FOREIGN CORRUPT PRACTICES ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

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JUNE 14, 2011

FOREIGN CORRUPT PRACTICES ACT

TUESDAY, JUNE 14, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:03 a.m., in room 2141, Rayburn Office Building, the Honorable F. James Sensenbrenner, Jr. (Chairman of the Subcommittee) presiding.

Present: Representatives Sensenbrenner, Gohmert, Goodlatte, Poe, Marino, Gowdy, Adams, Quayle, Scott, Conyers, Johnson, Chu, Jackson Lee, and Quigley.

Staff present: (Majority) Sam Ramer, Counsel; Lindsay Hamilton, Clerk; Joe Graupensberger, Counsel; Sam Sokol, Counsel; and Veronica Eligan, Professional Staff Member.

Mr. SENSENBRENNER. The Subcommittee will come to order.

Without objection, the Chair is authorized to declare recesses during votes today, which I don't anticipate.

I would like to welcome the witnesses today.

In 1977, the world was a very different place. The Soviet Union was continuing to expand its reach around the world, China had only recently been visited by President Nixon, and profit-making enterprises were forbidden in that country. Back then, the concerns arose about the level of bribery that American companies engaged in abroad. The revelations of slush funds and secret payments by American corporations were blamed for adversely affecting American foreign policy.

In response, Congress passed the Foreign Corrupt Practices Act, or the FCPA. The law sent a strong signal that bribery would not be tolerated and businesses would not be able to look the other way. The law addressed the issue of foreign bribery in three ways. First, it required all publicly held corporations, whether U.S. or foreign, to keep accurate books, records and accounts. Second, it required these issuers to maintain a responsible internal accounting control system. Third, it prohibited bribery of foreign officials by U.S. corporations and issuers, and these provisions applied to corporations as well as to individuals.

Thirty-four years later, the world has turned upside-down. The Soviet Union is shattered, leaving in its wake autonomous republics. China has become a global manufacturing power. The nature of overseas businesses has changed. Many of these countries have

some degree of state control over their businesses, bringing new relevance to the enforcement of our foreign bribery laws.

In the last few years we have seen a dramatic increase in the number of cases prosecuted by the Justice Department under the FCPA, including a record number of fines with staggering sums. The Wall Street Journal pointed out that FCPA fines made up half of all DOJ Criminal Division penalties in fiscal year 2010. This is a considerable windfall for the Federal Government.

Significant concerns about the FCPA and its enforcement by the Justice Department are being expressed by the business community, and business is already in trouble. Under the Obama Administration, America is suffering through a severe and prolonged economic downturn. Businesses that are trying to comply with the FCPA assert that the law is being enforced in a vague and impenetrable manner. Because the risks of prosecution are so great, with million-dollar fines and possible prison sentences, companies would rather settle with the Justice Department than go to court.

The result is a shortage of court decisions determining the limits of the law. Companies must then analyze cases prosecuted by the Justice Department and the settlements reached to determine how to do business in foreign markets.

The business community complains that the absence of case law interpreting the breadth and scope of the FCPA inflates the Department's prosecutorial discretion and confounds industries' ability to conform to the law. For instance, there is no clear rule on what qualifies as a foreign official, nor what percentage of state ownership qualifies a company as an instrumentality of the state. Companies lack guidance on how expensive a gift must be to be considered a bribe.

Businesses and corporations are bracing for thousands of new regulations from Obamacare and Dodd-Frank. The NLRB is trying to tell companies where they are allowed to build things in the U.S. We are expecting more onerous regulations from the EPA as it administratively legislates where Congress has chosen not to. It is no wonder that the business community suspects that the Administration is hostile to free enterprise. How are businesses supposed to hire when they do not know what their costs or legal exposure will be?

FCPA prosecutions should be effective and fair, and they must be predictable. The rules of the road must be communicated clearly. Companies should have the same ability to guide themselves as motorists do, so that business can start moving again.

As a part of its oversight functions over the Justice Department and the criminal laws of the United States, this Committee is well suited to examine the impact of the FCPA and to ask hard questions about whether the act is succeeding in its mission or is needlessly hurting American job creation. I look forward to hearing more about this issue and thank all of our witnesses for participating in today's hearing.

It is now my pleasure to recognize for his opening statement the Ranking Member of the Subcommittee, the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman, and I am pleased to join you for the Subcommittee hearing on Foreign Corrupt Practices Act.

The Foreign Corrupt Practices Act contains provisions that make it unlawful for individuals and corporations to make payments or bribes to foreign officials for the purpose of obtaining or retaining business opportunities abroad. At the time of its passage in 1977, Congress was concerned that such bribery harms American businesses, erodes confidence in the economic system, rewards corruption instead of efficiency, and creates foreign policy problems. These concerns remain.

In recent years, the Department of Justice has substantially increased the number of prosecutions against corporations and individual executives and has collected more in criminal fines than any other period in the history of the law. As a result of the collective efforts of the Department of Justice, Department of Commerce, and the Securities and Exchange Commission, the United States has investigated and prosecuted many foreign bribery cases. In fact, it has investigated and prosecuted more cases than any of the other 38-member countries of the OECD, the Organization of Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

That is an international agreement aimed at reducing corruption in developing countries by encouraging sanctions against bribery in international business transactions carried out by companies based in the Convention member countries. These increased enforcement efforts have raised concerns regarding certain provisions of the statute among some in the business and legal community. They argue that some of the prosecutions are unfair and actually harm U.S. companies and ultimately our economy by stifling incentives to do business abroad. Some feel that overly-aggressive enforcement places U.S. companies at a disadvantage in the global marketplace when competing against companies not subject to the U.S. law.

Specifically, they cite problems with current statutory definitions of "foreign official" and "instrumentality." One of the problems is the contention that the Justice Department and the SEC are interpreting the definition of "foreign official" too broadly, especially when it comes to payments to companies that are state owned or state controlled. Under those circumstances, it may not be immediately apparent whether a manager or other employee is to be considered a foreign official in the sense contemplated by the law.

Other recommendations for amending the law include having the ability to cite a company's compliance program as an affirmative defense against criminal liability. Having this would allow companies to rebut the imposition of criminal liability for violations if employees or contractors responsible for the violation were found to have circumvented compliance measures that were in place to identify and prevent violations.

As we speak, many companies invest substantial sums, perhaps even millions of dollars, in developing sophisticated compliance programs in an effort to train employees and in an effort to identify actual or potential problems and prevent them. They may retain in-house compliance officers and monitors, all without the ability to

be certain as to what conduct is safe and which isn't. The result may often be over-compliance, but many feel that it is better to be safe than sorry.

Lack of clear standards and guidance, even the availability of the Justice Department's opinion release procedure, may often result in companies declining to engage in an array of legitimate business activities which not only stifles business growth but ultimately our economy. Punishing those companies and individuals who are acting in good faith and who are already doing everything they can to identify and prevent violations of the law runs counter to our basic tenets of fairness and justice.

Another recommendation for change includes limiting successor liability. Why should a company be held criminally liable for actions of a company that it acquires or merges with, especially when actions occurred prior to the acquisition or merger and were entirely unknown to the acquiring company which had conducted its due diligence review of the offender company's operations? This, too, runs counter to our system of justice and the principle for punishing only the guilty party.

Other recommendations have included adding willfulness and materiality requirements and limiting parent liability for subsidiary's conduct not known to the parent.

Effective enforcement of the law is crucial to protecting and preserving the integrity of international business and economic development. As we applaud aggressive enforcement of our laws, we must also acknowledge the necessity of periodically reviewing those laws in order to ensure that they remain fair and just, as well as effective tools against crime and corruption, and that is what our witnesses will discuss today and why we look forward to their testimony.

Thank you, Mr. Chairman. I yield back.

Mr. SENSENBRENNER. I thank the gentleman from Virginia.

The gentleman from Michigan, Mr. Conyers, the Ranking Member of the full Committee, is recognized for 5 minutes for an opening statement.

Mr. CONYERS. Thank you, Chairman Sensenbrenner.

You observed that under the dawdling of the Obama administration, when we went into an economic decline, I would just like to put into the record that in the first year, the first month of President Obama being sworn in on January 20, 2009, the unemployment rate was 598,000. I suppose you are not going to blame him for that.

But in December, when he wasn't in office, the unemployment rate was 524,000 people out of work; and in November, it was 584,000, the people who lost their jobs and were unemployed, a small detail.

Now, to my tremendously competent Subcommittee on Crime Chairman, Bobby Scott, about this overly aggressive enforcement, there have been 140 cases in 10 years. Will somebody explain to me what makes that overly aggressive? I don't think so.

And so I would like to just shed a little different view about this thing. To me, there are six points that I wanted to mention.

First of all, I want to tell you a suggested amendment that I can support, and that is the addition of a compliance defense which

would permit companies to fight the imposition of criminal liability for these FCPA violations if individual employees or agents had circumvented compliance measures that were otherwise reasonable in identifying such violations.

But let's look at the clarification of foreign official and instrumentality provisions. Without a clear understanding of who is a foreign official, this could create a problem, and I think I can support that one.

But now let's start looking at limiting successor liability and limiting the parent company liability for acts of subsidiary. You don't get—if you buy a house and there is a mortgage on it that you didn't find, your liability isn't limited. You have got to pay for it. And so why should companies with pretty good sized legal assistance have to get off because there was something going on that they didn't know about? There is no such exception or modification made in the general practice of law, and I don't see why it should be here. Limiting the parent company liability for acts of the subsidiary. Oh, they didn't know they were doing wrong. Yeah, right. They have got all the lawyers that they need, and to now tell me that they didn't know that their subsidiary was engaged in wrongdoing is pretty hard for me to swallow this morning.

Adding a willfulness requirement for corporations, I am against that, too. If they do something wrong, whether we can find out who is willful or not, that is up to them to find out in court.

Thank you, Chairman Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Conyers.

It is now my pleasure to introduce today's witnesses.

Mr. Greg Andres has served as Acting Deputy Assistant Attorney General in the Criminal Division at the Department of Justice since late 2009. In that capacity, he supervises the fraud section, the appellate section, the capital case unit, and the organized crime and racketeering section. He joined the Division on detail from the U.S. Attorney's Office for the Eastern District of New York, where he has been an Assistant United States Attorney since 1999. He graduated from the University of Notre Dame and the University of Chicago Law School, where he was a member of the University of Chicago Law Review.

Judge Michael Mukasey served as Attorney General of the United States from November 2007 to January 2009. He joined Debevoise as a partner in the litigation practice in New York in February 2009, focusing his practice primarily on internal investigations, independent board reviews, and corporate governance. From 1988 to 2006, Judge Mukasey served as a district judge in the U.S. District Court for the Southern District of New York, becoming Chief Judge in 2000. Prior to his work with the U.S. District Court, he was in private practice for 11 years. From 1972 to 1976, he served as an Assistant United States Attorney for the Southern District of New York and chief of the Official Corruption Unit in 1975 to 1976. He received his LLB from Yale Law School in 1967, and his B.A. from Columbia College 4 years earlier.

George Terwilliger is a senior partner at White & Case LLP and global head of the firm's White Collar Practice Group. Mr. Terwilliger served 15 years in public service as a Federal prosecutor in the U.S. Justice Department. He served as U.S. Attorney

for the District of Vermont and as Deputy Attorney General. He earned his Juris Doctor from the Antioch School of Law in 1978, and his Bachelor's degree from Seton Hall University in 1973.

Ms. Shana-Tara Regon serves as director of White Collar Crime Policy for the National Association of Criminal Defense Lawyers. She focuses on monitoring and attempting to prevent over-criminalization and over-federalization. She also coordinates the NACDL's strategic partnership with other organizations on multiple Federal, legislative and agency initiatives. Prior to joining NACDL, Ms. Regon practiced as a white-collar defense lawyer for Shipman and Goodwin LLP in Hartford, Connecticut, representing individual and corporate clients in state and Federal civil and criminal investigations. Before her work at Shipman and Goodwin, Ms. Regon clerked for Justice Joette Katz of the Connecticut Supreme Court. She is a former president of the District of Connecticut's chapter of the Federal Bar Association and a former pupil of the Oliver Ellsworth Inn of Court. She received her Juris Doctor degree from Western New England College of Law, where she was a Note Editor for the Law Review. She also holds a Master of Fine Arts and Fiction Writing from the University of New Orleans and a B.A. in English from Sweet Briar College.

Each witness will be recognized for 5 minutes to summarize their written statement. Without objection, the full written statements will be included in the record at the point of each witness' testimony, and the Chair now recognizes Mr. Andres.

TESTIMONY OF GREG ANDRES, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. ANDRES. Good morning, Chairman Sensenbrenner, Ranking Member Scott——

Mr. SENSENBRENNER. Can you pull your mic up a little bit closer and make sure that it is turned on? We will reset the clock.

Mr. ANDRES. Okay. Good morning, Chairman Sensenbrenner, Ranking Member Scott, and distinguished Members of the Subcommittee. Thank you for providing me with the opportunity to speak to you today about the Department of Justice's enforcement of the Foreign Corrupt Practices Act. I am privileged to appear before you on behalf of the Department of Justice.

As the FCPA's legislative history made clear, corporate bribery is bad for business. In our free market system it is basic that the sale of products should take place on the basis of price, quality, and service. The Department of Justice is committed to fighting foreign bribery through continued enforcement of the FCPA, and by providing guidance to corporations and others on our enforcement actions.

Foreign corruption remains a problem of significant magnitude. The World Bank estimates that more than $1 trillion in bribes are paid each year, roughly 3 percent of the world economy. Some experts have concluded that bribes amount to a 20 percent tax on foreign investment. In the end, corruption undermines efficiency and good business practices.

Recently, a Federal jury in the Central District of California heard evidence of bribes paid by an American company to Mexican

officials. At issue were bribes, including a $297,500 Ferrari Spyder, a $1.8 million yacht, and payments of more than $170,000 toward one official's credit card bills. This conduct does not amount to good business practice.

In recent years, the Department has made great strides in prosecuting foreign corruption in all corners of the globe, against both foreign and domestic companies. These cases have often involved systematic, longstanding schemes in which significant sums of money were paid. They did not involve single bribe payments of nominal sums. For example, the Department's prosecution of Daimler AG involved hundreds of improper payments worth tens of millions of dollars to foreign officials in almost two dozen countries. Similarly, the Department's prosecution of Siemens AG, a German corporation, and three of its subsidiaries involved over $800 million in improper payments in a variety of countries.

When the Department seeks to enforce the FCPA against corporate entities, we do so pursuant to the internal procedures known as the Principles of Federal Prosecution Of Business Organizations. These Principles require Federal prosecutors to consider nine factors when assessing whether to pursue charges against a business entity. Those factors include the existence and effectiveness of a corporation's pre-existing compliance program, as well as remedial actions and a company's cooperation.

Many have commented about the recent increase in FCPA enforcement actions. At least one likely cause for this increase in cases is disclosures by companies consistent with their obligations under the Sarbanes-Oxley Act, which requires senior corporate officers to certify the accuracy of their financial statements. This has led to more companies discovering FCPA violations and making the decision to disclose them to the SEC and the Department of Justice.

Of note, the United States' treaty obligations also impact the Department's enforcement of the FCPA.

The Department also takes seriously our obligation to provide guidance in this area. Our goal is not simply to prosecute FCPA violations, but also to prevent corruption at home and abroad and promote a level playing field in business transactions. Senior officials from the Department and others often speak publicly about our enforcement efforts, highlighting relevant considerations and practices. In addition, through our Opinion Release Procedure, the Department advises companies on how to comply with the FCPA. This procedure is unique in U.S. criminal law.

The Department is proud of our FCPA enforcement record, and of our continued partnership with the SEC and the Departments of State and Commerce. We look forward to working with Congress as we continue our important mission to prevent, deter, and prosecute foreign corruption.

Thank you.

[The prepared statement of Mr. Andres follows:]

Department of Justice

STATEMENT

OF

GREG ANDRES
ACTING DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

ENTITLED

"FOREIGN CORRUPT PRACTICES ACT"

PRESENTED ON

JUNE 14, 2011

Statement of
Greg Andres
Acting Deputy Assistant Attorney General
Criminal Division
Department Of Justice

Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary
United States House of Representatives

"Foreign Corrupt Practices Act"

June 14, 2011

I. INTRODUCTION

Chairman Sensenbrenner, Ranking Member Scott, and distinguished Members of the Subcommittee: Thank you for providing me with the opportunity to speak to you today about the Department of Justice's enforcement of the Foreign Corrupt Practices Act ("FCPA"). I am privileged to appear before you on behalf of the Justice Department.

Corruption undermines the democratic process, distorts markets, and frustrates competition. When government officials, whether at home or abroad, trade contracts for bribes, communities, businesses and governments lose; and when corporations and their executives bribe foreign officials in order to obtain or retain business, they perpetuate a culture of corruption that we are working hard to change. As the FCPA's legislative history makes clear, "Corporate bribery is bad business. In our free market system it is basic that the sale of products should take place on the basis of price, quality, and service." The Department of Justice is committed to fighting foreign bribery through continued enforcement of the FCPA, and to providing guidance to corporations and others on our enforcement efforts.

II. FOREIGN CORRUPTION

Foreign corruption remains a problem of significant magnitude. Its effects are felt far and wide, including in U.S. markets, boardrooms, factories, mines, and farms. The World Bank estimates that more than $1 trillion dollars in bribes are paid each year – roughly three percent of the world economy. Some experts have concluded that bribes amount to a 20 percent tax on foreign investment.

Foreign bribery offends core American principles of fair play and it is plainly bad for business. In short, it stifles competition. Responsible companies, which prosper through innovation and efficiency, quality and customer service, unfairly lose business opportunities when their competitors cheat. Congress recognized as much more than 30 years ago, when it enacted the FCPA in the wake of the Watergate scandal, noting:

> The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. It short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business. Bribery of foreign officials by some American companies casts a shadow on all U.S. companies.

These principles have equal force today.

Moreover, corruption undermines efficiency and good business practices. Bribes are rarely paid only once. Companies and executives that pay bribes often rely on loose controls and poor accounting, which promote corporate instability and permit other crimes, such as embezzlement and antitrust violations, to flourish – all to the detriment of shareholders and the marketplace. Recently, a federal jury in the Central District of California heard evidence of

bribes paid by an American company to Mexican officials, including bribes consisting of a $297,500 Ferrari Spyder, a $1.8 million yacht, and payments of more than $170,000 towards one official's credit card bills. It is difficult to dispute that this conduct does not amount to good business practices.

III. ENFORCEMENT

In recent years, the Department has made great strides prosecuting foreign corruption in all corners of the globe – against both foreign and domestic companies. These cases have often involved systematic, longstanding bribery schemes in which significant sums of money were paid. Department prosecutions have not involved single bribe payments of nominal sums. For example, the Department's prosecution of Daimler AG involved hundreds of improper payments worth tens of millions of dollars to foreign officials in almost two dozen countries. Similarly, the Department's prosecution of Siemens AG, a German corporation, and three of its subsidiaries, involved the payment of over $50 million in bribes in a variety of countries.

A. Prosecution Guidelines

When the Department seeks to enforce the FCPA against corporate entities, it does so pursuant to internal procedures set forth in the Department's United States Attorney's Manual. These rules, also known as the *Principles of Federal Prosecution Of Business Organizations*, represent official Department policy that all federal prosecutors must follow.

The Principles require federal prosecutors to consider the following nine factors when assessing whether to pursue charges against a business entity:

1. The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;

2. The pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;

3. The corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;

4. The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;

5. The existence and effectiveness of the corporation's pre-existing compliance program;

6. 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;

7. The collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;

8. The adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and

9. The adequacy of remedies such as civil or regulatory enforcement actions.

Pursuant to these Principles, generally the Department does not hold a corporate entity accountable for the acts of a single employee. And while no single factor is necessarily more important than another, the existence and implementation of a company's compliance program remains an important factor, and one which the Department has routinely recognized as significant. For example, on April 8, 2011, the Department announced that it had entered into a deferred prosecution agreement with Johnson & Johnson, its subsidiaries, and its operating companies (collectively, "J&J"). As set forth in that agreement, the Department and J&J resolved the investigation in this manner, in part, because "J&J had a pre-existing compliance and ethics program that was effective and the majority of problematic operations globally

resulted from insufficient implementation of the J&J compliance and ethics program in acquired companies."

Cooperation is another important factor. The Panalpina matter helps illustrate this point. On November 4, 2010, the Department announced that it had resolved its investigation of Panalpina World Transport (Holding) Ltd. ("Panalpina"), a global freight forwarding and logistics services firm based in Basel, Switzerland, its U.S. subsidiary, and five oil and gas service companies and subsidiaries. According to publicly-filed documents, Panalpina and its U.S.-based subsidiary admitted that between 2002 and 2007, it paid thousands of bribes totaling at least $27 million to foreign officials in at least seven countries, including Angola, Azerbaijan, Brazil, Kazakhstan, Nigeria, Russia, and Turkmenistan. Because of their criminal conduct, the companies involved in the schemes agreed to pay a total of over $150 million in criminal penalties. As part of its efforts to cooperate with the Justice Department's investigation, Panalpina engaged counsel to lead investigations encompassing 46 jurisdictions, hired an outside audit firm to perform forensic analysis, and promptly reported the results of its internal investigation in over 60 meetings and calls with the Department and the SEC.

The Panalpina resolution was consistent with the Principles, which require federal prosecutors to consider resolving, where appropriate, FCPA investigations through deferred or non-prosecution agreements. As the Principles recognize, these agreements "occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation," especially where the collateral consequences of an indictment to the corporation could be significant.

B. Enforcement Actions

As the Daimler, Panalpina, and Siemens matters discussed above illustrate, the Department focuses its FCPA and related enforcement on matters where the allegations of criminal conduct are clear, egregious, and fall squarely within the FCPA. There are other examples of egregious conduct, including the following:

- **The Bonny Island matter: payments of over $180 million intended, in part, as foreign bribes.** On February 11, 2009, Kellogg Brown & Root LLC (KBR), a global engineering, construction and services company based in Houston, pleaded guilty to FCPA violations. KBR admitted that it paid two agents approximately $182 million, and that KBR had intended for these payments to be used, in part, for bribes to Nigerian government officials in exchange for engineering, procurement and construction contracts. KBR's former CEO, Albert "Jack" Stanley, also pleaded guilty for his role in the scheme. In addition, three foreign corporate business partners of KBR have all reached criminal resolutions with the Department in the Bonny Island matter: Snamprogetti Netherlands B.V. / ENI S.p.A (from Holland/Italy), Technip S.A (from France), and, most recently, JGC (from Japan).

- **The Maxwell Technologies matter: payments of over $2.5 million intended, in part, for foreign bribe payments.** On January 31, 2011, Maxwell Technologies Inc., a publicly-traded manufacturer of energy-storage and power-delivery products based in San Diego, pleaded guilty to charges related to the FCPA. Maxwell admitted that its wholly-owned Swiss subsidiary paid its agent in China more than $2.5 million, and that it intended for these payments to be used, in part, for bribes to officials at state-owned entities in exchange for business contracts.

- **The Alcatel-Lucent matter: payments of millions in foreign bribes.** On December 27, 2010, the Department announced that Alcatel-Lucent S.A. and three of its subsidiaries had resolved an FCPA investigation with the Department. Alcatel-Lucent's three subsidiaries paid millions of dollars in improper payments to foreign officials for the purpose of obtaining and retaining business in Costa Rica, Honduras, Malaysia and Taiwan. For example, one of the subsidiaries paid more than $9 million in bribes to foreign officials in Costa Rica in exchange for business contracts.

C. Corporate Governance Legislation & United States Treaty Obligations

Many have commented about the recent increase in FCPA enforcement actions. At least one likely cause for those cases is increased disclosures by companies consistent with their obligations under the Sarbanes-Oxley Act ("SOX"), which requires senior corporate officials to certify the accuracy of their financial statements, including that those statements accurately reflect companies' payments to third parties. The SOX certification process has led to more companies discovering FCPA violations and making the decision to disclose them to the SEC and DOJ.

Of note, United States' treaty obligations also impact the Department's enforcement of the FCPA. For example, the Organization of Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Antibribery Convention"), to which the United States and 37 other countries are signatories, as well as the United Nations Convention Against Corruption, are important.

The United States was a driving force behind the negotiation and conclusion of the OECD Antibribery Convention, which was approved by the United States Senate on July 31, 1998, and entered into force on February 15, 1999. In particular, the OECD Antibribery Convention requires the United States and all signatory countries to criminalize bribery of a "foreign public official," which the OECD Antibribery Convention broadly defines to include "any person exercising a public function for a foreign country, including for a public agency or public enterprise."

The Department is proud of our FCPA enforcement record, and of our continued partnership with the Securities and Exchange Commission and the Department of Commerce. Others have taken notice as well. On October 20, 2010, following a lengthy official review, the Organisation for Economic Co-operation and Development (OECD) noted that:

> The creation of a dedicated FCPA unit in the SEC, continued enforcement of books and records and internal controls provisions by the DOJ and SEC, increased focus on the prosecution of individuals and the size of sanctions have had a deterrent effect and, combined with guidance on the implementation of these standards, has raised awareness of U.S. accounting and auditing requirements among all issuers.

IV. GUIDANCE

The Department also takes seriously our obligation to provide guidance in this area: our goal is not simply to prosecute FCPA violations, but also to prevent corruption at home and abroad and promote a level playing field in business transactions.

In the past year we have made great efforts to provide more information and transparency. Senior officials from the Department, as well as others from the Securities and Exchange Commission and the Department of Commerce, often speak publicly about the Department's enforcement efforts, highlighting relevant considerations and practices. Department officials have addressed compliance officials, general counsels and other business executives both in the United States and abroad. In addition, the Department worked closely with the OECD to develop the Good Practice Guidance on Internal Controls, Ethics, and Compliance, which was issued in February 2010, and establishes a framework of what an effective compliance program should contain.

Moreover, through our Opinion Release Procedure, the Department advises companies on how to comply with the FCPA. This procedure, provided for in Title 15, United States Code,

Sections 78dd-l(e) and 78dd-2(f), is unique in U.S. criminal law and allows companies and individuals to request a determination in advance as to whether proposed conduct would constitute a violation of the FCPA. Requests for opinions under this provision require the Department to issue a response within 30 days of a completed request.

The resulting opinions, which are available on the Department's FCPA-dedicated website (http://www.justice.gov/criminal/fraud/fcpa/), provide additional guidance on the Department's interpretation and enforcement of the FCPA. For example, the Department has issued at least five advisory opinions concerning whether a party fit within the definition of "foreign official." In one such opinion, issued on September 1, 2010, the Department explained that a consultant who was otherwise a "foreign official" would not be acting as a "foreign official" under a particular business arrangement given the facts and circumstances posed. Similarly, opinions have been issued regarding what constitute "bona fide" expenditures in promoting a product and what are considered excessive travel and entertainment costs for foreign government officials.

Our website also contains a copy of the FCPA statute in 15 different languages, the relevant legislative history, and a "Lay Person's Guide" to the FCPA, a plain language explanation of the Act. Further, we include on our website the relevant documents from our FCPA prosecutions and resolutions dating back to 1998 (and thus include more than 140 FCPA prosecutions, including charging documents, plea agreements, deferred prosecution agreements, press releases, and other relevant pleadings).

V. CONCLUSION

As discussed above, international bribery is bad for United States' businesses, weakens economic development, undermines confidence in the marketplace, and distorts competition. FCPA enforcement is vital to United States' business interests, to ensuring the integrity of the

world's markets and sustainable development globally, and to making the international business climate more transparent and fair for everyone.

We look forward to working with Congress as we continue our important mission to prevent, deter, and prosecute foreign corruption.

Mr. SENSENBRENNER. Thank you, Mr. Andres.
Judge Mukasey?

TESTIMONY OF THE HONORABLE MICHAEL MUKASEY, FORMER ATTORNEY GENERAL, PARTNER, DEBEVOISE & PLIMPTON LLP

Judge MUKASEY. Thank you, Mr. Chairman.

Good morning, Chairman Sensenbrenner, Ranking Member Scott, and Members of the Committee. Thank you very much for hearing me today on behalf of the U.S. Chamber Institute for Legal Reform on the important subject of the Foreign Corrupt Practices Act.

I should say at the outset that none of us is against—or I should say none of us favors the kinds of cases described by Mr. Andres. The question is what can be done to detect, deter, and prevent the incidence of that kind of behavior.

For all the merits of the FCPA in curbing corrupt business practices, and they are substantial, more than 30 years of experience have shown ways in which the law and its enforcement can be improved. In my written testimony I describe six possible amendments to help do that. Today I would like to concentrate and highlight two in particular, the addition of a compliance defense, and a clarification of the meaning of the terms "foreign official" and "instrumentality" in the FCPA. These improvements I think are likely to raise the standards that businesses follow and will give more focus and certainty to help them better comply with the FCPA.

The law does not now provide a compliance defense—that is, an affirmative defense that would allow companies to rebut criminal liability for violations if the people responsible evaded compliance measures that were otherwise reasonably designed to identify and prevent such violations. A company can now be held liable for violations committed by rogue employees, agents or subsidiaries even if the company has a state-of-the-art FCPA compliance program.

It is true that the DOJ or the SEC may look more favorably on a company with a strong FCPA compliance program when deciding whether to charge the company or what settlement terms to offer, and a compliance program can be taken into account by a court at the sentencing of a corporation convicted of an FCPA violation. But those benefits are subject to unlimited prosecutorial discretion, or are available only after the liability phase of a prosecution is over, or both. There is also no guarantee that a strong compliance program will be given the weight it deserves.

The system now in place has conflicting incentives. On the one hand, an effective compliance program can hold out a qualified promise of indeterminate benefit should a violation occur and be disclosed. On the other hand, if all that can be achieved is a qualified and indeterminate benefit, there is a perverse incentive not to be too aggressive lest wrongdoing be discovered, and there is a resulting tendency of standards to sink to the level of the lowest common denominator, or at best something that is only a slight improvement over it. This Catch-22 policy doesn't really serve anyone's interest.

Here I think it is useful to look for guidance to another statutory system in which companies now do have a compliance defense under U.S. law, and I am speaking of the system we use to combat improper workplace discrimination based on race, sex, religion, and national origin. Under Title 7 of the Civil Rights Act of 1964, there can be no corporate liability if a company has an anti-discrimination policy and provides a way for employees who have been subject to workplace discrimination to get redress. Dozens, if not hundreds, of cases are resolved every year based on this compliance program

defense. I think the lesson here is that having a compliance defense actually diminishes the overall incidence of discrimination because it encourages employers to have robust systems of compliance. Otherwise, it would look like the interests that are served by the FCPA are given more weight in a statutory scheme than the interests served by the Civil Rights laws, which of course is not the case. And I think we should draw a lesson from Title 7 on how best to achieve the goals of the FCPA statute.

The FCPA prohibits corrupt payments or offers of payment to foreign officials, but it does not provide adequate guidance as to who is a foreign official. The term is defined to include any officer or employee of a foreign government or any instrumentality thereof, but the FCPA doesn't define what an instrumentality is. The DOJ and the SEC considers everyone who works for an instrumentality, from the most senior executive to the most junior mailroom clerk, to be a foreign official. Two judges recently rejected defense motions arguing that employees of state-owned enterprises are not foreign officials under the FCPA, and in doing so, the courts indicated that there are limits on the definition of instrumentality, but neither court clarified what those limits are.

If the definitions of these fundamental statutory terms vary by circumstance and by case, and therefore have to be decided by a jury rather than as a matter of law, it becomes impossible for companies to figure out in advance what conduct may and may not provide a meaningful risk of violating the FCPA. This approach creates uncertainties and puts up barriers to U.S. businesses trying to sell their goods and services abroad, particularly in countries where many companies are partly owned or controlled by the state. It also makes it difficult for companies to focus their monitoring and compliance programs on clearly identifiable situations involving foreign officials and foreign instrumentalities.

The FCPA therefore should be amended to clarify the meaning of "foreign official," indicate the percentage of ownership by a foreign government that would qualify the entity as an instrumentality. We think majority ownership is the most plausible threshold.

The reforms that I described today and in my written testimony, by providing greater clarity and certainty to the business community, would reinforce incentives for compliance and help ensure that companies operating in the U.S. or listed on its securities exchanges adhere to high legal and ethical standards when they do business abroad. The result will be a statute that is both stronger and fairer.

Thank you very much.

[The prepared statement of Judge Mukasey follows:]

Written Testimony

United States House of Representatives

Committee on the Judiciary

Subcommittee on Crime, Terrorism and Homeland Security

"The Foreign Corrupt Practices Act"

June 14, 2011

The Honorable Michael B. Mukasey
Partner, Debevoise & Plimpton LLP, on behalf of the U.S. Chamber Institute for Legal Reform

Good morning Chairman Sensenbrenner, Ranking Member Scott, and members of the Committee. I am Michael B. Mukasey, a partner at the law firm of Debevoise & Plimpton LLP in New York. I served as Attorney General of the United States from November 2007 to January 2009. I also served for more than eighteen years, from January 1988 to September 2006, as a United States District Judge for the Southern District of New York, including as Chief Judge from 2000 to 2006. I am testifying today on behalf of the U.S. Chamber Institute for Legal Reform, which seeks to make the nation's legal system simpler, fairer and more efficient for everyone. The Institute for Legal Reform was founded in 1998 by the U.S. Chamber of Commerce, which represents the interests of three million businesses and organizations of all sizes, sectors and regions.

The Foreign Corrupt Practices Act ("FCPA") is a valuable statute that helps reduce corruption and reinforce public and investor confidence in markets here and abroad. The primary aim of Congress in enacting the FCPA was to prohibit U.S. companies and companies listed on U.S. exchanges from paying or offering bribes to foreign government officials and political parties for the purpose of obtaining or retaining business opportunities. In addition to anti-bribery provisions, Congress included in the FCPA requirements that any corporation with securities listed on a U.S. exchange maintain financial books and records that accurately reflect transactions by the corporation and maintain adequate internal accounting controls. Collectively, these

provisions properly target foreign bribery and the improper business practices that enable and facilitate such bribe schemes.

While I served as Attorney General, the Department of Justice ("DOJ" or "Department") took its responsibilities under the Act very seriously. Some of the largest FCPA penalties were imposed during my tenure. I think the Members will agree that I am not "soft" on crime of any kind – including overseas corruption.

However, for all the merits of the FCPA in curbing corrupt business practices, thirty-four years of experience have revealed ways in which the statute itself and its enforcement could be improved. In particular, while the past decade has seen an extraordinary increase in the level of FCPA enforcement and investigation by the Department and the Securities and Exchange Commission ("SEC"), judicial oversight of such enforcement remains minimal. Companies are rarely positioned to litigate an FCPA enforcement action to its conclusion or even risk indictment with consequent debarment in some industries, and the possibility of substantial prison time for individual defendants, has led most to negotiate pleas of guilty. The primary statutory interpretive function therefore is performed almost exclusively by the DOJ Fraud Section and the SEC, which are responsible for bringing FCPA charges. By negotiating resolutions in many cases before an indictment or enforcement action is filed, the agencies effectively control the disposition of the FCPA cases they initiate and impose their own extremely broad interpretation of the FCPA's key provisions. We are left with a circumstance in which, as Professor Mike Koehler, a specialist in the FCPA, has stated, "the FCPA means what the enforcement agencies say it means."[1]

Instead of serving the original intent of the statute, which was to punish companies that participate in foreign bribery, actions taken by the government under more expansive interpretations of the statute may ultimately punish corporations whose connection to improper acts is attenuated or, in some cases, nonexistent. The result is that the FCPA, as it is currently written and enforced, leaves corporations vulnerable to civil and criminal penalties for a wide variety of conduct that is in many cases beyond their control or even their knowledge.

The shortcomings in the FCPA and its enforcement may be remedied by several improvements and amendments that will enable businesses to have a clearer understanding of what is and is not a violation of the FCPA. Today I will outline six

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[1] Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 Ind. L. Rev. 389, 410 (2010).

reforms that are intended to provide more certainty to businesses when trying to comply with the FCPA and to ensure that the statute and its enforcement are consistent with the fundamental principles of our criminal justice system. The six changes are:

(1) Adding a compliance defense;

(2) Clarifying the meaning of "foreign official";

(3) Improving the procedures for guidance and advisory opinions from the DOJ;

(4) Limiting a company's criminal liability for the prior actions of a company it has acquired;

(5) Adding a "willfulness" requirement for corporate criminal liability; and

(6) Limiting a company's liability for acts of a subsidiary not known to the parent.

1. Adding a Compliance Defense

The FCPA does not currently provide a compliance defense -- that is, an affirmative defense that would permit companies to rebut the imposition of criminal liability for FCPA violations if the people responsible for the violations circumvented compliance measures that were otherwise reasonably designed to identify and prevent such violations. A company may therefore be held liable for FCPA violations committed by rogue employees, agents or subsidiaries even if the company has a state-of-the-art FCPA compliance program. It is true that the DOJ or SEC may look more favorably on a company with a strong FCPA compliance program when determining whether to charge the company or what settlement terms to offer,[2] and such compliance programs may be

[2] *See* Principles of Federal Prosecution of Business Organizations, Title 9, Chapter 9-28.000, UNITED STATES ATTORNEY MANUAL, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm (decision whether to charge). While evidence of a strong compliance program may help a corporation reach a resolution on less onerous terms than it otherwise would have received, the government has complete discretion as to how much credit to give for such a program.

taken into account by a court at the sentencing of a corporation convicted of an FCPA violation.[3] However, such benefits are subject to unlimited prosecutorial discretion, are available only after the liability phase of a prosecution, or both. There is also no guarantee that a strong compliance program will be given the weight it deserves.

By contrast, the comprehensive Bribery Act of 2010 passed by the British Parliament – Section 6 of which addresses bribes of foreign officials and closely tracks the FCPA – provides a specific defense to liability if a corporate entity can show that it has "adequate procedures" in place to detect and deter improper conduct.[4] The Ministry of Justice recently released detailed guidance on what may constitute "adequate procedures,"[5] and the Act is due to become effective on July 1, 2011. Similarly, in 2001, the Italian government passed a statute that proscribes foreign bribery but contains a compliance defense.[6] Articles 6 and 7 of the Italian statute permit a company to avoid liability if it can demonstrate that, before employees of the company engaged in a specific crime (such as bribery), it (1) adopted and implemented a model of organization, management and control designed to prevent that crime, (2) engaged an autonomous body to supervise and approve the model, and (3) the autonomous body adequately exercised its duties.[7]

The addition of a compliance defense would align the FCPA with the enforcement regimes of the U.K. and Italy, helping to ensure consistent application of anti-corruption law across jurisdictions. Furthermore, the principles embodied in the U.K. Bribery Act and the Italian statute closely track the factors currently taken into consideration by courts in the United States, albeit at a very different phase of the criminal process – namely, sentencing.[8] These principles – which Congress and the Sentencing Commission

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3 *See* U.S.S.G. § 8B2.1.

4 *See* Bribery Act of 2010, ch. 23, § 7(2) (U.K.).

5 *See* Ministry of Justice, The Bribery Act 2010: Guidance (Mar. 30, 2011), available at www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf.

6 Legislative Decree no. 231 of 8 June 2001; *see also* McDermott, Will & Emery, *Italian Law No. 231/2001: Avoiding Liability for Crimes Committed by a Company's Representatives*, (Apr. 27, 2009), *available at* http://www.mwe.com/info/news/wp0409f.pdf.

7 *See id.*

8 *See* U.S.S.G. § 8B2.1.

have already identified as key indicators of a strong and effective compliance program – should be considered instead during the liability phase of an FCPA prosecution, as they are under the British and Italian statutes.

In the earlier days of the FCPA, Congress had shown interest in such an affirmative defense to liability for companies that had adopted and vigorously enforced FCPA compliance programs. In 1986, Representative Howard L. Berman proposed a "due diligence" affirmative defense that would be available to any company that had established and implemented procedures designed to prevent FCPA violations and had exercised due diligence to prevent the violation at issue.[9] The defense was adopted by the House of Representatives but not included in legislation ultimately signed into law.[10]

Such a defense merits renewed consideration. The FCPA was not intended nor should it be applied as a strict liability statute under the anti-bribery provisions of the Act. Companies cannot guarantee that all of their thousands or even hundreds of thousands of employees worldwide will comply with the Act at all times. Responsible companies implement and enforce strong compliance measures designed to avoid and promptly address infractions. This is precisely what Congress intended with the passage of the FCPA, and it is exactly what the capital markets and American shareholders expect our companies to do. There is little more that a responsible company can do.

In fact, policies adopted by the DOJ, the SEC, and the U.S. Sentencing Commission over the past two decades have all been designed to give companies reasons and incentives to implement effective compliance measures. Many companies have responded to these initiatives, often at substantial cost. The absence of a compliance defense tells corporate America, in effect, no compliance effort can be good enough -- even if you did everything we required, we still retain the right to prosecute purely as a matter of our discretion. I question whether that is the appropriate signal to send to the business community and to American shareholders.

A company that has a strong pre-existing FCPA compliance program that is effective in identifying and preventing violations should be permitted to present that program as an affirmative defense where employees or agents have circumvented that

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[9] Trade and International Economic Policy Reform Act of 1986, H.R. 4800, 99th Cong.. The proposed "due diligence" defense is discussed at 132 Cong. Rec. H. 2946.

[10] *See* H.R. Conf. Rep. on H.R. 3, 100th Cong., 2d Sess. 916, 922-23 (1988).

compliance program, rather than be compelled to rely solely on the discretion of prosecutors. It is inherently unfair to impose liability for the acts of rogue employees on a company that had in place a robust FCPA compliance program designed to prevent such acts.[11] The adoption of a compliance defense not only will increase compliance with the FCPA by providing businesses with an incentive to develop and enforce strong compliance programs that effectively deter and identify violations, but also will protect businesses from incurring potentially significant liability as a result of conduct by employees who commit crimes despite a business's diligence. Otherwise, the system in place is one with conflicting and even perverse incentives. On the one hand, an effective compliance program can hold out a qualified promise of indeterminate benefit should a violation occur and be disclosed, as it would have to be as part of such a program. On the other hand, if all that can be achieved is that qualified and indeterminate benefit, there is a perverse incentive not to be too aggressive lest wrongdoing be discovered, and a consequent tendency for standards to seek the lowest common denominator, or at best something that is only a slight improvement over it.

2. Clarifying the Meaning of "Foreign Official"

The FCPA prohibits corrupt payments or offers of payment to foreign officials, but does not provide adequate guidance on who is a "foreign official" for purposes of the statute. Under the FCPA, a "foreign official" is defined as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization,[12] or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization."[13] The statute does not, however, define

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[11] It is quite clear that and accepted reality that no system of internal controls can prevent all forms of willful deceit. The SEC itself recognizes this proposition. *See* SEC Div. of Corp. Fin., Staff Statement on Management's Report on Internal Controls Over Financial Reporting (2005) ("[D]ue to their inherent limitations, internal controls cannot prevent or detect every instance of fraud. Controls are susceptible to manipulation, especially in instances of fraud caused by the collusion of two or more people including senior management.").

[12] A "public international organization" is "(i) an organization that is designated by Executive order pursuant to section 288 of title 22; or (ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register." 15 U.S.C. §§ 78dd-1(f)(1)(B), 78dd-2(h)(2)(B), 78dd-3(f)(2)(B).

[13] 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).

"instrumentality."[14] It is therefore unclear what types of entities are "instrumentalit[ies]" of a foreign government such that their employees will be considered "foreign officials." As a result, it is often difficult for companies to determine when they are dealing with "foreign officials," particularly in markets in which many companies are at least partially state-owned.

The DOJ's and SEC's enforcement of the FCPA make clear that they interpret the terms "foreign official" and "instrumentality" extremely broadly. From the government's perspective, once an entity is defined as an "instrumentality", all employees of the entity – regardless of rank, title, role or position – are considered "foreign officials."[15] The DOJ's current perspective is illustrated by a recent statement by an Assistant Chief of the DOJ's Fraud Section, who said, "[i]t's not necessarily the wisest move for a company" to challenge the definition of "foreign official," and "[q]uibbling over the percentage ownership or control of a company is not going to be particularly helpful as a defense."[16]

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[14] By contrast, the Foreign Sovereign Immunities Act includes a clear and time-tested definition of "instrumentality," illustrating that the lack of such a definition in the FCPA can be readily cured:

> "An 'agency or instrumentality of a foreign state' means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in [28 U.S.C. § 1332 (c), (e)], nor created under the laws of any third country."

28 U.S.C. § 1603(b).

[15] Taken to its logical conclusion, the government's position means that – if the United States were a foreign government – employees of General Motors or AIG could be considered "foreign officials" of the United States government, because the government owns portions of each company.

[16] Christopher M. Matthews, "DOJ Official Warns Against Challenging Foreign Official Definition in FCPA Cases" (May 4, 2011), *available at* www.mainjustice.com/justanticorruption.

The DOJ's position recently has met with some success in the courts: two judges recently rejected defense motions arguing that employees of state-owned enterprises are not "foreign officials" under the FCPA. Yet, in doing so, the courts recognized that there are limits on the definition of instrumentality – but neither court clarified what those limits are. On April 20, 2011, Judge A. Howard Matz of the Central District of California, while concluding that the particular enterprise at issue may be an "instrumentality" of a foreign government, found that Congress did not intend either to include or to exclude *all* state-owned enterprises from the ambit of the FCPA.[17] On May 18, 2011, Judge James V. Selna, also of the Central District of California, denied a similar motion, holding that whether a state-owned enterprise qualifies as an "instrumentality" is a question of fact for the jury to decide based on a variety of factors, including the level of investment in the entity by a foreign state, the foreign state's characterization of the entity and its employees, the foreign state's degree of control over the entity, the purpose of the entity's activities, the entity's obligations and privileges under the foreign state's law, the circumstances surrounding the entity's creation and the foreign state's extent of ownership of the entity.[18]

If the definitions of these fundamental statutory terms vary by circumstance and by case, and therefore must be determined by a jury rather than as a matter of law, it becomes impossible for companies to determine in advance what conduct may and may not present a meaningful risk of violating the FCPA. This approach to which foreign companies qualify as "instrumentalities" of foreign governments and who may be a "foreign official" engenders tremendous uncertainty and creates barriers to U.S. businesses seeking to sell their goods and services in foreign markets. Without a clear understanding of the parameters of "instrumentality" and "foreign official," companies have no way of knowing whether the FCPA applies to a particular transaction or business relationship, particularly in countries like China where most if not all companies are at least partially owned or controlled by the state.

The FCPA should therefore be amended to clarify the meaning of "instrumentality" and "foreign official." The statute should indicate the percentage ownership by a foreign government that will qualify a corporation as an "instrumentality," with majority ownership as the most plausible threshold; whether ownership by a foreign official necessarily qualifies a company as an instrumentality and, if so, whether the foreign official must be of a particular rank or the ownership must

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[17] *U.S. v. Noriega, et al.*, No. 02:10-cr-01031-AHM, Criminal Minutes – General (C.D. Cal. Apr. 20, 2011), ECF No. 474, at 2, 14.

[18] *U.S. v. Carson, et al.*, No. 08:09-cr-00077-JVS, Criminal Minutes – General (C.D. Cal. May 18, 2011), ECF No. 373, at 5.

reach a certain percentage threshold; and to what extent "control" by a foreign government or official will qualify a company as an "instrumentality."

3. Improving Guidance from the DOJ

The FCPA, as amended, permits the DOJ to issue advisory opinions and guidelines regarding compliance with the statute. In practice, though, such opinions and guidance are issued infrequently by the DOJ. For its part, the SEC has not issued advisory opinions on FCPA-related questions and does not have a process for doing so. This near-absence of a meaningful advisory opinion process represents a lost opportunity for the enforcement agencies to provide practical guidance to the business community and thereby enhance FCPA compliance.

The 1988 amendments to the FCPA require the DOJ to issue opinions in response to questions regarding whether prospective conduct would conform with the DOJ's enforcement policies.[19] A rebuttable assumption of compliance with the FCPA applies to conduct that the DOJ identifies as conforming to its FCPA enforcement policies. Unfortunately, this advisory procedure is rarely used. The opinion archive of the DOJ's Fraud Section shows that the DOJ has issued only 33 opinions in more than 18 years, an average of about 1.8 opinions per year.[20]

The 1988 amendments also required the DOJ to determine, following consultation with other agencies and a public notice and comment period, whether the business community's compliance with the FCPA would be enhanced or assisted by "further clarification of the [FCPA's anti-bribery provisions]."[21] In the event the DOJ concluded such clarification was warranted, it was authorized to issue guidelines describing conduct that would conform to the FCPA's anti-bribery provisions.[22] In addition, or as an alternative, it was authorized to offer "general precautionary procedures" that companies

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[19] The 1988 amendments were enacted as Title V of the Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418.

[20] *See* http://www.justice.gov/criminal/fraud/fcpa/opinion/ for a complete list of opinions issued from 1993 to 2010. As of June 8, 2011, no opinions had been issued in 2011.

[21] Guideline issuance authority remains codified at 15 U.S.C. § 78dd-1(d) and 15 U.S.C. § 78dd-2(e).

[22] *Id.*

could implement voluntarily to conform their conduct to the requirements of the FCPA.[23] In accordance with the 1988 amendments, the DOJ invited interested parties to submit their views concerning the extent to which the business community's compliance with the FCPA would be enhanced by the issuance of guidelines.[24] On July 12, 1990, the DOJ formally declined to issue guidelines. The Federal Register notice announcing the decision stated simply that, "[a]fter consideration of the comments received, and after consultation with the appropriate agencies, the Attorney General has determined that no guidelines are necessary."[25] The DOJ does not appear to have reconsidered the issuance of guidelines in the two decades since 1990.

The overwhelming majority of businesses operating in the U.S. or listed on U.S. exchanges seek in good faith to ensure that they do not violate the requirements of the FCPA, and therefore would find meaningful advisory opinions and guidelines from both the DOJ and the SEC to be tremendously useful in reviewing and monitoring their conduct and practices, improving their internal controls and enhancing their compliance programs. An active advisory opinion process and robust guidelines from the enforcement agencies would likely result in a higher level of compliance by companies subject to the FCPA.

4. Limiting Criminal Successor Liability

Currently, a company may be held criminally liable under the FCPA for the actions of a company that it acquires or merges with – even if those actions took place prior to the acquisition or merger and were entirely unknown to the acquiring company.[26] Such criminal successor liability is at odds with the basic principles and goals of criminal law, including punishing only culpable conduct or deterring offending behavior. While a

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[23] *Id.*

[24] 54 Fed. Reg. 40,918 (Oct. 4, 1989).

[25] 55 Fed. Reg. 28,694 (July 12, 1990).

[26] *See, e.g.*, Department of Justice FCPA Opinion Procedure Release No. 03-01 (Jan. 15, 2003), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2003/0301.pdf (advising that a company that conducted due diligence on a target company and self-reported any violations that took place pre-acquisition may be able to escape criminal and/or civil successor liability, thereby suggesting that successor liability was a viable theory of liability under the FCPA).

company may mitigate its risk by conducting due diligence prior to an acquisition or merger (or, in certain circumstances, immediately following an acquisition or merger),[27] such due diligence does not provide a legal defense, but merely a circumstance that the DOJ may consider when deciding whether to exercise its discretion not to prosecute. Thus, even when an acquiring company has conducted exhaustive due diligence and immediately self-reported the suspected violations of the target company, it is still legally susceptible to criminal prosecution and substantial penalties. Its only recourse is an appeal to the prosecutorial discretion of the DOJ.

Examples of the application of criminal successor liability under the FCPA include the recent Snamprogetti and Alliance One cases. Snamprogetti was a wholly-owned Dutch subsidiary of ENI S.p.A. From approximately 1994 to 2004, Snamprogetti participated in a bribery scheme.[28] In 2006, after the conduct at issue had ended, ENI sold Snamprogetti to Saipem S.p.A. The DOJ ultimately reached a deferred prosecution agreement in connection with these charges, and the parties to that agreement included Snamprogetti, ENI and Saipem.[29] Under the terms of the deferred prosecution agreement, Saipem is jointly and severally liable for the $240 million fine imposed on Snamprogetti, and its inclusion in the deferred prosecution agreement reflects that it is being held criminally liable for Snamprogetti's conduct on a theory of successor liability. Alliance One was formed in 2005 by the merger of Dimon Incorporated ("Dimon") and Standard Commercial Corporation ("SCC"). Employees and agents of two foreign subsidiaries of Dimon and SCC committed FCPA violations prior to the merger.[30] In 2010, the DOJ brought a criminal case against Alliance One on a successor liability

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[27] *See* Department of Justice FCPA Opinion Procedure Release No. 08-02 (Jun. 13, 2008), *available at* http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0802.html (providing advice on proper post-acquisition due diligence in the rare situation where it was impossible for the acquiring company to perform due diligence on the target prior to acquisition).

[28] *See* Criminal Information, *United States v. Snamprogetti Netherlands B.V.*, Crim. No. H-10-460 (S.D. Tex. Jul. 7, 2010).

[29] *See* Deferred Prosecution Agreement, *United States v. Snamprogetti Netherlands B.V.*, Crim. No. H-10-460 (S.D. Tex. Jul. 7, 2010).

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

theory, ultimately entering into a non-prosecution agreement.[31] In both cases, the conduct that constituted an FCPA violation took place entirely at a predecessor entity prior to a merger or acquisition, yet the successor entity was subjected to liability for that conduct.

The threat of criminal successor liability even if thorough investigation is undertaken prior to a transaction has had a significant chilling effect on mergers and acquisitions. For example, Lockheed Martin terminated its acquisition of Titan Corporation when it learned about bribes paid by Titan's African subsidiary that were uncovered during pre-closing due diligence; Lockheed Martin was unwilling to assume the risk of successor liability for those bribes under the FCPA.[32]

Under basic principles of criminal law, a company, like a person, should not be held liable for the actions of another company with which it did not act in concert. Yet in the FCPA context, due to the DOJ's position on criminal successor liability, that is just what is happening. The DOJ's position on criminal successor liability contrasts with the application of successor liability in civil litigation, where the doctrine originated. In the civil context, the question of whether such liability can be imposed generally requires a complex analysis of a variety of factors, including whether the successor company expressly agreed to assume the liability and whether a merger or acquisition veiled a fraudulent effort to escape liability. Courts may also look to whether it is actually in the public interest to impose such liability. *See, e.g., United States v. Cigarette Merchandisers Ass'n, Inc.*, 136 F. Supp. 214 (S.D.N.Y. 1955).

Clear parameters for criminal successor liability under the FCPA are needed. A company should not be held criminally liable for pre-acquisition violations by an acquiree. If the successor company inherits employees who continue to commit FCPA violations, such new or continuing conduct may appropriately be imputed to the new

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[31] *See, e.g.*, Complaint, *Securities and Exchange Commission v. Alliance One International, Inc.*, Civil Action No. 01:10-cv-01319 (RMU) (D.D.C. Aug. 6, 2010), *available at* http://www.sec.gov/litigation/complaints/2010/comp21618-alliance-one.pdf (describing the merger in ¶ 1 of the Complaint, and then detailing the actions taken by the Dimon and SCC subsidiaries, which formed the basis for the charges against Alliance One).

[32] *See* Margaret M. Ayres and Bethany K. Hipp, *FCPA Considerations in Mergers and Acquisitions*, 1619 PLI/CORP 241, 249 (Sept. 17, 2007); *see also* SEC Litig. Rel. No. 19107, 2005 WL 474238 (Mar. 1, 2005), *available at* http://www.sec.gov/litigation/litreleases/lr19107.htm.

company. However, criminal conduct by employees of one company, pre-acquisition, should not be imputed to a different company (the acquirer). That would amount to an extraordinary expansion of the doctrine of *respondeat superior* (imputation of current employee conduct to an employer). If a company conducts reasonable due diligence regarding an acquisition, the company should as a matter of law (rather than merely as a matter of the government's discretion) not be subject to criminal liability for pre-acquisition conduct by the acquired entity.[33]

5. Adding a "Willfulness" Requirement for Corporate Criminal Liability

Although the FCPA expressly limits an individual's liability for violations of the anti-bribery provisions to situations in which that individual has violated the Act "willfully," it does not contain any similar limitation for corporations.[34] This inconsistency in the statutory language substantially extends the scope of corporate criminal liability: a company can face criminal penalties for a violation of the FCPA even if there is no identifiable person of authority who knew that the conduct was unlawful or even wrong. Given that corporations act through their employees or agents and therefore can be liable only if an individual for whom the corporation is liable has committed the criminal act, it should not be possible to convict a corporation unless the employee is liable. Such individual liability requires willful conduct, and so should corporate liability.

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[33] What constitutes sufficient due diligence necessarily will vary depending on the risks in a given transaction – e.g., whether the target company does significant business in regions that are known for corruption – and the size and complexity of the transaction. But sufficient due diligence should not require a full internal investigation and the expenditure of extraordinary resources by the company. Instead, guidance from the DOJ could outline standards for such diligence and identify factors that will be considered in determining whether diligence was adequate.

[34] 15 U.S.C. § 78dd-3(a)(2). The anti-bribery provisions do contain a requirement that conduct in furtherance of an improper payment must be "corrupt" in order to constitute an FCPA violation, and this requirement applies to both corporate entities and to individuals. *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a). The FCPA does not define the word "corruptly," but courts interpret it to mean an act that is done "voluntarily and intentionally, and with a bad purpose." *See, e.g., United States v. Kay*, 513 F.3d 461, 463 (5th Cir. 2008). The requirement that an individual's conduct be "willful" in addition to "corrupt" necessitates a showing that not only was the act in question performed with a bad purpose, but with the knowledge that conduct was unlawful. *Id.* at 463-64.

Adding a willfulness requirement for corporate criminal liability also will help address another area of concern in the FCPA: the potential liability of a parent company for acts of a subsidiary that are not known to the parent.[35] Nothing in the legislative history indicates that the FCPA was intended to allow a parent corporation to be charged with criminal violations of the anti-bribery provisions if it had no direct or even indirect knowledge of improper payments by a subsidiary. At most, the drafters indicated that if a parent company's ignorance of the actions of a foreign subsidiary resulted from conscious avoidance of knowledge, the parent "could be in violation of section 102 requiring companies to devise and maintain adequate accounting controls."[36]

Furthermore, because the DOJ and SEC have construed their FCPA jurisdiction to extend to acts that have only the most attenuated of connections to the United States, the lack of a "willfulness" requirement means that corporations can be held criminally liable for FCPA anti-bribery violations in situations where they not only do not have knowledge of the improper payments, but also do not even know that U.S. law is applicable to the conduct at issue. In such a case, the parent corporation could be charged with violations of the anti-bribery provisions even if it was unaware that the FCPA could reach such conduct.

The "willfulness" requirement therefore should be extended to corporate criminal liability under the FCPA. This amendment would significantly reduce the likelihood that a company will be criminally sanctioned for FCPA violations of which the company had no direct knowledge. The risk of criminal liability for conduct outside the control or knowledge of any person of authority at the company also would be mitigated by the addition of a rebuttable presumption that gifts of truly de minimis value – a trinket bearing the company logo or a modest business lunch – shall be presumed not to violate the FCPA. Similarly, rather than the current strict liability standard for books and records and internal controls violations, under which companies can be charged regardless of how small the payment in question, there should be a materiality standard. This would bring the FCPA in line with other securities laws.

6. Limiting Parent Liability for Subsidiary's Conduct Not Known to the Parent

The SEC has charged parent companies with civil violations of the anti-bribery provisions of the FCPA based on actions of which the parent is entirely ignorant taken by

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[35] *See infra* Section 6.

[36] *See* S. Rep. No. 95-114, at 11 (1977).

foreign subsidiaries.[37] This approach is contrary to the statutory language of the anti-bribery provisions, which – even if they do not require evidence of "willfulness," as discussed above – do require evidence of knowledge and intent for liability. It is contrary to the position taken by the drafters of the FCPA, who recognized the "inherent jurisdictional, enforcement and diplomatic difficulties raised by the inclusion of foreign subsidiaries of U.S. companies in the direct prohibitions of the bill" and who made clear that an issuer or domestic concern should be liable for the actions of a foreign subsidiary only if the issuer or domestic concern engaged in bribery by acting "through" the subsidiary.[38] It also appears to be at odds with the DOJ's stated position that a parent corporation "may be held liable for the acts of [a] foreign subsidiary[y] [only] where they authorized, directed, or controlled the activity in question."[39]

I am aware of no explanation or rationale for the government's theory that a parent company can be liable for a subsidiary's violations of the anti-bribery provisions where the activity was not "authorized, directed or controlled" by the parent or where the parent did not itself act "through" the subsidiary, but, to the contrary, where the subsidiary's improper acts were undertaken without the parent's knowledge, consent, assistance or approval. Nor has that theory been tested in court. In the absence of any judicial guidance on the contours and the limits, if any, of this potential parent-company liability, it remains a source of significant concern for American companies with foreign subsidiaries. The fact that a parent may exercise "control" of the corporate actions of a foreign subsidiary should not, without more, expose the parent company to liability under the anti-bribery provisions of the FCPA where it did not direct, authorize or even know of the improper payments at issue.

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[37] For example, in 2009, the SEC charged United Industrial Corporation ("UIC"), an American aerospace and defense systems contractor, with violations of the FCPA's anti-bribery provisions based on allegations that a UIC subsidiary made improper payments to a third party, but did not allege that UIC had any direct knowledge of the improper payments. *See In re* United Industrial Corp., Exchange Act Release No. 60005, 2009 WL 1507586 (May 29, 2009), *available at* http://www.sec.gov/litigation/admin/2009/34-60005.pdf; SEC Litig. Rel. No. 21063, 2009 WL 1507590 (May 29, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr21063.htm.

[38] *See* H.R. Conf. Rep. 95-831, at 14 (1977). *See also supra* fn 36 and accompanying text (the drafters intended that actions of a foreign subsidiary unknown to a parent company could constitute FCPA liability only under the books-and-records and internal controls provisions, and not under the anti-bribery provisions).

[39] Department of Justice, *Layperson's Guide to FCPA*, *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf.

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The reforms I have discussed today, by providing greater clarity and certainty to the business community, will provide incentives for compliance and help ensure that companies operating in the U.S. or listed on its securities exchanges adhere to high legal and ethical standards when doing business abroad. These amendments also will focus the investigative resources of the DOJ and SEC on the corrupt business practices that were the principal concern of Congress when it enacted the FCPA and that both the government and the business community seek to eradicate. The result will be a statute that is both stronger and fairer.

Mr. SENSENBRENNER. Thank you, Judge Mukasey.
Mr. Terwilliger?

**TESTIMONY OF GEORGE J. TERWILLIGER, III,
PARTNER, WHITE & CASE LLP**

Mr. TERWILLIGER. Thank you, Mr. Chairman, Ranking Member Scott, Mr. Conyers.

Mr. SENSENBRENNER. Mr. Terwilliger, could you move the mic closer and make sure it is on? And reset the clock, please.

Mr. TERWILLIGER. Thank you. Mr. Chairman, Ranking Member Scott, Mr. Conyers, it is always a privilege to be asked to join the Committee in this room. I thank you and the Committee Members for the privilege of coming back.

At the outset, I would like to put my further remarks in this context. I favor the fair enforcement of sensible anti-corruption statutes because corrupt markets cannot be free markets. In international commerce specifically, a level playing field is essential to free market competition, and I believe American businesses are well positioned to succeed in free and fair competition.

Today I endeavor to bring to our discussion my experience both in public service and in the private practice of law which you so kindly made reference to, Mr. Chairman.

The Department of Justice and the Securities and Exchange Commission are realizing the enforcement goal of driving companies into far greater compliance with the FCPA than has ever before been achieved. But there is another less desirable effect that results from the combination of greatly stepped up enforcement combined with the uncertainty of the precise legal parameters of conduct subject to the requirements and proscriptions of this statute. That hidden effect is the cost imposed on our economic growth when companies forgo business opportunity out of concern for FCPA compliance risk. This hurts the creation of jobs and the ability of U.S. companies to compete with companies elsewhere that do not have to concern themselves with uncertainties of the terms and requirements of the FCPA.

I and the practice group which I chair at White & Case guide companies through comprehensive FCPA risk assessments and counsel companies seeking to create or improve robust compliance programs. We also advise companies on FCPA matters in the context of contemplated or ongoing business transactions and projects. I am able to draw on this personal experience and with confidence convey to the Committee that there is hidden cost borne of the uncertainties attached to FCPA compliance risk. In calculating the risk arising from FCPA compliance obligations against the benefits of a given business venture, uncertainties exist as to the requirements of the FCPA and its interpretation and application by enforcement authorities.

When faced with that uncertainty, companies sometimes forgo deals they could otherwise do, take a pass on contemplated projects, or withdraw from ongoing projects and ventures. Companies making such decisions are not doing so because they are generally risk-averse. They are doing so by the simple reasoning that the risk of non-compliance, as defined by the statute and those charged with its enforcement, cannot be calculated with sufficient certainty.

Thus, I commend consideration of legislative reform that can help to clarify ambiguity in the statute and its application. Others,

both here today and in other fora, have suggested terms of the statute that would benefit from further definition or clarification. I would add to those suggestions these further considerations.

First, I believe it is worthy to consider providing by statute a post-closing period of repose for companies involved in acquisitions during which they would be shielded from FCPA enforcement while undertaking a review of FCPA compliance in the acquired business and undertaking steps to remediate potential FCPA issues that are discovered as a result of that review.

Providing that an acquiring company would have a period of time from the date of acquisition to conduct a thorough assessment, remediate existing misconduct and impose its compliance policies upon the acquired company is consistent with the core objectives of FCPA enforcement and presents no hazard to the fundamental objectives of the statute itself.

Second, a statutory safe-harbor provision in the law could provide companies that strive for anti-corruption compliance with increased certainty that their efforts will provide them with some level of protection from FCPA liability. Such a provision could shield from criminal liability companies that operate demonstrably robust compliance programs and that self-report any misconduct that arises despite their best efforts. It makes no sense to me to engage in criminal prosecution of a company that operates a state-of-the-art compliance program and that investigates, corrects and self-reports its own non-compliant circumstances.

My written statement contains additional detail as to these suggestions and further observations on proposals outlined by others. I look forward to answering any questions the Subcommittee may have and to discussing these matters with Members today or members of staff on any other occasion.

Thank you.

[The prepared statement of Mr. Terwilliger follows:]

Testimony of
George J. Terwilliger III, Esq.
Partner, White & Case LLP

Before the

House Judiciary Committee
Subcommittee on Crime, Terrorism and Homeland Security
Hearing on
The Foreign Corrupt Practices Act
Tuesday, June 14, 2011

Mr. Chairman, Ranking Member, and Members of the Subcommittee, thank you for the opportunity to discuss reforms to the Foreign Corrupt Practices Act, commonly referred to as the FCPA.

At the outset, please allow me to put my further remarks in context. I favor the fair enforcement of sensible anti-corruption statutes because corrupt markets cannot be free markets. In international commerce specifically, a level playing field is essential to free market competition and I believe American businesses are well positioned to succeed in free and fair competition.

Today, I endeavor to bring to our discussion the benefit of my experience of fifteen years in the Department of Justice, including the privilege of serving as Deputy Attorney General, United States Attorney and front-line federal prosecutor, as well as experience since in my work as head of the global White Collar Practice at White & Case LLP, where I have advised US, foreign and multinational clients on FCPA and other enforcement matters.

Considerations for Reform of the FCPA

Over the past several years the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") have put renewed vigor into the enforcement of the FCPA and that has resulted in compliance with this and similar statutes being a matter of major concern to US and multinational companies. Indeed, it is widely reported that US and foreign companies spend millions on FCPA and related compliance efforts, including internal investigations and cooperation with government investigations.[1] Penalties in enforcement actions cost even more. In 2010 alone, US enforcement authorities collected $1.8 billion in FCPA-related fines, penalties and disgorged profits.

[1] For example, Avon Products reported in its quarterly filing in February that the company spent $59 million in 2009 and $96 million in 2010 on "professional and related fees associated with [its] FCPA investigation and compliance reviews." Avon Products, 10-K filing, Feb. 24, 2011. Other examples include Siemens AG which spent approximately $850 million in legal and accounting fees during the course of a 2 year investigation and Daimler AG which spent approximately $500 million in legal and accounting fees during the course of a 5 year investigation. Michael Kendall & Paul Thompson, *Managing the Budget of an International White-Collar Investigation*, Corporate Counsel, August 17, 2010.

The DOJ and the SEC have stepped up enforcement by adding dedicated FCPA resources, by conducting industry-wide investigative sweeps and utilizing aggressive investigative techniques typically reserved for non-white collar crimes.

These authorities are realizing the enforcement goal of driving companies into far greater compliance with this law than has ever before been achieved. However, the combination of greatly stepped up enforcement combined with uncertainty of the precise legal parameters of conduct subject to the requirements and proscriptions of this statute carries a hidden cost as well. That hidden effect is the cost imposed on our economic growth when companies forgo business opportunity out of concern for FCPA compliance risk. This hurts the creation of jobs and the ability of US companies to compete with companies that do not have to concern themselves with the uncertainties of the terms and requirements of the FCPA.

I and my practice group colleagues guide companies through comprehensive FCPA risk-assessments and counsel companies seeking to create or improve robust anti-corruption compliance policies and programs. We also advise companies on FCPA matters in the context of contemplated or ongoing business transactions and projects. I am able to draw on this personal experience and confidently convey to the Subcommittee that there is in fact a hidden cost born of the uncertainties attached to FCPA compliance risk. In calculating the risk arising from FCPA compliance obligations against the benefits of a given business venture, uncertainties exist as to the requirements of the FCPA and its interpretation and application by enforcement authorities. When faced with that uncertainty, companies sometimes forgo deals they could otherwise do, take a pass on contemplated projects or withdraw from ongoing projects or ventures. Companies making such decisions are not doing so because they are generally risk-averse. They are doing so by the simple reasoning that the risk of non-compliance, as defined by the statute and those charged with its enforcement, cannot be calculated with sufficient certainty. This is not merely the result of consideration of monetary risk, even though the cost of an FCPA investigation that results in no penalties can be great. Companies must also account for the risk to reputation that can arise from the mere suggestion or investigation of FCPA compliance issues. The uncertainties which occasion these hidden costs to our economy are grounded in both the terms of the statute and the parameters of its enforcement.

Uncertainty as to the FCPA's terms has existed since the law was enacted in 1977. Two prior amendments to the statute have tried to remedy some of that uncertainty, but have simply not, in my judgment, done enough. Because there are few occasions for challenges in adversarial judicial proceedings to the DOJ's interpretation of the FCPA, federal prosecutors have broad discretion to interpret and apply its terms. The result is that today what might loosely be called "prosecutorial common law" more defines the terms of the statute than do the terms of the law as established by Congress.

Thus, I commend consideration of legislative reform that can help to clarify ambiguity in the statute and its application. Others, both here today and in other fora, have suggested terms of the statute that would benefit from further definition and/or clarification. I would add to those suggestions these further considerations.

First, a reform I believe worthy of consideration is providing by statute a post-closing period of repose for companies involved in acquisitions during which they would be shielded

from FCPA enforcement while undertaking review of FCPA compliance in the acquired business and undertaking steps to remediate potential FCPA issues discovered as a result of that review. Providing that an acquiring company would have a period of time from the date of acquisition to conduct a thorough risk assessment, remediate existing misconduct and impose its compliance policy upon the acquired company is consistent with the core objectives of FCPA enforcement and presents no hazard to the fundamental objectives of the statute itself.

Second, a statutory safe-harbor provision in the law could provide companies that strive for anti-corruption compliance with increased certainty that their efforts will provide them with some level of protection from FCPA liability. Such a provision could shield from criminal liability companies that operate demonstrably robust compliance programs and that self-report the misconduct in question that arises despite their best efforts. It makes no sense to me to engage in criminal prosecution of a company that operates a state of the art compliance program and that investigates, corrects and self-reports non-compliant circumstances that do arise. I think many if not most prosecutors would agree with me on that proposition and have so concluded in the context of enforcement decisions, at least in some cases. But doubt as to the precise benefits of voluntary disclosure under existing enforcement policy produces uncertainties. Such uncertainty could be replaced with a bright line providing that companies acting responsibly on the terms which I have outlined would have a safe harbor from criminal liability even where a violation arose despite their best efforts.

Providing for greater certainty in the terms of the statute and its enforcement promotes good corporate compliance practices and that helps secure further the statute's objectives to promote corruption free markets. It has the added benefit of helping to allow business decisions to be grounded more in business terms rather than legal risk analysis.

The following provides additional detail as to these suggestions.

Successor Liability Reform

The first proposed reform balances the regulatory interest of eliminating market-distorting corrupt practices with the national interest in promoting business growth and prosperity.

One of the biggest challenges of the FCPA to American business arises in the context of mergers and acquisitions of or involving foreign business operations. This issue takes on even greater importance today as we can easily recognize that growth at home—and the jobs that come with it—is in part dependent on US companies being able to globalize their operations in significant measure through overseas acquisitions and mergers. However, the enforcement environment today can deter not just foreign business transactions where there are indications that FCPA non-compliant practices may lurk, but also may deter potentially beneficial and profitable opportunities where that risk cannot be determined by usual pre-acquisition due diligence.

While pre-acquisition anti-corruption due diligence is necessary to help identify instances of misconduct that might expose a US acquirer to successor liability, the extent of such examination is in most instances limited by the terms of the deal and/or law. Because of those

limitations, companies may walk away from potential acquisitions not because of an identifiable corruption issue, but because they were not able to determine with certainty that no FCPA issues existed. Under current law, an acquiring company becomes liable after the date of acquisition for unlawful payments made by the target company thereafter. The DOJ has also pursued FCPA enforcement actions based on a successor liability theory for payments arising prior to acquisition.[2]

I believe an amendment to the FCPA is worthy of consideration that would provide that if in a defined period after an acquisition closes, a company conducts a detailed compliance assessment of the acquired company's operations, promptly discloses to the government and remediates any non-compliant conduct uncovered, the acquiring company would be immune from penalty for FCPA violations occurring in the acquired operations during or prior to that period.[3] This would both incentivize and allow an acquiring company the opportunity to uncover issues not identified during pre-acquisition due diligence and to quickly and fully integrate the acquired entity into its compliance program. A post-acquisition period of repose would, by providing both an incentive to and a means for US companies to uncover and resolve FCPA issues, represent a reasoned approach to application of FCPA standards in the context of international transactions.

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[2] For example, two foreign subsidiaries of Alliance One, an American company, settled FCPA charges as successors in liability for pre-merger conduct. Alliance One was formed with the merger of Dimon Incorporated and Standard Commercial Corporation in 2005. Alliance One settled charges based on conduct occurring between 2000 and 2004 paying a total of $9.45 million in criminal penalties. DOJ Press Release, Alliance One International Inc. and Universal Corporation Resolve Related FCPA Matters Involving Bribes Paid to Foreign Government Officials, August 6, 2010, *available at* http://www.justice.gov/opa/pr/2010/August/10-crm-903.html.

[3] This is not foreign to enforcement policy, based at least on the DOJ's own framework articulated in a 2008 opinion procedure release and more recently in a deferred prosecution agreement with Johnson & Johnson. In 2008, an US company, submitted an opinion procedure release request regarding a potential acquisition. Opinion Procedure Release, No. 08-02 (June 13, 2008), available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf. The acquiring company had limited ability to conduct meaningful pre-acquisition FCPA due diligence because of legal restrictions on disclosures during the bidding process. In response to its request, the DOJ agreed to delay action for 180 days against the company for possible FCPA violations resulting from the acquisition, contingent upon a rigorous post-closing plan requiring FCPA due diligence and disclosure. Under the DOJ's "post-closing plan," that company was obligated to retain external counsel and third-party consultants to conduct due diligence; complete high-risk due diligence within 90 days, medium-risk due diligence within 120 days, and low-risk due diligence within 180 days; institute its own Code of Business Conduct with anti-corruption policies and procedures; and disclose any violations.

More recently, the DOJ provided a slightly less rigid framework for acquisition due diligence in a deferred prosecution agreement with Johnson & Johnson. The deferred prosecution agreement requires pre-acquisition due diligence, but notes that "[w]here such anticorruption due diligence is not practicable prior to acquisition of a new business for reasons beyond J&J's control, or due to any applicable law, rule, or regulation, J&J will conduct FCPA and anticorruption due diligence subsequent to acquisition and report to the Department." Johnson & Johnson, Deferred Prosecution Agreement, Attachment D, dated January 14, 2011 (filed April 8, 2011).

Further, the DOJ mandated that Johnson & Johnson take the following steps: institute its anti-corruption policies and procedures as quickly as possible and in any event less than one year post-closing; train directors, officers, employees, third-parties and joint venture partners on anti-corruption laws and the company's policies and procedures; and conduct an FCPA-specific audit of the newly acquired company within 18 months of acquisition.

Although the DOJ limits the terms of its opinion procedure release and deferred prosecution agreement to only the company party to a decision, these statements from the DOJ can provide useful guidance to Congress when crafting an effective due diligence waiting period. The DOJ, itself, has drafted and endorsed these terms.

Self-Reporting Safe Harbor

Companies have gone to great efforts to conduct risk assessments, develop and implement compliance policies, and monitor compliance efforts. Both US and foreign companies have heeded the advice of anti-corruption compliance experts, designated anti-corruption compliance personnel and generally enjoy support for these efforts from their senior managers, audit committees and boards of directors. Despite these time and cost intensive efforts, companies have to consider that they are still vulnerable to the same potential penalties as though they had taken no such actions at all.

Federal enforcement authorities have consistently encouraged, if not as a practical matter demanded, that as to the FCPA companies voluntarily conduct internal investigations, disclose potential violations and cooperate with government investigations. The government has consistently said and in practice provided some benefit to companies that take such steps. However, companies considering those steps, especially self-reporting, have to face uncertain benefits of voluntary disclosure and the uncertain reaction of the DOJ to disclosed misconduct.[4]

A presumption against criminal prosecution where companies operate robust compliance programs and voluntarily report their own misconduct would balance the interests of companies and enforcement agencies. I am not advocating amnesty for self-reporting. The government could still impose penalties, but the threat of criminal enforcement would be eliminated and standards can be adopted to produce more certainty as to reductions in penalties where companies self-report. Enforcement authorities would likely see an increase in the number of companies voluntarily disclosing and instituting remedial measures in a transparent manner and government resources would be conserved by avoiding expenditures on companies which, by

[4] Corporate compliance efforts are being further threatened by the new SEC whistleblower bounty program, part of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). US companies have expended significant time, resource and funds to develop robust internal reporting systems to identify and remediate misconduct. Under the new whistleblower program, a whistleblower may circumvent internal reporting channels and go directly to the SEC to report misconduct. Whistleblowers stand to receive a windfall with little incentive to report such conduct internally. This is compounded by advertisements by plaintiff's attorneys luring individuals to blow the whistle on their employer with the promise of "substantial compensation, potentially millions of dollars." http://www.foreign-corrupt-practices-act.org/ (visited June 9, 2011). After urging by US companies, the US Chamber of Commerce, and other business advocacy groups to protect the internal reporting mechanisms vital to effective compliance programs, the SEC adopted final rules which, I respectfully submit, do not do enough to mitigate the threat to US companies' compliance efforts occasioned by reporting encouraged under the whistleblower program. For example, the SEC final rules do not require whistleblowers to first report their information through internal compliance channels, even where proven and effective internal reporting systems exist. This omission by the SEC stands at odds with other policy and statutory guidance, including within Sarbanes-Oxley, that encourages effective internal compliance reporting structures and even penalizes the absence of such structures.

Another matter meriting consideration in this context, if not independent congressional review and monitoring, are the recent reports that the SEC is using "risk metrics" and analytics to target potential areas of misconduct. While there are not yet sufficient facts available about this enforcement policy from which to draw definitive judgments, these reports suggest that SEC investigations of companies are being undertaken where there is not even preliminary evidence or facts of record to suggest that a violation of law may have occurred. If that is the case, this will only add greatly to the uncertainties that currently attach to the business assessment of FCPA enforcement risk. Moreover, responding to such general inquiries could cost companies significant expenditures where there is no credible evidence to suggest a violation exists. While American businesses are struggling to regain a competitive edge in this bleak economic environment, regulators should not forestall growth of US businesses in international markets based on a statistical calculation of potential non-compliance with the FCPA.

their remedial conduct, demonstrate that they do not pose a significant corruption threat. Likewise, companies that have best-in-class compliance programs would be able to engage in business operations without the lingering specter of unquantifiable FCPA compliance risk.

In addition to addressing these two potential reforms, I would also like to comment on other provisions in the existing statute that deserve consideration for clarification.

Additional Considerations for Statutory Clarification

Clarification of the Definition of a "Foreign Official"

The language of the FCPA prohibits improper payments to foreign officials. The term "foreign officials" means "any officer or employee of a foreign government or any department, agency, or ***instrumentality*** thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization."[5] As with other provisions of the FCPA, the DOJ and SEC have adopted a broad interpretation of this provision.

Recent challenges to the definition of "foreign official" have highlighted ambiguity in the relevant terms of the FCPA. Of primary concern is whether and under what circumstances a state-owned enterprise is an "instrumentality" which brings its employees within the definition of "foreign official." The DOJ has construed the term "instrumentality" broadly to include state-owned enterprises. This interpretation went unchallenged for many years until several individual defendants and one company challenged the definition in two cases in the Central District of California and a pending challenge in the Southern District of Texas.[6] The case-by-case analysis

[5] 15 U.S.C. § 78dd-1, et seq.

[6] Lindsey Manufacturing and its executives challenged the government's position that employees of a Mexican state-owned utility were foreign officials under the FCPA. United States v. Noriega, et al., No. 10-1031 (C.D. Cal. April 20, 2011). Judge Howard A. Matz ultimately concluded that employees of the state-owned enterprise may be foreign officials under the FCPA. Judge Matz provided a list of characteristics that may make a state-owned enterprise an instrumentality: "the enterprise provides a service to the citizens – indeed, in many cases to all the inhabitants – of the jurisdiction; the key officers and directors of the enterprise are, or are appointed by, government officials; the enterprise is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties, such as entrance fees to a national park; the enterprise is vested with and exercises exclusive or controlling power to administer its designated functions; the enterprise is widely perceived and understood to be performing official (i.e., governmental) functions." United States v. Noriega, et al., No. 10-1031, at 9 (C.D. Cal. April 20, 2011).

In a similar challenge, former employees of Control Components, Inc. filed a motion to dismiss arguing that various state-owned enterprises to which improper payments were allegedly made were not instrumentalities. United States v. Carson et al., Case No. 09-00077 (C.D. Cal. May 18, 2011). Judge James V. Selna denied the defendants' motion. Judge Selna listed several characteristics to consider: "the foreign state's characterization of the enterprise and its employees; the foreign state's degree of control over the enterprise; the purpose of the enterprise's activities; the enterprise's obligations and privileges under the foreign state's law, including whether the enterprise exercises exclusive or controlling power to administer its designated functions; the circumstances surrounding the enterprise's creation; and the foreign state's extent of ownership of the enterprise, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans). Such factors are not exclusive, and no single factor is dispositive." United States v. Carson et al., Case No. 09-00077, at 5 (C.D. Cal. May 18, 2011).

While these legal challenges are helpful to highlight the uncertainty that individuals and companies face, these decisions fail to provide a workable framework.

of this question produces unnecessary uncertainty as to what entities need to be subject to companies' stepped up scrutiny for purposes of FCPA compliance.

While there is no theoretical reason to eliminate from a comprehensive anti-corruption statutory scheme any bribes, ambiguity in the terms of the FCPA, which has limited anti-bribery provisions, as to which recipients may be within its proscriptions results in uncertainty in risk analysis of circumstances where that may be a crucial determination. This has very practical implications. Gifts or other benefits that may be customarily provided in a commercial context and given without a corrupt intent, may nonetheless fall under the FCPA's jurisdiction if the recipients are employed by an enterprise whose ownership may be traced to a foreign state, no matter how attenuated from the government such enterprise may be.

Clarification on Facilitation Payments

Despite having been part of the FCPA since its enactment and clarified in the 1988 amendments, permissible facilitating payments are still very much a mystery for many companies. The facilitating payments exception exists in theory, but not in practice, because there are no well-defined parameters in the law as to what falls within the exception. The FCPA lists several illustrative examples of facilitating payments for routine government action, such as obtaining permits, licenses, or other official documents and processing governmental papers. But where is the line drawn between permissible facilitation and bribe? With the DOJ's expansive interpretation of the FCPA's prohibition, many companies which discover what appear to be benign facilitating payments can be left wringing their hands with uncertainty as to whether the practice violates the law. It is commonly understood that facilitating payments are relatively modest payments. But again, there is no guidance in the statute as to what is a modest payment. Due to the heightened sensitivity and concern regarding anti-corruption compliance, companies are struggling to understand whether the actions of a single or few employees would be legal or could incur significant penalties for the company and potential jail time for individuals. This uncertainty in the law merits consideration of clarification.

Conclusion

In the interest of both the fair administration of the law and in promoting the growth of American business, and the jobs such growth can engender, Congress should consider amending the FCPA to provide increased clarity in the law and certainty in its application for those companies that endeavor to comply with its dictates. Developments in the business environment and FCPA enforcement policy counsel that Congress should evaluate its statutory approach to addressing corruption concerns and balance the need to free markets of corrupting influence with the equally important objective of providing clarity as to what is required and what is prohibited by this statute. Thankfully, the business community is generally rejecting corrupt business practices in favor of free and fair markets and is making ongoing investments designed to promote those objectives. This commitment to compliance and ethical business conduct should be recognized and encouraged by providing stability and predictability for US businesses working to conform their operations to the requirements of the FCPA.

Again, I thank the Chairman and Members of the Subcommittee and I look forward to answering any questions that the Subcommittee may have.

As Judge Selna stated, "mere monetary investment in a business enterprise by the government may not be sufficient to transform that enterprise into a governmental instrumentality." Id. at 7. But what is sufficient?

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Mr. SENSENBRENNER. Thank you, Mr. Terwilliger.
Ms. Regon?

TESTIMONY OF SHANA-TARA REGON, DIRECTOR, WHITE COLLAR CRIME POLICY, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Ms. REGON. Thank you. Good morning, Chairman Sensenbrenner, Ranking Member Scott, and distinguished Members of the Subcommittee. My name is Shana Regon, and I am director of White Collar Crime Policy for the National Association of Criminal Defense Lawyers.

NACDL is the country's largest organization of criminal defense lawyers, and we work to ensure justice and due process for all of those accused of crimes.

Despite its more than 30-year history, there is vast disagreement and uncertainty about the meaning of many of the FCPA's key provisions. Because there has been so little judicial scrutiny of FCPA enforcement theories, right now the FCPA essentially means whatever the DOJ and SEC says it means.

Significantly, DOJ has been allowed to use the law as if it were virtually a strict liability statute, meaning that actual knowledge of wrongdoing does not need to be proved. Such an application is inconsistent with notions of fundamental fairness. In addition, because the reach of the FCPA is so vast and its provisions so amorphous, DOJ now oversees and regulates virtually all American companies and individuals seeking to do business abroad in ways those who created the FCPA never could have envisioned.

The purpose of the FCPA is laudable. It was originally designed to prohibit U.S. companies and individuals from offering bribes to foreign government officials for the purpose of unfairly obtaining business opportunities. But explicit commercial bribery is not the only kind of situation in which the FCPA can be applied. Because the law vaguely prohibits giving anything of value, it can unfortunately be used to criminalize all kinds of perfectly legitimate business activities.

Also, DOJ, as you have heard from my other colleagues this morning, has taken a very broad view of who qualifies as a foreign official. Recent prosecutions have involved payments to mid-level employees of state-owned companies. This expansive definition of foreign official makes doing business in many areas of the world automatically rife with potential criminal exposure.

Take this example. A U.S. company is trying to win a contract with a partially state-owned Chinese hospital in order to provide it with rubber gloves. In an effort to create goodwill and foster a business relationship between the parties, managers of the U.S. company take their Chinese counterparts out to dinner to talk about the potential deal. Maybe they pay for the car service in order to pick everyone up. Are these FCPA violations? Perhaps they fly the Chinese managers to the U.S. for a site visit to the factory, and provide them with a hotel room during their stay. While they are close by, they take their guests to visit a famous landmark or tourist destination. What about a small gift when, months into the negotiations, one of the Chinese managers announces the birth of his son? What about giving a contribution to their favorite charitable cause in China?

The truth is, U.S. companies and the individuals working for them do not have any real way of knowing whether any of these

activities could expose them to criminal liability under the FCPA. Right now, a careful criminal defense lawyer would advise her client that it depends entirely on the opinions of the DOJ or SEC at a particular moment in time.

It is also worth emphasizing that, although the statute contains a willfulness requirement for individuals in the anti-bribery provisions, the government has increasingly relied on the willful blindness doctrine as a substitute for proving willfulness and knowledge in FCPA prosecutions. This doctrine has been extended to cases where no actual knowledge existed.

The practical effect of this doctrine is that the CEO of an American company can be held personally, criminally liable for the actions of his employee halfway across the world, whether he knew about them or not. This doctrine dangerously eviscerates the mens rea requirements Congress meant for the statute to provide.

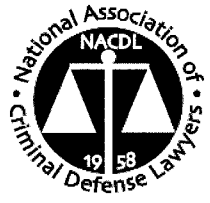
NACDL is not advocating that American companies or individuals be permitted to bribe officials in other countries in order to get business done. Commercial corruption is a very real problem in the global marketplace, and advocating for reform in the FCPA context is absolutely not advocating for commercial bribery. But here is the reality: right now, Americans cannot ascertain with any degree of confidence what kinds of conduct are legal. The result is that companies are over-complying at great cost, and individuals have no real idea of what is prohibited and what is not.

We need more clarity in the law. While it is true that the government has yet to prosecute someone solely for a $100 dinner, nothing in the statute prevents them from doing so, and nothing in their own enforcement policies or procedures prevents them from doing so. Punishing American businesses who are acting in good faith and throwing in jail supervisors who had no way of knowing about a payment half a world away could not have been what Congress intended, nor can that be a commonsense approach in this difficult economic climate that has cost many Americans their jobs and imperiled our Nation's status in the global economy.

The FCPA is emblematic of the general problem of over-criminalization. While the FCPA properly seeks to prevent serious misconduct, its language and application have led to unintended consequences. NACDL appreciates your efforts to consider and address these issues, and we join many organizations, on both the left and the right, in the call for some much-needed commonsense reform in this area, particularly reforms that will strengthen the mens rea requirements of the statute and bring clarity, uniformity and fairness to its enforcement.

Thank you.

[The prepared statement of Ms. Regon follows:]



Written Testimony of
Shana-Tara Regon
Director of White Collar Crime Policy

on behalf of the

National Association of Criminal Defense Lawyers

Before the
House Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security

Re: "Foreign Corrupt Practices Act"

June 14, 2011

SHANA-TARA REGON, ESQ., is the Director of White Collar Crime Policy for the National Association of Criminal Defense Lawyers (NACDL). In that capacity, she focuses on monitoring and attempting to prevent overcriminalization, overfederalization, and the erosion of *mens rea* in our federal criminal laws. She also works to maintain the sanctity of the attorney-client privilege and to prevent the further erosion of civil liberties in our criminal justice system. She also coordinates NACDL's strategic partnership with other organizations on multiple federal legislative and agency initiatives. Prior to joining NACDL, Ms. Regon practiced as a white collar defense lawyer at Shipman & Goodwin, LLP in Hartford, CT representing individual and corporate clients in state and federal civil and criminal investigations. She received her J.D., *magna cum laude*, from Western New England College School of Law, where she was a Note Editor for the Law Review. Following law school, she clerked for Justice Joette Katz of the Connecticut Supreme Court. Ms. Regon is a former President of the District of Connecticut's Chapter of the Federal Bar Association and a former pupil of the Oliver Ellsworth Inn of Court. She is admitted to practice in state and federal courts in Connecticut, Massachusetts, the United States Court of Appeals for the Second Circuit, and the United States Supreme Court.

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The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's more than 10,000 direct members— and 80 state and local affiliate organizations with another 28,000 members— include private criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

My name is Shana-Tara Regon, and I am the Director of White Collar Crime Policy for the National Association of Criminal Defense Lawyers (NACDL). With over 10,000 members, NACDL is the country's largest organization of criminal defense lawyers. It works to advance the criminal defense bar's goals of ensuring justice and due process for those accused of crimes. Prior to my policy position at NACDL, I was a practicing criminal defense attorney in Hartford, Connecticut, with experience in representing individuals and companies in white collar criminal and civil enforcement matters. I greatly appreciate the opportunity to testify on behalf of NACDL about an issue of increasing concern among NACDL members, the Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq. ("FCPA").

The FCPA prohibits American companies and their employees and agents from giving "anything of value" to "foreign officials" in order to obtain or retain business. Despite its more than 30-year history, there is vast disagreement and uncertainty about the meaning of many of the key provisions of the FCPA. Published judicial decisions interpreting it are sparse, perhaps because the FCPA was not vigorously enforced until recently. In addition, enforcement authorities largely focused their FCPA investigations on corporations, which generally cannot undertake the life-or-death risk inherent in aggressively defending a felony criminal case by forcing rulings on key points of law, much less taking the case to trial and through to appeal.

Because there has been so little judicial scrutiny of FCPA enforcement theories, right now the FCPA essentially means whatever the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) say it means. For example, and perhaps most significantly, DOJ has used the law as if it were virtually a strict liability statute—meaning that actual knowledge of wrongdoing does not need to be proved. Such an application is inconsistent with the great weight of criminal justice jurisprudence and notions of fundamental fairness. In addition, because the reach of the FCPA is so vast and its provisions so amorphous, DOJ now oversees and regulates virtually all American companies and individuals seeking to do business abroad in ways those who created the FCPA surely never intended or envisioned.

The purpose of the FCPA is laudable—it was originally designed to prohibit U.S. companies and individuals from offering bribes to foreign government officials for the purpose of unfairly obtaining business opportunities. But explicit commercial bribery is not the only kind of situation in which the FCPA has been applied. Because the law vaguely prohibits giving "anything of value," it can unfortunately be applied to criminalize all kinds of perfectly legitimate business activities. In addition to the expansive view of what kinds of conduct can lead to criminal exposure under the FCPA, is the question of who qualifies as a "foreign official." In cases where the conduct involves payments to individuals working in the executive, legislative, or judicial branches of their governments, determining whether the recipient is a "foreign official" is not difficult. But recent prosecutions have involved payments to mid-level employees of "state-owned companies"—that is, payments to employees who generally do not fit a layperson's view of a "foreign official."[1] This expansive definition of "foreign official"

[1] For example, in a recent California prosecution, *United States v. Carson*, No. 8:09-cr-77-JVS (C.D. Cal.), the government has alleged FCPA violations based on payments by employees of an American company to mid-level officers of state-owned oil, nuclear, and power companies in China, Korea, Malaysia, and United Arab Emirates. The government defends such prosecutions on the ground that the FCPA defines a "foreign official" as an "officer or employee of a foreign government" or "any department, agency, or instrumentality thereof." Thus, the argument

makes doing business in many areas of the world, especially where government-owned enterprises are common, automatically rife with potential criminal exposure.

Take this example: A U.S. company is trying to win a contract with a partially state-owned Chinese hospital to provide it with rubber gloves. In an effort to create goodwill and foster a business relationship between the parties, managers of the U.S. company take their Chinese counterparts out to dinner in order to talk about a potential deal. Maybe they pay for the car service in order to pick every one up and drive them home again. Are these FCPA violations? Perhaps they fly the Chinese managers to the U.S. for a site visit to the rubber glove factory, and provide them with a hotel room during their stay. Is that a violation? What if they take their guests to visit a famous landmark or tourist destination located near their factory? What about a small gift when, months into the negotiations, one of the Chinese managers announces the birth of his son? The truth is, U.S. companies do not have any real way of knowing whether any of these activities could expose them to criminal liability under the FCPA; right now, a careful criminal defense lawyer would advise her client that it depends entirely on the opinions of the DOJ or SEC at a particular moment in time.[2]

It is also worth emphasizing that, although the statute contains a "willfulness" requirement in an attempt to limit an individual's liability for violating the anti-bribery provisions of the FCPA, as in other areas of white collar law, the government has increasingly relied on the "willful blindness" doctrine as a substitute for proving willfulness and knowledge in FCPA prosecutions. Properly construed, the "willful blindness" doctrine merely allows a finding of "knowledge" and "willfulness" in a situation where the evidence shows the defendant "actually knew but . . . refrained from obtaining final confirmation . . . ."[3] Nonetheless, both inside and outside the FCPA context, this doctrine has often been extended to cases where "no actual knowledge existed," but where a jury could determine from the evidence "the defendant had not tried hard enough to learn the truth."[4] The practical effect of this doctrine is that the CEO of an American company can be held personally, criminally liable for the actions of his

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goes, state-owned companies are "instrumentalities" of foreign governments, and their employees (even low level ones) are "foreign officials" within the meaning of the Act.

[2] In 1988, Congress amended the FCPA to require DOJ to issue opinions in response to questions regarding whether prospective conduct would conform with DOJ's enforcement policies. Unfortunately, this opinion procedure has not provided the business community with the clarity or guidance that Congress may have intended. Only three opinions were issued in 2010 and only one opinion was issued in 2009. There are numerous reasons why this process does not provide sufficient guidance to persons wishing to be compliant with the law. First, the opinion process only expresses the opinion of DOJ, not the SEC, who is also charged with enforcing the FCPA. Second, the opinions do not create legal precedence for anyone else; in other words, a company cannot rely upon an opinion granted to another company, even if the essential facts or conduct is the same. Third, the opinions released by DOJ are so explicitly detailed that details of a potential business dealing no longer remain confidential, which can affect not only the parties involved, but the entire marketplace.

[3] *United States v. Reyes*, 302 F.3d 48, 54 (2d Cir. 2002).

[4] *United States v. Ferrarini*, 219 F.3d 145, 157 (2d Cir. 2000).

employee half way across the world—whether he knew about them or not. This doctrine dangerously eviscerates the *mens rea* protections Congress meant for the statute to provide.[5]

As things stand now, U.S. companies and individuals are at a severe competitive disadvantage, while simultaneously at risk of criminal prosecution, because the contours of this law are vague and overly broad. NACDL is not advocating that American companies or individuals be permitted to bribe officials in other countries in order to get business done. Commercial corruption is a very real, very insidious problem in the global marketplace and advocating for reform in the FCPA context is absolutely not advocating for commercial bribery. But here is the reality: Right now, American companies, large and small, have spent billions of dollars on sophisticated compliance programs in an effort to ferret out those kinds of situations and, more importantly, to prevent them from happening in the first place. Because no one can ascertain with any degree of confidence what kinds of conduct are safe, however, companies are over-complying at great cost. If a company finds out that one of its local employees in Nigeria may have made a $20 payment to help get a permit to park a delivery truck in front of the company's building, that company may feel compelled to hire expensive outside counsel to do a thorough investigation into how that situation occurred and whether it has ever occurred in the past, as well as to provide it with advice as to how to prevent that sort of conduct from occurring again. The next step, for most companies, is to voluntarily reveal what it has discovered during its investigation. In return for being so diligent in its effort to disclose the conduct and prevent it from reoccurring, the company will willingly pay to DOJ whatever DOJ wants by way of a fine in order to avoid having to go to trial and risk a criminal prosecution. The company might agree to pay for an internal corporate monitor; it will agree to being audited—all of this costing the company millions of dollars in actual costs, not to mention the cost attributable to business interruptions.

In exchange for spending millions on compliance programs in good faith efforts to be compliant with FCPA law, U.S. companies are suffering with what has now become an unduly inhospitable regulatory environment. Most Americans are not trying to break the law; they are not looking for permission to bribe foreign officials. But they are looking for some clarity in the law as to what is prohibited and what is not. Is paying for a $100 meal for an executive at a company owned by a foreign government a felony? What about a birthday gift to a business colleague? What about a charitable contribution to a business contact's favorite charity? While it is true that the government has yet to prosecute someone for a $100 dinner, nothing in the statute prevents them from doing so, nothing in their own enforcement policies or procedures prevents them from doing so, and so any criminal defense lawyer wishing to avoid committing legal malpractice is forced into the position of telling their client that such routine business activities *may* be unlawful. That, in turn, is leading to a cessation of a wide array of legitimate business activity. American businesspeople need fairness in enforcement when they are already doing whatever they can to ferret out and prevent violations of the law. Further punishing American

[5] The erosion of *mens rea*, or criminal intent, requirements in federal criminal law has been an issue of increasing concern for NACDL. *See* Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (The Heritage Foundation and National Association of Criminal Defense Lawyers) (2010) *available at* www.nacdl.org/withoutintent, as well as NACDL's prior Congressional testimony on the subject, available at: http://www.nacdl.org/public.nsf/WhiteCollar/Letters_and_Testimony.

businesses who are acting in good faith and throwing in jail supervisors who had no way of knowing about a payment half a world away could not have been what Congress intended thirty years ago when it drafted this law. Nor can that be a good-sense approach in this difficult economic climate that has cost many Americans their jobs and imperiled our nation's status in the global economy.

Defining broad categories of conduct as criminal will not eliminate all wrongdoing and criminalizing vast swaths of activity will not make America a better place. Indeed, for the first 100 years of our history, we had no federal prisons (except to house soldiers) and we started off with only three federal crimes—treason, piracy and counterfeiting.[6] Now we have over 4,450 federal criminal laws on the books, plus so many additional criminal provisions hidden in the federal regulatory scheme that no one has yet been able to count them. The average American is likely unaware of most of the criminal laws that could subject him or her to prosecution by the government. Many federal criminal statutes are duplicative of state criminal laws, and many more are duplicative of each other. Further, these federal laws are sometimes written broadly, with vague terms, and supported by questionable constitutional authority.

The FCPA is emblematic of the serious problem of overcriminalization. While it seeks to prevent and redress serious misconduct, its language and application have led to unintended consequences. NACDL appreciates your efforts to consider and address these issues and we join many other organizations, from both the left and the right, in the call for some much-needed commonsense reform in this area, particularly reforms that will strengthen the *mens rea* requirements of the statute and bring clarity, uniformity and fairness to its enforcement.

[6] Peter J. Henning, *Misguided Federalism*, 68 Mo. L. Rev. 389, 414 (2003); *see also* Brandon L. Bigelow, *The Commerce Clause and Criminal Law*, 41 B.C. L. Rev. 913, 931-932 (2000).

Mr. SENSENBRENNER. Thank you very much.

The Chair is going to defer his questions until the end.

And to begin, the Chair recognizes the gentleman from Pennsylvania, Mr. Marino, for 5 minutes.

Mr. MARINO. Thank you, Mr. Chairman.

Welcome, guests.

Deputy Andres, I am going to begin with you, and then we will go to your left. What is the number one obstacle in the way of enforcement today on corruption, and what is your recommendation to alleviate that obstruction?

Mr. ANDRES. Foreign bribery cases are difficult for a variety of reasons. Obviously, in prosecuting those cases, we need to rely on evidence from abroad, which takes time. We make MLAT requests from our foreign partners to get that evidence. But they take longer, and they are harder to detect than domestic cases, because much of the conduct often takes place abroad.

So I think the statute of limitations, I know the Department has discussed recommendations in the past to extend the statute of limitations so that we had a longer period of time to investigate those cases, so that we could root out the problem of foreign corruption, which is a substantial problem. There has been much discussion about the increased enforcement of foreign bribery, but I think that discussion fails to recognize the size and magnitude of the problem, which are substantial.

Mr. MARINO. Thank you.

General Mukasey, the same question, but could you expand a little bit on—you brought up two points that you would like to see implemented?

Judge MUKASEY. Yes.

Mr. MARINO. Please.

Judge MUKASEY. I think the availability of a compliance defense actually might help the problem that Mr. Andres just identified by allowing companies to generate more information on a voluntary basis to help prosecute those cases that have to be prosecuted abroad. If companies have vigorous enforcement and oversight mechanisms that they can rely on to avoid prosecution themselves, they are perfectly available to provide information with respect to foreign actors who may very well deserve to be prosecuted.

The definition, the issue of definition I think is a major problem for reasons that were referred to in Ms. Regon's testimony. If we don't know who a foreign official is, everything from providing a cab ride to somebody who worked late on up is going to make it very difficult for a company to function, and as she pointed out, a defense lawyer has to err on the side of caution in advising her clients on what they can and can't do, which inhibits the conduct of business.

Mr. MARINO. Thank you.

Attorney Terwilliger, do you want me to repeat the question? I saw you jotting some notes, so I think you know what I am looking for.

Mr. TERWILLIGER. Thank you. Actually, I think a point worth making in terms of obstacle to enforcement and achieving the objectives of the statute is that companies are actually much better positioned to gather more information more quickly overseas than the Justice Department or the SEC is. And as a result of that, policies that favor companies who do investigate themselves and who do engage in voluntary disclosure is an aid to enforcement rather than an obstacle.

I believe, frankly, the Justice Department could do more to encourage such self-investigation, voluntary disclosure and so forth.

And frankly, the Congress ought to pay attention to things like Dodd-Frank and the SEC whistleblower program, which are undercutting internal compliance measures, including the self-reporting which can lead to voluntary disclosure.

Mr. MARINO. Thank you. And Attorney Regon, you brought out some good points as to where this type of investigation would go. But where do you draw the line when it comes to gifts, between that and corruption?

Ms. REGON. Thank you, Congressman Marino. That is an excellent question, and I think probably DOJ might know it when they see it. I think Ferraris and water ski jets and millions of dollars of payment for direct quid pro quo can be strong evidence of explicit commercial bribery. But unfortunately, with a statute that is written so broadly, all sorts of legitimate business activities and normal legitimate business payments can get swept into this. And I think that three out of the four witnesses today have spoken to the Committee about our fear that the language is providing DOJ with the ability to bring in too much of this legitimate business activity.

Certainly, I don't think you heard any of the witnesses today advocate on behalf of direct explicit commercial bribery. It does harm American businesses. But there is a line, and it is recognizable between that and perhaps giving a charitable donation to someone because they asked and you have been in a business dealing with them for 5 years, or giving a cab ride home to an employee.

Mr. SENSENBRENNER. The time of the gentleman has expired.

The gentleman from Virginia, Mr. Scott, is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Judge Mukasey, you talked about the compliance defense. Are you asking for a total defense or required mitigation?

Judge MUKASEY. I think we are asking for a defense, but it would be an affirmative defense. Understand that the state of play in a trial would be that there would be a proved violation, and then the question would be whether the compliance mechanism that the company had in place was reasonably designed, if complied with, to have detected the violation that took place.

It is an uphill climb for a company to establish that defense. All that we are asking is that they should be allowed to try.

Mr. SCOTT. What should be the mens rea requirement for an individual, the CEO, and for the corporation?

Judge MUKASEY. The mens rea requirement should be what it is in connection with crimes generally, that you have to—what I used to say when I was a prosecutor and when I was AG is you shouldn't prosecute any case in which you can't tell yourself that the person who is accused of committing it, when he put his head on the pillow that night, didn't tell himself or should not have told himself, hey, I committed a Federal crime today. If you can't say that somebody knew that and had every reason to know it, then the case should not be prosecuted.

That is the mens rea requirement. It has to be something that somebody can clearly identify with a straight face as having been a criminal act.

Mr. SCOTT. What about the corporation?

Judge MUKASEY. The corporation, in a sense there is no such thing as the corporation. They are just a bunch of people. So there has got to be somebody who identifiably had the knowledge or who knew facts to which he voluntarily and purposely closed his eyes, and this trenches on the willful ignorance issue that has come up recently.

Mr. SCOTT. You can have a rogue individual who commits the crime. When should the corporation be responsible for that?

Judge MUKASEY. When that individual is in a policymaking position.

Mr. SCOTT. Mr. Andres, you have mentioned six-figure bribery cases, and we have also heard about free meals and cab rides. Are de minimis cases ever brought?

Mr. ANDRES. They are not, sir. And just to clear the record, the Department of Justice has never prosecuted somebody for giving a cup of coffee to a foreign official, a martini, two martinis, a lunch, a taxi ride, or anything like that. And it is not clear that those acts in and of themselves would evidence an intent to bribe somebody.

If one looks at the Department's actions——

Mr. SCOTT. Would you object to a provision excluding de minimis transactions?

Mr. ANDRES. I would, for a few reasons. One, small de minimis payments paid over time on multiple occasions can amount to a more significant bribe if, in fact, there is an intent to bribe. I think the relevant consideration is not the amount of the bribe but rather the intent, whether it is an intent to bribe. I think that both the Department of Justice and the government need to be clear that all bribery, just as in domestic bribery, is inappropriate.

So I don't think it is appropriate to have an exception for a smaller bribe. But I would also note that this talk of taxis and meals is not reflected in our enforcement actions. The cases that we have prosecuted——

Mr. SCOTT. But one of the things we are hearing is people don't know where the line is, and if you were to put something in the code to help people ascertain where that line is, it would be helpful. That is why I asked about a de minimis, and you have suggested you don't want that in there, which brings the cab rides and meals back in play.

Mr. ANDRES. I believe that a reflection of the Department's enforcement actions, our public comments on our website provide adequate guidance with respect to the statute. I don't think anybody seriously believes that providing a taxi ride to somebody is, in fact, a violation of the Foreign Corrupt Practices Act. We have prosecuted cases in which people have turned over suitcases full of cash, hundred-dollar bills amounting to a million dollars. How someone would have the impression that we are prosecuting——

Mr. SCOTT. Well, let me have Judge Mukasey comment on it.

Judge MUKASEY. The taxi ride example is for real. It occurred at a company in which somebody worked overtime, was given a taxi because the trains had stopped running, and then some nervous counsel found out about it, reported it to the Justice Department and was told that it probably wasn't a violation but to go back and investigate the entire circumstances of the relationship with that company and come up with a result of that investigation to deter-

mine that no illegal payments had been made. A couple of hundred thousand dollars later it was determined that, in fact, there had been no violation. But that couple of hundred thousand dollars could have been used for a lot better purposes than conducting an unnecessary investigation.

Mr. SENSENBRENNER. The gentleman's time has expired.

The Vice-Chairman of the Committee, the gentleman from Texas, Mr. Gohmert?

Mr. GOHMERT. Thank you, Mr. Chairman.

I would like to follow-up on that, General Mukasey. One of the problems that I hear—and, of course, you have been a judge, and you listen for little words that prick up your ears. When I hear words like "I don't think that would be a violation," that doesn't give companies much assurance if somebody in a legal position with the government says I don't think it is, or I think it is. It seems like we ought to have a clear enough line that people don't have to think. They can say yes, it is or it isn't.

And I appreciate the statement that all bribery is illegal, Mr. Andres, and there should not be an exception for smaller bribery. The thing is, we can define bribery. And as in the example that General Mukasey has mentioned, a taxi ride, if you say, for heaven's sake, anything under this amount obviously is not bribery, then that gives companies a clear line where they know they can do this and not have to spend $200,000 because there may be a young prosecutor or a young FBI agent that thinks I can make a name going after this big company.

And, of course, we know that because of the Director's 5-year up or out policy, we eliminated thousands and thousands of years of experience in the FBI supervisory positions. So like in many cases, or some cases at least, you go from people with 25 years or more to 5 or 6 years being the supervisor. When you had experienced people in charge they would say, "Give me a break. You know, a $10 taxi ride is not bribery. We are not going to do that." When you have got a 5-year supervisor going I have got a career in front of me, I want to get the Director's attention, then it seems like there is more room to have FBI agents or prosecutors more aggressive than they should be.

I am for punishing crime. I was known as a hang 'em high-type judge. But I do believe in having the law clear enough so people don't have to worry about it.

General Mukasey, let me ask you. If the DOJ doesn't give information about how it is making charging decisions, is that in effect treating every company as a potential law breaker where they can't make adequate plans for the future?

Judge MUKASEY. Obviously, I think the more information that is available on how these decisions are made, the easier it is for people to function. But there is a difference between saying this is how we do it on a general and non-binding basis, and actually having a legal provision in the statute that is clear to everybody as a basis for governing your behavior going forward. It is one thing for somebody like Mr. Andres, who is very experienced and makes sane and rational decisions, to say, well, this is not the way I would do it, but that doesn't necessarily govern the behavior of everybody out there, and it certainly doesn't control what goes through the mind

of a corporate attorney who is worrying about the possibilities for his company going forward.

Mr. GOHMERT. Have you ever drafted specific language that you think would help make the law tighter?

Judge MUKASEY. I believe the Chamber has submitted a bill.

Mr. GOHMERT. Did you participate in that?

Judge MUKASEY. I did not participate in it. I reviewed it.

Mr. GOHMERT. Okay. Saying you reviewed it doesn't tell me anything.

Judge MUKASEY. Well, it says——

Mr. GOHMERT. You can review it and think it is crazy.

Judge MUKASEY. The language is that $250 is presumptively proper.

Mr. GOHMERT. So you like the language?

Judge MUKASEY. Which seems about right. I do.

Mr. GOHMERT. Okay. Thank you.

Mr. Andres, why should a company ever be criminally prosecuted if it does a compliance program that meets all the reasonable standards of Chapter 8 guidance? I mean, obviously they can have rogue people that do things, but I believe in holding the people accountable that commit crimes and make mistakes. But if the company has done everything appropriately and legally, why not go after individuals instead of a company that didn't know about the incident? It seems like it is a strict liability standard. Please.

Mr. ANDRES. Congressman, the Department does not prosecute corporations based on the acts of a single rogue employee. It hasn't, certainly not in this field. And again, when you——

Mr. GOHMERT. But it could.

Mr. ANDRES. Not under the guidelines that are provided under the Principles of Federal Prosecution of Business Organizations. We look at how pervasive the conduct is. If the employee is a high-ranking official in the company, that is a different issue. But if it is a rogue employee on a lower level, we would not prosecute that under our own principles.

Let me address your point about the compliance defense. The Department would oppose an affirmative compliance defense for a few reasons. First, we already take into consideration a company's compliance program. We take it into consideration and review it, and it is a serious consideration. Over the last 20 years the Department has developed a series of broader factors that we consider that includes compliance, that includes cooperation and self-disclosure. To review only compliance would be a substantial change in the way that the Department has done business over several Attorney Generals for more than 20 years.

The affirmative defense of compliance is also a novel concept. It is not one that is well defined, either here or otherwise, and it could lead to paper compliance; that is, a company having a compliance program on paper that is not rigorous and that doesn't help to prevent bribery.

And one last point. Critics or proponents of the compliance defense have relied on foreign law to support that position. They have turned to the UK Bribery Act, which has been criticized by many in the business community here in the United States. But more importantly, it is not yet in effect. So there is no precedent to follow

to say that the UK Bribery Law and its affirmative compliance defense would be effective here in the United States.

Secondly, they point to Italian law and their Foreign Corrupt Practices Act, which also has a compliance defense. That provision has been roundly criticized in the international circles. The OECD said that that defense provided little assistance in determining what an acceptable model is in a particular case. That defense has actually never been applied in practice.

So if we take on this affirmative compliance defense, we, in effect, create a loophole, because as even the proponents of the defense say, no compliance program is perfect. It would allow necessarily for some bribery to occur. So I think that given that it is a novel and somewhat risky approach, the time is not right to adopt such a compliance defense.

Mr. GOHMERT. Thank you, Mr. Chairman.

Mr. SENSENBRENNER. The gentleman from Michigan, Mr. Conyers, is recognized for 5 minutes.

Mr. CONYERS. Thank you, Chairman Sensenbrenner.

Welcome back to the Committee, General Mukasey.

Judge MUKASEY. It is a pleasure to be here.

Mr. CONYERS. You have a few more lawyers than you had when we last saw you before us. Let's see, you are down to only 700 now. And you were up over 100,000 the last time I saw you here.

Judge MUKASEY. I had the benefit of 100,000 then, only 700 now.

Mr. CONYERS. Yeah. Let me ask you, was it during—was it when you were Attorney General that we had this taxi ride case happen that cost a couple of hundred thousand bucks?

Judge MUKASEY. I don't know precisely when that happened.

Mr. CONYERS. But it could have been during your watch.

Judge MUKASEY. It is conceivable.

Mr. CONYERS. Okay. Now, of all people, I know you are not telling us here today that ignorance of the law is an excuse. If you don't know that it is against the law, if you don't know that something you are doing is against the law, does that excuse you?

Judge MUKASEY. No. The——

Mr. CONYERS. Right. Ignorance of the law is no excuse. So how can you say that you didn't prosecute anybody if they went to bed at night and they didn't know they were violating the law? You ask people before they are indicted whether they ever went to bed and thought they were violating the law?

Judge MUKASEY. That they either knew or should have known by the standards of society as we accept them. We didn't——

Mr. CONYERS. Right. So ignorance of the law is no excuse.

Judge MUKASEY [continuing]. Is okay to sell drugs or rob banks.

Mr. CONYERS. Yeah. Ignorance of the law is no excuse, is it?

Judge MUKASEY. No.

Mr. CONYERS. All right. Now, why in the cases of bribery do we need to have a de minimis rule? In local law enforcement, prosecutors statewide, Feds—look, you mean that if there is just a little bit of bribery and it is really low, that we ought to have a threshold? What on earth—corporations have more lawyers than anybody else, the ones sitting here. What do they need to know how low the crime has got to be before it is prosecutable? I don't think that they deserve to know that. Nobody is prosecuting people for how many

drinks or a meal that you brought them, or gave them a ride. Everybody knows that that doesn't have any logic.

And so I ask the Association of Criminal Defense Lawyers witness, give me some examples of over-criminalization of the Foreign Corrupt Practices Act.

Ms. REGON. Certainly, Mr. Conyers. I think the problem that we all——

Mr. CONYERS. Just give me the examples.

Ms. REGON. Sure. The example is that the law is written so expansively that——

Mr. CONYERS. No. Give me the examples. Give me an instance of where one case was ever brought by the Department of Justice which it would constitute over-criminalization.

Ms. REGON. Respectfully, sir, I am probably not aware of absolutely every single——

Mr. CONYERS. No, of course you are not. I will tell you why you are not.

Ms. REGON. A number of them—they have increased their enforcement.

Mr. CONYERS. I will tell you why you are not, is because only 140 cases have been brought in 10 years.

Ms. REGON. And they have increased their enforcement 10-fold in the last 5 years, and so I did not——

Mr. CONYERS. And that averages 14 cases a year. Is that over-criminalization to you?

Ms. REGON. A statute that allows the government to prosecute someone as broadly as the statute currently allows is——

Mr. CONYERS. I said is 14 cases a year over-prosecution to you?

Ms. REGON. A statute with no reasonable limitation is over-criminalization.

Mr. CONYERS. Just answer my question, okay?

Ms. REGON. I am, sir. A statute that provides no reasonable limitation to prosecutorial discretion is over-criminalization. I have testified here today that I am concerned more about the prosecutions to come than the prosecutions——

Mr. CONYERS. You haven't——

Mr. SENSENBRENNER. The gentleman's time has expired.

The Chair recognizes the gentleman from Texas, Mr. Poe?

Mr. POE. Thank you, Mr. Chairman.

Thank you for being here.

Similar to my friend, Mr. Gohmert, in my other life I was a felony court judge for 22 years in Texas, heard everything from stealing to killing, and several death penalty cases, and I don't like crooks. But on this situation, I want to talk about the world as it is, not the way that we wish that it were.

Let me start with China. China seems to have, to me, through their government, a systematic philosophy of corruption. They will do anything they can, anywhere in the world, to get their way. They will steal from the United States. They will pay bribes. They will do it all. They are dealing with a philosophy that any means necessary to get it the Chinese way.

We, on the other hand, believe in the rule of law, that some things are actually things we shouldn't do, like bribery. The Chinese are effective in their philosophy. Here we are building the na-

tion of Iraq. Just got back from Iraq last night, and when I was there I learned that, of course, the Chinese are going to rebuild their oil drilling system. I suspect—my opinion—maybe some money changed hands for the Chinese to be doing that instead of American oil companies. I don't know.

And compliance seems to be part of the issue here. We want our American companies to operate within the law. We set the law, and we need to make sure that it is effective. It disturbs me that we give the Justice Department too much discretion on who they want to go after and who they don't want to go after. There doesn't seem to be a rule of thumb except they use their discretion whenever they want to. I think that is a universal problem. I was a prosecutor for 8 years, and I see that that is a problem with the prosecution side.

Ms. Regon, I am going to let you finish your answer that ran out of time. Tell me why compliance is a better idea than what we have under the current system, from your point of view.

Ms. REGON. Thank you, sir, for the opportunity to answer that question. And I think it is because what the criminal law really seeks to do is try to prevent misconduct from occurring in the first place, and to deter those individuals and corporations who would engage in crimes otherwise not to do so. And so I think a robust compliance program protects companies and individuals from engaging in misconduct because it educates them about what that misconduct would be. It trains them to avoid it. It trains them to identify it. And it also provides a reporting mechanism when misconduct does occur, even if it is perhaps on the other side of the ocean, not from the American employees.

And it also—usually a good compliance program will provide an opportunity for a whistleblower to say safely, without retaliation, there is some misconduct happening. And then it provides the company with a nice structure about what to do if that kind of thing happens.

That seems to me a commonsense way of both preventing these kinds of misconduct from happening and also for providing remedial measures when it does happen. You end up deterring the conduct from happening to begin with. You—individuals don't end up being sort of surprised in a gotcha game about what was prohibited and what wasn't if there is a good, robust compliance program.

Mr. POE. Follow-up question. The global economy where we have U.S. companies trying to compete worldwide, especially with companies or countries that don't follow any rules except to win, do you think that that would help international competition? Would it hurt as far as United States companies go, Ms. Regon?

Ms. REGON. Well, I think that the Department of Justice should be congratulated on being the world's enforcer on foreign corruption. I think other countries look at our international corruption laws and think that we are doing the best job. And so I congratulate them on that.

I think the discussion here today has been not to sort of make it easier for anyone, including American businesses or anyone internationally, to bribe in order to get business done. I think the discussion here today is how to give individuals and companies clarity about what the law means and what it doesn't so that we

can all go out and conduct business, stimulate our economy, stimulate economic growth throughout the globe without engaging in corruption or without being fearful that a cab ride or other legitimate business activities could be criminalized, and that clarification is needed today.

Mr. POE. I agree with you on that. I am certainly not advocating that we loosen the standards for American companies. They just need to have some absolute certainty as to what is a violation, what is not, and when they will be prosecuted, and if they do something this will happen, as opposed to too much discretion on the part of what something means and what a bribe happens to be. Maybe Congress has a responsibility to define what bribery is, although we all know what it is. It needs to be somewhat definite.

Thank you, Mr. Chairman. I yield back the remainder of my time.

Mr. SENSENBRENNER. Thank you.

The gentlewoman from California, Ms. Chu?

Ms. CHU. Thank you, Mr. Chair.

Mr. Andres, you clearly articulated the reason that the Department of Justice doesn't agree with passing statutory language authorizing a compliance defense. However, is it my understanding that you consider a compliance program a factor in determining a company sentence for bribery offenses?

Mr. ANDRES. Both at the sentencing phase and at the charging phase, that is, a decision whether or not to enter into—charge a company, to enter in some resolution, or to decline prosecution in the first place. We certainly take into consideration a company's compliance program.

And just to amplify that a little, there are, of course, cases where we decide not to prosecute or not to require a company to enter into a resolution, because they have strong compliance programs. You don't read about those because we don't issue a press release when we decide not to prosecute. So there is certainly—that certainly is an important factor that we take into consideration.

Ms. CHU. Are there currently any guidances that are available to companies that articulate or describe what you believe to be a strong compliance program?

Mr. ANDRES. Sure. There are a variety of different reference materials, including the United States Sentencing Guidelines, and OECD good practice guides that dictate or describe things that are important for a valid and robust compliance program. They talk about things such as having an articulated policy against foreign bribery, having standards and procedures designed to reduce violations of their policies, to have senior officials charged with implementation and oversight, and a variety of other factors that are detailed in those various resources.

Ms. CHU. If—well, are those guidelines readily available?

Mr. ANDRES. They are readily available. I think another point with respect to guidance, every time the Department has entered into a resolution with a company dating back to, I believe, 1988, we published those detailed plea agreements, resolutions and other documents on our website. So you could go back and look on our website and see, for example, in the Daimler case, what the specific resolution was, what issues there were with compliance, what

modifications we may have asked from that company or any of the other companies that we prosecuted. All those documents are available on the Department's website.

Ms. CHU. How could we incentivize corporations to have these kinds of compliance programs, then?

Mr. ANDRES. I think we incentivize companies by giving them credit for their compliance programs, which, as I said, we do. As I mentioned, there are instances where we decide not to prosecute a company because of compliance. There are other factors that go into the mix as well, such as cooperation, self-disclosure, and remediation. But clearly, by making decisions based on compliance factors, which we do, and to the extent that we can publicize that and make the business community aware of the fact that we take that into consideration, I think we provide the right incentives.

Ms. CHU. Let me ask about something else, which is that in 2004 DOJ initiated two FCPA investigations, and SEC initiated three. However, last year DOJ brought 48 investigations, and the SEC brought 26 investigations. I am trying to get the reason for this, get an understanding of what is the problem. Is the problem bigger, or is the enforcement greater?

Mr. ANDRES. I think the problem is as big as it has ever been, if not bigger. I think we have become aware of more cases for a variety of different reasons.

One, the world is smaller. We can communicate with our foreign law enforcement partners through emails and otherwise much more easily than previously.

Secondly, at least one reason why there are more cases—I don't think it is the sole reason—is that CEOs of corporations are complying with other laws such as the Sarbanes-Oxley law, which requires them to verify their financial statements. In doing that and getting confidence as to the credibility of those financial statements, they are detecting problems with foreign bribery, and in many instances they are disclosing that to the Department of Justice.

So I think, again, the problem is a substantial one. That certainly has led to more enforcement. But there is a variety of factors which has led to the increase.

Ms. CHU. And how would these new proposals address this trend?

Mr. ANDRES. The proposals?

Ms. CHU. Yeah.

Mr. ANDRES. Well, again, the Department is concerned about the proposals with respect to a compliance defense or another definition of a foreign official, because they provide some possibility for loopholes, that some bribery becomes acceptable. And I think just as in domestic bribery, the Unites States needs to send a clear message that bribery is unacceptable.

Ms. CHU. Thank you. I yield back.

Mr. SENSENBRENNER. The gentleman from South Carolina, Mr. Gowdy, is recognized for 5 minutes.

Mr. GOWDY. Thank you, Mr. Chairman.

Mr. Andres, you are not suggesting that current DOJ has placed more of an emphasis or is more concerned about these prosecutions than predecessor DOJs, are you?

Mr. ANDRES. Far from it. Many of the investigations that are now coming to resolution have been ongoing for some time. So I think it is not necessarily an appropriate barometer to say that if we have had X number of resolutions in this year, it is because there is more enforcement now. Those investigations take time.

Mr. GOWDY. Right. Just like when other witnesses have come before Judiciary and we have noticed a downturn in investigations and prosecutions, it would also be unfair for us to suggest that the current DOJ isn't concerned about those lines of cases, right?

Mr. ANDRES. Again, it is hard to comment on these things generally. But suffice to say, at least with respect to the FCPA prosecutions, those investigations are often longstanding. They take some time. So it may be that prosecutions resulting in resolutions now have gone on for years.

Mr. GOWDY. All right. In response to an earlier question, you said DOJ isn't prosecuting cup of coffee cases, or that is at least a pretty good paraphrase of what you said. And my concern isn't whether or not you are or are not prosecuting cup of coffee cases. The question is whether or not you can, because one is a declination issue and the other is a jurisdictional issue, and I think those are very, very different and require a different analysis.

So can you prosecute cup of coffee cases?

Mr. ANDRES. Just so I am clear, with respect to whether or not we can, there are within the statute exceptions for reasonable and bona fide promotional expenses. There are also other exceptions that cover legitimate business expenses. So if a cup of coffee is given to a foreign official without an intent to bribe that individual, we would not be able to bring that case because there is not the requisite intent to bribe.

Mr. GOWDY. What do you do with a different standard, the different mens rea standard for corporations and individuals? Do you support having a willful requirement for corporations, or not?

Mr. ANDRES. Well, with respect to that distinction, I would say that in our enforcement, I am not aware of any cases where companies have complained that they have been held accountable for any conduct that is other than willful conduct. But I think it is also important to recognize that in the FCPA, in the legislation, the statute, the standard with respect to corporations talks about corruptly. So the word "willfully" is replaced by the word "corruptly," and I think those two words are very similar. In large part they encompass the same type of conduct.

Mr. GOWDY. Professor Terwilliger, do you see any issues with not having a willful requirement for corporations in conjunction with not also affording them a compliance defense?

Mr. TERWILLIGER. Certainly, sir. And I have been accused of a lot of things, but being an academic is not one of them. It is a pleasure to be here with you today.

The problem with a willfulness requirement for corporations is just what General Mukasey mentioned. Corporations can't think; only individuals can think. And therefore any ascribing of an intent to a corporation is really artificial because the corporation itself is artificial.

It seems to me that all of that kind of debate surrounds much more the question of definitions of the statute than it does the ex-

ercise of prosecutorial discretion. I think the Justice Department generally does a fairly good job of exercising its discretion.

What the Congress' job is, if I may, is to define the parameters in which that discretion is exercised, and that is where there is uncertainty. And when and under what circumstances a corporation itself and its shareholders should be penalized because employees go off on some bribery scheme that, in spite of having a good compliance program, in spite of having complete buy-in by a CEO and so forth, that to me is an enforcement policy question that rests right here, not in the Justice Department.

Mr. GOWDY. Ms. Regon, there are other crimes that are strict liability crimes, but you don't think this should be added to the list? There are contraband cases, child pornography, under-age sex cases that are strict liability crimes. Why is this different?

Ms. REGON. Well, I think it is up to the Congress to determine which crimes are or are not strict liability crimes, and I do believe that 30 years ago the Congress who created the FCPA did not intend it to be so. It is certainly within your province to decide when that is appropriate and when that isn't.

I think the problem here is you have a statute where that was not the intent. It does contain a willfulness requirement, at least for individuals, in the anti-bribery provisions. I think that when the Congress included that word, I think that they meant it, and I think that, unfortunately, because the statute is otherwise written fairly expansively, it does allow DOJ and SEC to treat the statute as if it is a little bit—to sort of prosecute to the fullest extent that the law allows.

You know, they do a good job, they do their jobs, and they will take as much as the Congress gives them. And I think that that doesn't mean to suggest bad faith on the part of prosecutors. It just means that any one of us, given our job, will do it to the expansive limitations that are given to them. And unfortunately, there aren't as many limitations in the statute as there should be.

Mr. GOWDY. Thank you, Mr. Chairman.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. Terwilliger, you just said something that is very profound. You said corporations can't think, and I wish that you had been the attorney who could have argued that to the U.S. Supreme Court in the Citizens United case. [Laughter.]

Mr. JOHNSON. But I would like to turn now to Ms. Regon and ask you, have you ever been a prosecutor before?

Ms. REGON. I have not, sir.

Mr. JOHNSON. But would it be fair to say that the looser the law, then the more prosecution discretion comes into play?

Ms. REGON. Certainly.

Mr. JOHNSON. And then to narrowly draw the law means less prosecutorial discretion.

Ms. REGON. It means less discretion. It doesn't necessarily mean less prosecutions.

Mr. JOHNSON. Well, it could result in less prosecution victories.

Ms. REGON. I think if DOJ means what it says here today, which is that it is really focused on explicit commercial bribery, and I

think Mr. Andres promised that the DOJ would never prosecute a company for the rogue acts of an employee overseas, I think if they meant that, then they wouldn't mind that the statute was so narrowed because they would still be allowed to prosecute explicit commercial bribery. I think that they enjoy a certain broader amount of discretion so they can in the future bring the kinds of cases they want to bring.

Mr. JOHNSON. Yes, but my problem is that, okay, while we want to narrowly draw statutes to limit prosecutorial discretion in cases of legalized crime, because there are two. There is legalized crime, there is legal crime and illegal crime.

Ms. REGON. Well, I am not——

Mr. JOHNSON. The illegal crime is the blue collar type of crime, the burglaries, robberies, rapes, murders, those kinds of things, theft, shoplifting, drug dealing. That is illegal crime. Some would argue that things like white-collar crime are legal crime, and they argue that it is legal crime because the prosecutions for that kind of misconduct are not as vigorous as they should be.

So in the case of legalized crime or legal crime, I am bothered by the notion that we need clarification, and I am bothered by the fact that there has not been a whole lot of prosecutorial activity in this arena, FCPA, in the past. And so it just seems kind of fishy. We are trying to let some folks off the hook for legal crime.

Ms. REGON. Congressman Johnson, if I may respond to that, I think that there are a number of people who have been prosecuted for white-collar crimes and that are, in fact, serving what in effect are life sentences, and they would——

Mr. JOHNSON. There have been some examples made.

Ms. REGON. Yes. They would disagree that white-collar crime is not real crime.

Mr. JOHNSON. There have been some examples made, some of which I disagree with, some of which I feel like people were treated too harshly by the criminal justice system for white-collar crime just to make them an example, and I can feel your pain in terms of representing clients who may fall on the wrong side of political correctness, and I hear what you are saying. But I do not think to amend the law in this case would prevent prosecution discretion from being misused from a political standpoint.

Ms. REGON. Sir, I would like to respond to really what I feel is the heart of your question, which is I think that both blue collar criminals and white-collar criminals or those who are accused of those sorts of crimes, they both deserve constitutional fairness. They both deserve fair notice of what is against the law before they are prosecuted for potentially violating——

Mr. JOHNSON. But nobody——

Mr. SENSENBRENNER. The gentleman's time is expired.

Will the witness continue her answer? And then I will recognize the gentlewoman from Florida.

Ms. REGON. Thank you, Chairman, very much.

The Constitution requires fair notice to each of us about what the law prohibits and what the law does not. We do this because we think it deters conduct. We do this because it is fair, because it provides due process notification to all of us, and I think that is important to anyone accused of any type of crime. NACDL rep-

resents those accused of all types of crimes, including burglary and rape and child——

Mr. JOHNSON. I realize that.

Ms. REGON. The full panoply of crimes, and I don't think that there is a difference between——

Mr. JOHNSON. But legally——

Mr. SENSENBRENNER. The gentleman's time has expired.

Mr. JOHNSON. Legal crimes——

Mr. SENSENBRENNER. The gentleman's time has expired.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. SENSENBRENNER. The gentlewoman from Florida, Ms. Adams.

Ms. ADAMS. Thank you, Mr. Chairman.

Mr. Andres, does DOJ have definitions for foreign official instrumentality? Do you have that in your agency?

Mr. ANDRES. So in addition to the statute, foreign official as defined in the statute, there are now several decisions by district courts, two in California, recently one in Miami, which have further amplified the definition of foreign official. And beyond that I would say that it is important when we think about that concept that the foreign official definition in the statute is consistent with our own treaty obligations.

So, yes, there is a definition in the statute.

Ms. ADAMS. What about DOJ?

Mr. ANDRES. We follow the definition——

Ms. ADAMS. You don't have any tweaks to it whatsoever when you are determining whether or not to file?

Mr. ANDRES. We don't support a change in the definition of foreign official, again because——

Ms. ADAMS. What about instrumentality?

Mr. ANDRES. Same answer, because we are fearful that that will—there is a bright line rule with respect to who constitutes a foreign official. We think if companies are not paying bribes, that there is really no fear of prosecution from FCPA enforcement.

Ms. ADAMS. Well, I have listened to the different conversations, different questions, and you said that you publish when you have your decisions on how you came about your decisions. What about when you decide not to file? Is there some area in which you have that information so that people can go to that area and find out if it is consistent, is there any irregularities based on decisions made whether or not to file?

Mr. ANDRES. So that is a difficult area for the government. We don't, in large part, because we don't want to penalize a company or an individual that has been investigated and not prosecuted, that there may be some prejudice from that. But let me——

Ms. ADAMS. Can you tell me how many cases maybe in the last year that you have had come to your agency where you wanted to take a look but then you changed your mind or whatever and decided maybe it didn't fall into the parameters or didn't quite make that bright line test, about how many cases that would be this year alone?

Mr. ANDRES. I don't have those numbers, and I can try and provide them. I will say one other thing about guidance. In the FCPA there is a unique feature in the law called the procedure, or an

opinion procedure process. It is unique to the FCPA. If a company has a question about who constitutes a public official, or if some particular conduct, they have the ability to ask the Department of Justice for an advisory opinion as to whether or not that conduct will violate the statute.

So if there is a question about a payment being made or whether somebody constitutes a——

Ms. ADAMS. Such as the taxi cab ride that cost $200,000 to investigate.

Mr. ANDRES. If, in fact, that is true, then yes, you could ask the question, and the Department would be obligated under the statute to give you an opinion as to whether or not that conduct——

Ms. ADAMS. So just curious. Would it be fair to say, in the absence of court involvement in FCPA cases, judges will have the opportunity to define the limits in the FCPA, and therefore DOJ alone gets to define what the law means?

Mr. ANDRES. I don't think that is right. There is judicial oversight. We just finished——

Ms. ADAMS. I said in the absence of it.

Mr. ANDRES. I'm sorry?

Ms. ADAMS. In the absence of judicial oversight, in the absence of the court involvement, then you would be making all those definitions and defining.

Mr. ANDRES. Yes, but every one of these cases is negotiated with experienced defense counsel. And so we take a great amount of time to speak to defense lawyers who are very experienced in this field in making decisions about how to come to resolutions. So there is ample opportunity for them to address these issues with the Department.

Ms. ADAMS. Judge, I see maybe you wanted to add something?

Mr. MUKASEY. I would simply point out that none of those cases are binding on any other case. So, yes, they provide an interesting case study for somebody who would like to make a future decision, but there is no guarantee that it is going to come out the same way.

Ms. ADAMS. Interesting. So it all falls back to DOJ and the decisions that they decide to make based on what?

Mr. ANDRES. We decide based on the definition of a foreign official in the statute. And while an opinion release may not be binding on a separate party, nothing precludes that party from asking the Department the particulars of his or her case so that they can have clarity about what the law is. We feel that that procedure has the ability to provide explicit guidance.

Ms. ADAMS. Would it be possible, just say in the last year, for you to provide to the Committee the amount of cases that were brought to your attention and that were not filed upon, and the reasons and rationale why you did not file those cases?

Mr. ANDRES. We certainly can try to figure out the number of cases we declined, the various factors that went into——

Mr. SENSENBRENNER. Will the Department submit this information in writing to the Committee?

Mr. ANDRES. To the extent that we can—to the extent that we can gather that information, we will certainly try to.

Mr. SENSENBRENNER. Without objection, when the information is received, it will be made a part of the record.

And the gentlewoman's time has expired.

The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Mr. Chairman, thank you, and I thank you and the Ranking Member, Mr. Scott, for holding the hearing. It is extremely important for this Committee to be diligent in oversight. And if there is a Committee that has a broad reach, it is the Judiciary Committee in terms of the layers of laws that we have to address.

So let me try to probe as quickly as I can to the Department of Justice. Tell me how many attorneys and staff, to your best knowledge, are assigned to the Foreign Corruptions Act.

Mr. ANDRES. Well, I am going to—I can obviously get that number in particular, but I am going to say there are probably between 15 and 20 lawyers in the Department of Justice in Washington that are assigned to those cases and do those cases primarily. When we, in fact, prosecute a case, we often partner up with the local U.S. Attorney's Office. So——

Ms. JACKSON LEE. So you add resources when it happens to fall within a different jurisdiction.

Mr. ANDRES. That is right.

Ms. JACKSON LEE. So any given time, you could have 10—excuse me—you could have 15, 20, 25 if you are working on a case, or more. I mean, I would imagine there is some flexibility there.

Mr. ANDRES. Fifteen or 20 in Washington who are dedicated solely to this mission, the prosecution of foreign bribery, and then lawyers, prosecutors in offices throughout the United States who will supplement our trial team if we go to trial, or in the investigative team.

Ms. JACKSON LEE. Do you think that is an excessive amount?

Mr. ANDRES. Certainly not in light of what the problem is, that is the size and magnitude of foreign bribery and the way that that negatively impacts on American business, which isn't to say I am asking for more resources, but only to say the problem is significant.

Ms. JACKSON LEE. So your prosecution, however, is of U.S. companies that engage in bribery. Is that correct?

Mr. ANDRES. No. That I think is a common misconception. Our—the FCPA allows us to prosecute a range of different companies, both foreign and domestic. In fact, one of the ways that we are hopeful that we are helping American businesses is by the prosecution of foreign companies who are engaged in widespread——

Ms. JACKSON LEE. And give me the nexus. If I am in a foreign country and I am a foreign company from elsewhere, what is the nexus for suing that company for bribing? And I would add to it that there is an American company trying to do business, I am bribing, I get the business, but I am a foreign country—excuse me—foreign company in a foreign country, the same country that this United States business is in.

Mr. ANDRES. So, for example, if you are a foreign company who is listed on an exchange in the United States, then we can—you fall within the jurisdiction. Eight of the 10 largest FCPA settle-

ments in the history of the statute are against foreign companies, which isn't to say that we target——

Ms. JACKSON LEE. And is the action based upon a bribery, does it have to impact a U.S. company, or because it is on an exchange you have the jurisdiction?

Mr. ANDRES. No, it doesn't have to impact an American company necessarily.

Ms. JACKSON LEE. But the bribery, of course, is one that undermines the normal course of business.

Mr. ANDRES. Clearly it affects the level playing field, and we believe——

Ms. JACKSON LEE. Give me some—and my time is running, so I am interrupting. Give me some, one or two cases and your assessment of whether you have been excessive.

Mr. ANDRES. So, for example, the Siemens case involved improper payments of over $800 million in four countries, and that bribery scheme lasted over 6 years. That was a company that we prosecuted.

Ms. JACKSON LEE. Right. What was the settlement? What was the result?

Mr. ANDRES. The settlement was a payment, I believe, of approximately over $800 million settlement with respect to the payments that were made——

Ms. JACKSON LEE. And what would be your answer to the question that it is antiquated and over-broad?

Mr. ANDRES. I don't believe that is true, and I don't believe change is necessary to the statute. Again, given the magnitude of the problem and the possibility that some change to the statute could either send a message that we were sanctioning some type of bribery or producing loopholes which would further——

Ms. JACKSON LEE. Thank you.

Mr. ANDRES [continuing]. Impact American business.

Ms. JACKSON LEE. Thank you.

May I get Ms. Shana-Tara Regon? What is your opposition, or what do you think we can do to improve? Frankly, let me tip my hand and say that I think it is a valuable purpose for this act. What are your arguments against its utilization?

Ms. REGON. Congresswoman Lee, we would agree that the act itself started off with a laudable goal, and that is to prevent explicit commercial bribery abroad, and we are certainly not here to suggest that there shouldn't be anti-corruption laws on the books. We are suggesting that those that do exist have understandable and rational limitations, that the people who are subject to those laws are able to understand by reading the law what is prohibited and what is not so that they can then conform their conduct to the law and not violate it. That is, unfortunately, not the case with this statute.

Ms. JACKSON LEE. Mr. Chairman, may I just thank General Mukasey for being here? I wanted to pose a question, but he knows the great respect that I have for him and thank him for his service that he rendered as Attorney General and on the Federal bench, and I will look forward maybe to engaging with you on this question.

Mr. MUKASEY. Thank you very much. Good to see you again.

Ms. JACKSON LEE. Thank you. Good to see you.

Mr. SENSENBRENNER. The gentlewoman also knows that the gavel is bigger than normal. [Laughter.]

Ms. JACKSON LEE. But I know you won't throw it. Thank you, Mr. Chairman. [Laughter.]

Mr. SENSENBRENNER. The gentleman from Arizona, Mr. Quayle.

Mr. QUAYLE. Thank you, Mr. Chairman.

Mr. Andres, in 2006 Macau became the number one gambling market in the world, surpassing Las Vegas, and it was recently reported that gambling revenue in Macau rose about 42 percent in May, and year over year, and it is expected to continue to grow in this manner.

Has the DOJ looked into the gambling practices in Macau and if there is any illegal activity occurring in that arena?

Mr. ANDRES. I am not sure that would be appropriate for me to comment on any ongoing investigation to the extent there was one. So I am not sure that is a question I am able to answer.

Mr. QUAYLE. Okay. Let me go to another subject. Now, when you are trying to decide whether a company is an instrumentality of the state, what sort of ownership structure or ownership percentage do you have to be there to fall within that definition? Because one of the things I am wondering is if under that guidance, is GM considered an instrumentality of the state?

Mr. ANDRES. So there are a variety of factors which we look at, and ownership is not the sole factor. In deciding whether or not an instrumentality constitutes, or a foreign official constitutes an entity bribing against which we could prosecute, we look at the characterization, the foreign state's characterization of the entity and its employees, the foreign state's degree or control over the entity, the purpose of the entity, the state law, the creation. So the fact alone that GM, that there is some government investment in GM would not, under the tests we use, qualify it as an instrumentality of the United States.

Mr. QUAYLE. So just the ownership stake does not actually trigger that. You would actually say, well, if there was some communication with the board and various members of the government basically being able to control or influence, as you will, where a company goes, would that then fall under that category?

Mr. ANDRES. Yes. So ownership is one of several factors that we consider, but it is not the sole factor. Just to give you an example, in the recent prosecution of Lindsay Manufacturing, they were bribing a state-owned electric company in Mexico, and in the constitution, the Mexican constitution dictated that people had a right to electricity. So that was one of the factors that we considered, the country's own constitution and how it defined what the responsibilities of the entity were, the instrumentality.

Mr. QUAYLE. Okay. Thank you.

Mr. Terwilliger, the SEC recently implemented new rules pursuant to the Dodd-Frank bill which encourages whistleblowers to actually go directly to the SEC, which circumvents the internal corporate compliance requirements. Now, given your experience conducting these internal investigations, can you speak to the appropriateness of the whistleblower provision included in the Dodd-Frank bill? And also I would like to get specific in terms of how

they are allowing the monetary sanctions that the government receives, the whistleblower gets a percentage of that, and how that would influence and have, I think, maybe a possible perverse effect on whistleblowing going forward.

Mr. TERWILLIGER. Thank you, Mr. Quayle. And I think it is—I commend you for attention to that issue, and the Committee's attention to it, because what we are really talking about here and the fundamental need for reform is to address the impact on the American economy and American businesses which create the jobs that Americans so desperately need right now. And, yes, having a level playing field in the world for competition is good for American business, but wasting money on compliance efforts that get nothing at the end of the day is problematic.

And the uncertainty that attaches to the parameters of the FCPA costs tremendous amounts of money not just to hire lawyers to try to figure out where they are and to discuss them in a reasonable basis with the Justice Department in the context of an enforcement action, but even to decide whether, for example, given your example, an instrumentality in a similar situation to General Motors is, in fact, an instrumentality of the government or not, and therefore enhanced compliance procedures would be needed if a U.S. company was engaged in business with it. Those uncertainties as to those questions create a lot of hidden cost and may have a U.S. company say, look, I am not going to spend $200,000 to find that out; I am going to leave.

In terms of the whistleblower act, the fundamental problem with the whistleblower statute and its impact on compliance programs is this. Companies need to know if something wrong is being done in their operations, and they need to know it in a timely way so they can remediate it, take corrective action and, if appropriate, disclose it to the government and accept the consequences.

The whistleblower statute encourages employees to go around the company and instead go to the SEC. Why should someone who stands to gain a percentage of a recovery act in a manner that is going to limit the bad acts which determine the size of what that recovery would be? It is something that I would humbly suggest is well worth Congress' attention.

Mr. QUAYLE. And going back to the creation of jobs—that is the final question? My time is——

Mr. SENSENBRENNER. Sure.

Mr. QUAYLE. Thank you, Mr. Chairman. Without getting into any confidences, how—can you give us an example? Do you have any knowledge of companies that have been ceding markets to foreign companies because they are afraid of what happens under FCPA?

Mr. TERWILLIGER. I would not—I think ceding markets would go too far, at least between, beyond data that is available to me. I would say that American companies have become much more circumspect in dealing with opportunities, particularly smaller opportunities that may grow into something larger in some of the developing markets of the world, including China, which was mentioned earlier, simply because the cost/benefit analysis of worrying about FCPA compliance issues in this world of uncertain parameters, which is no criticism of the Justice Department. I think they do un-

dertake an effort to be fair in enforcement. But that is the end of the line. We are worried about the beginning of that line.

Mr. QUAYLE. Thank you. Thank you, Mr. Chairman.

Mr. SENSENBRENNER. Thank you very much, Mr. Quayle.

I have changed the order of questioning deliberately today rather than asking my questions first, but I am going to do it last because I wanted to hear both the testimony as well as the answers to questions of Members of the Committee.

There is no question in my mind that we have to bring this law up to date. Nobody here is in favor of bribery, but there has to be more uncertainty. And I must say I was a bit befuddled at the statement that the former Chairman of the Committee, Mr. Conyers, made, saying that corporations should know what is illegal. I think while a corporation is not a human being, but everybody has a right to know what is illegal, and there has to be much more certainty in the law.

So I think that we are going to have to have a defined parameter which may be a little bit less than it has been, recognizing that there have been some changes with the result of China's economy exploding and the collapse of the Soviet Union, so that people have a better idea of what is in bounds and what is out of bounds.

I have several points that I have heard, and I am going to ask you, Mr. Andres, and you, Ms. Regon, what your idea of an appropriate response would be.

First is a better clarification of the definition of a foreign official, particularly when you are dealing with a quasi-state-owned enterprise like are very common in China and the Middle East.

The second is how we delineate between a legitimate business activity and bribery, because I think that there has to be a clarification on that.

The third is talking about affirmative defenses such as the affirmative defense that has been provided in Title 7 of the Civil Rights Act, where if there is a remediation in the workplace, that can be pleaded as an affirmative defense; a clarification of the type of mens rea that the prosecution must prove in order to successfully convict someone who is indicted.

And then I am really concerned about a de minimis defense and having at least some clarification that when an opinion is issued, the Justice Department would have to accept that as precedential value rather than saying, well, it was okay if X did it, but it is criminal if Y does exactly the same thing.

And we talked quite a bit about the taxi ride. And if you are working until 3 o'clock in the morning and everything is shut down, I don't know what good it does to wait for an advisory opinion that can take as long as 30 days from the Justice Department for the U.S. corporation official or somebody else to decide to get back to the hotel and snare some Z's, rather than sitting and waiting until somebody from Washington tells them what is good and what is not and whether this is bribery or whether it is a legitimate business activity.

So if you can kind of sum this up, both Ms. Regon and Mr. Andres, on how we deal with this issue, I think it would be very helpful to the Committee in drafting legislation. And I would like to ask

you to go first, Ms. Regon, because I would like to hear the answer to your observation from Mr. Andres.

Ms. REGON. Thank you, Chairman, and I will attempt to answer succinctly the many questions that you have put to me. I would first like to say that NACDL has not taken an official policy position on the types of reforms my colleagues have mentioned today, but I would like to suggest that we are certainly supportive of anything that the Congress does to clarify, bring uniformity, and bring fairness to the enforcement of this statute. We are particularly supportive of ensuring that mens rea requirements in the statute, on behalf of both individuals and corporations, is as high and as protective as possible so that only persons who are purposely engaging in corrupt, explicit commercial bribery are punished by the act.

I think that defining more narrowly who a foreign official is so that companies and individuals can look prospectively and say I am dealing with a foreign official in this business deal, therefore my compliance measures have to be up, my focus on what I am doing and what my employees are doing needs to be more sharp, sharply focused, I think that would help and go a long way in ensuring both compliance with the statute and preventing misconduct.

Where you get misconduct is where you get these fuzzy lines where no one, companies or the individuals working for them, really understands what is prohibited or not, and I fail to see a rational explanation for not providing that kind of clarity to people so that they can conform their behavior to it.

I think that we have many bribery statutes on the books that address other types of bribery in other contexts. Some of those are written very tightly and very well, and no one seems to have any difficulty figuring out what is bribery and what is not. So I suggest that we use those as models.

I think an affirmative defense could be helpful to a company. The Department has testified that they do take into consideration compliance defenses when they are thinking about whether to charge a company or what an appropriate sentence should be. I guess I would suggest that from NACDL's point of view, we would like to foster fairness in the criminal justice system, and having a prosecutor also sort of be judge and jury and being the sole person in that calculation making the determination of how valuable the compliance defense is isn't quite fair.

And so I believe the people that are supporting an affirmative defense in this way are probably coming from that point of view and hoping that it is taken into consideration slightly more than just the same person that is deciding whether a violation of the statute has actually occurred.

Mr. SENSENBRENNER. Mr. Andres, which of Ms. Regon's suggestions don't you agree with?

Mr. ANDRES. I am not sure I agree with any of them, sir.

Mr. SENSENBRENNER. Okay.

Mr. ANDRES. Just stepping back for a minute, with respect to the definition of a foreign official, Mr. Chairman, you talk about the different structures in China. I think one of the things that you have to take into consideration in defining what a foreign official is is that the statute covers the whole world. And so what constitutes a foreign official in China because of different structures

within the government and how they run their state-run industries may be very different from those joint ventures or structures that are government-controlled in Brazil, or in France. So——

Mr. SENSENBRENNER. But how do you know that when you are trying to negotiate a contract to sell American-made products?

Mr. ANDRES. Well, two things. If there is a concern about who constitutes a foreign official, you ask the government for an opinion and you provide the relevant facts.

Mr. SENSENBRENNER. Oh, come on now. China is a communist country. They are not going to tell you what the governmental involvement is or who gets paid which way.

Mr. ANDRES. Well, we are going to——

Mr. SENSENBRENNER. They don't have the type of disclosure that Western countries, including the United States, has on who owns what, with disclosures that the SEC requires of public corporations.

Mr. ANDRES. I understand that, sir, but there is no prohibition with doing—the statute doesn't make it illegal doing business with China. It makes illegal providing a bribe. And so with respect to whether or not a company could bribe a commercial entity versus bribing a foreign official, the Department's position would be that if companies aren't paying bribes, they have nothing to fear with respect to enforcement——

Mr. SENSENBRENNER. Okay. Then would the Department approve an amendment to the Foreign Corrupt Practices Act to use the statute on bribing somebody in a commercial contract to apply to any type of bribery and forget about this debate on who a foreign official is, because bribery is bribery? That is a lot clearer than what is in the Foreign Corrupt Practices Act.

The thing is that we have heard from every one of the witnesses today that this statute is vague, it does not tell people what is criminal activity and what isn't, and it is subjective, and what the Justice Department determines, which you don't know until you find out there is an investigation or get hit with an indictment, and there is no precedential value to advisory opinions that have been issued in the past.

Now, I have been pretty pro-prosecution, as my friend from Virginia can say, probably too much so. But I really think that it would behoove the Department to realize that this statute needs updating because China was a lot different in 1977 than it is today, and I think most of the Middle East is going to be changing pretty rapidly if the newspaper reports are correct.

Mr. ANDRES. Mr. Chairman, obviously the Department is more than willing to work with Congress on any possible changes.

Mr. SENSENBRENNER. Okay.

Mr. ANDRES. Although I——

Mr. SENSENBRENNER. Okay. Well, the invitation is there, and we are going to be drafting a bill. So, see you later. [Laughter.]

Mr. ANDRES. Understood, with the exception, Mr. Chairman, that——

Mr. SENSENBRENNER. Okay.

Mr. ANDRES. I will say that while there have been criticisms by the other members of the panel, no one has raised a single example of a prosecution or enforcement action which was remotely close to the line. The cases that we are prosecuting——

Mr. SENSENBRENNER. But that is not the point, Mr. Andres. You know, the thing is is that if you were the general counsel of a corporation that was involved in the globalized economy and you had to go advise your CEO and everybody else who is involved in this, you are going to be advising in the most narrow way and exercising the greatest amount of caution because of what is going on. And as a result, legitimate business activity which is not bribery in nature is going to be quashed, and we end up being put at a significant disadvantage to our foreign competitors. Get the message, sir, and tell that to the AG.

Well, I made my point. I think all of the Members of the Committee, as well as the witnesses, have made their point. I would like to thank all of you for coming, even those of you who have had a tough time.

Does the gentleman from Virginia want to put something into the record?

Mr. SCOTT. Yes. Mr. Chairman. Letters from—statements from the Global Financial Integrity and Citizens for Responsibility and Ethics in Washington.

Mr. SENSENBRENNER. Without objection, the material will be put in the record.

The purpose of this Committee or this hearing having been concluded, without objection, the Committee stands adjourned.

[Whereupon, at 12 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

global witness

Global Witness Written Testimony Submitted for the Record
Hearing on the Foreign Corrupt Practices Act
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Crime, Terrorism and Homeland Security

June 14, 2011

Global Witness would like to thank the Committee for the opportunity to submit written testimony in support of strong enforcement of the Foreign Corrupt Practices Act (FCPA).

Global Witness is a non-governmental organization with offices in Washington, DC and London. For 15 years, Global Witness has exposed how, rather than benefiting a country's citizens, abundant timber, diamonds, minerals, oil and other natural resources can incentivize corruption, destabilize governments, and lead to war. We were co-nominated for the 2003 Nobel Peace Prize for our work in combating the trade in conflict diamonds. Global Witness was part of the coalition that successfully campaigned for the creation of the Extractives Industries Transparency Initiative, which brings together governments, companies and civil society groups to work for greater public disclosure and independent oversight of oil, gas and mining revenues.

Global Witness has carried out numerous investigations concerning allegations of bribery and corruption on the part of companies or public officials around the world, whose findings we make public in our reports. Our work has given us a detailed understanding of the anti-corruption laws of different countries and of the practices of corporations in respect to bribery and corruption.

Harmful Impacts of Bribery

Bribery, particularly the bribery of foreign public officials, by multinational companies, is prevalent in many developing countries, including countries rich in natural resources where our work is concentrated. Bribery undermines the rule of law and the principle of fair competition and entrenches bad governance in such countries, hindering their efforts to alleviate poverty and often contributing to instability and human rights abuses.

Bribery can lead directly to human suffering and death, for example where it results in government contracts being awarded to companies that perform substandard construction work or provide substandard goods and services in the health sector. Bribery of foreign officials can help to entrench corrupt elites by providing the incentive and the means to

maintain a tight grip on power, particularly in natural resource rich states where the stakes and potential rewards are higher.

Thus bribery is not a victimless crime or a regrettable but unavoidable cost of business for companies overseas. It is a morally poisonous and economically destructive crime which contributes, directly and indirectly, to poverty and human suffering.

Bribery and other corrupt practices have devastating effects on developing economies and their citizens' quality of life. The cost of corruption in Africa alone has been estimated at $148 billion a year, representing 25% of the continent's GDP.[1] Corruption undermines economic growth rates and cripples public services, as money which should be destined for reinvestment and public expenditure finds its way into private bank accounts, often abroad. It also discourages foreign investment, threatens democracy and can lead to instability.

Corruption is often thought of as endemic to Africa and other developing countries, but it is actually exacerbated by actors in developed countries. Companies actively fuel corruption in developing countries when they pay bribes. When companies fail to disclose legitimate payments to governments, they passively fuel corruption.

Curbing Bribery to Promote a Better Business Environment

Corruption is also bad for business. Bribery increases the cost of doing business. This external cost cannot be accurately budgeted for, as once a bribe is paid the cost of continuing to do business may increase over time with additional demands for bribes. Bribery undermines the rule of law. It also distorts competition and is economically inefficient. Companies compete with each other over the size of the bribe they are willing to pay, rather than the quality of their work product.

Curbing bribery would:

- create a level playing field for business as the open market, and not the bribe, would be the impetus behind sales and contracts;
- reduce the cost of doing business;
- create greater security for contracts;
- downgrade corporate risk in key markets;
- reduce operational costs, such as the cost of capital and insurance premiums; and
- lead to more politically stable and secure environments in which U.S. companies and investors can operate, and therefore help to ensure access to scarce resources.

Laws such as the Foreign Corrupt Practices Act promote more stable business environments and protect responsible companies. Some companies view the FCPA like a shield against irregular and unpredictable payments, particularly in corrupt countries, as it protects them from having to engage in corrupt or otherwise illegal activities that are suggested by government officials.

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[1] African Union study on corruption in Africa prepared in 2004 see: Smith, Pieth and Jorge "The Recovery of Stolen Assets: A Fundamental Principle of the UN Convention Against Corruption", Briefing Paper, published by the U4 Anti-Corruption Resource Centre, Norway, February 2007.

Newmont Mining, the second largest oil mining company in the world, views the FCPA as a valuable business tool. Earlier this year, Chris Andersen, Director Corporate & External Affairs Africa, stated, "...Newmont's experience, particularly in Africa has been that [the] FCPA has been an enormously valuable protective device for us...and we found it to be like an insurance policy."[2]

Global Action to Tackle Bribery and Corruption

The U.S. has long led the world in addressing bribery and corruption. Since the U.S. adopted the FCPA in 1977, many international conventions including the OECD Anti-Bribery Convention (1999) and the UN Convention Against Corruption (UNCAC, 2005), ratified by the U.S. in 2006, have been enacted, directly influenced by U.S. leadership. Many countries have also passed domestic laws to combat bribery. Earlier this year, China and Russia adopted anti-bribery laws to implement these conventions.

Global momentum to tackle bribery is also evidenced by the G20 prioritizing an Agenda for Action on Combating Corruption, Promoting Market Integrity, and Supporting a Clean Business Environment. G20 member states agreed to lead by example at the Seoul Summit in November 2010, including the ratification and implementation of UNCAC and the adoption and enforcement of laws and other measures against international bribery, such as the criminalization of bribery of foreign public officials.

Strong enforcement of anti-bribery laws is critical in reducing corruption and promoting a better business operating environment for companies. The U.S. has increased its enforcement of the FCPA during the last decade - in fact, the largest number of cases and monetary penalties were levied last year. The U.S. government should continue to set an example for the rest of the world through robustly enforcing the FCPA and promoting anti-corruption efforts globally through the G20 and other mechanisms. A strong FCPA is crucial in helping to build a fair and stable operating environment for the private sector and to promote economic development and improved governance. An effectively enforced FCPA also gives the U.S. government significant credibility in its wider diplomatic and political outreach to promote democracy and good governance across the globe.

In short, for the U.S. to roll back any of its ground-breaking anti-bribery law at this critical juncture when the rest of the world is finally starting to match its standard, would be an abdication of its leadership role on this important issue.

For more information, please contact Global Witness Head of U.S. Office Corinna Gilfillan (cgilfillan@globalwitness.org, tel: 202 621 6665) or Policy Advisor Stefanie Ostfeld (sostfeld@globalwitness.org, tel: 202 621 6674) for more information.

[2] Statement by Chris Andersen, Director Corporate & External Affairs Africa, Newmont Mining during a Panel Discussion: New and Emerging Financial Reporting Requirements and the EITI, Extractive Industries Transparency Initiative Global Conference, March 2, 2011, Paris, France. http://soundcloud.com/eiti/paris2011-en-emerging-reporting-requirements at 20:30 mins

Statement for submission

Hearing of the
Sub-committee on Crime, Terrorism and Homeland Security
Judiciary Committee
United States House of Representatives

On proposals to Amend the Foreign Corrupt Practices Act
June 14, 2011

Karin Lissakers
Director
Revenue Watch Institute
New York, New York

The US Chamber of Commerce has chosen a peculiar time to launch an assault on the Foreign Corrupt Practices Act, which outlaws the bribery of foreign government officials for commercial gain. Congress adopted the ground-breaking legislation with broad bi-partisan support in 1977.

Twenty-four years later, the rest of the world is getting serious about bribery, too:

After public outcry over an attempted government whitewash of British aeronautics giant BAE's alleged payoffs to promote sales in Saudi Arabia, the British parliament last year adopted an anti-bribery statute that is even tougher than the FCPA.

One of Germany's largest multinationals, Siemens Group, has turned out its entire top management, retrained staff and adopted stringent anti-bribery rules, after a scandal and large fines for its lavish foreign bribery slush fund.

The G20 group of major industrial and emerging market economies has an anti-corruption working group focused on anti-corruption laws. One measure of its impact is that China recently outlawed bribery of foreign officials by Chinese companies operating abroad.

Under an OECD convention, all member states are obligated to adopt and enforce anti-bribery statutes, and the OECD peer review process has become more blunt and public. The reputation risk to companies and the political risk to governments of continuing to do "business as usual" is simply too great.

Now the Chamber of Commerce wants to water down the FCPA allowing the reintroduction of old practices, for example, letting agents and foreign subsidiaries do the dirty work with no legal implications for the parent company.

In the Senate hearings 36 years ago that led to the FCPA, executives from the Northrop Corporation, a major manufacturer of military aircraft at the time, testified that it paid automatically a per cent of its non-Western Hemisphere global earnings to a law firm in Lichtenstein. The executives claimed not to know what the money was used for or who the beneficial owners of the firm were, but the arrangement was good for sales.

Congress also considered the practices of the Lockheed Corporation. Subpoenaed documents showed that Lockheed used a Japanese agent to funnel at least $14 million to a fanatic nationalist group that wanted to re-militarize Japan and restore the absolute power of the Emperor. This, too, was apparently good for sales.

Three competing companies discovered through the Senate testimony that they had hired the same agent to "facilitate" a deal in Persian Gulf states. The agent was going to get—and share with foreign officials—his 10 percent, no matter who won the contract. In Italy, the national petroleum trade association dunned oil company subsidiaries monthly for their contribution to the tens of millions of dollars in payments the industry made to Italian law makers to preserve special tax breaks. An Exxon executives testified that its Italian subsidiary's share of the bribes to members of parliament was not "material" so that there was no obligation for the parent to be aware. The subcommittee chairman assured the executive that such sums were certainly "material" for the legislators.

The changes to the FCPA the US Chamber proposes would re-open the door to such pernicious practices, and worse, and greatly weaken the Justice Department 's ability to enforce remaining provisions. Among the changes sought would be to limit the liability of parent companies for the actions of their subsidiaries. In 1977, after a year of hearings and examining tens of thousands of corporate documents, Congress knew what it was doing when it required parent companies and their executives to be accountable for the actions of subsidiaries and agents in the conduct of overseas business. Congress should not tamper with a provision, and a law, that has stood the test of time.

Bribery distorts markets, damages corporate reputations, subjects companies to endless shake-downs and damages public life in countries where the US should be seen as a trusted business and political partner.

In the Middle East and North Africa, citizens have risen in revolt against corrupt regimes that treat the national economies as a family business for personal gain. Like-minded regimes in other parts of the world are feeling the heat. Dropping US

safeguards against bribery now could not be more short-sighted or damaging to our foreign policy.

Congress should reject any effort to weaken the US anti-bribery statute and instead continue to advance policies that promote honest business and transparent and accountable governance around the world.

The Revenue Watch Institute is an independent non-profit organization devoted to promoting the transparent, accountable and effective management of oil, gas and mining resources for the public good.

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Protect and Maintain the Foreign Corrupt Practices Act (FCPA)

The Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. §§ 78dd-1, et seq., prohibits domestic companies from bribing foreign officials in foreign markets for the purpose of obtaining international business opportunities. The statute prohibits not only bribes paid to foreign officials, but also -- because bribes paid to foreign officials to obtain or retain government contracts are frequently unrecorded -- making false or misleading entries on a company's books for any purpose.

The FCPA purposefully has a broad reach, extending to any company headquartered in the U.S., any natural persons who are citizens, nationals or residents of the U.S., and any company operating globally with securities registered in the U.S. Importantly, "foreign official" includes not only those directly employed by the government, but also persons employed by commercial enterprises owned or controlled by foreign governments, referred to under the statute as "instrumentalities."

Significantly, over the last three years the Department of Justice ("DOJ") has increased substantially the number of enforcement actions against corporations and individual executives. This new vigilance in ferreting out corruption promotes a competitive and fair international playing field and is more vital today than ever. The World Bank estimates that more than $1 trillion in bribes is paid each year – approximately 3% of the world economy, which some suggest amounts to a 20% tax on foreign investment. As the 1977 House Report accompanying the statute's passage stated, this kind of corruption erodes public confidence in the integrity of the free market system, rewards corruption instead of efficiency, and creates foreign policy problems. And to state the obvious, it's unethical.

The FCPA Under Assault

Despite the importance of the FCPA, many in the business community, including the Chamber of Commerce, seek to weaken its reach under the guise of "reforming" and "modernizing" the statute for an increasingly competitive global economy, suggesting the statute is impeding U.S. economic growth. Evidence shows otherwise. In fact, in its recent digest on FCPA enforcement trends, one prominent international law firm that represents corporate defendants wrote that on average the fines imposed on violators "call into question some of the outlandish claims made on both sides of the aisle – that the consequences of a FCPA violation are in all cases severe and dissuasive or that the enforcement penalties are out-of-control, extreme, and crippling."[i] The same firm said it had "never seen a company put out of business as a result of a FCPA enforcement action."[ii]

In describing his experience working in more than 50 developing countries, one commentator noted the FCPA only enhances the stature of Americans doing business abroad rather than limiting opportunities: U.S. companies "may lose the occasional piece of business, but we gain a lot more."[iii] Efforts to weaken the scope of the FCPA are nothing short of a tacit endorsement of bribery and unethical behavior. The so-called "reforms" pedaled by the Chamber would only encourage corrupt business practices and subsequently tarnish the image of the U.S. abroad.

Efforts to add a compliance defense should be rejected. Analysis of DOJ's enforcement actions indicate the department already considers a company's compliance efforts in making prosecutorial decisions. In addition, the U.S. Sentencing Guidelines credit a company's FCPA compliance efforts in determining the appropriate sentencing guideline. Adding a compliance defense might serve to encourage some companies to create so-named, but deliberately ineffective compliance programs to avoid being held accountable for unethical activities

Narrowing the definition of "foreign official" is unnecessary and ignores congressional intent. While corporations have argued the definition of "foreign official" is overly broad and vague, courts that have considered the issue have rejected this view."[iv] One court dismissively noted, "persons of common intelligence would have fair notice of this statute's prohibitions."[v] Moreover, DOJ has issued ample guidance on how it applies "foreign official" in enforcement actions.[vi]

Adding a "willfulness" requirement is unnecessary. A review of FCPA enforcement actions shows that DOJ is not prosecuting such cases unless a corporation has engaged in willful criminal conduct. The department follows time-tested legal principles in evaluating whether to charge a corporation, such as the "nature and seriousness of the offense," the "pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management."[vii]

Amending the books-and-records provisions to require the government to show a violation was "knowing" would let corporations off the hook. Critics argue that because corporations can be liable for the corrupt actions of their subsidiary employees, the books-and-records and internal control provisions are tantamount to "strict liability." As written, the statute provides strong incentives for corporations to adopt compliance programs. Adding a knowing intent would allow corporations to avoid culpability by deliberately turning a blind eye to violations. Justice department prosecutors, judges and juries, rather than corporations themselves, can determine whether compliance programs were adequate.

Adding a materiality requirement ignores the reality of how bribery works. Congress understood when enacting the FCPA that corruption often takes the form of small "gifts" or payments made repeatedly over time. A stream of benefits is often part of a larger scheme. Moreover, a review of enforcement actions shows small gifts made over time have never been the primary basis for FCPA actions, which instead focus on larger payments.

Any effort to limit a company's civil liability for acts of a subsidiary should also be rejected. As DOJ has said in testimony before the U.S. Senate Judiciary Committee, successor liability is a well-established principle of corporate criminal liability and is imposed only when the facts and circumstances of a particular case warrant such treatment.[viii]

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[i] Shearman & Sterling LLP, *FCPA Digest: Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act*, (January 2011), http://www.shearman.com/files/upload/FCPA-Trends-and-Patterns-Jan-2011.pdf (p.3).

[ii] *Id.*

[iii] Raymond Baker, *Keeping Commitments*, (Dec. 9, 2010), http://www.huffingtonpost.com/raymond-baker/keeping-commitments_b_794153.html.

[iv] See, e.g., *United States v. Nguyen*, et al., 2:08-cr-00522-TJS, Dkt. No. 144 (E.D. Pa. Dec. 30, 2009); *United States v. Carson*, et al., 8:09-cr-00077-JVS, Dkt. No. 373 (C.D. Ca. May 18, 2011); *United States v. Aguilar*, et al., 8:09-cr-00077-JVS, Dkt. No. 335 (C.D. Ca, Apr. 1, 2011).

[v] *United States v. Esquenazi*, et al., 1:09-cr-21010-JEM, Dkt. No. 309 at 3 (S.D. Fla. Nov. 19, 2010).

[vi] See, e.g., *Lay Person's Guide to the FCPA*, http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf (the DOJ website also includes documents related to nearly 150 FCPA prosecutions, including charging documents, plea agreements, and relevant pleadings and orders).

[vii] *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcommittee on Crime and Drugs Committee on the Judiciary*, 111th Cong. 3 (2010) (Questions for the Record by Senator Amy Klobuchar for Acting Deputy Assistant Attorney General Greg Andres).

[viii] *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcommittee on Crime and Drugs Committee on the Judiciary*, 111th Cong. 5 (2010) (Questions for the Record by Senator Christopher A. Coons for Acting Deputy Assistant Attorney General Greg Andres).

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THE FOREIGN CORRUPT PRACTICES ACT IN CONTEXT

What is the Foreign Corrupt Practices Act (FCPA)?

- The FCPA was adopted in 1977 in response to the Watergate and other scandals of the time. It (a) requires companies to maintain accurate and detailed books and records, and (b) criminalizes the offer, payment or promise to pay money or anything else of value to a foreign official in order to obtain or retain business (what we generally refer to as bribery).

Why is bribery bad for business?

- Bribery creates an external cost of doing business that can't be accurately budgeted and demands for bribes, once indulged in the first instance, only increase over time.
- Bribery is economically inefficient because it distorts competition. Companies are no longer competing on the quality of their work or product and its price, but rather on the amount of bribe they are willing to pay.

Why is bribery bad for society?

- When the size of a bribe is the deciding factor in which firm obtains business, the firm hired may not be qualified to do the job, may use substandard materials that, due to additional bribes, may never be inspected, and the resulting work-product may be overpriced, inadequate or even unsafe.
- For example, a recent study analyzed death rates from earthquake-induced building collapse in countries experiencing earthquakes of equivalent magnitude and found that 83% of all deaths due to building collapse occurred in countries where corruption was rife, especially in the building industry.[1]

The FCPA was adopted in 1977. How is the rest of the world addressing bribery?

- International conventions based on the FCPA:
  - Inter-American Convention Against Corruption entered into force in 1997.
  - OECD Anti-Bribery Convention entered into force in 1999.
  - Council of Europe Convention on Corruption (Criminal) entered into force in 2002.
  - Council of Europe Convention on Corruption (Civil) entered into force in 2003.
  - African Union Convention on Preventing and Combating Corruption entered into force in 2006.
- The UN Convention Against Corruption (UNCAC), which is much broader than the FCPA, entered into force in 2005 and has 140 signatories including the U.S., which ratified UNCAC in 2006.

[1] http://tyglobalist.org/blogs/corruption-kills-earthquake-death-tolls-and-the-role-of-corruption/

- Various countries have adopted anti-bribery laws building off of the FCPA and to implement these conventions, including China and Russia this year.
    - Chinese statute: Does not define "foreign official", does not permit facilitation payments, and does not include any affirmative defenses.
    - Russian statute: punishes not only bribery of foreign officials, but all forms of commercial bribery (as required under UNCAC), but is otherwise considered a "mirror" of the FCPA.

WE HAVE SHOWN THE WORLD THAT THE U.S. IS SERIOUS ABOUT COMBATING BRIBERY, AND THE WORLD IS FOLLOWING OUR LEAD.

WEAKENING THE FCPA NOW WILL SEND A MESSAGE TO THE WORLD THAT THE U.S. IS SOFT ON CORRUPTION AND OUR COMPANIES ARE DEEP POCKETS FOR BRIBE-SEEKERS.

THE U.S. SHOULD FOCUS ON ENCOURAGING WORLDWIDE ENFORCEMENT, NOT CRIPPLING A STATUTE THAT HAS BEEN THE MODEL FOR INTERNATIONAL ANTI-BRIBERY LEGISLATION.

Questions? Please contact Please contact Heather A. Lowe, Legal Counsel & Director of Government Affairs, Global Financial Integrity (hlowe@gfip.org); Stefanie Ostfeld, Policy Advisor, Global Witness (sostfeld@globalwitness.org); Sarah Pray, Policy Analyst for Africa at The Open Society Foundation (spray@osi-dc.org) or Nicole Tichon, Executive Director, Tax Justice Network USA (ntichon@tjn-usa.com).

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