Busting Bribery

SUSTAINING THE GLOBAL MOMENTUM OF THE FOREIGN CORRUPT PRACTICES ACT

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Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act

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David Kennedy,
Manley O. Hudson Professor of Law,
Harvard Law School and

Dan Danielsen, Professor of Law,
Northeastern University School of Law

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Executive Summary

For more than three decades, the United States has been a global leader in the fight against corruption. The passage of the Foreign Corrupt Practices Act (FCPA) in 1977 drew a line in the sand: a culture of corruption was incompatible with sound international business practice. In the years since, largely at the behest of the United States, dozens of leading trading partners have adopted domestic legislation criminalizing corrupt foreign business practices in conformity with a number of multilateral treaties setting global anti-corruption standards. Through the globalization of anti-corruption regulation, the effort begun in 1977 to achieve a global business environment based on business merit and not bribes is finally coming to fruition. Support for good governance and the elimination of corruption has brought citizens to the streets in country after country. At no time since the passage of the FCPA has global support for the elimination of corrupt business practice been as strong. This is not the time to turn back.

Unfortunately, the U.S. Chamber of Commerce now proposes to do just that. In its brief *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act (2010)*, the Chamber proposes to change the Act in ways that would substantially undermine the possibility for successful enforcement of America's anti-bribery commitments. The Chamber's proposed amendments would also set back decades of progress in the global struggle against corruption. Since the adoption of the FCPA, many countries and international organizations have adopted similar regulations, such as the United Nations Convention Against Corruption, the Organization for Economic Cooperation and Development Anti-Bribery Convention, and national laws spreading across the

globe from Europe to Russia to China. By weakening the FCPA, the U.S. would send a signal to these entities that our commitment to combatting corruption has wavered, potentially stalling this global momentum.

The Chamber justifies its proposals as modest requests to protect American business from prosecutorial overreach. In fact, FCPA prosecutorial overreach by the Department of Justice (DOJ) is a myth. While the number of FCPA enforcement actions has increased, the average amount of fines obtained from corporate offenders has remained largely consistent and modest.[1] The private sector is responsible for the most significant implementation of FCPA requirements and compliance remains the goal of criminal investigation and enforcement at every stage.[2] Moreover, DOJ enforcement has not singled out American companies—indeed, as the Chamber Report recognized, the DOJ has sought to ensure a level playing field for American business by diligent enforcement of the FCPA in respect of foreign companies.[3] In addition, the Chamber's proposals would needlessly hamstring what has been a judicious and increasingly effective use of prosecutorial discretion to encourage compliance and isolate the most egregious violations.

- Often seen as the least concerning of the Chamber's proposals, the creation of an affirmative defense of "compliance" to FCPA corporate criminal liability is actually potentially very dangerous. **Compliance is already taken into account at every stage in the investigation and resolution of FCPA violations.** In 1988, Congress amended the FCPA to eliminate liability based on a company's failure to eliminate bribery which it had "reason to know" was taking place. A defense of "adequate" or "good faith" compliance makes no sense when, as under the current FCPA, corporate criminal liability requires proof beyond a reasonable doubt that the company acted with actual knowledge and corrupt intent to influence a foreign government to gain an improper business advantage. Creating a compliance defense to knowing and intentional violations of the FCPA would amount to eliminating criminal liability under the Act all together by permitting a "fig leaf" compliance program to insulate companies from their knowing and intentional wrongdoing.
- Eliminating successor corporate criminal liability for an acquiror for violations undertaken prior to acquisition by an acquiree would result in perverse incentives to avoid investigation of past FCPA violations by potential acquirees. Such a failure to investigate, while seeming to reduce acquisition costs in the short run, would likely expose the acquiring company to substantial unknown business risks and future enforcement where bribery remains undiscovered and therefore unaddressed. **Even if rarely imposed, the potential for successor liability remains**

important to prevent companies from escaping from liability through restructuring while preserving appropriate incentives for monitoring and compliance in the context of acquisitions.

- The Chamber asserts that it is necessary to add a "wilfullness" requirement to the mens rea standards for corporate criminal liability because of an alleged inequity with the standard applied for individual criminal liability. In fact, as interpreted and applied by the courts and the DOJ and the SEC, the applicable standards for criminal liability for both individuals and corporations are effectively equivalent. The Chamber's intent appears to be to substantially reduce the scope of activity proscribed by the FCPA by absolving corporations of criminal responsibility for long-standing, pervasive, knowing and intentionally unlawful acts if they did not also have specific knowledge that their conduct was violating the FCPA. Seen in this light, **the Chamber's proposal looks much more like a license to commit pervasive and intentional bribery than a modest attempt to eliminate the risk of prosecutorial over-reach.**
- The Chamber's proposed elimination of civil liability under the FCPA for the corrupt activities of subsidiaries would offer a formal escape route from enforcement by elevating corporate form over substantive knowledge and intent while eliminating a significant incentive for parent companies to undertake appropriate oversight of the corrupt activity of their subsidiaries. Congress has long recognized that parent companies frequently engage in foreign bribery through the use of subsidiaries and that eliminating the risk of liability would encourage a head-in-the-sand management style of conscious disregard and deliberate ignorance to facilitate corrupt activity abroad. The Chamber's arguments about the potential risk of prosecutorial over-reach are purely speculative. **Eliminating the risk of civil liability, however, would substantially decrease the incentives for parent company to oversee FCPA compliance by their foreign subsidiaries and the effectiveness of the FCPA as a limit on corrupt corporate activity abroad.**
- The Chamber's effort to turn back the clock is most striking in the proposal to narrow the definition of "foreign official" at a time when the global trend is the other way—toward criminalizing bribery of both public officials and private actors. The Chamber's proposed "clarifications" would seriously compromise the purposes of the FCPA to prevent intentional bribery in a world which organizes public authority in a wide variety of ways. **Because the contours of public control over commercial life vary greatly in different contexts, legislative clarification would be destined to be both over and under inclusive.** This is precisely the type of issue best left to sound administrative management and judicial review.

Contrary to the Chamber's rhetoric, the global trends are toward increased international anti-corruption compliance, the FCPA is working as Congress intended and new legislation is neither necessary nor advisable. This is not the moment for the United States to abandon its decades-long leadership in the struggle to bend the culture of global business away from the scourge of corruption. Widespread corruption abroad imposes enormous costs on American business, damages the global business environment and undermines the integrity and effectiveness of governments. A culture of corruption raises the costs of penetrating foreign markets and undermines predictability and business confidence. It imposes particular hardships on small and medium sized American enterprises seeking to participate in the global economy. Fighting these obstacles to American business has required a long-term commitment by the U.S. government and by American companies to change the climate for global commercial activity and the culture of business-government relations in countries across the world.

I. Introduction

1. The Challenge: Improving the Global Climate for American Business

For more than three decades, the United States has been a global leader in the fight against corruption. Widespread corruption abroad imposes enormous costs on American business, damages the global business environment and undermines the integrity and effectiveness of governments. A culture of corruption raises the costs of penetrating foreign markets and undermines predictability and business confidence. It imposes particular hardships on small and medium sized American enterprises seeking to participate in the global economy. Fighting these obstacles has required a long-term commitment by the U.S. government and by American companies to change the climate for global commercial activity and the culture of business-government relations in countries across the world.

A culture of corruption raises the costs of penetrating foreign markets and undermines predictability and business confidence.

The most powerful buttress against corruption is the vigilance and determination of the private sector, for which participation in the global market should not come at the cost of business integrity. The business community has long recognized that it cannot fight corruption in the global economy

without the support of government. Legal requirements in home jurisdictions establish a floor, giving business concrete justifications for resisting demands for corrupt payments. Moreover, multilateral collaboration among governments in standard setting and enforcement is necessary to change the global culture of corruption. A sound global business environment requires a level playing field to ensure that corrupt practices do not simply migrate to the most permissive location. Our diplomatic support for global anti-bribery standards strengthens foreign public authorities in their own efforts to end the culture of corruption.

The passage of the Foreign Corrupt Practices Act in 1977 drew a line in the sand: a culture of corruption was incompatible with sound international business practice and an unacceptable basis for global economic growth.[4] The FCPA represented an alliance between government and the American business community, driven by a shared recognition of the harms inflicted on American business by foreign corruption.[5] The Act both raised the cost of corruption and encouraged sound business practice. By criminalizing the payment of bribes abroad, the FCPA strengthened the hand of American business in refusing the demands of corrupt foreign officials.[6] By requiring that listed companies maintain records and file reports, the FCPA encouraged internal vigilance by leading business actors.[7]

It was nevertheless clear from the start that victory over corruption would require more than a statute. It would require a long-term commitment to raise global standards, encourage private sector engagement and compliance, and support public sector reform in the developing world. In the years since passage of the FCPA, the struggle against bribery and corruption has been a shared project of Republicans and Democrats and a common project of American government and American business. It has also been a striking success for American diplomacy and multilateral engagement.

Since passage of the FCPA, the American fight against corruption has developed in three phases: global standard setting, private sector compliance, and careful enforcement. The United States has worked diligently to create a level playing field for business by encouraging the adoption of national anti-corruption measures and multinational obligations to criminalize bribery and corruption. Over the last decade, governments across the world have strengthened national anti-corruption legislation, creating a transnational network of overlapping laws supporting the fight against corruption. Leading global businesses have risen to the challenge, strengthening their own internal management systems to ensure compliance and say no to corruption. Over the last years, the United States has increased its enforcement activity, focusing on the most egregious behavior and encouraging a culture of compliance by American and foreign business alike.

2. A Legacy of Success: Global Standards, Private Sector Compliance, Judicious Enforcement

The FCPA initiated a trend. In the years since its passage, dozens of leading trading partners have joined the United States in criminalizing corrupt foreign business practice.[8] The United States has been a strong supporter of multilateral efforts to raise standards, most notably the OECD Anti-Bribery Convention and the UN Convention Against Corruption.[9] These multilateral efforts have in turn sped the adoption of national statutes with functionally equivalent prohibitions on corruption. It is noteworthy that several recent national statutes, including those in the United Kingdom and Italy, go beyond what the FCPA requires and hold business to stricter standards.[10] American companies operating in the global economy today—like their counterparts abroad—are subject to a dense fabric of anti-corruption measures.

In the years since its passage, dozens of leading trading partners have joined the United States in criminalizing corrupt foreign business practices.

As the legal playing field has leveled, the private sector has largely risen to the challenge. Encouraged by the requirements of many statutes, including the FCPA, many American companies have developed best practice routines of internal monitoring and compliance, often reflected in enterprise wide "zero tolerance" policies. By developing a more robust culture of compliance, the private sector is transforming the culture of transnational business. The leading professional services firms routinely assist companies in monitoring and compliance.[11] Moreover, collaboration between government and business has been critical to this record of success, particularly as mainstream American business has increasingly come to see the need for anti-bribery policies as protection for themselves as well as for developing nations.[12]

Building on these successes, American and foreign authorities have gradually begun to strengthen their enforcement activities, focusing on individuals and entities which have not gotten the message that making corrupt payments to government officials to gain an unfair business advantage is no longer a permissible business practice in today's global economy. The FCPA provides for civil and criminal enforcement authority by the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ).[13] For many years, criminal enforcement activity was modest. Indeed, from 1977 until 2000, the SEC and the DOJ together averaged only three FCPA prosecutions a year with minimal, if any, penalties.[14]

As best practice compliance initiatives became more widespread in the business community and other jurisdictions adopted parallel statutes, the DOJ strengthened its

The DOJ's commitment to a level playing field for global business is clear: investigations have been brought against foreign and American entities. Indeed, the largest fines have been levied against foreign entities.

enforcement activity to target and isolate particularly bad actors and to encourage effective compliance.[15] Sensible DOJ enforcement leading to compliance helps protect U.S. companies from prosecution abroad. **The DOJ's commitment to a level playing field for global business is clear: investigations have been brought against foreign and American entities.[16] Indeed, the largest fines have been levied against foreign entities.[17]**

Top 10 FCPA Settlements

Rank	Company	Country	Settlement	Year
1	Siemens	Germany	$800 million	2008
2	KBR/Halliburton	USA	$579 million	2009
3	BAE	UK	$400 million	2010
4	Snamprogetti Netherlands B.V./ENI S.p.A	Holland/Italy	$365 million	2010
5	Technip S.A.	France	$388 million	2010
6	JGC Corporation	Japan	$218.8 million	2011
7	Daimler AG	Germany	$185 million	2010
8	Alcatel-Lucent	France	$137 million	2010
9	Panalpina	Switzerland	$81.8 million	2010
10	Johnson & Johnson	USA	$70 million	2011

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Across the American legal system, it is routine for criminal enforcement to be targeted in such a way as to encourage compliance while focusing any punitive measures on the most egregious offenders. Resource management concerns affect all areas of criminal enforcement and it is now well understood that encouraging private sector compliance is the most cost effective way to reduce criminal activity in the business sector. In every field—from taxation and securities regulation to environmental protection—this requires the wise use of prosecutorial discretion coupled with careful guidance to business about behavior that may trigger criminal sanction. The most effective

approach is precisely the one adopted by the DOJ in relation to the FCPA. The standards set forth in a criminal statute are given meaning in a changing business environment through case by case investigation which generates public guidance for industry against the background of judicial review. Guidance may come from administrative opinions, from the negotiated outcomes of successful investigations or from judicial opinions.[18]

The DOJ stepped up enforcement through a careful balance of administrative guidance, prosecutorial discretion and negotiated settlement in the shadow of judicial review. As in other fields, the DOJ is coupling its investigations with use of Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs) to encourage compliance rather than punish prior bad acts.[19] This practice can be controversial because it runs the risk of letting entities off too easily and encourages a close working relationship between DOJ investigators and the targets of their investigations.[20] In the FCPA context, it reflects a balanced judgment by the DOJ that compliance and self-monitoring are ultimately the surest route to effective enforcement.

This targeted enforcement activity is consistent with the letter and spirit of the 1988 amendments to the FCPA by which Congress narrowed the basis for criminal liability to those who *knowingly* and *corruptly* make payments to foreign officials.[21] The Congressional objective was clear. By eliminating criminal liability for those with only a "reason to know" that a bribe would be passed to a foreign official,[22] Congress focused prosecutors on those individual or corporate persons who make bribes *knowingly* and with *corrupt intent*. Doing so focused FCPA criminal liability on the most culpable and encouraged effective compliance by business—compliance which actually prevents knowing and intentional violations of the Act. Where specific knowledge and intent cannot be proven, the Act provides no basis for criminal liability.

The anti-corruption world is changing rapidly. There is a great need for flexibility to deal with the range of institutional and cultural situations in the global economy, the rapidly changing forms corruption takes over time, and the diverse compliance risks faced by businesses of different sizes in different sectors. In this area, one size will not fit all. When standards are formalized at too high a level, they can become a barrier to entry for small and medium-sized enterprises. Legislating formal defenses can likewise set the bar too low, frustrating the clear Congressional intent to criminalize knowing and corrupt bribery abroad. Precisely at such a moment, we should encourage the DOJ and the SEC, in consultation with the business community, to move forward prudently with their enforcement activities subject to the tempering hand of judicial review.

The United States has consistently provided leadership in setting standards and in developing the tools for robust voluntary compliance by the private sector in part through the wise exercise of prosecutorial discretion focused on leveling the global playing field.[23] Strengthening the global culture of compliance requires a steady and

balanced collaboration between enterprise and government, identifying best practice, isolating bad actors, and aligning incentives for business and government to strengthen resistance to corruption in all its forms. The record of the DOJ is clear: investigation of violations by foreign and domestic businesses, negotiated resolution of investigations focused on effective compliance and a determination to prosecute the most egregious violators. Undertaken in the shadow of judicial review, FCPA enforcement has been notable for the very few instances in which companies have sought to appeal DOJ or SEC administrative action under the FCPA. The system is working precisely as Congress intended.

Dispelling the Myth of Excessive FCPA Enforcement

The recent increase in DOJ and SEC enforcement of the FCPA has been greatly exaggerated and in fact, emerges as appropriate in the context of the global fight on corruption. Recent enforcement has been tailored to encourage compliance while reserving penalties for only the most egregious corporate behavior. The DOJ has focused more directly on individuals making corrupt payments than on corporate entities and has been as robust in addressing violations by foreign entities as by American corporations. Indeed, some of the largest fines have been levied against foreign violators.

As multilateral obligations and national statutes have leveled the ground and private sector self-monitoring and compliance have increasingly become the norm, the DOJ has stepped up its enforcement activities. Placed in historical and comparative context, the uptick in enforcement activity over the last years has been rather modest. The beginning of a concerted effort to increase FCPA enforcement—both in terms of the number of enforcement actions and the size of the penalties sought—emerged only in 2003, as international and national anticorruption statutes became common.

Despite the vocal criticism of the fines and penalties that have accompanied the uptick in prosecution, it is important to note that two-thirds of the fines collected in 2010 derived from just three matters. Although the number of FCPA prosecutions has risen since 2007, the average fine per corporate proceeding has remained quite stable over the last decade with the exception of two cases resulting in particularly large settlements. Focusing on the number of enforcement actions can also be misleading. Totals often reflect enforcement actions against affiliated companies arising from a single action—or instances in which the same company is separately charged by the DOJ and SEC. Eliminating this double counting would reduce the number of corporate prosecutions initiated in 2010 from 47 to 20.

II. Three Decades of Multilateral Collaboration

1. Global Consensus: The Costs of Corruption

When the FCPA was adopted in 1977, the costs of corruption were only beginning to be understood and appreciated. In many parts of the world, bribery was thought to be a routine cost of doing business. One occasionally heard that it could even increase economic efficiency by providing a simple way around complex and rigid bureaucracies.

In the 1990s, an enormous scholarly literature emerged chronicling the economic, political and cultural consequences of corruption.[24] It became clear that corruption damages economic growth, reduces both domestic and foreign investment, slows business development and encourages the growth of an informal economy. Battling corruption became a priority for the leading international financial institutions and for the development community. The corrosive effects of corruption on the effectiveness and legitimacy of public authorities were understood to impede economic progress across the developing world.

We now know that corruption wreaks havoc on economic growth and undermines the integrity and effectiveness of business and government alike. Corruption damages both developing and developed country economies, increasing costs and reducing the efficiency and stability of world markets.[25] Today, American businesses recognize not

only the negative effects of corruption on both development and enterprise, but the role of the private sector in stopping the spread of bribery and corruption.[26]

Corruption remains the scourge of economic development.[27] Corruption weakens governments by undermining the rule of law and public confidence in government institutions.[28] Corruption siphons public expenditures away from important social services such as health and education, reduces the productivity of public expenditures, and impedes governmental tax and tariff revenues.[29]

Corruption weakens governments by undermining the rule of law and public confidence in government institutions.

Corruption also threatens the global business environment.[30] For businesses, the corrosive effects on multinationals and small to medium-sized enterprises alike are multi-faceted and complex. In addition to the direct cost of bribe payments, companies suffer reputational risk, the threat of extortion, increased cost of capital, distorted prices, unfair competition and decreased staff morale.[31] In a corrupt environment, significant capital is expended in unproductive payments, resulting in financial loss to the company and significant lost development potential to the world. American business has learned that bribes "do not make good business sense."[32] Paying a bribe may provide a company with a particular service or set of goods, but the lack of a written contract leaves a company without a guarantee that the service will be performed or that the goods will in fact be awarded. In addition, the lack of record permits the possibility that in the next instance, the bribe amount could be raised.[33] Corruption creates an uneven playing field for ethical actors, makes companies vulnerable to higher costs for transacting business, and represents a severe threat to corporate reputation.[34] Failure to put in place active measures against corruption permits "employees and third parties to rationalize stealing from the company," and the cost to a company of reputational damage due to revelations of corruption can be far higher than "merely" the financial cost of the immediate investigation. A company may lose shareholders, customers, and partners, as well as employees. Reputational loss may result in loss of business, if governments or civil society become suspicious of a company's ethical track record.[35]

These costs are difficult to calculate with confidence. We do know that for all the strides we have made in the fight against corruption, there is still a long way to go. Corruption remains endemic and American business continues to suffer its costs. According Daniel Kaufman, during his tenure as Director of Global Governance at the World Bank Institute, a "conservative approach" to measuring bribery of public sector actor by private sector entities yields an estimate of US $1 trillion annually in corrupt payments.[36] Corrupt payments themselves, as Kaufman noted, represent only one part of the overall problem of corruption. Embezzlement, theft of public assets, and private

sector bribery are also significant.[37] The knock-on costs from lost efficiency, reputation and more are incalculable.

Moreover, American companies participating in the global economy continue to perceive corruption as a significant obstacle to business.[38] In a 2009 survey by accounting firm Ernst & Young, one in four respondents reported that their company had experienced an incident of bribery or corruption over the course of 2007 and 2008 and 18% knew their company had lost business to a competitor who had paid a bribe.[39] Twenty-three percent of respondents "knew that someone in their company had been solicited to pay a bribe to win or retain business."[40] In a survey of more than 2,700 business executives in twenty-six countries in 2008, Transparency International found that nearly forty percent of polled business executives had been asked to pay a bribe when working with public institutions, and fifty percent estimated that corruption increased their project costs by at least ten percent.[41] Transparency International found that eighty percent of the 91,500 individuals they surveyed believe political parties are corrupt or extremely corrupt.[42] Bribes paid to politicians and officials in developing countries approach $20 to $40 billion every year, which is a figure equivalent to forty percent of official development assistance.[43]

In short, the challenges which led to the FCPA remain with us. Robust anti-corruption efforts by business and government remain necessary. Unlike 1977, however, the network of legislation and the prospects for enforcement have expanded markedly, as has the compliance and self-monitoring practices of the business community. Progress is being made.

2. Standard Setting: A Transnational Network of National and Multilateral Anti-Corruption Legislation

2.1 The First Step: The 1977 Foreign Corrupt Practices Act (FCPA)

The FCPA was adopted in part due to a scandal involving the aerospace company Lockheed bribing foreign officials to garner business and reflected widespread concern about the harmful effects of bribery and corruption by American companies operating abroad.[44] The Senate statement accompanying the bill was unequivocal: "Corporate bribery is bad business."[45] In the ensuing years, the FCPA has twice been amended, most substantially in 1988, to sharpen its focus and align its requirements with multilateral commitments.[46]

So long as the FCPA was the only significant national statute criminalizing foreign corruption and applied only to U.S. domestic concerns and issuers subject to SEC

regulation, the playing field for participation in the global economy was not level. In 1988, Congress directed the Executive Branch to encourage America's most significant trading partners to enact similar legislation.[47] The result was the OECD's Convention on Combating Bribery of Foreign Public Officials, signed by thirty-three states in 1997 and ratified by the United States in 1998.[48] As a consequence, the FCPA was again amended in 1998 to bring it into line with the requirements of the OECD convention.[49] The most significant changes extended jurisdiction to cover foreign nationals or foreign corporations who act in furtherance of a prohibited payment while in US territory and to provide for the exercise of jurisdiction on the basis of the territoriality principle.[50]

Taken together, the impact of these amendments is clear. The FCPA has been narrowed in focus and broadened in scope. On the one hand, only the most culpable are subject to criminal liability. The requirement that bribery be "knowing" narrows the FCPA relative to some other significant anti-bribery statutes, most notably the United Kingdom.[51] At the same time, the jurisdictional reach of criminal enforcement was broadened to encompass foreign persons and entities when they act within the United States and to apply civil and criminal penalties to all employees or agents of U.S. businesses whether or not they are U.S. nationals.[52] The resulting statute focuses enforcement on egregious conduct while encouraging the use of criminal enforcement power to encourage non-corrupt business practices by U.S. and foreign companies alike and to ensure a level playing field for American business globally.[53]

2.2 Leveling the playing field: Multilateral Obligations and National Anti-Bribery Statutes

U.S. leadership in the struggle against corruption has been remarkably successful in global standard setting. In 1977, the FCPA stood alone as a national law criminalizing bribery and corruption.[54] The statutory situation today could not be more different. Multilateral conventions committing countries to join the fight against corruption have been widely signed and ratified. More than one hundred countries, including many of our closest allies and most important commercial competitors, have signed the United Nations Convention Against Corruption, committing themselves to adopting implementing legislation criminalizing bribery.[55]

American leadership has been crucial. The FCPA has been a model for legislation elsewhere. Its existence has made it more difficult for opponents of anti-corruption legislation in other countries to argue that they would be placing their own firms at a competitive disadvantage. The American government has provided steady and critical support for multilateral efforts to set global standards prohibiting bribery and corruption. The success of these efforts is visible in the strength and breadth of multilateral commitments to criminalize bribery and corruption and in the number and stringency of the national statutes passed since 1977.

The World Follows: Other Anti-Bribery Laws Passed after the FCPA

- Inter-American Convention Against Corruption, 1997
- OECD Anti-Bribery Convention, 1999
- Council of Europe Convention on Corruption (Criminal), 2002
- Council of Europe Convention on Corruption (Civil), 2003
- The UN Convention Against Corruption (UNCAC), 2005
- African Union Convention on Preventing and Combating Corruption, 2006
- UK Bribery Act, 2010
- Russian Anti-Bribery Laws, amended 2011
- Chinese Anti-Bribery Laws, amended 2011

American efforts to develop multilateral treaty commitments to fight corruption first bore fruit in the 1990s. The most significant achievement was the conclusion of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (The OECD Convention) in 1997.[56] A number of significant regional instruments were also concluded, including the Inter-American Convention Against Corruption, which came into force in 1997.[57] Thirty-eight countries are now parties to the OECD Convention which sets global standards for anti-corruption legislation and commits signatories to passing domestic legislation that is the "functional equivalent" of that provided by its terms to ensure a harmonized playing field for global business.[58] Crucially, the OECD Convention recognizes that good intentions and sound legislation are only the start. Defeating the culture of corruption requires an iterative process of peer monitoring to assess compliance and make recommendations for improvement. All thirty-eight countries have now passed anti-bribery laws and consented to OECD monitoring.[59] The OECD Convention also provides for cooperation in investigations and proceedings and renders bribery an extraditable offense.

Then-Assistant Secretary of State for Economic and Business Affairs, Daniel K. Tarullo, credited several key trends supporting the State Department's efforts to engender multilateral anti-corruption commitments, including the growing views of economists with regard to the detrimental effects of corruption on economic development

and democratic accountability; louder calls by developing countries for industrialized nations to limit bribery by their companies; support by U.S. business for anti-bribery policies; and increasing intolerance for bribery among members of the public.[60]

In 2003, the United Nations Convention Against Corruption (UNCAC) was signed, coming into force in 2005.[61] UNCAC commits all signatories to adopting legislation outlawing the bribery of foreign public officials.[62] The UNCAC has a far broader range of signatories (140 developed and developing countries including China)[63] and content than the OECD Convention, although its requirements are generally less stringent in compelling harmonization. In addition to foreign bribery, UNCAC prohibits domestic bribery of public officials and recommends measures to prevent bribery in the public sector.[64] It goes further than the FCPA in encouraging criminalization of both active and passive bribery.[65] UNCAC has expansive provisions on mutual assistance in investigation and breaks new ground in global asset recovery.[66]

The State Department summarized the significance of these developments in 2003 in these words:

> "Bribery and corruption tilt the playing field and create unfair advantages for those willing to engage in unethical or illegal behavior. Corrupt practices penalize companies that play fair and seek to win contracts through the quality and price of their products and services... Since [the enactment of the FCPA] the U.S. has been trying to level the playing field by encouraging other industrialized countries to take similar steps—and these efforts are finally paying off."[67]

If it might once have been said that the FCPA threatened to place those subject to its terms at a competitive disadvantage, this is no longer the case. Often spurred by new multilateral commitments, dozens of countries, including our most important trading partners, have now passed anti-bribery statutes of their own.[68] Moreover, Congress has narrowed and focused the FCPA through amendment. The result is a transnational regulatory framework which has leveled the legal playing field considerably while dispersing regulatory and prosecutorial exposure.

This global network of anti-bribery laws reflects a worldwide consensus that bribery damages governments and business enterprises alike. It has changed the rules of the game for global commerce. In many ways, the flurry of recent national and international legislation reflects the success of the US campaign against bribery. As the US State Department has recognized, a global network of enforcement is the most efficacious and enduring way to combat corruption in an era of globalization.[69] Global business today is subject to the anti-corruption rules of multiple jurisdictions and no company operating transnationally can ignore the possibilities for liability under a variety of statutes. As in other fields of legal regulation, companies engaging in global eco-

nomic activity must ensure compliance and manage the risks of exposure to multiple overlapping regulatory requirements.

Significantly, the American FCPA is no longer alone in criminalizing corrupt practices which occur outside American territory or which are committed by foreign individuals or business entities under some circumstances. The FCPA applies to all issuers listing with the SEC, to domestic concerns, regardless of where the violation takes place, and to foreign persons and companies whose activities have a link to or impact upon the American economy which "can be prosecuted for foreign bribery that has a connection to the US."[70] The extraterritorial character of the FCPA has been crucial in ensuring that the Act's applicability does not prejudice American business. That other nations have joined us in extraterritorial enforcement has only contributed to this leveling effect. Many national statutes are silent on extraterritorial applicability, prohibiting bribery wherever it occurs, and relying on general rules of criminal procedure to determine the possibilities for extraterritorial prosecution.[71] Others explicitly authorize extraterritorial applicability under various circumstances.[72] The OECD Convention was cautious about the extraterritorial principle, although the OECD requirement of "functional equivalence" among anti-bribery statutes has permitted signatories, including the United States and the United Kingdom, to adopt explicit extraterritorial authorization for combating bribery and corruption.[73] Perhaps most notably, the UK's Bribery Act applies to acts taking place in whole or in part in the UK or committed by a UK national elsewhere, as well as making any company that "carries on a business or part of a business" in the UK subject to prosecution for the offense of failing to prevent bribery, regardless of where the bribery itself took place.[74] As a result, American corporations and citizens doing business abroad may be subject to the anti-corruption legislation of other OECD countries for corrupt activities both within the territory of such countries and elsewhere.

Although the OECD and UN Conventions aimed to harmonize national anti-bribery legislation, national statutes continue to differ, often in important ways. Several national statutes prohibit activities not addressed by the FCPA. As a result, our FCPA is no longer the most restrictive national statute. Indeed, the only point on which the FCPA is broader than the OECD Convention is its inclusion of corrupt payments made to candidates for office or to political parties.[75] In many situations, American businesses are now subject to anti-corruption standards more extensive than those contained in the FCPA. In this respect, further reducing the scope of the FCPA would not reduce the need for internal monitoring and compliance measures for many American businesses operating transnationally.

For example, unlike the FCPA, some more recent statutes, including that of the United Kingdom, prohibit receiving bribes (so-called "passive bribery") as well as making bribes.[76] Some, again including the United Kingdom, criminalize bribery directed at private parties as well as public officials.[77] The FCPA excludes so-called "facilitation"

payments (small payments for routine and non-discretionary government action) from scrutiny.[78] Although this approach has been followed in some places,[79] the UK has no such exception.[80] The FCPA also creates an affirmative defense for "reasonable and bona fide expenditure, such as travel and lodging expenses," incurred by or on behalf of a foreign official and "directly related" to the "promotion, demonstration, or explanation of products or services" or "the execution or performance of a contract with a foreign government or agency thereof."[81] This defense has no parallel in the OECD Convention. The British statute also provides for no similar defense for hospitality or other bona fide expenses.[82] In this area, the UK leaves a great deal of prosecutorial discretion in administering a legislative standard more restrictive than that of the FCPA.

Most importantly, the United Kingdom and Italy reject the approach taken by Congress when it narrowed the FCPA to capture only those corrupt payments made *knowingly*. Both Britain and Italy establish offenses for individuals and entities which do not require knowledge.[83]

In short, American leadership and multilateral standard setting work. The global playing field for business is being leveled. Businesses in the global economy are now subject to a variety of statutes prohibiting bribery and corruption. They differ in detail—some stricter, some less so—but the mosaic of legislation increasingly makes clear that transnational economic actors are subject to anti-corruption virtually everywhere that they do business. A less corrupt global business environment means greater competitiveness for American companies, easier access to global markets for small and medium-sized American companies and greater economic growth for all.

As the progenitor of this global trend, the FCPA remains a robust example of the importance of standard setting and enforcement. It remains the crucial global benchmark for fighting corruption. How it is interpreted and enforced by American business and American government are as important to the global anti-corruption efforts now as its existence on the statute books was three decades ago.

FCPA and Foreign Companies—Leveling the Playing Field

It is important to note that FCPA enforcement has not focused on American companies in ways which would put them at a disadvantage in the global economy. Reflecting the authorities' commitment to leveling the playing field for transnational business, FCPA enforcement has increasingly focused on foreign entities. In 2010, the six largest penalties—accounting for 80% of the penalties collected—derived from matters involving non-U.S. corporations. Of the three largest penalties ever, two involved foreign enterprises. Of the twenty corporate matters brought in 2010, more than half involved non-U.S. companies, accounting for 94% of the penalties imposed in 2010. This emphasis on the activities of foreign companies belies the notion that increased FCPA enforcement has harmed U.S. companies relative to their foreign counterparts. Rather, careful enforcement by the United States against foreign and American business helps to establish a level playing field whose terms are guided by the best compliance practices of American business.

III. The Proposed Amendments: A Radical Reversal of More than 30 years of U.S. Policy Promoting Fair Competition through a Global Fight Against Corruption

Under the misleadingly innocuous title "Restoring Balance," the U.S. Chamber Institute for Legal Reform has proposed six far-reaching amendments to the FCPA that each would significantly reduce the scope and efficacy of the FCPA while substantially undermining more than 30 years of successful U.S. leadership in promoting global anti-corruption standards reflected in the adoption of the OECD Anti-Bribery Convention, the UN Convention Against Corruption and national legislation modeled on (and in some cases more stringent than) the FCPA by all of the OECD countries and a number of our most important non-OECD trading partners (including China, Russia and Brazil).[84] At the very moment when U.S.-championed cries for a global level playing field based on competitive merit and corruption-free governance are sweeping the world on the streets of transitional countries and emerging democracies and in the legislatures of all our major trading partners, Congressional action substantially weakening the FCPA would send a dangerous and destabilizing message to our trading partners,

foreign companies, foreign officials and emerging democratic movements around the world while undermining the crucial role the FCPA plays in helping U.S. companies to resist demands for bribes abroad as the price of access to foreign markets and opportunities.

In 1977, the FCPA was a ground-breaking and unique piece of legislation crafted in partnership with U.S. business to help promote competition-based market access by U.S. companies to foreign markets through the encouragement of a global business environment based on business merit and not bribes.[85] Today, in large part due to the success of a strong 30-year commitment to anti-corruption by the U.S. government and U.S. businesses, the FCPA has become the model for the global proliferation of national anti-corruption legislation that attempts to reduce corrupt business practices while strengthening competition-based economic growth. In these circumstances, eroding the FCPA through limiting amendments would not reduce the need for U.S. companies to adopt bribery-free business practices and robust compliance and reporting mechanisms—in the current global regulatory environment, these are not just good global business practices, they are required by the laws of numerous foreign jurisdictions where U.S. companies are doing business.

The FCPA has become the model for the global proliferation of national anti-corruption legislation that attempts to reduce corrupt business practices while strengthening competition-based economic growth.

Adoption of the proposed amendments could, however, have the significant unintended consequence of displacing U.S. leadership in the articulation of global anti-corruption norms while centering anti-bribery enforcement action under the array of foreign legislation to which U.S. companies operating abroad would remain subject in the administrative agencies and courts of foreign trading partners. While the Chamber Report makes a number of speculative claims about the risks of potential abuse of enforcement discretion by the DOJ and the SEC under the FCPA, the Chamber Report presents no actual evidence that these agencies are not achieving an appropriate balance between using their FCPA investigatory authority to assist U.S. companies to improve global business practices and FCPA compliance, on the one hand, and prosecuting the most egregious violations of the Act on the other.

The bottom line is that the FCPA is working and the world has taken notice. Today, not only U.S. companies, but the companies of virtually all our major trading partners are subject to anti-bribery legislation modeled on (and sometimes more stringent than) the FCPA.[86] The DOJ and the SEC have shown care and prudence in the enforcement of the FCPA and have pursued egregious violations of the Act by U.S.

and foreign companies with equal vigor, creating no competitive disadvantage for U.S. companies.[87] Through the judicious use of Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs), the DOJ and the SEC have helped numerous companies ferret out corruption among employees while improving compliance practices and reducing the risk of non-compliance in the future. Moreover, helping U.S. companies to establish good global business practices in conformity with the FCPA also helps U.S. companies to reduce the risk of non-compliance under foreign anti-bribery legislation.

In such circumstances, eroding the scope and efficacy of the FCPA by adopting the Chamber's proposed amendments would be anything but "Restoring Balance" —it would (i) needlessly introduce rigidity and uncertainty into the FCPA by disturbing established FCPA enforcement practices characterized by reasonableness and prudent flexibility based solely on chimerical fears of potential prosecutorial abuse and overreaching, (ii) undermine U.S. policy leadership in the global fight against corruption, and (iii) signal to the world a major reversal from the U.S.'s uncompromising commitment to the global promotion of business practices and public institutions free from corruption. In fact, Congressional adoption of the Chamber's proposed amendments to the FCPA would reflect a radical retreat in the global fight against corruption.

1. Proposed Amendment: Creating a Statutory Compliance Defense

Compliance is already taken into account at every stage in the investigation and resolution of FCPA violations

At first blush, the Chamber's suggestion of adding a statutory compliance defense to the FCPA has some intuitive appeal. After all, as the Chamber's Report acknowledges, both the DOJ and the SEC regularly take a company's compliance efforts into account at every stage of the enforcement process, from undertaking a preliminary investigation, to deciding whether to pursue an indictment or enter into a DPA or NPA, to determining appropriate measures for bringing a company into compliance, to determining whether to impose fines or other sanctions for proven violations of the Act. If the DOJ and the SEC are taking compliance into account already, why not formalize that practice in the statutory language of the FCPA?

The most direct answer is that an affirmative defense of "adequate" or "good faith" compliance is fundamentally inconsistent with the FCPA's very high standards for corporate criminal liability which require prosecutors to prove that a company's

prohibited acts be both "knowing" and "corruptly" undertaken with intent.[88] The FCPA defines "knowing" as follows:

> (2) (A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if—
>
> (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
>
> (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.
>
> (B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.[89]

While the term "corruptly" is not expressly defined in the Act, the DOJ has issued a public statement interpreting the term as follows: "The person making or authorizing the payment must have a corrupt intent, and the payment must be intended to induce the recipient to misuse his official position to direct business wrongfully to the payer or to any other person."[90] These standards of liability were summarized in the Congressional Conference Report on the 1988 amendments to the Act:

> Thus, the "knowing" standard adopted covers both prohibited actions that are taken with "*actual knowledge*" of intended results as well as other actions that, while falling short of what the law terms "positive knowledge," nevertheless evidence *a conscious disregard or deliberate ignorance of known circumstances* that should reasonably alert one to the high probability of violations of the Act.[91]

From these articulated and clearly-defined standards of corporate culpability under the FCPA, it becomes immediately apparent that an affirmative defense of "good faith" or "adequate" compliance is simply inappropriate. On the one hand, effective, "good faith" compliance is logically incompatible with the requirement under the Act that violations be undertaken with "actual knowledge" or "a conscious disregard or deliberate ignorance of known circumstances" and the requisite "corrupt" intent to induce a foreign official to misuse his official position to wrongfully obtain business or direct business to another. Any compliance program that *knowingly* permitted, facilitated, or consciously or deliberately turned a blind eye to *corrupt,* intentional violations of the FCPA must be either *per se* inadequate or not undertaken in good faith. On the other hand, the existence of a merely formal compliance program is irrelevant to the question

of whether knowing, intentional and corrupt behavior took place. **Creating a "compliance defense" to knowing and intentional violations of the Act would amount to eliminating criminal liability under the Act all together by permitting a "fig leaf" compliance program to insulate companies from knowing and intentional wrong-doing.**

Creating a "compliance defense" to knowing and intentional violations of the Act would amount to eliminating criminal liability under the Act all together by permitting a "fig leaf" compliance program to insulate companies from knowing and intentional wrong-doing.

The Chamber's assertion that the existence of affirmative defenses for corporate compliance in the U.K. and Italian anti-bribery statutes creates a justification for the creation of an affirmative compliance defense under the FCPA is both inappropriate and misleading. With respect to the U.K. Bribery Act of 2010 (the "U.K. Act"), the affirmative defense of "adequate" compliance procedures is only available with respect to a new and very broad strict criminal liability offense created in the U.K. Act. In the U.K., a "commercial organization" may be held criminally liable for failure to prevent prohibited bribery by any person "who performs services" for such organization.[92] In other words, under this provision of the U.K. Act, a company can be held liable for failure to prevent bribery conducted by employees or representatives *without the company's knowledge and without any corporate intent* to make the bribes. No such offense exists under the FCPA, and the U.K. Act tellingly does not provide any affirmative defense of compliance for those offenses which include a *mens rea* requirement equivalent to the FCPA.[93]

Italian Legislative Decree No. 231 of 8 June 2001 (the "Italian Act") creates administrative liability for companies resulting from offences committed by persons holding representative, administrative or managerial positions in the company so long as the criminal acts are in the interest of or otherwise benefit the company.[94] Like the U.K. Act, *there is no requirement in the Italian Act that the company have knowledge of the criminal activity or any intent to commit violations* by its representatives in order to establish liability.[95] Article 6 of the Italian Act creates an affirmative defense for failure to prevent the criminal activity of an employee or representatives if the company can demonstrate that prior to the criminal activity the company had established and effectively implemented a compliance program suitable to preventing the corporate crime at issue and overseen by an autonomous supervisory body that adequately performed its duties.[96] Thus, as with the U.K. Act, the compliance defense under the Italian Act is provided in respect to corporate administrative liability for a company's failure to prevent criminal acts by its representatives whether or not it had knowledge of such acts or intended them to be undertaken.

The U.K. and Italian approaches might be reasonable as a matter of regulatory policy, allowing a company to avoid liability for its failure to prevent a particular instance of criminal activity by an employee or representative about which it lacked knowledge if the company can establish that it had in place an otherwise effective compliance program adopted, implemented and administered in good faith. **Despite the Chamber's assertions to the contrary, there is no similar strict liability offense under the FCPA pursuant to which a company could be held responsible for acts of its employees or agents about which it had no knowledge or with respect to which it had not acted corruptly with "conscious disregard of known circumstances."** Since Congress eliminated corporate criminal liability for acts that a company "had reason to know" were unlawful in its 1988 amendments to the FCPA, the FCPA requires both knowledge and corrupt intent in order to hold a company liable for criminal acts by persons acting on the company's behalf.[97] As has been discussed already, an affirmative defense of "good faith" or "adequate" compliance is logically inconsistent with a liability standard that requires corporate violations to be both "knowing" and "corruptly" and intentionally undertaken. In this context, adopting the Chamber's proposal to amend the FCPA to include an affirmative defense for corporate compliance in the face of knowing and intentional bribery would signal to our OECD partners a significant loosening of the applicable standards of conduct for corporations under the Act as well as a major shift in policy regarding the U.S. commitment to fighting global corruption.[99]

The Chamber also suggests that companies will lack adequate incentives to implement appropriate compliance programs because of fear that the compliance program itself may subject them to liability under the FCPA without a formal statutory affirmative defense for compliance. This concern is simply not supported by the facts. The obligation to put in place appropriate mechanisms to ensure adequate reporting up the chain of command and compliance with applicable law has its roots in the most basic requirements of corporate law—the fiduciary duty of managers to act in good faith and in the best interests of the corporation in the oversight of a company's operations. The fundamental fiduciary duty of due care and oversight requires company management to adopt appropriate reporting mechanisms reasonably designed to bring malfeasance by employees and representative to light as well as compliance mechanisms designed to ensure compliance with the company's legal obligations under applicable law.[99] While a Board's decision as to the type and scope of reporting and compliance mechanisms necessary in particular circumstances, if undertaken in good faith and in the absence of a ["systematic or conscious disregard for known circumstances"], will insulate the board from liability, the fiduciary obligation to adopt appropriate compliance measures remains a legal obligation of the corporate law of every state.[100]

This basic obligation to engage in good faith compliance is strengthened by the provisions of the U.S. Sentencing Guidelines which set forth guidance for judges, pros-

ecutors and companies with respect to corporate criminal liability and compliance, not only for the FCPA, but also for the numerous other federal statutes providing criminal sanctions for corporate acts. For example, the introductory comments to the section of the U.S. Sentencing Guidelines Manual dealing with corporate crimes suggest that the Guidelines are designed to provide "incentives for organizations to maintain internal mechanisms for preventing, deterring, detecting, and reporting criminal conduct."[101] Under the Guidelines, a corporation's criminal culpability and the possibility of sanction can be reduced by the existence of what the Guidelines call an "Effective Compliance and Ethics Program."[102] The Guidelines also define in significant detail the minimal requirements necessary to establish an "Effective Compliance and Ethics Program."[103] While the U.S. Supreme Court in *United States v Booker*, 543 U.S. 220 (2005), determined that the U.S. Sentencing Guidelines were advisory and not binding on the courts, the Chamber has not put forth any evidence that either the DOJ or the federal courts are acting other than in conformity with the Guidelines in respect to the treatment of compliance efforts by companies in connection with FCPA investigations or prosecutions. In fact, as has been noted elsewhere, and acknowledged by the Chamber Report, DOJ and SEC practice suggests that compliance is taken into account at every stage of the investigation and prosecution process under the FCPA, including decision to enter into DPAs and NPAs in appropriate circumstances.

Finally, in large part due to efforts of the United States in promoting anti-bribery legislation abroad, both U.S. and foreign companies are subject to anti-bribery statutes substantially equivalent to and in some cases more stringent than the FCPA in numerous countries around the world in which they are doing business, including virtually all major trading partners. In other words, engaging in robust compliance practices is not a matter of business choice, such practices are an essential part of the requirements for doing business in the modern global economy.

In sum, appropriate reporting and compliance mechanisms are required as a matter of basic fiduciary duty, as part of the general obligation to comply with applicable law, as a significant method in accordance with the U.S. Sentencing Guidelines for reducing the risk of corporate criminal liability and sanction under federal law, and as an essential part of any effort to avoid criminal sanctions under the applicable anti-bribery laws of all OECD countries and most other major trading partners. Under such circumstances, it can hardly be said that the incentives to adopt adequate compliance mechanisms do not exist—good compliance practices are a necessary part of good global business.

2. Proposed Amendment: Eliminating Successor Liability for Pre-Acquisition Acts of an Acquired Company under the FCPA

Successor liability is rarely imposed, but it remains important to prevent companies from escaping from liability through restructuring

Much of the rhetorical heat contained in the section of the Chamber's Report dedicated to its proposal to eliminate successor liability for acquiring companies for the criminal acts of their acquirees is generated not from any issue peculiar to the FCPA, but rather from a strong ideological objection to successor liability in general. In describing the scope of its proposed amendment to the FCPA, the Chamber Report states: "At a minimum, a corporation, irrespective of whether or not it conducts reasonable due diligence prior to and/or immediately after an acquisition or merger, should not be held criminally liable for ... historical violations [committed by its acquiree(s)]."[104] While the imposition of successor criminal liability is indeed quite rare, the potential for successor corporate criminal liability in appropriate circumstances is by no means new or unique.[105] Moreover, there are good policy reasons for retaining the possibility of successor criminal liability in cases where eliminating such liability would substantially undermine the purposes of the criminal statute in question, even if successor liability is rarely applied in fact.[106] The FCPA is just such a case and the DOJ and SEC actions in the *Alliance One* case, described in the Chamber's Report as an example of why successor liability is inappropriate, demonstrates precisely why successor liability is a crucial part of the FCPA enforcement framework.[107]

In the *Alliance One* case, Dimon Incorporated (Dimon) and Standard Commercial Corporation (SCC), two independent wholesale leaf tobacco merchants, each acting through foreign subsidiaries, engaged in systematic and sustained schemes of bribery of foreign officials to obtain contracts for tobacco purchases for resale.[108] In the case of Dimon, the bribery schemes lasted for a period of eight years in Kyrgyzstan and four years in Thailand.[109] In the case of SCC, the bribery scheme was conducted over four years in Thailand.[110] Both companies were also charged with numerous other FCPA violations for prohibited acts in a number of other countries including Greece, China and Indonesia.[111] Evidence was proffered in the case of both companies that the bribery schemes were undertaken by the subsidiaries *at the direction of senior management at the parent company level*.[112] In 2005, Dimon and SCC merged to form Alliance One International, Inc. (Alliance One).[113]

Under the rule proposed by the Chamber, Alliance One could escape all liability for the knowing and intentional criminal acts of its predecessor companies (Dimon

and SCC) merely as a consequence of restructuring its corporate operations through a merger. This is not a case in which Alliance One sought to investigate or eliminate the criminal behavior of its predecessor companies after the merger. Nor was Alliance One the innocent victim of the unauthorized acts of low level employees in its foreign subsidiaries. Yet, precluding the DOJ and the SEC from pursuing successor criminal liability after a restructuring as the Chamber urges Congress to do would have precluded the investigation and prosecution of egregious and long-standing FCPA violations by Alliance One and its predecessors, thereby significantly reducing the effectiveness of the FCPA, while creating perverse incentives for companies to avoid liability through restructuring. It bears noting that even in the face of significant knowing and intentional violations of the FCPA by Alliance One as successor to Dimon and SCC, in addition to fines paid in connection with the guilty pleas of both subsidiaries and Alliance One, the DOJ also entered into a Non-Prosecution Agreement with Alliance One which focused on helping the company and its subsidiaries to improve internal compliance processes to reduce the risk of non-compliance in the future.[114] Far from an example of prosecutorial over-reaching, the *Alliance One* case demonstrates that the current FCPA (including the availability of potential successor criminal liability) is an appropriate mechanism for punishing egregious and sustained bad acts from the past while creating an appropriate framework of incentives to encourage good corporate business practices for the future.

A similarly compelling case for successor criminal FCPA liability as an important mechanism for encouraging adequate pre-acquisition due diligence and post-acquisition compliance mechanisms can be made in the common circumstance where a potential acquiror is considering the acquisition of a company that may have engaged in FCPA violations. An excellent case in point is the one considered by the DOJ in its Opinion Release No. 08–02 (June 13, 2008) (hereinafter *Halliburton* case), which, like the *Alliance One* case, generates considerable critical commentary in the Chamber's Report.[115]

In the *Halliburton* case, Halliburton Company requested an opinion from the DOJ pursuant to the FCPA Opinion Release Procedure in a circumstance where it was engaged in competitive bidding for the acquisition of a U.K.-based company in the oil and gas industry that was traded on the London Stock Exchange and had operations in more than 50 countries, more than 4,000 employees and numerous national oil companies as customers (the Target).[116] Due to peculiarities of U.K. law in competitive bidding situations, Halliburton had neither sufficient time nor sufficient access to information to complete its FCPA and anti-corruption due diligence on Target and it was precluded from making an offer conditional on the satisfactory completion of due diligence.[117] In such circumstances, Halliburton sought assurance from the DOJ as to whether (i) it would be held liable under the FCPA for the acquisition of the Target, (ii) it would be liable for any FCPA liabilities of the Target prior to the acquisition and (iii) it would be

held liable for any post-acquisition conduct by the Target before it was able to complete its FCPA due diligence, if such conduct is identified and disclosed to the DOJ within 180 days of the acquisition.[118]

In Opinion Release No. 08–02 the DOJ describes a comprehensive post-acquisition plan of investigation, risk assessment, disclosure and cooperation put forward by Halliburton which indicates a significant, good faith effort to identify wrong-doing and to rectify it as soon as practicable, while also undertaking to create a new corporate culture of FCPA and anti-corruption compliance in the Target and throughout its operations.[119] In response to Halliburton's proposal, and recognizing that Halliburton was precluded by U.K. law from undertaking the due diligence it deemed appropriate prior to the acquisition, the DOJ opined that Halliburton would not be subject to FCPA successor liability (i) for merely acquiring the Target, (ii) for pre-acquisition conduct by the Target disclosed during the 180-day period following the closing, or (iii) for post-acquisition conduct of the Target disclosed during the 180-day period following the closing, in the latter two instances, provided that Halliburton implemented its post-closing and remediation plan, and that no Halliburton employee or agent knowingly played a role in the violations by the Target.[120]

From the *Halliburton* case, one can see the crucial role that the potential for successor FCPA liability plays in encouraging companies to engage in appropriate pre- and post-acquisition due diligence and compliance activities. The case also demonstrates the usefulness of the Opinion Procedure for obtaining guidance as to appropriate corporate behavior in the context of a complex multinational acquisition as well as the flexibility the DOJ has shown in helping companies to fashion appropriate due diligence, compliance and risk management mechanisms without thwarting an otherwise advantageous acquisition.

To fully appreciate the benefits of successor FCPA liability, consider the perverse incentives for companies if successor liability were eliminated from the FCPA as proposed by the Chamber. Because under the Chamber's proposal an acquisition would immunize an acquiring company from liability for the criminal acts of the acquired company, companies like Halliburton might decide not investigate the past FCPA violations of potential acquirees. Such a failure to investigate, while seeming to reduce acquisition costs in the short run, would likely expose the acquiring company to numerous unknown and potentially catastrophic business risks (especially if much of the acquired company's business was procured by or relied upon bribes or corruption). In addition, the absence of a thorough pre-acquisition due diligence process may also significantly increase the risk of post-acquisition liability for the acquiring company under the FCPA (and other applicable foreign anti-bribery legislation) because without a clear picture of the corrupt practices of its acquiree at the time of the acquisition, the acquiring

company may fail to put in place necessary and appropriate reporting and compliance mechanisms to avoid future violations after the acquisition.

From this example, it becomes clear that adequate diligence both before and after an acquisition is not fundamentally about compliance with the FCPA, it's about good business practice in a complex global business environment. Successor liability under the FCPA helps to prevent companies from seeking to avoid liability for their own past criminal behavior through corporate restructurings. At the same time, successor liability provides an additional incentive for companies to engage in levels of diligence both before and after an acquisition sufficient to be sure that when they make an acquisition they are not acquiring much more business risk and potential liability than they bargained for. It is also important to note that successor liability is a part of "best practice" anti-bribery legislation of our major trading partners, including the U.K. and Italy.[121]

In sum, far from evidencing a problem with the FCPA or DOJ or SEC practice with respect to successor liability, the resolution of the *Alliance One* case and the DOJ's advice to Halliburton in Opinion Release No. 08–02 demonstrate that the system is functioning just as it was intended—providing appropriate mechanisms to prevent companies from escaping the consequences of criminal conduct through corporate restructuring, while at the same time providing incentives for companies to engage in appropriate levels of diligence both before and after acquisitions, thereby avoiding unnecessary and costly business and regulatory risk. Adopting the Chamber's proposal to eliminate successor liability from the FCPA would disrupt this functional balance, while creating perverse incentives regarding due diligence and compliance that would neither serve the interests of U.S. business nor the purposes of the FCPA.

3. Proposed Amendment: Adding "Willfulness"

As interpreted and applied by the courts and the DOJ and the SEC, the applicable standards for criminal liability for both individuals and corporations are effectively equivalent

The Chamber's proposal to add a "willfulness" requirement to establish corporate criminal liability under the FCPA is premised on an asserted unfairness in the legal treatment of corporations as opposed to individuals under the Act. As the Chamber's Report puts the argument:

> The omission [of a willfulness requirement for corporations] substantially extends the scope of corporate criminal liability—as opposed to individual criminal liability—since it means that a company can face criminal penalties for a violation

of the FCPA even if it (and its employees) did not know that its conduct was unlawful or even wrong.[122]

This is a misstatement of the *mens rea* requirements for corporate criminal liability under the FCPA both as reflected the case law and in DOJ and SEC practice. As has been repeatedly stated, establishing corporate criminal liability under the FCPA requires prosecutors to prove beyond a reasonable doubt that the corporate defendant's actions be both "knowing" and "corruptly" undertaken.[123] **The courts and the DOJ have interpreted "corruptly" to require that the defendant acted "knowingly and dishonestly, with the specific intent to achieve an unlawful result by influencing a foreign public official's actions in one's own favor."[124] Thus, the Chamber's claim that corporations run the risk of criminal penalties under the FCPA of innocent, unknowing or mistaken violations of the Act is simply not accurate.**

Moreover, the Chamber's Report misstates the case law as to the legal meaning of the "willfulness" standard in the FCPA for individual defendants. In a long and carefully reasoned opinion, the U.S. Court of Appeals for the 5th Circuit in *United States v. Kay* articulated the meaning of the "willfulness" standard in the FCPA.[125] In *Kay*, the Court begins its analysis of the "willfulness" requirement by recognizing that "willfulness" is not defined in the FCPA but derives rather from 15 U.S.C. § 78ff(c)(2)(A) which defines the applicable civil and criminal penalties for a broad range of federal statutes.[126] In the absence of a statutory definition for "willfulness" the court looks to the common law interpretation of the term following the structure of analysis established by the United States Supreme Court for analyzing criminal willfulness in federal statutes in *Bryan v. United States*, 524 U.S. 184 (1998).[127] Following *Bryan*, the court in *Kay* articulates three different levels of interpretation for criminal willfulness in federal law—the first (lowest) level requires the defendant to have acted intentionally with knowledge of having committed an act which falls within the ambit of prohibited conduct under the applicable statute regardless of whether the defendant knew of the existence of the statute or that the conduct was wrongful; the second (intermediate) level requires the defendant to have known that his actions were in some way unlawful regardless of whether the defendant knew of the specific statute prohibiting the conduct; and the third (strictest) level, found to apply only in very rare circumstances involving complex statutes like the tax code, requires the defendant to know the terms of the specific statute and that he was violating the statute.[128] Following the Second Circuit, which had also considered the meaning of the "willfulness" requirement under the FCPA, and the Supreme Court's logic in *Bryan* as to the rare circumstances in which the strictest "willfulness" standard should apply in connection with federal criminal statutes, the *Kay* court held that the FCPA was not a "complex" statute within the meaning of *Bryan* requiring the strictest standard of willfulness.[129] Rather, the *Kay* court held that a jury instruction requiring the

jury to find that the "Defendants acted corruptly, with an 'unlawful end or result,' and committed 'intentional' and 'knowing' acts with a bad motive" was sufficient to establish the "willfulness" required for a criminal conviction of an individual under the FCPA.[130]

A comparison of the established interpretation of the "willfulness" requirement for individual criminal liability under the FCPA with the *mens rea* requirements of "knowing" and "corrupt" acts for corporate criminal liability under the Act reveals that the standards are effectively equivalent. **Contrary to the Chamber's suggestion, even absent a "willfulness" requirement for corporations, no parent company could be successfully charged with criminal violations of the FCPA for unlawful payments made by a subsidiary about which it had no actual knowledge and with respect to which it did not manifest the requisite corrupt "bad or wrongful purpose and intent to influence a foreign official to misuse his official position."**[131]

Conversely, adopting the "willfulness" standard that is currently applied under the FCPA to individuals for corporate criminal liability would not, as the Chamber suggests, protect a corporation from being "charged with violations of the anti-bribery provisions, even if it was unaware that the FCPA could reach such payments,"[132] because the FCPA "willfulness" standard does not require defendants to have knowledge of and intent to violate the specific provisions of the FCPA, but only knowledge that making payments to a foreign official to influence the official's actions is in some way unlawful.[133] In fact, as interpreted and applied by the courts and the DOJ and the SEC, the applicable standards for criminal liability for both corporations and individuals under the FCPA require that the defendant knowingly engage in acts proscribed by the Act with the bad or wrongful purpose and intent that those acts would induce a foreign official to misuse his or her official position. Despite the Chamber's claims to the contrary, these standards simply do not permit successful prosecution of innocent, mistaken or unknowing persons, whether corporations or individuals, under the FCPA.

From this analysis, the real impact of the Chamber's proposal becomes clear—to raise the criminal liability standard for corporations and individuals under the FCPA to require defendants to know the specific provisions of the FCPA and to have the specific intent to violate those provisions. In other words, for the addition of a "willfulness" requirement to have the effect the Chamber desires, it would be necessary to raise the standard to the strictest level of criminal willfulness articulated in *Bryan*. In explaining the very rare circumstances in which federal law requires criminal defendants to have knowledge and intent to violate specific statutory provisions, the Court states:

> [Those cases] involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct. As a result, we held that these statutes "carve out an exception to the traditional rule" that

> ignorance of the law is no excuse and required the defendant to have knowledge of the law. The danger of convicting individuals engaged in apparently innocent activity that motivated our decisions [in those cases involving complex statutes] is not present here because the jury found that this petitioner knew that his conduct was unlawful.[134]

The two federal circuits that have considered the question of whether the FCPA was a "complex statute" requiring the strictest "willfulness" standard have found that it is not, reasoning that the conduct proscribed under the FCPA—the knowing bribery of a foreign official with the bad or wrongful intention of inducing a foreign official to misuse his or her official position for advantage—was not the sort of highly technical prohibition that posed a significant risk of being innocently or inadvertently violated.[135] In other words, one doesn't need to know the specific provisions of the FCPA to know that bribing a foreign official with the intent to obtain an unfair business advantage is wrongful and likely to be prohibited by some applicable law. This is the standard of "willfulness" that the courts and the DOJ/SEC have found is required by the FCPA for both individual and corporate criminal liability, and put in these clear terms, this standard presents no evidence of the extreme unfairness to corporations that the Chamber Report suggests.

Moreover, a brief examination of some of the cases that the Chamber Report cites in support of the alleged unfairness to corporations of the FCPA's current *mens rea* standards and which, by implication, the addition of a "willfulness" requirement would correct, are quite telling in exposing just how extreme the Chamber's conception of "willfulness" really is and what the impact of adopting such a standard in the FCPA would entail. For example, the Chamber strongly criticized the separate charges brought in the *Siemens* case against a Bangladeshi subsidiary of Siemens ("Siemens Bangladesh") as evidence of the kind of unfairness and prosecutorial over-reaching which makes the addition of a "willfulness" standard to the FCPA for corporate criminal liability necessary.[136] In particular, the Chamber Report suggests that prosecution of Siemens Bangladesh was inappropriate because all of the bribes were made by foreign entities outside the United States and Siemens Bangladesh did not know that making some of the bribes from U.S. bank accounts might subject it to liability under the FCPA.[137] In fact, the DOJ charged and Siemens Bangladesh plead guilty to knowingly and intentionally making thirty-three illegal payments over the course of more than five years and amounting to more than $5,335,000 for the purpose of obtaining telecommunications business for other companies in the Siemens group.[138] Moreover, the acts of Siemens Bangladesh were part of a pattern of bribery that, according to the DOJ, "was unprecedented in scale and geographic reach" involving "more than $1.4 billion in bribes to government officials in Asia, Africa, Europe, the Middle East and

the Americas."[139] As it can hardly be asserted under these facts that either Siemens or Siemens Bangladesh did not know that their sustained and pervasive pattern of bribery together with their systematic efforts to falsify corporate records to hide their bribery was wrongful and in violation of law (the current standard of *mens rea* and "willfulness" required under the FCPA), it becomes clear that the Chamber's proposed addition of "willfulness" could only be meant to require that Siemens and Siemens Bangladesh would have to know and intend for their conduct to violate the specific provisions of the FCPA to be subject to liability. In other words, the Chamber's proposed "willfulness" standard would insulate Siemens Bangladesh from criminal responsibility for its long-standing, pervasive, knowing and intentionally unlawful acts of bribery merely because it did not have specific knowledge that making bribes from U.S. bank accounts would violate provisions of the FCPA. Seen in this light, the Chamber's proposal looks much more like a license to commit pervasive and intentional bribery with impunity rather than a modest attempt to eliminate the unfairness to corporations of the risk of possible prosecutorial over-reach.

The Chamber's Report also singled out the *BAE* case as evidence of "[t]he government's increasingly broad interpretation of the jurisdictional reach of the FCPA" in its discussion of the need for a "willfulness" standard.[140] In *BAE*, BAE Systems plc, a U.K. corporation, plead guilty "to conspiring to defraud the United States by impairing and impeding its lawful functions, to make false statements about its Foreign Corrupt Practices Act (FCPA) compliance program, and to violate the Arms Export Control Act (AECA) and International Traffic in Arms Regulations (ITAR)" which false statements and failures to make disclosure to the U.S. government resulted in more than $200 million in ill-gotten gains to BAE.[141] The Chamber Report suggests that the basis for charges in *BAE* "was the possible use of U.S. bank accounts to make improper payments," which, in the context of a discussion of the "willfulness" standard must be meant to imply, as with Siemens Bangladesh, that it was unfair to prosecute BAE because it did not specifically know that making such payments from the U.S. would violate the FCPA.[142] In fact, the charges in relation to the FCPA to which BAE plead guilty in the *BAE* case did not involve the unlawful payments themselves. Rather, BAE "knowingly and willfully failed to create sufficient compliance mechanisms to prevent and detect violations of the anti-bribery provisions of the FCPA" while making knowing and willful false statements to the U.S. government to the contrary.[143]

The Chamber's mischaracterization of the *BAE* case is instructive of its intention with regard its proposed "willfulness" standard. Since BAE was charged for and actually pleaded guilty to "knowingly and willfully making false statements to U.S. government agencies," the "willfulness" standard the Chamber is proposing must be more strict than the one applied in *BAE* if the addition of such standard would have an impact on

the ability of the United States to prosecute companies such as BAE on similar facts in the future. Moreover, if the addition of the Chamber's strict "willfulness" standard to the FCPA would limit the DOJ and the SEC from investigating and prosecuting pervasive and systematic corporate corruption on the scale evidenced in the *Siemens* and *BAE* cases, the Chamber's proposed amendment can only be understood as an attempt to significantly circumscribe the scope of the FCPA and restrict the ability of the U.S. government to fight even the most extreme cases of corporate corruption. Once again, far from limiting the unfairness to corporations of unreasonable exercises of prosecutorial discretion, the Chamber's proposal looks more like a license to bribe with impunity even in cases where there is no question as to a company's intention to bribe and knowledge that its acts were wrongful or unlawful merely because the company did not also know it was violating the specific provisions of the FCPA.

Taken on its own, the primary beneficiaries of the Chamber's proposed "willfulness" amendment would seem to be foreign corporations, like Siemens and BAE, that might be less likely to know the specific provisions of the FCPA than U.S. companies. When read together with the Chamber's other proposed FCPA amendments including the elimination of successor liability and liability for the acts of subsidiaries, the Chamber's broader agenda of significantly limiting the scope and efficacy of the FCPA with respect to both U.S. and foreign corporations becomes apparent.

4. Proposed Amendment: Eliminating a Parent Company's Civil Liability under the FCPA for the Unlawful Acts of Its Subsidiary

Eliminating the risk of civil liability would substantially decrease the incentives for parent company to oversee FCPA compliance by their foreign subsidiaries

Just as the potential for successor corporate criminal liability provides an important incentive for an acquiring company to undertake thorough due diligence, the potential for a corporate parent to be held civilly liable for FCPA violations carried out by its subsidiaries provides a critical mechanism for incentivizing parent companies to adopt and effectively implement a group-wide anti-corruption compliance program. Such programs are designed to prevent FCPA violations by their controlled subsidiaries before such violations occur and to promptly detect, disclose and eliminate such violations that do occur. There is no doubt that Congress was aware when it adopted the FCPA that companies frequently use foreign subsidiaries to make corrupt payments to

foreign officials. As the House Committee on Interstate and Foreign Commerce noted in discussing the bill that came to be the FCPA:

> The committee found it appropriate to extend the coverage of the bill to non-U.S. based subsidiaries because of the extensive use of such entities as a conduit for questionable and improper conduct. The committee believes this extension of U.S. jurisdiction to so-called foreign subsidiaries is necessary if the legislation is to be an effective deterrent to foreign bribery. Failure to include such subsidiaries would only create a massive loophole in this legislative scheme through which millions of bribery dollars will continue to flow.[144]

While the FCPA as finally adopted in 1977 did not extend direct liability to foreign subsidiaries, the House-Senate Conference in discussing the final Act made clear that a U.S. parent company, whether an issuer or a domestic concern under the Act, would remain liable for corrupt payments made indirectly through its foreign subsidiary.[145] As has been repeatedly stated, the predicate for liability under the anti-bribery provisions of the FCPA is "knowledge" and "corrupt" intent. In adopting a definition of "knowledge" in the 1988 amendments to the FCPA that eliminated liability for violations by subsidiaries about which it had "reason to know" while retaining a parent company's liability for "conscious disregard" or "deliberate ignorance" of the unlawful activity of its subsidiaries,[146] Congress meant to address the "head-in-the-sand problem" to ensure that

> Management officials could not take refuge from the Act's prohibitions by their unwarranted obliviousness to any action (or inaction), language or other "signaling" device that should reasonably alert them of the "high probability" of an FCPA violation.[147]

Through these mechanisms, Congress preserved an incentive for parent companies to monitor and secure compliance by their foreign subsidiaries while seeking to protect parent companies from strict liability for violations by subsidiaries conducted wholly independently and without the parent's knowledge or tacit acquiescence.

In the accounting and controls provisions of the FCPA Congress expressed a similar intent to require that parent companies remain vigilant over the acts of their subsidiaries. As the Senate Committee on Banking, Housing and Urban Affairs explained,

> a U.S. company which "looks the other way" in order to be able to raise the defense that they were ignorant of bribes made by a foreign subsidiary, could be in violation of [15 U.S.C. § 78(m)(b)(2)] requiring companies to devise and maintain adequate accounting controls. Under the accounting section no off-the-

books accounting fund could be lawfully maintained, either by a U.S. parent or by a foreign subsidiary, and no improper payment could be lawfully disguised.[148]

Significantly, Congress chose to hold parent companies liable for even unknowing violations of the books and records and accounting and control provisions of the FCPA by their foreign subsidiaries in recognition of the fact that without the prospect of such liability, the temptation for parent companies to "look the other way" might be too great.[149]

It is in this context that the Chamber's proposal to amend the FCPA to limit a parent company's civil liability for the acts of a subsidiary must be assessed. It seems clear that Congress has repeatedly refused to eliminate liability of parent companies for FCPA violations conducted through subsidiaries in recognition of the fact that doing so would effectively insulate the vast bulk of foreign bribery from the reach of the Act. On the other hand, the Chamber is correct in suggesting that if the FCPA permitted a parent corporation to be liable for an act of bribery by a subsidiary of which it had no knowledge and in which it did not participate or acquiesce through "conscious disregard" or "deliberate ignorance" would eviscerate the knowledge and intent requirements of the Act.

The FCPA seeks to achieve a delicate balance between these two extremes whereby under the books and records and accounting and controls provisions of the Act a parent corporation is obligated to ensure that the books and records of its subsidiaries accurately reflect the disposition of corporate assets, including, if applicable, corrupt payments to foreign officials. If the parent consciously or deliberately fails to take any action to ensure proper and accurate reporting by its subsidiaries in accordance with the books and records and accounting and control provisions of the FCPA, to investigate "red flags" that might reasonably alert it to potential unlawful behavior by its subsidiaries or to take appropriate steps to eliminate corrupt payments being made by a subsidiary of which it becomes aware through such reporting, it may give rise to a reasonable inference that the parent indirectly participated in the subsidiary's acts of bribery through its knowing acquiescence, conscious disregard or deliberate ignorance of its subsidiary's unlawful actions.[150] It is important to note that in such a circumstance, it is the parent's conscious acquiescence in the unlawful acts of its subsidiary through a deliberate failure of oversight that gives rise to its potential liability under the Act and not the acts of the subsidiary alone. Moreover, it would still be incumbent upon the government to establish that the parent's failures and omissions were both knowing and corruptly undertaken in order for liability to attach under the anti-bribery provisions (as opposed to the books and records and controls provisions) of the Act.

While the Chamber's Report asserts that the SEC "routinely charges parent companies with civil violations of the anti-bribery provisions based on actions taken by

foreign subsidiaries of which the parent is entirely ignorant," it supports this assertion with only two case examples,[151] neither of which justifies the disturbance of the balanced framework of "carrot" and "stick" incentives created by Congress in the FCPA to induce parent companies to secure the compliance of their foreign subsidiaries that would result if the Chamber's proposed amendment on parent/subsidiary liability were adopted.[152]

In the first case, *In the Matter of United Industrial Corporation* ("UIC"), the SEC charged UIC, a defense contractor, with violations of the books and records, the controls and the anti-bribery provisions of the FCPA in connection with a scheme of bribery undertaken by Thomas Wurzel, the CEO of one of UIC's subsidiaries, to secure defense business for UIC in connection with a military aircraft depot in Cairo, Egypt.[153] The SEC also brought a separate enforcement action against Thomas Wurzel directly for violations of the FCPA.[154] The SEC's allegations supporting UIC's culpability under the Act included (i) a lack of meaningful controls to prevent or detect Wurzel's illegal conduct, (ii) approval by UIC's legal department of its subsidiary's retention of the Egyptian agent through which the bribes were made without any due diligence and on the basis of a contract which did not comply with UIC's stated FCPA compliance policy, (iii) approval by a UIC official of at least one substantial payment to the agent without investigation as to the purposes of the payment, (iv) the substantial financial benefit to UIC of the unlawful conduct and (v) the fact that Thomas Wurzel had a direct reporting line to UIC's CEO and that UIC routinely listed Wurzel in its Forms 10-K and annual reports as "senior management" of UIC.[155]

In the second case, *In the Matter of Diagnostic Products Corporation* (DPC), the SEC charged DPC, a producer and seller of diagnostic medical equipment, with violations of the books and records, controls and anti-bribery provisions of the FCPA in respect of a scheme of bribery conducted over an 11-year period involving improper commission payments made by a subsidiary of DPC to doctors and laboratory employees who controlled purchasing decisions at state-owned hospitals in China.[156] A separate DOJ action was brought directly against DPC's subsidiary DPC (Tianjin) Co. for FCPA violations for the same bribery scheme.[157] While the Cease and Desist Order acknowledges that DPC did not become directly aware of the unlawful payments until November 2002 when accountants alerted it to Chinese tax issues with respect to the payments, there is some implication that the company's failure to discover unlawful payments frequently paid in cash and consistently made over a period of 11 years could give rise to an inference of a deliberate lack of adequate controls or a "conscious disregard" of unlawful activity by its subsidiary.

Whether the charges brought by the SEC in the *UIC* or the *DPC* cases would have been sustained at trial is a matter of conjecture that only court action could definitively resolve. Nevertheless, attention to these cases reveals a number of important things.

First, the remedies undertaken in both cases could have been sustained under the books and records and adequate controls provisions of the FCPA regardless of any alleged violation of the anti-bribery provisions.[158] Hence, it is unclear from these cases whether the anti-bribery charges were a significant basis for the SEC's action or merely a make-weight addition to a complaint based primarily on the books and records and controls provisions that the Chamber concedes contemplate liability for violations of foreign subsidiaries regardless of knowledge or intent by the corporate parent. Second, in both cases, the SEC articulates a colorable claim that the parent company participated or knowingly acquiesced in the unlawful bribery scheme of its subsidiary, giving rise to possible liability under the anti-bribery provisions of the Act.[159] Third, had the cases gone to trial, or had the defendant parent companies chosen to challenge the SEC action, the SEC would have been required to establish that the parent's acts and omissions met both the knowledge and the corrupt intent requirements of the Act in order to subject the parent companies to liability under the Act. Finally, the remedies pursued by the SEC in both cases—an undertaking to cease and desist from further violations of the Act and disgorgement of the profits gained as a result of the unlawful bribes—suggest the SEC's intention to induce the parent to secure compliance with the FCPA by it and its subsidiaries rather than punishment of the parent's behavior.[160]

Despite the Chamber's citation of both of these cases to exemplify the need to limit a parent company's liability for the acts of its subsidiary, in neither case was the parent company subjected to any civil or criminal penalty or fine. Rather, in the case of DPC, a criminal penalty was levied by the DOJ against DPC's subsidiary DPC (Tianjin) Ltd., and in the case of UIC, a civil penalty was leveled by the SEC against Thomas Wurzel, the CEO of UIC's subsidiary, who instigated the bribery scheme.[161] With respect to the parent companies, the SEC pursued the equitable remedy of "disgorgement" authorized under the Securities Exchange Act of 1934 and used to divest wrong-doers of their ill-gotten gains and to induce compliance with the securities laws.[162] Unlike a penalty, which is designed to punish, disgorgement is intended to prevent unjust enrichment by restoring the company to the financial position in which it would have been if the wrongdoing had not taken place.[163]

Taken together, these cases suggest an effort by the SEC and the DOJ to implement Congress's dual mandate in the FCPA of inducing appropriate oversight by parent corporations over the activities of their subsidiaries, while permitting enforcement actions to be brought against parent companies in circumstances where there is reason to suspect that the parent may be violating the FCPA through the use of its foreign subsidiaries. While reasonable people might differ on whether the exercise of prosecutorial discretion under the FCPA in any particular case is appropriate, absent a showing of persistent prosecutorial abuse, it is most appropriate to leave the resolution of any

such cases which might arise in future to the courts, rather than making a fundamental legislative change to the architecture of the FCPA. In this regard, the fact that large, multinational corporations such as UIC and DPC chose to settle rather than challenge the SEC's charges under the FCPA may be a reflection of the companies' recognition of the colorable nature of those charges and the substantial risk of a judgment of additional liability at trial.[164] In any event, the Chamber has failed to establish that the speculative and unsubstantiated risk of civil liability by parent companies for the wholly independent acts of their subsidiaries outweighs the substantial risk, long recognized by Congress, that insulating parent companies from all liability for bribery undertaken by their foreign subsidiaries "would only create a massive loophole in this legislative scheme through which millions of bribery dollars will continue to flow."[165] Faced with such unequal risks, the prudent course for Congress would be to preserve the FCPA in its current form with respect to parent/subsidiary liability.

5. Proposed Amendment: Narrowing the Statutory Definition of "Foreign Official"

Public control over commercial enterprise varies greatly in different contexts and different countries, thus legislative clarification would be both over and under inclusive

As the Chamber correctly notes, not all knowing and corrupt payments intended to result in an undue advantage are prohibited by the FCPA. The FCPA, unlike anticorruption statutes in many other countries, does not prohibit bribery of private actors. The Act focuses on the knowing, intentional and corrupt bribery of foreign government officials, either directly or indirectly, for the purpose of exercising inappropriate influence on government policy or obtaining improper business advantage from a foreign government. This reflects the intention of Congress when it enacted the FCPA to focus on the harm done to our economy and to our foreign policy interests by the practice of bribing foreign governments.[166] The FCPA's definition of "foreign official" must be read in the context of the statute as a whole.

Accordingly, the FCPA limits the scope of the act in several crucial ways. As we have seen, the FCPA sets a high standard for *mens rea*, unlike the national anti-corruption statutes in the United Kingdom and elsewhere. Only payments made knowingly, intentionally, and corruptly are prohibited. Moreover, the purpose of the bribe must relate to the exercise of public authority. Specifically, the FCPA prohibits bribes directed to "foreign officials" for the purpose of

"(A) (i) influencing any act or decision of such foreign official in his official capacity,

(ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or

(iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person."[167]

The Act also prohibits payments made to

"any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of

"(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directly business to, any person."[168]

The Act clearly exempts "facilitating or expediting payment[s] to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action"[169] and provides an affirmative defense for payments which were "lawful under the written laws and regulations" of the foreign country whose officials received the payments and for "reasonable and bona fide expenditure[s], such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof."[170]

The FCPA's definition of "foreign official," tracks the approach taken by multilateral anti-corruption treaties and by the national statutes of other jurisdictions. In one way or another, all define "foreign official" broadly enough to permit appropriate administrative and prosecutorial discretion aimed at implementing the larger purpose of the legislation: prohibiting corrupt and illegal payments by people and organizations intended to improperly influence foreign government decision-making. The FCPA focuses on the nature of the entity to whom corrupt payments are made, prohibiting bribes directed to "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization."[171] The OECD defines "foreign public official" as

> any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization.[172]

The United Kingdom focuses more directly on the function being performed than on the nature of the entity concerned, defining a foreign official in terms of the exercise of a "public function" on behalf of a country or territory outside the UK, a public agency, public enterprise, or public international organization,[173] including "officers exercising public functions in state-owned enterprises."[174] In each of these cases, the definition is broad enough to permit interpretation in light of changing circumstances and the diverse forms through which public authority is exercised across the world.[175]

More importantly, the developing trend is towards the criminalization of private commercial as well as public bribery, rendering it less important to determine with precision the class of persons to whom it is permissible to offer corrupt payments. Indeed, with the rise of national statutes applicable to both public and private bribery, it would be a risky compliance strategy for a business entity to focus its global compliance program on the classification of the beneficiaries of the corruption. This trend is visible in national statutes in the UK and elsewhere, as well as in the OAS treaty—to which the U.S. is a signatory.[176]

The Chamber describes the potential prosecutorial reach of the FCPA in alarming terms. The hypothetical scenarios they sketch would indeed be alarming if the *other limitations* in the Act were disregarded. What, they ask, about a paying a speaking fee to a foreign professor who works for a public university? Might a company face liability for making payments to any commercial entity with substantial public ownership, such as

a foreign version of General Motors or A.I.G? The correct answer may well be *yes* if all of the requirements under the Act are satisfied. That is, if the payment to the professor was (i) unlawful under the law of the country involved, (ii) unable to qualify as a routine facilitative or expediting payment, and (iii) knowingly, intentionally and corruptly made for the prohibited purpose of influencing official action to obtain a business advantage. A similar analysis would apply in the case of a foreign commercial entity with substantial public ownership. Bribes knowingly and corruptly paid to such an entity for the prohibited purpose improperly influencing government decision-making for business advantage in violation of local law in circumstances which are neither routine nor reasonable and bona fide expenditures would be prohibited. But, when expressed in context, this hardly seems an example of unfairness to the corporate actors involved. As the Chamber acknowledges, case law has already begun to give guidance on the range of entities which may improperly influence official policy if offered corrupt payments for these prohibited purposes.[177]

The Chamber specifically proposes to restrict the scope of the FCPA by adopting a formal definition limiting the meaning of "instrumentality of a foreign government" to entities with a specific level of government ownership and restricting the meaning of "foreign official" to persons with a specific rank. Doing so would frustrate the purpose of the Act—and it would not benefit business which would continue to be subject to the much the broader functional definitions included in other national statutes. In a world which organizes public authority in a large variety of ways, drafting a rule arbitrarily limiting the types of foreign public "instrumentalities" to which the FCPA applies would seriously compromise the purpose of the Act to prevent intentional bribery which corrupts foreign officials and official decision-making. Because public authority is arranged very differently in different countries, entities controlled by the government, owned by the government, or associated with members of a foreign government may sometimes be more important in setting official policy than some official bodies. It is for this reason that the Act clearly includes payments to "any person," whether that person is or is not an "official" which are made for the purpose of corrupting official decision-making. Since the contours of public control over commercial life vary greatly in different cultural contexts, any legislative clarification would be destined to be both over- and under-inclusive. This is precisely the type of issue best left to sound administrative management and judicial review.

IV. Conclusion: The Way Forward for American Leadership

Congress enacted the FCPA in the wake of the Watergate scandal after an SEC investigation revealed that American firms had paid over $300 million in questionable payments to foreign government officials.[178] Congress felt that these events tarnished the image of the US abroad and impaired confidence in the financial integrity of American corporations.[179] The America business community agreed. Bans on bribery, they felt, would improve the climate and culture of international business. The American foreign policy community was equally concerned that illegal political contributions to foreign governments and transnational bribery by some American firms threatened to undermine foreign governments and hinder the lawful pursuit of U.S. business interests abroad. The resulting statute set a worldwide example and inaugurated a global campaign to eliminate corruption in transnational business.

More than thirty years later, corruption has never been more stigmatized globally. Governments everywhere have adopted strong statutes prohibiting bribery and corruption. By supporting multilateral standard setting, harnessing the extraterritorial reach of the FCPA to hold foreign companies accountable, and cooperating with foreign enforcement agencies, the United States continues to make a powerful contribution to transforming global business culture. The private sector has responded by developing powerful practices of compliance and internal monitoring. The result is a more open and reliable climate for international economic activity. It is easier for enterprises to

resist demands for corrupt payments. Off the shelf compliance programs are available to strengthen internal controls by businesses of all sizes. It is easier for foreign governments to discipline their own officials where enterprises operating in their jurisdiction are prohibited from making bribes and required to maintain records demonstrating that they have not done so. The global campaign against corruption has not been a constraint on American economic performance—quite the opposite. It has improved the climate for global business and made it easier for American firms to participate in the global economy on an equal footing.

As the global campaign turns towards strengthened enforcement and the administrative routinization of anti-corruption commitments, it will be particularly important for American authorities, led by the DOJ and the SEC, to retain their traditional flexibility, their commitment to a level playing field, and their emphasis on private sector compliance and monitoring as the most effective tools in the battle against corruption. The Chamber's misleading rhetoric notwithstanding, the global trends are all good, the FCPA is working and new legislation is not necessary.

Notes

1. The Chamber claims that the "top ten FCPA settlements ...total $2.8 Billion." They neglect to mention that the average fine per corporate proceeding has barely risen in the last decade, with the exception of two cases with abnormally high settlements, Siemens and Halliburton/KBR. Shearman & Sterling LLP, *Recent Trends and Patterns in FCPA Enforcement, FCPA Digest, at ix (Mar. 2009), available at http://www.shearman.com/files/upload/LT-030509-FCPA-Digest-Recent-Trends-and-Patterns-in-FCPA-Enforcement.pdf.*

2. The DOJ has stated that their "goal is not simply to prosecute FCPA violations, but also to prevent corruption." The DOJ's FCPA prosecutions involve "systemic long-standing bribery schemes" and not merely the payment of a single isolated bribe of nominal sums. Greg Andres, Acting Deputy Assistant Attorney General, *Foreign Corrupt Practices Act*, before the U.S. House of Representatives, at 4, 9, Jun. 14, 2011, available at http://judiciary.house.gov/hearings/pdf/Andres06142011.pdf.

3. The Chamber of Commerce recognizes that the DOJ is expanding the "FCPA net beyond its borders." *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, U.S. Chamber Institute for Legal Reform, at 4 (Oct. 2010).

4. Foreign Corrupt Practices Act of 1977, 15 U.S. C. §§ 78dd-1 *et seq.*; Michael Bixby, *The Lion Awakens: The FCPA, 1977–2010*, 12 San Diego Int'l. L. J. 89 (Fall 2010).

5. Unlawful Corporate Payments Act of 1977, H.R. Rep. No. 95–640, 95th Cong., 1st Sess., at 1–2 (Sept. 28, 1977).

6. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 *et seq.*

7. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78m.

8. Frank C. Razzano & Travis P. Nelson, *The Expanding Criminalization of Transnational Bribery: Global Prosecution Necessitates Global Compliance*, 42 Int'l Law 1259 (2008).

9. Between 1997 and 2007, seven major international or regional conventions related to anti-corruption fields were established, including the *United Nations Convention Against Corruption*, Oct. 31, 2003, G.A. Res. 58/4, U.N. Doc. A/RES/58/422. The other international conventions are the *Inter-American Convention to Prevent and Punish Torture*, Mar. 29, 1996, 35 I.L.M. 724 (Organization of American States) (34 signatories); *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Dec. 18, 1997, 37 I.L.M. 4 (38 signatories); *Criminal Law Convention on Corruption*, Jan. 27, 1999, Europ. T.S. No. 173 (Council of Europe) (48 signatories); *Civil Law Convention on Corruption*, Nov. 24, 1999, Europ. T.S. No. 174 (Council of Europe) (42 signatories); *African Union Convention on Preventing and Combating Corruption*, Jul. 11, 2003, 43 I.L.M. 5 (40 signatories); *United Nations Convention Against Transnational Organized Crime*, Nov. 15, 2000, G.A. Res. 55/25, U.N. Doc. A/55/383 (147 signatories). "UNCAC obligates state parties to implement a detailed set of measures to prevent, detect, and sanction corruption, including a private right of action," and "also sets for a framework for international cooperation in investigating and prosecuting cross-border cases." Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 Harv. J. on Legis. 425, 453–54 (2009).

10. *Bribery Act* (2010) c.23; Italian Lgs. Decree no. 231/2001.

11. Brandon L. Garrett, *United States v. Goliath*, 93 Va. L. Rev. In Brief 105 (2007).

12. *See* Daniel Tarullo, U.S. Dept. of State, *Developments at the OECD in the Multilateral Regulation of Corrupt Payments* (Apr. 10, 1995), available at http://dosfan.lib.uic.edu/ERC/economics/statements/950410.html; Alejandro Posadas, *Combating Corruption Under International Law*, 10 Duke J. Comp. & Int'l L. 345, 377–378 (2000).

13. Securities Exchange Act of 1934, 15 U.S.C. § 78u and U.S. Atty Manual, 9-47.110, -47.130, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/47mcrm.htm. H.R. Rep. No. 95–640, at 9 (1977), available at http://www.usdoj.gov/criminal/fraud/fcpa/history/1977/houseprt.html.

14. Eugene R. Erbstoesser et al., *The FCPA and Analogous Foreign Anti-Bribery Laws—Overview, Recent Developments, and Acquisition Due Diligence*, 2 Cap. Markets L.J. 381, 386 (2007).

15. *See* Reid Jonkers, *Recent Development: Recent Trends and Patterns in FCPA Enforcement*, 4 Envt'l. & Energy L. & Pol'y J. 297, 299–301 (2010); Shearman & Sterling LLP, *Recent Trends and Patterns in FCPA Enforcement, FCPA Digest (Mar., 2009), available at http://www.shearman.com/files/upload/LT-030509-FCPA-Digest-Recent-Trends-and-Patterns-in-FCPA-Enforcement.pdf*. In 2006, Assistant Attorney General Alice Fisher indicated that "Prosecuting corruption of all kinds is a high priority for the Justice Department and for me as the head of the Criminal Division.... By enforcing the FCPA, we are demonstrating our commitment to combating global corruption, maintaining the integrity of U.S. markets, and setting an example for other countries around the world." Alice Fisher, Assistant Attorney General, Remarks at the American Bar Association, National Institute on the Foreign Corrupt Practices Act, (Oct. 16, 2006) at 1–2.

16. Lanny Breuer, Assistant Attorney General, speaking at the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009) at 6: "We will press for ever-increasing vigilance by our foreign counterparts to prosecute companies and executives in their own countries for foreign bribery...This is part of a long-term goal to ensure a level-playing field for U.S. companies," available

at http://online.wsj.com/public/resources/documents/111709breuerremarks.pdf. *See also*, Alice Fisher, Assistant Attorney General, Remarks at the American Bar Association, National Institute on the Foreign Corrupt Practices Act, (Oct. 16, 2006) at 2: "By working with our international partners around the world, we are raising the bar on global anti-corruption enforcement.... By enforcing the FCPA, and by encouraging our counterparts around the world to enforce their own anti-corruption laws, we are making sure that your competitors do not gain an unfair advantage when competing for business."

17. American firms are barely represented among those who have paid the highest FCPA penalties. In descending order of highest fines paid to date: 1. Siemens AG (Germany): $800 million in 2008; 2. KBR / Halliburton (U.S.): $579 million in 2009; 3. BAE Systems PLC (U.K.): $400 million in 2010; 4. Snamprogetti Netherlands BV / ENI SpA (Holland/Italy): $365 million in 2010; 5. Technip SA (France): $338 million in 2010; 6. JGC Corp. (Japan): $218.8 million; 7. Daimler AG (Germany): $185 million in 2010; 8. Alcatel-Lucent SA (France): $137 million in 2010; 9. Panalpina Group (Switzerland): $81.8 million in 2010; and 10. ABB Ltd. (Switzerland): $58.3 million in 2010. Joe Palazzolo, *Another US Company Bumped Off FCPA Top 10 List*, The Wall Street Journal, Apr. 6, 2011, available at http://blogs.wsj.com/corruption-currents/2011/04/06/another-us-company-bumped-off-fcpa-top-10-list/.

18. Beyond the guidance provided by past decisions, or by statutory mandate, the DOJ provides an opinion procedure through which entities may request the DOJ's opinion on proposed transactions or business conduct. Foreign and Corrupt Practices Act Opinion Procedure, 28 C.F.R. part 80 (Jul. 1, 1999) available at http://www.justice.gov/criminal/fraud/fcpa/docs/frgncrpt.pdf. *See also,* http://www.justice.gov/criminal/fraud/fcpa/opinion/.

19. Similar practices have been employed in financial services prosecutions. Gretchen Morgenson & Louise Story, *As Wall St. Polices Itself, Prosecutors Use Softer Approach*, The New York Times, Jul. 7, 2011, available at http://www.nytimes.com/2011/07/08/business/in-shift-federal-prosecutors-are-lenient-as-companies-break-the-law.html.

20. Speaking in the context of financial regulation more broadly, Mary Ramirez, former assistant United States attorney and Professor at Washburn University School of Law stated: "If you do not punish crimes, there's really no reason they won't happen again. I worry and so do a lot of economists that we have created no disincentive for committing fraud or white-collar crime." Quoted in *Behind the Gentler Approach to Banks by U.S.* The New York Times, Jul. 8, 2011, at 1.

21. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1(a)(3)). H. R. Rep. No. 100-576. at 920 (1988) (Conf. Rep.) *reprinted in* 1988 U.S. Code Cong. & Admin. News 1547, 1951.

22. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, *et seq.*; H.R. Rep. No. 100–576, at 917 (1988) (Conf. Rep.) *reprinted in* 1988 U.S. Code Cong. & Admin. News 1547, 1950. The United Kingdom still criminalizes negligent failure to prevent corruption as well as knowing corruption. *Bribery Act* (2010), c.23.

23. There has also been a marked increase in cooperation among enforcement authorities in different countries. For example, when announcing the plea agreement in *U.S. v. Stanley*, No. 08-cr-597 (S.D. Tex. 2008), the DOJ declared that authorities in France, Switzerland, Italy, and the UK provided significant assistance to the U.S. government's investigation. Press Release, Dept. of Justice, *Former Officer and Director of Global Engineering and Construction Company Pleads Guilty*

to Foreign Bribery and Kickback Charges, Sept. 3, 2008, available at http://www.justice.gov/opa/pr/2008/September/08-crm-772.html. Marcia J. Staff credits an increase in international business transactions and globalization for the renewed emphasis on combating bribery. Marcia J. Staff, *International Law and Business Ethics: Bribery in the Context of the Americas*, 16 Currents: Int'l Trade L.J. 88 (2007–2008)

24. *See*, for example, Paolo Mauro, *Corruption and Growth*, 110 Quart. J. Econ. 681 (1995); Shang-Jin Wei, *Why is Corruption So Much More Taxing than Tax*, The National Bureau of Economic Research Working Paper (Nov. 1997); Susan Rose-Ackerman, Corruption: A Study in Political Economy (New York, Academic Press 1978); Andrei Shleifer & Robvert Vishny, *Corruption*, 108 Quart. J. Econ. 599 (1993); Jens Christopher Andvig, *The Economics of Corruption: A Survey*, 43 Studi Economici 57 (1991); Kimberly Ann Elliott, Corruption and the Global Economy, (Institute for International Economics, Washington, D.C., 1997).

25. Antonio Argandoña, *The 1996 ICC Report On Extortion and Bribery in International Business Transactions*, 6 Business Ethics, 134, 135 (Jul., 1997) available at http://www.iese.edu/research/pdfs/DI-0326-E.pdf. See also, The World Bank, *The Cost of Corruption* (Apr.8, 2004) available at http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190187~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html.

26. Ralph Peterson, Chairman and Chief Executive Officer CH2M Hill, *in* Pricewaterhouse-Coopers, *Confronting Corruption*: *The Business Case for an Effective Anti-Corruption Program*, at 8 (Jan. 2008) available at http://www.pwc.com/th/en/publications/assets/confronting_corruption_printers.pdf.

27. The World Bank, *Six Questions on the Cost of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann* (2001) available at http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,print:Y~isCURL:Y~contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html. Research conducted in more than 48 developing countries demonstrates the dangerous relationship between higher levels of reported corruption and reduced Millennium Development Goals results in education, maternal health and access to water. Transparency International, *The Anti-Corruption Catalyst: Realising the MDGs by 2015* (2010).

28. Evidence from a global survey on corruption and confidence in public institutions showed a higher frequency of bribery and payments of larger sums are indicators of a weak investment climate, which also affects the efficiency of government services. *See* Mary Hallward-Driemeier, *Who Survives? The Impact of Corruption, Competition and Property Rights across Firms*, World Bank Development Research Group, Policy Research Working Paper 5084 (Oct. 2009).

29. Opportunities for corruption distort national public sector priorities. For example, where official opportunities to extract rent are lower in the health and education sectors, public investment will focus on areas with more political discretion, such as military expenditures or infrastructure construction. As a result, corruption can exacerbate public health crises and environmental degradation. It can be seen in unsafe roads and buildings, unregulated medicines, lack of access to clean water and the violation of human rights with impunity. See Paolo Mauro, *Corruption and Growth*, 110 Quart. J. Econ. 681 (1995).

30. Some experts estimate that bribes amount to a 20 per cent tax on foreign investment. Greg Andres, Acting Deputy Assistant Attorney General, *Foreign Corrupt Practices Act*, before the U.S. House of Representatives, at 3, Jun. 14, 2011, available at http://judiciary.house.gov/hearings/pdf/

Andres06142011.pdf. "Corruption has a corrosive impact on both market opportunities overseas and the broader business climate. It also deters foreign investment, stifles economic growth and sustainable development, distorts prices, and undermines legal and judicial systems. More specifically, corruption is a problem in international business transactions, economic development projects, and government procurement activities." U.S. Dept. of State, *Fighting Global Corruption: Business Risk Management*, at 3, no. 10731 (2001-2003). By contrast, "Accountability, transparency, disclosure, protection of shareholders' rights and building long-term value are the core values of good corporate governance. These values are also the pillars of a functioning market economy.... Good governance reduces market volatility, encourages foreign direct investment and capital inflows, promotes sustainable economic growth, and produces a more equitable distribution of resources to the people." U.S. Dept. of State, *Fighting Global Corruption: Business Risk Management*, at 8, no. 10731 (2001–2003).

31. Transparency International, *Global Corruption Barometer 2010*, at 13, available at http://www.transparency.org/policy_research/surveys_indices/gcb/2010. Companies with anti-corruption programs suffer up to fifty percent fewer instances of corruption and are less likely to suffer lost business opportunities.

32. PriceWaterhouseCoopers, *Confronting Corruption: The Business Case for an Effective Anti-Corruption Programme*, at 6 (Jan. 2008) available at http://www.pwc.com/th/en/publications/assets/confronting_corruption_printers.pdf.

33. PriceWaterhouseCoopers, *Confronting Corruption: The Business Case for an Effective Anti-Corruption Programme*, at 6 (Jan. 2008) available at http://www.pwc.com/th/en/publications/assets/confronting_corruption_printers.pdf. David Hess, *Catalyzing Corporate Commitment to Combating Corruption*, 88 J. Bus. Ethics 781, 782 (2009).

34. In a 2008 survey, PriceWaterhouseCoopers found that 55% of respondents in a survey on anticorruption practices suggested that the most severe impact to their companies if corrupt practices were discovered would be to corporate reputation. PriceWaterhouseCoopers, *Confronting Corruption: The Business Case for an Effective Anti-Corruption Programme*, at 2 (Jan. 2008) available at http://www.pwc.com/th/en/publications/assets/confronting_corruption_printers.pdf.

35. Ralph Peterson, Chairman and Chief Executive Officer CH2M Hill, *in* PriceWaterhouseCoopers, *Confronting Corruption: The Business Case for an Effective Anti-Corruption Program*, at 8 (Jan. 2008) available at http://www.pwc.com/th/en/publications/assets/confronting_corruption_printers.pdf.

36. The World Bank, *Six Questions on the Cost of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann* (2001), available at http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,print:Y~isCURL:Y~contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html.

37. The World Bank, *Six Questions on the Cost of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann* (2001), available at http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,print:Y~isCURL:Y~contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html.

38. A recent survey showed that 45 per cent of respondents did not enter a specific market or pursue a particular opportunity because of corruption risks. 39 per cent said their company lost

a bid due to corrupt officials. PriceWaterhouseCoopers, *Confronting Corruption: The Business Case for an Effective Anti-Corruption Programme* at 2 (Jan. 2008) available at http://www.pwc.com/th/en/publications/assets/confronting_corruption_printers.pdf.

39. Ernst & Young, *Corruption or Compliance—Weighing the Costs: 10th Global Fraud Survey*, at 6 (2009).

40. Ernst & Young, *Corruption or Compliance—Weighing the Costs: 10th Global Fraud Survey*, at 6 (2009).

41. Transparency International, *Global Corruption Report 2009*, at xxv, available at http://www.transparency.org/publications/gcr. The problem was perceived to be worse in some areas. For example, more than sixty percent of executives in Egypt, Morocco, Nigeria and Pakistan reported being solicited for bribes.

42. Transparency International, *Global Corruption Barometer 2010*, at 13, available at http://www.transparency.org/policy_research/surveys_indices/gcb/2010. "Standard and Poor's, the bond rating agency, gives investors a 50 to 100 per cent chance of losing their entire investments within five years in countries with various degrees of corruption." United Nations, *The Cost of Corruption*, 10th United Nations Congress on the Prevention of Crime and Treatment of Offenders (Feb. 2000).

43. Transparency International, *Global Corruption Barometer 2010*, at 13, available at http://www.transparency.org/policy_research/surveys_indices/gcb/2010.

44. For a discussion of the legislative impetus behind the FCPA *see*, Michael Bixby, *The Lion Awakens: The FCPA, 1977-2010*, 12 San Diego Int'l. L. J. 89 (Fall 2010). *See also*, Masako N. Darrough, *The FCPA and the OECD Convention: Some Lessons from the U.S. Experience*, SSRN (Feb. 2004); *Multinational Corporations and United States Foreign Policy, Hearings Before the Subcomm. on Multinational Corporations of the Senate Comm. Of Foreign Relations*, 94th Cong. 5 (1975), *microformed on* CIS No. 76-S381-6 (Congress. Info. Serv.); and *The Activities of American Multinational Corporations Abroad, Hearings Before the Subcomm. on International Economic Policy of the House Comm. on International Relations*, 94th Cong. 37 (1975), *microformed on* CIS No. 76-H461-15 (Congress. Info. Serv.), at 40–147.

45. *Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 305*, Sen. Rep. No. 95-114, 95th Cong., 1st Sess., at 3 (Mar. 28, 1977), available at http://www.justice.gov/criminal/fraud/fcpa/history/1977/senaterpt-95-114.pdf. Corporate leaders testified in Senate hearings at the time in favor of anti-bribery legislation, arguing that there would be economic benefits to disincentivizing bribery. Significantly, the legislative effort was motivated in part by the business community's voluntary disclosures of widespread bribery. A 1977 U.S. House of Representatives Report highlighted voluntary reports by companies of payments in excess of $300 million of corporate funds in bribes. H. R., Rep. No. 95-640, 95th Cong., 1st Sess., (Sept. 28, 1977) available at http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf. Several days after the Senate began hearing testimony on the Foreign Payment Disclosures Act (the proposed bill preceding the FCPA), the SEC released a report on questionable and illegal corporate payments and practices to the Senate Committee on Banking, Housing, and Urban Affairs. Alejandro Posadas, *Combating Corruption Under International Law*, 10 Duke J. Comp. & Int'l L. 345, 354 (2000). The report was an analysis of the voluntary disclosures the SEC had received from eighty-nine corporations. *See Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Pay-*

ments and Practices Submitted to the Senate Banking, Housing and Urban Affairs Committee, reprinted in 353 Sec. Reg. & L. Rep. 36–41 (1976). The SEC report concluded that bribery of foreign officials was neither isolated nor rare and proposed strengthening the issuer's requirements to maintain books and records that reflect accounting transactions and movements, as well as the requirement to devise and maintain appropriate systems of control by criminalizing the falsification of these records. *The Activities of American Multinational Corporations Abroad, Hearings before the Subcomm. on International Economic Policy of the House Comm. on International Relations*, 94th Cong. 37 (1975), *microformed* on CIS No. 76-H461-15 (Congress. Info. Serv.), at 40–147. On the SEC's voluntary disclosure program, *see* Alejandro Posadas, *Combating Corruption Under International Law*, 10 Duke J. Comp. & Int'l L. 345, 350 (2000).

46. The 1988 amendments narrowed the basis for criminal liability, eliminating liability for those who had only "reason to know" that a bribe would be made. For the original language, *see* Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 *et seq*. For the 1988 amendments, see Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 5003(a), (c), 102 Stat. 1418, 1423–24 (1988). *See also*, H.R. Rep. No. 100–576 at 917 (1988) (Conf. Rep.), *reprinted in* 1988 U.S. Code Cong. & Admin. News 1547, 1950. Since 1988, only persons who make payments "knowing" that they will be used for a prohibited purpose are criminally liable under the Act. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(a)(3) The FCPA defines "knowing" as follows: "A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if (i) Such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or (ii) Such person has a firm belief that such circumstance exists or that such result is substantially certain to occur. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(f)(2)(A). The Act provides, furthermore, that "When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist." Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(f)(2)(B).

47. H.R. Rep. No. 100–675, at 924 (1988) (Conf. Rep.) requesting that the President develop an anti-bribery agreement "with member countries of the Organization of Economic Cooperation and Development." This is also indicated in the proposed legislative history of the Act at http://www.justice.gov/criminal/fraud/fcpa/docs/leghistory.pdf. It was repeated in the President's signing statement for the 1998 amendments, available at http://www.justice.gov/criminal/fraud/fcpa/docs/signing.pdf.

48. *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Dec. 18, 1997, 37 I.L.M. 4.

49. The International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105–366, 112 Stat. 3302 (1998).

50. The International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105–366, 112 Stat. 3303 (1998).

51. *Bribery Act* (2010) §7, c.23; The Italian legislation defines the administrative liability of legal persons for the actions of supervisors, representatives, managers or those under their supervision or management in similarly broad terms. Italian Lgs. Decree no. 231/2001.

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

53. Today, the FCPA's elements require the following to pursue an anti-bribery charge:

A covered person with a nexus to U.S. commerce pays, offers, promises to pay, or gives money or "anything of value" or authorizes any of these actions directly to any foreign official or indirectly to another person while "knowing" it will be passed on to a foreign official, doing so corruptly, and intending to have that official use his/her influence with a foreign government or instrumentality thereof for the purpose of (a) Influencing any act or decision of such foreign official in his official capacity." Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(a)(1)(A)(i); (b) Inducing that person to do or omit to do any act in violation of his or her lawful duty; (c) Securing any improper advantage; or (d) Inducing that person to use his or her influence with a foreign government to affect or influence any government act or decision, in order to assist such issuer in obtaining or retaining business for or with or directing business to, any person." Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(a)(1)(B). The FCPA offers two possible affirmative defenses: either that the payment in question was "lawful under the written laws and regulations" of the foreign official's country, Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(c)(1); or that it was a "reasonable and bona fide expenditure." Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(c)(2). It also provides for an exception for "facilitation payments" meaning those payments made "to expedite or to secure the performance of a routine governmental action" by a foreign official. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(b). This provision has been read to apply only to "relatively minor, ministerial acts, where the payment is made simply to speed up a result which would have been obtained eventually anyway." William M. Hannay, Corp. Compl. Series: FCPA, § 1:21 (Thomson Reuters 2010-2011). Enforcement power is shared between the DOJ and SEC, with the latter having investigative, injunctive, and civil enforcement powers over companies registered with the SEC or acting on their behalf 15 U.S.C. § 78u, while the former may conduct criminal investigations and prosecutions for willful violations of either section of the FCPA and has civil enforcement power over companies not subject to US jurisdiction. U.S. Atty Manual, 9-47.110, -47.130, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/47mcrm.htm.

54. Alejandro Posadas, *Combating Corruption Under International Law*, 10 Duke J. Comp. & Int'l L. 345–414, 358 (2000).

55. UNOCD, *United Nations Convention Against Corruption UNCAC Signature and Ratification Status as of 1 May 2011*, available at http://www.unodc.org/unodc/en/treaties/CAC/signatories.html.

56. *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Dec. 18, 1997, 37 I.L.M. 4. *See also*, The Georgetown Journal of International Law 2010 Symposium: Combating Global Corruption (FCPA Enforcement), Washington, D.C., March 22, 2010, at 6; and Statement of Alan Larson, Chairman of the Board of Transparency International USA, before the Senate Foreign Relations Committee, Jun. 21, 2006, at 3.

57 *Inter-American Convention Against Corruption*, Mar. 29, 1996, 35 I.L.M. 724. Additional regional instruments banning bribery include the *Law Convention on Corruption*, Jan. 27, 1999, Europ. T.S. No. 173 (Council of Europe); *Civil Law Convention on Corruption*, Nov. 24, 1999, Europ. T.S. No. 174 (Council of Europe); *African Union Convention on Preventing and Combating Corruption*, Jul. 11, 2003, 43 I.L.M. 5; *United Nations Convention Against Transnational Organized Crime*, Nov. 15, 2000, G.A. Res. 55/25, U.N. Doc. A/55/383; *European Union: Treaty on the Fight Against Corruption*

Involving Officials of the European Communities or Officials of Member States of the European Union, O.J. C 195 (Jun. 25, 1997), 37 I.L.M. 12 (1998); *Southern African Development Community: Protocol Against Corruption*, Malawi (Aug. 2001); *Economic Community of West African States: Protocol on the Fight Against Corruption* (Dec. 21, 2001).

58. OECD, *The OECD Convention of Combating Bribery of Foreign Officials in International Business Transactions*, http://www.oecd.org/document/20/0,3343,en_2649_34859_2017813_1_1_1_1,00.html.

59. OECD, *OECD Anti-Bribery Convention: National Implementing Legislation*, http://www.oecd.org/document/30/0,3343,en_2649_34859_2027102_1_1_1_1,00.html.

60. Daniel Tarullo, U.S. Dep't. of State, *Developments at the OECD in the Multilateral Regulation of Corrupt Payments* (Apr. 10, 1995), available at http://dosfan.lib.uic.edu/ERC/economics/statements/950410.html. *See, also*, Alejandro Posadas, *Combating Corruption Under International Law*, 10 Duke J. Comp. & Int'l L. 345–414, 377–378 (2000).

61. *United Nations Convention Against Corruption*, Oct. 31, 2003, G.A. Res. 58/4, U.N. Doc. A/RES/58/422.

62. UNOCD, *Background of the United Nations Convention Against Corruption*, available at http://www.unodc.org/unodc/en/treaties/CAC/index.html.

63. UNOCD, *United Nations Convention Against Corruption UNCAC Signature and Ratification Status as of 1 May 2011*, available at http://www.unodc.org/unodc/en/treaties/CAC/signatories.html.

64. *United Nations Convention Against Corruption*, Art. 15, Oct. 31, 2003, G.A. Res. 58/4, U.N. Doc. A/RES/58/422. Both the international offer (art. 15(a)) and acceptance (art. 15(b)) of a bribe to a public official is subsumed under this offence.

65. *United Nations Convention Against Corruption*, arts. 15 & 16, Oct. 31, 2003, G.A. Res. 58/4, U.N. Doc. A/RES/58/422.

66. *United Nations Convention Against Corruption*, Art. 46 & Chpt. V, Oct. 31, 2003, G.A. Res. 58/4, U.N. Doc. A/RES/58/422.

67. Key goals of U.S. international anticorruption policy include implementation and enforcement of the OECD Bribery Convention by all signatories and hemispheric partners; "nurture stability in democratic institutions and strengthen the rule of law in transitional economies;" "promote global and regional anticorruption norms and initiatives that deter and punish corruption;" "engage the business community to join the U.S. and other governments in promoting corporate governance, transparency, and integrity in business operations." U.S. Dept. of State, *Fighting Global Corruption: Business Risk Management*, at 11-12, no. 10731 (2001–2003).

68. All 38 signatories of the OECD Convention now have anti-bribery statutes functionally equivalent to the FCPA, including Germany, Italy, UK and Canada. *See*, StGB §311–8, 299–302, 108e & 108b and OwiG §29a, 30 & 130; Act. 300 (2000) and Italian Lgs. Decree no. 231/2001; *Bribery Act* (2010) c.23; *Corruption of Public Officials*, S.C. 1998, c.34, respectively. Moreover, China, India, Russia and Singapore, although not members of the OECD, have also adopted anti-bribery statutes, PRC Criminal Code, Art. 385 & 389, Prevention of Corruption Act, 1988 (No. 49 of 1988); Federal Law No. 97-FZ (May 5, 2011); Prevention of Corruption Act (chapt. 241), 1960, respectively. The United Nations Convention Against Corruption has itself been ratified by more than 100 nations,

who are now committed to implementing anti-corruption legislation. *United Nations Convention Against Corruption*, Art. 5, Oct. 31, 2003, G.A. Res. 58/4, U.N. Doc. A/RES/58/422.

69. The Georgetown Journal of International Law 2010 Symposium: Combating Global Corruption (FCPA Enforcement), Washington, D.C., Mar. 22, 2010, at 4. *See also*, U.S. Dept of Justice Press Release, Oct. 20, 2010, available at http://blogs.usdoj.gov/blog/archives/1020.

70. Michael Fine, *Coordinating UK Bribery Act & FCPA Compliance*, 9 LRN's Ethics & Compliance Alliance (2010-11). Issuers and domestic concerns may be held liable under the FCPA for acts taken *within* the territory of the United States. *See*, Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1(a), 78dd-2(a). For acts taken *outside* the United States, U.S. issuers and domestic concerns are liable pursuant to 15 U.S.C. §§ 78dd-1(g), 78dd-2(i). The 1998 amendments expanded the FCPA to assert territorial jurisdiction over foreign companies and nationals. *See*, Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-3(a), (f)(1).

71. Most notably in the recent case of *B v. The Commissioner of the Independent Commission Against Corruption* (FACC6/2009), the Hong Kong Court of Final Appeal has confirmed that through the concept of agency, Hong Kong law has extraterritorial reach despite the absence of express language in the Prevention of Bribery Ordinance (chpt. 201). Similarly, Japanese criminal sanctions do not, as a general rule, apply to activities unrelated to Japan. However, the Unfair Competition Prevention Act, Art. 21(6), 1998 [No. 47 of 1993] applies the Penal Code provision on extra-territorial effect *mutatis mutandis* to certain offences under the UCPA.

72. Interestingly, China's new bribery law follows the US and UK statutes in providing explicitly for extraterritorial application. P.R.C. Criminal Law, arts. 6–8, 30. Similarly, the South African Prevention and Combating of Corrupt Activities Act, §35, 2003 [No. 12 of 2004] contains an explicit extraterritoriality provision. Hong Kong has also applied its law extraterritorially. See: http://www.traverssmith.com/assets/pdf/Legal_Briefings/overseas_version_of_bribery_flyer.pdf. Hong Kong's Court of Final Appeal applied its bribery laws extra-territorially to encompass persons in Hong Kong who offered bribes to agents outside Hong Kong for their acts outside Hong Kong. http://www.bakermckenzie.com/files/Uploads/Documents/Court%20of%20Final%20Appeal%20gives%20Hong%20Kong%20anticorruption.pdf. See, http://www.paulhastings.com/assets/publications/1894.pdf?wt.mc_ID=1894.pdf.

73 Indeed, the OECD Working Group on Bribery chided Belgium for failure to treat bribery and corruption committed by foreign officials extra-territorially, Working Group on Bribery in International Business Transactions, Belgium, Phase 2 Report, Recommendation 4.c (2005), available at http://www.oecd.org/document/45/0,3746,en_2649_34859_44570477_1_1_1_1,00.html. Other countries, including Japan, Australia, Korea and Belgium have extended their jurisdictional exercise beyond their borders within the framework of the OECD's "functional equivalent" requirement. OECD, *OECD Anti-Bribery Convention: National Implementing Legislation*, available at http://www.oecd.org/document/30/0,3343,en_2649_34859_2027102_1_1_1_1,00.html.

74. *Bribery Act* (2010) §12, c.23, available at http://www.legislation.gov.uk/ukpga/2010/23/section/12. This has been reiterated by the UK Foreign and Commonwealth Office. Foreign and Commonwealth Office, *The UK Bribery Act*, http://www.fco.gov.uk/en/global-issues/conflict-minerals/legally-binding-process/uk-bribery-act. *See also*, Michael Fine, *Coordinating UK Bribery Act & FCPA Compliance* (Apr. 2011).

75. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§78dd -1(a)(2)-(3); -2(a)(2)-(3); -3(a)(2)-(3)

76. A number of countries, including South Africa and the UK, prohibit both active and passive bribery, creating offenses for both the purveyor and the recipient of any benefit or advantage. *See*, South Africa, Prevention and Combating of Corruption Act (2004) §3 (Act 12 of 2004) and United Kingdom *Bribery Act* (2010) §§ 1, 2, c.23. According to the OECD, the Italian law implementing the OECD Convention amended the Criminal Code by creating two new offences: the offence of bribery of foreign public officials and the passive bribery offence for officials of the European Communities. As the OECD discussed, however, the existing provisions of the Italian Criminal Code already included penalties for domestic public officials for passive bribery. OECD Working Group on Bribery in International Business Transactions, Italy: Phase 1: Review of Implementation of the Convention and 1997 Recommendation, at 2-3, 5 (May 16, 2011).

77. *Bribery Act* (2010) §§ 1–5, c.23. Notably, the UK statute goes well beyond the FCPA to criminalize private as well as public sector bribery—penalizing bribery of "a person," rather than only "foreign public officials."

78. The statute provides an exception for "any facilitating or expediting payment . . . the purpose of which is to expedite or to secure the performance of a routine governmental action." Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(b). A "routine governmental action," is "only an action which is ordinarily and commonly performed by a foreign official." Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(f)(3)(A). *See also*, Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(f)(3)(B).

79. For example, comments by the Australian government on the bribery provisions of their criminal code indicate that their facilitation payments defense was based on the FCPA. Australia's code permits a defense based on facilitation payments if all of the following conditions are met: (1) the benefit was minor; (2) the behavior that the benefit was given to obtain was minor, routine and non-discretionary; (3) there was a record made of the conduct (which included the value, of the benefit, the date, the identity of the foreign public official, the particular action that was expedited, and a signature); and (4) the record has been retained, or lost or destroyed by other circumstances; or the prosecution took place seven years after the conduct. Australia Criminal Code Amendment (Bribery of Foreign Officials) Act 1999, § 70.4 (1–2) (No. 43 of 1999).

80. Richard Alderman, Director of the UK Serious Fraud Office ("SFO") has clarified that while companies need not expect that as of July 1, 2011 as the Bribery Act Comes into force, the SFO will immediately prosecute every company providing facilitation payments, the statute is meant to move companies toward a "zero tolerance" position on such expenditures. Alderman also stated that "corporations should come and talk to the SFO about these issues so that we can understand that their commitment is real. This also gives the corporate the opportunity to talk to us about the problems that they face in carrying on business in the areas in which they trade. It is important for us to know this in order to discuss with the corporate what is a sensible process." Alderman stated that the following approach, authored by UK attorneys on thebriberyact.com fairly reflected the UK approach to these payments: "The SFO have informed us that when considering the activities of a company which continues to make small facilitation payments after 1 July 2011, the SFO will be looking to see: (1) whether the company has a clear issued policy regarding such payments; (2) whether written guidance is available to relevant employees as to the procedure they should follow when asked to make such payments; (3) whether such procedures are being followed by employees; (4) if there

is evidence that all such payments are being recorded by the company; (5) if there is evidence that proper action (collective or otherwise) is being taken to inform the appropriate authorities in the countries concerned that such payments are being demanded; (6) whether the company is taking what practical steps it can to curtail the making of such payments. If the answers to these questions are satisfactory then the corporate should be shielded from prosecution." Quoted in: http://thebriberyact.com/2011/06/21/facilitation-payments-sfo-endorse-sfo-thebriberyact-com-six-step-solution/.

81. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1(c), -1(f)(3); 78dd-2(c), -2(h)(4); 78dd-3(c), -3(f)(4)(A). In two 2007 Opinions, the DOJ outlined steps a company may take to avoid FCPA liability in the context of such travel and lodging expenses for foreign officials. U.S. Dept. of Justice, DOJ Opinion Procedure No. 07-01, available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2007/0701.pdf. *See also*, U.S. Dept. of Justice, DOJ Opinion Procedure No. 07–02, available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2007/0702.pdf.

82. Nevertheless, the UK Guidance from the Ministry of Justice has clarified that the Government will weigh the decision to investigate such expenditures in light of the intent and the potential public interest served by prosecution For example, in the case of a hospitality payment, "the prosecution would need to show that the hospitality was intended to induce conduct that amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. This would be judged by what a reasonable person in the UK thought." UK MOJ, Bribery Act of 2010 Guidance, at 10, available at http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf.

83. *Bribery Act* (2010) § 7, c.23; and Italian Lgs. Decree no. 231/2001, Art. 5,7.

84. OECD, *OECD Anti-Bribery Convention: National Implementing Legislation*, http://www.oecd.org/document/30/0,3343,en_2649_34859_2027102_1_1_1_1,00.html.

85. *See* Unlawful Corporate Payments Act of 1977, H.R. Rep. No. 95-640, 95th Cong., 1st Sess., at 1-2 (Sept., 28, 1977); Lanny Breuer, Assistant Attorney General, speaking at the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009) at 6.

86. *See* OECD, *OECD Anti-Bribery Convention: National Implementing Legislation*, http://www.oecd.org/document/30/0,3343,en_2649_34859_2027102_1_1_1_1,00.html.

87. "[O]ver the last five years, more than half of the corporate FCPA resolutions have involved foreign companies or U.S. subsidiaries of foreign companies." Greg Andres, Acting Deputy Assistant Attorney General, Statement Before Senate Judiciary Subcommittee on Crime and Drugs, Washington, D.C., Nov. 30, 2010, available at http://www.justice.gov/criminal/pr/testimony/2010/crm-testimony-101130.html.

88. *See* Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1, *et seq*. *See also*, Written Testimony of Michael B. Mukasey, on behalf of the U.S. Chamber Institute for Legal Reform, to the House Committee on the Judiciary, Subcommittee on Crime, Terrorism and Homeland Security, at 15, Jun. 14, 2011, acknowledging that the statutory language of the FCPA requires "evidence of knowledge and intent for liability."

89. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(f)(2)(a) and (b).

90. U.S. Dept. of Justice, Lay-Persons Guide to FCPA, available at http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf (last visited July 31, 2011).

91. H.R. Rep. No. 100–576, at 920 (1988) (Conf. Rep.) *reprinted in* 1988 U.S. Code Cong. & Admin. News 1547, 1951, emphasis added.

92. U.K. *Bribery Act* (2010) §§ 7 and 8, c.23. *See also*, UK MOJ, Bribery Act of 2010 Guidance, at 8, available at http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf.

93. Compare U.K. *Bribery Act* (2010) §§ 6 and 14, c.23 (bribery of foreign persons and the requirement of "consent or connivance" for liability of bodies corporate) with §§ 7 and 8 (failure to prevent a bribe by associated persons). *See also*, U.K. Ministry of Justice, *The Bribery Act of 2010—Guidance*, Mar., 2011, available at http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf, at 8–9.

94. *See* Italian Lgs. Decree No. 231/2001, "Administrative Liability of Legal Persons," Art. 5, *quoted in* Working Group on Bribery in International Business Transactions, Italy: Phase 2 Report, 55–56 (Nov. 29, 2004), available at http://www.oecd.org/dataoecd/30/36/38313133.pdf.

95. In the case of those supervised by persons in representative, administrative, or managerial positions, liability is based on the "non-observance of the obligations of management or supervision." Italian Lgs. Decree No. 231/2001, Art. 7(1).

96. Italian Lgs. Decree no 231/2001, Art. 6., *quoted in* Working Group on Bribery in International Business Transactions, Italy: Phase 2 Report, 55–56 (Nov. 29, 2004), available at http://www.oecd.org/dataoecd/30/36/38313133.pdf. Effective implementation of a compliance program "suitable to prevent crimes of the same sort as the one committed" excludes corporate liability on the grounds of "non-observance of management or supervision" for actions of those who are supervised. Italian Lgs. Decree No. 231/2001, Art. 7.

97. *See* Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1, *et seq.* (as amended). *See also*, H.R. Rep. No. 100–576, at 917 (1988) (Conf. Rep.) *reprinted in* 1988 U.S. Code Cong. & Admin. News 1547, 1951.

98. Like the United States, several OECD countries treat compliance as an important factor to be considered in assessing liability. Like the United Kingdom, several OECD countries sometimes treat a compliance program as a defense to a requirement less stringent that the US standard of knowing and intentional corruption. In countries that prosecute lesser violations—for failure to take care, or failure to take reasonable precautions, for example—it is common and fitting to treat an appropriate compliance program as a defense or very significant mitigating factor. As discussed above, the UK permits a full defense of "adequate procedures" against the strict liability offence of failing to prevent bribery. *Bribery Act* (2010) § 7(2). In Italy, where corporations may be held administratively liable for offences of their representatives, directors, supervisors, and others, adequate and effective "organizational models" offer a full defense. Italian Lgs. Decree No. 231/2001, Art. 6–7. In Australia, the criminal code permits a defense of due diligence in one case of corporate criminal responsibility. A corporation is held criminally responsible if the "body corporate expressly, tacitly, or impliedly authorized or permitted" an employee, agent or officer to commit the offence of bribing a foreign public official while "acting within the actual or apparent scope of his/her employment or authority." Authorization or permission may be established either through proof of the act being "expressly, tacitly, or impliedly authorized or permitted" by the board of directors or by a "high managerial agent;" or by the existence of a "corporate culture" which either "directed, encouraged, tolerated or led to non-compliance" or the non-existence of a corporate culture requiring compliance. If a high

managerial agent was involved but "the body corporate proves that it exercised 'due diligence' to prevent the conduct, authorization or permission in question," then the provision does not apply. OECD Working Group on Bribery in International Business Transactions, Australia: Phase 2 Report, at 9 (Jan. 4, 2006), Australia Criminal Code 2002, A2002-51, §51 (3–4) (*repub*. 1 July 2011)). Chile's standard of corporate liability was partially inspired by Italy. In Chile, prosecutors must establish the failure by the entity to "comply with its duties of management and supervision," as one element of corporate criminal responsibility, placing the "burden of proof on prosecutors." OECD Working Group on Bribery in International Business Transactions, Chile: Phase 1ter, at 9 (Dec. 2009). Corporate criminal responsibility for bribery may be found if the offence is "directly and immediately committed" in the interest of the legal entity or by the owners, controllers, responsible officers, executives, representatives, those "conducting activities of administration and supervision" or anyone under the supervision thereof if the offense "results from the breach of the legal person's direction and supervisory functions." If adequate organizational models based on minimum requirements listed in the law had been adopted prior to the offence, then the functions of supervision and direction will be considered to have been met. Chile Law 20, 393, Art. 3, *qtd in. in* OECD Working Group on Bribery in International Buiness Transactions, Chile,: Phase 1 ter, at 16 (Dec. 2009) The OECD cautions that "having a code of conduct on paper will not be sufficient to avoid responsibilities. If prosecutors can prove that the code does not meet the minimum requirements…or that it is not implemented, the company can be responsible for the offense." OECD Working Group on Bribery in International Business Transactions, Chile: Phase 1ter, at 7–8 (Dec. 2009). Existence of internal monitoring or a compliance program may be included as a factor in considering administrative liability in Germany for a corporation based on an administrative offence by a "responsible person," but according to the OECD, "whether such measures are in place does not appear to go as far as constituting a defense thus preventing the establishment of the company's liability." OECD Working Group on Bribery in International Business Transactions, Germany: Phase 3, at 23 (Mar. 17, 2011) Administrative liability for legal persons may result either due to the criminal actions (such as bribery) of a "responsible person" (including a "broad range of senior managerial stakeholders") or an administrative offence by such a person, including a "violation of supervisory duties." In the case of a criminal act by a responsible person, the prosecutor must demonstrate either that the offence violated "duties of the legal entity" or that the legal entity "gained or was supposed to gain" a profit. In the case of the administrative offence, a corporation may be "punished for any breach of corporate duties when such a breach resulted from a failure by a corporate representative to faithfully discharge his/her duties of supervision." The OECD notes that corporate liability may result not only through the actions of senior managers but less directly by "offences by lower-level personnel which result from a failure by a senior corporate figure" to adequately supervise them. OECD Working Group on Bribery in International Business Transactions, Germany: Phase 3, at 22 (Mar. 17, 2011). According to the OECD, Japanese law holds a legal person criminally responsible "based on the principle that the company did not exercise due care in the supervision, selection, etc. of an officer or employee to prevent the culpable act. The burden rests on the legal person to prove that due care was exercised. Where a legal person raises the defence, a person must be identified as having exercised due care, etc., and the court must determine whether it was exercised properly having regard to the nature of the legal person and the circumstances of the case." OECD Working Group on Bribery in International Business Transactions, Japan: Phase 1, at 7 (May 2002). Summaries of these and other OECD countries' "compliance-like" rules may be found in Mike Koehler,

The Compliance Defense Around the World (June 30, 2011), available at http://www.corporatecomplianceinsights.com/2011/the-compliance-defense-around-the-world/.

99. *See In re Caremark Int'l Derivative Litig.*, 698 A 2d 959 (Del. Ch. 1996) (setting forth standards of conduct for directors of Delaware corporations with regard to the establishment of reporting and compliance mechanisms sufficient to meet their fiduciary duty of oversight).

100. *In re Caremark Int'l Derivative Litig.*, 698 A 2d 959 (Del. Ch. 1996).

101. U.S. Sentencing Guidelines Manual, Ch. 8, Intro. (2010).

102. U.S. Sentencing Guidelines Manual § 8C2.5(f) (2010).

103. U.S. Sentencing Guidelines Manual § 8B2.1 (2010).

Effective Compliance and Ethics Program

(a) To have an effective compliance and ethics program, for purposes of subsection (f) of § 8C2.5 (Culpability Score) and subsection (c)(1) of § 8D1.4 (Recommended Conditions of Probation—Organizations), an organization shall—

(1) exercise due diligence to prevent and detect criminal conduct; and

(2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.

(b) Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:

(1) The organization shall establish standards and procedures to prevent and detect criminal conduct.

(2) (A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.

(B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.

(C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

(3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew,

or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.

(4) (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subparagraph (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.

(B) The individuals referred to in subparagraph (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.

(5) The organization shall take reasonable steps—

(A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;

(B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and

(C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

(6) The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through

(A) appropriate incentives to perform in accordance with the compliance and ethics program; and

(B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.

(7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.

(c) In implementing subsection (b), the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process.

104. *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, U.S. Chamber Institute for Legal Reform, 19 (Oct. 2010).

105. *Rodriguez v. Banco Central*, 777 F. Supp. 1043, 1064 (D.P.R. 1991), aff'd 990 F.2d 7 (1st Cir. 1993) (in the RICO context, "successor liability should be found only sparingly and in extreme cases due to the requirement that RICO liability only attaches to knowing affirmatively willing participants"); *R.C.M. Executive Gallery Corp. v. Rols Capital Co.*, 901 F. Supp. 630, 635 (S.D.N.Y. 1995) (finding the possibility for successor liability if the purchaser could be shown to have knowledge of a RICO violation at the time of the acquisition); *United States v. Alamo Bank of Texas*, 880 F.2d 828 (5th Cir. 1989) (finding successor liability for the acquirer for violations of the Bank Secrecy Act by an acquired company prior to the merger).

106. *See*, e.g. *United States v. Cigarette Merchandisers Ass'n, Inc.*, 136 F. Supp. 214 (S.D.N.Y. 1955) (finding criminal successor liability necessary to enforce the State's public policy in favor of holding corporations liable for their debts and obligations after dissolution).

107. *Securities and Exchange Commission v. Alliance One International, Inc.*, Civil Action No. 01:10-cv-01319 (RMU) (D.D.C. Aug. 6, 2010), available at http://www.sec.gov/litigation/complaints/2010/comp21618-alliance-one.pdf; *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, U.S. Chamber Institute for Legal Reform, 17 (Oct., 2010) (describing legal actions taken by the DOJ and the SEC against Alliance One International, Inc. and related companies).

108. *Securities and Exchange Commission v. Alliance One International, Inc.*, Civil Action No. 01:10-cv-01319 (RMU) (D.D.C. Aug. 6, 2010), available at http://www.sec.gov/litigation/complaints/2010/comp21618-alliance-one.pdf. *See also*, Press Release, Department of Justice, *Alliance One International Inc. and Universal Corporation Resolved Related FCPA Matters Involving Bribes to Foreign Government Officials*, Aug. 6, 2010, available at http://www.justice.gov/opa/pr/2010/August/10-crm-903.html.

109. *Securities and Exchange Commission v. Alliance One International, Inc.*, Civil Action No. 01:10-cv-01319 (RMU) (D.D.C. Aug. 6, 2010), available at http://www.sec.gov/litigation/complaints/2010/comp21618-alliance-one.pdf. *See also*, Press Release, Department of Justice, *Alliance One International Inc. and Universal Corporation Resolved Related FCPA Matters Involving Bribes to Foreign Government Officials*, Aug. 6, 2010, available at http://www.justice.gov/opa/pr/2010/August/10-crm-903.html.

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111. *Securities and Exchange Commission v. Alliance One International, Inc.*, Civil Action No. 01:10-cv-01319 (RMU) (D.D.C. Aug. 6, 2010), available at http://www.sec.gov/litigation/complaints/2010/comp21618-alliance-one.pdf. *See also*, Press Release, Department of Justice, *Alliance One International Inc. and Universal Corporation Resolved Related FCPA Matters Involving Bribes to Foreign Government Officials*, Aug. 6, 2010, available at http://www.justice.gov/opa/pr/2010/August/10-crm-903.html.

112. *Securities and Exchange Commission v. Alliance One International, Inc.*, Civil Action No. 01:10-cv-01319 (RMU) (D.D.C. Aug. 6, 2010), available at http://www.sec.gov/litigation/complaints/2010/comp21618-alliance-one.pdf. *See also*, Press Release, Department of Justice, *Alliance One International Inc. and Universal Corporation Resolved Related FCPA Matters Involving Bribes to Foreign Government Officials*, Aug. 6, 2010, available at http://www.justice.gov/opa/pr/2010/August/10-crm-903.html.

113. *Securities and Exchange Commission v. Alliance One International, Inc.*, Civil Action No. 01:10-cv-01319 (RMU) (D.D.C. Aug. 6, 2010), available at http://www.sec.gov/litigation/complaints/2010/comp21618-alliance-one.pdf. *See also*, Press Release, Department of Justice, *Alliance One International Inc. and Universal Corporation Resolved Related FCPA Matters Involving Bribes to Foreign Govern-*

ment Officials, Aug. 6, 2010, available at http://www.justice.gov/opa/pr/2010/August/10-crm-903.html.

114. *See* Press Release, Department of Justice, *Alliance One International Inc. and Universal Corporation Resolved Related FCPA Matters Involving Bribes to Foreign Government Officials*, Aug. 6, 2010, available at http://www.justice.gov/opa/pr/2010/August/10-crm-903.html.

115. U.S. Dept. of Justice, DOJ Opinion Procedure No. 08–02 (Jun. 13, 2008), available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf. For the U.S. Chamber's commentary, *see Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, U.S. Chamber Institute for Legal Reform, 16–17 (Oct. 2010).

116. U.S. Dept. of Justice, DOJ Opinion Procedure No. 08–02, at 1 (Jun. 13, 2008), available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf.

117. U.S. Dept. of Justice, DOJ Opinion Procedure No. 08–02, at 1 (Jun. 13, 2008), available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf.

118. U.S. Dept. of Justice, DOJ Opinion Procedure No. 08–02, 1–2 (Jun. 13, 2008), available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf.

119. U.S. Dept. of Justice, DOJ Opinion Procedure No. 08–02, 4–6 (Jun. 13, 2008), available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf.

120. U.S. Dept. of Justice, DOJ Opinion Procedure No. 08–02, at 4 (Jun. 13, 2008), available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf.

121. *See* UK MOJ, Bribery Act of 2010 Guidance,, available at http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf, at 28 (discussing appropriate levels of diligence required in the context of an acquisition); Italian Lgs. Decree no. 231/2001, Art. 28 (stating that in the case of a corporate restructuring or merger, the successor entity "remains liable for the crimes committed prior to the date when the transformation came into effect.").

122. *See Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, U.S. Chamber Institute for Legal Reform, 20 (Oct. 2010).

123. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, 78ff(c)(2), 78dd-2. H.R. Rep. No. 100–576, at 920 (1988) (Conf. Rep.) *reprinted in* 1988 U.S. Code Cong. & Admin. News 1547, 1951.

124. *United States v. Kay*, 513 F.3d 432 (5th Cir. 2007), reh den, reh en banc, den 513 F.3d 461 (5th Cir. 2008), cert den; *Kay v. United States*, 2008 U.S. LEXIS 6775 (U.S., Oct. 6, 2008). *See also, Stichting Ter Behartiging Van de Belanden Van Oudaandeelhouders, in Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173, 183 (2d Cir. 2003) (concluding "that the word 'corruptly' in the FCPA signifies, in addition to the element of 'general intent' present in most criminal statutes, a bad or wrongful purpose and an intent to influence a foreign official to misuse his official position."); U.S. Dept. of Justice, Lay-Persons Guide to FCPA, available at http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf (last visited July 31, 2011) (interpreting the "corruptly" requirement of the FCPA to mean "The person making or authorizing the payment must have a corrupt intent, and the payment must be intended to induce the recipient to misuse his official position to direct business wrongfully to the payer or to another person.").

125. *United States v. Kay*, 513 F.3d 432 (5th Cir. 2007).

126. *United States v. Kay*, 513 F.3d 432, 439 (5th Cir. 2007). *See also,* Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78-ff.

127. *United States v. Kay*, 513 F.3d 432 (5th Cir. 2007).

128. *United States v. Kay*, 513 F.3d 432, 447–51 (5th Cir. 2007).

129. *See United States v. Kay*, 513 F.3d 432, 448 (5th Cir. 2007) (citing *Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173, 181 (2d Cir. 2003), and *Bryan v. United States*, 524 U.S. 184, 193–196).

130. *United States v. Kay*, 513 F.3d 432 (5th Cir. 2007). *See also, Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173, 181 (2d Cir. 2003) ("Knowledge by a defendant that it is violating the FCPA—that it is committing all the elements of an FCPA violation—is not itself an element of the FCPA crime. Federal statutes in which the defendant's knowledge that he or she is violating the statute is an element of the violation are rare; the FCPA is plainly not such a statute.").

131. See *Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173, 181 (2d Cir. 2003).

132. *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act,* U.S. Chamber Institute for Legal Reform, 21 (Oct. 2010).

133. *See United States v. Kay*, 513 F.3d 432, 450-52 (5th Cir. 2007); *Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173, 181 (2d Cir. 2003).

134. *Bryan v. United States*, 524 U.S. 184, 194–195.

135. *See United States v. Kay*, 513 F.3d 432, 438 (5th Cir. 2007); *Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173, 181 (2d Cir. 2003).

136. *See Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act,* U.S. Chamber Institute for Legal Reform, 21–22 (Oct. 2010).

137. *See Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act,* U.S. Chamber Institute for Legal Reform, 21–22 (Oct. 2010).

138. *See* Statement of Offense, *United States v. Siemens Bangladesh Limited,* Cr. No. 08-369-RJL (D.D.C. Dec. 15, 2008), available at http://www.justice.gov/opa/documents/siemens-bangladesh-stmt.pdf.

139. Press Release, U.S. Dept. 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.

140. *See Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act,* U.S. Chamber Institute for Legal Reform, 21 (Oct. 2010).

141. *See* Press Release, U.S. Dept. of Justice, *BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million in Criminal Fine,* Mar. 1, 2010, available at http://www.justice.gov/opa/pr/2010/March/10-crm-209.html.

142. *See Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act,* U.S. Chamber Institute for Legal Reform, 21 (Oct. 2010).

143. *See* Press Release, U.S. Dept. of Justice, *BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million in Criminal Fine,* Mar. 1, 2010, available at http://www.justice.gov/opa/pr/2010/March/10-crm-209.html.

144. Unlawful Corporate Payments Act of 1977, H.R. Rep. No. 95–640, 95th Cong., 1st Sess., at 12 (Sept. 28, 1977).

145. *See* Foreign Corrupt Practices, H.R. Conf. Rep. No. 94–831, 95th Cong., 1st Sess., at 14 (Dec. 6, 1977) ("[T]he conferees intend to make clear that any issuer or domestic concern which engages in bribery of foreign officials indirectly through any person or entity would itself be liable under the bill.").

146. *See* Foreign Corrupt Practices Act Amendments, H.R. Rep. No. 100–576, at 920 (1988) (Conf. Rep.), *reprinted in* 1988 U.S. Code Cong. & Admin. News 1547, 1950. ("[T]he 'knowing' standard adopted covers both prohibited actions taken with "actual knowledge" of intended result as well as other actions that, while falling short of what the law terms 'positive knowledge,' nevertheless evidence a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to a high probability of violations of the Act.").

147. *See* Foreign Corrupt Practices Act Amendments, H.R. Rep. No. 100–576, at 920–921 (1988), (Conf. Rep.) *reprinted in* 1988 U.S. Code Cong. & Admin. News, 1547, 1950.

148. *Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 305*, Sen. Rep. No. 95–114, 95th Cong., 1st Sess., at 11 (Mar. 28, 1977), available at http://www.justice.gov/criminal/fraud/fcpa/history/1977/senaterpt-95-114.pdf.

149. *See Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 305*, Sen. Rep. No. 95–114, 95th Cong., 1st Sess., at 3 (Mar. 28, 1977), available at http://www.justice.gov/criminal/fraud/fcpa/history/1977/senaterpt-95-114.pdf. *See also, Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, U.S. Chamber Institute for Legal Reform, at 22 No. 71 (Oct. 2010) ("the drafters intended that actions of a foreign subsidiary unknown to a parent company could constitute FCPA liability only under the books-and-records and internal controls provisions, and not under the anti-bribery provisions.").

150. *See* Edward Brodsky, *Foreign Subsidiaries and the Foreign Corrupt Practices Act*, Bus. Crimes Bul. 5, 6 (Mar. 1995) ("a foreign subsidiary will not insulate a parent from FCPA liability if the parent authorizes, directs or otherwise participates in an unlawful payment by the subsidiary. Such liability could even arise if the parent became aware of the improper payment and did nothing to stop it, since the prosecutor might argue that the parent implicitly authorized the payment.").

151. *See Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, U.S. Chamber Institute for Legal Reform, at 22–23 (Oct. 2010).

152. The relationship between the liability of the subsidiary and that of the parent can be useful in encouraging compliance. For example, in *U.S. v. AGCO Ltd.*, No. 1:09-cr-249-RJL (D.C. Cir. 2009), the DOJ charged the wholly-owned subsidiary with conspiracy to commit fraud rather than the parent. As a result of the parent's cooperation, the DOJ charged only the UK subsidiary, bringing only conspiracy charges rather than charging substantive FCPA or wire fraud violations. *See* https://secure.traceinternational.org/compendium/view.asp?id=62.

153. *See United Industrial Corp.*, Exchange Act Release No. 60005 (May 29, 2009), available at http://www.sec.gov/litigation/admin/2009/34-60005.pdf; SEC Litig. Rel. No. 21063 (May 29, 2009), available at http://www.sec.gov/litigation/litreleases/2009/lr21063.htm.

154. *See* Complaint, *Securities and Exchange Commission v. Thomas Wurzel*, Case No. 1:09-cv-01005 (May 29, 2009), available at http://www.sec.gov/litigation/complaints/2009/comp21063.pdf; SEC

Litig. Rel. No. 21063 (May 29, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr21063.htm.

155. *See United Industrial Corp.*, Exchange Act Release No. 60005 (May 29, 2009), available at http://www.sec.gov/litigation/admin/2009/34-60005.pdf.

156. *See Diagnostic Products Corp.*, Exchange Act Release No. 51724 (May 20, 2005), available at http://www.sec.gov/litigation/admin/34-51724.pdf.

157. *See* Press Release, Dept. of Justice, *DPC (Tianjin) Ltd. Charged with Violating the Foreign Corrupt Practices Act,* May 20, 2005, available at http://www.justice.gov/opa/pr/2005/May/05-crm-282.htm.

158. *See United Industrial Corp.*, Exchange Act Release No. 60005 (May 29, 2009), available at http://www.sec.gov/litigation/admin/2009/34-60005.pdf; Diagnostic Products Corp., Exchange Act Release No. 51724 (May 20, 2005), *available at* http://www.sec.gov/litigation/admin/34-51724.pdf.

159. *See United Industrial Corp.*, Exchange Act Release No. 60005 (May 29, 2009), available at http://www.sec.gov/litigation/admin/2009/34-60005.pdf; *Diagnostic Products Corp.*, Exchange Act Release No. 51724 (May 20, 2005), available at http://www.sec.gov/litigation/admin/34-51724.pdf.

160. *See United Industrial Corp.*, Exchange Act Release No. 60005 (May 29, 2009), available at http://www.sec.gov/litigation/admin/2009/34-60005.pdf; *Diagnostic Products Corp.*, Exchange Act Release No. 51724 (May 20, 2005), available at http://www.sec.gov/litigation/admin/34-51724.pdf.

161. *See* Press Release, Dept. of Justice, *DPC (Tianjin) Ltd. Charged with Violating the Foreign Corrupt Practices Act,* May 20, 2005, available at http://www.justice.gov/opa/pr/2005/May/05-crm-282.htm; SEC Litig. Rel. No. 21063 (May 29, 2009), available at http://www.sec.gov/litigation/litreleases/2009/lr21063.htm.

162. *See SEC v. First City Financial Corp.*, 890 F.2d 1215, 1230 (Dist. D.C. 1989); *see also, SEC v. Patel,* 61 F.3d 137, 139 (1st Cir. 1995).

163. *See Securities and Exchange Commission v. First City Financial Corp.*, 890 F.2d 1215, 1230 (Dist. D.C. 1989).

164. In cases where corporations believe that the charges brought by the DOJ or the SEC are an abuse of enforcement discretion, there is always recourse to the courts. *See, e.g., U.S. v. Bourke,* S2 05 Cr. 518 SAS (S.D.N.Y. Jul. 1, 2009), a case which the Chamber Report suggests was such an abuse of discretion currently on appeal in the U.S. Court of Appeals for the Second Circuit. *See Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act,* Chamber Institute for Legal Reform (Oct. 2010), at 3.

165. Unlawful Corporate Payments Act of 1977, H.R. Rep. No. 95-640, 95th Cong., 1st Sess., at 12 (Sept. 28, 1977)

166. "The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is...not only...unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. It short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency.... Corporate bribery also creates severe

foreign policy problems for the United States. The revelation of improper payments invariably tends to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations." Unlawful Corporate Payments Act of 1977, H.R. Conf. Rep. No. 95–640, 95th Cong., 1st Sess. (Sept. 28, 1977), available at http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf.

167. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(a)(1)(A)-(B); 15 U.S.C. § 78dd-3(a)(1)(A)–(B)

168. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(a)(3)(A)-(B); 15 U.S.C. § 78dd-3(a)(3)(A)–(B)

169. Foreign Corrupt Practices Act of 1977, 15 U.S.C § 78dd-1(b); 15 U.S.C. § 78dd-3(b)

170. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1(c); -3(c)

171. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1(f)(1); -2(h)(2)(A); -3(f)(2). The focus for the FCPA is on the purpose of the payment rather than the particular duties of the official receiving it. U.S. Dept. of Justice, Lay-Person's Guide, available at http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf (last visited July 10, 2011). The DOJ has also outlined specific steps by which a company can avoid having a consultant which also provided services to a foreign government being considered a foreign official. U.S. Dept. of Justice, Opinion Procedure No. 10-03 (Sept. 1, 2010), available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1003.pdf

172. OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Dec. 18, 1997, 37 I.L.M. 4, Art.1 (4)(a), available at http://www.oecd.org/dataoecd/4/18/38028044.pdf. The OECD has specified that member states should interpret "the criteria in the Convention and its Commentaries defining a foreign public official...broadly" and that "no element of proof beyond those contemplated in Article 1 of the Convention is required." Working Group on Bribery in International Business Transactions, Germany: Phase 3 Report, at 15 (Mar. 17, 2011), available at http://www.oecd.org/dataoecd/5/45/47416623.pdf.

173. More specifically, a foreign official is defined as any individual who "(a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), (b) exercises a public function—(i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or (ii) for any public agency or public enterprise of that country or territory (or subdivision), or (c) is an official or agent of a public international organization." *Bribery Act* (2010) § 6(5), available at http://www.legislation.gov.uk/ukpga/2010/23/crossheading/bribery-of-foreign-public-officials.

174. UK MOJ, Bribery Act of 2010 Guidance, available at http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf. *US v. Carson* found that employees of state-owned companies *could* be 'foreign officials' under the FCPA; whether a state-owned company constitutes an 'instrumentality' under the FCPA will be determined on a case-by-case basis. Factors that would warrant consideration in these cases include: (i) the foreign state's characterization of the entity and its employees, (ii) the foreign state's degree of control over and extent of ownership of the company, (iii) the purpose of the entity's activities, and (iv) the company's obligations and privileges under

the foreign state's law. *US v. Carson*, No. 8:09-cr-00777-JVS (C.D. Cal. 2011). A 1994 DOJ Opinion procedure found that the general director of a state-owned enterprise is a 'foreign official' under the FCPA, despite not being considered a government employee or public official under his nations' law. DOJ Opinion Procedure 94–01 (May 13, 1994), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/1994/9401.pdf.

175. This reflects the fact that both the OECD Convention and UNCAC define "foreign public official" broadly. UNCAC defines "foreign public official" as "any person holding a legislative, executive, administrative, or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise." A public official is defined as "any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; (ii) an other person who performs a public function, including for a public agency or public enterprise, or provides a public services, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a 'public official' in the domestic law of a State Party." For certain measures, public official may be defined as "any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party." *United Nations Convention Against Corruption*, Art. 2(a)-(b), Oct. 31, 2003, G.A. Res. 58/4, U.N. Doc. A/RES/58/422. The OECD Commentary clarifies that exercising a "public function" includes "any activity in the public interest, delegated by a foreign country" and that a "public enterprise" includes "any enterprise, regardless of its legal form, over which a government or governments, may, directly or indirectly, exercise a dominant influence." OECD, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Art. 1(12), 1(14). In addition, the Commentaries indicate that in "special circumstances, public authority may in fact be held by persons...not formally designated as public officials. Such persons, though their *de facto* performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials." OECD, *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Art. 1(16).

176. UNCAC recommends that States Parties criminalize "the promise, offering, or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity for a private sector entity...in order that he or she, in breach of his or her duties, act or refrain from acting" or the "solicitation or acceptance" of such advantages. *United Nations Convention Against Corruption*, Art. 21, Oct. 31, 2003, G.A. Res. 58/4, U.N. Doc. A/RES/58/422. The UK Bribery Act makes it an offence to "offer, promise, or give a financial or other advantage to another person" when the intent is to induce or reward improper activity or when the individual offering the advantage "knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity." *Bribery Act* (2010) §§ 1(1–3).

177. *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, U.S. Chamber Institute for Legal Reform (Oct., 2010). The cases cited by the Chamber involved large-scale payments and privileges provided to employees of state-owned or state-controlled enterprises for purposes of retaining or gaining business. To include employees of state-owned or state-controlled enterprises within the definition of foreign official when payments are made with a corrupt intent for the purposes of gaining or retaining a business advantage fits both the intended scope and

purposes of the FCPA and more recent legislation, including the UK Bribery Statute. According to the Guidance on the U.K. Statute, this includes "officers exercising public functions in state-owned enterprises" in its foreign official definition. UK MOJ, Bribery Act of 2010 Guidance, at 11, available at http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf.; *U.S. v. Control Components, Inc.*, No. SACR09-00162 (C.D. Cal. Jul. 28, 2009) (Criminal fine, organizational probation, and compliance monitoring imposed after CCI entered a guilty plea regarding payments of "approximately $4.9 million in corrupt payments to officers and employees of state-owned customers," including electric, petroleum, and nuclear power companies in China as well as oil and nuclear power companies in Malaysia, Korea, and the United Arab Emirates for the purposes of gaining or retaining business for CCI, as well as providing false information to investigators and destroying relevant documents); *US v. Kellogg, Brown & Root LLC*, H-09-071 (S.D. Tex. filed Feb. 11, 2009) (Plea agreement regarding decade-long scheme of bribery of Nigerian government officials, including members of the executive branch of the Nigerian government, officials of the government-owned petroleum company, and officials of a company functionally controlled by the Nigerian government, for purposes of securing government contracts); Complaint, *SEC v. Halliburton Company and KBR, Inc.,* Civil Action No. 4:09–399 (Feb. 11, 2009) (Related charges by the SEC of violating anti-bribery, books and records, and internal controls provisions of FCPA, resulting in $177 million disgorgement by KBR Inc. and Halliburton); *United States v. Baker Hughes Services International Inc.,* No. H-07-129 (S.D. Tex. filed Apr. 11, 2007); *SEC v. Baker Hughes Incorporated and Roy Fearnley,* H-07-1408 (S.D. Tex, filed Apr. 26, 2007) (Investigations by both the SEC and the DOJ resulting in a final judgment, a guilty plea on FCPA charges, a DPA, and a multi-million dollar fine including admissions by BHSI of paying approximately $4.1 million in bribes to an intermediary in the belief that funds would be transferred to the Kazakh state-owned oil company Kazakhoil for the purposes gaining oil contracts in Kazakhstan); *In Re Lucent Technologies* (2007); Complaint, *S.E.C. v. Lucent Technologies,* C.A. No. 07–2301, (D.D.C. Dec. 21, 2007) (NPA signed with the DOJ acknowledging improperly recorded and inadequately monitored expenditures by Lucent for travel and entertainment for Chinese government officials, including managers in state-owned telecommunications companies, provided for the purposes of seeking or retaining business; fines included $1,000,000 by the DOJ and $1.5 million in civil penalties by the SEC).

178. Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. Int'l L. & Com. Reg. 83, 87 (2007).

179. S. Rep. 95–114, *Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 305,* 95th Cong., 1st Sess., at 3 (Mar. 28, 1977), available at http://www.justice.gov/criminal/fraud/fcpa/history/1977/senaterpt-95-114.pdf.

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