

How Should We Measure the Effectiveness of the Foreign Corrupt Practices Act? Don't Break What Isn't Broken—The Fallacies of Reform

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What makes a statute effective—enforcement statistics such as convictions and fines or whether it is, in practice and in the field, observed by those whose conduct it targets? The authors take the position that the Foreign Corrupt Practices Act (FCPA), by any measure, has been effective in curbing improper conduct by U.S. companies. In contrast, many of the criticisms and proposals for “reform” show a lack of understanding of the actual practices by the enforcement authorities and the companies regulated by the statute, or are motivated by misplaced policy considerations.

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I. INTRODUCTION

The Foreign Corrupt Practices Act (FCPA) was first enacted in 1977 amidst a furor over foreign payments and off-the-books cash slush funds maintained by U.S. issuers.¹ In signing the legislation, President Jimmy Carter noted, “Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries. Recent revelations of widespread overseas bribery have eroded public confidence in our business institutions.”² Although the legislation provided for “hard” enforcement through criminal prosecution and civil injunctions, it also incorporated “soft” enforcement aspects, including “safe harbors” associated

¹ Philip B. Heyman [sic], *Justice Outlines Priorities in Prosecuting Violations of Foreign Corrupt Practices Act*, AM. BANKER, Nov. 21, 1979, at 4.

² *Id.* at 5.

with FCPA Opinions issued by the Department of Justice (DOJ) and requirements that issuers implement reasonable internal financial controls.³

Indeed, from the very beginning, the government's intent was to take into consideration a corporation's genuine efforts to comply with the law. For example, in 1979, Philip B. Heymann, the Assistant Attorney General for DOJ's Criminal Division announced that although "[p]ro forma adoption of an antibribery policy will not insulate top management and the company from intense investigation and prosecution if serious controls are lacking[,] . . . where a company has been making good faith efforts to monitor its employees, that will be relevant in our decision how to proceed."⁴ Heymann concluded by saying, "The most efficient means of implementing the Foreign Corrupt Practices Act is voluntary compliance by the American business community."⁵

Experience under the FCPA for the past thirty-five years has mirrored these themes. The government has actively investigated and prosecuted FCPA cases, and some very big names have been caught in the enforcement web. The number of prosecutions, however, although increasing in recent years, is not really the right measure of the FCPA's effectiveness in preventing transnational bribery by U.S. companies. Of more significance, the *risk* of government enforcement has spurred a public/private regime of "soft" enforcement, in which industry groups, individual corporations, and the government have engaged in a dialogue—admittedly sometimes in the context of enforcement actions—over what internal controls and procedures are effective in preventing corruption. The corporate community's overall commitment to this internal compliance regime is the best measure of the FCPA's effectiveness.

Moreover, after thirty-five years of experience of doing business under the FCPA, the business community has largely internalized the necessary controls. Despite criticism aimed at the FCPA from certain business organizations and academics, the general scope of the FCPA is fairly well-delineated and understood. Many of the criticisms fail to identify an FCPA-centric problem other than that the authorities are enforcing the law. In many cases, the medicine they recommend to cure the alleged ill of ambiguity and overreaching prosecution is more likely to kill the patient, that is, enforcement of the FCPA, than to improve its health through allegedly bringing greater clarity as to its elements and defenses. This is not to say there aren't problems in application of the existing statute, but they aren't necessarily the problems identified by the critics, nor are they likely to be solved by the solutions the critics propose.

³ See *id.* at 8, 10.

⁴ *Id.*

⁵ *Id.*

II. CORPORATE BEHAVIOR AND ENFORCEMENT RISK PRIOR TO THE ENACTMENT OF THE FCPA

Prior to the enactment of the FCPA, no country in the world explicitly prohibited bribery of foreign officials for business purposes.⁶ This is not to say that no U.S. law could be interpreted to apply to such conduct. Under the honest-services fraud theory, the government could proceed under the federal mail- and wire-fraud statutes⁷ to prosecute payments that deprived an employer, including a foreign government, of the honest services of its employee, the foreign official.⁸ Further, many states prohibit commercial bribery, and federal prosecutors could charge violations of those state bribery laws using the Travel Act.⁹ The Securities and Exchange Commission (SEC) maintained that U.S. corporations were required to disclose such payments as part of the securities laws. That is, “[w]hen the SEC successfully prosecuted a company for an illicit payment, it was because the agency could prove that the company failed to disclose a ‘material’ transaction in violation of U.S. securities law[s].”¹⁰ “In addition, prosecutors could invoke the Bank Secrecy Act, which requires the reporting of funds that are taken out of, or brought into, the United States.”¹¹ “However, such indirect means of preventing foreign bribery were ineffective.”¹² This incomplete method of prosecuting foreign bribery prevented

⁶Frontline WORLD, Reactions to *Spotlight: History of the FCPA*, PBS (Feb. 13, 2009), <http://www.pbs.org/frontlineworld/stories/bribe/2009/02/history-of-the-fcpa.html>.

⁷See 18 U.S.C. §§ 1341, 1343 (2006).

⁸The honest-services theory has a long and storied history. For many years, it was the main vehicle by which the federal government prosecuted corrupt state officials. In 1987, in *McNally v. United States*, 483 U.S. 350, 361 (1987), the Supreme Court struck down a conviction under this theory, finding no support in the text of the mail or wire fraud statutes. Congress quickly responded in 1988 by inserting a statutory definition, codified in 18 U.S.C. § 1346 (2006), that stated that a “scheme or artifice to defraud” included corrupt schemes “to deprive another of the intangible right of honest services.” *Skilling v. United States*, 130 S. Ct. 2896, 2927 (2010) (quoting 18 U.S.C. § 1346 (2006)). Although the theory is again under attack today with the Supreme Court finding that § 1346 is overly vague in application, the core concept—that an employer may suffer tangible harm when a third party suborns one of its employees or agents—has thus far not been questioned. *See id.* at 2935 (Scalia, J., concurring).

⁹See 18 U.S.C. § 1952 (2006).

¹⁰Sam Singer, Comment, *The Foreign Corrupt Practices Act in the Private Equity Era: Extracting a Hidden Element*, 23 EMORY INT’L L. REV. 273, 274 (2009).

¹¹Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CALIF. L. REV. 185, 188 (1994); *see also* The Financial Recordkeeping and Reporting of Currency and Foreign Transactions Act of 1970, 31 U.S.C. §§ 5311–5330 (2006); Notice of Plea and Plea Agreement, *United States v. Textron, Inc.*, No. 07-CV-01505 (D.D.C. July 10, 1979).

¹²Pines, *supra* note 11, at 188.

prosecutions, and perhaps more importantly, failed to send the desired message that the bribery of foreign officials was wrong.¹³

In 1974, Stanley Sporkin, the head of the SEC's Enforcement Division, established a "'voluntary disclosure program' that allowed an issuer to conduct an internal investigation of its foreign payments, adopt a policy of ceasing such payments, and file a report concerning these matters with the SEC."¹⁴ Sporkin warned companies that "unless companies voluntarily made immediate and full disclosure of their activities, they would face harsher legal consequences later."¹⁵ This amnesty-like approach swiftly brought many bribes in the public view, as over 600 corporations voluntarily disclosed the making of illicit foreign payments to obtain contracts.¹⁶ "After the extent of the bribery was discovered, the SEC's first priority was to remedy the deficiencies in the legal system that allowed secret slush funds and other off-the-books accounting techniques" on the theory that "[a]ccounting misconduct of this kind undermined the integrity of corporate books and records, an essential element of the reporting system administered by the SEC."¹⁷

As a result of the SEC program and public scandals involving alleged bribery by U.S. companies of officials in Japan, Mexico, Italy, and the Netherlands, Congress enacted the FCPA in 1977.¹⁸ In doing so, Congress gave the SEC the amendments to the securities laws it requested, thereby requiring all issuers to maintain accurate books and records and to implement internal controls, both at the parent company and at controlled subsidiaries.¹⁹ However, it went further and enacted a specific prohibition against paying bribes to foreign officials, applicable not only to issuers but to any U.S. person or

¹³ *See id.*

¹⁴ Kathleen A. Lacey et al., *Assessing the Deterrent Effect of the Sarbanes-Oxley Act's Certification Provisions: A Comparative Analysis Using the Foreign Corrupt Practices Act*, 38 VAND. J. TRANSNAT'L L. 397, 416 (2005); *see also* S. COMM. ON BANKING, HOUS., & URBAN AFFAIRS, 94TH CONG., REP. OF THE SEC ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 6-7 (Comm. Print 1976) (discussing creation of voluntary disclosure program).

¹⁵ Robert Cyran, Rob Cox & David Vise, *Gates Should Weigh Microsoft Breakup*, WALL ST. J. (June 17, 2006), <http://online.wsj.com/article/SB115050746420383142.html>.

¹⁶ Stanley Sporkin, Dir., Div. of Enforcement, U.S. Sec. and Exch. Comm'n, *The Saxe Lectures in Accounting: A Regulator Responds* (Dec. 18, 1978), *available at* http://newman.baruch.cuny.edu/digital/saxe/saxe_1978/sporkin_78.htm.

¹⁷ Lacey, *supra* note 14, at 417.

¹⁸ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

¹⁹ *See* 15 U.S.C. § 78m(b)(2)-(7) (2006).

entity.²⁰ Both the books-and-records provisions and the anti-bribery provisions carried the risk of criminal or civil enforcement and significant fines.²¹

III. DEFENSE INDUSTRY INITIATIVE

The combination of the FCPA's requirement that issuers adopt internal financial controls and some of the early FCPA prosecutions encouraged corporations to adopt anti-corruption compliance programs. Although some of these programs were admittedly rudimentary, certain industries that viewed themselves as particularly at risk, already highly regulated, or already the target of enforcement actions, led the way.

One of the earliest examples of an industry compliance code can be found in the defense industry. In 1985, the defense industry was faced with allegations of widespread criminal misconduct and government mismanagement.²² To address the issue, President Reagan appointed the "The President's Blue Ribbon Commission on Defense Management" (the Packard Commission) to recommend reforms.²³ The Packard Commission produced an Interim Report in February 1986 in which it observed that waste, fraud, and abuse had eroded the public's confidence in the defense industry and the Department of Defense.²⁴ "The Commission urged defense contractors to improve the defense acquisition process through greater self-governance,"²⁵ stating: "To assure that their houses are in order, defense contractors must promulgate and vigilantly enforce codes of ethics that address the unique problems and procedures incident to defense procurement. . . . They must also develop and implement internal controls to monitor these codes of ethics and sensitive aspects of contract compliance."²⁶

Subsequently, executives from eighteen defense contractors voluntarily met and drafted the principles that became known as the Defense Industry Initiative on Business Ethics and Conduct (DII).²⁷ By July 1986, thirty-two major defense contractors had pledged to adopt DII's core principles, which included developing and training employees in written Codes of Conduct, encouraging

²⁰ See 15 U.S.C. §§ 78dd-1 to -2 (2006). In 1998, the statute was amended to apply to non-U.S. persons who took any act in furtherance of a foreign bribe within the territory of the United States. See 15 U.S.C. § 78dd-3 (2006).

²¹ See 15 U.S.C. § 78dd-2(g); *id.* § 78m(b)(4)–(5).

²² *Origins of DII*, DEF. INDUSTRY INITIATIVE ON BUS. ETHICS & CONDUCT, <http://www.dii.org/about-us/history> (last visited Aug. 19, 2012).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ PRESIDENT'S BLUE RIBBON COMM'N ON DEF. MGMT., A QUEST FOR EXCELLENCE: FINAL REPORT TO THE PRESIDENT, at xxix (1986).

²⁷ *Origins of DII*, *supra* note 22.

internal reporting of violations thereof, and self-monitoring for compliance with federal procurement laws.²⁸

No compliance code, however, will prevent willful misconduct and evasion of controls. In subsequent years, a number of signatories to the DII ran afoul of the FCPA, with enforcement actions against General Electric,²⁹ Lockheed Corporation,³⁰ IBM,³¹ and Textron³² based on either their own actions or those of their overseas subsidiaries.

IV. GOVERNMENT COMPLIANCE GUIDANCE

In the early years of the FCPA, there was a fair amount of uncertainty as to how the statute would be applied. Representatives from DOJ admitted: “The interpretive questions arising under the Act depend on subtle judgments of fact and law. We’re dealing with a new Act, where no one has much enforcement experience. It is an Act that presents questions there has never been occasion to address in domestic bribery law”³³ Shortly after enactment of the FCPA, President Carter noted in his export policy statement the hope that “American business will not forego legitimate export opportunities because of uncertainty about the application of [the FCPA]” and asked DOJ to provide some form of guidance to the business community.³⁴ Over time, the guidance came in various forms, such as DOJ FCPA Opinion Procedure Releases, the U.S. Sentencing Guidelines, DOJ Principles of Federal Prosecution of Business Organizations, through various FCPA settlements, and through the Organization for Economic Cooperation and Development (the OECD).

A. DOJ FCPA Opinion Procedure Releases

To resolve uncertainty specific to the interpretation of the FCPA, the Department established procedures to “enable issuers and domestic concerns to obtain an opinion of the Attorney General as to whether certain specified, prospective—not hypothetical—conduct conforms with the Department’s present enforcement policy regarding the anti-bribery provisions of the Foreign

²⁸ *See id.*

²⁹ *See* United States v. Steindler, No. CR-1-94-29-1 (S.D. Ohio Nov. 18, 1994).

³⁰ *See* United States v. Lockheed Corp., No. 1:94-CR-226, 1995 U.S. Dist. LEXIS 22529, at *2 (N.D. Ga. Jan. 9, 1994).

³¹ *See* Int’l Bus. Machs., Exchange Act Release No. 58504, available at www.sec.gov/litigation/admin/34-43761.htm.

³² *See* Notice of Plea and Plea Agreement, United States v. Textron, Inc., No. 07-CV-01505 (D.D.C. July 10, 1979).

³³ AM. BANKER, *supra* note 1, at 8.

³⁴ *Id.*

Corrupt Practices Act.”³⁵ The SEC does not have a separate opinion procedure release process; rather, in 1980, the SEC declared its decision to follow the guidance announced through DOJ’s Opinion Release Procedure.³⁶

Fifty-six FCPA opinions have been released to date, covering a range of topics such as charitable contributions, gifts and entertainment, commissions, and hiring foreign agents/representatives.³⁷ However, given the relative dearth of opinions (only one opinion was released in 2011)³⁸ and their limited precedential value (proffered opinions only bind DOJ with respect to the facts at issue and are not intended to provide safe harbors to parties other than the requestor),³⁹ the FCPA opinions have had only relatively minor impact on corporate compliance.

B. U.S. Sentencing Guidelines

In November 1991, the U.S. Sentencing Commission released the Federal Sentencing Guidelines for Organizations.⁴⁰ The Guidelines’ approach, which entailed providing both guidance and incentives for compliance programs, has been described as “path breaking.”⁴¹ At the time, Judge William W. Wilkins, Jr., then Chairman of the Commission, wrote:

[T]he “carrot and stick” approach of the guidelines for organizations, with its heavy reliance on . . . compliance programs, must still be viewed as developmental. If organizations ignore this exploratory invitation to shield

³⁵ 28 C.F.R. § 80.1 (2008); *see also* 15 U.S.C. § 78dd-1(e) (2006). The FCPA was amended in 1988 to also require the Attorney General to consider whether additional general guidance should be published. Ultimately, DOJ, after soliciting public comment, determined that it was not necessary and instead published a “Lay-man’s Guide to the FCPA.” *FCPA: Lay-Person’s Guide*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf>. More recently, however, DOJ has announced that it is, in fact, preparing official guidance. Press Release, U.S. Dep’t of Justice, Assistant Attorney General Lanny A. Breuer Speaks at the 26th National Conference on the FCPA (Nov. 8, 2011), *available at* <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html>.

³⁶ *See* SEC Release No. 34-17099, 45 Fed. Reg. 174 (Sept. 5, 1980). A second SEC Release, No. 34-18255, 46 Fed. Reg. 222 (Nov. 18, 1981), held that the SEC would continue to adhere to the policy announced in Release No. 34-17099.

³⁷ *See* Opinion Procedure Releases, U.S. Dep’t of Justice, *available at* <http://www.justice.gov/criminal/fraud/fcpa/opinion>.

³⁸ *Id.*

³⁹ *See* 28 C.F.R. §§ 80.1–80.16 (2008).

⁴⁰ *See* U.S. SENTENCING GUIDELINES MANUAL ch. 8 (1991) (amended 2004).

⁴¹ Jeffrey M. Kaplan, *The Sentencing Guidelines: Field Notes on a 20-year Experiment*, FCPA BLOG (Oct. 26, 2011, 6:28 AM), <http://www.fcpablog.com/blog/2011/10/26/the-sentencing-guidelines-field-notes-on-a-20-year-experimen.html>.

against potential liability with well-designed and rigorously implemented compliance systems, it is doubtful this new approach will endure.⁴²

While the “stick” approach of increased enforcement has certainly gained a degree of prominence (especially in light of the increased number of FCPA cases in the past decade), corporations have indeed accepted this “exploratory invitation” and have devoted considerable effort to developing effective compliance programs.

The “carrot” under the Guidelines is the possibility of significantly reduced sentences for corporations that have adequate compliance programs.⁴³ To earn this reduction, corporations must have effective compliance and ethics programs that comport with specific minimum requirements set forth in the Guidelines. These requirements are designed to ensure that the corporation “exercise[s] due diligence to prevent and detect criminal conduct; and otherwise promote[s] an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”⁴⁴

Prior to 2010, the Guidelines disqualified a corporation from being awarded for its compliance program where “high-level personnel” were involved with or should have known about the criminal conduct.⁴⁵ In 2010, the Commission amended (with congressional approval)⁴⁶ the Guidelines to provide that, subject to a few conditions, an organization can still be credited for having an effective compliance and ethics program—even where high-level personnel were involved with or should have known about the criminal conduct at issue.⁴⁷

C. Metcalf & Eddy and Morgan Stanley

Over the years, DOJ and the SEC have provided guidance included in enforcement actions. Two FCPA actions in particular stand out in the unusually specific attention the enforcement authorities paid to compliance and ethics programs. In the 1999 case of *United States v. Metcalf & Eddy*, DOJ for the first time provided a detailed list of elements that the defendant corporation should

⁴² William W. Wilkins, Jr., *Foreword to* JEFFREY M. KAPLAN ET AL., COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES: PREVENTING CRIMINAL AND CIVIL LIABILITY, at xlii (1993).

⁴³ Under the Guidelines, if a guilty organization has an effective compliance and ethics program that was in place at the time of the offense, the court will subtract three points from its culpability score. The difference can be significant: a fine of \$1–2 million would be reduced to \$0.4–0.8 million. *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f)(1) (2010).

⁴⁴ *Id.* § 8B2.1(a)(1)–(2) (2010).

⁴⁵ U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f)(3)(A) (1991) (stating that credit for effective compliance and ethics program not applicable if high-level personnel “participated in, condoned, or was willfully ignorant of the offense”).

⁴⁶ *See* 28 U.S.C. § 994(p) (2006).

⁴⁷ *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f)(3)(C) (2010).

include in its remedial compliance and ethics program.⁴⁸ Over a decade later, Morgan Stanley's excellent compliance program completely shielded the company from being prosecuted for the misdeeds of one of its employees.

In *Metcalf & Eddy*, the architectural and engineering services firm allegedly paid for unauthorized travel expenses for the chairman of an Egyptian sanitary and drainage organization and his family.⁴⁹ In a rare civil action by DOJ, Metcalf & Eddy agreed to maintain a carefully defined compliance program designed to detect and prevent violations of the FCPA.⁵⁰ The consent identified several critical elements of the program, building upon the Sentencing Guidelines while providing more concrete (and practical) guidance in the FCPA context. For example, the consent calls for the establishment and maintenance of a committee to review the retention of third-party agents for business development in a foreign jurisdiction as well as the suitability of all prospective joint venture partners.⁵¹ The consent also prescribes that all contracts and contract renewals contain terms and conditions providing for termination if the other party breaches the requisite anti-bribery representations and warranties.⁵²

The legacy of *Metcalf & Eddy* continues today, with DOJ continuing to provide "best practices" guidance in its corporate settlements. In recent years, plea agreements, deferred prosecution agreements, and non-prosecution agreements have all included an appendix listing the minimum elements required of a compliance program.⁵³ The appendices include the *Metcalf & Eddy* elements but provide additional guidance including:

- specifically requiring procedures covering gifts, hospitality, entertainment, expenses, customer travel, political contributions, charitable donations, sponsorships, facilitation payments and solicitation and extortion;
- recommending the use of risk assessments addressing the individual circumstances and particular bribery risks of the company; and
- recommending periodic review and testing of the company's anti-corruption standards and procedures.⁵⁴

⁴⁸ See generally Complaint for Permanent Injunction and Ancillary Relief, *United States v. Metcalf & Eddy, Inc.*, No. 99-CV-12566 (D. Mass. 1999); Final Judgment of Permanent Injunction Against Metcalf & Eddy, Inc., *United States v. Metcalf & Eddy, Inc.*, No. 99-CV-12566 (D. Mass. 1999).

⁴⁹ See Complaint for Permanent Injunction and Ancillary Relief at para. 21, *United States v. Metcalf & Eddy, Inc.*, No. 99-CV-12566 (D. Mass. 1999).

⁵⁰ See generally Consent and Undertaking of Metcalf & Eddy, Inc., *United States v. Metcalf & Eddy, Inc.*, No. 99-CV-12566 (D. Mass. 1999).

⁵¹ *Id.* at para. 4(c).

⁵² *Id.* at para. 4(i).

⁵³ See, e.g., Deferred Prosecution Agreement at C-1 to C-7, *United States v. Bizjet Int'l Sales & Support, Inc.*, No. 12-CR-61 (N.D. Okla. 2012).

⁵⁴ See *id.* at C-2 to C-3.

Meanwhile, DOJ and the SEC recently displayed a concrete “carrot” in their enforcement actions against Garth Peterson, former managing director of Morgan Stanley’s business in China.⁵⁵ According to court documents, Peterson circumvented Morgan Stanley’s internal controls to transfer a multi-million dollar ownership interest in a Shanghai building to himself and a Chinese official of a state-owned enterprise with whom he had a personal friendship.⁵⁶ The SEC and DOJ charged Peterson with FCPA violations, but declined to prosecute his employer Morgan Stanley, specifically crediting Morgan Stanley’s strong compliance program. As *Forbes* noted:

Both the DOJ and SEC took a pass [from prosecuting Morgan Stanley]: very unusual in this context. Even more unusual was that the DOJ went out of their way to explain that Morgan Stanley benefited—to the point of getting a declination—from its pre-existing compliance program. . . .

Even the wording of the press release shows respect for Morgan Stanley’s compliance. It used phrases like “the defendant used a web of deceit to thwart Morgan Stanley’s” compliance program.⁵⁷

D. U.S. DOJ’s Principles of Federal Prosecution of Business Organizations

The government’s decision to decline prosecution of Morgan Stanley reflects a concrete example of DOJ’s *Principles of Federal Prosecution of Business Organizations (Principles)*, first promulgated in 1999.⁵⁸ While the *Principles* make clear that a compliance program does not *absolve* a corporation from criminal liability,⁵⁹ they reflect the Department’s policy that an effective compliance program is a relevant factor affecting prosecutorial discretion. Of significance here, the *Principles* include the following factors to guide a prosecutor in determining whether to charge a corporation:

⁵⁵ United States v. Peterson, No. 12-CR-224, 2012 U.S. Dist. LEXIS 66025, at *2 (E.D.N.Y. May 9, 2012).

⁵⁶ See *id.* at *4.

⁵⁷ Howard Sklar, *The Most Marketable Compliance Officer in the World*, FORBES (Apr. 30, 2012), <http://www.forbes.com/sites/howardsklar/2012/04/30/the-most-marketable-compliance-officer-in-the-world/>.

⁵⁸ Memorandum from Eric Holder on Bringing Criminal Charges Against Corporations to Dep’t Component Heads and U.S. Attorneys, at § VII (June 16, 1999), available at <http://www.justice.gov/criminal/fraud/docs/reports/1999/charging-corps.pdf>. In 2008, the *Principles* were included in the *U.S. Attorney’s Manual*. See U.S. Dep’t. of Justice, Attorneys’ Manual, tit. 9, ch. 9-28.800, Principles of Federal Prosecution of Business Organizations, Corporate Compliance Programs [hereinafter *Principles*], available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm.

⁵⁹ See *Principles*, *supra* note 58, at ch. 9-28.900.

- “the pervasiveness of wrongdoing within the corporation, including the complicity in, or condoning of, the wrongdoing by corporate management”;⁶⁰
- “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents”;⁶¹
- “the existence and effectiveness of the corporation’s pre-existing compliance program”;⁶² and
- “the corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies.”⁶³

The *Principles* also identify a number of factors to consider in evaluating the effectiveness of a compliance program: “the comprehensiveness of the compliance program; the extent and pervasiveness of the criminal conduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including . . . disciplinary action . . . and revisions to corporate compliance programs.”⁶⁴ The latest versions of the *Principles* also refer to the adequacy of corporate governance mechanisms; for example, “whether the corporation’s directors exercise independent review over proposed corporate actions.”⁶⁵ The *Principles* make clear that corporations should ensure that compliance programs are more than merely “paper program[s]”: that is, the program is “designed, implemented, reviewed, and revised, as appropriate, in an effective manner,” supported by “staff sufficient to audit, document, analyze, and utilize the results of the corporation’s compliance efforts,” and communicated to the corporation’s employees and agents so they are “adequately informed about the compliance program and are convinced of the corporation’s commitment to it.”⁶⁶

E. OECD and UN Guidance

Beginning in the late 1990s, the FCPA went global with a series of international agreements. The most significant of these was the 1997 OECD

⁶⁰ *Id.* at ch. 9-28.300(A)(2).

⁶¹ *Id.* at ch. 9-28.300(A)(4).

⁶² *Id.* at ch. 9-28.300(A)(5). The phrase “pre-existing,” underlined in the original, was introduced in the 2006 version. The emphasis was removed, but the phrase retained, when the *Principles* were incorporated in the U.S. Attorneys’ Manual in 2008.

⁶³ *Id.* at ch. 9-28.300(A)(6).

⁶⁴ *Id.* at ch. 9-28.800(B).

⁶⁵ *Principles*, *supra* note 58, at ch. 9-28.800(B).

⁶⁶ *Id.*

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention).⁶⁷ The OECD Convention recognized that “all countries share a responsibility to combat bribery in international business transactions,”⁶⁸ and provided the international framework for the global prosecution of cross-border corruption. The OECD Working Group on Bribery is charged with conducting peer reviews to monitor the parties’ implementation of the convention. In addition to country-specific evaluations, it has conducted “horizontal reviews” to identify widespread practices, both good and bad. One of these reviews resulted in the OECD Council issuing a Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, notable in particular for its “Good Practice Guidance on Internal Controls, Ethics, and Compliance.”⁶⁹ This Guidance largely tracks the elements set out in the DOJ Appendices.

F. *The U.K. Bribery Act 2010*

In 2010, after many years of false starts, the U.K. finally enacted a comprehensive reform of its anti-corruption statutes. The U.K. Bribery Act 2010⁷⁰ includes prohibitions on paying and receiving bribes, both for domestic and foreign officials and between private commercial parties. Uniquely, it contains a strict liability criminal provision holding corporations accountable for bribery by an “associated person”—defined as lower-level employees, agents, and other third parties⁷¹—but offers an affirmative defense to the corporation if the bribery took place despite the existence of “adequate procedures” to prevent it.⁷²

In May 2011, the U.K. Ministry of Justice issued official guidance on what type of program would qualify for the adequate procedures defense.⁷³ This guidance is, again, similar to that found in the DOJ Appendices and the OECD Guidance, with some additional detail. The guidance emphasizes the affirmative

⁶⁷ Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (2011), available at <http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/38028044.pdf> [hereinafter OECD Convention].

⁶⁸ *Id.* at pmb1.

⁶⁹ See ORG. FOR ECON. CO-OPERATION & DEV., RECOMMENDATION OF THE COUNCIL FOR FURTHER COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (Nov. 26, 2009), available at <http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/44176910.pdf>.

⁷⁰ Bribery Act, 2010, c. 23 (U.K.).

⁷¹ See *id.* at c. 23, § 8.

⁷² *Id.* at c. 23, § 7(1).

⁷³ See U.K. MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE (2011), available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>; see also Philip Urofsky, Stephen Fishbein & Richard Kelly, *The UK Bribery Act 2010*, REV. SEC. & COMMODITIES REG., Aug. 17, 2011, at 171.

defense available to companies that have adequate procedures in place to prevent bribery, and provides six principles of bribery prevention: proportionate procedures, top-level commitment, risk assessment, due diligence, communication (including training), and monitoring and review.⁷⁴ The six principles are not prescriptive, and are intended to be flexible—thus as an additional aid, the guidance provides case studies that illustrate potential scenarios that relate to each of the principles.⁷⁵

V. SOFT ENFORCEMENT V. CONVICTIONS

Although the first two decades following the enactment of the FCPA saw some notable cases against some of the United States' most prominent corporations, recent years have seen a significant uptick in the frequency, scope, and severity of FCPA actions.⁷⁶ In particular, since 2007, DOJ and the SEC have brought a record number of actions, with corresponding increases in the size of penalties meted out to corporations and individuals.⁷⁷ This “new era” of more aggressive prosecution has, in turn, encouraged corporations to pay even greater attention to their internal compliance programs, matching the “hard” enforcement with “soft” enforcement.

A. OECD Recognition

The value and effectiveness of corporate “soft” enforcement has been recognized by the OECD Working Group on Bribery (the Working Group) in its reports on U.S. compliance with the OECD Convention. In its 2002 report, while recognizing the corporate perception that DOJ and the SEC had demonstrated their “willingness to prosecute large and medium-sized companies, and often high-level officers of those companies, alleged to have been involved in violations of the FCPA throughout the world,”⁷⁸ the Working

⁷⁴ U.K. MINISTRY OF JUSTICE, *supra* note 73, at 20–31.

⁷⁵ *See id.* at 6. The U.K. Ministry of Justice was careful to note, however, that the case studies are merely illustrative and should not be seen as “standard setting, establishing any presumption, reflecting a minimum baseline of action or being appropriate for all organizations whatever their size.” *Id.* at 32.

⁷⁶ *See* Pete J. Georgis, *Settling with Your Hands Tied: Why Judicial Intervention Is Needed to Curb an Expanding Interpretation of the Foreign Corrupt Practices Act*, 42 GOLDEN GATE U. L. REV. 243, 246 (2012) (“Since 2004, the U.S. government has devoted vast resources toward prosecuting FCPA violations.”).

⁷⁷ *See* PHILIP UROFSKY, SHEARMAN & STERLING LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN FCPA ENFORCEMENT 3–4 (July 2012), available at <http://www.shearman.com/files/Publication/e6d23f1f-9d58-4aa5-ae61-b2122928ce18/Presentation/PublicationAttachment/0085db08-378f-4bcf-a366-c7ce9e28e2ba/FCPA-Digest-Recent-Trends-and-Patterns-073012.pdf>.

⁷⁸ ORG. FOR ECON. CO-OPERATION & DEV., REPORT ON APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL

Group took stock—for the first time in any report issued by a governmental body—of the role and utility of corporate compliance programs as a measure of the effectiveness of U.S. anti-corruption efforts. The Working Group acknowledged that these corporate compliance programs had developed in response to the “powerful incentives” generated by FCPA enforcement, quoting one member of the bar as stating that “corporate compliance programs are the single most important measure contributing to prevention and deterrence.”⁷⁹

The Working Group approvingly noted that “[c]ompliance programs are by now well-developed and well-understood among large public companies,”⁸⁰ due in part to a “wealth of material” available on anti-corruption policies and “the emphasis placed on promoting. . . [their use] by in-house counsel and the private Bar.”⁸¹ The Working Group noted, however, that corporate compliance programs had not been uniformly adopted throughout the business community. For example, the Working Group found that compliance policies are “more extensively and intensively taught, understood, and implemented within the U.S. than internationally, where the problem of bribery is most likely to arise[.]” citing evidence that companies generally perform more monitoring activities at home than abroad.⁸² In addition, it noted that a “significant number of small companies operating in the international market . . . do business without a compliance program.”⁸³ The OECD Report expressed concern that small and medium-size U.S. enterprises doing business outside of the U.S. were “slip[ping] through the net” for a variety of reasons, including “less experience, less awareness and fewer resources” to implement compliance programs sufficient to detect and deter foreign bribery.⁸⁴

In its subsequent reports,⁸⁵ the Working Group found that the United States had made expansive efforts to raise the level of awareness of both the FCPA

BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATting BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 6 (Oct. 2002), available at <http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/1962084.pdf> [hereinafter OECD, REPORT ON APPLICATION].

⁷⁹ *Id.* at 17.

⁸⁰ *Id.* at 18.

⁸¹ *Id.* at 17.

⁸² *Id.* at 18.

⁸³ *Id.*

⁸⁴ OECD, REPORT ON APPLICATION, *supra* note 78, at 19.

⁸⁵ See ORG. FOR ECON. CO-OPERATION & DEV., UNITED STATES: PHASE 2: FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS ON THE APPLICATION OF THE CONVENTION AND THE 1997 RECOMMENDATION ON COMBATting BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (June 1, 2005), available at <http://www.oecd.org/dataoecd/7/35/35109576.pdf>; ORG. FOR ECON. CO-OPERATION & DEV., UNITED STATES: PHASE 3: REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATting BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 2009 REVISED RECOMMENDATION ON COMBATting BRIBERY IN INTERNATIONAL FCPA AND THE OECD CONVENTION (Oct. 15, 2010), available at <http://www.oecd.org/dataoecd/>

and the OECD Convention. These efforts included training to those who provide counseling to U.S. businesses on foreign markets, seeking to have the issue raised in programs administered by private sector organizations, and producing a guide on business ethics geared towards those new to international trade.⁸⁶

In its most recent report, the Working Group focused on the effects of the “substantial enforcement” of the FCPA.⁸⁷ The examiners reported that they had spent equal time with government and non-government representatives—a departure from its practice in 2002—to assess the implications of this high level of enforcement on the private sector and, in particular, to “ensure adequate time to assess the impact of the high level of enforcement . . . on corporate compliance.”⁸⁸ In these meetings, the examiners heard that heavier sanctions combined with the active enforcement by DOJ and SEC had spurred serious efforts to improve private-sector anti-bribery measures, internal controls, books and records, and compliance systems.⁸⁹ Non-government representatives also pointed to the U.S. Sentencing Guidelines and the SEC’s criticisms of specific internal controls failures as providing encouragement to establish effective compliance policies.⁹⁰ The Working Group reported that representatives from all business sectors understood the need for internal audits of foreign subsidiaries in particular, and that all private sector participants had hotlines for anonymous whistleblower reporting.⁹¹

B. *Current Industry Codes*

Vigorous FCPA enforcement has also resulted in more rigorous corporate standards and the rise in comprehensive industry codes directed at bribery issues. Similar to the earlier DII, these codes set out rules to ensure transparency and prevent corruption in high-risk industries, particularly where those industries do business in corruption-prone countries, are multinational in scope, and tend to work closely with government entities. For example, the *Wall Street Journal* recently reported “[t]he world drugs industry is tightening its code of practice in an attempt to clamp down on corruption and bribery, particularly in emerging markets.”⁹² Below, we examine the industry compliance codes in the pharmaceuticals industry and extractive industry.

10/49/46213841.pdf [hereinafter OECD, UNITED STATES: PHASE 3].

⁸⁶ See generally *supra* note 85.

⁸⁷ OECD, UNITED STATES: PHASE 3, *supra* note 85, at 11.

⁸⁸ *Id.* at 6.

⁸⁹ See *id.* at 11.

⁹⁰ See *id.* at 30.

⁹¹ See *id.*

⁹² Sten Stovall, *Stronger Code of Practice for Global Pharma Industry*, WALL ST. J. THE SOURCE (Mar. 1, 2012, 3:02 PM), <http://blogs.wsj.com/health/2012/03/01/stronger-code-of-practice-for-global-pharma-industry/>.

1. *Pharmaceuticals*

Geneva-based International Federation of Pharmaceutical Manufacturers and Associations (IFPMA) is a non-profit, non-governmental organization representing associations and companies in the pharmaceutical industry.⁹³ The U.S.-based member association is the Pharmaceutical Research and Manufacturers of America (PhRMA), which includes virtually every major multinational pharmaceutical company.⁹⁴

The IFPMA Code of Practice, initially adopted in 1981,⁹⁵ was revised in 2012, possibly as a response to increased scrutiny of the industry by U.S. enforcement officials. Indeed, in the last several years, global pharmaceutical companies involved in both organizations—whose business in developing countries often involves sales to state-run health systems—have been the targets of an industry “sweep” by the SEC and DOJ for FCPA violations.⁹⁶ The revised Code of Practice extends the standards beyond marketing practices to cover all interactions with healthcare professionals, medical institutions, and patient organizations. The Code’s guiding principles state “[p]harmaceutical companies’ interactions with stakeholders must at all times be ethical, appropriate and professional. Nothing should be offered or provided by a company in a manner or on conditions that would have an inappropriate influence.”⁹⁷ Among other provisions, the IFPMA Code prohibits payments in cash and gifts to health care professionals and restricts the use of “promotional aids” to those relevant to the practice of the healthcare professional and of minimal value and quantity.⁹⁸

The IFPMA also stresses the role of compliance training, calling for companies to “establish and maintain appropriate procedures to ensure compliance with relevant codes and applicable laws and to review and monitor all activities and materials in that regard” and to “ensure that relevant

⁹³ *About IFPMA: Welcome*, INT’L FED’N OF PHARMACEUTICAL MFRS. & ASS’NS, <http://www.ifpma.org/about-ifpma/welcome.html> (last visited Nov. 18, 2012).

⁹⁴ *About PhRMA*, PHARMACEUTICAL RESEARCH & MFRS. OF AM., <http://www.phrma.org/about/about-phrma> (last visited Nov. 18, 2012); *Member Companies*, PHARMACEUTICAL RESEARCH & MFRS. OF AM., <http://www.phrma.org/about/member-companies> (last visited Nov. 18, 2012).

⁹⁵ *Foreword* to IFPMA CODE OF PRACTICE (Int’l Fed’n of Pharm. Mfrs. & Ass’ns 2012).

⁹⁶ See Samuel Rubenfield, *Pharma Code Revamp Follows US Industry Sweep*, WALL ST. J. CORRUPTION CURRENTS (Mar. 1, 2012, 5:05 PM), <http://blogs.wsj.com/corruption-currents/2012/03/01/pharma-code-revamp-follows-us-industry-sweep/> (citing 2011 FCPA settlement by Johnson & Johnson, and disclosure of investigations for possible FCPA violations by AstraZeneca, Merck & Co., and other pharmaceutical companies).

⁹⁷ IFPMA CODE OF PRACTICE, Guiding Principles on Ethical Conduct and Promotion (Int’l Fed’n of Pharm. Mfrs. & Ass’ns 2012).

⁹⁸ *Id.* at art. 7.1.3.

employees receive training appropriate to their role.”⁹⁹ Each of the member associations maintain separate Codes that reflect the provisions set out in the IFPMA Code,¹⁰⁰ and it encourages member associations to “include provisions intended to assure compliance with their national codes.”¹⁰¹

2. Mining, Oil, and Gas

The Extractive Industries Transparency Initiative (EITI) is an initiative implemented by thirty-seven resource-rich countries, established to promote transparency and accountability in the extractive industries.¹⁰² The EITI principles and criteria require, among other things, “[r]egular publication of all material oil, gas and mining payments by companies to governments . . . and all material revenues received by government from oil, gas and mining companies . . . to a wide audience in a publicly accessible, comprehensive and comprehensible manner.”¹⁰³ The EITI also calls for such payments and revenues to be subject to credible independent audits to confirm the veracity of those publications.¹⁰⁴ The requirements for implementing the EITI are brought together in the EITI Rules.¹⁰⁵

EITI compliance is assessed according to a “validation methodology” involving the EITI board and various stakeholders, and each EITI signatory country is assigned “candidate” or “compliant” status. Validation is not an audit; rather, it evaluates EITI implementation in consultation with stakeholders, verifies achievements with reference to the EITI global standard, identifies opportunities to strengthen the EITI process going forward, and determines a country’s “candidate” or “compliant” status.¹⁰⁶ Currently sixteen countries are in “compliant” status,¹⁰⁷ while twenty-one are “candidate”

⁹⁹ *Id.* at art. 12.1–2.

¹⁰⁰ *See, e.g.*, CODE ON INTERACTIONS WITH HEALTHCARE PROF’LS (Pharm. Research & Mfrs. of Am. 2008).

¹⁰¹ IFPMA CODE OF PRACTICE art 13.2 (Int’l Fed’n of Pharm. Mfrs. & Ass’ns 2012).

¹⁰² *EITI Countries*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <http://eiti.org/countries> (last visited Nov. 18, 2012); *The EITI Principles and Criteria*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <http://eiti.org/eiti/principles> (last visited Nov. 18, 2012).

¹⁰³ EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, EITI RULES 11 (Sam Bartlett & Kjerstin Andreasen eds., Apr. 2011), available at http://eiti.org/files/2011-11-01_2011_EITI_RULES.pdf.

¹⁰⁴ *Id.*

¹⁰⁵ *See id.* at 13.

¹⁰⁶ *See id.* at 34–54.

¹⁰⁷ They include: Azerbaijan, Central African Republic, Ghana, Kyrgyz Republic, Liberia, Mali, Mauritania, Mongolia, Mozambique, Niger, Nigeria, Norway, Peru, Timor-Leste, Yemen, and Zambia. *See EITI Countries*, *supra* note 102.

countries.¹⁰⁸ A number of governments have endorsed the EITI (including those of Australia, Canada, the U.K., the U.S., and the EU),¹⁰⁹ and over sixty “of the world’s largest oil, gas and mining companies have chosen to become EITI Supporting Companies.”¹¹⁰

C. M&A Effects

A final area in which the impact of heightened FCPA enforcement can be readily observed—indeed, cannot be ignored—is increasingly stringent FCPA due diligence conducted in the mergers and acquisitions context. DOJ and the SEC have taken the position that a successor company can be held criminally and civilly liable for a predecessor’s pre-acquisition violations. The M&A boom between the years 2005 and 2008 produced public examples in which M&A deals were complicated, delayed, or terminated due to FCPA concerns.¹¹¹ But here again, the FCPA’s effectiveness can be measured not by the number of M&A-related enforcement matters, but rather by the way that the heightened threat of liability created incentives for self-regulation and private enforcement by business entities.

One of the most dramatic (and expensive) examples of this was the abandoned merger between defense contractors Lockheed Martin Corporation and The Titan Corporation. In 2003, Lockheed entered an agreement to acquire Titan but during due diligence learned that Titan had made improper payments through third-party agents in several foreign countries.¹¹² As a condition of going forward, Lockheed caused Titan to “involuntarily” disclose its FCPA violations to DOJ and the SEC but, even then, ultimately walked away when Titan was unable to reach an acceptable resolution with the government.¹¹³

¹⁰⁸ They include: Afghanistan, Albania, Burkina Faso, Cameroon, Chad, Côte-d’Ivoire, Democratic Republic of Congo, Gabon, Guatemala, Guinea, Indonesia, Iraq, Kazakhstan, Madagascar (candidate status temporarily suspended), Republic of the Congo, São Tomé and Príncipe, Sierra Leone, Solomon Islands, Tanzania, Togo, and Trinidad and Tobago. *See EITI Countries, supra* note 102.

¹⁰⁹ *Stakeholders: Countries*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <http://eti.org/supporters/countries> (last visited Aug. 13, 2012).

¹¹⁰ *Id.*

¹¹¹ *See* PHILIP UROFSKY & DANFORTH NEWCOMB, SHEARMAN & STERLING LLP, RECENT TRENDS AND PATTERNS IN FCPA ENFORCEMENT 10–11 (Oct. 2008), *available at* http://www.shearman.com/files/upload/LIT_FCPA_Trends_121208.pdf; *see also id.* at 10 (“[I]t is important to recognize that recent dramatic swell in the overall number of mergers and acquisitions increased the overall likelihood that violations discovered in the course of due diligence will be specifically FCPA-related.”).

¹¹² Carolyn Lindsey, *More Than You Bargained for: Successor Liability Under the U.S. Foreign Corrupt Practices Act*, 35 OHIO N.U. L. REV. 959, 971 (2009).

¹¹³ *See id.*; *see also* PHILIP UROFSKY & DANFORTH NEWCOMB, SHEARMAN & STERLING LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN

Nearly one year after the failed merger, Titan entered a guilty plea and settled with the SEC, agreeing to pay aggregate criminal and civil fines of \$28 million, the largest combined penalty at that time.¹¹⁴ Not coincidentally, L-3, a communications company, almost immediately acquired Titan.¹¹⁵

The 2007 enforcement action against Vetco International Ltd.'s subsidiaries illustrates that "acquired" FCPA risks can also go severely awry when not properly addressed through effective compliance programs. In 2004, ABB Ltd., a Swiss engineering company, voluntarily disclosed that several of its Vetco Gray subsidiaries, which it was in the process of spinning off to a private equity consortium, had made improper payments to government officials in Nigeria.¹¹⁶ This sale closed after two of those subsidiaries entered guilty pleas and paid a combined fine of \$10.5 million.¹¹⁷

The new owners subsequently obtained a DOJ Opinion Procedure Release stating that DOJ would not take any enforcement action against the acquirers for additional pre-acquisition conduct provided they implemented a rigorous compliance system, the scope of which was set forth in the Opinion.¹¹⁸ Following the acquisition, however, the Vetco Gray companies failed to abide by the Opinion and post-acquisition misconduct by three Vetco subsidiaries came to light. The result was guilty pleas by the three Vetco subsidiaries and a \$26 million fine, the highest criminal fine in an FCPA matter to that date.¹¹⁹ Unsurprisingly, the lack of an effective compliance program was cited by DOJ as a reason for levying the record fine against the Vetco subsidiaries.¹²⁰

D. Conclusion

Even critics of the FCPA agree that "[a]s the DOJ and the SEC have increased their enforcement efforts, FCPA due diligence has become a more important (and more expensive) component of cross-border business

CORRUPT PRACTICES ACT 17 (Mar. 2009), available at <http://www.shearman.com/files/upload/LT-030509-FCPA-Digest-Recent-Trends-and-Patterns-in-FCPA-Enforcement.pdf>.

¹¹⁴ News Release, Office of the U.S. Attorney, S. Dist. of Cal. (Mar. 1, 2005), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/titan-corp/03-01-05titan-pr-plea.pdf>.

¹¹⁵ See Andrew Ross Sorkin, *L-3 to Acquire Titan, Expanding Share of Military Market*, N.Y. TIMES, June 4, 2005, at C2.

¹¹⁶ Press Release, U.S. Dep't of Justice, ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd. Plead Guilty to Foreign Bribery Charges (July 6, 2004), available at http://www.justice.gov/opa/pr/2004/July/04_crm_465.htm.

¹¹⁷ *Id.*

¹¹⁸ See Opinion Procedure Release No. 04-02, U.S. Dep't of Justice, Foreign Corrupt Practices Act Review (July 12, 2004), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0402.pdf>.

¹¹⁹ Press Release, U.S. Dep't of Justice, Three Vetco Int'l Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay \$26 Million in Criminal Fines (Feb. 6, 2007), available at http://www.usdoj.gov/opa/pr/2007/February/07_crm_075.html.

¹²⁰ *Id.*

transactions.”¹²¹ Whereas in the past corporate executives may have swept corruption issues under the rug in potentially lucrative transactions, today “significant corporate attention [is] now devoted to detecting and resolving FCPA issues prior to closing M&A transactions”¹²² and companies are “expend[ing] more resources on a ‘deeper dive’ into the potential counterparty’s business practices than would have been expected a decade ago.”¹²³ This diligence can, in turn, act not only as a substantial source of assistance to U.S. regulators seeking to detect violations of the FCPA, but it can also assist acquiring companies to identify and rout out bribery and corruption issues internally. This “soft enforcement,” although obviously a reaction to the government’s “hard enforcement” efforts, more accurately represents the success and effectiveness of the FCPA than the number of cases brought against corporations or individuals, the length of sentences imposed, or the amount of fines collected.

VI. THE FALLACIES OF REFORM

Although abundant evidence indicates that the government’s aggressive but targeted approach to FCPA enforcement has had a significant impact on preventing and deterring foreign bribery, the current FCPA regime is not without its detractors. As awareness of the FCPA has increased, so too has the criticism volleyed at the statute’s purported deficiencies by some practitioners and legal scholars. More recently, the Chamber of Commerce has also joined in attacking the FCPA’s application, arguing that the statute’s growing reach has significant anti-competitive consequences for U.S. companies doing business abroad.¹²⁴ Unsurprisingly, the Chamber’s central thesis is that “[t]he current FCPA enforcement environment has been costly to business.”¹²⁵

¹²¹ COMM. ON INT’L BUS. TRANSACTIONS, N.Y.C. BAR ASS’N, THE FCPA AND ITS IMPACT ON INTERNATIONAL BUSINESS TRANSACTIONS—SHOULD ANYTHING BE DONE TO MINIMIZE THE CONSEQUENCES OF THE U.S.’S UNIQUE POSITION ON COMBATING OFFSHORE CORRUPTION? 9 (2011), <http://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf> [hereinafter N.Y.C. BAR REPORT].

¹²² Daniel J. Grimm, *The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Successor Liability and Its Consequences*, 7 N.Y.U. J. L. & BUS. 247, 292 (2010).

¹²³ N.Y.C. BAR REPORT, *supra* note 121, at 9.

¹²⁴ Not all business leaders agree that the FCPA requires reform. Bill O’Rourke, an Alcoa VP, for example, has publically praised the FCPA for prompting companies to implement ethics and compliance training programs and allowing U.S. companies to take a stronger stance against bribery. Joe Palazzolo, *Alcoa Exec Says Business Leaders Should Stick Up for the FCPA*, WALL ST. J. CORRUPTION CURRENTS (June 24, 2011, 3:41 PM), <http://blogs.wsj.com/corruption-currents/2011/06/24/alcoa-exec-says-business-leaders-should-stick-up-for-the-fcpa/>.

¹²⁵ ANDREW WEISSMANN & ALIXANDRA SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, U.S. CHAMBER OF COMMERCE, RESTORING BALANCE: PROPOSED AMENDMENTS TO

In our view, most of these criticisms are unfounded and built on strawmen. Others seem intended to repeal the FCPA *sub rosa* by proposing “solutions” that would essentially gut the law and render it toothless. Finally, a few accurately describe the real-world difficulty and cost of complying with the FCPA and its foreign counterparts but propose remedies that have significant flaws. In this section, we summarize these criticisms and the solutions proposed by the critics and then outline some of their flaws and fallacies. We also, however, offer some suggestions of our own.

A. *The Criticisms*

1. *Ambiguity*

A perennial critique of the FCPA is that it is a “vague statute” which has been interpreted largely through settlements rather than through judicial review, with the result that very little guidance is available regarding what specific conduct is prohibited.¹²⁶ These criticisms focus particularly on the meaning of “agency or instrumentality” of a foreign government—whether, for example, employees of state-owned enterprises might be foreign officials under the FCPA.¹²⁷ Similar attacks are made on the “to obtain or retain business” element and the government’s allegedly overbroad interpretation of the “knowledge” requirement set forth in the FCPA’s third party payment provisions.¹²⁸ From a

THE FOREIGN CORRUPT PRACTICES ACT 5 (2010), available at http://www.instituteforlegalreform.com/sites/default/files/restoringbalance_fcpa.pdf [hereinafter CHAMBER OF COMMERCE REPORT].

¹²⁶ See, e.g., Joel M. Cohen et al., *Under the FCPA, Who Is a Foreign Official Anyway?*, 63 BUS. LAW. 1243, 1273 (2008); James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233, 1233 (2007); Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907, 909 (2010) [hereinafter Koehler, *Façade*]; Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 494–97 (2011); N.Y.C. BAR REPORT, *supra* note 121, at 3–4.

¹²⁷ See Cohen et al., *supra* note 126, at 1273; Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 410, 413 (2010); Westbrook, *supra* note 126, at 534–35.

¹²⁸ Georgis, *supra* note 76, at 246–48, 258; Koehler, *Façade*, *supra* note 126, at 971–76; Westbrook, *supra* note 126, at 540–41, 544–48; see also John Ashcroft & John Ratcliffe, *The Recent and Unusual Evolution of an Expanding FCPA*, 26 NOTRE DAME J.L. ETHICS & PUB. POL’Y 25, 34 (2012) (“Due to the absence of any substantial case law after more than 34 years, even the most basic elements of the FCPA, like what constitutes a ‘bribe’ or who is considered a ‘foreign official,’ remain largely undefined.”); Kenneth Winer & Gregory Husisian, *The ‘Knowledge’ Requirement of the FCPA Anti-Bribery Provisions: Effectuating or Frustrating Congressional Intent?*, 24 WESTLAW J. WHITE-COLLAR CRIME 1, 3 (Oct. 2009), available at <http://www.foley.com/files/Publication/a1d4aa39-1324-4018-bd8a-1cbddfc15e02/Presentation/PublicationAttachment/7e8b814e-446b-411d-8722->

compliance perspective, critics raising these concerns claim the FCPA's broad and uncertain scope may "render corporations and individual officers overly cautious, avoiding not only objectionable conduct but also acts that should be permitted and even encouraged."¹²⁹

The Chamber of Commerce maintains that it "may not be immediately apparent whether an individual is considered a 'foreign official' within the meaning of the act"¹³⁰ and that "[w]ithout a clear understanding of what companies are considered 'instrumentalities,' companies have no way of knowing whether the FCPA applies to a particular transaction or business relationship."¹³¹ However, despite the articles, motions, and expert affidavits, there is little evidence that the government has stretched the definition beyond its obvious and predictable meaning. Not surprisingly, this argument has thus far failed before every district court to which it has been presented and is, in our view, likely to fail in the Courts of Appeals as well.¹³² In recent cases, the government has elaborated on its approach, providing very specific criteria, since adopted by the district courts in their decisions and jury instructions, of what constitutes control; e.g., alleging facts that include government majority control, the government appointing officers or directors, government officials sitting on supervisory boards, profits being paid to the government, and government veto over major expenditures or involvement in important operational decisions.¹³³

From a practical, real-world perspective, it is also difficult to see how "instrumentality" is vague. Although it may be difficult to determine if a particular entity is or is not a state instrumentality in China, something that may not even be clear to the Chinese, in most cases in our experience the information is available if you look, and, if not, one can ask the entity itself. On a more fundamental level, we have found that many of our clients simply don't care. They take the position that they are not going to pay bribes to officials of a public *or* private entity, full stop. To them, the relevance of the public/private distinction is limited to whether special rules apply to legitimate marketing expenditures, not to whether or not to make a corrupt payment. Indeed, this

1e747b29b303/FCPAWinerHusisian2009.pdf; Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 812–17 (2011).

¹²⁹ N.Y.C. BAR REPORT, *supra* note 121, at 11.

¹³⁰ CHAMBER OF COMMERCE REPORT, *supra* note 125, at 6.

¹³¹ *Id.* at 27.

¹³² See Order Denying Defendants' Motion to Dismiss Counts 1 through 10 of the Indictment at 6294, 6299–300, *United States v. Carson*, No. SACR 09-00077-JVS (C.D. Cal. May 18, 2011), 2001 WL 5101701, at *1; *United States v. Aguilar*, 783 F.Supp. 2d 1108, 1120 (C.D. Cal. 2011); *United States v. Esquenazi*, No. 09-21010-CR-Martinez-Brown, 2010 U.S. Dist. Lexis 143572, at *5 (S.D. Fla. Nov. 19, 2010); *United States v. Nam Quoc Nguyen*, No. 08-cr-00522-TJS (E.D. Pa. Dec. 30, 2009).

¹³³ See, e.g., *United States v. Alcatel-Lucent, S.A.*, Nos. 1:10-cr-20906-MGC-1; 1:10-cr-20907-MGC-1, 2012 U.S. App. Lexis 16143, at *7–13 (S.D. Fla. Dec. 27, 2010).

position is becoming increasingly common as the risk of prosecution under foreign laws such as the U.K. Bribery Act, which prohibits both public and commercial bribery,¹³⁴ becomes more likely; indeed, even in some FCPA cases the U.S. has prosecuted both aspects of corruption.¹³⁵

The critiques involving the FCPA's "business nexus" may have more merit. The FCPA prohibits *quid pro quo* payments intended to "assist in obtaining or retaining business."¹³⁶ For many years, practitioners debated whether the FCPA was essentially a procurement fraud statute and that the "business," therefore, had to come from the government. This argument largely ended after the Fifth Circuit ruled in *U.S. v. Kay* that the FCPA was not limited to bribes to obtain business from a foreign government or even to bribes that led "directly to the award or renewal of contracts."¹³⁷ The court warned, however:

Although we recognize that lowering tax and customs payments presumptively increases a company's profit margin by reducing its cost of doing business, it does not follow, *ipso facto*, . . . that such a result satisfies the statutory business nexus element. . . . There are bound to be circumstances in which such a cost reduction does nothing other than increase the profitability of an already-profitable venture or ensure profitability of some start-up venture.¹³⁸

Again, from a compliance perspective, this issue may mean little for corporations seeking to comply with the law: a bribe is a bribe is a bribe. When criminal liability is at issue, however, it is important that the borders of the statute be carefully limned. In our view, the government *has* overreached in some cases in which it lumped together "obtain and retain business" bribes with payments that merely increased profits, such as payments to tax officials to obtain tax rebates.¹³⁹ We are not sure that the answer is an amendment to the statute, however, much as greater fidelity by the government to the statute as it exists.

2. Prosecutorial Over-Reaching

Critics also complain that the government's aggressive FCPA theories have not been subjected to judicial scrutiny because the vehicles used to resolve FCPA enforcement actions—DOJ non-prosecution agreements ("NPAs"),

¹³⁴ See Bribery Act, 2010, c. 23, §§ 6–7 (U.K.).

¹³⁵ Brief for Petitioner at 5–6, *United States v. SSI Int'l Far East, Ltd.*, No. 06-cr-00398 (D. Or. Oct. 10, 2006), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/ssi-intl/10-10-06ssi-information.pdf>.

¹³⁶ 15 U.S.C. § 78dd-1(a)(1) (2006).

¹³⁷ *United States v. Kay*, 359 F.3d 738, 755 (5th Cir. 2004).

¹³⁸ *Id.* at 759–60.

¹³⁹ See, e.g., Deferred Prosecution Agreement at 1–3, *United States v. Pride Int'l, Inc.*, No. 10-766 (S.D. Tex. Nov. 4, 2010); Non-Prosecution Agreement, *Noble Corp.* (Nov. 4, 2010), available at <http://www.justice.gov/opa/documents/noble-npa.pdf>.

deferred prosecution agreements (DPAs), plea agreements, and SEC settlements—“result [from] private negotiations between the enforcement agencies and the alleged wrongdoer.”¹⁴⁰ As Professor Mike Koehler has observed, these negotiations occur “in the context of the enforcement agencies dangling substantial ‘carrots’ [before corporations to agree] to its . . . interpretation of the law. At the same time, the alleged wrongdoer is cognizant of the enforcement agencies’ substantial ‘sticks’ should it disagree with the enforcement agencies.”¹⁴¹ Some commentators warn that “this unbridled power has allowed prosecutors to become corporate governance bullies, forcing corporate defendants to accept the government’s interpretation of the FCPA—no matter how unreasonable or dubious it may appear to be.”¹⁴² Others worry that, without judicial review, key aspects of the FCPA are subject to incremental expansion “without a legally authoritative articulation.”¹⁴³ Echoing the academic concerns about unchecked prosecutorial power, the Chamber further argues that it is “unfair” for “aggressive or misinformed prosecutors, who can exploit the power imbalance inherent in the current FCPA statute” to hold a business with a strong compliance system liable for behaviors of third-party vendors or errant employees who violate the business’s anti-bribery policies.¹⁴⁴

On one level, the basic premise of this criticism is valid: to date, only two corporations have taken the government to trial in the thirty-year history of the FCPA (and both of them ultimately prevailed).¹⁴⁵ All of the over 100 corporations charged with having violated the FCPA have settled, either by entering guilty pleas or, since 2004, by agreeing to non-judicial resolutions such as DPAs or NPAs.¹⁴⁶ This does, of course, mean that the government’s theories are tested only insofar as they seek to go beyond what a settling corporation can stomach.

On the other hand, proponents of this criticism have a difficult time pointing to specific cases in which the government overreached on the law and, although we expect there were heated negotiations in those conference rooms as to the facts, in the end, the corporations that settled did admit to them. Further, in our view, DPAs and NPAs offer considerable benefits to corporations.

¹⁴⁰ Koehler, *Façade*, *supra* note 126, at 909; *see also* Georgis, *supra* note 76, at 275; Westbrook, *supra* note 126, at 561–63; N.Y.C. BAR REPORT, *supra* note 121, at 5–6.

¹⁴¹ Koehler, *Façade*, *supra* note 126, at 909; *see also* Westbrook, *supra* note 126, at 574–76.

¹⁴² Ashcroft & Ratcliffe, *supra* note 126, at 34.

¹⁴³ Westbrook, *supra* note 126, at 563.

¹⁴⁴ CHAMBER OF COMMERCE REPORT, *supra* note 125, at 7, 13.

¹⁴⁵ *See* United States v. Aguilar, 783 F. Supp. 2d 1108 (C.D. Cal. 2011) (defendants initially convicted, but convictions later vacated for prosecutorial misconduct); United States v. Harris Corp., No. 3:90-cr-00456-CAL (N.D. Cal. Mar. 20, 1991) (defendants’ motion for a judgment of acquittal granted).

¹⁴⁶ *See* Koehler, *Façade*, *supra* note 126, at 932.

Although they must pay fines and admit to wrongdoing, they achieve a certain outcome in a reasonable period, thus avoiding drawn-out prosecutions and trials, with their attendant negative publicity and uncertainty. The argument that the government overreaches in these agreements because they are not reviewed by a judge seems to us to put the burden on the wrong party. If a corporation believes that the government is overreaching on the facts or the law, it should take the government to court (and we hereby offer our services!).

There is another strand to this argument—that NPAs and DPAs are not sufficiently punitive and allow corporations to essentially buy their way out of a conviction. It is true that these agreements allow the corporation eventually to walk away without a criminal conviction, assuming it fulfills the requirements of the agreement. Those requirements, however, can be onerous, even more so than what a court might have imposed after a trial and conviction. For example, unlike in a civil settlement, the corporation may not “neither admit nor deny” the facts and must admit to criminal conduct. This may have serious collateral consequences in private civil litigation, in regulatory actions, in debarment proceedings, and, in the event of a breach of the agreement, in a future prosecution. Further, in almost every case, the corporation must agree to some form of compliance monitoring, which may range from potentially expensive independent monitors to self-reporting. Finally, the financial penalties assessed in a DPA or an NPA are based on the Sentencing Guidelines with, at least recently, a fairly transparent reduction for cooperation; these penalties are thus comparable to those that would have been imposed in similar circumstances by a court.

Certainly, in our experience and that of our colleagues, the government can be unreasonable both in its view of the facts and the law and, knowing that corporations will not take them to court, government prosecutors have a certain confidence that they can push the envelope to achieve their desired result. It would be foolish not to recognize that a corporation has great incentives to concede rather than challenge disputed facts and legal theories; nevertheless, the fact is that there is a judicial option available—it is up the corporation, not the government, to avail itself of it.

3. The Costs of Uncertainty

A third concern that pervades academic literature is the notion that companies who are unable to predict their risk of liability are likely to engage in over-compliance or to approach international business transactions with excessive caution. In this view, “[a]ggressive enforcement, based on an expansive interpretation of a vague statute, a little-used DOJ opinion process, and the temptation perhaps to assume that more draconian criminal enforcement

is better, have all led to a lack of predictability in law enforcement,”¹⁴⁷ which, in turn, translates to adoption of “unnecessarily expensive” compliance programs or internal investigations by risk-averse companies who are “left to fill in the gaps” regarding the parameters of what conduct is illegal.¹⁴⁸

Compliance is not free—it takes resources to draft procedures, conducting training, doing due diligence, auditing financial controls, and investigating alleged wrongdoing. It is possible that the risk of prosecution may cause businesses to think twice about certain behavior and to adopt a more conservative approach to making payments to third parties and marketing to customers. It is questionable, however, whether these costs are any greater than those required to ensure compliance with other regulatory requirements such as health, safety, environment, or antitrust.

Further, there is a significant difference between uncertainty arising from the alleged vagueness of the FCPA and uncertainty resulting from unpredictable risk of prosecution for violations. The Chamber has never identified a single prosecution that did not fall squarely within the statute. Instead, it has posited an unsourced example of a company allegedly spending hundreds of thousands of dollars in legal fees investigating a taxi ride allegedly provided to a government official.¹⁴⁹ Faced with this example, we have to question why any company would react as described unless there were additional facts not included in the Chamber’s anecdote. A proper compliance program is designed to keep a company on the right side of the law. If an issue arises, it must be dealt with in an appropriate way—one that is scaled to the risk and appropriate to the type of issue. A full-blown internal investigation may be justified where there is a risk of serious violations or endemic evasion of controls; isolated and minor lapses in judgment should most often be dealt with quickly and internally through counseling and training. *If* a corporation actually reacted as the Chamber suggested, it would appear to be less related to the meaning of the FCPA than a lack of judgment at the posited corporation.

¹⁴⁷ Doty, *supra* note 126, at 1239; *see also* Koehler, *Façade*, *supra* note 126, at 984–90, 1000–02 (discussing “carbon-copy . . . enforcement actions [that] resulted in materially different charges”).

¹⁴⁸ Georgis, *supra* note 76, at 244, 247; *see also* Koehler, *Façade*, *supra* note 126, at 1001–05; Westbrook, *supra* note 126, at 574–75; Yockey, *supra* note 128, at 823–25; N.Y.C. BAR REPORT, *supra* note 121, at 8–9.

¹⁴⁹ *See Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Security of the Comm. on the Judiciary House of Representatives*, 112th Cong. 56–57 (2011) (statement of The Honorable Michael Mukasey, Partner, Debevoise & Plimpton LLP, speaking on behalf of the U.S. Chamber Institute for Legal Reform) (relaying an example involving a taxi ride that purportedly occurred at an unspecified company).

B. *The Proposals*

Critics have advanced numerous proposed revisions to the government's enforcement policies to check the "unruly" expansion of the FCPA and to prevent the inefficiencies purportedly created by uncertainty surrounding DOJ's and SEC's interpretation of key FCPA provisions.

1. *Significantly Limit Corporate Liability*

The Chamber suggests that a compliance defense, which would permit companies to demonstrate it took reasonable compliance measures, would increase compliance with the FCPA by providing businesses with an incentive to "deter, identify, and self-report potential and existing violations."¹⁵⁰ Some academics, too, support the adoption of a compliance defense, arguing that "[b]y better incentivizing organizations to implement more robust FCPA policies and procedure[s], an FCPA compliance defense can reduce instances of improper conduct and thereby advance the FCPA's objectives."¹⁵¹

This proposal takes its cue from the affirmative defense of "adequate procedures" in the U.K. Bribery Act.¹⁵² The problem with the proposal in its current form is that it is simply too easy to erect a façade of compliance and allow business to proceed with a wink and nod. A business could have the best of all worlds—if something happens and it is not discovered, all to the good; if something happens and it is discovered, then it can point to its check-the-box compliance program as a defense. Such a defense would work better if it provided concrete disincentives to non-compliance while still protecting a corporation that had a good faith and otherwise effective program. As an example, a compliance defense could allow a qualifying corporation to avoid the consequences of a criminal or civil enforcement proceeding but still be required to disgorge the illicit gains.

2. *Reg. FCPA*

James R. Doty, a former General Counsel of the SEC and current Chairman of the Public Company Accounting Oversight Board, has proposed addressing some of these same issues through the formulation and adoption of a "Reg. FCPA," similar to Regulation D under the Securities Act of 1933, which "would establish a permissive filing regime; by making the filing, a registrant would benefit from a regulatory presumption of compliance."¹⁵³ Under this

¹⁵⁰ CHAMBER OF COMMERCE REPORT, *supra* note 125, at 13.

¹⁵¹ Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 656 (2012).

¹⁵² See Bribery Act, 2010, c. 23, § 7 (U.K.).

¹⁵³ Doty, *supra* note 126, at 1234.

proposal, “Reg. FCPA would set forth items required to be described, represented or disclosed, with appropriate exhibits, constituting the registrant’s FCPA Compliance Program” and “[t]he filed FCPA Compliance Program would be subject to Staff review and comment, as with the Annual Report on Form 10-K.”¹⁵⁴ A company would be required to establish an FCPA Compliance Program and “to certify that it has . . . discharged [its] duties under the program.”¹⁵⁵

In the event of a violation, the registrant could claim a safe harbor if it could show that it established and implemented an FCPA Compliance Program and reasonably believed that it was compliant.¹⁵⁶ Doty argues that a Reg. FCPA would address “the central issue of when a company’s compliance system and anti-bribery policy are sufficient, in either design or implementation, to safeguard the corporate enterprise from vicarious responsibility for the actions and omissions of employees”¹⁵⁷ and would also “result in a more robust interpretive process and greater guidance and predictability for U.S. companies that seek to comply with the requirements of the statute.”¹⁵⁸

Similar to the compliance-defense proposal, this proposal is unlikely to provide the right incentives for a corporation to implement an effective compliance program unless it was also required to disgorge its illicit profits. Moreover, this proposal would seem to be an invitation to even more litigation, with shareholders and investors alleging that the “Reg. FCPA” disclosure was false or misleading because the company’s compliance program had not been effective to prevent bribery.

3. Parent/Subsidiary Liability

The Chamber also advocates limiting a parent company’s civil liability for the acts of a subsidiary unless the parent directed, authorized, or knew about the improper payments in question.¹⁵⁹ Such an amendment would dovetail with the Chamber’s additional recommendation that Congress add a willfulness requirement to establish corporate criminal liability, which the Chamber argues is necessary to address the disparity in the legal treatment of corporations and individuals under the Act.¹⁶⁰ The sum of the amendments is that corporations would only be liable for FCPA violations where senior management knew about and authorized a violation of the FCPA in circumvention of a rigorous compliance program.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1244.

¹⁵⁶ *Id.* at 1245.

¹⁵⁷ *Id.* at 1235.

¹⁵⁸ *Id.* at 1248.

¹⁵⁹ CHAMBER OF COMMERCE REPORT, *supra* note 125, at 22–24.

¹⁶⁰ *Id.* at 20–22.

This part of the Chamber's proposal is somewhat puzzling as neither of its elements have anything to do with the FCPA. It is black-letter law that a parent is only liable when it authorized or directed, or controlled a subsidiary's bad conduct, i.e., where the parent was part of the wrongdoing. Although there are certainly cases in which the government could have been clearer in delineating this legal principle in its pleadings, there is nothing in the FCPA's anti-bribery provisions that imposes any greater parent liability. Similarly, the FCPA's standard for corporate liability is the same as applies in every other criminal statute—a corporation is liable if an employee or agent, acting within the scope of their duties and in part for the benefit of the corporation, violates the law.¹⁶¹ The Chamber is, in effect, proposing to change the legal standard for corporate liability solely for one statute, without explaining why it is necessary for the FCPA, as opposed to all other offenses.

4. *Limits (or Guidance) on Successor Liability*

Another proposal put forward by the Chamber, and subscribed to by some academics, is to limit a company's liability for the prior actions of a company it has acquired. It claims that "[t]he uncertainty about how much due diligence is sufficient . . . ha[s] in recent years had a significant chilling effect on mergers and acquisitions" and that some "companies have ceased foreign operations rather than face the uncertainties of FCPA enforcement."¹⁶² Accordingly, it proposes that "a corporation, irrespective of whether or not it conducts reasonable due diligence . . . should not be held criminally liable for such historical violations" and that guidance should be created "that spells out the general due diligence steps that are warranted" in undertaking an M&A transaction.¹⁶³ Daniel Grimm echoes the view that, at a minimum, further guidance is needed on adequate diligence and that a safe harbor from successor liability would alleviate the FCPA's strain on international transactions. Grimm argues that:

The DOJ and the SEC could significantly reduce uncertainty in cross-border M&A transactions by providing reasonable and firm FCPA due diligence and post-closing compliance guidelines that can be relied upon by transacting parties. A safe harbor from FCPA successor liability for business entities that

¹⁶¹ See Principles, *supra* note 58, at ch. 9-28.200(B) ("Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold a corporation liable for these actions, the government must establish that the corporate agent's actions (i) were within the scope of his duties and (ii) were intended, at least in part, to benefit the corporation.").

¹⁶² CHAMBER OF COMMERCE REPORT, *supra* note 125, at 15.

¹⁶³ *Id.* at 19–20.

can show they have met the newfound guidelines would provide an effective antidote to the current malaise.¹⁶⁴

First, similar to the Chamber's proposal on corporate liability, the Chamber's proposal here is not tied to any particular text of the FCPA but is instead a proposal to change corporate liability principles solely for the FCPA. The FCPA never speaks to successor liability. Instead, the government, applying traditional liability theories, has taken the position that a mere change in ownership does not extinguish liability. As with the compliance defense, it may be that this proposal would be less likely to create disincentives for compliance if it included a provision to deprive those who benefited from the wrongful conduct of their illicit proceeds. In the case of an M&A transaction, that would be the previous owners or shareholders who presumably benefited from the wrongful conduct through greater profits or a higher sales price. We have observed in some cases that parties have established an escrow account to cover fines resulting from ongoing investigations; it may be that this practice could be adopted to establish an escrow account of certain duration for companies with a high FCPA risk profile, thus protecting the acquirer for undisclosed or undiscovered violations.

As to the second part of the proposal, we completely understand the desire for guidance. Providing such guidance in a form that will provide a safe harbor, however, will be difficult for the government, or for Congress, as there is no such thing as a one size fits all due diligence program. Further, we are concerned that this proposal may represent a case of "be careful for what you wish" because we may not like the guidance we get. We can already see this in the example of the Halliburton FCPA Opinion.¹⁶⁵ In that case, Halliburton wished to have a safe harbor if it purchased a company through an auction that provided only limited opportunity for due diligence. DOJ agreed, but only on the condition that Halliburton agree to conduct extensive post-acquisition compliance review including email reviews, forensic auditing, and periodic reports to the government.¹⁶⁶ One can only imagine that Halliburton breathed a sigh of relief when it did not win the auction and did not acquire the company!

5. Further Guidance

All critics of the current FCPA regime agree that further clarification is needed with respect to the contours of an FCPA violation. They do not, however, agree on who is best equipped to provide that guidance. The Chamber

¹⁶⁴ Grimm, *supra* note 122, at 331.

¹⁶⁵ Opinion Procedure Release No. 08-02, U.S. Dep't of Justice, Foreign Corrupt Practices Act Review (June 13, 2008), *available at* <http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf>.

¹⁶⁶ *Id.*

calls for an amendment to the FCPA to clearly define “instrumentality.”¹⁶⁷ Joseph Yockey has called for enhanced regulatory guidance to “clarify[] the definition of ‘foreign official,’ the meaning of ‘instrumentality’ of a foreign government, and the way regulators interpret the FCPA’s corrupt intent and business nexus requirements.”¹⁶⁸

Others argue that “the primary initiative for change [should] come from the enforcement authorities involved.”¹⁶⁹ Amy Westbrook, for example, recommends that “[t]he DOJ and SEC should clarify, in general terms that reflect the contemporary global business environment, what the FCPA requires.”¹⁷⁰ She also proposes that “official clarification from the agencies that indicates what is acceptable (‘safe harbor’) conduct . . . would allow companies to design business procedures that keep them within the law.”¹⁷¹

Other commentators take the position that judicial intervention in the enforcement of diversion agreements “would help to clearly demarcate the line between lawful and unlawful conduct, providing some certainty in FCPA compliance and enforcement.”¹⁷² Citing Judge Jed S. Rakoff’s widely publicized denial of a proposed settlement in *SEC v. Citigroup Global Markets Inc.*,¹⁷³ Pete Georgis proposes that courts should engage in a review of all DPAs and NPAs stemming from FCPA violations.¹⁷⁴

We have previously discussed the risks of asking for detailed guidance from the government, whether it be the Executive or Legislative branch. Asking for it from the Judicial branch may be no better. Indeed, as demonstrated by Judge Rakoff’s decision, courts may not necessarily intervene in ways that benefit a corporate defendant. Moreover, although the government’s theories may be put to the test by establishing a judicial role in DPAs and NPAs, doing so also reduces the certainty that accompanies a negotiated settlement and may lead to greater disclosure and examination of the facts than a corporation would prefer.

C. *Some of Our Own Proposals*

Although we are not convinced that the proposals outlined above solve any real problems, there are some areas in which FCPA enforcement and compliance could be improved. We outline below a few modest suggestions.

¹⁶⁷ CHAMBER OF COMMERCE REPORT, *supra* note 125, at 27.

¹⁶⁸ Yockey, *supra* note 128, at 833.

¹⁶⁹ Ashcroft & Ratcliffe, *supra* note 126, at 35.

¹⁷⁰ Westbrook, *supra* note 126, at 575.

¹⁷¹ *Id.* at 575–76.

¹⁷² Georgis, *supra* note 76, at 275–76.

¹⁷³ *SEC v. Citigroup Global Mkts. Inc.*, 827 F. Supp. 2d 328 (S.D.N.Y. 2011).

¹⁷⁴ Georgis, *supra* note 76, at 279.

1. *Eliminate Overlapping Enforcement Jurisdiction*

As described above, the FCPA originated in an SEC investigation into cash slush funds maintained by issuers. Perhaps because the SEC initially brought the problem to Congress, it gave both DOJ and the SEC jurisdiction over these provisions.

In the first twenty years of the statute, the SEC brought almost no actions under the anti-bribery provisions. More recently, for various reasons, it has taken a greater interest in that part of the statute, and it is now a rare case involving an issuer that does not have both a criminal action by DOJ and a parallel civil action by the SEC. Indeed, in the 2010 reorganization of the SEC's Division of Enforcement, the FCPA was identified as one of five areas of concentration and there are now reportedly over thirty enforcement attorneys, as well as in-house experts and accountants assigned to investigating FCPA cases.¹⁷⁵

The SEC's enforcement of the anti-bribery provisions raises a fundamental matter of fairness. Take two companies, one public and one private, and assume that both violate the FCPA and realize the same illicit gain from the violation. The private company will be subject only to DOJ's jurisdiction and will therefore be exposed to a criminal fine of up to twice its gain.¹⁷⁶ The public company, on the other hand, will be subject both to that criminal fine *and* to a civil fine and disgorgement of the illicit proceeds, thus potentially paying a third more in fines than the private company for the same conduct.¹⁷⁷

We respectfully submit that bribery, as opposed to books and records, is far from central to the SEC's mission of protecting investors. Out of fairness, the SEC should get out of the anti-bribery business.

2. *Disgorgement*

We don't mean to pick on the SEC, but its policy of demanding disgorgement in books and records cases should also be carefully examined. As Paul R. Berger, Steven S. Michaels, and Amanda M. Ulrich have explained, “[t]o obtain disgorgement, the government must prove a causal connection between the wrongdoing and the profits representing the unjust enrichment.”¹⁷⁸

¹⁷⁵ See Press Release, U.S. Sec. & Exch. Comm'n, SEC Names New Specialized Unit Chiefs and Head of New Office of Market Intelligence (Jan. 13, 2010), *available at* <http://www.sec.gov/news/press/2010/2010-5.htm>; *see also* U.S. DEP'T OF JUSTICE, RESPONSE OF THE UNITED STATES: QUESTIONS CONCERNING PHASE 3, OECD WORKING GROUP ON BRIBERY 9, 42 (May 3, 2010), *available at* <http://www.justice.gov/criminal/fraud/fcpa/docs/response3.pdf>.

¹⁷⁶ See 15 U.S.C. § 78dd-2(g) (2006); 18 U.S.C. § 3571(d) (2006).

¹⁷⁷ See 15 U.S.C. § 78dd-2(g) (2006); 18 U.S.C. § 3571(d) (2006).

¹⁷⁸ Paul R. Berger et al., *Do FCPA Remedies Follow FCPA Wrongs? “Disgorgement” in Internal Controls and Books and Records Cases*, FCPA UPDATE (Debevoise & Plimpton)

In a bribery case, there is a clear link between the bribes paid and the illicit proceeds realized. But, as Berger and his colleagues have argued, where only books and records and internal controls violations are alleged, there is a “disconnect between the remedy and the charged ‘wrong’” because no causal connection exists between the failure to accurately record a payment and any illegal profits arising from that payment.¹⁷⁹ We agree with these authors that, at a minimum, the courts (or Congress) should take a hard look at whether the SEC’s practice of seeking disgorgement in books and records cases crosses the line from equitable remedy into punishment for the charged violations.

3. *Require Clear Pleadings*

To some degree, the ambiguity cited by the critics is not the fault of the statute but of sloppy or deliberately vague pleading by the authorities. As an example, in a number of recent cases, the government has described different kinds of payments, some of which are clearly “obtain or retain business” bribes while others are just as clearly facilitation payments that may have not been booked properly. However, rather than identifying which is which, the government has simply incorporated *all* of the alleged payments into both the bribery and books and records counts.¹⁸⁰ Similarly, in some other recent cases, even the link to “obtain or retaining business” is obscure, such as where the payment was to allow goods into a country; it might be that there is a theory that such importing was essential to the defendant’s ability to obtain or retain business, but the government did not go to the trouble of alleging the necessary facts.¹⁸¹

In short, although the statute is not complicated, it does require the existence of certain elements. The government, it seems to us, is obligated to outline the factual and legal basis for its charges.

4. *Develop Transparent Protocol for Multiple Jurisdictions*

Prior to the OECD Convention and other international agreements, most transnational bribery payments violated the laws of only two countries—the United States and the country whose official was bribed. Today, a single payment may violate the laws of numerous countries. For example, a French

LLP, New York, N.Y.), Aug. 2011, at 1, *available at* <http://www.debevoise.com/files/Publication/9d56da80-1da1-4e29-bc27-4288643df3cc/Presentation/PublicationAttachment/ea922c2f-78d8-46ea-ad2d-69638418a04e/FCPAUpdateAugust2011.pdf>.

¹⁷⁹ *Id.* at 3.

¹⁸⁰ *Compare* Information at 5–8, *United States v. Panalpina, Inc.*, No. 10-765 (S.D. Tex. Nov. 4, 2010) (explaining that many of the allegedly improper payments related to expedited processing of customs procedures), *with* 15 U.S.C. § 78dd-1(b) (2006) (FCPA exception for payments to expedite routine government actions).

¹⁸¹ *See, e.g., United States v. Panalpina, Inc.*, No. 10-765 (S.D. Tex. Nov. 4, 2010).

company meets with a Libyan official in Italy and then pays a bribe out of its Swiss bank account. That alone violates four countries' laws. If the payment was made in U.S. dollars or the company is a U.S. issuer, that makes five countries, and so on.

The OECD Convention contemplates that the parties will coordinate investigations and prosecutions under these circumstances.¹⁸² To some degree, we have seen more coordination in the former, but it remains unclear who takes the lead and what happens when differing jurisdictions take a different view of the applicable law or evidence. We suggest that there be a clear protocol that will establish under which circumstances a particular country will lead the investigation. Further, under what circumstances will the U.S. authorities defer to a foreign enforcement authority's facially valid decision, i.e., not a decision based on apparent political or economic reasons, but based on a conclusion that there are not sufficient facts to establish a violation?

VII. CONCLUSION

Compliance with the law can sometime be difficult, particularly in situations where a corporation is operating outside its comfort zone, in countries with less transparency and greater opportunities for corruption. The FCPA, however, demands that companies take these costs into account before doing business in those places in the first place. Not doing so, of course, invites the risk of an even more expensive and more damaging enforcement action. Well-run companies have responded by adopting risk-based compliance programs that are based on compliance models developed through years of private sector experience and government guidance. The true measure of the effectiveness of the FCPA is the adoption and internal enforcement of these programs.

The recent surge in enforcement has, of course, sparked a backlash. More enforcement offers more opportunities for criticism and more opportunities for suggesting that enforcement of the law against businesses is unfair or unpredictable. These claims are, for the most part, unsupported by facts or law and most of the proposals are unlikely to improve the effectiveness of the statute. Indeed, in some cases, the reforms would open loopholes that are likely to make enforcement of the statute impossible. Although there are some issues relating to the government's application of the statute in particular cases, these can be addressed without destructive surgery on the statute itself.

¹⁸² OECD Convention, *supra* note 67, at art. 4, para. 3.