sues ABB Ltd. in Foreign Bribery Case, *supra* note 88.

[91] Paul S. Atkins & Bradley J. Bondi, *Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program*, 13 FORDHAM J. CORP. & FIN. L. 367, 399–400 (2008); Barbara Black, *Should the SEC Be a Collection Agency for Defrauded Investors?*, 63 BUS. LAW. 317, 330–31 (2008).

[92] Max Gulker et al., *SEC Settlement Trends: 2H11 Update*, NERA, 21 (Jan. 23, 2012), http://www.nera.com/nera-files/PUB_SEC_Trends_2H11_01_12.pdf.

[93] Christopher Cox was the SEC Chairman from August 2005 through January 2009, and Mary L. Schapiro has been the SEC Chairman since January 2009. SEC, *Historical Summary*, *supra* note 28.

[94] Chairman Cox stated that from January 2006 through November 2008, the SEC brought thirty-eight foreign bribery cases. Christopher Cox, Chairman, U.S. Sec. & Exch. Comm'n, The Importance of International Enforcement Cooperation in Today's Markets 4 (Nov. 7, 2008), *available at* http://www.sec.gov/news/speech /2008/spch110708cc.htm. In fact, he understated the number of cases: fourteen (FY 07); fifteen (FY 08); thirteen (FY 09); sixteen (FY 10); and twenty (FY 11). *See* SEC FCPA ACTIONS DATABASE, *supra* note 8.

[95] Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Fiscal 2008 Enforcement Results (Oct. 22, 2008), *available at* http://www.sec.gov/news/press/2008/2008-254.htm. The SEC also highlighted FCPA actions as major enforcement cases in its annual reports. *E.g.*, 2008 SEC PERFORMANCE & ACCOUNTABILITY REPORT 110; 2007 SEC PERFORMANCE & ACCOUNTABILITY REPORT 91.

[96] *E.g.*, Linda Chatman Thomsen, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Remarks Before the Minority Corporate Counsel 2008 CLE Expo 5–6 (Mar. 27,

December 2008, government officials, including SEC Enforcement Director Linda Chatman Thomsen, called a news conference to announce a $1.6 billion settlement among Siemens AG, the SEC, DOJ, and a number of other U.S. and international law enforcement bodies.[97] The SEC portion of the settlement—$350 million in disgorgement—was by far the largest settlement amount obtained by the SEC under the FCPA.[98]

The Siemens settlement also marked the first time that U.S. and foreign prosecutors had coordinated their enforcement efforts to address violations of anti-bribery laws.[99] The fight against global corruption has become a favorite talking point of the SEC and indeed appears to be the sole justification for the SEC's aggressive enforcement.[100]

In January 2009, President Obama named Mary L. Schapiro to chair the SEC, and she assumed the responsibility of restoring the credibility of the SEC, which had been humiliated by the Madoff scandal.[101] In order to enhance the stature of the Enforcement Division, she recruited a new Director of Enforcement, Robert Khuzami, with a strong background as a federal prosecutor.[102] Mr. Khuzami, in turn, recruited from outside the SEC two deputy directors, perhaps to mark a break from the past and emphasize Enforcement's new outlook.[103] One of Mr. Khuzami's first acts was to form five specialized units within the Enforcement Division to handle complex cases, one of which,

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2008), *available at* http://www.sec.gov/news/speech/2008/spch032708lct.htm ("Since January 2006, the SEC has ordered the payment of more than $200 million in penalties, disgorgement and prejudgment interest for FCPA violations.").

[97] Linda Chatman Thomsen, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Statement at News Conference Announcing Siemens AG Settlement (Dec. 15, 2008), available at http://www.sec.gov/news/speech/2008/spch121508lct.htm.

[98] *Id.* According to Ms. Thomsen, this was more than ten times the amount of the previously largest settlement. *Id.*

[99] *Id.*

[100] *See infra* notes 103–04 and accompanying text.

[101] Mary L. Schapiro, *Message from the Chairman*, PERFORMANCE & ACCOUNTABILITY REP. 2 (2009).

[102] Mr. Khuzami served for eleven years as a federal prosecutor in Manhattan, where he was for three years Chief of its Securities and Commodities Fraud Task Force. Press Release, U.S. Sec. & Exch. Comm'n, Robert Khuzami Named SEC Director of Enforcement (Feb. 19, 2009), *available at* http://www.sec.gov/news/press/2009/2009-31.htm. Before joining the SEC, Mr. Khuzami was General Counsel for the Americas for Deutsche Bank AG. *Id.*

[103] Press Release, U.S. Sec. & Exch. Comm'n, Lorin L. Reisner to Join SEC Enforcement Division (July 2, 2009), *available at* http://www.sec.gov/news/press/2009/2009-150.htm; Press Release, U.S. Sec. & Exch. Comm'n, George S. Canellos Named Regional Director of SEC New York Regional Office (June 2, 2009), *available at* http://www.sec.gov/news/press/2009/2009-125.htm.

the Foreign Corrupt Practices Act unit, would "focus on new and proactive approaches to identifying violations of the Foreign Corrupt Practices Act."[104]

In November 2010, the SEC and DOJ conducted the first sweep of an industrial sector (the oil services industry) to crack down on foreign payments and obtained settlements with seven companies; the total sanctions paid to the SEC amounted to $236.5 million.[105] In announcing the settlements, the SEC made clear that coordinated law enforcement efforts against industry sectors would continue.[106]

Remarkably, at no time have these SEC Chairmen or Enforcement Directors offered a convincing explanation of how the enforcement of the anti-bribery provision fits within the SEC's mission.[107] In discussing the increased efforts, Chairman Cox related it vaguely to two of his themes—enforcement as the SEC's top priority and the importance of international cooperation in an era of global securities markets.[108] Chairman Schapiro asserted a connection thusly: "Corrupt business practices hurt companies, developing markets and ultimately investors."[109] Enforcement Director Thomsen described the FCPA actions as "help[ing] to combat bribery and public corruption in countries all around the globe,"[110] without, however, tying that purpose to the SEC's mission. In a speech assessing the first one hundred days of his tenure, Mr. Khuzami emphasized that there had been a "reinvigoration of our core mission of investor protection."[111] In the same speech, speaking about the new FCPA unit, he stated

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[104] Robert Khuzami, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement 4 (Aug. 5, 2009), *available at* http://www.sec.gov/news/speech/2009/spch080509rk.htm.

[105] Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials (Nov. 4, 2010), *available at* http://www.sec.gov/news/press/2010/2010-214.htm [hereinafter SEC Press Release].

[106] *Id.*

[107] The SEC's stepped-up campaign to enforce a complex statute, without first developing normative standards of conduct through rulemaking or interpretive guidance, may not constitute best practices for the SEC. Pitt & Schapiro, *supra* note 73, at 167.

[108] Cox, *supra* note 94.

[109] Mary L. Schapiro, Chairman, U.S. Sec. & Exch. Comm'n, Remarks at the National Conference of the Society of Corporate Secretaries and Governance Professionals 2 (July 9, 2010), *available at* http://www.sec.gov/news/speech/2010/spch070910mls.htm. In a September 23, 2011 letter to Senator Mike Crapo, Ms. Schapiro gave an additional reason: the SEC's FCPA enforcement program "incentivizes companies to self-assess and update their compliance and internal controls—all of which benefits companies' operations overall and provides greater transparency to investors." Letter from Mary L. Schapiro, Chairman, U.S. Sec. & Exch. Comm'n, to the Honorable Mike Crapo, U.S. Senator (Sept. 23, 2011) (on file with author).

[110] Linda Chatman Thomsen, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, It's Always Something 6 (June 4, 2008), *available at* http://www.sec.gov/news/speech/2008/spch060408lct.htm.

[111] Khuzami, *supra* note 104.

that "[w]hile we have been active in this area, more needs to be done, including being more proactive in investigations, working more closely with our foreign counterparts, and taking a more global approach to these violations."[112] Mr. Khuzami, however, stated no connection between the SEC's mission and enforcement of the anti-bribery provision, despite the fact that he articulated as a first principle the need "to be as *strategic* as possible" and, as a third principle, to be "as *smart* as possible [because the SEC's] resources are finite and critically limited."[113] Moreover, his list of enforcement priorities did not specifically include FCPA actions.[114]

In addition, apart from the fact that the SEC issues press releases announcing every FCPA settlement, there has been little discussion by other Commissioners or in SEC reports about FCPA actions and how these actions relate to the SEC's mission. The little commentary there is focuses on the value of coordinated international efforts to combat bribery[115] and raising the SEC's profile on the global stage.[116]

Instead, the SEC's message is to emphasize the number of actions and the amount of the sanctions and to project an image of a tough law enforcement official. While the message may serve a deterrent effect, another purpose may well be to boost the reputation of the SEC.[117] The Siemens settlement for example, was announced just a few days after the revelation of the Madoff fraud called into doubt the SEC's ability to police the securities markets.[118] In emphasizing in her remarks the "unsavory story" and the "intricate scheme,"[119] Ms. Thomsen may well have wanted to communicate the message: see, we can track down bad guys and make them pay. Similarly, in the press release

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[112] *Id.*

[113] *Id.*

[114] Enforcement actions relating to the credit crisis had the highest priority, followed by Ponzi schemes, cross-market misconduct, and a broad category denominated "traditional bread-and-butter priorities" that included accounting and financial statement fraud. *Id.*

[115] *E.g.*, *Federal and State Enforcement of Financial Consumer and Investor Protection Laws: Hearing Before H. Comm. on Fin. Servs.*, 111th Cong. (Mar. 20, 2009) (statement of Elisse B. Walter, Comm'r, U.S. Sec. & Exch. Comm'n), *available at* http://www.sec.gov/news/testimony/2009/ts032009ebw.htm; Press Release, U.S. Sec. & Exch. Comm'n, OECD Commends U.S. Regulators for Efforts to Fight Transnational Bribery (Oct. 20, 2010), *available at* http://www.sec.gov/news/press/2010/2010-200.htm; *see also* 2010 SEC PERFORMANCE & ACCOUNTABILITY REPORT 157 (referring to extensive cooperation with federal and foreign law enforcement agencies and regulators to bring wrongdoers to justice).

[116] Cheryl J. Scarboro, Chief of the FCPA Unit, U.S. Sec. & Exch. Comm'n, Remarks at News Conference Announcing New SEC Leaders in Enforcement Division 4 (Jan. 13, 2010), *available at* http://www.sec.gov/news/speech/2010/spch011310newsconf.htm (speaking about raising the SEC's profile on the global stage).

[117] *See* Donald C. Langevoort, *The SEC as a Lawmaker: Choices About Investor Protection in the Face of Uncertainty*, 84 WASH. U. L. REV. 1591, 1620 (2006) (using insider trading cases as an example of how enforcement is a way to reach out for public support).

[118] *See supra* notes 97–99 and accompanying text.

[119] *See supra* notes 96–99 and accompanying text.

announcing the settlements in the oil services industry, Mr. Khuzami communicated a strong message of cracking down on corporate wrongdoing:

> Bribing customs officials is not only illegal but also bad for business, as the coordinated efforts of law enforcement increase the risk of detection every day. . . . These companies resorted to lucrative arrangements behind the scenes to obtain phony paperwork and special favors, and they landed themselves squarely in investigators' crosshairs.[120]

IV. A CALL TO RETURN TO THE SEC'S INVESTOR PROTECTION MISSION

There is extensive academic literature offering theories on what is wrong with agencies in general and the SEC in particular. Public choice theory is the foundation of much critical analysis of how agencies operate. Public choice theory explains that government officials are motivated by self-interest and pursue agendas that advance their interests without regard to the public good.[121] Administrative agencies act to expand their power and influence, frequently by aligning with the industry they are regulating, and seek opportunities for lucrative post-government employment.[122] Professor Jonathan Macey, for example, has applied public choice theory to argue that the SEC exhibits symptoms of agency obsolescence that may aggravate agency imperialism, "turf-grabbing," and capture by special interest groups.[123] More recently, psychological theory has been used to explain agencies' poor policy choices. Cognitive errors on the part of government officials can lead to overconfidence and a narrow focus on their mission.[124] Professors Stephen Choi and Adam Pritchard argue that, because of cognitive biases, the SEC should have to overcome a presumption against regulation and demonstrate a high likelihood

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[120] SEC Press Release, *supra* note 105.

[121] For descriptions of public choice theory and relevant sources, see Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 34–41 (1998); and Jeffrey J. Rachlinski & Cynthia A. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 563–71 (2002).

[122] Rachlinski & Farina, *supra* note 121, at 567–68.

[123] Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909, 921–23 (1994); *see also* Jonathan R. Macey & David D. Haddock, *Shirking at the SEC: The Failure of the National Market System*, 1985 U. ILL. L. REV. 315, 321–24 (explaining, using public choice theory, the SEC's failure to pursue a national market system). *See generally* David D. Haddock & Jonathan R. Macey, *Regulation on Demand: A Private Interest Model, with an Application to Insider Trading Regulation*, 30 J. L. & ECON. 311 (1987) (using public choice theory to criticize insider trading regulation).

[124] *See generally* Rachlinski & Farina, *supra* note 121; Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486 (2002).

of net benefits from new regulation.[125] Finally, organization theory asserts that internal institutional biases cause agency dysfunction, which causes the agency to displace public interest goals with self-serving institutional goals. Professor Donald Langevoort has used this theory to explore the SEC's use of rhetorical conventions in molding agency behavior.[126]

Do any of these theories provide any explanatory power with regard to the history of the SEC's use of its enforcement powers under the FCPA? Contrary to public choice theory, the SEC did not seek out or welcome the opportunity to expand its power to enforce the anti-bribery provision.[127] To the contrary, as I have recounted, the SEC consistently asserted that it was not part of its mission.[128] On the other hand, the SEC's recent, unexplained aggressive enforcement fits with the theory that a failing agency may take efforts to reassert its importance.[129] Similarly, the psychological theory does not provide an unequivocal explanation, although its emphasis on overconfidence may explain the contradiction between the SEC's recent aggressive enforcement and its inability to see that bribery is not part of its mission.[130] Similarly, organization theory's emphasis on agency dysfunction from within may help explain why the agency took up a campaign against global corruption at a time when it was perceived as failing at its investor protection mission, although the SEC's abbreviated discussion of its relationship to its mission discounts the significance of rhetoric.[131] Ultimately, however, none of these theories provide much explanatory power for the SEC's recent aggressive campaign to enforce the FCPA.[132] We are left with the fact that, for unexplained reasons, the SEC determined to make an about-face.

Is it unfair to fault the SEC for enforcing the FCPA? Even if enforcement of the FCPA detracts from the SEC's investor protection mission, it can be argued that it is simply an unavoidable cost to carry out the congressional mandate of fighting against overseas bribery. Congress, after all, tasked the SEC with that responsibility; if the SEC did not enforce the FCPA, it would arguably be shirking its statutory responsibilities.

The SEC is not unique in possessing multiple, even conflicting goals; indeed, multiple-goal agencies have been identified as a fundamental problem

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[125] *See generally* Stephen J. Choi & A. C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1 (2003).

[126] *See generally* Donald C. Langevoort, *The SEC as a Bureaucracy: Public Choice, Institutional Rhetoric, and the Process of Policy Formulation*, 47 WASH. & LEE L. REV. 527 (1990) (explaining the theory and applying it to SEC policy decisions).

[127] *See supra* notes 122–24 and accompanying text.

[128] *See supra* notes 20–21, 66, 76 and accompanying text.

[129] *See supra* note 124 and accompanying text.

[130] *See supra* note 125 and accompanying text.

[131] *See supra* note 126 and accompanying text.

[132] *See generally* Langevoort, *supra* note 126 (discussing how theories do not provide convincing explanations of agency behavior).

in developing an effective regulatory system.[133] Economic and political science literature forecasts that multiple-goal agencies will devote too many resources on responsibilities that are easier to measure and have higher incentives and will devote too little attention on responsibilities that are harder to measure and have lower incentives.[134] The SEC's decision to ramp up FCPA enforcement in recent years may be consistent with this prediction: both the SEC and the enforcement attorneys may derive greater benefits (publicity, sense of accomplishment, and, for the attorneys, future job prospects) from big-dollar FCPA settlements against multinational corporations than they do from bringing enforcement actions to deter and punish more mundane types of fraud that do not grab headlines. Accordingly, one can question whether an agency with multiple goals, like the SEC, allocates its resources to best serve the public welfare.

Unfortunately, we lack empirical studies on the effectiveness of the SEC, but there is a consensus among academics, policy makers, and the media that, at least since the turn of the century, the SEC's "glory days" are behind it.[135] In the past decade, it has been slow to detect securities fraud and corruption.[136] Many question why the SEC has not brought more actions against financial services firms and their executives who brought the world's economy to the brink of collapse.[137] Strikingly, the SEC's diminished reputation as an effective enforcer of the federal securities laws coincided with its stepped up enforcement of the FCPA. While these developments are not necessarily correlated, they suggest that stepped-up FCPA enforcement has distracted the SEC from its mission.

Scholars of the SEC have tied the SEC's effectiveness to its clearly defined mission: "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[138] According to Joel Seligman,[139] "[t]he broader an

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[133] Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 12–13 (2008).

[134] *Id.* at 9.

[135] *E.g.*, Jonathan G. Katz, *Reviewing the SEC, Reinvigorating the SEC*, 71 U. PITT. L. REV. 489, 496 (2010) (stating there is a "strong consensus" that the SEC in recent years has failed to perform satisfactorily); Langevoort, *supra* note 117, at 1608 (stating that many see the "golden age" of the SEC from the early 1960s through either the 1970s or 1980s).

[136] For example, the SEC did not detect the Enron/Worldcom financial fraud, the mutual funds and analysts' conflicts, the Madoff scandal, or the current financial crisis.

[137] *See, e.g.*, Ben Hallman, *SEC Enforcement Chief Defends Record Under Fire From Rakoff, Critics*, HUFFINGTON POST (Jan. 18, 2012, 9:55 AM), http://www.huffingtonpost.com/2012/01/18/sec-mounts-defense-of-enforcement_n_1205318.html (describing criticism that the SEC is not doing enough to hold executives accountable for fraud).

[138] SEC, *supra* note 7; *see also* James D. Cox, *Reinventing the SEC by Staring into Its Past*, 78 U. CIN. L. REV. 459, 461 (2009) (pointing to its apolitical mission as a reason for the SEC's durability).

[139] Joel Seligman is the foremost historian of the SEC and author of THE TRANSFORMATION OF WALL STREET, *supra* note 10.

agency's jurisdiction, the more likely it is to lack resources or focus to address appropriate priorities."[140] The literature on administrative agencies, moreover, supports the importance of a clearly defined mission to an agency's effectiveness. A central, clearly defined mission allows an agency to develop expertise.[141] It may reduce the likelihood of conflicting responsibilities.[142] It also guards against the danger of "spreading itself too thin" or the misallocation of scarce resources.[143]

With respect to expertise: since Congress first considered enactment of the FCPA, the SEC has consistently stated that the statute presented "a broad issue of national policy with important implications for international trade and commerce"[144] which was outside the scope of the SEC's expertise. It has never subsequently convincingly explained how enforcement of the FCPA fits within the SEC's mission.[145] With respect to conflicting responsibilities: protecting investors was, at least until recently, seen as an apolitical agenda that everyone could agree on.[146] Although obtaining large penalties against large multinational corporations may win the SEC support by playing to populist distrust, others view regulating overseas bribery activities as moralistic and anti-competitive.[147] Moreover, if SEC staff does not view the FCPA as part of its

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[140] Joel Seligman, Tyrell Williams Lecture, *Key Implications of the Dodd-Frank Act for Independent Regulatory Agencies*, 89 WASH. U. L. REV. 1, 16–17 (2011). Current and former SEC Commissioners have contributed to the literature on the SEC's mission from a deregulatory perspective. *See* Atkins & Bondi, *supra* note 91, at 367; Troy A. Paredes, *On the Decision to Regulate Hedge Funds: The SEC's Regulatory Philosophy, Style, and Mission*, 2006 U. ILL. L. REV. 975, 1004, 1018; Pitt & Shapiro, *supra* note 73, at 149.

[141] Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 19 (2010) (explaining that the need for expertise is classic explanation for creating independent agencies); *see also* Cox, *supra* note 138, at 463–65 (describing SEC studies of industry practices that led to important reforms).

[142] Stevenson, *supra* note 23, at 72 (raising the concern that enforcing the FCPA makes the SEC "ever more schizophrenic"). The SEC's tripartite mission does present the classic conflict between advancing industry goals versus the public interest. For example, SEC staff recently defended its grant of various waivers to securities laws violators because of its statutory mandate to maintain fair, orderly, and efficient markets and facilitate capital formation. Meredith Cross, et al., Letter to the Editor, *The View From the S.E.C.*, N.Y. TIMES, Feb. 13, 2012, at A22, *available at* http://www.nytimes.com/2012/02/13/opinion/the-view-from-the sec.html?_r=1&sq=meredith cross sec&st=cse&scp=2&pagewanted=print.

[143] Seligman, *supra* note 140.

[144] *See supra* note 21 and accompanying text.

[145] *See generally supra* notes 107–15 and accompanying text.

[146] *See* Cox, *supra* note 138.

[147] *See* Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 282–85 (1997) (arguing that the FCPA is officious and insensitive to cultural differences but rejecting the argument of competitive disadvantage).

mission, it may reflect adversely on the *esprit de corps*.[148] I concede, however, that these arguments with respect to expertise and conflicting responsibilities are theoretical and speculative.

With respect to allocation of resources, we are dealing with reality. The SEC has consistently, and with good reason, asserted that it has inadequate resources to address all the increased demands placed upon it, particularly by growth in the securities industry and by Dodd-Frank.[149] Scarcity of resources is a perennial problem for the SEC that will not change. In recent years, congressional approval of the SEC's budget has been an extended, contentious process, reflecting, at times, varying views of the SEC's competence and the politics of government budgeting that has engendered considerable uncertainty about the SEC's level of funding.[150] Apart from the vagaries of the budgeting process, the reality is that federal agencies function in a world where resources are always scarce and priorities must be made.

Of course we cannot know if the SEC would do a better job of protecting investors if resources were not diverted from its investor protection mission. The fact remains, however, that there is little countervailing public interest in SEC enforcement of the FCPA because Congress could consolidate enforcement of the FCPA within DOJ. It seems unlikely that consolidation would significantly weaken the congressional mandate of fighting against overseas bribery since DOJ already has established expertise in criminal enforcement of the statute.[151]

Although I conclude that the best solution is to consolidate enforcement of the anti-bribery provision in DOJ, some administrative law scholars do identify policy justifications for the sharing of jurisdiction among agencies. The principal advantages of redundant regulation are said to be the potential to

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[148] *See* Langevoort, *supra* note 117, at 1611–12 (suggesting that the institutional commitment to investor protection may have weakened). Khuzami's creation of a specialized (elite) unit, the attention given to large FCPA settlements, and the training provided for lucrative post-SEC careers are all consistent with public choice theory. *See generally supra* note 121.

[149] *See, e.g.*, SEC, STRATEGIC PLAN: FISCAL YEARS 2010–2015, at 6–7 (2010), *available at* http://www.sec.gov/about/secstratplan1015f.pdf.

[150] In fact, the SEC's budget does not impact the government's overall budget, because it is funded from industry fees. If the budget approved by Congress is less than the fees, the SEC must reduce its fees. Exchange Act § 31, 15 U.S.C. § 78ee (2006). Chairman Schapiro argued, without success, for self-funding during congressional deliberations leading up to Dodd-Frank. Mary L. Schapiro, Chairman, U.S. Sec. & Exch. Comm'n, Statement Concerning Agency Self-Funding 1–3 (Apr. 15, 2010), *available at* http://www.sec.gov/news/speech/2010/spch041510mls.htm.

[151] *See* Stevenson, *supra* note 23, at 71, and accompanying text. One of the reasons Congress gave the SEC FCPA enforcement power was because the SEC had already developed expertise. *See id.*

harness expertise and competencies of specialized agencies.[152] More specifically, redundancy can improve regulation by creating competition among agencies, developing collective expertise, and providing insurance against one agency's shortcomings.[153] It is debatable, however, the extent to which these potential benefits are ever realized. Has shared DOJ and SEC enforcement accomplished more than DOJ could do on its own, and, if so, at what cost, in terms of diminishment of the SEC's investor protection mission? We simply do not know. Against these potential benefits, multiple goals may cause agencies to lose their sense of mission.[154]

Congressional committees have previously recognized that it would make sense to consolidate both criminal and civil enforcement within DOJ.[155] More recently, consolidation of agencies has become a talking point both in the Executive Branch and Congress. President Obama recently asked for authority to propose mergers of agencies, which Congress would then have to approve or reject.[156] Congress previously adopted a policy to "eliminate overlapping and duplication of effort" among agencies[157] and instructed the GAO to make recommendations for consolidation.[158] There does not appear to be any downside to consolidation, because DOJ has the experience, expertise, and global perspective to enforce the anti-bribery provision.

Academic literature worries about "agency creep," self-aggrandizing efforts to expand agency jurisdiction and power.[159] The history of the FCPA, however, is an example of another problem. Congress gave the SEC power that it did not want, that is not part of its central mission, and that puts a strain on its

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[152] Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1135 (2012).

[153] *Id.* at 1151; *see also* Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 211–16 (explaining overlapping and underlapping jurisdiction as partial response to agency problems).

[154] *See supra* notes 140–14242 and accompanying text.

[155] *See supra* Parts II.C.3, II.D, and note 80. Some academics have called for the transfer of all the SEC's enforcement powers to DOJ. *See, e.g.*, Peter J. Henning, *Should the SEC Spin Off the Enforcement Division?*, 11 TRANSACTIONS: TENN. J. OF BUS. L. 121, 130–33 (2009); A. C. Pritchard, *The SEC at 70: Time for Retirement?*, 80 NOTRE DAME L. REV. 1073, 1096–97 (2005). My proposal is more modest.

[156] Mark Landler & Annie Lowrey, *Obama Bid to Cut the Government Tests Congress*, N.Y. TIMES, Jan. 14, 2012, at A1.

[157] 5 U.S.C. § 901(a) (2006).

[158] Public Debt Limit Increase, Pub. L. No. 111-139, § 21, 124 Stat. 8, 29–30 (codified at 31 U.S.C. § 712 (2010)). The GAO has issued two reports identifying areas of potential duplication. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-342SP, 2012 ANNUAL REPORT: OPPORTUNITIES TO REDUCE DUPLICATION, OVERLAP AND FRAGMENTATION, ACHIEVE SAVINGS, AND ENHANCE REVENUE (Feb. 28, 2012); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-318SP, OPPORTUNITIES TO REDUCE POTENTIAL DUPLICATION IN GOVERNMENT PROGRAMS, SAVE TAX DOLLARS, AND ENHANCE REVENUE (Mar. 1, 2011).

[159] *See generally supra* note 121 and accompanying text.

resources.[160] Although for many years it made the choice not to exercise vigorously this power, the SEC in the recent years has, without explanation, reversed its course.

Finally, it's "déjà vu all over again." In Dodd-Frank, Congress could not resist giving the SEC additional powers that are outside its investor protection mission. Dodd-Frank § 1502 requires reporting companies to disclose whether they manufacture products using "conflict minerals" sourced from the Democratic Republic of Congo or contiguous countries and tasks the SEC with promulgating rules to implement the provision.[161] SEC Chairman Schapiro freely admitted that the subject matter is outside the SEC's expertise.[162] To date, the SEC has expended countless hours in drafting regulations, which met with substantial criticism from industry and human rights groups alike.[163] No good can come of this.

The SEC is the federal agency charged with the responsibility of protecting investors. Unfortunately, since securities fraud shows no sign of abating, the need for protecting investors only continues to grow. The SEC needs to return to its original purpose: investor protection.

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[160] *See generally* Langevoort, *supra* note 126 (explaining why theories on how and why agencies regulate are unconvincing because of different circumstances).

[161] *See* Celia R. Taylor, *Conflict Minerals and SEC Disclosure Regulation*, 3 HARV. BUS. L. REV. ONLINE 105, 109–10 (Jan. 10, 2012), http://www.hblr.org/wp-content/uploads/2012/01/Taylor-Conflict-Minerals.pdf (criticizing the proposed rules).

[162] Press Release, U.S. Sec. & Exch. Comm'n, SEC Proposes Specialized Disclosure of Use of Conflict Minerals Under Dodd-Frank Act (Dec. 15, 2010), *available at* http://www.sec.gov/news/press/2010/2010-245.htm.

[163] *See* David S. Hilzenrath, *SEC Grapples with Writing 'Conflict Minerals' Rules for Firms*, WASH. POST, Oct. 19, 2011, at A14, *available at* http://www.washingtonpost.com/business/economy/sec-struggles-to-write-conflict-minerals-regulations-forcompanies/2011/10/18/gIQAvZqfvL_story.html. Oxfam America sued the SEC to force completion of the regulations, which Congress contemplated would be issued within 270 days after the statute's effective date. Ben Gemen, *Oxfam sues SEC to force completion of Dodd-Frank oil transparency rule*, THE HILL (May 16, 2012, 11:35 AM), http://thehill.com/blogs/e2-wire/e2-wire/227731-oxfam-sues-sec-to-force-oil-transparency-rule. The SEC issued the final rules on August 22, 2012. Conflict Minerals, Exchange Act Release No. 34-67716, 77 Fed. Reg. 56274 (Sept. 12, 2012).

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