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BRIBERY**Ten Seldom Discussed Foreign Corrupt Practices Act Facts That You Need to Know**

BY MIKE KOEHLER

Much is written about the Foreign Corrupt Practices Act. However, amid the clutter of enforcement agency rhetoric and resolution documents not subjected to any meaningful judicial scrutiny as well as the mountains of FCPA Inc. marketing material touting the next compliance risk, there are certain FCPA facts that are seldom discussed.

Yet such facts, covering the entire span of the FCPA—from the statute’s enactment, to its statutory provisions, to FCPA enforcement, to FCPA reform, to the FCPA industry itself—occasionally bear repeating.

This article does that by highlighting 10 seldom discussed FCPA facts that you need to know.

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**1: The FCPA Was Enacted
For Political Reasons**

The FCPA, enacted in 1977, is often portrayed as an altruistic law reflective of a post-Watergate morality that sought to “level the playing field” and rid the world of corruption. Sure, there are some statements in the FCPA’s extensive enacting legislative history to support this view; after all politicians acted like politicians in the mid-1970s.

However, it is clear from the legislative history that selfish, political reasons were the main motivation of Congress in enacting the FCPA. In the words of Sen. Frank Church (D-Idaho), a champion of the FCPA in the Senate: “It is time to treat [the discovered foreign corporate payments] for what it is: a serious foreign policy problem.”¹ In holding hearings on what would become the FCPA, Church likewise remarked: “I have focused on the foreign policy aspects of this issue because that is the chief concern of my subcommittee,”² and on the Senate floor Church stated: “U.S.-based corporations should not be allowed to weaken a friendly government through bribery and corruption while the United States is relying on that government as a stable sure friend in supporting our policies. U.S.-based corporations should not be supporting political factions antithetical to those supported by the U.S. Government.”³

In the U.S. House, Rep. Stephen Solarz (D-N.Y.) emerged as a champion of the FCPA and stated: “[F]ailure to take prompt and effective action can only encourage the continuation of these practices and, thereby, continue to create serious problems in our international economic and political relations throughout the world. One government has already been toppled

¹ Hearings before the Subcomm. on Multinational Corps. of the S. Comm. on Foreign Relations, *Multinational Corporations and United States Foreign Policy*, 94th Cong. 1 (1975).

² Hearing before the Subcomm. on Int’l Trade of the S. Comm. on Fin., *Protecting the Ability of the United States to Trade Abroad*, 94th Cong. 1–2, 19 (1975).

³ 122 CONG. REC. S651516 (1976) (daily ed. May 5, 1976).

and political parties in several other countries have been seriously compromised.”⁴ Elsewhere during the legislative process, Solarz stated: “We simply cannot permit activity which so damages U.S. foreign policy.”⁵ Similar motivations were expressed by other House leaders. In the words of Rep. John Moss (D-Calif.): “[S]urely the public expects more than to have foreign policy made in the board rooms of United Brands or Lockheed [two companies that were the focus on Congressional inquiries].”⁶ In the words of Rep. Michael Harrington (D-Mass.): “U.S. business contributions to foreign political parties can severely impair official policy. The U.S. Government, not private business, should conduct U.S. foreign policy.”⁷

Congress’s main motivation in enacting the FCPA in 1977 matters in 2015 and beyond as selfish, political reasons continue to impact FCPA enforcement. Despite Assistant Attorney General Leslie Caldwell’s recent statement that FCPA enforcement is “necessary” to “protect our own national security,” national security is, as a matter of law and seemingly as a matter of practice, a reason *not* to enforce the FCPA.⁸

National Security. For example, the FCPA itself states that “with respect to matters concerning the national security of the United States, no duty or liability under [the FCPA] shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives.”⁹

U.S. national security also seems to have been a reason not to enforce the FCPA as a matter of practice. Consider the enforcement action against U.K.-based defense contractor BAE Systems Plc. Despite the Justice Department alleging conduct that clearly implicated the FCPA’s anti-bribery provisions, BAE was not charged with violating the FCPA.¹⁰

Consider also the mysterious conclusion to the James Giffen enforcement action. In 2003, Giffen was criminally charged with making more than \$78 million in unlawful payments to two senior officials of the Republic of Kazakhstan in connection with certain oil transactions in which various U.S. oil companies acquired valuable rights in Kazakhstan.” However, Giffen’s defense

was that his actions were made with the knowledge and support of the CIA, the National Security Council, the Department of State and the White House. In 2010, the enforcement action took a sudden and mysterious turn when Giffen agreed to plead guilty to a one-paragraph superseding indictment charging a misdemeanor tax violation.¹¹ The enforcement action ended with the presiding judge imposing no jail time on Giffen and stating that he was a Cold War hero and that the enforcement action should have never been brought in the first place. Giffen presumably prevailed over the DOJ not because of the facts or the law, but because he possessed significant leverage over the government in that he asserted his actions were taken with the knowledge and support of the highest levels of the U.S. government.

To diminish the selfish, political aspects of the FCPA’s origins as well as FCPA enforcement, political actors in this new era of FCPA enforcement—just like those from a prior era—construct populist rhetoric around FCPA enforcement.

For instance, despite the fact that most companies resolving FCPA enforcement actions are otherwise viewed as industry leaders that sell the best products for the best prices, the FCPA enforcement agencies frequently link FCPA enforcement to classical notions of bribery, such as roads not being built, schools lying in ruins, and basic public services going unprovided.¹²

2: FCPA’s Anti-Bribery Provisions Are Limited in Scope

The FCPA was a pioneering statute. Yet at the same time, the FCPA was intended to be a limited statute. During Congress’s multi-year investigation of the foreign corporate payments problem, it learned of a wide range of foreign corporate payments to a variety of recipients for a variety of reasons.¹³ Congress could have legislated as to the wide range of payments discovered and indeed certain of the bills introduced during the legislative process captured a wide range of foreign corporate payments.¹⁴

Yet in passing the FCPA, Congress intended to capture only a narrow range of foreign corporate payments.

For instance, in the FCPA’s anti-bribery provisions, Congress narrowed the range of actionable payments to those involving a narrow category of foreign recipients (i.e. “foreign officials”) and for a specific purpose (i.e. to “obtain or retain business.”)¹⁵

Congressional Intent. Congress’s intent would seem directly linked to the primary foreign policy motivation it had in investigating the foreign corporate payments

⁴ Hearings before the Subcomm. on Int’l Econ. Policy of the H. Comm. on Int’l Relations, *The Activities of American Multi-national Corporations Abroad*, 94th Cong. 2 (1975).

⁵ Unlawful Corporate Payments Act of 1977: Hearings Before the Subcomm. of Consumer Prot. and Fin. of the H. Comm. on Interstate and Foreign Commerce, 95th Cong. 63 (1977).

⁶ Hearings before the Subcomm. on Consumer Prot. and Fin. of the H. Comm. on Interstate and Foreign Commerce, *Foreign Payments Disclosure*, 94th Cong. 2 (1976).

⁷ Hearings before the Subcomm. of Consumer Prot. and Fin. of the H. Comm. on Interstate and Foreign Commerce, *Unlawful Corporate Payments Act of 1977*, 95th Cong. 63 (1977).

⁸ <http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-duke-university-school-law>

⁹ 15 USC 78m(b)(3).

¹⁰ 05 WCR 178 (3/12/10). To learn more about the BAE enforcement action, see, *The Façade of FCPA Enforcement*, (pgs. 993-996), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1705517.

¹¹ 05 WCR 561 (8/13/10). See also, <http://www.fcraprofessor.com/the-giffen-gaffe-the-final-chapter>.

¹² See, e.g., Lanny Breuer and *Foreign Corrupt Practices Act Enforcement*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2238156.

¹³ See, *Report of the Securities and Exchange Commission On Questionable and Illegal Corporate Payments and Practices* (1976), reprinted in Special Supplement, Sec. Reg. & L. Rep. (BNA) No. 353, at 2 (May 19, 1976).

¹⁴ See, *The Story of the Foreign Corrupt Practices Act*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185406.

¹⁵ See 15 USC 78dd-1 et seq.

as well as recognition of the difficult and complex business conditions encountered in many foreign markets.

For instance Sens. Church and William Proxmire (D-Wisc.), another champion of the FCPA in the Senate, were clear as to the scope of the law they envisioned. Church stated during a hearing:

[L]et us be clear that we are not just talking about a little 'baksheesh' to grease the palm of some petty clerk in order to speed needed documents on their way through the bureaucratic labyrinth. What we are talking about is a concerted effort by the petroleum industry to buy favorable tax and energy legislation in a European country in which one U.S. company alone made over \$50 million in contributions to the government parties and members of the cabinet over a [nine]-year period.¹⁶

Reacting to a report from the Securities and Exchange Commission that summarized a wide range of foreign corporate payments to a variety of recipients for a variety of reasons, Proxmire stated: "[A] bribe is fairly easy to define. [. . .] [W]e define it as a payment to an official of a foreign government for the purpose of inducing him to use his influence to secure business for the issuer or influence legislation or regulations of his government."¹⁷

Proxmire further remarked during a Senate hearing that "we are not concerned so much about the low level grease payments. What we are talking about is the payment . . . to make a sale [. . .] bribery for the purpose of making sales abroad."¹⁸

Senate and House reports evidence the limited nature of what would become the FCPA and that it would not capture all foreign corporate payments Congress learned of during its multi-year investigation. For instance, a key 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". In using the word "corruptly", the committee intends to distinguish between payments which cause an official to exercise other than his free will in acting or deciding or influencing an act or decision and those payments which merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action. In defining "foreign official", the committee emphasizes this crucial distinction by excluding from the definition of "foreign official" government employees whose duties are essentially ministerial or clerical. 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 be 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. However, where the payment is made to influence the passage of law, regulations, the placement of government contracts, the formulation of policy or other discretionary governmental functions, such payments would be prohibited. The committee fully recognizes that the proposed law will not reach all corrupt payments overseas.¹⁹

Narrow Category. Congress also limited the FCPA's payment provisions to a narrow category of foreign recipients.

For instance, notwithstanding the U.S. Court of Appeals for the Eleventh Circuit's recently flawed decision in *United States v. Esquenazi*²⁰, the following salient facts from the FCPA's legislative history are undisputed:

- During its multi-year investigation of foreign corporate payments that preceded enactment of the FCPA, Congress was aware of the existence of so-called state-owned or state-controlled enterprises (SOEs) and 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. These bills were introduced in both the Senate and the House during both the 94th (1975-76) and 95th (1977-78) Congresses; and

- 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 S. 305, the bill that ultimately became the FCPA in December 1977.²¹

Limiting Element. The FCPA's anti-bribery provisions also contain a limiting "business purpose" element. The December 1977 Conference Report stated:

The scope of the prohibition [in the Senate bill] was limited by the requirement that the offer, promise, authorization, payment, or gift must have as a purpose inducing the recipient to use his influence with the foreign government or instrumentality, influencing the enactment or promulgation of legislation or regulations of that government or instrumentality or refraining from performing any official responsibilities, so as to direct business to any person, maintain an established business opportunity with any person or divert a business opportunity from any person. The House amendment was similar to the Senate bill; however, the scope of the House amendment was not limited by the "business purpose" test. . . . [T]he conferees clarified the scope of the 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

¹⁶ Hearing before the Subcomm. on Int'l Trade of the S. Comm. on Fin., *Protecting the Ability of the United States to Trade Abroad*, 94th Cong. 1-2, 19 (1975).

¹⁷ Hearing before the S. Comm. on Banking, Hous., and Urban Affairs, *Prohibiting Bribes to Foreign Officials*, 94th Cong. 19 (1976).

¹⁸ Hearings before the S. Comm. on Banking, Hous., and Urban Affairs, *Foreign and Corporate Bribes*, 94th Cong. 46 (1976).

¹⁹ H.R. Rep. No. 95-640, at 4-8 (1977). See also S. Rep. No. 94-1031 at 6-7 (1976).

²⁰ 752 F.3d 912, 2014 BL 136610, (11th Cir. 2014) (09 WCR 342, 5/30/14).

²¹ Decl. of Professor Michael J. Koehler in support of defendants' motion to dismiss counts one through 10 of the indictment, *United States v. Carson*, No. 8:09-cr-00077 (C.D. Cal. Feb. 21, 2011).

or decision so as to assist an issuer in obtaining, retaining or directing business to any person.²²

In short, despite learning of a wide range of foreign corporate payments to a variety of recipients and for a variety of reasons, Congress intended, and accepted in passing the FCPA, to capture only a narrow range of such payments.

The fact that the FCPA's anti-bribery provisions are limited in scope matters today. Despite accurately stating in the FCPA guidance that "the FCPA does not cover every type of bribe paid around the world for every purpose,"²³ with increasing frequency in this new era of FCPA enforcement, it appears that the DOJ and SEC have transformed FCPA enforcement into a free-for-all in which any conduct the enforcement agencies find objectionable is fair game to extract a multimillion-dollar settlement from a risk averse corporation.

For instance, few FCPA enforcement actions involve traditional, bona fide foreign government officials, and many enforcement actions involve payments outside the context of foreign government procurement or to influence foreign government legislation or regulations.²⁴

If a comprehensive bribery statute—covering a wide range of foreign corporate payments to a wide variety of recipients for a wide variety of reasons—is what Congress desires, it could have passed such a law in 1977 when the FCPA was enacted, as well as in 1988 and 1998 when the FCPA was amended.

Moreover, if the enforcement agencies desire an FCPA statute broader than the one Congress passed, the agencies should lobby Congress for it and not expand the FCPA through enforcement actions that are not subjected to any meaningful judicial scrutiny.

3: FCPA's Internal Controls Provisions Are Qualified in a Number of Ways

The free-for-all nature of FCPA enforcement is also evident through internal-controls enforcement theories. Here again, some basic facts bear repeating.

The internal-controls provisions generally state that issuers must devise and maintain a system of internal-accounting controls sufficient to provide reasonable assurances that transactions are properly authorized, recorded, and accounted for by the issuer.²⁵ The FCPA specifically defines the terms "reasonable assurance" and "reasonable detail" to mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.²⁶

As clear from the statutory language, Congress intended for the internal-control provisions to be qualified by concepts of reasonableness. This intent is best evidenced by a 1977 Senate report which stated:

The committee recognizes . . . that management must exercise judgment in determining the steps to be taken, and the cost incurred, in giving assurance that the objectives expressed [in the FCPA's books and records internal controls

provisions] will be achieved. Here, standards of reasonableness must apply. [. . .] While management should observe every reasonable prudence in satisfying the objections called for [in the provisions] the committee recognizes that management must necessarily estimate and evaluate the cost/benefit relationships to the steps to be taken in fulfillment of its responsibilities.²⁷

Legislative History. As to the FCPA's definition of "reasonable assurance" and "reasonable detail," legislative history instructs:

"The prudent man qualification [was adopted] in order to clarify that the current standard does not connote an unrealistic degree of exactitude or precision. The concept of reasonableness of necessity contemplates the weighing of a number of relevant factors, including the costs of compliance."²⁸

In addition to the above qualification, the FCPA specifically states—as to issuers which hold 50 percent or less of the voting power with respect to a firm—that the books and records and internal control provisions:

[R]equire only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such [firm] to devise and maintain a system of internal accounting controls consistent [with the books and records and internal controls provisions]. Such circumstances include the relative degree of the issuer's ownership of the [firm] and the laws and practices governing the business operations of the country in which such firm is located. An issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements [of the books and records and internal controls provisions].²⁹

Court Decision. Consistent with the above statutory language and legislative history, the only judicial decision to directly address the substance of the internal-controls provisions states in pertinent part:

The definition of accounting controls does comprehend reasonable, but not absolute, assurances that the objectives expressed in it will be accomplished by the system. The concept of "reasonable assurances" contained in [the internal control provisions] recognizes that the costs of internal controls should not exceed the benefits expected to be derived. It does not appear that either the SEC or Congress, which adopted the SEC's recommendations, intended that the statute should require that each affected issuer install a fail-safe accounting control system at all costs. It appears that Congress was fully cognizant of the cost-effective considerations which confront companies as they consider the institution of accounting controls and of the subjective elements which may lead reasonable individuals to arrive at different conclusions. Congress has demanded only that judgment be exercised in applying the standard of reasonableness.³⁰

Further, consistent with the FCPA's statutory language and legislative history, the SEC's most extensive

²⁷ S. Rep. 95-114 (1977).

²⁸ H. Conf. Rep. 100-576 (1988).

²⁹ 15 USC 78m(b)(2)(6).

³⁰ *SEC v. World-Wide Coin Investments*, 567 F. Supp. 724 (N.D. Ga. 1983). In addition, various courts have held—in the context of civil derivative actions in which shareholders seek to hold company directors liable for breach of fiduciary duties due to the company's alleged FCPA violations—that just because improper conduct allegedly occurred somewhere within a corporate hierarchy does not mean that internal controls must have been deficient. See, e.g., *Midwestern Teamsters Pension Trust Fund v. Deaton*, 2009 BL 393222 (S.D. Tex. 2009); *Freuler v. Parker*, 803 F. Supp.2d 630, 2011 BL 173896 (S.D. Tex. 2011).

²² H.R. Rep. No. 95-831, at 11-12 (1977) (Conf. Rep.).

²³ 07 WCR 871 (11/16/12). Guidance available at <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>.

²⁴ See, e.g., <http://www.fcpaprofessor.com/the-foreign-officials-of-2014>.

²⁵ 15 USC 78m(b)(2)(B).

²⁶ 15 USC 78m(b)(7).

guidance on the internal-controls provisions states in pertinent part:

Private sector decisions implementing these statutory objectives are business decisions. And, reasonable business decisions should be afforded deference. This means that the issuer need not always select the best or the most effective control measure. However, the one selected must be reasonable under all the circumstances.

The accounting provisions' principal objective is to reach knowing or reckless conduct.

Inherent in this concept [of reasonableness] is a toleration of deviations from the absolute. One measure of the reasonableness of a system relates to whether the expected benefits from improving it would be significantly greater than the anticipated costs of doing so. Thousands of dollars ordinarily should not be spent conserving hundreds. Further, not every procedure which may be individually cost-justifiable need be implemented; the Act allows a range of reasonable judgments.

The test of a company's internal control system is not whether occasional failings can occur. Those will happen in the most ideally managed company. But, an adequate system of internal controls means that, when such breaches do arise, they will be isolated rather than systemic, and they will be subject to a reasonable likelihood of being uncovered in a timely manner and then remedied promptly. Barring, of course, the participation or complicity of senior company officials in the deed, when discovery and correction expeditiously follow, no failing in the company's internal accounting system would have existed. To the contrary, routine discovery and correction would evidence its effectiveness.³¹

Problematic Enforcement Theories. The above qualifications in the FCPA's internal-controls provisions matter because the SEC often advances enforcement theories in corporate FCPA enforcement actions that are seemingly inconsistent with the above legal authority and even enforcement agency guidance.

For instance, in several FCPA enforcement actions, the SEC has advanced a standard akin to issuer strict liability for the alleged activities of subsidiaries by invoking a "failure to prevent" standard that does not even exist in the FCPA and is inconsistent with actual legal authority.³²

FCPA enforcement actions against Oracle Corp. and Hewlett-Packard Co. are particularly emblematic of the seeming free-for-all nature of FCPA internal-control enforcement theories.

The Oracle enforcement action was based on allegations that certain employees of Oracle's subsidiary in India secretly structured certain transactions off of Oracle India's corporate books, "creating the potential for bribery or embezzlement." The only allegations against Oracle itself is that it failed, as relevant to the transactions, to audit distributor margins against end user prices and that it failed to audit third-party payments made by distributors. Lost in the SEC enforcement action charging Oracle for books-and-records and internal-controls violations, however, is the fact that it is common for large multi-national companies like

Oracle to engage thousands of third parties across the globe to assist in business development. Because of this, audits Oracle was held liable for not conducting are not practical or cost-effective absent red flags suggesting improper conduct. The SEC did not allege any such red flag issues. In fact, the SEC alleged that Oracle's India subsidiary "concealed" and kept "secret" the conduct from Oracle.³³

In the HP enforcement action, the DOJ's and SEC's own allegations paint a picture of HP establishing, particularly given the time periods relevant to the enforcement action, a reasonable system of internal accounting controls, yet being a victim of the willful and deceptive conduct of a "small fraction" of employees who designed covert means to circumvent HP's internal controls. Among other things, the enforcement agencies acknowledged that HP had:

- existing FCPA and related policies and procedures in place and that all relevant employees received training on the policies;
- existing policies and procedures in place related to commission payments to channel partners, due diligence of channel partners, and other tracking policies regarding channel partners;
- an existing approval process in place that applied to all service-related projects valued at greater than \$500,000 anywhere in the world and as part of that process HP managers questioned relevant subsidiary employees at questionable information; and
- an existing certification and sub-certification process—as required by the 2002 Sarbanes-Oxley Act—in place as relevant to the referenced subsidiaries.

Nevertheless, the enforcement agencies alleged that HP's internal controls were insufficient because a "small fraction" of employees through covert means, concealment, misrepresentation and deception circumvented the internal controls.³⁴

Similar to why the limited scope of the FCPA's anti-bribery provisions matter, if the enforcement agencies desire FCPA internal-controls provisions that are unqualified, the agencies should lobby Congress for such provisions and not expand the FCPA through enforcement actions that are not subjected to any meaningful judicial scrutiny.

4: Overall Losing Record for DOJ, SEC When Put to Ultimate Burden of Proof

Throughout this new era of FCPA enforcement, the enforcement agencies have consistently proclaimed the success of their FCPA enforcement programs by referencing statistics, such as the number of enforcement actions and the aggregate amount of FCPA corporate FCPA settlement amounts. Certainly, the DOJ and SEC have had "success" exercising leverage and securing large corporate FCPA settlements against risk-averse

³¹ SEC release No. 17500 (Jan. 29, 1981).

³² See <http://www.fcpaprofessor.com/issues-to-consider-from-the-goodyear-enforcement-action>, discussing the 2015 Goodyear Tire & Rubber Co. enforcement action (10 WCR 180, 3/6/15), and *Why You Should Be Alarmed by the ADM FCPA Enforcement Action* (09 WCR 58, 1/24/14), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2383938.

³³ <http://www.fcpaprofessor.com/the-dilution-of-fcpa-enforcement-has-reached-a-new-level-with-the-secs-enforcement-action-against-oracle>.

³⁴ 09 WCR 623 (9/19/14). See also <http://www.fcpaprofessor.com/hp-enforcement-action-where-to-begin>.

corporations through resolution vehicles often not subjected to any meaningful judicial scrutiny.

However, by focusing on the *quantity* of FCPA enforcement, the *quality* of that enforcement is often left unexplored. The simplistic notion advanced by the enforcement agencies seems to be that more FCPA enforcement is an inherent good regardless of enforcement theories, regardless of resolution vehicles, and regardless of actual outcomes when put to its burden of proof.

Flawed Logic. This logic is troubling and ought to be rejected. In a legal system founded on the rule of law, a more meaningful form of government enforcement agency success is prevailing in the context of an adversarial system when put to the burden of proof. As to this form of success, the DOJ and SEC have had far less “success” in enforcing the FCPA.

Indeed, it is a fact that in recent instances of judicial scrutiny of DOJ FCPA enforcement, federal court judges have stated, in three separate cases, as follows:

- “This appears to be the end of a long and sad chapter in the annals of white collar criminal enforcement.”

- “The instances of misconduct [by DOJ prosecutors] were so varied and occurred over such a long period of time “that they add up to an unusual and extreme picture of a prosecution gone badly awry.”

- “The problem here is that the principal witness against [the FCPA defendant] . . . knows almost nothing.” [. . .] [The DOJ] shouldn’t indict people on stuff [they] can’t prove.”³⁵

More broadly, the following facts bear repeating. In FCPA history:

- the DOJ is 0-2 in corporate enforcement actions when put to its ultimate burden of proof;³⁶

- the DOJ has an overall losing record in individual enforcement actions when put to its burden of proof;³⁷

- the SEC has never prevailed in an enforcement action when put to its ultimate burden of proof.³⁸

Challenging Enforcement Theories. The overall losing record of the enforcement agencies when put to its ultimate burden of proof in FCPA enforcement actions

matters because it demonstrates the “façade” of FCPA enforcement in which prosecutorial common law (i.e., settled enforcement actions) is viewed as legal authority.

However, in many instances of FCPA scrutiny, two distinct questions can be asked:

(1) Whether, given the DOJ’s and SEC’s enforcement theories, the conduct at issue can expose a company to FCPA scrutiny and an FCPA enforcement action?

(2) Whether Congress, in passing the FCPA, intended to capture the alleged conduct at issue and whether a court would find the alleged conduct to be in violation of the FCPA?

As a practical matter, risk-averse corporations care more about the first question than the second. However, those who value the rule of law should care more about the second question. As former Attorney General Alberto Gonzales rightly noted:

“In an ironic twist, the more that American companies elect to settle and not force the DOJ to defend its aggressive interpretation of the [FCPA], the more aggressive DOJ has become in its interpretation of the law and its prosecution decisions.”³⁹

Take Responsibility. Corporations often complain about the expansive enforcement theories that have come to define this new era of enforcement. However, the business community itself is, at least in part, responsible for the current aggressive FCPA enforcement climate. Indeed, as a dean of the FCPA bar rightly observed:

One reality is the enforcement agencies’ [FCPA] views on issues and enforcement policies, positions on which they are rarely challenged in court. The other is what knowledgeable counsel believe the government could sustain in court, should their interpretations or positions be challenged. The two may not be the same. The operative rules of the game are the agencies’ views unless a company is prepared to go to court or to mount a serious challenge within the agencies.

If more business organizations subject to FCPA scrutiny would exhibit courage and exercise their right to force the enforcement agencies to prove all of the elements of the charged offense, it is likely that this new era of FCPA enforcement would look much different.

5: NPAs and DPAs Are New Inventions And Not Part of U.S. Legal Tradition

However, a major reason why this new era of FCPA enforcement does not look different is because of the resolution vehicles the DOJ has created to resolve alleged instances of corporate FCPA scrutiny.

Historically, the DOJ had two choices when dealing with alleged instances of corporate FCPA scrutiny: charge the company or do not charge the company.

However, in 2004 the DOJ introduced nonprosecution agreements (NPAs) and deferred prosecution agreements (DPAs) to FCPA enforcement, and since then the DOJ’s use of such alternative resolution ve-

³⁵ See, *What Percentage of DOJ FCPA Losses is Acceptable?*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2027461 (discussing the Africa Sting enforcement action, the Lindsey Manufacturing enforcement action, and the John O’Shea enforcement action). See also 07 WCR 278 (4/6/12)(charges were dismissed against 22 defendants).

³⁶ See <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>. See also 07 WCR 431 (6/1/12).

³⁷ See, e.g., <http://www.fcpaprofessor.com/looking-back-on-the-eckhardt-amendment>; See also <http://www.fcpaprofessor.com/category/alfredo-duran>, <http://www.fcpaprofessor.com/bribes-for-buses-however-nothing-but-a-bumpy-road-for-the-doj>, and <http://www.fcpaprofessor.com/at-the-11th-hour>.

³⁸ <http://www.fcpaprofessor.com/the-sec-has-never-prevailed-in-an-fcpa-enforcement-action-when-put-to-its-ultimate-burden-of-proof>.

³⁹ <http://www.fcpaprofessor.com/add-alberto-gonzalez-to-the-list-of-former-high-ranking-doj-officials-who-support-an-fcpa-compliance-defense>.

hicles has become the dominate way in which alleged corporate FCPA scrutiny has been resolved.

Indeed, since 2010, NPAs and DPAs have been used to resolve approximately 85 percent of corporate FCPA enforcement actions.⁴⁰

There is nothing in the FCPA itself, nor any other grant of Congressional authority, authorizing the DOJ to use NPAs and DPAs to resolve alleged instances of FCPA scrutiny. Rather, the DOJ created and championed these vehicles all by itself.

Use of NPAs and DPAs to resolve alleged instances of corporate FCPA scrutiny is one of the more obvious reasons for the general upward trend of FCPA enforcement in this new era. As candidly acknowledged by a former unit chief of the DOJ's FCPA unit: if the DOJ did not have the option of resolving FCPA enforcement actions with NPAs or DPAs, the DOJ "would certainly bring fewer cases."⁴¹

Likewise, the Organization for Economic Cooperation and Development has stated: "It seems quite clear that the use of these agreements is one of the reasons for the impressive FCPA enforcement record."⁴²

Extensive Use of Settlement Devices. The DOJ's extensive use of NPAs and DPAs to resolve alleged corporate criminal liability in the FCPA context present 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 guilty to any charges—allow egregious instances of corporate conduct to be resolved too lightly without adequate sanctions and without achieving maximum deterrence. 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.

Thus, NPAs and DPAs both facilitate the under-prosecution of egregious instances of business bribery as well as the over-prosecution of business conduct.

It is easy to see why the DOJ favors the use of NPAs and DPAs to resolve FCPA enforcement actions. The use of such resolution vehicles insulates the DOJ's FCPA enforcement theories from judicial scrutiny in all but the rarest of circumstances and places the DOJ in the role of prosecutor, judge and jury all at the same time. The use of NPAs and DPAs thus also allows the DOJ to feed its lucrative FCPA enforcement program.

However, in a legal system founded on the rule of law, *quality* of enforcement should matter more than *quantity* of enforcement. More FCPA enforcement—while popular politically and pleasing to civil society groups and FCPA Inc.—is not an inherent good, particularly when the reason for the high levels of enforcement conflict with accepted rule of law principles. Indeed, several former U.S. attorney generals have

⁴⁰ <http://www.fcprofessor.com/doj-enforcement-of-the-fcpa-year-in-review-5>.

⁴¹ Mark Mendelsohn *on the Rise of FCPA Enforcement*, 24 Corporate Crime Reporter 35 (Sept. 10, 2010).

⁴² OECD, *Phase 3 Report On Implementing The OECD Anti-Bribery Convention in the United States* (Oct. 2010).

sharply criticized the DOJ's frequent use of NPAs and DPAs in the FCPA context.⁴³

NPAs and DPAs were a new experiment in enforcing the FCPA. However, the experiment ought to stop.

In proposing to abolish NPAs and DPAs in the FCPA context (as I have long proposed), it is important to understand that such a proposal does not seek to abolish a long-standing feature of the U.S. criminal justice system. Rather, such a proposal merely seeks a return to the prosecute or do not prosecute criminal justice system that has served our country well since its founding.

6: FCPA Enforcement Is Largely Corporate Only

Against the backdrop of alternative resolution vehicles being used to resolve the majority of corporate FCPA enforcement actions is the fact that few corporate enforcement actions result in related charges against employees of the corporate entity resolving the enforcement action.

Key to achieving deterrence in the FCPA context is prosecuting individuals to the extent the individual's conduct legitimately satisfies the elements of an FCPA violation. For a corporate employee with job duties that provide an opportunity to violate the FCPA, it is easy to dismiss corporate money being used to pay settlement amounts. On the other hand, it is not easy to dismiss hearing of an individual with a similar background and job duties being criminally charged and sent to federal prison for violating the FCPA.

The enforcement agencies have long recognized that an FCPA enforcement program based solely on corporate fines is not effective and does not adequately deter future FCPA violations.⁴⁴

Rhetoric. Such rhetoric continued in 2014 as the assistant attorney general of the DOJ's Criminal Division stated:

"Corporations do not act, but for the actions of individuals. In all but a few cases, an individual or group of individuals is responsible for the corporation's criminal conduct. The prosecution of culpable individuals—including corporate executives—for their criminal wrongdoing continues to be a high priority for the department."⁴⁵

Likewise, the director of the SEC's Enforcement Division stated:

"[A]ctions against individuals have the largest deterrent impact. Individual accountability is a powerful deterrent because people pay attention and alter their conduct when they personally face potential punishment. And so in the FCPA arena as well as all other ar-

⁴³ Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, *Foreign Corrupt Practices Act*, House of Representatives (June 14, 2011) (testimony of Michael Mukasey); <http://www.fcprofessor.com/former-attorney-general-alberto-gonzales-criticizes-various-aspects-of-doj-fcpa-enforcement>.

⁴⁴ See e.g., Mike Koehler, *A Foreign Corrupt Practices Act Narrative*, 22 Mich. St. Int'l Law Review, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2428555.

⁴⁵ <http://www.justice.gov/opa/speech/remarks-assistant-attorney-general-criminal-division-leslie-r-caldwell-22nd-annual-ethics>.

eas of our enforcement efforts, we are very focused on attempting to bring cases against individuals.”⁴⁶

Wide Gap. However, as in prior years, the enforcement agencies rhetoric about individual FCPA enforcement actions remains hollow and there remains a wide gap between corporate and individual FCPA enforcement actions.

For instance, of the seven DOJ corporate enforcement actions from 2014, six (86 percent) have *not*, at least yet, resulted in any related charges against employees of the corporate entity resolving the enforcement action. Likewise, of the seven SEC corporate FCPA enforcement actions from 2014, seven (100 percent) have *not*, at least yet, resulted in any related charges against employees of the corporate entity resolving the enforcement action.

The wide gap between corporate and individual FCPA enforcement actions in 2014 was not an anomaly. Indeed, since 2008, the DOJ has resolved 67 corporate FCPA enforcement actions and 50 (75 percent) have *not*, at least yet, resulted in any DOJ charges against company employees.⁴⁷ Similarly, since 2008 the SEC has resolved 72 corporate FCPA enforcement actions and 60 (83 percent) have *not*, at least yet, resulted in any SEC charges against company employees.⁴⁸ The higher SEC figure compared to the DOJ figure is notable in that the SEC, as a civil law enforcement agency, has a lower burden of proof in an enforcement action.

‘Clustering’ Approach. To be sure, the DOJ and SEC have brought FCPA enforcement actions against individuals. However, the 2014 DOJ individual actions follow a typical “clustering” approach in which just three “core” actions resulted in the 10 individual prosecutions. Such an approach was consistent with prior years in that since 2008, the DOJ has charged 99 individuals with criminal FCPA offenses, yet 58 percent of the individuals have been in just five “core” actions, and 78 percent of the individuals have been in just 11 “core” actions.⁴⁹

In other words, DOJ FCPA individual enforcement numbers are significantly skewed by a small handful of enforcement actions.

The same is true for SEC FCPA individual enforcement actions. Indeed, since 2008, the SEC has charged 35 individuals with civil FCPA offenses, yet 60 percent of the individuals have been in just five “core” actions.⁵⁰ In other words, and like the DOJ statistics, SEC FCPA individual enforcement numbers are significantly skewed by a small handful of enforcement actions.

Against the backdrop of aggressive enforcement agency rhetoric about individual prosecutions, the wide gap between corporate and individual FCPA enforcement raises several significant legal and policy issues. For starters, it causes one to legitimately wonder whether the conduct giving rise to the corporate FCPA

enforcement action was engaged in by ghosts. Indeed, others have rightly asked the “but why was nobody charged” question in connection with many corporate FCPA enforcement actions.⁵¹

Quality of Cases. However, an equally plausible reason why no individuals have been charged in connection with most corporate FCPA enforcement actions may have to do with the quality and legitimacy of the corporate enforcement action in the first place. As highlighted above, DOJ corporate FCPA enforcement actions are often resolved through NPAs and DPAs, and such resolution vehicles are not subjected to any meaningful judicial scrutiny and are often agreed to by business organizations for reasons of ease and efficiency, and not necessarily because the conduct at issue violated the FCPA.

Indeed, prior to becoming SEC Chairman, Mary Jo White stated a “fear [that] the deferred prosecution [agreement] is becoming a vehicle to show results.”⁵²

Likewise, former Attorney General Gonzales stated:

■ It is “easy, much easier quite frankly,” for the DOJ to resolve FCPA inquiries with NPAs and DPAs; such resolution vehicles have “less of a toll” on the DOJ’s budget and such agreements “provide revenue” to the DOJ. It is all “unfortunate”; and

■ “In an ironic twist, the more that American companies elect to settle and not force the DOJ to defend its aggressive interpretation of the [FCPA], the more aggressive DOJ has become in its interpretation of the law and its prosecution decisions.”⁵³

Perhaps most telling, Mark Mendelsohn, former chief of the DOJ’s FCPA unit, has talked about the “danger” of NPAs and DPAs and how “it is tempting for the [Justice Department] or the SEC . . . to seek to resolve cases through DPAs or NPAs that don’t actually constitute violations of the law.”⁵⁴

Different Dilemmas. Individuals charged with FCPA violations, on the other hand, face a deprivation of personal liberty, damage to their personal reputations, and personal financial consequences and are thus more likely to force the DOJ to satisfy its high burden of proof as to all FCPA elements. In other words, perhaps the more appropriate question is not “why was nobody charged” in connection with most corporate FCPA enforcement actions, but rather do corporate NPAs and DPAs necessarily represent provable FCPA violations?

In determining whether NPAs or DPAs represent over-prosecution of the FCPA, a suitable proxy is analyzing the number of individual prosecutions that follow corporate NPAs or DPAs. A compelling data point is that since NPAs and DPAs were first introduced to the FCPA context, only 9 percent of corporate enforcement actions resolved solely with an NPA or DPA have resulted in related criminal charges of company employees.

⁴⁶ <http://www.sec.gov/News/Speech/Detail/Speech/1370543493598#.VPiEJvnF-Sp>.

⁴⁷ <http://www.fcpaprofessor.com/a-focus-on-doj-fcpa-individual-prosecutions-3>.

⁴⁸ <http://www.fcpaprofessor.com/a-focus-on-sec-fcpa-individual-actions-3>.

⁴⁹ <http://www.fcpaprofessor.com/a-focus-on-doj-fcpa-individual-prosecutions-3>.

⁵⁰ <http://www.fcpaprofessor.com/a-focus-on-sec-fcpa-individual-actions-3>.

⁵¹ <http://www.nytimes.com/2011/06/25/business/25stewart.html?pagewanted=1&r=2&>.

⁵² <http://www.fcpaprofessor.com/an-informed-and-forceful-critique-of-npas-and-dpas-by-guess-who>.

⁵³ <http://www.fcpaprofessor.com/former-attorney-general-alberto-gonzales-criticizes-various-aspects-of-doj-fcpa-enforcement>.

⁵⁴ *Mark Mendelsohn on the Rise of FCPA Enforcement*, 24 Corporate Crime Reporter 35 (Sept. 10, 2010).

The “why was nobody charged” question is also tempting to ask in connection with SEC FCPA enforcement given that 83 percent of corporate FCPA enforcement actions since 2008 have *not*, at least yet, resulted in any SEC charges against company employees. Yet, like with the DOJ figures, there may be an equally plausible reason why so few individuals have been charged in connection with most corporate SEC FCPA enforcement actions. The reason may have to do with the quality and legitimacy of the corporate enforcement action in the first place.

With the SEC the issue is not so much NPAs or DPAs, as such resolution vehicles have been used sparingly by the SEC.⁵⁵ However, neither case resulted in any related charges against company employees. Rather, the issue seems to be the SEC’s neither admit nor deny settlement policy as well as the SEC’s increased use of administrative actions. Indeed, a notable development from 2014 was the Second Circuit concluding in a non-FCPA case that challenged the SEC’s neither admit nor deny settlement policy that SEC settlements are not necessarily about the truth, but pragmatism.

Individuals in an SEC FCPA enforcement, even if only a civil action and even if frequently allowed to settle on neither admit nor deny terms or through an administrative process, have their personal reputation and finances at stake and are thus more likely than corporate entities to challenge the SEC and force it satisfy its burden of proof as to all FCPA elements.

As to the problematic surge in SEC administrative actions used to resolve alleged instances of FCPA scrutiny, it is worth highlighting that since 2013 the SEC has used administrative actions to resolve 12 corporate FCPA enforcement actions, and in only one instance has there been a related SEC enforcement action against company employees.⁵⁷ In other words, and like in the DOJ context, perhaps the more appropriate question is not “why was nobody charged,” in connection with most SEC corporate FCPA enforcement actions, but rather, do SEC corporate FCPA settlements necessarily represent provable FCPA violations?

The above statistics should prompt questions about the quality and legitimacy of many corporate FCPA enforcement actions and may explain the wide gap between corporate and individual FCPA enforcement. The wide gap between corporate and individual enforcement, whether in the FCPA context or more broadly, raises important legal and policy issues. Indeed, former Attorney General Eric Holder stated in 2014:

[T]he [DOJ] recognizes the inherent value of bringing enforcement actions against individuals, as opposed to simply the companies that employ them. We believe that doing so is both important—and appropriate—for several reasons:

First, it enhances accountability. Despite the growing jurisprudence that seeks to equate corporations with people, corporate misconduct must necessarily be committed by flesh-and-blood human beings. So wherever misconduct occurs within a company, it is essential that we seek to

⁵⁵ See 06 WCR 405 (5/20/11) (DPA with Tenaris SA in 2011), and 08 WCR 334 (5/17/13) (NPA with Ralph Lauren in 2013).

⁵⁷ <http://www.fcpaprofessor.com/a-focus-on-sec-fcpa-individual-actions-3>; <http://www.fcpaprofessor.com/the-sec-gets-creative-in-bringing-its-first-fcpa-enforcement-action-of-2015>.

identify the decision-makers at the company who ought to be held responsible.

Second, it promotes fairness—because, when misconduct is the work of a known bad actor, or a handful of known bad actors, it’s not right for punishment to be borne exclusively by the company, its employees, and its innocent shareholders.

And finally, it has a powerful deterrent effect. All other things being equal, few things discourage criminal activity at a firm—or incentivize changes in corporate behavior—like the prospect of individual decision-makers being held accountable. A corporation may enter a guilty plea and still see its stock price rise the next day. But an individual who is found guilty of a serious fraud crime is most likely going to prison.⁵⁸

Yet despite the above rhetoric, the statistics speak for themselves and there is an undeniably wide gap between corporate and individual FCPA enforcement.

7: Voluntary Disclosure Isn’t Required

If you read FCPA enforcement agency speeches you know that voluntary disclosure is one of the most talked about topics in the FCPA arena. It is easy to understand why the enforcement agencies favor and encourage voluntary disclosure. Simply put, it makes their job easier and it is cost-effective from a budget and resource standpoint. For instance, the DOJ has candidly stated that it “absolutely need[s] companies through their firms to provide us with their investigations.”⁵⁹ Indeed, since 2011, approximately 55 percent of corporate DOJ FCPA enforcement actions have been based on voluntary disclosures.⁶⁰ Likewise, since 2011, approximately 60 percent of corporate SEC FCPA enforcement actions have been based on voluntary disclosures.⁶¹

Such statistics are noteworthy given the common narrative of “aggressive” FCPA enforcement actions based on flimsy legal theories. However, in most instances, the DOJ or SEC do not “enforce” the FCPA, but rather process corporate voluntary disclosures. Thus, perhaps the more appropriate conversation should be “aggressive” FCPA voluntary disclosures based on flimsy legal theories.

Pot of Gold. Yet voluntary disclosures are often the fuel that feeds the vibrant and lucrative industry known as FCPA Inc. and it is easy to understand why FCPA Inc. often extols the perceived benefits of voluntary disclosure. Voluntary disclosures lead to FCPA scrutiny, FCPA scrutiny often leads to world-wide investigations, and world-wide investigations often lead to FCPA en-

⁵⁸ <http://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law>.

⁵⁹ <http://www.wsj.com/news/articles/SB10000872396390443862604578028462294611352>.

⁶⁰ See <http://www.fcpaprofessor.com/voluntary-disclosure-statistics>. The 55 percent figure actually under-represents the impact of voluntary disclosures on the DOJ’s FCPA enforcement program because several FCPA enforcement actions are generally viewed as “fruits” of a prior voluntary disclosures.

⁶¹ See <http://www.fcpaprofessor.com/voluntary-disclosure-statistics>. Here again, the 60 percent figure actually under-represents the impact of voluntary disclosures on the SEC’s FCPA enforcement program because several FCPA enforcement actions are generally viewed as “fruits” of a prior voluntary disclosures.

forcement actions with post-enforcement action compliance and reporting obligations.

Simply put, voluntary disclosures are like a rainbow and waiting on the other side is often a pot of gold for FCPA Inc. Indeed, the largest financial consequence for a company under FCPA scrutiny is rarely the actual FCPA settlement amount, but rather pre-enforcement action professional fees and expenses as well as post-enforcement action professional fees and expenses.⁶²

Against this backdrop is the fact that there is nothing in the FCPA that requires voluntary disclosure. Although issuers are required by the securities laws to disclose all material information to investors, conduct implicating the FCPA seldom rises to the level of materiality for most companies.

The above fact matters because corporate counsel and others making business decisions on behalf of an organization with potential FCPA issues need to understand that thoroughly investigating an issue, promptly implementing remedial measures, and effectively revising and enhancing compliance policies and procedures—all internally and without disclosing to the enforcement agencies—is a perfectly acceptable, legitimate, and legal response to FCPA issues in but all the rarest of circumstances. Such a response is also likely to be significantly more cost effective than the alternative.

Irony. Indeed, one irony of the enforcement agencies championing voluntary disclosure is how former enforcement agency attorneys change their position after government service. As noted by a former SEC enforcement attorney and a former DOJ enforcement attorney:

Not all potential [FCPA] problems, however, are appropriate for disclosure. [...] Prematurely attracting the government's attention may, as a practical matter, shift the burden to the company to prove the absence of a corruption problem. [...] Companies need to weigh the potential benefits of cooperation against the significant costs of initiating a potentially unwarranted government investigation.⁶³

Similarly, the former chief of the DOJ's Fraud Section has stated:

It often will not be in a company's best interest to disclose if, for example, the allegations prove not to be credible or if it is unclear whether the conduct even amounts to a violation of law. Under those circumstances, a disclosure could unnecessarily embroil the company in a lengthy and costly government investigation and result in other repercussions such as triggering civil litigation and harm to a company's reputation that could otherwise be avoided.⁶⁴

8: Comparing FCPA Enforcement To Enforcement of Similar Foreign Laws Is an Apple to Oranges Comparison

The U.S. of course is not the only country with an FCPA-like law. At present, approximately 40 other countries have adopted, like the U.S., the OECD Convention on Combating Bribery of Foreign Public Offi-

cials in International Business Transactions, which commits signatory countries to adopt and enforce a law prohibiting payments to foreign public officials.

The OECD itself, as well as various civil society and monitoring groups, track country-specific enforcement statistics and compare such statistics among OECD Convention signatory countries. The statistics often generate much media attention and discussion, but the problem is that the comparative statistics are practically meaningless because they compare apples to oranges for at least two reasons.

First, the U.S. is rare among OECD Convention countries in having so-called respondeat superior liability in which a business organization can face criminal or civil liability based on the conduct of any employee or agent to the extent the conduct was within the employee or agent's scope of employment/agency and was intended, at least in part, to benefit the business organization.

In contrast, most other OECD Convention countries either:

- do not recognize legal person liability; or
- if they do only allow such liability to the extent conduct was engaged in by so-called "controlling minds" of the business organization such as board members or executive officers.

Against this backdrop, it is not surprising that the country with the most lenient form of business organization liability—the U.S.—has the most enforcement actions.

Second, the U.S. is rare among OECD Convention countries in resolving alleged FCPA violations via NPAs, DPAs or administrative actions. As highlighted above, NPAs and DPAs were introduced by the DOJ to the FCPA context in 2004, and since 2010 approximately 85 percent of corporate DOJ FCPA enforcement actions have included either an NPA or DPA.

The SEC began using NPAs and DPAs to resolve alleged FCPA violations in 2011, and in 2014 approximately 85 percent of corporate SEC FCPA enforcement actions were resolved via the SEC's internal administrative process. The common thread in all three resolution vehicles is the absence or practical absence of any judicial scrutiny of FCPA enforcement theories.

Old School. In contrast, in nearly every other OECD Convention country law enforcement agencies must do something that may be considered old-fashioned by current U.S. standards—and that is prove actual legal violations to someone other than itself. Against this backdrop, it is not surprising that the country—the U.S.—with three options to resolve alleged instances of bribery (charge, do not charge, or resolve via an NPA, DPA or administrative action) has more enforcement actions than other OECD Convention countries with only the traditional two options (charge vs. do not charge).

In short, comparing U.S. FCPA enforcement statistics to enforcement statistics in other OECD Convention countries is an apples to oranges comparison. Despite inflated FCPA Inc. statistics, the fact is that in any given year there are approximately 10 to 15 core FCPA enforcement actions. Query how many FCPA enforcement actions there would be if the U.S. had legal principles and resolution vehicles consistent with nearly every other OECD Convention country?

For the above reasons, most comparative enforcement statistics of OECD Convention countries are prac-

⁶² See e.g., http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2449252.

⁶³ <http://www.insidecounsel.com/2013/07/10/regulatory-investigating-potential-bribery-means-l>.

⁶⁴ http://www.weil.com/~media/files/pdfs/FCPA_Compliance_Enforcement_Insights.pdf

tically meaningless. However, the OECD and other civil society and monitoring groups continue to crank out such statistics that seem to place a priority on quantity of enforcement actions vs. quality of enforcement actions.

9: Most Peer Nations Have A Compliance-Like Defense Relevant to FCPA-Like Offenses

Sticking with the topic of other FCPA-like laws in other OECD Convention countries is the fact that most peer nations have a compliance-like defense relevant to FCPA-like offenses. Indeed, the following countries have, or are considering, a compliance-like defense: Australia, Chile, Germany, Hungary, Italy, Ireland, Japan, Korea, New Zealand, Poland, Portugal, Spain, Sweden, Switzerland and the U.K.

That additional OECD Convention countries do not have compliance-like defenses in their domestic law does not mean that those countries rejected such defenses. Rather, as discussed above, in many OECD Convention countries, the concept of legal person criminal liability (as opposed to natural person criminal liability) is non-existent. Further, in many OECD Convention countries that recognize legal person criminal liability, such liability can only result from the actions of so-called “controlling minds.” In short, if a foreign country does not provide legal person liability, there is no need for a compliance defense, and the rationale for a compliance defense is less compelling if legal person liability can only result from the conduct of high-level executive personnel or other “controlling” minds of the legal person.

Notwithstanding the above fact, as well as the fact that several former U.S. attorney generals and other high-ranking prosecutors favor an FCPA compliance defense, the DOJ maintains that such a defense is “novel” and “risky.”

Like Other Countries. However, as the above facts demonstrate, an FCPA compliance defense is hardly “novel” and “risky.” Rather, an FCPA compliance defense would align the FCPA with the existing laws of many peer nations. Most importantly, an FCPA compliance defense would advance a number of important policy objectives.

For instance, an FCPA compliance defense would better incentivize more robust corporate compliance, reduce improper conduct, and thus best advance the FCPA’s objective of reducing bribery. Compliance is a cost center within a business organization and expenditure of finite resources on FCPA compliance is an investment best sold if it can reduce legal exposure, not merely lessen the impact of legal exposure as is currently the stated position of the FCPA enforcement agencies.

An FCPA compliance defense would also increase public confidence in FCPA enforcement and allow the enforcement agencies to better allocate their limited prosecutorial resources to cases involving corrupt business organizations and the individuals who actually engaged in the improper conduct. As to this later point, while voluntary disclosures are the single largest source of corporate FCPA enforcement actions, many business organizations that learn through internal reporting

mechanisms of rogue employee conduct implicating the FCPA are hesitant to report such conduct to the enforcement authorities. In such situations, business organizations are rightfully concerned to submit to the DOJ’s opaque and unpredictable decision-making process and are rightfully concerned that its pre-existing FCPA compliance policies and procedures and its good-faith compliance efforts will not be properly recognized. The end result is that the enforcement agencies often do not become aware of individuals who make improper payments in violation of the FCPA and the individuals are thus not held legally accountable for their actions.

More Disclosure Likely. An FCPA compliance defense surely will not cause every business organization that learns of rogue employee conduct to disclose such conduct to the enforcement agencies. However, it is reasonable to conclude that an FCPA compliance defense will cause more organizations with robust FCPA compliance policies and procedures to disclose rogue employee conduct to the enforcement agencies. Thus, an FCPA compliance defense can better facilitate DOJ prosecution of culpable individuals and increase the deterrent effect of FCPA enforcement actions.

An FCPA compliance defense may indeed result in less “hard” FCPA enforcement as certain business organizations will be able to avail itself of the compliance defense. However, an FCPA compliance defense is likely to increase “soft” enforcement of the FCPA through better incentivizing more robust corporate compliance

10: FCPA Inc. Is A Multibillion-Dollar Business

Any company doing business in the global marketplace will encounter several legal and non-legal risks. Risk of violating the FCPA is certainly among these risks, and thus, FCPA compliance unquestionably ought to be on the radar screen of any business organization doing business in the global marketplace. Furthermore, pro-active FCPA compliance policies and procedures, informed by a unique risk assessment, unquestionably need to be implemented.

However, FCPA risk is often over-hyped in an effort to sell more FCPA compliance and investigative services. A candid FCPA practitioner observed:

The FCPA Paparazzi has done a great disservice to the business community. Call it a complete lack of credibility. Legal marketing has become confused in this day and age—marketing has now been turned into the ‘Fear Factor,’ meaning that lawyers need to scare potential clients into hiring them. That is flat-out wrong. Each week, new client alerts, client warnings and other cries of impending disaster are transmitted through the Internet to businesses.⁶⁵

Indeed, one common FCPA Inc. device is to distort actual FCPA statistics by counting DOJ and SEC enforcement actions separately (even though based on the same core set of facts), counting parent company resolution documents separately from subsidiary resolution documents (even though based on the same core set of facts), and counting corporate enforcement actions

⁶⁵ <http://blog.volkovlaw.com/2012/10/five-important-compliance-principles-to-prevent-fcpa-liability/>.

separately from related individual enforcement actions (even though based on the same core set of facts).⁶⁶ It is only through such creative counting methods that certain FCPA Inc. participants arrive at yearly FCPA enforcement actions in the dozens and dozens.

Numbers Tell a Story. The simple fact is that during this new era of FCPA enforcement there have been approximately 10-15 core corporate FCPA enforcement actions per year. Considering that all U.S. business organizations, all foreign companies with shares listed on a U.S. exchange, and certain other foreign business organizations and persons are all subject to the FCPA, you can decide whether such numbers represent boogeyman-like numbers.

Moreover, many FCPA enforcement actions (no matter how garden-variety they are) are often cited in FCPA Inc. marketing material as evidencing a new trend or risk area. In this new era of FCPA enforcement, it seems as if everything is a “sobering reminder,” there is constant speculation as to which industry “is going to be the next target,” and every company is warned to ask itself whether it will be prepared when the “government knocks on the door.”⁶⁷

Indeed, recent FCPA Inc. material included an article titled “Can Chinese New Year and the FCPA Co-Exist?” as well as discussion about the FCPA and other compliance risks of New York City’s Fashion Week.⁶⁸

The fact is FCPA Inc. is a multibillion-dollar industry that is aggressively marketed. Although some may view this as a provocative statement, it is no more provocative than highlighting the business incentives the oil industry has in suggesting that car owners change the oil every 3,000 miles (even though the owner’s manual for the vehicle suggests otherwise) or the business incentives the radar detection industry has in presenting speeding statistics.

⁶⁶ <http://www.fcpaprofessor.com/the-need-for-an-fcpa-lingua-franca-visual-proof>.

⁶⁷ <http://www.fcpaprofessor.com/marketing-the-fcpa-the-fcpa-risks-of-well-just-about-everything>.

⁶⁸ <http://www.law360.com/articles/618186/can-chinese-new-year-and-the-fcpa-co-exist>; <http://www.fcpablog.com/blog/2015/2/10/compliance-alert-five-risks-for-fashion-week-2015.html>.

Informed Decisions. Corporate counsel and others making business decisions on behalf of an organization in how to spend shareholder money on FCPA compliance need to have an informed perspective on this new era of FCPA enforcement, and part of being informed is understanding how FCPA Inc. has become a multibillion-dollar industry.

As stated by Sens. Amy Klobuchar (D-Minn.) and Christopher Coons (D-Del.) in the aftermath of the Senate’s 2010 FCPA hearing:

It has become apparent that too many companies are devoting a disproportionate amount of resources to FCPA compliance and internal investigations. To be clear, it is both necessary and desirable that companies pay adequate attention to compliance efforts, and in certain cases, adequate anti-corruption initiatives may require a significant corporate commitment. Over-compliance, however, can have a negative effect on product development, export promotion, and workforce expansion.⁶⁹

Indeed, in prior FCPA guidance, the SEC recognized that the public is not well served by “overly-burdensome compliance systems which extend beyond the requirements of sound management or the polices embodied” in the FCPA.⁷⁰

On this issue, refreshing words were offered by an FCPA practitioner who stated:

Over the past five years, the [FCPA] has solidified itself as an industry brimming with expert forums, company departments and substantial news coverage. Is this statute really the bear in the woods some say it is? [. . .] The existence of the FCPA industry (and professionals who are available to conduct internal investigations at a high price) does not mean that this reaction is what is always required. What is required first and foremost is reasonable judgment exercised by directors and professionals who seek both compliance and solutions—without assuming a bear is present at every turn.⁷¹

⁶⁹ <https://www.scribd.com/doc/81899022/Letter-to-AG-Holder-From-Senators-Klobuchar-and-Coons-Regarding-FCPA-Guidance>.

⁷⁰ SEC release No. 17500 (Jan. 29, 1981).

⁷¹ Pamela Marple, NACD Director Advisory, *The FCPA: A New Bear in the Woods?* (July 19, 2012).