RICHMOND JOURNAL OF GLOBAL LAW AND BUSINESS

Volume 12 *Summer 2013* *Number 3*

ARTICLES

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Richmond Journal of Global Law and Business

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Volume 12 *Summer 2013* *Number 3*

RICHMOND JOURNAL OF GLOBAL LAW AND BUSINESS

Volume 12 *Summer 2013* *Number 3*

AN EXAMINATION OF FOREIGN CORRUPT PRACTICES ACT ISSUES

Mike Koehler[1]

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

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[1] Mike Koehler is an Assistant Professor, Southern Illinois University School of Law. Professor Koehler is the founder and editor of the website FCPA Professor (www.fcpaprofessor.com) and his FCPA expertise and views are informed by a decade of legal practice experience at a leading international law firm. The issues covered in this article, current as of January 1, 2013, assume the reader has sufficient knowledge and understanding of the FCPA as well as FCPA enforcement, including the role of the Department of Justice and Securities and Exchange Commission and the resolution vehicles typically used to resolve FCPA inquiries. Interested readers can learn more about these topics, and others, by reading Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907 (2010), *available at* http://paper.ssrn.com/sol3/papers.cfm?abstract_Id=1705517. The author's FCPA Professor website (www.fcpaprofessor.com) is also a useful resource for FCPA developments and analysis, specifically the FCPA 101 page of the site ((*FCPA 101*, FCPA PROFESSOR (last visited Mar. 28, 2012), http://www.fcpaprofessor.com/fcpa-101).

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

INTRODUCTION

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

I. 2012 FCPA ENFORCEMENT OVERVIEW

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

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

A. DOJ FCPA Enforcement Statistics

As demonstrated in Table I, in nine corporate FCPA enforcement actions[2] in 2012, the DOJ collected approximately $142 million in criminal fines.

TABLE I - 2012 DOJ CORPORATE FCPA ENFORCEMENT ACTIONS

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

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

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

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

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

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

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

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

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

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

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

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

[11] U.S. v. BizJet Int'l, Deferred Prosecution Agreement, No. 1:12-CR-61CVE (N.D. Ok. Mar. 14, 2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/bizjet/2012-03-14-bizjet-deferred-prosecution-agreement.pdf. A voluntary disclosure generally refers to a situation in which a company on its own (often through internal audits or internal reporting mechanisms) learns of conduct that might implicate the FCPA. After an internal investigation, the company's lawyers disclose the conduct that might implicate the FCPA to the enforcement agencies even though, in many cases, the enforcement agencies would likely not otherwise find out about the conduct. The FCPA does not require such disclosure, but general securities law issues such as materiality may be relevant even though few instances of conduct implicating the FCPA rise to the level of materiality. For additional "carrots" relevant to a company's decision to voluntarily disclose, *see* Koehler, supra note 3. For potential conflicts of interests in the voluntary disclosure process, *see Voluntary Disclosures and the Role of FCPA Counsel*, FCPA PRO-

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

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

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

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

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

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

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

[17] *Id.*

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

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

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

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

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

B. SEC FCPA Enforcement Statistics

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

TABLE II - 2012 SEC CORPORATE FCPA ENFORCEMENT ACTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[35] *Id.*

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

[37] *In the Matter of Allianz SE*, Securities and Exchange Commission, Order Instituting Cease-and-Desist Proceedings Pursuant to Section21C of the Securities and Exchange Act of 1934, Exchange Act Release No. 68448 (Dec. 17, 2012), *available at* http://www.sec.gov/litigation/admin/2012/34-68448.pdf.

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

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

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

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

C. Aggregate FCPA Enforcement Statistics

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

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

– domestic and foreign – with shares registered on a U.S. exchange or otherwise required to make filings with the SEC). In other words, the SEC generally does not have jurisdiction over private companies or foreign companies that are not issuers. Thus, certain FCPA enforcement actions from 2012, such as Marubeni, BizJet / Lufthansa, Data Systems & Solutions and NORDAM Group did not have an SEC component. As a general matter, the DOJ has criminal jurisdiction over "issuers," "domestic concerns," (i.e. any business entity with a principal place of business in the U.S. or organized under U.S. law), and non-U.S. companies and persons to the extent a bribery scheme involved conduct "while in the territory of the U.S." In addition, the DOJ has a higher burden of proof in a criminal prosecution. As a result, and given the DOJ's prosecutorial discretion, certain FCPA enforcement actions in 2012 such as Oracle, Allianz and Eli Lilly only included an SEC component. As to the DOJ's discretion, the DOJ has stated that it, "has declined to prosecute both individuals and corporate entities in numerous cases based on the particular facts and circumstances presented in those matters, taking into account the available evidence." *See* DEP'T OF JUSTICE & SEC. & EXCH., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 75 (Nov. 2012), *available at* http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf [hereinafter RESOURCE GUIDE]. Based on information in the DOJ and SEC authored Resource Guide, it appears that factors motivating a declination include voluntary disclosure and cooperation, effective remedial measures, and small improper payments. *Id.* at 77-79. In addition, the DOJ has separately stated that it has declined prosecutions when, among other things, a single employee, and no other employee, was involved in the improper payments at issue and the improper payments at issue involved minimal funds compared to the overall business revenues. *See DOJ Declines to Get Specific in Declination Responses*, FCPA PROFESSOR (Oct. 12, 2011), http://www.fcpaprofessor.com/doj-declines-to-get-specific-in-declination-responses.

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

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

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

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[41] *See supra* Tables I and II.

[42] *Id.*

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

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

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

II. TOP FCPA ISSUES FROM 2012

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

A. Corporate vs. Individual Prosecutions

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

1. Corporate Non-Prosecution and Deferred Prosecution Agreements

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

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

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

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

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

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

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

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

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

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

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

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

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

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

strate that these agreements are effective at helping the department achieve this goal."[53]

Use of such alternative resolution vehicles to resolve alleged corporate criminal liability in the FCPA context presents two distinct, yet equally problematic public policy issues. The first is that such vehicles, because they do not result in any actual charges filed against a company—and thus do not require the company to plead to any charges—allow egregious instances of corporate conduct to be resolved too lightly without adequate sanctions and without achieving maximum deterrence.[54] The second is that such vehicles, because of the same factors discussed above, nudge companies to agree to the vehicles for reasons of risk-aversion and efficiency and not necessarily because the conduct at issue actually violates the FCPA.[55] Thus, use of NPAs or DPAs contribute to "over-prosecution" of business conduct[56] while at the same time allowing "under-prosecution" of egregious instances of corporate bribery.

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

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[53] *Id.* at 28.

[54] *See e.g.*, Gretchen Morgenson & Louise Story, *As Wall Street Policies Itself, Prosecutors Use Softer Approach*, N.Y. TIMES (July 7, 2011), http://www.nytimes.com/2011/07/08/business/in-shift-federal-prosecutors-are-lenient-as-companies-break-the-law.html?_r=2&ref=gretchenmorgenson (detailing the rise in NPAs and DPAs and addressing, among other things, whether the agreements run the risk of "letting companies off too easily").

[55] For an extended discussion of this dynamic, *see* Koehler, supra note 3 (discussing the increase in NPAs and DPAs and various criticisms of NPAs and DPAs). Indeed, former DOJ FCPA chief Mark Mendelsohn stated that the "danger" of NPAs and DPAs "is that it is tempting for the [DOJ] or the SEC since it too now has these options available, to seek to resolve cases through DPAs or NPAs that don't actually constitute violations of the law." *Mark Mendelsohn on the Rise of FCPA Enforcement*, *supra* note 47.

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

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

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

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

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

[58] *Id.*

[59] *Id.*

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

[61] *Id*.

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

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

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

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

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

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

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

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

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

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

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[65] *Id*.

[66] *Id*.

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

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

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

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

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

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

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[69] *See* Press Release, Dep't of Justice *supra* note 63.

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

[71] *Id*.

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

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

2. General Lack of Individual Prosecutions

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

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

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

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

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

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

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

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

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

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

3. The DOJ's Failures in Individual Prosecutions

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

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

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

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

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

[79] *See* Koehler*, supra* note 77.

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

a. Africa Sting Cases

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

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

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

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

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

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

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

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[82] *Id*.

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

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

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

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

[87] *Id.*

[88] *See Significant dd-3 Development in Africa Sting Case*, FCPA PROFESSOR (June 9, 2011), http://www.fcpaprofessor.com/significant-dd-3-development-in-africa-sting-case.

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

[90] *Id.*

second group of six defendants, and the second trial in the manufactured case began in September 2011.[91] At the close of the DOJ's case in December 2011, Judge Leon dismissed the conspiracy charge against all defendants.[92] One defendant, facing only that conspiracy charge, was exonerated by Judge Leon's decision.[93] The trial proceeded, the charges went to the jury, the jury deliberated, and in January 2012, the jury found two defendants not guilty.[94] As for the remaining three defendants, the jury was unable to reach a decision and once again Judge Leon declared a mistrial as to all remaining counts.[95]

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

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

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

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[91] *See Africa Sting Development—"Mr. Giordanella You Are Excused . . . You Are Free to Go,"* FCPA PROFESSOR (Dec. 22, 2011), http://www.fcpaprofessor.com/africa sting-development-mr-giordanella-you-are-excused-you-arefree-to-go.

[92] *Id.*

[93] *Id.*

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

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

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

[97] *Id*.

view of the jury was that "the defendants had acted in good faith and the FBI/DOJ in bad faith."[98]

The jury foreman concluded the FCPA Professor post by stating:

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

Two weeks later, on February 21, 2012, the DOJ moved to dismiss with prejudice the criminal charges against all of the remaining Africa Sting defendants.[100] The DOJ's filing stated that "continued prosecution of this case is not warranted under the circumstances."[101]
The next day, Judge Leon granted the DOJ's motion to dismiss, stating:

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

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[98] *Id*.
[99] *Id*.
[100] *See Game Over—DOJ Moves to Dismiss Africa Sting Cases*, FCPA PROFESSOR (Feb. 21, 2012), http://www.fcpaprofessor.com/game-over-doj-moves-to-dismissafrica-sting-cases.
[101] *See* Government's Motion to Dismiss, U.S. v. Amaro Goncalves, No. 09-CR-335-RJL (D.D.C. Feb. 21, 2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/goncalvesa/2012-02-21-goncalvesa-government-motion-to-dismiss.pdf.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In 2010, the DOJ charged Lindsey Manufacturing Co., a small private company in California, and two of its executives, company CEO Keith Lindsey and Steve Lee, the company's CFO, with FCPA offenses for their alleged roles in a conspiracy to pay bribes to Mexican government officials at the Comision Federal de Electricidad ("CFE"), an alleged state-owned utility company. First Superseding Indictment, U.S. v. Enrique Aguilar, (C.D. Cal. 2010) (No. 10-1031(A)-AHM), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/aguilare/10-21-10aguilar1st-supersed-indict.pdf. Various pre-trial defense motions were unsuccessful, and the defendants proceeded to trial. In May 2011, Lindsey, Lee, and Lindsey Manufacturing were found guilty of various FCPA charges after a five-week jury trial, and the DOJ called the verdict an "important milestone" in its FCPA enforcement efforts, as Lindsey Manufacturing was the first company ever to be tried and convicted of FCPA offenses. *See* Press Release, Dep't of Justice, *California Company, Its Two Executives and Intermediary Convicted By Federal Jury* (May 10, 2011), *available at* http://www.justice.gov/opa/pr/2011/May/11-crm-596.html. The milestone was short-lived, however, as Judge Howard Matz (C.D. Cal.), after months of post-trial legal wrangling, vacated the convictions and dismissed the indictment after finding numerous instances of prosecutorial misconduct. *See Milestone Erased*, FCPA PROFESSOR (Dec. 1, 2011), http://www.fcpaprofessor.com/milestone-erased-judge-matz-dismisses-lindsey-convictions-says-that-dr-lindsey-and-mr-lee-were-put-through-a-severe-ordeal-and-that-lindsey-manufacturing-a-small-once-highly-respected-ente. In the words of Judge Matz, the instances of misconduct were so varied and occurred over such a long time "that they add up to an unusual and extreme picture of a prosecution gone badly awry." U.S. v. Enrique Aguilar, No. CR 10-01031(A)-AHM (C.D. Cal. Dec. 1, 2011) (order granting motion to dismiss), at 5, , *available at* http://www.scribd.com/doc/74445224/Judge-Matz-Ruling-Vacating-Lindsey-Convictions. Judge Matz specifically cited the following missteps: "The Government team allowed a key FBI agent to testify untruthfully before the grand jury, inserted material falsehoods into affidavits submitted to magistrate judges in support of applications for search warrants and seizure warrants, improperly reviewed e-mail communications between one Defendant and her lawyer, recklessly failed to comply with its discovery obligations, posed questions to certain witnesses in violation of the Court's order, engaged in questionable behavior during closing argument and even made misrepresentations to the Court." *Id*. at 2. In a striking close to his opinion, Judge Matz stated: "Dr. Lindsey and Mr. Lee were put through a severe ordeal. Charges were filed against them as a result of a sloppy, incomplete and notably over-zealous investigation, an investigation that was so flawed that the Government's lawyers tried to prevent inquiry into it. In some instances motives, statements and conduct were attributed to

them that were wholly unfounded or were obtained unlawfully . . . The financial costs of the investigation and trial were immense, but the emotional drubbing [Lindsey and Lee] absorbed was even worse. As for [Lindsey Manufacturing], the very survival of that small, once highly respected enterprise has been placed in jeopardy." *Id*.

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

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

b. O'Shea Case

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

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

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

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

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

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

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

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

[112] *Id*.

[113] *Id*.

> Court: The statue is more subtle than that. I'm not saying you couldn't have done it or they wouldn't have indicted him.
>
> Duross: The statute says an instrumentality of a foreign government. I think in fairness, Your Honor, it is not a stretch to think that a company that is created by, owned by and operated by a foreign government, could be considered an instrumentality. I think in the sharps relief of a trial in which we are going to be challenged on those issues, we needed to have been more prepared and we were not.
>
> Court: I don't know what was presented to the Grand Jury, but as I observed several days ago, the Government should have been prepared before they brought the charges to the Grand Jury. It's something you have to prove. And you shouldn't indict people on stuff you can't prove.[114]

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

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

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[114] *Id*.

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

[116] *Id*.

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

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

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

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

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

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

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

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

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

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

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

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

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

As highlighted above, FCPA enforcement actions against pharmaceutical and medical device companies comprised 50% of corporate FCPA enforcement actions in 2012.[126] Like many enforcement actions in this era of FCPA enforcement, these actions had nothing to do with the type of foreign recipients Congress had in mind when it passed the FCPA. Rather, pharmaceutical and medical device companies were the subject of FCPA scrutiny because of an aggressive and dubious FCPA enforcement theory—a theory that has never been subjected to judicial scrutiny. The enforcement theory is that employees—such as physicians, nurses, mid-wives, lab personnel, etc—of certain foreign health care systems are "foreign officials" under the FCPA and thus occupy a status equal to traditional bona fide government officials.

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

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[120] *See id*. at 1003.
[121] *See id*.
[122] *Id*. at 938-43.
[123] *Id*. at 942.
[124] *Id*. at 934-35.
[125] Koehler, *supra* note 111, at 934-35.
[126] *See supra* note 41.

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

TABLE III – THE "FOREIGN OFFICIALS" OF 2012[127]

Enforcement Action	Alleged "Foreign Official"
Marubeni	*DOJ* As in prior Bonny Island bribery enforcement actions, the "foreign officials" were Nigeria LNG Limited ("NLNG") officers and employees. NLNG is majority owned by multinational oil companies, and Nigerian National Petroleum Corporation ("NNPC") owns 49% of NLNG. "[T]hrough the NLNG board members appointed by NNPC, among other means, the Nigerian government exercised control over NLNG, including but not limited to the ability to block the award of EPC contracts." In addition, the Marubeni enforcement action (like the prior enforcement actions) generically refers to the other Nigerian government officials.[128]
Smith & Nephew	*DOJ* "Greece has a national healthcare system wherein most Greek hospitals are publicly owned and operated. Health care providers who work at publicly-owned hospitals ("HCPs") are government employees, providing health care services in their official capacities. Therefore, such HCPs in Greece are "foreign officials" as that term is defined in the FCPA."[129] *SEC* "Greece has a national health care system wherein most Greek hospitals are publicly-owned and operated. Healthcare providers, including doctors, who work at publicly-owned hospitals are government employees, providing healthcare services in their official capacities. The public doctors in Greece are "foreign officials" as that term is defined in the FCPA"[130]

[127] This table is based on information from the DOJ or SEC's charging documents. As evident from the information in the table, in certain instances the enforcement agencies describe the "foreign official" with reasonable specificity; in other instances with virtually no specificity. *Certain of the enforcement actions in the table technically only involved FCPA books and records and internal control charges. However, actual charges in most FCPA enforcement actions hinge on voluntary disclosure, cooperation, collateral consequences, and other non-legal issues. Thus, even if an FCPA enforcement action is resolved without FCPA anti-bribery charges, the action remains very much about the "foreign officials" involved.*

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

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

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

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

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

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

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

Data Systems & Solutions	*DOJ* Ignalina Nuclear Power Plant ("INPP") is described as a "state-owned nuclear power plant in Lithuania and an 'agency' and 'instrumentality' of a foreign government The INPP employees are described as follows: Official 1 (the Deputy Head of the Instrumentation & Controls Department at INPP with influence over the award of contracts); Official 2 (the Head of Instrumentation & Controls Department at INPP with influence over the award of contracts); Official 3 (the Director General at INPP with influence over the award of contracts); Official 4 (the Head of International Projects Department at INPP with influence over the award of contracts); and Official A (the lead software engineer at INPP with influence over the award of contracts).[134]
Orthofix	*DOJ* "Instituto Mexicano del Seguro Social ("IMSS") was a social-service agency of the Mexican government that provided public services to Mexican workers and their families. IMSS was created in 1943 by order of the Mexican president, who continued to select IMSS's head, and subsequent changes to IMSS programs were made by acts of Mexico's legislature. IMSS provided health care services to tens of millions of people, including workers, their families, and pensioners, at hospitals that IMSS owned and operated throughout Mexico. Mexico's government funded IMSS through taxation and compulsory contributions." "Mexican Official 1 – a deputy administrator of Magdelena de las Salinas (a hospital in Mexico City that IMSS owned and controlled); Mexican Official 2 – the purchasing director of Magdelena de las Salinas; Mexican Official 3 – the purchasing director of Lomas Verdes (a hospital in the State of Mexico that IMSS owned and controlled); Mexican Official 4 – a sub-director of IMSS"[135] *SEC* "IMSS hospital employees [IMSS, the Mexican government-0wned medical care and social services provider]; certain IMSS officials"[136]
NORDAM Group	*DOJ* NPA refers to "customers in China including state-owned and -controlled entities, including airlines created, controlled, and exclusively owned by the People's Republic of China."[137]

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

[135] *Id*.

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

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

Pfizer / Wyeth	*DOJ* "The manufacture, registration, distribution, sale, and prescription of pharmaceuticals were highly-regulated activities throughout the world. While there were multinational regulatory schemes, it was typical that each country established its own regulatory structure at a local, regional, and/or national level. These regulatory structures generally required the registration of pharmaceuticals and regulated labeling and advertising. Additionally, in certain countries, the government established lists of pharmaceuticals. that were approved for government reimbursement or otherwise determined those pharmaceuticals that might be purchased by government institutions. Moreover, countries often regulated the interactions between pharmaceutical companies and hospitals, pharmacies, and healthcare professionals. In those countries with national healthcare system, hospitals, clinics, and pharmacies were generally agencies or instrumentalities of foreign governments, and, thus, many of the healthcare professionals employed by these agencies and instrumentalities were foreign officials within the meaning of the FCPA." - Croatian Official (a citizen of the Republic of Croatia who held official positions on government committees in Croatia and had influence over decisions concerning the registration and reimbursement of Pfizer products marketed and sold in the country); - Russian Official 1 (a citizen of the Russian Federation who was a medical doctor employed by a public hospital who had influence over the Russian government's purchase and prescription of Pfizer products marketed and sold in the country); - Russian Official 2 (a citizen of the Russian Federation who was a high-ranking government official who held official positions on government committees in Russia and had influence over decisions concerning the reimbursement of Pfizer products marketed and sold in the country); - Russian Official 3 (a citizen of the Russian Federation who had influence over decisions concerning the treatment algorithms involving Pfizer products marketed and sold in the country). - In addition to the above "foreign officials," the information refers to "numerous [other] government officials, including physicians, pharmacologists and senior government officials, who were employed by foreign governments or instrumentalities of foreign governments, including in Bulgaria, Croatia, Kazakhstan, and Russia."[138] *SEC* "Foreign officials, including doctors and other healthcare professionals employed by foreign governments" in Bulgaria, China, Croatia, Czech Republic, Italy, Kazakhstan, Russia, and Serbia. "Foreign officials, including doctors and other healthcare professionals employed by foreign governments" in Indonesia, Pakistan, China, and Saudi Arabia.[139]

[138] U.S. v. Pfizer H.C.P. Corp, No. __ (D.D.C. Aug. 7, 2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/pfizer/2012-08-07-pfizer-info.pdf.

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

Tyco	*DOJ* The information alleges: that Saudi Aramco ("Aramco") was a Saudi Arabian oil and gas company that was wholly-owned, controlled, and managed by the government, and an "agency" and "instrumentality" of a foreign government; that Emirates National Oil Company ("ENOC") was a state-owned entity in Dubai and an "agency" and "instrumentality" of a foreign government; that Vopak Horizon Fujairah ("Vopak") was a subsidiary of ENOC based in the U.A.E. and an "agency" and "instrumentality" of a foreign government; and that the National Iranian Gas Company ("NIGC") was a state-owned entity in Iran and an "agency" and "instrumentality" of a foreign government. - "employees of end-customers in Saudi Arabia, the U.A.E., and Iran, including to employees at Aramco, ENOC, Vopak, and NIGC" - General references to payments customers, including government customers, in China, India, Thailand, Laos, Indonesia, Bosnia, Croatia, Serbia, Slovenia, Slovakia, Iran, Saudia Arabia, Libya, Syria, the United Arab Emirates, Mauritania, Congo, Niger, Madagascar, and Turkey. - "designers at design institutes owned or controlled by the Chinese government" - "publicly-employed healthcare professionals" in China - "a former employee of Banjarmasin provincial level public water company (PDAM) [Indonesia] and two payments to the project manager for PDAM Banjarmasin in connection with the Banjarmasin Project", employees of PLN [a state-owned electricity company in Indonesia] - "employees of a public utility owned by the Government of Vietnam" - "a security officer employed by a government-owned mining company in Mauritania" - publicly employed health care providers in Saudi Arabia[140] *SEC* Similar to the DOJ's allegations above. In addition, the SEC complaint alleges the following additional foreign officials: - an employee of an instrumentality of the Turkish government - an employee of a government-controlled entity in Malaysia - representatives of a company majority-owned by the Egyptian government - public health care providers in Poland[141]
Oracle	*SEC* General reference in the complaint to "Indian government end-users," Indian "government customers" and a contract with India's Ministry of Information Technology and Communication.[142]

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

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

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

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

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

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

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

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

[145] *See* Koehler, supra note 44.

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

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

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

SOEs are "foreign officials" under the FCPA is currently the focus of an appeal pending in the Eleventh Circuit.[149]

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

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

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http://www.scribd.com/doc/49310598/U-S-v-Stuart-Carson-el-al-Declaration-of-Professor-Michael-Koehler. In sum, the declaration states as follows, "There is no express statement or information in the FCPA's legislative history describing the 'any department, agency, or instrumentality' portion of the 'foreign official' definition. Further, there is no express statement or information in the FCPA's legislative history to support the DOJ's expansive legal interpretation that alleged SOEs are 'instrumentalities' (or 'departments' or 'agencies') of a foreign government and that employees of SOEs are therefore 'foreign officials' under the FCPA's anti-bribery provisions. However, there are several statements, events, and information in the FCPA's legislative history that demonstrate that Congress did not intend the 'foreign official' definition to include employees of SOEs. Among other things, during its multi-year investigation of foreign corporate payments that preceded enactment of the FCPA, Congress was aware of the existence of SOEs and that some of the questionable payments uncovered or disclosed may have involved such entities. In certain of the competing bills introduced in Congress to address foreign corporate payments, the definition of 'foreign government' expressly included SOEs," and Congress was provided a more precise definition of "foreign government" to include SOEs. However, despite being aware of SOEs, despite exhibiting a capability for drafting a definition that expressly included SOEs in other bills, and despite being provided a more precise way to describe SOEs, Congress chose not to include such definitions or concepts in the bill that ultimately became the FCPA."

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

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

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

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

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

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

1. FCPA Guidance

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

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

[152] *See* Lanny A. Breuer, Assistant Attn'y Gen., Address at the 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011), *available at* http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html.

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

[154] See RESOURCE GUIDE, *supra* note 40.

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

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

a. Background

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

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

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

The OECD Phase 2 report concluded with a recommendation:

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

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[156] *See* 15 U.S.C. § 78dd-1(d) (1998).

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

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

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

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

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

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

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

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

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

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[161] *Id*. at 10.

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

[163] *See Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. (2010), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111shrg66921/pdf/CHRG-111shrg66921.pdf.

[164] *Id*.

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

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

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

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

b. Overview

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

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

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

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

[170] *See id*. at 10.

[171] *See id*. at 48, 82.

[172] *See id*. at 52-63.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[179] *Id*. at 15.

[180] *Id*. at 21.

retroactively create FCPA liability for the acquiring issuer."[181]

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

c. Grading the Guidance

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

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[181] *Id*. at 28.
[182] *Id*. at 39.
[183] *Id*. at 40.
[184] *Id*. at 43.
[185] *See* Sprenkel, *supra* note 177.

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

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

Jurisdiction

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

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

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

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

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

[190] *See Significant DD-3 Development in Africa Sting Case*, FCPA Professor (June 9, 2011), http://www.fcpaprofessor.com/significant-dd-3-development-in-africa-sting-case.

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

Obtain or Retain Business

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

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

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

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

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

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

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

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

[193] *See* H.R. Rep. No. 94-831 (1977).

[194] *Id.* at 12.

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

> clined to amend the "obtain or retain business" language in the FCPA.[196]

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

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

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

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

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

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[196] *Id*. at 686 n. 6.
[197] United States v. Kay, 359 F.3d 738, 745 (5th Cir. 2004).
[198] *See* RESOURCE GUIDE, *supra* note 40, at 13.
[199] *See* Kay, 359 F.3d at 744.
[200] *Id.*
[201] *Id.*
[202] *See* United States v. Duran, No. 89-802-CR-KEHOE (S.D. Fla. Apr. 17, 1990) (granting Duran's Motion for Judgment of Acquittal), *available at* http://www.scribd.com/doc/92621550/USA-v-Pou-Et-Al-Judgment-of-Aquittal-Alfredo-Duran.

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

The Guidance boldly states that payments made to secure favorable government treatment regarding taxes, customs, and licensing or "to obtain government action to prevent competitors from entering a market. . .all satisfy the business purpose test."[204] However, the above information indicates something much different when the enforcement agencies are held to their burdens of proof. In an interesting twist, the Guidance even cites in a footnote the most relevant legislative history on this issue – House Report No. 95-460.[205] House Report No. 95-460 states that the bill, which would become the FCPA, does not "reach payments made to secure permits, licenses, or the expeditious performance of similar duties of an essentially ministerial or clerical nature which must of necessity by performed in any event."[206] The Guidance again opts for citation to self-styled prosecutorial common law, rather than faithfully summarizing *Kay* or mentioning other similar cases when discussing the "obtain or retain business" element

Foreign Official

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

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

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

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

[205] *See id*. at 111 n. 160.

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

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

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

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

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

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

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

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

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

[210] *See id*. at 21.

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

[212] *Id*. at 101.

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

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

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

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

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

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

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

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

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

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

[219] *See id*.

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

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

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

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

In addition, the Guidance states that the

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

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

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

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

[222] *See id*.

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

[224] *Id*. at 75.

[225] *Id*.

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

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

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

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

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

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

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

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

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

[232] *See id*. at 78.

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

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

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

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

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

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[233] *See id*. at 78-79.

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

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

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

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

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

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

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

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

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

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

[240] *See id.* at 611.

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

[242] *See id.* at 62.

[243] *See id.* at 59.

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

2. Morgan Stanley's So-Called Declination

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

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

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

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

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

[245] *Id.*

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

[247] SEC Press Release, *supra* note 244.

[248] *Id*.

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

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

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

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

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

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[249] DOJ Press Release, *supra* note 246.

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

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

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

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

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

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

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

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

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

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

[254] Lanny A. Breuer, supra note 152.

[255] *Id*.

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

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

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

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

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[256] *See, e.g.,* Complaint at 12, Sec. & Exch. Comm'n v. Peterson, No. 12-224 (E.D.N.Y. 2012), *available at* http://www.sec.gov/litigation/complaints/2012/comppr2012-78.pdf.

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

[258] *Id*. at 5.

[259] *Id*. at 13.

[260] *Id*. at 14.

[261] *Id*. at 15.

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

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

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

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

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

[264] *Id*. at 24.

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

[266] DOJ Press Release, *supra* note 246.

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

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

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

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

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

3. Wal-Mart Potential FCPA Exposure

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

a. The New York Times Articles

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

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

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

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

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

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

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

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[273] *See id*.
[274] *See id*.
[275] *See id.*
[276] *See id*.
[277] *See id*. *See also* Associated Press, *Wal-Mart Bribery Allegations Put Focus on Mexican Middlemen Used to Grease Bureaucratic Wheels*, CBS NEWS (Apr. 24, 2012), http://www.cbsnews.com/8301-202_162-57419686/wal-mart-bribery-allegations-put-focus-on-mexican-middlemen-used-to-grease-bureaucratic-wheels/ (explaining that stores often "funnel a portion of the fees they charge clients to corrupt officials to smooth the issuance of permits, approvals and other government stamps" and in Mexico "where laws on zoning rules, construction codes and building permits are vague or laxly enforced, the difference between opening a store quickly and having it held up for months may depend on using a gestor.").
[278] Barstow, *supra* note 272.

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

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

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

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

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

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

[280] Barstow, *supra* note 272.

[281] *Id*.

[282] *Id*.

[283] *Id*.

[284] *See* Barstow, *supra* note 272.

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

Notwithstanding whatever may have occurred within Wal-Mart in 2005 and 2006 upon learning of potentially problematic payments, the subsequent November 2012 *Times* article suggests that Wal-Mart was pro-actively seeking to understand its FCPA risks long before the front-page *Times* article in April 2012.[287] According to the *Times*, Wal-Mart's internal review began in Spring 2011 when Jeffrey Gearhart, Wal-Mart's general counsel, learned of an FCPA enforcement action against Tyson Foods (like Wal-Mart, a company headquartered in Arkansas).[288] According to the *Times*, "the audit began in Mexico, China and Brazil, the countries Wal-Mart executives considered the most likely source of problems" and Wal-Mart hired professional accounting and legal firms to conduct the audit.[289]

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

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

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[285] *See id.*

[286] *Id*.

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

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

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

[290] Barstow, *supra* note 272.

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

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

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

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[291] *Id*.
[292] *Id*.
[293] *Id*.
[294] *Id*.

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

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

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

> Over the past 20 months, we have made significant improvements to our compliance programs around the world and have taken a number of specific, concrete actions with respect to our processes, procedures and people. Over the past several months we have:
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> - Established several new compliance positions around the world;
> - Directed more than 300 third-party legal and accounting experts who have dedicated in excess of 79,000 hours to this effort;
> - Conducted more than 85 in-country visits and more than 1,000 interviews of market personnel;
> - Spent more than $35 million on new processes and procedures; and

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[295] *Id*.

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

[297] *Id*.

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

b. Issues Raised by Wal-Mart's Scrutiny

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

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

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

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

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

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

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

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

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

Likewise, the relevant House Report stated:

> The bill's coverage does not extend to so-called grease or facilitating payments. [. . .] The language of the bill is deliberately cast in terms which differentiate between such payments and facilitating payments, sometimes called 'grease payments'. For example, a gratuity paid to a customs official to speed the processing of a customs document would not be reached by the bill. Nor would it reach payments made to secure permits, licenses, or the expeditious performance of similar duties of an essentially ministerial or clerical nature which must of necessity by performed in any event. While payments made to assure or to speed the proper performance of a foreign official's duties may be reprehensible in the United States, the committee recognizes that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments. As a result, the committee has not attempted to reach such payments. [. . .] The committee fully recognizes that the proposed law will not reach all corrupt payments overseas.[302]

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

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

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[301] S. REP. NO. 95-114, at 7 (1977).
[302] H.R. REP. NO. 95-640, at 4-8 (1977).
[303] *See* 123 CONG. REC. 36306 (daily ed. Nov. 1, 1977) (statement of Rep. Eckhardt).

Consistent with this Congressional intent, the FCPA specifically excluded from the definition of "foreign official" "any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical" when it passed in December of 1977.[304] This was the FCPA's original, albeit indirect, facilitation payment or grease exception. When Congress amended the FCPA in 1988, it, among other things, changed the definition of foreign official by removing this indirect facilitation payment exception from the "foreign official" definition and creating the standalone facilitation payment exception currently found in the statute.[305] The relevant House Report indicated that Congress did not seek to disturb Congress's original intent, stating:

> The policy adopted by Congress in 1977 remains valid, in terms of both U.S. law enforcement and foreign relations considerations. Any prohibition under U.S. law against this type of petty corruption would be exceedingly difficult to enforce, not only by U.S. prosecutors but by company officials themselves. Thus, while such payments should not be condoned, they may appropriately be excluded from the reach of the FCPA. U.S. enforcement resources should be devoted to activities that have a much greater impact on foreign policy.[306]

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

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

[305] *See* 15 U.S.C. § 78dd-1(b).

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

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

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

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

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

c. Do the Issues Even Matter?

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

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

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

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

[311] Kay, 359 F.3d. at 760.

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

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

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

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

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

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

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

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

d. The Impact of Wal-Mart's Scrutiny

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

Investor Reaction

Perhaps the most immediate and tangible impact of Wal-Mart's FCPA scrutiny was investor reaction and the decline in its stock price following the April 2012 *Times* article. On the last trading day before the *Times* article, Wal-Mart's stock closed at $62.45.[314] The first trading day after the *Times* article, the stock dropped 4.7% and continued on a downward trend for a few days eclipsing billions of dollars in shareholder value.[315] Investors were spooked by the intense media coverage and were likely paranoid by some of the wildly speculative comments, including that Wal-Mart could face approximately $13 billion in ultimate fine and penalty amounts.[316]

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

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

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

However, it did not take long for Wal-Mart's stock to recover its value. As of this writing, Wal-Mart's stock price is $79.86 per share[317] demonstrating that, absent certain limited exceptions, when a company discloses or is otherwise reported to be under FCPA scrutiny, other than a potential temporary decline in a company's stock often based on misinformed doomsday scenarios, the market cares little about FCPA scrutiny and realizes how diluted FCPA enforcement has become in this current era. Indeed, commenting on the rapid rise in Wal-Mart's stock price after the *Times* induced dip, a Forbes commentator stated, "My 30 years of experience in the markets has repeatedly shown to me that whenever a company is accused of violations of FCPA, headlines are always scary, but in the end, the downdraft in the stock invariably becomes a buying opportunity."[318]

Lengthy and Costly World-Wide Review

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

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

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bined U.S. fine and penalty amount in FCPA history is $800 million. Press Release, Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), *available at* http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html.

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

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

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

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

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

FCPA Related Civil Suits

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

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

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

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

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

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

Retail Industry Sweep

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

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

CONCLUSION

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

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

NAVIGATING THE FCPA'S AMBIGUOUS "INSTRUMENTALITY" PROVISION: LESSONS FOR THE ENERGY INDUSTRY

*Clinton R. Long**

I. INTRODUCTION

In the years since the Foreign Corrupt Practices Act ("FCPA") was enacted in 1977,[1] creating significant civil and criminal penalties for persons and corporations who offer or pay bribes to the officials of foreign governments,[2] the energy industry has paid $2.12 billion in fines under the statute.[3] This ranks as the highest of any industry by a significant margin, and represents nearly 50 percent of the $4.42 billion in total fines paid by all industries under the FCPA.[4] Not only are the fines significant, but the U.S. Department of Justice ("DOJ") has brought a larger number of FCPA enforcement actions against the energy industry than against any other industry.[5] Some even say that U.S. authorities are targeting the energy industry and are "using [it] to enforce United States corruption standards on the rest of the world."[6]

Regardless of the DOJ's motives for its enforcement practices, it is clear that there are significant FCPA risks in countries rich with energy resources.[7] Much of the world's energy resources are located in

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[1] U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 1 (2010) [hereinafter RESTORING BALANCE].

[2] Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a) (2012).

[3] *Where the Bribes Are: Penalties in U.S. Government FCPA Cases Since 1977*, JAMES MINTZ GROUP, http://fcpamap.com/ (last visited Dec. 13, 2012).

[4] *Id*.

[5] Bob Tippee, *Extractive Industries Are Top Target for Bribery Enforcement*, OIL & GAS J., Aug. 16, 2011, *available at* http://www.ogj.com/articles/2011/08/extractive-industries-are-top-target-for-bribery-enforcement.html (citing TRACE INTERNATIONAL, GLOBAL ENFORCEMENT REPORT 2011, at 9 (2011)).

[6] Reid Jonkers, *Recent Development: Recent Trends in FCPA Enforcement*, 4 ENVTL. & ENERGY L. & POL'Y J. 297, 297 (2009).

[7] *Id*.

countries where bribery is prevalent and customary.[8] Additionally, the energy industry provides significant opportunities for interaction with foreign government officials, the specific persons toward whom the FCPA prohibits bribes.[9] For example, in order to extract oil, natural gas, and other resources in a specific country, a company must obtain licenses and other documents directly from that country's government, which makes interaction with foreign officials frequent and consequently increases the temptation to pay bribes.[10]

Another significant FCPA challenge for energy companies is the presence of a wide variety of corporate structures in the industry, specifically including a number of state-owned enterprises ("SOEs").[11] The presence of SOEs in the energy industry is problematic for FCPA compliance because the statute prohibits bribes to "any officer or employee of a foreign government or any department, agency, or *instrumentality* thereof . . . ."[12] The statute does not define "instrumentality,"[13] but the DOJ has frequently considered SOEs to be instrumentalities of foreign governments and, consequently, their employees to be foreign officials.[14] This means that in the energy indus-

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[8] *See, e.g.*, *Azerbaijan and Oil: Too Much of a Good Thing*, ECONOMIST, Aug. 17, 2006, *available at* http://www.economist.com/node/7796434, *cited in* Robert Peachey, Comment, *Petroleum Investment Contracts After the Baku-Tblisi-Ceyhan (BTC) Pipeline*, 31 NW. J. INT'L L. & BUS. 739, 768 n.167 (2011).

[9] Jonkers, *supra* note 6, at 297.

[10] *See id*.

[11] It has been said that "[a]n array of state-owned entities . . . dominate the world's oil and gas industry." David G. Victor et al., *Introduction and Overview*, *in* OIL AND GOVERNANCE: STATE-OWNED ENTERPRISES AND THE WORLD ENERGY SUPPLY 3 (David G. Victor et al. eds., 2012). SOEs can be broadly defined as enterprises that are owned in whole or in part by a national or local government. *See* Timothy Kyepa, *Integrating the Proposed National Oil Company of Uganda into the Corporate Governance Discourse: Lessons from Norway*, 30 J. ENERGY & NAT. RESOURCES L. 75, 82 (2012). They are "sometimes also referred to as government corporations, government-linked companies, parastatals, public enterprises, or public sector enterprises — [and] are a diverse mix ranging from internationally competitive listed companies, large-scale public service providers, wholly owned manufacturing and financial firms, to small and medium enterprises." *Id*. (*quoting* WORLD BANK, HELD BY THE VISIBLE HAND: THE CHALLENGE OF SOE CORPORATE GOVERNANCE FOR EMERGING MARKETS 1 (2006), *available at* http://rru.worldbank.org/Documents/Other/CorpGovSOEs.pdf [hereinafter HELD BY THE VISIBLE HAND]).

[12] Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A) (2012) (emphasis added).

[13] RESTORING BALANCE, supra note 1, at 24.

[14] U.S. DEP'T OF JUSTICE & SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 20 (2012) [hereinafter RESOURCE GUIDE].

try, where there are SOEs literally from A (Albpetrol in Albania[15]) to Z (Zawia Oil Refining Company in Libya[16]), and in other industries, companies can encounter significant FCPA trouble when they pay bribes to employees of SOEs.[17]

The inclusion of SOEs into the "instrumentality" provision has not been popular with the private sector.[18] Some have called for a modification of the FCPA to "include a clear definition of 'instrumentality'" to combat the uncertainty surrounding the term's meaning.[19] Others have requested that the DOJ give additional guidance on the interpretation of the term,[20] which the DOJ recently provided.[21] However, neither of these proposed solutions can significantly help energy companies comply with the FCPA in their business ventures abroad. Determining whether an SOE should be considered an instrumentality for FCPA purposes is a fact-specific question requiring a case-by-case analysis.[22] Asking Congress or the DOJ for a change in the definition of instrumentality or additional guidance will not necessarily reduce FCPA risks because businesses would have a similarly difficult time determining whether a foreign enterprise fits into that interpretation, definition, or guidance.

The most effective way for energy companies to maneuver through the difficulties of the FCPA's instrumentality provision is to strengthen their compliance mechanisms to prohibit bribery to anyone—including officials of purely private enterprises.[23] This is the safest method of preventing FCPA liability and is necessary for energy companies due to the existence of the United Kingdom's Bribery Act 2010 ("Bribery Act"), which prohibits bribery of public and private offi-

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[15] *Company Overview of Albpetrol Sh.A.*, BLOOMBERG BUSINESSWEEK, http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=10741109 (last visited Dec. 13, 2012).

[16] Zawia is a fully owned subsidiary of Libya's oil SOE (National Oil Corporation). *Fully Owned*, NATIONAL OIL CORPORATION, http://en.noclibya.com.ly/index.php?option=com_content&task=view&id=318&Itemid=0 (last visited Dec. 13, 2012).

[17] *See* RESOURCE GUIDE, *supra* note 14, at 20.

[18] *See, e.g.*, RESTORING BALANCE, *supra* note 1, at 25–27.

[19] *Id*. at 27.

[20] *E.g.*, Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 576 (2011).

[21] RESOURCE GUIDE, *supra* note 14, at iv.

[22] *Id*. at 20.

[23] Some companies have already begun doing so. *Concerns About the U.S. Chamber Institute of Legal Reform's Proposals for Amending the FCPA*, GLOBAL FIN. INTEGRITY 1, http://www.gfintegrity.org/storage/gfip/documents/Capitol_Hill/fcpa_response_to_us_chamber.pdf (last visited Dec. 14, 2012) [hereinafter GLOBAL FIN. INTEGRITY].

cials.[24] Energy companies thus have numerous incentives to treat all foreign entities as instrumentalities and completely avoid FCPA liability under the "instrumentality" provision.

This paper will first provide a background to the FCPA (including the energy industry's challenges in complying with the FCPA), and an analysis of the FCPA's "instrumentality" provision and how this provision affects energy companies. Following this section, there will be an analysis of the different interpretations of "instrumentality" held by the DOJ, industry groups, scholars, and U.S. federal courts. This paper will then propose that energy companies can avoid FCPA liability by strengthening their compliance mechanisms to treat all foreign entities as instrumentalities of foreign governments, or, in other words, by prohibiting bribery to any foreign person.[25]

II. BACKGROUND

A. The FCPA and the Energy Industry

The FCPA was enacted in 1977, after the fallout from the Watergate Scandal revealed that a number of U.S. companies had engaged in extensive bribery of foreign government officials in order to further their business interests.[26] The essence of the FCPA for the purposes of this paper can be stated as follows: no "issuer,"[27] "domestic concern,"[28] or other relevant party[29] can bribe[30] a foreign official[31] in

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[24] Bribery Act, 2010, c. 23, § 1. *See infra* Section IV ("Proposal").

[25] GLOBAL FIN. INTEGRITY, *supra* note 23, at 1 (while not proposing this for companies, this source recognizes that some companies are already strengthening their compliance programs for this purpose).

[26] James A. Barta & Julia Chapman, *Foreign Corrupt Practices Act*, 49 AM. CRIM. L.REV. 825, 825–26 (2012).

[27] 15 U.S.C. § 78dd-1(a). The DOJ says that an issuer is "a corporation that has issued securities that have been registered in the United States or who is required to file periodic reports with the SEC." *Foreign Corrupt Practices Act: Antibribery Provisions*, U.S. DEP'T OF JUSTICE 4–5, *available at* http://klifesolutions.com/wp-content/uploads/2012/03/GUI_GOV_DOJ_FCPA_Lay-Persons-Guide.pdf (last visited Apr. 28, 2013) [hereinafter *Lay-Person's Guide*].

[28] 15 U.S.C. § 78dd-2(a). This is a broad term encompassing any "citizen, national, or resident of the United States" as well as "any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of" any U.S. state, territory, or other possession. *Lay-Person's Guide*, *supra* note 27.

[29] 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a) (This includes anyone who does not fall into the issuer or domestic concern categories but nonetheless uses "the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of . . ." an FCPA violation. *Id*. § 78dd-3(a). Furthermore, no one can perform a prohibited action on behalf of any of these parties, and this includes any "officer,

order to acquire or retain any form of business.[32] Violations of the FCPA can result in significant civil and criminal penalties—including prison time and large fines—for individuals and corporations.[33] Also, it should be noted that parties subject to the FCPA can request an Opinion from the U.S. Attorney General in order to determine whether planned actions would violate the FCPA.[34] This opinion procedure has been used to ascertain whether a specific person could be considered a "foreign official."[35]

Energy companies have a long and checkered past with the FCPA. In the investigation after the Watergate Scandal, a number of oil companies were found to have made large payments to officials of

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director, employee, or agent of [any of these parties] or any stockholder thereof acting on behalf of [any of these parties]" to commit an FCPA violation.).

[30] *Id.* §§ 78dd-1(a)(1), -2(a)(1), -3(a)(1) (While the word "bribe" is not used in the description of these actions, the statute prohibits "an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value.").

[31] *Id.* §§ 78dd-1(a)(2), -2(a)(2), -3(a)(2). This also includes "any foreign political party or official thereof or any candidate for foreign political office." *Id.* §§ 78dd-1(a)(3), -2(a)(3), -3(a)(3). Also bribes cannot be paid to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to . . ." either of the other two prohibited groups. *Id.* §§ 78dd-1(a)(3), -2(a)(3), -3(a)(3).

[32] The statute says "in obtaining or retaining business for or with, or directing business to, any person" (1) in order to influence "any act or decision of such [recipient] in [his, her, or its] official capacity;" (2) in order to induce that recipient "to do or omit to do any act in violation of the lawful duty of such [recipient];" (3) in order to secure "any improper advantage;" or (4) in order to induce the recipient "to use [his, her, or its] influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality." *Id.* §§ 78dd-1(a)(1)(B)-(2), -2(a)(1) (B)-(2), -3(a)(1) (B)-(2).

[33] *Id.* §§ 1(a), -2(a), -3(a).

[34] Issuer or Domestic Concern, 28 C.F.R. § 80.4 (2012). This is not meant to be an opportunity for companies and persons to request opinions on hypothetical questions and facts; the transaction at issue "must be an actual—not a hypothetical—transaction but need not involve only prospective conduct." Transaction, 28 C.F.R. § 80.3 (2012).

[35] U.S. Dep't of Justice, Opinion Procedure Release, Foreign Corrupt Practices Act Review 1-2, 5 2, 6 (Sept. 18, 2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2012/1201.pdf (The issue was whether a member of a foreign government's royal family would be considered a foreign official. The DOJ found that the royal family member was not a foreign official: he has no official government title or position and had only worked for the government for a short period many years prior, does not act on behalf of the government or royal family, enjoys no governmental privileges due to his membership in the family, and does not interact in any way with those officials deciding on the transactions.).

foreign governments.[36] "Overseas payments," political contributions, and other questionable payments were found in the books of Citgo, Exxon, Gulf Oil, Mobil Oil, and others.[37] Since the enactment of the FCPA, the U.S. District Court for the Southern District of Texas—which includes Houston, where many oil and gas companies have offices[38]—has overseen a number of FCPA plea bargains[39] and deferred prosecution agreements.[40] Some of the largest fines in the history of the FCPA involve energy companies, such as Kellogg Brown & Root's $402 million fine (the second largest FCPA fine at the time) for bribing Nigerian officials in exchange for a contract to build natural gas facilities.[41]

The energy industry is susceptible to FCPA liability for a few reasons. First, among the countries with the world's largest reserves of energy resources are many countries with corrupt governments.[42] The following table, listing countries whose oil or natural gas reserves (or both) are among the highest fifteen amounts in the world, demonstrates this relationship. The table also shows each country's score from Transparency International's *2012 Corruption Perceptions Index* ("CPI"), which "measures the perceived levels of public sector corrup-

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[36] Lewis D. Solomon & Leslie G. Linville, *Transnational Conduct of American Multinational Corporations: Questionable Payments Abroad*, 17 B.C. INDUS. & COM. L. REV. 303, 303–04 n.2 (1976).

[37] *Id.*, at 304.

[38] *E.g.*, *List of Oil and Gas Companies in Houston*, SUBSEA OIL & GAS DIRECTORY, http://www.subsea.org/company/allbycity.asp (last visited Dec. 14, 2012).

[39] *See, e.g.*, Plea Agreement at 1, U.S. v. Baker Hughes Serv. Int'l, No. 07-129 (S.D. Tx. Apr. 11, 2007), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/baker-hughs/04-11-07bakerhughes-plea.pdf.

[40] *See, e.g.*, Deferred Prosecution Agreement at 1, U.S. v. Pride Int'l, No. 10-766 (S.D. Tx. Nov. 4, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/pride-intl/11-04-10pride-intl-dpa.pdf. "Deferred prosecution agreements are essentially contracts with the DOJ, whereby the DOJ agrees not to pursue the charges filed against the corporation so long as the corporation fulfills certain requirements contained in the agreement." John A. Gallagher, Note, *Legislation is Necessary for Deferred Prosecution of Corporate Crime,* 43 SUFFOLK U. L. REV. 447, 449 (2010) (citing Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 321–22 (2007)).

[41] *Foreign Corrupt Practices Act Update Resource Center,* JENNER & BLOCK, Feb. 2009, (citing Press Release, U.S. Dep't of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009)), *available at* http://jenner.com/resource_centers/update/691[hereinafter KBR Press Release].

[42] Jonkers, *supra* note 6, at 297.

tion in countries worldwide" on a scale of 0 to 100.[43] A lower score indicates a higher perception of corruption.[44] Each country's ranking is also listed in the CPI in comparison to all others (176 countries were ranked in 2012).[45]

Country	Oil Reserves Ranking[46]	Gas Reserves Ranking[47]	CPI Score[48]	CPI Ranking[49]
Saudi Arabia	2	6	44	66
Venezuela	3	9	19	165
Iran	5	3	28	133
Iraq	6	13	18	169
Kuwait	7	21	44	66
Russia	9	2	28	133
Libya	10	23	21	160
Nigeria	11	10	27	139
Kazakhstan	12	15	28	133
Brazil	13	34	39	80
China	17	14	43	69
Algeria	18	11	34	105

The CPI is admittedly selective, for example, it lists Canada as having the fourth largest amount of oil reserves in the world[50] and a corresponding CPI score of 84, placing it among the ten most transparent countries in the world;[51] however, this list of countries shows that there are many energy-rich countries that have significant corruption issues. When corruption is more prevalent in a foreign government, bribe requests and offers are more likely to occur and more difficult to

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[43] TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTION INDEX 2012, at 2 (2012), *available at* http://files.transparency.org/content/download/537/2229/file/2012_CPI_brochure_EN.pdf / [hereinafter CORRUPTION PERCEPTION INDEX 2012].
[44] *Id.*
[45] *Id.*
[46] Central Intelligence Agency, *Crude Oil - Proved Reserves*, WORLD FACTBOOK (2012), *available at* https://www.cia.gov/library/publications/the-world-factbook/rankorder/2244rank.html [hereinafter *Crude Oil - Proved Reserves*].
[47] Central Intelligence Agency, *Natural Gas - Proved Reserves*, WORLD FACTBOOK (2012), *available at* https://www.cia.gov/library/publications/the-world-factbook/rankorder/2253rank.html.
[48] CORRUPTION PERCEPTION INDEX 2012, *supra* note 43, at 3.
[49] *Id.*
[50] *Crude Oil - Proved Reserves*, *supra* note 46.
[51] CORRUPTION PERCEPTION INDEX 2012, *supra* note 43, at 3.

avoid.[52] This can create significant FCPA compliance issues for energy companies,[53] as the number of FCPA enforcement actions against the industry demonstrates.[54]

Second, energy companies have significant amounts of interaction with foreign governments.[55] There are numerous opportunities for regulatory interaction with officials such as customs agents[56] and through procedures for acquiring licenses and other documentation.[57] Furthermore, foreign governments own much of the world's energy resources: for example, as of 2007, "77 percent of the world's oil reserves are held by national oil companies with no private equity, and there are 13 state-owned oil companies with more reserves than ExxonMobil, the largest multinational oil company."[58] An energy company's direct client, therefore, might be a foreign government or a ministry, agency, or SOE that oversees that state's natural resources.[59] Interaction with the government is absolutely necessary in the energy industry on multiple fronts, and this can result in increased FCPA liability.[60]

Third, energy companies often use agents to acquire contracts.[61] The FCPA extends liability from agents' actions to their principals,[62] which means that companies in the energy industry must be especially careful about who they hire and what those agents do on

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[52] *See* WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK 11 (1997), *available at* http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf (last visited Dec. 13, 2012).

[53] *See* Jonkers, *supra* note 6, at 297.

[54] *See* Tippee, *supra* note 5 (citing TRACE INTERNATIONAL, GLOBAL ENFORCEMENT REPORT 2011, at 9 (2011)).

[55] *See* Jonkers, *supra* note 6, at 297.

[56] *See, e.g.*, Press Release, U.S. Dep't of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties (Nov. 4, 2010), *available at* http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html.

[57] *See* Jonkers, *supra* note 6, at 297.

[58] Tina Rosenberg, *The Perils of Petrocracy*, N.Y. TIMES MAG., Nov. 4, 2007, *available at* http://www.nytimes.com/2007/11/04/magazine/04oil-t.html?_r=1&oref=slogin.

[59] *See, e.g.*, Leslie Wayne, *Foreign Firms Most Affected by a U.S. Law Barring Bribes*, N.Y. TIMES, Sept. 3, 2012, at B1, *available at* http://www.nytimes.com/2012/09/04/business/global/bribery-settlements-under-us-law-are-mostly-with-foreign-countries.html?pagewanted=all.

[60] *See* Jonkers, *supra* note 6, at 297.

[61] *See, e.g.*, Patrick H. Martin & J. Lanier Yeates, *Louisiana and Texas Oil & Gas Law: An Overview of the Differences*, 52 LA. L. REV. 769, 795–96 (1992).

[62] Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a) (2012).

their behalf.[63] These challenges mean that the energy industry is vulnerable to committing actions that the FCPA prohibits.[64]

B. The "Instrumentality" Provision

One of the more controversial aspects of the FCPA is the ambiguity surrounding the reference to a foreign government's "instrumentality."[65] This reference is found in the definition of "foreign official" in the statute:

> [A]ny 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.[66]

Whether or not an entity is an "instrumentality" has significant implications: if an entity is considered an instrumentality of a foreign government, then its employees are considered foreign officials and therefore cannot be bribed.[67] This provision is important to a number of FCPA enforcement actions. In 2009, the DOJ completed nine enforcement actions against corporations, and six of them required an interpretation of whether employees of SOEs were "foreign officials."[68] The problem is that the statute does not define "instrumentality,"[69] and until recently, there was a shortage of guidance on its meaning.[70] The FCPA's legislative history is also inconclusive on the matter.[71] According to FCPA scholar Mike Koehler, nowhere in the FCPA's legislative history is there an "express statement or information" about what "instrumentality" means.[72]

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[63] Jonkers, *supra* note 6, at 297 (citing Palmina M. Fava et al., *Energy Sector Faces Greater FCPA Scrutiny*, OIL & GAS FIN. J., Sept. 1, 2008, *available at* http://www.ogfj.com/articles/print/volume-5/issue-9/features/energy-sector-faces-greater-fcpa-scrutiny.html).

[64] *See* Jonkers, *supra* note 6, at 297.

[65] *See, e.g.*, RESTORING BALANCE, *supra* note 1, at 24–27.

[66] 15 U.S.C. §§ 78dd-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A) (emphasis added).

[67] *See id.*

[68] Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence,* 43 IND. L. REV. 389, 412 (2010).

[69] RESTORING BALANCE, *supra* note 1, at 24.

[70] The *Resource Guide* was released in November 2012 and dedicated two pages to the "instrumentality" provision. RESOURCE GUIDE, *supra* note 14, at iv, 20–21.

[71] Declaration of Professor Michael Koehler at 3, U.S. v. Carson, No. 09-77 (C.D. Ca. Feb. 21, 2011) [hereinafter Koehler Declaration].

[72] *Id.* at 4.

In the energy industry and others, it can be quite difficult to know what "instrumentality" means in practice.[73] One reason for this is that throughout the world there exists a wide variety of government involvement in many sectors of the world economy, and the lines between government agencies and private corporations are often unclear.[74] Specifically, it is not always apparent whether SOEs are instrumentalities of foreign governments.[75] The DOJ considers many SOEs to be instrumentalities,[76] but the statute does not indicate what level of government ownership or influence must be present.[77]

C. "Instrumentality" in the Energy Industry

While the ambiguity regarding the meaning of "instrumentality" can be dangerous for any industry, it is particularly so for energy companies. First, energy companies do business in a wide range of countries around the world, which inherently involves working with a number of different corporate structures with various levels of government ownership.[78] The industry is neither purely private nor public and state involvement is prevalent.[79]

On one end of the spectrum of corporate structures in the industry are companies that are completely owned and controlled by a foreign state and function like a government agency.[80] An excellent example is Petróleos de Venezuela, S.A. ("PDVSA") under Hugo Chávez, the late president of Venezuela. While it is unclear what will happen with PDVSA now that Chávez's presidency is over, PDVSA is currently owned entirely by the government of Venezuela.[81] The president of PDVSA—Rafael Ramírez—has also been the oil minister and

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[73] *See* RESTORING BALANCE, *supra* note 1, at 24–27.

[74] *See* HELD BY THE VISIBLE HAND, *supra* note 11, at 1 (SOEs "are a diverse mix ranging from internationally competitive listed companies, large-scale public service providers, wholly owned manufacturing and financial firms, to small and medium enterprises").

[75] *See* RESTORING BALANCE, *supra* note 1, at 24–27.

[76] Koehler Declaration, *supra* note 71, at 3.

[77] RESTORING BALANCE, *supra* note 1, at 25.

[78] *See* HELD BY THE VISIBLE HAND, *supra* note 11, at 1.

[79] Rosenberg, *supra* note 58 (Rosenberg offers some reasons as to why so many national energy companies and SOEs exist: "nationalized oil is the trend. . . . Oil- and gas-dependent countries are historically ill governed. Today their people are in rebellion against globalization, which promised much but has brought them little. They have been told their countries are rich, but they see they are poor. So someone must be stealing the profits. Most often, nationalization is a reaction to the idea that the thief is a foreign company.").

[80] *See* VICTOR ET AL., *supra* note 11, at 3.

[81] Stacy Rentner, Note, *Venezuela: How a Hydrocarbons Law Crippled an Oil Giant*, 27 HASTINGS INT'L & COMP. L. REV. 351, 355 (2004) (citing Uisdean R. Vass &

was a close political ally of President Chávez.[82] According to Ramírez, PDVSA did not employ people who were not supporters of Chávez during his presidency.[83] Chávez also fired 18,000 "antigovernment managers" in the midst of a strike at PDVSA and significant political turmoil around the country in 2003.[84] PDVSA had many characteristics of a privately held corporation before Chávez became president,[85] but clearly became an instrumentality of the Venezuelan government under the FCPA[86] or any other definition of the term while Chávez was in office.

On the other end of the spectrum are a number of entities that are partially owned by foreign governments and function far more like private enterprises.[87] For example, Eni is an Italian energy company that does business in over eighty countries, employs more people outside of Italy (45,516) than it does within the country (33,328), and has stock on exchanges in Italy and the United States.[88] Eni's Board of Directors selects the chief executive officer, and other aspects of the corporate structure are typical of Italian law and tradition.[89] In other words, at first glance, Eni looks very similar to a number of large international energy companies.

One distinguishing factor, however, is that the Italian government owns slightly more than 30 percent of Eni.[90] Additionally, the government possesses a "golden share" which permits it, among other things, to veto certain shareholder decisions despite its minority ownership.[91] The extent of this share is unclear because Italy has faced European Union law scrutiny and was recently threatened with an action at the European Court of Justice regarding its golden shares in multiple industries.[92] These developments led Italy to reduce the pow-

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Adriana Lezcano, *The New Venezuelan Legal Regime for Natural Gas: A Hopeful New Beginning?*, 36 TEX. INT'L L.J. 99, 103 (2001)).

[82] *A Tragedy Foretold: A Fatal Refinery Blast Will Not Help Hugo Chávez*, ECONOMIST, Sept. 1, 2012, *available at* http://www.economist.com/node/21561934.

[83] *See id.*

[84] Juan Forero, *Free-Spending Chavez Could Swing Vote His Way*, N.Y. TIMES, Aug. 14, 2004, at A3.

[85] Rosenberg, *supra* note 58.

[86] 15 U.S.C. §§ 78dd-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A) (2012).

[87] *See* VICTOR ET AL., *supra* note 11, at 3.

[88] ENI, CORPORATE GOVERNANCE REPORT 2011 4 (2012), *available at* http://www.eni.com/en_IT/attachments/governance/publications/2012/Corporate_Governance_Report_2011.pdf.

[89] *Id.*

[90] *Id.* at 8.

[91] *Id.* at 9–10.

[92] *Italy Limits 'Golden Share' Rules to Avoid Hefty EU Fines*, EUBUSINESS, Mar. 9, 2012, http://www.eubusiness.com/news-eu/italy-regulate.fm1/.

ers of its golden shares in Eni and other companies.[93] It would be a difficult task to determine whether an international company such as Eni—with many appearances of a private enterprise but partially owned by a government whose golden share powers are ambiguous—is an instrumentality under the FCPA.

In between these two examples are many energy companies that are owned in part by foreign governments. There are also companies that are owned in whole or in part by other SOEs, which is the case with Nigeria Liquefied Natural Gas ("NLNG").[94] NLNG is a joint venture that came into existence to develop Nigeria's natural gas sector.[95] Three private companies own 51 percent of NLNG, and the remaining 49 percent is owned by Nigeria's state-owned petroleum company.[96] The DOJ considers NLNG to be an instrumentality of the Nigerian government,[97] but this might not be obvious to energy companies and others.[98] NLNG and these other examples show the variety of corporate structures in the energy industry and the consequent challenges that companies can face in interpreting the "instrumentality" provision.

The second reason why the "instrumentality" provision is difficult for energy companies to abide by is that many of the countries where energy companies do business have very little transparency.[99] This not only means that employees of SOEs and government agencies are more likely to request, accept, or require bribes,[100] but also that information about corporate structures might not be available.[101] This makes it challenging to learn about the extent of government involvement and control in these entities and carry out a useful "instrumentality" assessment. Performing due diligence on potential clients and FCPA liability is essential for effective compliance with the statute's provisions,[102] but a company will be without necessary knowledge (and susceptible to liability) when key information about the foreign entities they are working with is unavailable.

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[93] *Id.*

[94] *Our Company: Background*, NIGERIA LNG LTD., http://www.nlng.com/PageEngine.aspx?&id=35 (last visited Dec. 13, 2012).

[95] *Id.*

[96] *Our Company: Shareholders*, NIGERIA LNG LTD., http://www.nlng.com/PageEngine.aspx?&id=35 (last visited Dec. 13, 2012).

[97] KBR Press Release, *supra* note 41.

[98] *See* RESTORING BALANCE, *supra* note 1, at 26.

[99] *See supra* Section II ("Background"); Subsection A ("The FCPA and the Energy Industry").

[100] *See* WORLD BANK, *supra* note 52, at 11.

[101] *See* HELD BY THE VISIBLE HAND, *supra* note 11, at 19.

[102] *E.g.*, Thomas McSorley, *Foreign Corrupt Practices Act*, 48 AM. CRIM. L. REV. 749, 776–77 (2011).

III. ANALYSIS

Because the FCPA offers no definition of "instrumentality,"[103] the DOJ, industry groups, scholars, and U.S. federal courts interpret it differently. Increasing guidance from U.S. courts and the DOJ makes it clear that each situation is fact-specific and the analysis must be done on a case-by-case basis.[104] However, this means that some level of uncertainty regarding the "instrumentality" provision remains prevalent.[105]

A. Perspective of the DOJ

The DOJ has produced two documents for the purpose of providing FCPA guidance: *A Resource Guide to the U.S. Foreign Corrupt Practices Act* ("*Resource Guide*")[106] and the *Lay-Person's Guide to the FCPA* ("*Lay-Person's Guide*").[107] The *Lay-Person's Guide* does not explain what an "instrumentality" is, although it does briefly explain "foreign official."[108] On the other hand, the *Resource Guide* explains the DOJ's "instrumentality" analysis of SOEs,[109] which will surely be at least somewhat useful for energy companies.

In the *Resource Guide*, the DOJ emphasizes four factors that govern its "fact-specific analysis" of SOEs as potential instrumentalities: "ownership, control, status, and function."[110] In making this analysis, the DOJ also uses factors that district courts have approved in jury instructions and used in deciding cases. These factors include "whether key officers and directors of the entity are, or are appointed by, government officials," "the foreign state's characterization of the entity and its employees," and "whether the governmental end or purpose sought to be achieved is expressed in the policies of the foreign government."[111] Companies are advised "no one factor is dispositive or necessarily more important than another."[112] An intriguing aspect of the *Resource Guide* is the DOJ's statement that "as a practical matter, an entity is unlikely to qualify as an instrumentality if a government

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[103] RESTORING BALANCE, supra note 1, at 24.
[104] RESOURCE GUIDE, *supra* note 14, at 20.
[105] *See* RESTORING BALANCE, *supra* note 1, at 27.
[106] RESOURCE GUIDE, *supra* note 14.
[107] *Lay-Person's Guide*, *supra* note 27.
[108] A foreign official can be "any public official, regardless of rank or position." *Id.* at 3.
[109] RESOURCE GUIDE, *supra* note 14, at 20.
[110] *Id.*
[111] *Id.* For the lists of factors from the district courts, *see infra* subsection C ("Federal Courts").
[112] *E.g.*, RESOURCE GUIDE, *supra* note 14, at 21.

does not own or control a majority of its shares."[113] However, this comes with the caveat that there are situations in which the DOJ would still consider that company to be an instrumentality: the presence of political appointments, veto power, and a golden share were enough to make a company an instrumentality in one case because the "government nevertheless had substantial control over the company."[114]

The DOJ says in the *Resource Guide* that there should be a broad interpretation of "instrumentality,"[115] and it has implemented this view in practice.[116] Some of these interpretations are less controversial than others. For example, a company almost wholly owned (97 percent) and completely controlled by the government of Haiti is certainly an instrumentality.[117] However, even in more ambiguous situations, such as minority government ownership ("over one third") in a company, the DOJ has still viewed the company at issue as an instrumentality.[118] Another example is the NLNG situation previously mentioned.[119] In that enforcement action against KBR,[120] the DOJ found NLNG to be an instrumentality of Nigeria because its largest shareholder is the Nigerian National Petroleum Corporation,[121] which is owned entirely by the Nigerian government.[122] KBR clearly violated the FCPA by paying a number of other bribes to executive branch officials, but the DOJ's characterization of NLGN as an instrumentality with that corporate structure at least raises some question marks.[123]

The *Resource Guide* answers a number of questions, yet it is unlikely that the DOJ can offer more definitive guidance on the "instrumentality" provision because of the fact-specific nature of each situation.[124] Only time will tell if the *Resource Guide* succeeds in

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[113] *Id.*

[114] *Id.*

[115] *E.g.*, *id.* at 20.

[116] RESTORING BALANCE, *supra* note 1, at 25.

[117] RESOURCE GUIDE, *supra* note 14, at 21.

[118] Non-Prosecution Agreement at 3, U.S. v. Comverse Tech., Inc., (Apr. 6, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/rae-comverse/04-06-11comverse-npa.pdf.

[119] See *supra* section II ("Background'), subsection C ("'Instrumentality' in the Energy Industry").

[120] KBR Press Release, *supra* note 41.

[121] The Nigerian National Petroleum Corporation owned 49% when the events in question occurred. *Id.*

[122] *Id.*; *Oil and Gas in Nigeria*, *Overview*, MBENDI INFO. SERV., http://www.mbendi.com/indy/oilg/af/ng/p0005.htm (last visited Dec. 13, 2012).

[123] *See* RESTORING BALANCE, *supra* note 1, at 26.

[124] *See* RESOURCE GUIDE, *supra* note 14, at 20.

assuaging the complaints of industry groups and scholars discussed in the next subsection.

B. Industry Groups and Scholars

On the other side of the spectrum from the DOJ are commentators that find the DOJ's interpretation of "instrumentality" far too broad.[125] One of the most prominent complaints about the DOJ's interpretation is that there is no guidance on the level of ownership that a government must have in order for the relevant company to be considered an instrumentality.[126] The Chamber of Commerce argues that the DOJ's interpretation "effectively sweeps in entities that are only tangentially related to a foreign government."[127] Using the DOJ's logic, the Chamber of Commerce references two U.S. examples to prove its point: General Motors ("GM") and American International Group ("AIG").[128] In 2009, the U.S. government acquired 60 percent of GM's shares as part of a bailout to help the company survive bankruptcy.[129] In 2008, the U.S. government purchased 79.9 percent of AIG in a similar bailout.[130] The Chamber of Commerce analogizes that under the DOJ's reasoning, both AIG and GM would have been considered instrumentalities of the U.S. government at the time when the U.S. was their majority shareholder.[131] Had this occurred in a foreign country, AIG and GM employees would therefore have been considered foreign officials, which the Chamber of Commerce calls "absurd."[132]

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[125] RESTORING BALANCE, *supra* note 1, at 25.

[126] *Id.* at 27.

[127] *Id.*

[128] *Id.*

[129] David E. Sanger et al., *G.M. to Bankruptcy and a New Start*, N.Y. TIMES, Jun. 1, 2009, at A1, *available at* http://www.nytimes.com/2009/06/01/business/01auto.html?n=Top%2fReference%2fTimes%20Topics%2fSubjects%2fA%2fAutomobiles&_r=0. The U.S. government has since sold its majority but still owns 26.5 percent of the shares. Jeff Bennett & Sharon Terlep, *U.S. Balks at GM Plan: Government Is Reluctant to Sell Auto Stake at a Huge Loss*, WALL ST. J., Sept. 17, 2012, at A1, *available at* http://online.wsj.com/article/SB10000872396390443995604578000754035510658.html.

[130] Matthew Karnitschnig et al., *U.S. to Take Over AIG in $85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up*, WALL ST. J., Sept. 16, 2008, at A1, *available at* http://online.wsj.com/article/SB122156561931242905.html. As with GM, the government has since sold a significant number of shares, putting its current ownership level at around 15 percent. Leslie Scism et al., *Treasury Sells Chunk of AIG: Deal Marks End of U.S. Majority Ownership of Insurer, Earns Profit for Taxpayers*, WALL ST. J., Sept. 11, 2012, at C3, *available at* http://online.wsj.com/article/SB10000872396390444554704577644311101081138.html.

[131] RESTORING BALANCE, *supra* note 1, at 27.

[132] *Id.*

Alluding to another broad view of the "instrumentality" provision, the Chamber of Commerce discusses the Baker Hughes enforcement action, in which the DOJ found an entity "controlled by officials of the Government of Kazakhstan" to be an instrumentality.[133] Again analogizing to an example in the U.S., the Chamber of Commerce referenced New York City Mayor Michael Bloomberg.[134] Mayor Bloomberg owns 88 percent of Bloomberg LP.[135] According to the DOJ's logic in the Baker Hughes enforcement action, the Chamber of Commerce argues that Bloomberg LP can be considered an instrumentality (and its employees therefore foreign officials) because it is controlled by a government official in the U.S.[136] These results present significant challenges for U.S. businesses in their efforts to do business abroad.[137]

Another complaint is that there is nothing in the legislative history that suggests that Congress intended SOEs to be included in the definition of "instrumentality."[138] Mike Koehler, for example, submitted a declaration in the *U.S. v. Carson* case rejecting the DOJ's broad interpretation of the "instrumentality" provision.[139] In his declaration, he analyzed a number of bills, reports, amendments, and hearing transcripts encompassing over thirty years of legislative history.[140] His conclusion was that Congress never explicitly said that SOEs were to be interpreted as instrumentalities, and that there is a considerable amount of evidence indicating that Congress "did not intend the 'foreign official' definition to include employees of SOEs."[141]

Some suggest that there should be a new definition of these terms,[142] while others suggest specific clarifications of the "instrumentality" provision by having it "apply to foreign companies that are ma-

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[133] *Id.* (citing Plea Agreement at 6, U.S. v. Baker Hughes Serv. Int'l, No. 07-129 (S.D. Tx. Apr. 11, 2007), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/baker-hughs/04-11-07bakerhughes-plea.pdf).

[134] RESTORING BALANCE, *supra* note 1, at 27.

[135] *#8 Michael Bloomberg*, FORBES.COM, http://www.forbes.com/lists/2008/54/400list08_Michael-Bloomberg_C610.html (last visited Dec. 13, 2012).

[136] *See* RESTORING BALANCE, *supra* note 1, at 27.

[137] *Id.*

[138] *See, e.g.*, Koehler Declaration, *supra* note 71, at 4.

[139] *Id.* at 10–144. Witness testimony, such as Professor Koehler's in *U.S. v. Carson*, can often be given through a sworn declaration, which is "a succinct written statement of the direct testimony which that witness would be prepared to give if questions were propounded in the usual fashion at trial." Union State Bank v. Geller, 170 B.R. 183, 184 (S.D. Fla. 1994).

[140] Koehler Declaration, *supra* note 71, at 10–144.

[141] *Id.* at 4.

[142] *See, e.g.*, RESTORING BALANCE, *supra* note 1, at 27.

jority-owned or controlled by their respective governments."[143] Others agree that by using a majority ownership test "and by delineating other elements of 'dominant influence' such as majority voting rights and the ability to appoint the majority of directors and senior managers, Congress or the courts will permit U.S. companies to make rational assessments of their FCPA exposure."[144] In any case, the private sector does not agree with the DOJ's broad interpretation of this provision.[145]

C. Federal Courts

U.S. federal courts have begun addressing the "instrumentality" provision in recent years, which represents a new trend in FCPA enforcement.[146] Additional case law on the subject should be coming in the near future, including the first case on this provision to reach the U.S. Court of Appeals.[147] A few recent district court cases provide some useful guidance on a number of issues regarding SOEs and instrumentalities.

Two cases from the U.S. District Court for the Central District of California list specific factors that companies and the DOJ can use to help assess whether an SOE should be considered an instrumentality under the FCPA.[148] In *U.S. v. Carson*, the court gave a non-exhaustive set of factors for making this determination:

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[143] Joel M. Cohen et al., *Under the FCPA, Who Is a Foreign Official Anyway?*, 63 BUS. LAW. 1243, 1246 (2008).

[144] Court E. Golumbic & Jonathan P. Adams, *The "Dominant Influence" Test: The FCPA's "Instrumentality" and "Foreign Official" Requirements and the Investment Activity of Sovereign Wealth Funds*, 39 AM. J. CRIM. L. 1, 51 (2011).

[145] RESTORING BALANCE, *supra* note 1, at 25.

[146] *See, e.g.*, Steptoe & Johnson LLP,*"State-Owned Enterprises" Under the FCPA* 1 (June 3, 2011), *available at* http://www.steptoe.com/publications-newsletter-pdf.html/pdf/?item_id=209 [hereinafter *State-Owned Enterprises*].

[147] Michael P. Tremoglie, *11th Circuit Given Question of FCPA 'Instrumentality' Definition*, LEGAL NEWSLINE LEGAL J. (Aug. 27, 2012) http://legalnewsline.com/in-the-spotlight/237130-11th-circuit-given-question-of-fcpa-instrumentality-definition. This case involves a jury instruction that the defendants found to be incorrect: "[the] instructions broadly defined 'instrumentality' as 'a means or agency through which a function of the foreign government is accomplished,' and then permitted the jury to find Teleco an 'instrumentality' of the government if, among other things, it: (1) provided [undefined] 'services' to the citizens of Haiti; (2) was owned by the Haitian government; or (3) 'was widely perceived and understood' to be performing official or governmental functions." Reply Brief of Defendant at 37–38, U.S. v. Esquenazi, No. 11-15331 (11th Cir. Oct. 4, 2012).

[148] U.S. v. Aguilar, 783 F. Supp. 2d 1108 (C.D. Ca. 2011); Order Denying Defendants' Motion to Dismiss Counts 1 though [sic] 10 of the Indictment, U.S. v. Carson, No. 09-77, (C.D. Ca. May 18, 2011) [hereinafter Carson Order].

- 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, including whether the entity exercises exclusive or controlling power to administer its designated functions;
- The circumstances surrounding the entity's creation; and
- The foreign state's extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans).[149]

In *U.S. v. Aguilar*, this same district court used a slightly different approach in creating additional factors.[150] The court looked at a number of characteristics of government "departments" and "agencies," the two words that precede "instrumentality" in the FCPA's definition of "foreign official,"[151] to determine that the SOE in question exhibited similar traits and was therefore an instrumentality of a foreign government:

- The entity provides a service to the citizens — indeed, in many cases to all the inhabitants — of the jurisdiction.
- The key officers and directors of the entity are, or are appointed by, government officials.
- The entity 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 entity is vested with and exercises exclusive or controlling power to administer its designated functions.
- The entity is widely perceived and understood to be performing official (*i.e.*, governmental) functions.[152]

These factors give companies specific characteristics to look at as they try to determine whether a potential client would be consid-

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[149] *Carson Order, supra note 148,* at 5.

[150] U.S. v. Aguilar, 783 F. Supp. 2d at 1115.

[151] The definition of foreign official says "any officer or employee of a foreign government or any department, agency, or instrumentality thereof . . ." Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A) (2012).

[152] U.S. v. Aguilar, 783 F. Supp. 2d at 1115.

ered an instrumentality of a foreign government. The district court also mentioned that "this is a fact-specific question that depends on the nature and characteristics of the business entity."[153] Furthermore, it should be noted that none of these factors are dispositive in this analysis.[154] In fact, in *Carson*, the court said that even complete ownership is insufficient on its own to make an entity an instrumentality for FCPA purposes.[155] The court added that the DOJ's burden to prove that an SOE is an instrumentality is a "substantial evidentiary burden."[156]

From these cases, it is clear that the "instrumentality" provision can be interpreted to include SOEs, meaning an SOE's employees can be considered foreign officials under the FCPA.[157] This certainly does not mean that all entities with state ownership will be considered instrumentalities, as these opinions have made clear.[158] However, because every case is fact-specific, and the courts have looked at each on a case-by-case basis,[159] there is still a significant amount of uncertainty on the subject.[160]

IV. PROPOSAL

Finding problems with the FCPA's "instrumentality" provision and the DOJ's interpretation is far easier than offering workable solutions. For example, one prevalent proposal is that Congress should amend the FCPA again to further define "foreign official" or "instrumentality."[161] However, this proposal ignores the fact that Congress is the source of the current text of the statute, and any amendments could make these terms even more confusing. Another proposal is that Congress or the DOJ should specifically state what percentage of government ownership or control is required for an entity to be considered an instrumentality.[162] This is unworkable in practice and would not be beneficial for the DOJ or U.S. industries. As the *Resource Guide* and U.S. courts have said, ownership and control are not the only relevant factors in this analysis.[163] For example, setting the standard at over 50 percent of government ownership would mean that the DOJ's en-

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[153] Carson Order, *supra* note 148, at 12.
[154] *Id.* at 5.
[155] *Id.*
[156] *Id.* at 16.
[157] *See* 15 U.S.C. §§ 78dd-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A) (2012).
[158] U.S. v. Aguilar, 783 F. Supp. 2d at 1115; Carson Order, *supra* note 148, at 13.
[159] *E.g.*, Carson Order, *supra* note 148, at 12.
[160] *E.g.*, *State-Owned Enterprises*, *supra* note 146 at 4.
[161] *E.g.*, RESTORING BALANCE, *supra* note 1, at 27.
[162] *Id.*
[163] RESOURCE GUIDE, *supra* note 14, at 20.

forcement efforts would be frustrated where a government's level of ownership is below that number even if there is significant government control.[164] On the other hand, a company whose government ownership exceeds 50 percent but by all other indicators appears to function outside of government influence and control could be an instrumentality and result in FCPA liability for companies that are not careful.

These proposals also lack an understanding of the fact-specific nature of the analysis, which has been emphasized by both the DOJ[165] and the courts.[166] Even with useful additional guidance, such as the *Resource Guide*, it must still be applied to the facts of each case. U.S. companies would likely have an equally difficult time figuring out whether those new definitions and guidelines apply to the entity with which they are doing business.

Congress could eliminate this confusion by prohibiting all forms of foreign bribery and not just bribery of foreign officials.[167] By making it illegal to bribe anyone, U.S. law would no longer require the DOJ, federal courts, or U.S. companies to determine what an instrumentality is because every employee of every foreign entity would be covered. In the meantime, U.S. companies must deal with the ambiguity of the "instrumentality" provision. Energy companies in particular will continue to face difficulties due to the number of SOEs, the large variety of corporate structures, and pervasive government ownership and control in the industry.[168] However, energy companies do not need Congress to act to prevent FCPA liability under these provisions. They can take actions to protect themselves from FCPA liability arising out of ambiguous scenarios involving SOEs and their employees. This can be done through rigorous corporate compliance programs that prohibit any form of bribery.[169] In essence, energy companies should treat all foreign companies as if they were instrumentalities of foreign governments and all foreign colleagues as if they were foreign officials.[170]

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[164] The DOJ specifically referred to such an example in its recently published guidance. *Id.* at 21.

[165] *See id.* at 20.

[166] Carson Order, *supra* note 148, at 12.

[167] Some have proposed this as an action that the U.S. should take. *E.g.,* Peter Jeydel, *Yoking the Bull: How to Make the FCPA Work for U.S. Business*, 43 GEO. J. INT'L L. 523, 529 n.29 (2012) (citing GLOBAL FIN. INTEGRITY, *supra* note 23, at 1).

[168] *See supra* Section II ("Background"), Subsection C ("'Instrumentality' in the Energy Industry").

[169] Some companies have already created compliance programs to do so. GLOBAL FIN. INTEGRITY, *supra* note 23, at 1.

[170] Companies have begun doing so to specifically avoid trouble under the "foreign official" provision. *Id.*

Such a compliance program might appear excessive, but it is the safest way to ensure that no FCPA liability arises under these provisions.

This type of compliance program should not be difficult to create, considering the impact of other statutes on energy companies. The Bribery Act became effective in the United Kingdom ("UK") in 2011,[171] and the statute clearly has already had a significant influence on energy companies and their anti-bribery compliance programs.[172] The Bribery Act criminalizes bribery of foreign public officials[173] *and* anyone else.[174] This means that any form of bribery is a criminal act under the Bribery Act.[175] A company is also liable for failing to prevent bribery committed by persons associated with the company.[176] The jurisdictional reach of the Bribery Act is significant: in addition to any relevant act or omission that occurs within the UK,[177] jurisdiction also exists for violations occurring outside of the UK made by a person with a "close connection" to the UK."[178] Furthermore, regarding a company's failure to prevent bribery, jurisdiction exists for any corporation or partnership "which carries on a business, or part of a business, in any part of the United Kingdom."[179] There is jurisdiction regardless of where the corporation or partnership is incorporated or formed,[180] and also regardless of where the act in question occurs.[181]

Therefore, because most, if not all, energy companies have offices in the UK or do at least some business there,[182] they are subject

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[171] Jon Jordan, *The Need for a Comprehensive International Foreign Bribery Compliance Program, Covering A to Z, in an Expanding Global Anti-Bribery Environment*, 117 PENN ST. L. REV. 89, 96 (2012).

[172] *See, e.g.*, ANGLO AMERICAN PLC ET AL., PRINCIPLES FOR AN ANTI-CORRUPTION PROGRAMME UNDER THE UK BRIBERY ACT 2012 IN THE ENERGY & EXTRACTIVES SECTOR (2011), *available at* http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/e_s_assets/e_s_assets_2010/downloads_pdfs/Principles_for_an_AntiCorruption_Programme.pdf (last visited Dec. 14, 2012).

[173] Bribery Act, 2010, c. 23, § 6 (Among other factors, the statute generally says: "A person ('P') who bribes a foreign public official ('F') is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official.").

[174] *Id.* § 1 ("A person ('P') is guilty of an offence if . . . P offers, promises or gives a financial or other advantage *to another person* . . ." in exchange for the stated business advantages. (emphasis added)).

[175] *E.g.*, Jordan, *supra* note 171, at 96.

[176] Bribery Act, 2010, c. 23, § 7.

[177] *Id.* § 12(1).

[178] *Id.* § 12(2)–(3). This includes British citizens, companies incorporated in the UK, and primary residents of the UK, among others. *See id.* § 12(4).

[179] *Id.* § 7(5).

[180] *Id.*

[181] *Id.* § 12(5).

[182] *E.g.*, *United Kingdom: Contact Us*, CHEVRON, http://www.chevron.com/countries/unitedkingdom/contactus/ (last visited Dec. 13, 2012); *Contact Us*, SHELL,

to the Bribery Act's provisions.[183] As a consequence, these companies should already have mechanisms in place to prevent bribery of all foreign persons, including employees of entities that the DOJ considers to be instrumentalities under the FCPA.[184] Knowing that most, if not all, of the world's energy companies face the same legal constraints should provide some comfort to U.S. energy companies who are concerned about losing business as a result of such a substantial upgrade to their compliance programs.[185] Furthermore, the DOJ warns in the *Resource Guide* that "whether an entity is an instrumentality of a foreign government or a private entity, commercial (i.e., private-to-private) bribery may still violate the FCPA's accounting provisions, the Travel Act, anti-money laundering laws, and other federal . . . laws."[186] In sum, in the face of potential liability under the FCPA, other U.S. laws, and the Bribery Act, energy companies have plenty of incentives to strengthen their enforcement mechanisms to prevent all forms of bribery to employees of any foreign entity.

V. CONCLUSION

The DOJ is closely watching the energy industry and bringing a number of actions against companies that violate the FCPA.[187] The "instrumentality" provision of the FCPA is particularly ambiguous for the energy industry due the number of SOEs and range of corporate structures in the industry.[188] However, the provision has significant implications because employees of instrumentalities are considered foreign officials under the FCPA, which means that they cannot be bribed.[189] The DOJ has interpreted "instrumentality" to include

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http://www.shell.co.uk/home/content/gbr/footer/contact_us/ (last visited Dec. 13, 2012); *Cutting Edge Technology in the UK*, PETROBRAS, http://www.petrobras.com/en/countries/united-kingdom/united-kingdom.htm (last visited Dec. 13, 2012).

[183] Bribery Act, 2010, c. 23, § 7(5).

[184] *E.g.*, Jordan, *supra* note 171, at 89.

[185] A common complaint from U.S. companies of all industries is that the FCPA causes them to lose business to companies that do not have similar laws in their countries. *E.g.*, Jessica A. Lordi, Note, *The U.K. Bribery Act: Endless Jurisdictional Liability on Corporate Violators*, 44 CASE W. RES. J. INT'L L. 955, 984–85 (2012). One estimate listed the annual amount of lost export revenue at $1 billion. RESTORING BALANCE, *supra* note 1, at 6 (citing MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., RL30079, FOREIGN CORRUPT PRACTICES ACT 2 (1999)).

[186] RESOURCE GUIDE, *supra* note 14, at 21.

[187] Tippee, *supra* note 5 (citing TRACE INTERNATIONAL, GLOBAL ENFORCEMENT REPORT 2011 9 (2011)).

[188] *See supra* Section II ("Background"), Subsection C ("'Instrumentality' in the Energy Industry").

[189] *See* Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A) (2012).

SOEs,[190] and federal courts thus far have largely agreed with the DOJ.[191] Industry groups and scholars have disagreed with these interpretations, and many have asked for more guidance.[192] The DOJ has responded with factors that industries can use in assessing whether an entity is an instrumentality.[193] However, energy companies must still exercise caution because the analysis is very fact-specific and performed on a case-by-case basis.[194]

Because of the ambiguities surrounding the "instrumentality" provision,[195] and the DOJ's broad interpretation of it,[196] it is not advisable for energy companies to attempt to maneuver through these provisions and risk FCPA liability. Instead, it would be best for companies to strengthen their compliance programs in order to treat any foreign entity as if it were an instrumentality of a foreign government.[197] While this may appear to be a severe measure, the Bribery Act and other statutes make such compliance programs necessary.[198] Most importantly, it is the most effective method that companies can use to prevent FCPA liability when working with foreign energy companies.

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[190] RESOURCE GUIDE, *supra* note 14, at 20.
[191] *See, e.g.*, Carson Order, *supra* note 148, at 12.
[192] *E.g.*, Westbrook, *supra* note 20, at 576.
[193] RESOURCE GUIDE, *supra* note 14, at 20–21.
[194] *See, e.g.*, *id.* at 20.
[195] RESTORING BALANCE, *supra* note 1, at 24.
[196] *Id.*
[197] Some companies have already begun doing so. GLOBAL FIN. INTEGRITY, *supra* note 23, at 1.
[198] *E.g.*, Jordan, *supra* note 171, at 89.

AMENDING THE FOREIGN CORRUPT PRACTICES ACT: SHOULD THE BRIBERY ACT 2010 BE A GUIDELINE?

*Michael Peterson**

INTRODUCTION

On December 19th, 1977, President Jimmy Carter signed into law the Foreign Corrupt Practices Act (FCPA).[1] This Act prohibited the "furtherance of an offer, payment, promise to pay, authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value" to a foreign official.[2] As early as 1981, members of Congress introduced bills to amend the Act due to numerous complaints from the business and legal communities.[3] Both proponents and opponents of amending the FCPA set forth arguments in May, June, and July of 1981.[4] Similarly, in 2011, both sides debated the merits of the Act, along with what each side viewed as "improvements" to the Act.[5]

While the United States debated its own anti-bribery act, the United Kingdom passed the Bribery Act 2010.[6] Until 2009, British prosecutors had never convicted a company of bribery due to outdated legislation and the perception of bribery as "a necessary cost of doing business in certain countries."[7] As one world power debates the merits of amending its long standing anti-bribery law and another world power passes a similar yet distinct law, it is appropriate to look at one in the context of the other. This paper compares American and British

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[1] Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1, et seq. (1998). *See* Presidential Statement on Signing the Foreign Corrupt Practices and Investment Disclosure Bill (Dec. 20, 1977), *available at* http:/www.presidency.ucsb.edu/ws?pid=7036.

[2] Foreign Corrupt Practices Act § 78 dd-1(a).

[3] *See* Bartley A. Brennan, *Amending the Foreign Corrupt Practices Act of 1977: "Clarifying" or "Gutting" a Law*, 11 J. LEGIS. 56, 57 (1984).

[4] *Id.* at 56.

[5] *See Foreign Corrupt Practices Act: Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Security of the Comm. on the Judiciary*, 112th Cong. (2011) [hereinafter *FCPA: Hearing*] *available at* http://judiciary.house.gov/hearings/printers/112th/112-47_66886.PDF.

[6] Bribery Act 2010, 2010, c. 23 (U.K.).

[7] *UK Passes One of The World's Strictest Anti-bribery Laws*, BAKER & MCKENZIE (Aug. 2010), http://www.bakermckenzie.com/UKbriberyact.

anti-bribery law, and proposes that while the United States should amend the FCPA, it should generally not amend its anti-bribery laws to be similar to the stricter Bribery Act of 2010.

This paper is divided into four sections. The first section discusses the individual legal aspects of the FCPA and the Bribery Act of 2010; the second section discusses the differing features of the two acts; the third section discusses the criticisms of each of the acts; and the fourth section lays out a proposal of effective amendments which the author feels should be made to the FCPA.

SECTION ONE: THE ACTS

Foreign Corrupt Practices Act

In the United States, the Foreign Corrupt Practices Act (FCPA) as passed in 1977 and amended in 1988 and 1999, "was enacted for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business."[8] In essence, this law makes it unlawful to cause, directly or through agents, an act furthering a corrupt payment either directly to a foreign official, or knowing that all or a portion will be given or offered to such foreign official, within the the United States.[9] Specifically, the FCPA prohibits using an instrument of interstate commerce, "in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money or giving of anything of value" to: (1) any foreign official; (2) any foreign political party or official thereof; or (3) to any person when you know that all or a portion will go to any foreign official or foreign political party.[10] This Act, however, also creates exceptions for payments, "to expedite or to secure the performance of a routine governmental action."[11] These routine government actions include actions ordinarily and commonly performed in obtaining official documents, processing paper work, providing police protection, providing utilities, or in protecting perishable products.[12] As a defense, one can argue that the payments in question were (1) lawful under the written laws and regulations of the foreign country and/or (2) a reasonable and bona fide expenditure, such as travel and lodging expenses.[13] The FCPA also has imposed certain requirements in maintaining records that accurately and fairly reflect

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[8] *Foreign Corrupt Practices Act – An Overview*, DEP'T OF JUSTICE, http://www.justice.gov/criminal/fraud/fcpa (last visited Mar. 6, 2013) [hereinafter DEPT. OF JUSTICE].

[9] *Id.*

[10] Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(a) (1998).

[11] *Id.* §78dd-1(b).

[12] *Id.* §78dd-1(f)(3)(A).

[13] *Id.* §78dd-1(c).

transactions.[14] It also requires a system of internal controls to ensure the accuracy of such books and records.[15] As such, this Act extends to cover not only American corporations, but everyone conducting business within the United States.[16] The International Anti-Bribery and Fair Competition Act of 1988 amended the FCPA to improve the competitiveness of American business and promote international trade.[17] The penalties for breaching the FCPA range from jail time and large fines to exclusion from tendering for US government contracts.[18] More specifically, penalties can include fines up to $250,000 for individuals or $2 million for companies, prison sentences of up to 20 years, federal oversight of company operations, nullification of contracts, revocation of import/export licenses, and loss of product registration.[19] These penalties are in addition to the reputational damage and negative publicity of breaking the law and bribing foreign officials.[20] Meanwhile, neither the anti-bribery or accounting provisions have any express or implied private right of action.[21]

Bribery Act 2010

The Bribery Act 2010 made it an illegal for a person to offer, promise, or give a financial or other advantage to another person while i) intending the advantage to induce improper performance of a relevant function; ii) intending the advantage to reward a person for the improper performance; or iii) knowing or believing that acceptance of the advantage would constitute improper performance.[22] It does not matter if the person receiving the advantage or the offer of an advantage is the person who may actually perform or has performed the function or activity, nor does it matter if the person intending to bribe acts directly or through a third party.[23] Section 6 of the Act creates a similar offense for anyone who bribes a foreign public official with the intention to influence the official in her or his capacity as a foreign public official.[24] This Act also makes it an offense for a person to: i)

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[14] *See* Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 419 (2012).
[15] *See id*.
[16] *See* DEPT. OF JUSTICE, *supra* note 8.
[17] International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366.
[18] WORLD COMPLIANCE, THE END OF CORRUPTION, *available at* http://www.fcpa-worldcompliance.com/pdf/fcpa-brochure.pdf (last visited Mar.6, 2013)
[19] *Understanding Anti-Bribery Laws*, YALE, http://world-toolkit.yale.edu/restrictions/fcpa (last visited Mar. 3, 2013).
[20] *See id.*
[21] Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1024 (6th Cir. 1990).
[22] Bribery Act 2010, 2010, c. 23 § 1(1)-(3) (U.K.).
[23] *Id.* § 1(4)-(5).
[24] *Id.* § 6.

agree to or accept an advantage intending to improperly perform a relevant function as a consequence; ii) request or accept an advantage which itself constitutes improper performance; iii) agree or accept an advantage as a reward for an improper performance; or iv) perform an improper function in anticipation of or as a consequence of requesting or accepting an advantage.[25] Relevant functions are those that are (a) functions of a public nature; (b) any business activity; (c) activity in the course of a person's employment; or (d) any activity performed by or on behalf of a body of persons.[26] To qualify as a relevant function, the function must be conducted by a person expected to perform such activity in good faith, impartially, and in a position of trust.[27] Finally, this Act holds organizations responsible for failing to prevent a person associated with the organization from committing bribery with the intention of obtaining or retaining business or an advantage for the organization.[28] However, it is a full defense if the organization can show that it has in place, adequate procedures to prevent bribery by associated persons.[29] The Ministry of Justice produced guidance under Section 9 of the Act "about procedures which relevant commercial organizations can put into place to prevent persons associated with them from bribing."[30]

SECTION 2: COMPARISON OF ANTI-BRIBERY ACTS

There are several important and distinct differences between the United States' FCPA and the UK Bribery Act 2010 including: 1) whom it is an offense to bribe; 2) offenses for receipt of bribes; 3) corporate offenses; 4) the extent of criminal penalties; and 5) exceptions.[31] The foremost difference between the acts regards to whom it is an offense to make payments. While the FCPA prohibits direct or indirect payments to foreign officials and political parties,[32] the UK Bribery Act 2010 prohibits any advantage paid to any person with the inten-

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[25] *Id.* § 2.
[26] *Id.* § 3.
[27] *Id*.
[28] *Id.* § 7; MINISTRY OF JUSTICE, THE BRIBERY ACT 2010-GUIDANCE 8, *available at* http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf. The Bribery Act and its guidance use the British English spellings "organisation" and "defence," but for the continuity of this article, the author has used the American English spellings.
[29] Bribery Act 2010 § 7; MINISTRY OF JUSTICE, *supra* note 28 at 8.
[30] MINISTRY OF JUSTICE, *supra* note 28 at 2.
[31] David Flint & Valerie Surgenor, *The UK Bribery Act 2010 v Foreign Corrupt Practices Act of 1977: How Different Are They and Should Your Business be Concerned?*, ASS'N OF CORP. COUNSEL (Apr. 23, 2010), *http://www.lexology.com/library/detail.aspx?g=fa55bb1d-ff5d-4575-81d3-07acb4cfc0d7*.
[32] Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(a) (1998).

tion to induce an improper performance or reward for an improper performance,[33] including, but not limited to, foreign officials.[34] Under the FCPA, one can only be punished for paying an individual who is not a foreign official or a member of a foreign political party if the payment is made knowing that a portion of the value is going to a foreign official or political party.[35] The Bribery Act, however, does not require a connection to a foreign official for a bribe to fall within its purview.[36] By having made it an offense to bribe a larger group of individuals, it is much easier to violate the Bribery Act 2010 than the FCPA. It may be particularly relevant that it is illegal to make payments to corporate leaders who are not in any way connected to a foreign government under the Bribery Act 2010, but similar prohibitions are not included under the FCPA.

Second, the two laws differ greatly in whether it is only an offense to provide a bribe or whether it is also an offense to receive such benefits. The Bribery Act 2010 not only criminalizes providing a bribe, but also makes it an offense to request, receive, agree to receive, or anticipate an advantage as a consequence of performing an improper relevant function.[37] However, the FCPA contains no such provision concerning the receipt of bribes.[38]

Third, the acts differ regarding strict liability offences of corporate offenders. The Bribery Act 2010 holds corporations strictly liable for failing to prevent bribery.[39] "Under the Bribery Act, companies will be liable if anyone acting under its authority commits a bribery offence. Such persons can include employees, consultants, agents, subsidiaries and joint venture partners."[40] However, having adequate oversight procedures to prevent bribery offenses acts as a defense.[41] Again, the FCPA does not contain such a provision and does not have strict liability offenses for companies.[42]

Fourth, the acts differ in the severity of criminal penalties for bribery offenses. The FCPA creates fines of up to $2 million per violation by companies and up to $250,000 fines for individuals along with

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[33] Bribery Act 2010, 2010, c. 23 § 1 (U.K.).

[34] *Id*. § 6.

[35] Foreign Corrupt Practices Act § 78dd-1(a)(3).

[36] *See* Bribery Act 2010 § 1.

[37] *Id*. § 2.

[38] Flint, *supra* note 31 (highlighting the differences between the FCPA and the Bribery Act).

[39] Bribery Act 2010, 2010, c. 23, § 7 (U.K.).

[40] Flint, *supra* note 31.

[41] Bribery Act 2010 § 7; Flint, *supra* note 31.

[42] Flint, *supra* note 31.

up to 5 years imprisonment.[43] The Bribery Act on the other hand allows prosecutors to impose an unlimited fine and sentences of up to 10 years.[44]

Finally, the acts differ in how they treat legal facilitation payments versus bribes. The FCPA allows the facilitation or expedition of payments to expedite or secure the performance of a routine government action and payments, as long as the offers and gifts were lawful within the recipients' country.[45] Such payments are also allowed if they are part of reasonable and bona fide expenditures related to "the promotion, demonstration, or explanation of products or services" or the execution of a contract.[46] The Bribery Act 2010 has no such exceptions or defenses.[47]

SECTION 3: CRITICISMS OF THE ACTS

Criticisms of FCPA

The FCPA has received harsh criticisms from its inception. As early as 1978, there were major criticisms regarding vagueness of the definitions, which prompted some commentators to suggest that the vagueness has "forced American corporations to forego business opportunities abroad for fear of violating the FCPA."[48] Since 1978, the corporate and non-corporate worlds have changed, and the United States' economy has recently suffered. "America is suffering through a severe and prolonged economic downturn," according to the Chairman of the House Subcommittee on Crime, Terrorism, and Homeland Security.[49] Businesses that try to comply with the FCPA claim that the law's enforcement is vague and impenetrable.[50] There has been a dramatic increase in the number of cases the Justice Department has prosecuted during this time. These cases have resulted in a staggering amount of

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[43] *Id.* The maximum prison sentence for a violation of the Bribery provisions is 5 years. A 20-year prison sentence is applicable to willful violations of the Books and Records and Internal Control Provisions.

[44] *Id.*

[45] Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(b).

[46] *Id.* § 78dd-1(c).

[47] *See* Bribery Act 2010, 2010, c. 23 (U.K.); *see also* Flint, *supra* note 31 (comparing the FCPA and the Bribery Act).

[48] Brennan, *supra* note 3, at 62-63. *See generally Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 708 Before the Subcomm. on Securities and the Subcomm. on International Finance and Monetary Policy of the S. Comm. on Banking, Housing, and Urban Affairs*, 97th Cong. 4 (1981) (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Housing, & Urban Affairs).

[49] *FCPA: Hearing*, *supra* note 5, at 2 (statement of Rep. F. James Sensenbrenner, Jr., Chairman, Subcomm. on Crime, Terrorism, & Homeland Security).

[50] *Id.*

fines, making up half of all Department of Justice Criminal Division penalties in fiscal year 2010.[51] In 2010 alone these fines totaled some $1.8 billion dollars and included eight of the ten highest fines ever paid under the FCPA.[52] The rise in prosecutions has been so drastic that the United States Department of Justice has prosecuted more cases than any of the other 37 member countries of the Organization of Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[53] Some critics worry that the "over-aggressive enforcement" and the rise of prosecutions disadvantages U.S. companies, especially when competing with companies in the global marketplace that are not subject to U.S. law.[54] In response, the U.S. Chamber of Commerce has now prioritized amending the FCPA.[55] Corporate lobbyists' attempts to curb the FCPA have also sparked widespread debate about how the legislation is enforced.[56] In 2011 the general concern regarded statutory definitions, specifically those of "foreign official" and "instrumentality."[57] As Representative Robert Scott stated, "[o]ne 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."[58]

The FCPA has also been criticized because it does not inquire about intent or willfulness when dealing with corporate violations. Violations of the FCPA have expanded to not only cover bribes that business officials actually authorized or know, but also include "bribes a business owner or executive should have known were being made."[59] While Congress amended the "reason to know" standard in 1998, it has substituted concepts of willful blindness and conscious disre-

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[51] *Id.*

[52] *FCPA Year in Review 2010*, STEPTOE & JOHNSON LLP (Mar. 15, 2011), http://www.steptoe.com/publications-newsletter-129.html#_ftn1.

[53] *FCPA: Hearing*, *supra* note 5 at 3 (statements of Rep. Robert C. Scott, Member, Subcomm. on Crime, Terrorism, & Homeland Security).

[54] *Id.*

[55] Joe Palazzolo, *Critics Target Bribery Law*, WALL ST. J. (Nov. 28, 2011), http://online.wsj.com/article/SB10001424052970204753404577064061604755308.html?user=welcome&mg=id-wsj.

[56] *Id.*

[57] *FCPA: Hearing*, *supra* note 5, at 3 (statements of Rep. Robert C. Scott, Member, Subcomm. on Crime, Terrorism, & Homeland Security).

[58] *Id.*

[59] Michael P. Tremoglie, *Foreign Corrupt Practices Act is 'Sword of Damocles,' Critic Says,* LEGAL NEWSLINE LEGAL J. (July 16, 2012), http://legalnewsline.com/in-the-spotlight/236735-foreign-corrupt-practices-act-is-sword-of-damocles-critic-says.

gard.[60] However, this has still left the Act to apply to those who are "aware of a high probability of the existence of such circumstances," or "should have known."[61] The Act is essentially prohibiting actions that fall short of positive knowledge.[62] While these amendments impose a mens rea requirement to reduce possible liability for accidental violations,[63] the "should have known" standard still leaves room for such violations to result in criminal liability. Amendments have been suggested for changes to the intent requirements for corporate defendants.[64]

The FCPA, and the cases surrounding it, have also received criticism over the lack of a private right of action under the FCPA.[65] The basis of this criticism is that denying citizens the right to bring actions means that the inadequacies of the Act, ones that are not remedied by actions of government agencies, Congress, or the courts, are not being solved and the Act is being inadequately enforced.[66] While the recent increase in prosecution may have tempered the strength of this argument, commentators still contend that a private right of action should be included in FCPA enforcement because the rise in enforcement actions has led to collateral civil litigation based on alleged violations of federal securities laws, antitrust laws, state laws proscribing tortious interferences with prospective contractual relations, and other statutes being pursued as class actions or shareholder derivative actions.[67]

Criticisms of Bribery Act 2010

Despite its relatively young age, the United Kingdom's Bribery Act 2010 is not without its opponents. The main criticisms of the Act are that it is too broad and inhibits British corporations competing abroad. The Act, which was hurriedly passed in 2010 during the Labour government's last days, saw growing warnings about its consequences as early as January 2011 before the Act even became

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[60] H. Lowell Brown, *Parent-Subsidiary Liability Under The Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 31 (1998).

[61] *Id.*; *see also* Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(f)(2)(ii) (1998).

[62] Justin Serafini, *Foreign Corrupt Practices Act*, 41 AM. CRIM. L. REV. 721, 734 (2004).

[63] James A. Barta & Julia Chapman, *Foreign Corrupt Practices Act*, 49 AM. CRIM. L. REV. 825, 832 (2012).

[64] *Id* at 861.

[65] Mark, *supra* note 14, at 448.

[66] Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 215-16 (1994).

[67] *See* Mark, *supra* note 14.

effective.[68] At that time, the Government confirmed that the Bribery Act 2010 would be reassessed as part of a drive to ease regulatory burdens on business.[69] Legal experts have said that the law could hypothetically punish companies just because of their weak compliance procedures, which could unduly hamper British companies competing abroad. There are also fears that what has been described as the toughest anti-bribery law in the world could go so far as to punish small corporate gifts and drive away corporate sponsors.[70] While the Act was rewritten prior to coming into force, business still feared the extremely broad corporate criminal offence of "failing to prevent a bribe by an associated person."[71]

Another major criticism of the Bribery Act has been the ban on facilitation payments, which are allowed under the FCPA.[72] Those most affected by this ban include pharmaceutical, defense, and energy and construction sectors. The Ministry of Justice has produced guidance on the Act that, along with comments from Justice Secretary Kenneth Clarke, suggest that only extreme cases are likely to result in enforcement activity.[73] However, this leaves ambiguity for corporations hoping to abide by the Act and avoid liability.[74] The Ministry of Justice's guidelines did little to quash criticisms of the Act. Instead it caused new criticisms from those who believe the guidance watered down the Act's intentions, while prosecuting authorities still have plenty to do, and companies plenty to worry about.[75] Some critics hold that Parliaments attempt to craft a zero-tolerance approach to bribery is overshadowed by various problems including enforcement difficulties and the failure of the Ministry of Justice's Guidance in explaining

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[68] *See* James Kirkup, *Bribery Act to be Reviewed After Business Fears*, TELEGRAPH (Jan. 14, 2011), http://www.telegraph.co.uk/finance/yourbusiness/bribery-act/8258368/Bribery-Act-to-be-reviewed-after-business-fears.html.

[69] *Id*.

[70] *See id*.

[71] *See* Alex Bailin, *Revamped Bribery Act is Giving Firms the Jitters*, GUARDIAN (Apr. 1, 2011), http://www.guardian.co.uk/law/2011/apr/01/revamped-bribery-act-firms-jitters.

[72] *See id*.

[73] *Id*.

[74] *See id.*

[75] *See generally,* Jonathan Russell, *Serious Fraud Office Risks Clash with Ministry of Justice over Bribery Act*, THE TELEGRAPH (July 1, 2011), http://www.telegraph.co.uk/finance/yourbusiness/bribery-act/8609486/Serious-Fraud-Office-risks-clash-with-Ministry-of-Justice-over-Bribery-Act.html.

compliance.[76] The Act has been referred to as "the ballyhooed U.K. Bribery Act" and "the caffeinated younger sibling of the FCPA."[77]

SECTION 4: PROPOSAL

In light of the criticisms of the existing anti-bribery law, and the lack of a comprehensive international bribery compliance program,[78] I propose amendments to the FCPA, but only one amendment that should be adopted from the U.K. Bribery Act 2010.

The only amendment that should be made to the FCPA to make the act more similar to the Bribery Act 2010 is a full defense for corporations who have adequate procedures, programs, and practices in place to monitor and prevent bribery by associated persons.[79] Such a provision would allow companies to avoid criminal liability if employees or contractors who committed the violation circumvent the procedures the company has in place to prevent bribery.[80] It is practical to allow compliance programs, which train employees and help identify actual or potential problems,[81] to be a defense for the company on the occasion they do not work since these measures are a deterrent and companies invest substantial funds into them.[82]

At a congressional hearing in 2011, members of the Committee on the Judiciary who both supported and opposed major amendments to the FCPA came together for a suggested amendment that added a compliance defense. This defense would allow companies to avoid criminal liability if individual employees or agents who committed FCPA violations circumvented adequate procedures that were other-

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[76] *See* Bruce W. Bean & Emma H. MacGuidwin, *Beyond All Boundaries: The Extraterritorial Grasp of Anti-Bribery Legislation: Expansive Reach—Useless Guidance: An Introduction to the U.K. Bribery Act 2010*, 19 ILSA J. INT'L & COMP. L 323, 346 (2012).

[77] *See* Joe Palazzolo, *Law Blog Job of Week: SFO Director*, WALL ST. J. (Oct 25, 2011, 1:15 PM), http://blogs.wsj.com/law/2011/10/25/law-blog-job-of-week-sfo-director/.

[78] *See generally* Jon Jordan, *The Need For a Comprehensive International Foreign Bribery Compliance Program, Covering A to Z, in an Expanding Global Anti-Bribery Environment*, 117 PENN ST. L. REV. 89 (2012) (suggesting that an analysis of the guidance on compliance procedures provided through various international and domestic agencies can provide a minimum set of procedures that should be included in any international foreign bribery compliance program.).

[79] Bribery Act, 2010, c. 23, § 7 (2) (U.K.).

[80] *See FCPA: Hearing*, *supra* note 5, at 3 (statements of Rep. Robert C. Scott, Member, Subcomm. On Crime, Terrorism, and Homeland Security).

[81] *See id.*

[82] *See id.*

wise reasonable in preventing bribery.[83] Similarly, as seen with the Bribery Act 2010, companies can implement these adequate procedures through training, internal and external communication, and instituting internal controls.[84] With these compliance devices and the encouragement of a corporate defense, companies can develop programs through a continuous process of implementation, monitoring, reporting, and improving compliance programs in order to achieve its objectives. By using a corporate defense amendment to encourage companies to invest in corporate-wide compliance programs, the FCPA will be more successful in preventing bribery and companies will have less fear of the exuberant penalties for violations of which the corporation was unable to stop.

The conclusion that the United States should avoid amending the FCPA to be more like the Bribery Act 2010 does not mean that the FCPA should never be amended. Amendments, for example, can still be made to further encourage companies to prevent bribery through internal controls. On this point, instead of adopting the Bribery Act 2010's adequate procedures defense, the FCPA could be amended to mandate that corporations doing business abroad have anti-bribery procedures in place. In essence, the FCPA could be amended to be similar to the United State's Sarbanes-Oxley Act of 2002.[85] The Sarbanes-Oxley Act mandated several reforms to enhance corporate responsibility and enhance financial disclosures in order to combat corporate and accounting fraud.[86] Section 302 of this Act, for example, required principal executive officers to, among other responsibilities, establish and maintain internal controls.[87] Section 404, meanwhile, requires an annual internal control report that shall:

> (1) state the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting; and (2) contain an assessment, as of the end of the most recent fiscal year of the issuer, of the effectiveness of the inter-

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[83] *See FCPA: Hearing*, *supra* note 5, at 3-5 (statements of Rep. Robert C. Scott, Member, Subcomm. On Crime, Terrorism, and Homeland Security; statements of Rep. John Conyers, Jr., Member, Committee on the Judiciary).

[84] *See* PETER WILKINSON, THE 2010 UK BRIBERY ACT ADEQUATE PROCEDURES: GUIDANCE ON GOOD PRACTICE PROCEDURES FOR CORPORATE ANTI-BRIBERY PROGRAMMES 53-61 (Robert Barrington et al. eds., 2010), *available at* http://www.transparency.org.uk/our-work/publications/95-adequate-procedures—-guidance-to-the-uk-bribery-act-2010.

[85] *See generally* Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201.

[86] *See The Laws That Govern the Securities Industry*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/laws.shtml (last visited Mar. 7, 2013).

[87] *See* Sarbanes-Oxley Act § 7241.

> nal control structure and procedures of the issuer for financial reporting.[88]

By implementing similar requirements regarding bribery prevention, Congress can ensure that every company doing business abroad has adequate procedures to prevent bribery. This amendment would be implemented in a similar fashion as in the Sarbanes-Oxley Act, by having an agency (such as the Securities and Exchange Commission for the Sarbanes-Oxley Act) create the exact rules which must be followed in creating and auditing the internal controls designed to prevent bribery.

Congress should also amend the FCPA to eliminate concerns regarding vagueness, which is also an issue in the Bribery Act 2010, by providing more precise and workable definitions. Companies specifically cite problems with the current statutory definitions of "foreign official" and "instrumentality."[89] U.S. companies contend that the Justice Department and the Securities and Exchange Commission are interpreting the definition of "foreign official" too broadly, especially when dealing with payments to state owned or state controlled companies.[90] The difficulty for U.S. companies and their employees is that it is not immediately apparent whether a manager or other employee is considered a foreign official in the sense contemplated by the law. Some feel that this allows for overly-aggressive enforcement which disadvantages U.S. companies in the global marketplace.[91] While the law specifically prohibits payments to foreign officials, the U.S. Chamber of Commerce wants to clarify whether "employees of companies with state ownership or control behind them qualify as such."[92] Up to this point, the Justice Department has taken an expansive view of the definition and argued, "that virtually every employee a pharmaceutical company encounters in a state-run health-care system could be considered a foreign official."[93] Again, the problem of not having a clear understanding of who is a "foreign official" has generated support for more clear and precise definitions from multiple congressional members within the House Committee of the Judiciary.[94] There are two potential ways that Congress could deal with these ambiguities, especially regarding the definition of "foreign official." Congress could (1)

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[88] *See id.* § 7262.
[89] *See FCPA: Hearing*, *supra* note 5, at 3 (statements of Rep. Robert C. Scott, Member, Subcomm. On Crime, Terrorism, and Homeland Security).
[90] *Id*.
[91] *Id*.
[92] Palazzolo, *supra* note 55.
[93] *Id*.
[94] *See FCPA: Hearing*, *supra* note 5, at 3-5 (statements of Rep. Robert C. Scott, Member, Subcomm. On Crime, Terrorism, and Homeland Security; statements of Rep. John Conyers, Jr., Member, Committee on the Judiciary).

amend the FCPA to provide a more precise definition of "foreign official"; or (2) like the Bribery Act 2010, remove the "foreign official" requirement and create liability for bribing anyone in the course of business. However, the second option appears implausible since most, if not almost all, calls for amending the FCPA want to make the Act less powerful. However, giving a more precise statutory definition to "foreign official" will help guide companies, the Justice Department, the Securities and Exchange Commission, and the judiciary in enforcing the rules and rationale of the FCPA. Defining "foreign official" as only those who are a direct link to the government of a foreign nation will give clarity to U.S. companies dealing with state-run companies in the global marketplace.

Another amendment recommendation for the FCPA to assist corporations in avoiding the most severe penalties, while also assisting the enforcement of the FCPA, is to reduce the penalties for those who self-report violations. The shift from sporadic to more aggressive enforcement of the FCPA has been attributed, in part, by some Justice Department officials to the Sarbanes-Oxley Act 2002's requirement for corporate officers to certify the accuracy of their financial statements.[95] According to these officials, this requirement has led to more companies discovering potentially illicit payments and has led to more companies disclosing such discrepancies to the Securities and Exchange Commission and the Justice Department.[96] While companies are already forced to make disclosures under Sarbanes-Oxley, and companies are developing more internal procedures for identifying potential FCPA violations, an amendment that would give companies a reduction in penalties for self-reporting violations would be a positive change. Such a proposal, reducing penalties by as much as 40%, is already under consideration by lawmakers.[97] While Justice Department officials say companies are already given credit for cooperation, these reductions for cooperation need to be specifically quantified so that companies and boards can make informed decisions, according to Robert Tarun of Barker & McKenzie LLP, who authored the discount proposal.[98] This proposal can also work hand-in-hand with the two other proposals mentioned above. Companies may be more likely than ever to self-report by combining a corporate defense for adequate procedures with a reduction in penalties for self-reporting. Both the adequate procedure incentive, which should help companies identify more possible violations, and the protection of lower penalties for self reported violations if the procedures are not found to be adequate will

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[95] *See* Sarbanes-Oxley Act of 2002, 15 U.S.C. § 302(a); Palazzolo, *supra* note 53.

[96] Palazzolo, *supra* note 55.

[97] *Id.*

[98] *Id.*

encourage more self-reporting. Also, this amendment could be combined with a statutory requirement for internal controls and reporting on internal controls to raise awareness and reporting without fear of the stiffest penalties. Amendments combining the implementation of statutorily required internal controls and reporting with less severe penalties for self-reported infractions appears to be the avenue under which the United States could best lower instances of bribery violations and effectively deal with violations while not overly burdening United States companies competing abroad.

Finally, the FCPA could be amended or the courts' rulings overturned to create a private right of action, whether explicit or implied, for investors damaged by FCPA violations. This proposal, rather than deal with government enforcement for criminal liability, deals with what some see as the primary purpose of the FCPA, protecting investors.[99] If the intention of the Act is, at least in part, to protect investors in the United States, it appears that those investors, as private citizens, should be able to bring claims against companies for violations. Commentators have argued that the courts should recognize an implied private right of action, or that Congress should amend for an explicit private right of action, at least for violations of the anti-bribery provisions of the FCPA.[100] Such an amendment could be useful in enhancing clarification of the FCPA's provisions through increased enforcement.[101] Approximately 77% of FCPA enforcements by the Department of Justice and Security and Exchange Commission are resolved by deferred prosecution agreements or non-prosecution agreements.[102] This means that little is being done in the way of judicial scrutiny or interpretation with the result that the FCPA means "what the enforcement agencies say it means."[103] Allowing for private actions to be brought regarding FCPA enforcement, which explicitly removes the Department of Justice and Security and Exchanges Commission from the process, may result in more cases reaching the courts, allowing judicial review and interpretation of the provisions of the FCPA that have been criticized for ambiguities. However, even with the high number of cases being settled outside of full prosecution, as the enforcements brought by the Department of Justice continue to increase, judicial review may be possible without a private right of action.

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[99] Tremoglie, *supra* note 59.

[100] *See, e.g.*, Mark, *supra* note 14, at 419.

[101] Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 220 (1994).

[102] Joseph W. Yockey, *FCPA Settlement, Internal Strife, and the "Culture of Compliance"*, 2012 WIS. L. REV. 689, 697 (2012).

[103] Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J, INT'L L. 907, 907 (2010).

CONCLUSION

The FCPA was passed in 1977 and amended in 1998 to combat bribery of foreign officials in the global marketplace. In 2010 the United Kingdom passed the Bribery Act 2010 in response to international criticisms for failing to effectively join the fight against bribery. These two acts differ in several key components, including: 1) whom it is illegal to bribe; 2) liability for the receipt of bribes; 3) corporate defenses for adequate internal procedures; 4) amount of monetary penalties and length of incarceration terms; and 5) the legality of "facilitation payments." Nether act is free from an abundance of criticism and many specific calls are being made to amend the FCPA. It is important that the FCPA is amended in a way that will lower instances of bribery committed by companies while not limiting the ability of United States' companies to compete in the global market place. This article shows that the FCPA should not be amended to mirror the Bribery Act 2010 except for allowing a corporate defense for companies with adequate procedures designed to identify and prevent bribes. However, there are several other options for amending the FCPA such as requiring internal controls and reports on these controls; judicially or congressionally clearing ambiguous definitions, specifically "foreign officer"; reducing penalties in instances of self-reported violations; and creating an implied or explicit private right of action for FCPA enforcement.

"ICE" CAPADES: RESTITUTION ORDERS AND THE FCPA

*Shane Frick**

INTRODUCTION

The notion that victims should obtain compensation for their losses evokes basic principles of fairness. In Foreign Corrupt Practices Act ("FCPA") litigation, however, the all too common theme is that victims never receive compensation. In light of the massive efforts now underway to enforce the FCPA,[1] this precedent cannot continue.

For much of its history the FCPA was inconsequential to the legal landscape.[2] Within the last decade that notion has changed dramatically.[3] Enforcement of the FCPA has led to settlements, fines, and disgorgements totaling hundreds of millions of dollars.[4] Looming on the FCPA enforcement horizon is the Wal-Mart investigation.[5] The scope and scale of Wal-Mart's potential violations could set FCPA enforcement records and will almost certainly become the preeminent FCPA enforcement case of its time.[6] The potential for liability is com-

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[1] Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 FORDHAM L. REV. 775, 784 (2011).

[2] Dionne Searcey, *U.S. Cracks Down on Corporate Bribes*, WALL ST. J. (May 26, 2009), http://online.wsj.com/article/SB124329477230952689.html.

[3] Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389 (2009); Jordan Maglich, *Under the FCPA, Where Are Victim's Rights?*, FCPA BLOG (May 25, 2011, 6:42 AM), http://www.fcpablog.com/blog/2011/5/25/under-the-fcpa-where-are-victims-rights.html.

[4] Richard L. Cassin, *Pfizer Joins Our Top Ten Disgorgement List*, FCPA BLOG (Aug. 8, 2012, 8:02 AM), http://www.fcpablog.com/blog/2012/8/8/pfizer-joins-our-top-ten-disgorgement-list.html; Richard L. Cassin, *With Magyar In New Top Ten, It's 90% Non-U.S.*, FCPA BLOG (Dec. 29, 2011, 1:28 PM), http://www.fcpablog.com/blog/2011/12/29/with-magyar-in-new-top-ten-its-90-non-us.html.

[5] David Barstow, *Vast Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 22, 2012, at A1, *available at* http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?page wanted=all.

[6] Mike Scher, *Wal-Mart Will Test FCPA Enforcement in New Ways*, FCPA BLOG (Dec. 19, 2012, 4:10 AM), http://www.fcpablog.com/blog/2012/12/19/wal-mart-will-test-fcpa-enforcement-in-new-ways.html; Andy Spalding, *Wal-Mart's Expanding*

parable to the British Petroleum ("BP") Deepwater Horizon oil spill, with one commentator calling Wal-Mart the "BP of anti-bribery enforcement."[7]

Whatever similarities may exist between the Department of Justice's case against BP and the pending case against Wal-Mart, the similarities are likely to end when the discussion turns to victim compensation. When the BP prosecution ended, $2.4 billion went directly to construction and environmental reconstruction efforts.[8] However, assuming Wal-Mart is liable, it is unlikely that its victims will receive compensation in any fashion.

In FCPA enforcement, regardless of how a case concludes, very little if any money will see its way back to victims of the bribery.[9] This marginalization or, perhaps more accurately, near complete ignorance of victim's rights has led several FCPA commentators to decry the apparent injustice.[10] With the potential for the largest settlement ever for an FCPA enforcement action in the near future, this injustice to the victims looms ever larger.

This comment discusses federal restitution orders and why they are not a viable source of compensation for FCPA victims. Section I provides background information on the FCPA and outlines how it is enforced. Section II discusses victims' rights under a series of pieces of federal legislation. Section III looks at the primary precedent in the arena and explains why it shows that the restitution statutes do not provide sufficient FCPA victim restitution. Section IV discusses the pending Wal-Mart case and the issues facing Wal-Mart victims. Section V outlines other avenues of recovery for FCPA victims and proposes new measures for compensating victims.

Investigation Reveals FCPA as Trade Policy, FCPA BLOG (Nov. 15, 2012, 2:28 PM), http://www.fcpablog.com/blog/2012/11/15/wal-marts-expanding-investigation-reveals-fcpa-as-trade-poli.html.

[7] Andy Spalding, *If the DOJ is Compensating BP's Victims, Couldn't it Compensate Wal-Mart's?*, FCPA BLOG (Nov. 26, 2012, 6:13 AM), http://www.fcpablog.com/blog/2012/11/26/if-the-doj-is-compensating-bps-victims-couldnt-it-compensate.html.

[8] Press Release, U.S. Dep't of Justice, BP Exploration and Product Inc. Agrees to Plead Guilty to Felony Manslaughter, Environmental Crimes and Obstruction of Congress Surrounding Deepwater Horizon Incident (Nov. 15, 2012), *available at* http://www.justice.gov/opa/pr/2012/November/12-ag-1369.html.

[9] Maglich, *supra* note 3; Spalding, *supra* note 7.

[10] Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419 (2012); Mike Koehler, *Where Should the Money Go?*, FCPA PROFESSOR (Mar. 26, 2012), http://www.fcpaprofessor.com/where-should-the-money-go; Spalding, *supra* note 7.

I. A BRIEF OUTLINE OF THE FCPA

Congress passed the Foreign Corrupt Practices Act of 1977 in the wake of Securities and Exchange Commission ("SEC") investigations that showed rampant bribing of foreign government officials[11] by United States companies.[12] The FCPA itself outlaws bribing foreign officials in pursuit of business objectives with a corrupt intent.[13] In 1998, amendments to the FCPA extended its jurisdictional reach to include foreign companies and nationals who act to further a corrupt payment within United States territory.[14] Indeed, the anti-bribery provisions of the FCPA are far reaching and led the Fifth Circuit to conclude that Congress intended the FCPA to "cast [a] . . . wide net over foreign bribery."[15]

The SEC and Department of Justice ("DOJ") handle enforcement of the FCPA.[16] There are essentially three categories of individuals subject to these entities' jurisdiction: domestic concerns,[17] foreign companies and nationals who act in furtherance of an FCPA violation while in U.S. territory, and "issuers."[18] The DOJ is tasked with criminal enforcement against all three categories and civil enforcement against domestic concerns and foreign companies and nationals.[19] The SEC handles civil enforcement against issuers.[20]

When an individual or entity is criminally liable under the FCPA, a variety of penalties can result. Pursuant to the Alternative Fines Act, penalties can reach up to two times the "benefit that the defendant sought to obtain by making the corrupt payment."[21] The question of where this money goes brings a simple answer: straight into the United States Treasury.[22] With a handful of rare exceptions,[23]

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[11] Maglich, *supra* note 3.

[12] *A Resource Guide to the U.S. Foreign Corrupt Practices Act,* U.S. DEP'T OF JUST. 3, http://www.justice.gov/criminal/fraud/fcpa/guide.pdf (last visited Apr. 28, 2013) [hereinafter *FCPA Guide*].

[13] *Id.* at 14.

[14] *Id.* at 11-12.

[15] U.S. v. Kay, 359 F.3d 738, 749 (5th Cir. 2004).

[16] *FCPA Guide*, *supra* note 12, at 4-5.

[17] Domestic concerns are citizens, residents, and any business entity organized under U.S. law whose principle place of business is in the U.S. *Id.* at 2

[18] Issuers are corporations registered in the U.S. or corporations required to file certain SEC reports. *Id.* at 3.

[19] *Id.* at 2.

[20] *Id.* at 3.

[21] *Id.* at 6.

[22] *FCPA Fines: Where Does All the Money Go?*, TRACE BLOG (Feb. 13, 2009), http://traceblog.org/2009/02/13/fcpa-fines-where-does-all-the-money-go [hereinafter *FCPA Fines*]; Maglich, *supra* note 3; Mike Koehler, *ICE Appeal Receives Chilly Reception at 11th Circuit*, FCPA PROFESSOR (June 20, 2011), http://fcpaprofessor.

this has been the result of the vast majority of FCPA enforcement actions.[24] The question of why is a bit trickier.

The FCPA legislation itself remains largely silent on the issue.[25] The single reference to the Treasury in the text of the statute states that issuers who fail to file required information, documents, or reports are subject to a penalty of $100 each day payable to the Treasury.[26] With the remainder of the statute seemingly silent, history proves to be the best tool for further insight into the topic, though the matter is further complicated because FCPA cases are rarely litigated.[27]

The majority of potential FCPA violation cases never see the inside of a courtroom.[28] As a direct result of litigation costs[29] and the seemingly high probability of a guilty verdict,[30] corporations typically resolve criminal FCPA issues through "deferred-prosecution agreements," "non-prosecution agreements," or plea agreements.[31] An additional possible outcome is a declination,[32] a decision to not prosecute the individual or entity after an investigation.[33] Prosecutors base the decision to prosecute or to decline to prosecute on the *Principles of Federal Prosecution*, and a declination can occur for any number of rea-

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blogspot.com/2011/06/ice-appeal-receives-chilly-reception-at.html; Thomas O. Gorman, *An FCPA Motion That May Alter Settlement Procedures*, SEC ACTIONS (May 6, 2011), http://www.secactions.com/?p=326.

[23] *See* U.S. v. Diaz, No. 09-cr-20346-JEM (S.D. Fla. Aug. 5, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/diazj.html; U.S. v. F.G. Mason Eng'g, No. B-90-29 (D. Conn. 1990), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/fg-mason.html; U.S. v. Kenny Int'l Corp., No. 79-372 (D. D.C. 1979), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/kenny-international.html.

[24] FCPA Fines, *supra* note 22.

[25] *See* 15 U.S.C. §§ 78dd-1, et seq., *available at* http://www.justice.gov/criminal/fraud/fcpa/statutes/regulations.html.

[26] 15 U.S.C. § 78ff(b).

[27] Mike Koehler, *Has the FCPA Been Amended Since 1977?*, FCPA PROFESSOR (Jan. 25, 2013), http://www.fcpaprofessor.com/fcpa-101#q2 [hereinafter Koehler *1977*]; Mike Koehler, *The Manhattan Institute Joins the FCPA Reform Conversation*, FCPA PROFESSOR (Jan. 17, 2013), http://www.fcpaprofessor.com/the-manhattan-institute-joins-the-fcpa-reform-conversation [hereinafter Koehler *Manhattan*].

[28] Koehler *1977*, *supra* note 27; *see also* Koehler *Manhattan*, *supra* note 27.

[29] Koehler *Manhattan*, *supra* note 27.

[30] Mark, *supra* note 10, at 454-56.

[31] Mike Koehler, *How Are FCPA Enforcement Actions Typically Resolved?*, FCPA PROFESSOR (Jan. 25, 2013), http://www.fcpaprofessor.com/fcpa-101#q16; *see also* Koehler, *supra* note 27.

[32] *FCPA Guide*, *supra* note 12, at 75.

[33] *Id*.

sons.[34] While the raw number of declinations is not exceedingly high (combined known declinations by the SEC and DOJ between 2008 and 2012 was around 7),[35] they have involved high profile business entities.[36]

II. VICTIM'S RIGHTS TO RESTITUTION

The question of how FCPA criminal enforcement money can be dispersed to victims implicates several pieces of legislation. This comment will focus on the major criminal statutory provisions, namely: the Victims of Crime Act, Victim Witness Protection Act, Mandatory Victim Restitution Act, and the Crime Victims' Rights Act.[37] While these pieces of legislation contain laudable aims, they fail to address FCPA victims' needs in almost every conceivable scenario. The causes for this failure are varied, but the conclusion is singular: change is needed.

A. Victims of Crime Act

The Victims of Crime Act ("VOCA") established the Treasury's Crime Victims Fund, which is the primary repository for money that victims of FCPA actions may receive.[38] The U.S. Treasury oversees the fund, and the government deposits all fines for offenses against the United States into this fund.[39] Besides criminal fines, the deposits come from forfeited bonds, special assessments, and various other sources.[40] The fund itself receives staggering deposits with $2.362 billion deposited in the year 2010 alone.[41] The government uses the money available for distribution in a variety of ways, including: federal and state victim assistance programs, victim compensation, and discretionary grants (to support the training of victim service providers and affiliated professionals).[42] VOCA, however, fails to address the needs of FCPA victims.

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[34] *Id.*
[35] Richard L. Cassin, *2012: The Year in Declinations*, FCPA BLOG (Dec. 27, 2012, 4:18 AM), http://www.fcpablog.com/blog/2012/12/27/2012-the-year-in-declinations.html.
[36] Namely Morgan Stanley and Academi LLC (formally known as Blackwater Worldwide). *Id.*
[37] The Crime Victims' Rights Act was part of the Justice for All Act of 2004. PUB. L. NO. 108-405, 118 Stat 2260.
[38] 42 U.S.C. § 10601, *et seq*.
[39] 42 U.S.C. § 10601(b)(1).
[40] *Crime Victims Fund*, OFFICE FOR VICTIMS OF CRIME, http://www.ojp.usdoj.gov/ovc/pubs/crimevictimsfundfs/intro.html#figure1 (last visited Jan. 25, 2013).
[41] *Id.*
[42] *Id.*

The federal government does disperse money to state governments for victims of crime pursuant to VOCA, but in a limited way. The compensations occurs through grants and these grants are only available to victims of violent crimes.[43] This effectively excludes non-violent crime victims like victims of FCPA violations. While money is also available for victim assistance programs whose potential use could be for victims of any type of crime, FCPA victims do not receive such assistance. Compounding these technical difficulties is the persistent issue of convincing state governments to pay (typically) foreign victims of the violation of a federal crime. The federal government almost certainly would implement a more effective program, as they are the party enforcing the law and controlling the funds. This efficiency can be seen in the Federal Victim Notification System.

VOCA provides money from the Crime Victims Fund for the Federal Victim Notification System and to pay for victim-witness coordinators in all U.S. Attorneys' Offices.[44] In conjunction, these two entities notify and inform victims about possible restitution.[45] Increased use of money in this fashion could help identify victims of FCPA violations and inform them of their rights. This identification and notification would allow FCPA victims to exercise their statutory victims' rights and would allow courts to order restitution under the Victim and Witness Protection Act or Mandatory Victim Restitution Act. For reasons discussed below, this identification and notification does not occur. Accordingly, the money VOCA sets aside from the Crime Victims Fund does not assist FCPA victims through federal action either.

B. Crime Victims' Rights Act

Passed in 2004, the Crime Victims' Rights Act ("CVRA") created a "bill of rights" of sorts for victims of crime.[46] Of note, the CVRA expressly guarantees victims the right to "full and timely restitution."[47] DOJ personnel are required to use their best efforts to ensure that crime victims receive notification of, and are accorded, this right to restitution.[48] However, the notification requirement is limited by a further clause. In cases where there are multiple victims, or if the number of victims "makes it impracticable" to afford them all their rights, the court has discretion to make a "reasonable procedure to give effect" to the CVRA "that does not unduly complicate or prolong

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[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] Maglich, *supra* note 3.
[47] 18 U.S.C. § 3771(a)(6).
[48] *Id.* § 3771(c)(1).

the proceedings."[49] These limitations are readily apparent in large FCPA enforcements. Perhaps most damaging to FCPA victims, the CVRA also explicitly states that a victim has no cause of action for damages based on a violation of their CVRA rights.[50] However, the CVRA does allow victims to assert their victims' rights through a motion for relief and a writ of mandamus.[51]

C. Victim and Witness Protection Act and Mandatory Victim Restitution Act

Courts use restitution orders to compensate victims.[52] However, these restitution orders are exceedingly rare,[53] and have been found in only a handful of cases.[54] The statutory authority for ordering criminal restitution comes from the Victim and Witness Protection Act[55] and the Mandatory Victim Restitution Act.[56] The Victim and Witness Protection Act ("VWPA") empowers the court with the discretion to order restitution in certain cases.[57] Under the VWPA, a court may issue a restitution order for any offense falling under Title 18 of the U.S. Code.[58] When ordering restitution, the court must balance the loss of the victim, the defendant's financial resources, and any other factor that the court finds relevant.[59] In that way, the VWPA reflects "a focus on the penal goals of the State and the situation of the defendant," and not a focus "on the victim's injury."[60] Additionally, the "complexity exception" states that a court is not required to order restitution if it finds that the process of determining a victim's loss would be too complicated or would prolong the sentencing process to such a degree that it "outweighs the need to provide restitution to any victims."[61]

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[49] *Id.* § 3771(d)(2).
[50] *Id*. § 3771(d)(6).
[51] *Id*. § 3771(d)(3).
[52] Maglich, *supra* note 3.
[53] *Id.*
[54] *See* U.S. v. Diaz, No. 09-cr-20346-JEM (S.D. Fla. Aug. 5, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/diazj.html; U.S. v. F.G. Mason Eng'g, No. B-90-29 (D. Conn. 1990), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/fg-mason.html; U.S. v. Kenny Int'l Corp., No. 79-372 (D. D.C. 1979), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/kenny-international.html.
[55] 18 U.S.C. § 3663.
[56] *Id.* § 3663A.
[57] *Id.* § 3663(a)(1)(A).
[58] *Id.*
[59] *Id.* § 3663(a)(1)(B)(i)-(ii).
[60] Kelly v. Robinson, 479 U.S. 36, 52 (1986).
[61] 18 U.S.C. § 3663(a)(1)(B)(ii).

Congress pursued slightly different objectives when it passed the Mandatory Victim Restitution Act ("MVRA") in 1996.[62] The MVRA reflects "a more fundamental shift in the purpose of restitution," as the "new restitution scheme is not merely a means of punishment and rehabilitation, but an 'attempt to provide those who suffer the consequences of crime with some means of recouping the personal and financial losses.'"[63] This act, as the name implies, creates mandatory restitution in most federal cases.[64] While an FCPA violation is not explicitly among the qualifying mandatory offenses,[65] mandatory restitution is still available if the plea agreement connects the FCPA violation with what would have been a qualifying offense.[66] Working in tandem with the VWPA,[67] a court can also issue a restitution order agreed to in a plea agreement[68] in any criminal case, including an FCPA violation. In fact, a court can even provide restitution to individuals who are not "victims" of the charged offense.[69] Similar to the VWPA, a "complexity exception" tempers this availability of restitution under the MVRA.[70] An additional similarity exists between the MVRA and the VWPA in that restitution orders are nearly nonexistent.

The explanation for this dearth of restitution might be simpler than it first appears. The FCPA is codified in Title 15 while the VWPA and MVRA apply only to Title 18 offenses.[71] However, FCPA prosecutions usually include a conspiracy count,[72] which would be a Title 18

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[62] *Federal Crime Victims' Rights & Services,* U.S. DEP'T OF JUST., http://www.justice.gov/usao/briefing_room/vw/about.html.

[63] U.S. v. Perry, 360 F.3d 519, 530 (6th Cir. 2004) (quoting H.R. Rep. No. 104-16, at 5 (1995)).

[64] U.S. DEP'T OF JUST., *supra* note 62.

[65] Qualifying offenses include crimes of violence pursuant to 18 U.S.C. § 16, Title 18 property offenses, controlled substance manufacturing offenses, consumer products tampering, sexual abuse and sexual exploitation of children, domestic violence, telemarketing fraud, Child Support Recovery Act, and human trafficking. *See* Catharine M. Goodwin, *Restitution in Federal Criminal Cases*, U.S. COURTS ADMIN. OFFICE, http://www.ussc.gov/Education_and_Training/Guidelines_Educational_Materials/trainnew.pdf.

[66] 18 U.S.C. § 3663A(c)(2).

[67] *Id*. § 3663.

[68] *Id*. § 3663(a)(3).

[69] *Id*. § 3663A(a)(3). This apparent latitude could allow for creative victim compensation as there are serious issues with qualifying individuals or entities as "victims" under the statutory guidelines that will be discussed later.

[70] *Id*. § 3663A(c)(3).

[71] 18 U.S.C. § 3663(a)(1)(A), 18 U.S.C. § 3663A(a)(1).

[72] Maglich, *supra* note 3 ("A typical FCPA prosecution includes a count of conspiracy to violate the FCPA.").

offense and would allow the kind of MVRA tie-in discussed above.[73] Additionally, the DOJ has noted other Title 18 offenses tied with FCPA enforcement actions such as violations of the Travel Act,[74] money laundering, mail fraud, and wire fraud.[75] Any of these offenses would provide the court with the ability to order restitution through the VWPA,[76] though the power is purely discretionary.[77] Given this context, and the apparent frequency of Title 18 charges, the absence of restitution orders remains puzzling. A simple explanation is that the DOJ chooses not to pursue restitution in plea agreements as they could under the statutes, but other explanations exist.[78]

A second and related explanation lies in the difficulty with identifying victims in an FCPA bribery case. Certainly there are victims of FCPA violations[79] and the DOJ itself has stated as much.[80] The restitution statutes, the MVRA and VWPA, as well as the CVRA share a substantially similar definition of "victim."[81] In short, for an individual to be a victim they must be (1) directly and proximately harmed as a result of (2) an offense for which restitution can be ordered.[82] However, the MVRA and VWPA definitions carry extra language that includes people harmed in the course of a "scheme, conspiracy, or pattern" in its definition of victim so long as that "scheme, conspiracy, or pattern" is part of the charged offense.[83] Congress added this language specifically to deal with situations where a guilty plea results in dropped charges.[84]

These definitions are not without controversy, and the CVRA definition became the focus of litigation in a joint DOJ and SEC enforcement action against Alcatel-Lucent. The case raises several issues

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[73] 18 U.S.C. § 371.

[74] *Id.* § 1952.

[75] *FCPA Guide*, *supra* note 12, at 48-49.

[76] 18 U.S.C. § 3663.

[77] *Id.* § 3663(a)(1)(A) ("The court . . . may order . . . restitution.").

[78] *Id.* § 3663(a)(3).

[79] Koehler, *supra* note 10.

[80] "Bribery is not a victimless crime." *California Company, Its Two Executives and Intermediary Convicted by Federal Jury in Los Angeles on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico*, U.S. DEP'T OF JUSTICE (May 10, 2011), http://www.justice.gov/opa/pr/2011/May/11-crm-596.html [hereinafter *California Company*].

[81] 18 U.S.C. § 3663(a)(2); 18 U.S.C. 3663A(a)(2); 18 U.S.C. § 3771(e).

[82] 18 U.S.C. § 3663(a)(2); 18 U.S.C. 3663A(a)(2); 18 U.S.C. § 3771(e).

[83] *Id.*

[84] Under the older definition of victim, if the offense to which they were a victim was dropped as part of the plea agreement, the victim would have no avenue to recover as technically the crime they were a victim of was not pled to. U.S. v. Aguirre-Gonzalez, 597 F.3d 46, 50-51 (2010).

around defining FCPA victims, and provides insight into why more victims have not received restitution.

III. ALCATEL-LUCENT AND ICE

A. Introduction

From the 1990's through the end of 2006, Alcatel-Lucent, a global telecommunications equipment company, and its subsidiaries repeatedly violated the FCPA.[85] The violations occurred in several locations and notably through an Alcatel-Lucent subsidiary in Costa Rica.[86] In conjunction with the award of three contracts worth over $300 million, Alcatel-Lucent wired over $18 million to two Costa Rican consultants who dispersed roughly $9 million in bribes to Costa Rican officials.[87] Some of the bribed officials worked for a Costa Rican power company named Instituto Costaricense de Electricidad ("ICE").[88] In 2010, Alcatel-Lucent made an announcement that the company and its subsidiaries had reached a settlement agreement with the DOJ and SEC for approximately $137.4 million.[89] In May 2011, pursuant to the previously discussed provision of the CVRA,[90] ICE petitioned the U.S. District Court for the Southern District of Florida to protect their CVRA rights after the DOJ failed "to protect those rights."[91]

In their petition, ICE argued that it had suffered massive losses as a direct result of the disloyalty of its directors and employees who had been bribed.[92] ICE noted that it assisted in the prosecution of the case and that the SEC had already denied an ICE "Fair Fund" request without explanation.[93] ICE further stated that the DOJ had determined that it was not a victim due to a DOJ policy stating that

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[85] Press Release, U.S. Dep't of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010), *available at* http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html; *California Company, supra* note 80, at 1.

[86] *California Company, supra* note 80, at 2.

[87] *Id*.

[88] *FCPA Motion That May Alter Settlement Procedures*, SEC ACTIONS (May 6, 2011), http://www.secactions.com/an-fcpa-motion-that-may-alter-settlement-procedures/.

[89] Mike Koehler, *Is ICE a Victim? And an Open Question!*, FCPA PROFESSOR (May 25, 2011), http://www.fcpaprofessor.com/is-ice-a-victim-and-an-open-question.

[90] *See* 18 U.S.C. § 3771(d)(3).

[91] Petition for Relief Pursuant to 18 U.S.C. § 3771(d)(3) and Objection to Plea Agreements and Deferred Prosecution Agreement at 1, U.S. v. Alcatel-Lucent, No. CR-20907-CR-COOKE (S.D. Fla. 2011) [hereinafter ICE Petition for Relief], *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-etal/2011-05-02-ICE-Petition-for-Relief.pdf.

[92] *Id.* at 7.

[93] *Id.* at 11.

foreign governments were not victims.[94] ICE relied on the language of the MVRA's definition of victim, which included conspiracy charges.[95] Alcatel-Lucent, on the other hand, argued that the VWPA, not the MVRA, applied.[96] The District Court denied the petition, with the Court finding that ICE was involved in the crimes and suggesting it may have been a co-conspirator with Alcatel-Lucent.[97] The District Court further held that the MVRA complexity exception[98] applied, so the Court could decline to provide restitution regardless.[99] ICE then appealed the decision to the Eleventh Circuit in two related actions: a petition for a writ of mandamus and an appeal of the denial of its petition for victim status.[100]

B. Writ of Mandamus

ICE filed a writ of mandamus in the Court of Appeals for the Eleventh Circuit on June 15, 2011.[101] Rejecting the District Court's co-conspirator determination, ICE argued that it had not been officially charged as a co-conspirator[102] and then turned to agency law for further support. Relying on 9th and 2nd Circuit precedence, ICE argued that its directors and employees were agents and the "[l]aw is clear that agents who accept bribes . . . operate for their own benefit and to the detriment of their principles."[103]

ICE then turned to the language of the CVRA and noted that the statutory language defining victims does not exclude co-conspirators.[104] Again arguing that it was a statutory "victim" under the CVRA, ICE argued that it was eligible for mandatory restitution under the MVRA for two reasons.[105] First, ICE argued that "courts have universally applied the MVRA to the conspiracy offense" to which Alcatel-Lucent pled guilty.[106] Second, ICE argued that one of the qualifying mandatory MVRA offenses, "offenses against property," had been com-

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[94] *Id*. at 11, n.16.
[95] Petition for Writ of Mandamus at 17, Instituto Costarricense de Electricidad v. S.D. Fla. (11th Cir. 2011) (No. 11-13707G) [hereinafter ICE Writ of Mandamus], *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-etal/2011-06-15-Writ-of-Mandamus.pdf.
[96] *Id.* at 23.
[97] *Id.* at 11-13.
[98] 18 U.S.C. § 3663A(c)(3)(B).
[99] ICE Writ of Mandamus, *supra* note 95, at 25.
[100] In re Instituto Costarricense de Electricidad, No. 11-12708-G (11th Cir. 2011).
[101] Ice Writ of Mandamus, *supra* note 95, at 1.
[102] *Id*. at 22
[103] *Id.* at 20.
[104] *Id.* at 22.
[105] *Id.* at 23.
[106] *Id.* at 24.

mitted because money is property and the theft of money/property satisfied the MVRA guidelines.[107] ICE also noted, arguendo, that assuming Alcatel-Lucent was correct (that the VWPA and not the MVRA applied), it would still be entitled to restitution as a victim of a conspiracy charge.[108] Finally, ICE argued that the District Court's usage of the complexity exception was an error in light of the fact that ICE had submitted a "concise Declaration of Victim Losses"[109] which conceivably removed any specter that restitution "would complicate or prolong the sentencing process."[110]Accordingly, ICE urged the Eleventh Circuit to overturn the ruling of the District Court.

On June 17, 2011, the Court of Appeals for the Eleventh Circuit denied ICE's petition for writ of mandamus in an order slightly longer than two pages.[111] The Eleventh Circuit ruled that the District Court did not err when it found ICE had been a co-conspirator.[112] The Court went further and agreed with the District Court's determination that ICE did not establish that it had been harmed, citing 9th Circuit precedent that "[a]s a general rule, a participant in a crime cannot recover restitution."[113]

C. Petition for Victim Status

The Eleventh Circuit reviewed ICE's petition for victim status based on two issues. First, the court looked to ICE's claim against the deferred prosecution agreement entered into by Alcatel-Lucent itself.[114] The Eleventh Circuit ruled that it lacked jurisdiction to hear the case because a deferred prosecution agreement was not a final judgment and, as such, there was no final judgment from which ICE could appeal.[115] Second, the Eleventh Circuit turned to ICE's contention that its CVRA rights had been violated by the settlement agreement between the government and certain Alcatel-Lucent subsidiaries.[116]

The Eleventh Circuit again concluded that it lacked subject matter jurisdiction for several reasons. The court looked to its own

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[107] ICE Writ of Mandamus, *supra* note 95, at 14.
[108] *Id.* at 23.
[109] *Id.* at 25.
[110] 18 U.S.C. § 3663A(c)(3)(B).
[111] In re Instituto Costarricense de Electricidad, No. 11-12707-G, 11-12708-G (11th Cir. 2011), *available at* http://jenner.com/system/assets/assets/953/original/In_re_Instituto.pdf?1317065417.
[112] *Id.*
[113] *Id.* (citing U.S. v. Lazarenko, 624 F.3d 1247, 1252 (9th Cir. 2010)).
[114] U.S. v. Alcatel-Lucent France, *SA*, 688 F.3d 1301, 1304 (11th Cir. 2012).
[115] *Id.* at 1304-05.
[116] *Id.* at 1305.

precedent, and the precedent of the First,[117] Tenth,[118] and D.C. Circuits,[119] "that crime victims, as non-parties to the criminal action, lack standing to appeal the defendant's sentence."[120] The court went on to note that, under the CVRA, a writ of mandamus "is a crime victim's sole avenue for appellate review"[121] because the Victim and Witness Protection Act of 1982 (VWPA), a CVRA predecessor statute, did not create a private remedy for crime victims.[122] As the court also denied the writ of mandamus, this denial effectively ended ICE's quest for restitution.

D. Aftermath

Following the Eleventh Circuit's denial of both petitions, ICE appealed to the United States Supreme Court.[123] On December 10, 2012, the Supreme Court denied the petition for writ of certiorari.[124] With this denial, the future for victim restitution in FCPA enforcement remains cloudy.

As the ICE court held, a victim's status as a non-party[125] and the express language of CVRA[126] indicates that a writ of mandamus is a non-party victim's only avenue for redress under the CVRA, VWPA, and MVRA if a victim is not given restitution by a district court. As the Eleventh Circuit did not move past the issue of whether ICE qualified as a victim, the Court left several questions unanswered. First, if ICE was a victim, whether they would qualify under the MVRA because of the conspiracy charge or under the alternate theory that Alcatel-Lucent's offenses qualified as "crimes against property." Second, if ICE would alternatively qualify for compensation under the VWPA. Third, if the case would trigger the complexity clause, despite the "concise declaration" ICE filed.[127]

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[117] U.S. v. Aguirre-Gonzalez, 597 F.3d 46 (1st Cir. 2010).

[118] U.S. v. Hunter, 548 F.3d 1308 (10th Cir. 2008).

[119] U.S. v. Monzel, 641 F.3d 528 (D.C. Cir. 2011). Though not noted by the Court, the Third Circuit (*U.S. v. Stoerr*, 695 F.3d 271 (3d Cir. 2012)) and Fifth Circuit (U.S. v. Slovacek, 699 F.3d 423 (5th Cir. 2012)) have also ruled that crime victims lack jurisdiction or standing to appeal.

[120] Alcatel-Lucent France, *SA*, 688 F.3d at 1305 (11th Cir. 2012).

[121] *Id.* at 1305-06.

[122] *Id.* at 1305.

[123] Brief for the Petitioner, Instituto Costarricense de Electricidad v. U.S., 2012 WL 5492455 (2012).

[124] Instituto Costarricense de Electricidad v. U.S., 133 S. Ct. 806 (Dec. 10, 2012).

[125] U.S. v. Aguirre-Gonzalez, 597 F.3d 46, 52-53 (2010); Alcatel-Lucent France, *SA*, 688 F.3d at 1304-6.

[126] 18 U.S.C. § 3771(d)(3).

[127] ICE Writ of Mandamus, *supra* note 95, at 25.

Unfortunately for ICE, it was arguing a bad set of facts.[128] If the DOJ's assertions are correct, there was "profound and pervasive corruption at the highest levels of ICE."[129] Even ICE acknowledged that several members of its board of directors took bribes.[130] So, even if ICE was not a co-conspirator of Alcatel-Lucent, it certainly had some dirt on its hands. This raises a larger issue that permeates throughout anti-bribery efforts worldwide: who are the victims? The question presents an immense gray area that others have discussed at length[131] and is outside the scope of this comment. Regardless of where the line is drawn, however, there are certainly individuals or groups that can be called victims. So the question becomes if there are victims, and those victims have a case with better facts than ICE, would the triumvirate of the VWPA, CVRA, and MVRA provide restitution? Further, is the current restitution legislation addressing the needs of FCPA victims in general? These unanswered questions raise a number of concerns and their impact can only be truly understood in the context of a real life example like the pending Wal-Mart case.

IV. WAL-MART

In December 2011, Wal-Mart disclosed that it had conducted internal investigations concerning possible violations of the FCPA in Mexico.[132] While those investigations later expanded into Brazil, India, and China,[133] the focus has remained in Mexico.[134] The *New York*

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[128] Mike Koehler, *The Foreign Corrupt Practices Act Under the Microscope*, 15 U. PA. J. BUS. L. 1, 52 (2012).

[129] Government's Response to ICE's Petition for Victim Status and Restitution at 1, U.S. v. Alcatel-Lucent. No. 10-CR-20906-COOKE (S.D. Fla. 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-etal/2011-05-23-Gov-Response-re-Victim.pdf.

[130] ICE Petition for Relief, *supra* note 91, at 7.

[131] *See, e.g.*, Elizabeth Spahn, *Nobody Gets Hurt?*, 41 GEO. J. INT'L L. 861 (2010); Alexandra Wrage, *Paying the Fox to Buy New Chickens*, HUFFINGTON POST (July 15, 2010), http://www.huffingtonpost.com/alexandra-wrage/paying-the-fox-to-buy-new_b_647837.html; Koehler, *supra* note 10; Maglich, *supra* note 3.

[132] Richard L. Cassin, *Walmart Joins Our Corporate Investigations List*, FCPA BLOG (Dec. 12, 2011, 3:28 AM), http://www.fcpablog.com/blog/2011/12/12/walmart-joins-our-corporate-investigations-list.html.

[133] Richard L. Cassin, *Report of Massive Bribery by Walmart in Mexico*, FCPA BLOG (Apr. 21, 2012, 4:28 PM), http://www.fcpablog.com/blog/2012/4/21/report-of-massive-bribery-by-walmart-in-mexico.html; Richard L. Cassin, *Wal-Mart's Lobbying Triggers India Investigation*, FCPA BLOG (Dec. 12, 2012, 5:25 AM), http://www.fcpablog.com/blog/2012/12/12/wal-marts-lobbying-triggers-india-investigation.html; Stephanie Clifford and David Barstow, *Wal-Mart Inquiry Reflects Alarm on Corruption*, N.Y. TIMES (Nov. 15, 2012), http://www.nytimes.com/2012/11/16/business/wal-mart-expands-foreign-bribery-investigation.html?pagewanted=all; *Congressmen: Documents Show Wal-Mart CEO and Execs Told About Mexico*

Times reported in April 2012 that the bribe payments in Mexico alone totaled over $24 million.[135] The former head of Wal-Mart Mexican subsidiary Wal-Mart de Mexico's real estate department told the *New York Times* that the bribes "bought zoning approvals, reductions in environmental impact fees and the allegiance of neighborhood leaders."[136] Further allegations state that Wal-Mart executives knew about the bribery as early as 2005[137] and attempted to cover up the payments at their Bentonville, Arkansas headquarters.[138] The headquarters cover up purportedly involved Wal-Mart's top lawyer sending the internal investigation files to the general counsel of Wal-Mart de Mexico who supposedly authorized the bribes.[139]

One part of the story that has attracted particular media attention involves Wal-Mart opening a store near the UNESCO World Heritage Pre-Hispanic City of Teotihuacan.[140] According to reports, bribes were paid to the Municipal Council and the Director of the National Institute of Anthropology and History to clear the way for a Wal-Mart store to be built near the ancient pyramids.[141] In exchange for the bribes, a zoning map was changed to allow the new store to be built.[142] Residents objected to the move and protested for months to no avail.[143] In the end, Wal-Mart paid over $200,000 in bribes and built its newest

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Bribe Allegations in 2005, FCPA BLOG (Jan. 10, 2013, 2:45 PM), http://www.fcpablog.com/blog/2013/1/10/congressmen-documents-show-wal-mart-ceo-and-execs-told-about.html [hereinafter *Congressmen*].

[134] David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 21, 2012, at A1, *available at* http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?_r=2&.

[135] *Id.*

[136] *Id.*

[137] *Congressmen*, *supra* note 133.

[138] Barstow, *supra* note 134.

[139] *Id.*

[140] Letter from Elijah E. Cummings, Ranking Member, Comm. on Oversight & Gov't Reform & Henry A. Waxman, Ranking Member, Comm. on Energy & Commerce, to Michael T. Duke, C.E.O., Wal-Mart Stores, Inc., *in Congressmen*, *supra* note 133 [hereinafter Cummings Letter]; Maria Dolores Hernandez J., *Fallout in Mexico From Walmart Allegations*, FCPA BLOG (Jan. 21, 2013, at 1:23 AM), http://www.fcpablog.com/blog/2013/1/21/fallout-in-mexico-from-walmart-allegations.html; *Pre-Hispanic City of Teotihuacan*, UNESCO, http://whc.unesco.org/en/list/414 (last visited Jan. 25, 2013).

[141] Cummings Letter, *supra* note 140; Hernandez, *supra* note 140.

[142] David Barstow & Alejanda Xanic von Bertrab, *The Bribery Aisle: How Wal-Mart Got Its Way in Mexico*, N.Y. TIMES (Dec. 17, 2012), http://www.nytimes.com/2012/12/18/business/walmart-bribes-teotihuacan.html?_r=0.

[143] *Id.*

store "in the shadow of a revered national treasure," the pyramids of Teotihuacan.[144]

The ongoing Wal-Mart investigation provides a perfect example of the difficulties surrounding restitution in FCPA litigation. If the allegations made by the *New York Times* are true, and the DOJ's assertion that bribery is not a victimless crime[145] is correct, who should obtain restitution? Perhaps the question is best answered by starting with assessing what damage has been done. According to the *New York Times*, the new Wal-Mart in Teotihuacan has caused numerous issues, the most serious of which include: the destruction of ancient artifacts, increased traffic congestion, lost revenue to local businesses, and the intangible harm to Mexican culture and heritage.[146] The list of potential victims for these harms would include numerous individuals, from the citizens of Teotihuacan up to the Mexican government itself. Analyzing these entities' claims under current precedent, it seems unlikely that the restitution statutes would provide compensation.

The first hurdle that the potential victims would need to pass is completely out of their control. Pursuant to VWPA and MVRA requirements, Wal-Mart would need to be found guilty or plead guilty to a Title 18 offense.[147] Next, the potential victims would need to qualify under the statutory definition of "victim." The statutes share a common definition of "victim" and, in essence, require a showing that an individual or entity has been directly or proximately harmed as a result of a federal offense.[148] To some degree, the potential victim's ability to qualify would depend on what Wal-Mart actually was found guilty of, plead guilty to, or what charges are included in a deferred-prosecution or non-prosecution agreement. However, the statutory language extends "victims" to include those harmed by the "scheme, conspiracy, or pattern."[149] Accordingly, so long as the damage is tied to Wal-Mart's alleged scheme,[150] they should qualify. If the Mexican government seeks restitution, the same issues that arose for ICE may appear again. ICE attempted to claim that its own employees victimized the organization and, in many ways, Mexico would be making the

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[144] *Id.*

[145] *California Company*, *supra* note 80.

[146] Barstow & von Bertrab, *supra* note 142.

[147] 18 U.S.C. § 3663(a)(1)(A); 18 U.S.C. § 3663A(c).

[148] *See* 18 U.S.C. § 3771(b)(2)(D); 18 U.S.C. § 3663(a)(2); 18 U.S.C. § 3663A(a)(2).

[149] 18 U.S.C. § 3663(a)(2); 18 U.S.C. 3663A(a)(2); 18 U.S.C. § 3771(e).

[150] "Under 18 U.S.C. § 3663(a)(2), any conduct that is in the course of the scheme, conspiracy, or pattern may be considered in calculating restitution. Thus, if this case involved a scheme, conspiracy, or pattern of criminal activity, the district court could properly include the suppressed evidence in the restitution order regardless of whether it was conduct of conviction." U.S. v. Acosta, 303 F.3d 78, 87 (1st Cir. 2002).

same argument. Through the corruption of its own civil servants, the Mexican government provided Wal-Mart with the necessary building permits. In that light, a court may well view them as something akin to a co-conspirator as the Eleventh Circuit did with ICE. Precedent, however, may help Mexico in this instance.

In two of the rare instances where a court ordered restitution in FCPA cases, *U.S. v. F.G. Mason Engineering, Inc.* and *U.S. v. Juan Diaz*, the respective governments were able to obtain restitution for the losses they suffered as a result of their officials being bribed. In *Mason*, a manufacturer bribed a West German intelligence official in order to obtain business from the West German government.[151] The District Court ordered restitution to the West German government in the amount of $160,000.[152] In *Diaz*, an individual was ordered to pay $73,824.20 in restitution to the Haitian government following the discovery of a telephone rate conspiracy.[153]

What makes the Wal-Mart case more difficult than *Mason* or *Diaz* is the computation of damages. Even if a court did accept the notion that individual citizens or the government of Mexico were "victims" under the statute, it is unlikely that they would obtain restitution. The previously mentioned "complexity exception" will likely be triggered and would allow a court to avoid ordering restitution if it finds that the process of determining a victim's loss would be too complicated.[154] While the *Mason* court could use easily calculable sums of money that the company overcharged the West German government on contracts, and the *Diaz* court could use easily calculable sums of lost revenue from telephone rate charges, the damage caused by Wal-Mart is far more complicated and speculative.

If a private Mexican citizen or group of citizens were to assert the destroyed relics as their statutory damages, a court would face the task of calculating the value of ancient pottery, altars, plazas, graves, an 800-year-old wall, and other items that in many ways are priceless.[155] Similarly, local business owners may assert future business losses, but courts typically consider these types of claims too specula-

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[151] U.S. v. F.G. Mason Eng'g, Inc., Case No. B-90-29(JAC) (D. Conn. 1990), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/fg-mason.html.

[152] Plea Agreement at 3, U.S. v. F.G. Mason Eng'g, Inc., No. B-90-29-JAC (D. Conn. 1990), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/fg-mason/1990-06-25-fg-mason-plea-agreement-(fg-mason).pdf.

[153] U.S. v. Diaz, No. 1:09-20346-CR-MARTINEZ-1 (S.D. Fla. 2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/diazj/2012-05-23-diazj-amended-judgment.pdf; Maglich, *supra* note 3.

[154] 18 U.S.C. § 3663(a)(1)(B)(ii).

[155] Barstow & von Bertrab, *supra* note 142.

tive.[156] Further allegations of cultural harm would be even more speculative.[157] Further complicating the Mexican government's claims are the nature and details of the alleged offenses. Unlike the governments in *Mason* and *Diaz*, where single government employees intentionally deprived their governments of money, the myriad of Mexican officials involved in the Wal-Mart bribery scheme[158] makes the case far more analogous to ICE and thus unlikely to end in an award of restitution to the government. Given the multitude of issues facing the potential victims, it appears unlikely that any money from the Wal-Mart case will see its ways back to the victims through the restitution statutes.

V. OTHER AVENUES OF RECOVERY

While the restitution statutes are clearly an underutilized and seemingly inadequate means of recovery for FCPA victims, there are other avenues of potential recovery. For example, while the lack of a Title 15 restitution statute may prevent some FCPA victims from gaining restitution, another option is available under the Title 18 Conditions of Probation.[159] The Federal District Court of Utah noted in *U.S. v. Wenger* that the lack of a Title 15 restitution statute akin to the VWPA in Title 18 "appears to be a statutory 'glitch.'"[160] The court decried this lack of statutory authority to provide restitution as nonsen-

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[156] There is little precedent on the interpretation of the restitution statutes in FCPA cases. Turning to courts' interpretations of the statutes in other contexts, the preeminent case, *U.S. v. Fountain*, held that "projecting lost future earnings has no place in criminal sentencing if the amount or present value of those earnings is in dispute." U.S. v. Fountain, 768 F.2d 790, 802 opinion supplemented on denial of reh'g, 777 F.2d 345 (7th Cir. 1985). *Fountain* was interpreting the VWPA and the Ninth Circuit held that it was not directly applicable under the MVRA. U.S. v. Cienfuegoes, 462 F.3d 1160, 1167-68 (9th Cir. 2006). The Ninth Circuit interpreted the MVRA such that the complexity exception did not apply in the category of violent cases, but it did apply under the remaining MVRA categories. *Id.* The Eighth Circuit substantially agreed with the *Fountain* decision, but held that future claims were not categorically barred in MVRA cases as they are in VWPA cases. U.S. v. Oslund, 453 F.3d 1048, 1063 (8th Cir. 2006). The Fifth Circuit and Tenth Circuit have also largely agreed with the *Fountain* holding. U.S. v. Dupre, 117 F.3d 810, 824 (5th Cir. 1997); U.S. v. Serawop, 505 F.3d 1112, 1120 (10th Cir. 2007). As FCPA cases fall under the non-violent categories of the MVRA (if they fall under the statute at all) or more properly fall under the VWPA, the *Fountain* precedent is most applicable.

[157] Again, the lack of precedent makes finding analogous situations difficult. One case that may be instructive is U.S. v. Bengimina, where the Court found the valuation of restitution for a loss of corporate "good will" too complicated under the VWPA. 699 F.Supp. 214, 219 (W.D. Mo. 1988).

[158] Barstow & von Bertrab, *supra* note 142.

[159] 18 U.S.C. § 3563.

[160] United States v. Wenger, 2004 WL 724458, at *6 (D. Utah Jan. 30, 2004).

sical.[161] However, the court did note an interesting way around their lack of Title 15 authority. While declining to follow such an option, the Court noted that it nonetheless had the authority to order restitution for a Title 15 offense as a condition of supervised release.[162] This authority is admittedly limited,[163] but does provide an interesting method to grant restitution for crime victims where the defendant is put on supervised release.

Another possible avenue of recovery lies in civil litigation. There is no express private right of action under the FCPA, but victims have tried collateral civil litigation.[164] These efforts have included filing shareholder derivative, securities fraud, RICO, tortious interference, and unfair competition actions.[165] While some limited success has been found through collateral civil litigation, it too has proved to be a largely ineffective means of gaining restitution.[166]

The Socio-Economic Rights and Accountability Project ("SERAP"), a Nigerian NGO, has put forth a very interesting solution to the problem.[167] In March 2012, SERAP sent a letter to the SEC outlining a plan for broader victim compensation.[168] Under SERAP's plan, a victim foreign government or an NGO involved in that foreign state would have 60 days after the end of an FCPA enforcement action to file a claim for part or all of the settlement proceeds.[169] The U.S. Government would then have 60 days to act on the request and issue a statement explaining its decision.[170] The plan would require the foreign government or NGO to show that they have sufficient safeguards in place to protect against further misuse of the funds.[171] In this way, the claims of various foreign governments and other victims could be

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[161] *Id.*

[162] "At most, the court has limited authority, as a condition of supervised release following any prison term, to order restitution to victims." *Id.*

[163] "This limited authority to impose restitution makes no sense. In cases such as this one where victims have suffered significant losses as a direct and proximate result of the defendant's securities fraud, the court believes it should have the authority to impose full and immediate restitution." *Id.*

[164] Mark, *supra* note 10, at 420, 486.

[165] *Id.* at 420.

[166] *Id.* at 486.

[167] Alexander W. Sierck, *African NGO Asks for Distribution of FCPA Recoveries*, FCPA BLOG (Mar. 16, 2012, 3:18 AM), http://www.fcpablog.com/blog/2012/3/16/african-ngo-asks-for-distribution-of-fcpa-recoveries.html.

[168] Benjamin Kessler, *Giving Back to the Victims*, FCPA BLOG (May 2, 2012, 1:53 AM), http://www.fcpablog.com/blog/2012/5/2/giving-back-to-the-victims.html.

[169] Letter from Alexander W. Sierck, Volunteer, SERAP, to Robert S. Khuzami, Dir., Enforcement Div., U.S. Sec. and Exch. Comm'n 4 (2012), *available at* http://www.mediafire.com/?kkg0xg8bmwjy4aa.

[170] *Id.*

[171] *Id.* at 5.

evaluated on a case-by-case basis, outside of the court system, to determine the best use of the funds obtained through FCPA enforcement.[172] The SEC responded to SERAP's request by thanking them for the letter and stating that they would take the idea under consideration.[173] That consideration has ultimately led to no new policies by the SEC or DOJ in regards to victim compensation. However, the idea put forth by SERAP is a step in the right direction.

The type of plan called for by SERAP would alleviate many of the thorny problems around FCPA victim compensation. The thought of giving money back to the very governments who have been corrupted feels like "paying the fox to buy new chickens."[174] Under the SERAP plan, however, a foreign government would be required to show that they have taken steps to address their bribery issues before they would see a dime. Even if a government is unwilling or unable to change, the possibility that an NGO could distribute the money makes for a far better solution. Providing funds to an NGO after an FCPA violation is not unprecedented[175] and would alleviate the needs of further U.S. involvement while ensuring that at least some of the money is put to good use.

Unfortunately FCPA enforcement often brings about situations that have the feel of choosing the lesser of two evils. However, this difficulty should not lead to what it currently does: a bar to victim restitution. What the very real victims of FCPA violations need is new legislation or new DOJ policies that take into account the large gray area frequently found in FCPA enforcement. Whatever the final form of reform, some change must occur. The ICE case did not present ideal facts but that should not halt further reform efforts. As one commentator put it: "I am not sure where criminal fines should go when a *French* company bribes *Costa Rican* 'foreign officials,' but I am pretty sure that the answer should not be 100% to the *U.S.* Treasury."[176]

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[172] *Id.* at 1.

[173] Kessler, *supra* note 168.

[174] Wrage, *supra* note 131.

[175] In 2007, following an FCPA violation in Kazakhstan, an agreement was reached by the United States, Switzerland, and Kazakhstan whereby money from the violation was given to an NGO in Kazakhstan for the benefit of underprivileged Kazakh children. U.S. DEP'T OF JUSTICE, NEW YORK MERCHANT BANK PLEADS GUILTY TO FCPA VIOLATION; BANK CHAIRMAN PLEADS GUILTY TO FAILING TO DISCLOSE CONTROL OF FOREIGN BANK ACCOUNT (Aug. 6, 2010), *available at* http://www.justice.gov/opa/pr/2010/August/10-crm-909.html.

[176] Koehler, *supra* note 89.