

Corporate and M&A Law

Bribery of Foreign Officials [FCPA]

The FCPA in 2011 and Beyond: Is Targeted FCPA Reform Really the “Wrong Thing at the Wrong Time”?



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On November 8, 2011, Assistant Attorney General Lanny Breuer addressed the 26th National Conference on the Foreign Corrupt Practices Act (FCPA or the Act). AAG Breuer first noted that 2011–like 2010–witnessed boundary-pushing FCPA enforcement actions, with more FCPA trials than in any prior year and the longest prison sentence (15 years) ever imposed under the FCPA.¹

AAG Breuer then spent the balance of his time addressing the increasingly vocal calls by respected industry leaders and groups, and former DOJ and SEC officials and fraud prosecutors, including former Attorney General Michael Mukasey on behalf of the U.S.

Chamber of Commerce, urging Congressional action to (1) more clearly define the scope of the FCPA and (2) carve out certain limited defenses on public policy grounds.²

While assuring the attendees that he was open to clarifying or improving the Act, AAG Breuer stated unambiguously that the government has “no intention whatsoever of supporting reforms whose aim is to weaken the FCPA and make it a less effective tool for fighting foreign bribery.” According to AAG Breuer, “watering down” the FCPA—for instance, by removing the successor liability component—would only serve “to send exactly the wrong message” to countries who view the United States as an anti-corruption role model. In short, according to Breuer, “[t]his is precisely the wrong moment in history to weaken the FCPA.”

Perhaps to partially mute the growing calls for reform targeted at increasing the FCPA’s clarity and providing greater enforcement predictability, AAG Breuer promised to release detailed guidance in the coming year: “[I]n 2012, in what I hope will be a useful and transparent aid, we expect to release detailed new guidance on the Act’s criminal and civil enforcement provisions.” AAG Breuer cautioned, however, that “whether or not certain clarifications to the Act are appropriate, now is the time to ensure that the FCPA remains a strong tool for fighting the ill effects of transnational bribery.”

As of this writing the extent to which the promised guidance will serve to clarify the Act and more precisely define DOJ and the SEC’s enforcement powers is unknown, and we certainly do not want to second-guess those efforts here. That said, certain reforms—some of which may well be addressed in the forthcoming guidance—appear to be both called for and appropriate. Moreover, there are good reasons to believe that targeted, common sense reforms will not unsuitably “water down” the FCPA. Reforms,

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such as including an adequate compliance program defense are likely to encourage companies to implement rigorous training and compliance programs most likely to head off misconduct at the pass.

The Numbers Speak for Themselves

As AAG Breuer hinted, 2011—though not as historic as 2010—was another exceptional year for the FCPA enforcers. Indeed, in just a few short years, the FCPA has developed from a once-obscurer, largely unenforced criminal statute into one of the hottest, if not the hottest, legal issue facing the global business community. And this transformation was anything but accidental.

On November 17, 2009, AAG Breuer recapped the government’s 2009 FCPA enforcement efforts, noting that “[o]ne can say without exaggeration that this past year was probably the most dynamic single year in the more than thirty years since the FCPA was enacted.”³ Offering his follow-on FCPA retrospective during a November 16, 2010 speech, Breuer described a prosecutorial sea change: “We are in a new era of FCPA enforcement.”⁴ And the 2010 enforcement statistics certainly bore him out, underscoring that the FCPA without doubt ranked as one of the government’s top enforcement priorities.

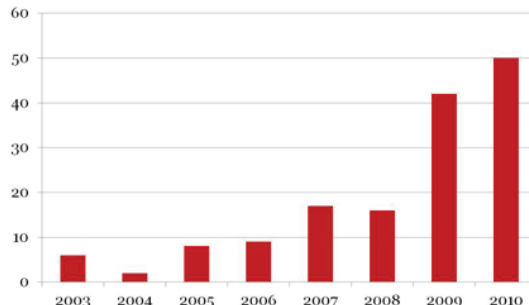
Earlier this year, Breuer confirmed the government’s intention to continue the accelerated FCPA enforcement efforts:

[I]n the Criminal Division, we have dramatically increased our enforcement of the Foreign Corrupt Practices Act in recent years. That statute, which was once seen as slumbering, is now very much alive and well. . . . We recently promoted a new head of the Section’s FCPA Unit and two assistant chiefs, and we have also increased the number of line prosecutors in the Unit, attracting high caliber attorneys with extensive experience—including Assistant U.S. Attorneys with significant trial and prosecutorial experience and attorneys from private practice with defense-side knowledge and experience. These changes have significantly increased our FCPA enforcement capabilities.⁵

SEC Director of Enforcement Robert Khuzami reinforced AAG Breuer’s comments: “Word is getting out that bribery is bad business, and we will continue to work closely with the business community and our colleagues in law enforcement in the fight against global corruption.”⁶

Historical context undoubtedly gives the recent enforcement stats and governmental pronouncements some added punch. First, ever-potent individual prosecutions under the FCPA have dramatically increased in recent years. In 2004 and 2005, DOJ charged seven individuals under the FCPA, collecting criminal fines of roughly \$27.5 million. In 2010, by contrast, the government resolved more than 20 FCPA enforcement actions, with some additional 29 defendants awaiting trial.

Individual Prosecutions on the Rise

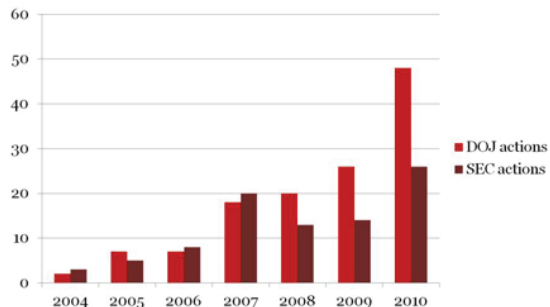


DOJ Criminal FCPA Actions Brought Against Individuals

Source: DOJ

Indeed, as widely noted, overall FCPA enforcement continues to hit new records. Consider that 2010 and 2011 witnessed eight of the ten largest FCPA settlements in history (the remaining two occurred since 2007). And the trend continued in 2011, which saw the longest prison sentence—15 years—ever secured under the FCPA⁷ and the largest forfeiture imposed on an individual in the FCPA history—\$149 million.⁸ Both DOJ and the SEC, moreover, announced plans to augment their dedicated FCPA resources.

U.S. Government Enforcement Actions



Summary of DOJ and SEC Enforcement Actions Brought Between 2004 and 2010.

Source: DOJ, SEC

Corporations fared little better in 2011. Although 2011 struggled to keep pace with the incredible numbers set in 2010 (corporate fines/disgorgements in the eight largest 2010 FCPA enforcement cases alone amounted to more than \$1.53 billion), there were a number of significant FCPA settlements in 2011, including settlements by JGC Corporation of Japan⁹ (\$218.8 million in criminal fines) and Johnson & Johnson¹⁰ (\$70 million in criminal fines, disgorgement and prejudgment interest).

But the gross 2010 and 2011 prosecution figures are not the only cause of the expanding sense of concern permeating the world's corporate boardrooms. A number of emerging enforcement trends promise that, while 2010 and 2011 were certainly milestone years for FCPA enforcement, 2012 will almost certainly witness a continuation of these ramped-up enforcement efforts:

- Multi-jurisdictional cooperation and parallel investigations and prosecutions are becoming routine.
- Transnational “carbon copy” prosecutions are gaining momentum.¹¹
- With reportedly over 150 open/pending investigations, investigative approaches and techniques are growing increasingly proactive and aggressive (with violations of the FCPA being investigated like “real” crimes, including undercover agents and informants, electronic surveillance, and court-authorized searches and seizures), promising more indictments and more trials.
- Whistleblower bounty provisions have been fine-tuned to lure in additional tipsters.¹²
- The prosecution of individual defendants continues to be a top enforcement priority.
- Law enforcement agent specialization has promoted more effective industry-specific enforcement.
- The “demand side” of the enforcement net is being widened to also catch bribe recipients and those middlemen who assist them.
- Congress now seeks to require mandatory debarment of governmental contractors found to be FCPA violators.¹³
- Increased compliance and promises of leniency encourage self-disclosure.

A glance beyond U.S. borders illustrates U.S. dominance in the anti-corruption arena. In 2010, the United States outpaced the rest of the world's collective enforcement efforts by a 3:1 ratio. The United States continues to file more than 70 percent of the world's foreign anti-bribery charges; in the distant second place is the UK, with 4.3 percent of prosecutions. Stated plainly, from 2000 to 2010, U.S. enforcers brought over 3.5 times more bribery enforcement actions than all other countries in the world combined.¹⁴

Such statistics serve to erase any lingering doubt as to whether the quotidian pronouncements of U.S. enforcement earnestness are more pivot than carousel.

Why Foreign Policy Considerations Should Not Doom U.S. Domestic Reform

– Reminiscences from the 1L Classroom

Even assuming, as AAG Breuer during his 2011 speech appears to have done, that some of the FCPA's statutory provisions could potentially benefit from fine-tuning, are critics right to be so

concerned? And if the Act's clarity and predictability could, in fact, be enhanced by way of some legislative tweaking, shouldn't our collective unease about sending the “wrong message” to other nations who are following our anti-corruption lead trump any such domestic worries? To answer these questions, we should go back to criminal law basics.

Since the time of the Norman Invasion of England, theorists and practitioners alike have understood that there is a difference between criminal and civil law, and that there are good reasons to draft criminal statutes particularly precisely—and to interpret them narrowly—in order to ensure even and predictable enforcement, and to correspondingly serve the democratic goal of sensibly limiting prosecutorial discretion.

From the analytical theorist's perspective, the criminal law, after all, carries with it unique condemnatory power.¹⁵ At its core, for something to be a crime, the undesirable “guilty” act (*actus reus*) must be combined with a guilty mind (*mens rea*). This common conception of the criminal law (1) places societal condemnation on the bad actor by punishing the “guilty mind,” while at the same time (2) seeking to specifically and generally deter future misconduct.

Indeed, as recently as February 14, 2011, the American Bar Association, in the context of the U.S. Sentencing Guidelines for economic crimes, highlighted the need to “plac[e] greater emphasis on . . . *mens rea* and motive in relation to an offense . . .”¹⁶ The point here is that whenever we dispose of, or undermine, the guilty mind requirement we threaten to neuter the criminal law's condemnatory and related deterrent functions.

Stated simply, the rules of criminal conduct must be both known and understood, and be capable of guiding persons or companies who want to remain law-abiding. Providing fair notice and uniformity in application, gaining compliance, and reducing the potential for abuse of discretion are, after all, universal rationales urging precise and thoughtful statutory drafting which, *ipso facto*, limits prosecutorial discretion.

The rule-of-law driven question, thus, has never been, and should never be, whether today's enforcers will fairly and ethically interpret a particular section of ambiguous statutory language.¹⁷ Such a perspective gives unduly short shrift to the core purpose and function of the criminal law, as reflected in thoughtful and nuanced statutory drafting.

– Foreign Policy Considerations Are Not Fundamentally at Odds with a Clear and Transparent FCPA

Moving from the general to the specific, good public policy and due process considerations counsel that, when we evaluate the sufficiency of a criminal statute such as the FCPA, we should not leave problem areas unreformed simply because of the possibility that such reforms are capable of being misconstrued by foreign observers. Indeed, for those of us personally experienced in the challenging effort to promote the rule of law in developing and post-conflict jurisdictions—that is, those countries in which

corruption is most rampant—the notion that, as a rule, slight adjustments to U.S. law could cause wholesale abandonment of reform efforts elsewhere is subject to dispute.

Consider, for example, that the FCPA, despite being over 30 years old and predating other jurisdictions’ laws, in many respects forms the enforcement vanguard. That said, as the following chart illustrates, other countries have clearly not exactly adopted the FCPA’s provisions chapter and verse:

ANTI-BRIBERY LEGISLATION COMPARISON CHART

ISSUE	U.K. BRIBERY ACT (2010)	U.S. FCPA (1977)	GERMAN ANTI-BRIBERY LAWS (1998, 2002)¹⁸	CHINESE ANTI-BRIBERY LAWS (1979, Amended 2011)	INDIA’S PREVENTION OF CORRUPTION ACT (1988)
<i>Is bribery of foreign public officials illegal?</i>	Yes, but unlike FCPA excludes political parties, party officials, and candidates for office from definition of “foreign public official.”	Yes	Yes, under the EU Anti-Bribery Law (EUBestG) and the Act on Combating International Bribery (IntBestG). However, the EUBestG only applies to member states of the EU, while the IntBestG covers only active bribery in international business transactions.	Yes	No
<i>Is commercial bribery and bribery of domestic officials illegal?</i>	Yes	No ¹⁹	Yes	Yes	Yes, but the PCA only prohibits bribery of domestic officials. ²⁰
<i>Can the recipient of a bribe be prosecuted?</i>	Yes	No	Yes	Yes	Yes

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<p><i>What is the requisite intent for liability to attach?</i></p>	<p>Bribing <i>another person</i> (Section 1) and offenses relating to being bribed (Section 2) require basic knowledge and the intent to “bring about improper performance.”²¹</p> <p>Bribery of a <i>foreign public official</i> (Section 6) requires the intent to influence the official so as to obtain/retain business or a business advantage.</p> <p>The “Corporate Offense” of <i>failing to prevent bribery</i> (Section 7) is a strict liability offense not requiring any <i>mens rea</i>. However, there is a statutory defense of the existence of “adequate systems and controls.” The burden of proof for the defense is the “balance of probabilities.”²²</p>	<p>The FCPA requires the accused to have acted “willfully,” “knowingly,” and “corruptly.” Knowledge, moreover, is defined to include “conscious disregard” or “willful blindness.”</p>	<p>Official Bribery: German criminal law requires that the bribe be offered or accepted in connection with the official’s discharge of an official duty or the past or future performance of an official act that violates his official duties.</p> <p>Commercial Bribery: To be guilty of active commercial bribery, the defendant must have acted “for competitive purposes” to obtain “an unfair preference in the purchase of goods or commercial services.” Passive commercial bribery requires the recipient to accept (or allow to be promised) a bribe “as consideration for according an unfair preference to another in the competitive purchase of goods or commercial services.” Finally, active commercial bribery of foreign officials requires the defendant to act “in order to obtain or retain . . . business or an unfair advantage in international business transactions.”</p>	<p>Under Chinese criminal law, the party giving a bribe must be seeking “improper benefits” (or “improper commercial benefits” for bribes of foreign officials), whereas the recipient must intend to use his or her power, authority, or position to seek a benefit for the briber. However, as a practical matter, intent is often presumed, especially if the bribe at issue is “relatively large” (generally over RMB10,000, or about \$1,500) or can be characterized as a “kickback” to a State entity or personnel.</p>	<p>The PCA requires that the “gratification” or valuable thing be offered or given as a motive or reward for performance or non-performance of an official act. Motive is presumed upon proof that the defendant offered or received any gratification or valuable thing.</p>

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<i>Can companies be held criminally liable?</i>	Yes	Yes	No, but legal <i>entities</i> can be subject to <i>administrative</i> fines under the Administrative Offenses Act (OWiG). In addition, individual corporate officers can be subject to criminal investigation and prosecution for their conduct on behalf of the corporation.	Yes	Yes
<i>Is there a “facilitation/grease payments” exception?</i>	No	Yes, the FCPA technically exempts small facilitation payments made to expedite or secure the performance of “routine governmental action.” That said, the exception is <i>extremely</i> narrow.	No	No	No
<i>Is failure to keep accurate books and records an offense?</i>	Although there is no such specific offense, the failure to keep accurate books and records could be interpreted as signifying a failure to have “adequate procedures” in place.	Yes, public companies and other “issuers” ²³ are required to file periodic reports with the SEC and to maintain accurate books and records.	No	No	No

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<i>Are “promotional expenses” exempt?</i>	No, but the UK Ministry of Justice’s Guidance announced that “[t]he Government does not intend for the Act to prohibit <i>reasonable and proportionate hospitality and promotional or other similar business expenditure</i> intended for these purposes.” ²⁴	Yes, the FCPA provides an affirmative defense for payments that are reasonable and bona fide business expenses (1) directly related to the promotion, demonstration or explanation of products or services, or (2) incurred in connection with the execution or performance of a contract with a foreign government or agency.	No	No, but there is a monetary threshold for criminal prosecution: RMB10,000 (approximately \$1,500) for an individual or at least RMB200,000 (approximately \$30,000) for an entity.	No
<i>Is the law applied extraterritorially?</i>	Yes, both individuals and companies may be liable under Section 1 and 2’s “general offenses” committed outside the UK, provided the company or individual has a “close connection” with the UK (that is, if they are UK citizens, residents, or incorporated in the UK). Section 7’s corporate offense of failing to prevent bribery applies to UK entities and anybody who “carries on a business, or any part of a business” in the UK.	Yes, the FCPA applies to acts by U.S. issuers, domestic concerns, and their agents and employees that occur wholly outside the U.S., and to acts by U.S. citizens or residents wherever they occur.	Yes, German criminal law applies to offenses committed “against a German” outside of Germany, and to offenses committed outside of Germany by a German individual. In addition, German companies can be held administratively liable for violations committed abroad by the company or its subsidiary.	Yes, Chinese criminal law applies to all PRC citizens (wherever located), all individuals in China, foreign nationals who commit crimes outside of China against the state or its citizen, and all companies, enterprises, and institutions organized under PRC law, including PRC domestic companies, joint ventures (including ones involving non-PRC companies), wholly foreign-owned enterprises, and non-PRC companies that have representative offices in China.	Yes, the PCA applies to all offenses committed in India and by Indian citizens outside India.

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<i>Is having robust corporate compliance program a defense?</i>	Yes, if the company can show that it had in place adequate procedures to promote compliance.	No, having a robust compliance programs does not provide a defense to liability. That said, having such a compliance program in place can be considered by the enforcement authorities in making charging and settlement decisions and can result in a reduced fine under the amended Federal Sentencing Guidelines.	No	No	No
<i>Is there a "local law" exception/defense?</i>	Yes, it is a defense if the foreign official is permitted or required under <i>written</i> local law to be influenced in his official capacity by the offer, promise, or gift.	Yes, an affirmative defense is available if payment to foreign official is lawful under <i>written</i> laws and regulations of foreign country.	Yes, as long as the case does not involve a violation of the public official's duty. The offering or acceptance of a benefit is not punishable if the competent public authority previously authorized the benefit at issue or authorizes it upon prompt report by the recipient.	No	No

ISSUE	U.K. BRIBERY ACT (2010)	U.S. FCPA (1977)	GERMAN ANTI-BRIBERY LAWS (1998, 2002) ¹⁸	CHINESE ANTI-BRIBERY LAWS (1979, Amended 2011)	INDIA'S PREVENTION OF CORRUPTION ACT (1988)
<i>What are the potential penalties?</i>	Unlimited fines for individuals and companies. Individuals may be imprisoned for up to 10 years.	<p>Anti-bribery provisions: For corporations, a fine per violation of up to \$2 million or up to twice the bribe paid or benefit sought or received, whichever is greater; for individuals, a fine of up to \$250,000 or up to twice the bribe paid or benefit sought or received, whichever is greater, and up to 5 years in prison per violation.</p> <p>Books and records provisions: For civil violations, up to \$150,000 for individuals and up to \$725,000 for corporations, depending on the circumstances and subject to regulatory inflation factors; for criminal violations, up to \$25 million for corporations, and up to \$5 million and up to 20 years in prison for individuals.</p>	<p>Depending on the specific violation, individuals may be imprisoned for up to 5 years, or up to 10 years in especially serious cases. Fines and/or confiscations or disgorgement may also be ordered.</p> <p>Under the OWiG, violators, including companies, can be fined up to €1 million, and confiscation or disgorgement may also be ordered.</p>	<p>Commercial bribery: The criminal penalty for commercial bribery is criminal detention of up to 3 years in prison if the amount involved is “relatively large”; however, if the amount involved is “huge,” the punishment is 3 to 10 years in prison and a fine. Entities that commit commercial bribery can be fined, and the responsible individuals can be imprisoned for up to 5 years. Asset confiscation and civil liability is also possible.</p> <p>Official bribery: The penalties for official bribery include fines, confiscation of property, and up to life imprisonment, depending on the amount involved. Business licenses may be revoked. In addition, State personnel who accept bribes can be sentenced to death.</p>	<p>The possible penalty for most offenses is 6 months to 5 years in prison, plus a fine.</p> <p>For “habitual” or “particularly corrupt or dishonest misconduct,” the potential punishment is up to 7 years in prison, plus a fine.</p>

Indeed, as the above chart demonstrates, the differences between the various national statutory regimes clearly outnumber the similarities, casting doubt on the view that the FCPA provides the precise mold on which all other anti-corruption laws are modeled.

Remember also that, from 2000 to 2010, U.S. enforcers brought over 3.5 times more bribery enforcement actions than all other countries in the world combined.²⁵ Thus, although the world may, indeed, be watching (and without question passing more local anti-corruption legislation), its collective zeal to actually *enforce* anti-corruption laws continues to significantly lag (and this despite record-shattering U.S. enforcement results). Consider the recent TRACE findings:

Foreign bribery enforcement by countries other than the United States actually fell in 2010, while the United States surged ahead with a more than a doubling of its formal enforcement figures between 2009 and 2010. . . . The United States has accumulated over 14 times as many anti-bribery enforcement actions as the country with the next highest total, the United Kingdom. Many countries worldwide have not pursued a single enforcement action in the 34-year period.²⁶

There, thus, is little dispute that the United States is, and will for the foreseeable future continue to be, the global anti-corruption leader. We, moreover, see scant evidence that foreign countries with a genuine interest in stemming corruption will somehow be broadly discouraged from doing so simply because the U.S. Congress decides to provide additional clarity and fair notice as to the scope of the FCPA, or otherwise modify the Act to limit what many view as liability sounding more in regulatory than in criminal law. After all, 2010 and 2011 saw the DOJ and SEC enforcing the FCPA with truly historic vigor, yet other countries continue to march to their own enforcement drum.

A Closer Look at the Reform Targets

There is near-universal agreement that the government's FCPA enforcement efforts deserve considerable praise, and that DOJ's designated FCPA Unit has delivered on its promise to take anti-corruption seriously. Those of us who served as front-line government attorneys championing the fight against foreign corruption will, indeed, find great truth in AAG Breuer's November 8, 2011, comment that "[t]here are few more destructive forces in society than the effect of widespread corruption on a people's hopes and dreams."

That said, certain discrete sections of the FCPA can fairly be viewed as calling for more precise definition (after all, if the precise scope of the FCPA's provisions was crystal clear, then why provide ongoing executive branch guidance?). Such fine-tuning amendments are certainly nothing new—there are, indeed, few bedrock statutory schemes that have not benefited from this type of incremental improvement.

The goal of those calling for FCPA reform is, broadly speaking, to:

1. Remove the guesswork out of whether the DOJ or the SEC would construe certain actions as violating the law;
2. Protect law-abiding companies from the difficult-to-control actions of past or present rogue employees or transaction partners; and
3. Allow global businesses to rely on good corporate governance and a robust culture of compliance to protect their legal and reputational interests.

The moderate reforms discussed herein promise to help achieve these objectives, benefit the business community, and provide much-needed guidance to the government enforcers of the FCPA (namely, DOJ and SEC), as well as to the judiciary.

Examining the FCPA Skirmish Line

As noted during our legislative drafting discussion, there is near-universal agreement that the vacuum created by the FCPA's textual ambiguity has largely been filled by DOJ and SEC's own interpretation of statutory meaning and the extent of their enforcement authority (a policy that, for the reasons discussed in the prior section, is viewed by many as being at odds with fundamental criminal justice principles). Thus, the explosive rise in FCPA enforcement, a relative lack of judicial oversight over deferred prosecution agreements, and a shortage of substantive judicial rulings on the meaning of the FCPA's more controversial (and broadly-worded) provisions means that U.S. enforcers are put in a position of having to serve not only as prosecutors in FCPA matters, but also as quasi-legislators providing substantive content to legislation and as quasi-judges routinely controlling case disposition. The business community, among others, has understandably perceived the resulting enforcement environment as unnecessarily unpredictable. Moreover, there are certain limitations on liability which, for public policy reasons, merit careful consideration.

— Suggestion #1: Provide a Sensible "Adequate Compliance Procedures" Defense

Starting with the possible defenses, the FCPA, unlike the UK Bribery Act 2010, does not provide a corporate defense to criminal liability when a company's employees or third-party agents circumvent existing compliance measures to commit FCPA violations, regardless of how robust those compliance measures are and how genuine a company's culture of compliance may be. The adoption of a UK-style adequate procedures defense, however, promises to increase compliance by providing companies with a substantial and tangible incentive to implement vigorous anti-bribery training and compliance programs, and to identify and self-report potential violations. Indeed, such a defense is generally consistent with the November 2010 amendments to the U.S. Sentencing Guidelines [Section 8B2.1\(b\)\(7\)](#), which now makes

more readily available a long-standing three-level total offense level reduction for companies with “effective compliance [and ethics] programs.”

The proposed adequate compliance procedures defense, at bottom, protects corporations from liability based on the actions of a rogue employee or agent, while at the same time providing needed guidance to investigators and prosecutors. The addition of a compliance defense, moreover, is consistent with Supreme Court precedent recognizing that it is appropriate and fair to limit *respondeat superior* liability where a company can demonstrate that it took specific good-faith steps to prevent the offending conduct.²⁷

– **But What about the Claim that an FCPA Compliance Defense Is Unnecessary?**

Critics of the proposed compliance defense, including the authors of the recent “Busting Bribery”²⁸ white paper, argue that introducing such a defense to knowing and intentional violations of the FCPA will allow a company’s “fig leaf” compliance program to insulate it from liability even if it engaged in knowing and intentional wrongdoing. They further question how even a sound compliance program could ever provide a defense to a knowing violation of the Act. After all, in their view, the compliance scheme permitted, facilitated, or consciously disregarded corrupt, intentional violations of the FCPA—given this, the compliance program must be either *per se* inadequate, or not undertaken in good faith.

Despite some surface-level appeal, it strikes us that, on more careful inspection, this reasoning appears to misapprehend (1) the FCPA’s knowledge requirement, (2) the principle of *respondeat superior*, as well as (3) the nature and scope of the proposed compliance defense.

For one, the FCPA has always contemplated corporate criminal liability under *respondeat superior* principles: liability attaches (or, rather, is imputed) when an employee acts within the scope of his or her duties intending to benefit, at least in part, the organization. As sketched out in the below decision tree, the FCPA has never required knowledge of the employee’s conduct by the board, executive officers, or other high-ranking executives.

The *Busting Bribery* authors’ arguments notwithstanding, under the proposed compliance defense, if the company’s officers knowingly and intentionally violated the FCPA, the company could *not* rely on the compliance defense. On the other hand, if an employee, at any level, engaged in knowing and intentional conduct in violating the FCPA, the company could only rely on the proposed compliance defense to the extent that it had in place pre-existing compliance policies and procedures reasonably designed *and* implemented to prevent and detect, insofar as practicable, the conduct at issue (in other words, under the circumstances, the company could not reasonably be expected to prevent this rogue employee’s misconduct).

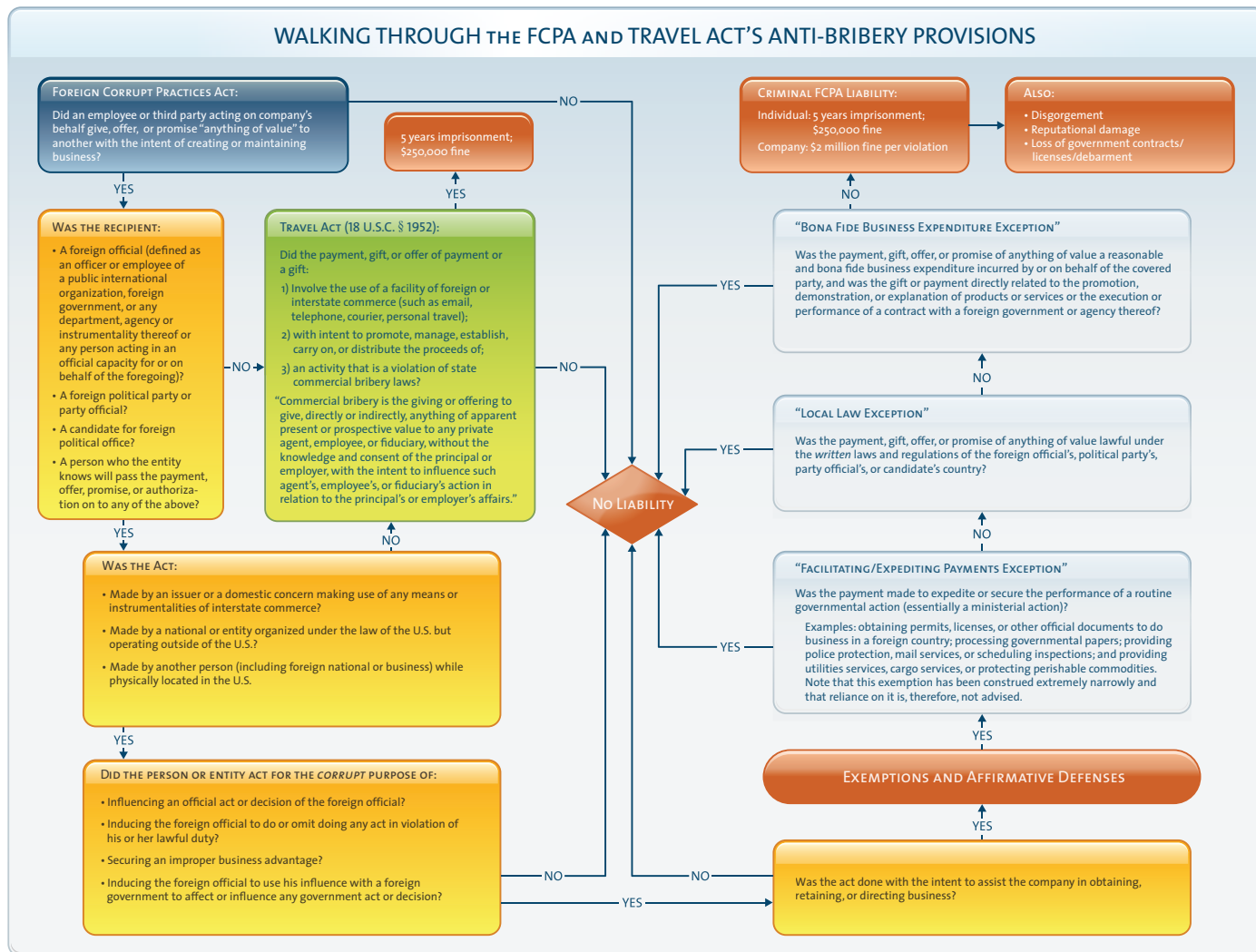
Indeed, the UK Bribery Act 2010, which became effective July 1, 2011, recognizes the importance of encouraging companies to adopt robust compliance programs. Companies able to demonstrate that they have adequate procedures to prevent bribery from occurring are afforded a complete defense to the strict liability charge of failure to prevent bribery. Although the UK Bribery Act and the FCPA operate slightly differently, the inclusion of a UK-style compliance defense is far from a radical concept, and it certainly merits serious consideration.

– **Suggestion #2: Appropriately Limit Successor Liability**

Currently, a company is exposed to criminal and civil FCPA liability for the actions of a company that it acquired or that it is associated with through a merger or acquisition. And it matters not that the acts took place (1) prior to the combination and/or (2) without the knowledge of the acquirer. That the buyer conducted reasonable due diligence before or after a merger or acquisition, moreover, provides no defense even though in such circumstances there is no concern about immunizing a bad actor. There are sound reasons to consider removing criminal corporate liability from such historical violations.

This particular call for reform, once again directed at stemming the spread of “artificial crimes” and enhancing the unique condemnatory power of the criminal sanction, is based on the fundamental criminal law precept that there should be no liability for an individual or company that did not act in concert with the bad actor, and that, therefore, possessed no “guilty mind.” Accordingly, companies conducting reasonable due diligence should not, as a matter of law and as a matter of fairness, be subject to FCPA liability for conduct occurring prior to the merger or acquisition and without the purchaser’s knowledge or acquiescence. Concurrently, the proposed amendment’s good-faith due diligence requirement prevents a bad corporate actor from being immunized (that said, those culpable *individuals* who actually engaged in the criminal misconduct are, of course, always subject to prosecution).

Under the current regime, whether an acquiring company is charged is a matter of DOJ or SEC discretion. At the very least, the government should issue guidance clearly delineating what constitutes sufficient buy-side investigatory due diligence, accounting for reasonable differences based on the risk, size, and complexity of the transaction. (And the 2005 merger of Dimon International Kyrgyzstan and Standard Commercial Corporation to form Alliance One International does not undercut this proposal;²⁹ in that case, two arguably criminal companies came together to form a new company that engaged in crime—such a merger would certainly not meet the proposed amendment’s required good faith due diligence standards).



– Suggestion #3: Establish a Fitting Scope of Corporate Liability for Acts of a Subsidiary

The SEC routinely charges civil violations of the FCPA's anti-bribery provisions based on actions taken by foreign subsidiaries, even when the parent company (1) has no knowledge of the acts, and (2) took no steps to consciously avoid such knowledge. Although concededly the most controversial of the proposals discussed herein, there are sound public policy considerations for why the SEC should not impose such liability when the improper acts were undertaken without the parent's knowledge, consent, assistance, or approval.

Although the SEC certainly has brought such charges, the courts have not weighed in on the SEC's legal theories in the FCPA context. The scope of this basis for liability should be definitively established, particularly since basic *respondent superior* principles counsel against exposing the parent company to liability when

it did nothing to direct or authorize the improper payments in question, and, in fact, took all reasonable steps to prevent such misconduct.

– Suggestion #4: Properly Define "Foreign Official"

Most FCPA enforcement actions necessarily involve improper payments to "foreign officials." Experience teaches, however, that U.S. businesses need a clearer roadmap concerning who can be considered a "foreign official." Nor does the FCPA clearly define what types of entities constitute "instrumentalities" of a foreign government (and neither the DOJ nor the SEC has provided specific guidance regarding what entities qualify as such, though such guidance may be forthcoming). Despite this ambiguity, the government's enforcement actions are routinely predicated on an interpretation that "instrumentalities" of foreign governments

include companies that are state-owned or - controlled (and, ergo, that employees of such state-owned enterprises qualify as foreign officials under the FCPA).

This largely unbounded interpretation of the statute opens the door for potentially bizarre results, such as transforming U.S. citizens who work for American companies with some component of foreign government ownership—a US car company, for example—into “foreign government officials.” Such an outcome is at odds with the FCPA’s extensive legislative history, which reveals a clear congressional intent to criminalize corrupt payments made to persons associated with more traditional foreign government entities, such as “Presidents, Prime Ministers, and Princes.”³⁰

– *Case Law Illustrates Why “Foreign Official” Calls for Precise Definition*

While there have been some recent judicial opinions on the definition of “foreign official,” none of those rulings cast doubt on the need for greater specificity.

On April 20, 2011, for example, Judge Howard Matz in the *Lindsey Manufacturing* case ruled that, “because a state-owned corporation having the attributes of [the Mexican state-owned electric utility] may be an ‘instrumentality’ of a foreign government within the meaning of the FCPA . . . officers of such a state-owned corporation . . . may therefore be ‘foreign officials’ within the meaning of the FCPA.”³¹ The court, in handing down its ruling, set forth a “non-exclusive list” of factors to be considered when determining whether a particular state-owned enterprise could be considered an “instrumentality” of a foreign government. The fact that a member of the Judicial Branch was tasked with doing the Legislative Branch’s job of attempting to define what “may be” an “instrumentality” should provide little comfort to those who advocate for the legislative *status quo*.

Similarly, consider Judge James Selna’s May 18, 2011 ruling that “a mere monetary investment in a business entity by the government *may not* be sufficient to transform that entity into a governmental instrumentality . . . [But] when a monetary investment is combined with additional factors that objectively indicate the entity is being used as an instrument to carry out governmental objectives, that business entity would qualify as a governmental instrumentality.”³² The Judge thereafter drafted up a list of “factors” that were “not exclusive . . . [and] no single factor is dispositive.” According to the Court, the proposed factors’ “chief utility . . . is simply to point out that several types of evidence are relevant when determining whether a state-owned company constitutes an ‘instrumentality’ under the FCPA—with state ownership being only one of several considerations.” The FCPA, however, is not a common law offense, and judicial efforts to construct their own definitions of key terms, while understandable in the absence of more precise language, are certainly not a bar to Congressional action.

The FCPA, in short, should be modified to clearly define:

1. What percentage of ownership by a foreign government is necessary to qualify a corporation as an “instrumentality”? (*Our suggested answer*: 100 percent);
2. To what extent “control” by a foreign government or official would qualify an entity as an “instrumentality”? (*Our suggested answer*: Total operational control); and
3. Whether ownership by a “foreign official” qualifies a corporation as an “instrumentality,” and, if so, whether the “foreign official” must be of a certain rank, or ownership must reach a certain percentage? (*Our suggested answer*: No).

Reform Is Necessary

As we have seen, the U.S. government’s fortified FCPA enforcement efforts rightfully deserve recognition. That said, recent developments illustrate why certain discrete sections of the FCPA’s statutory language can fairly be viewed as overly broad and inadequately defined. Public policy considerations, moreover, counsel in favor of certain distinct limitations on imputed liability where there is no evidence of the requisite “guilty mind.” These deficiencies too frequently leave the U.S. and foreign business communities (1) inadequately protected from the difficult-to-control actions of past or present rogue employees or transaction partners; (2) having to guess whether certain actions will be construed as violating the law; and (3) unable to rely on good corporate governance and a robust culture of compliance to sufficiently protect their legal and reputational interests. Although there is ample room for good-faith disagreement, this certainly is a discussion worth having.

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¹ Lanny A. Breuer, Assistant Attorney General, *Address to the 26th National Conference on the Foreign Corrupt Practices Act* (Nov. 8, 2011).

² See, e.g., New York City Bar Association, *The FCPA And Its Impact On International Business Transactions—Should Anything Be Done to Minimize the Consequences of the U.S.’s Unique Position on Combating Offshore Corruption?* (Dec. 2011); U.S. Chamber of Commerce, *Restoring the Balance: Proposed Amendments of the Foreign Corrupt Practices Act* (Oct. 27, 2010); ABA *Ponders FCPA Reform*, FCPA Professor Blog (Nov. 8, 2011) (discussing *Proposed ABA Criminal Justice Section Resolution for Limited Reform of the FCPA*, dated October 29, 2011); Mike Koehler, *The Façade of FCPA Enforcement*, 41 *Geo. L.J.* 4 (2010) (“Against the backdrop of aggressive enforcement and the resulting multi-million dollar fines and penalties is the undeniable fact that, in most instances, there is no judicial scrutiny of the FCPA enforcement theories. The end result is that the FCPA often means what the enforcement agencies say it means. Because of the ‘carrots’ and ‘sticks’ relevant to resolving a government enforcement action, FCPA defendants are nudged to accept resolution vehicles notwithstanding the enforcement agencies’ untested and dubious enforcement theories or the existence of valid and legitimate defenses. The end result is often the facade of FCPA enforcement.”); Matthew J. Kovacich, *Backyard Business Going Global*, 32 *Hamline L. Rev.* 529, 559 (2009) (“The DOJ and SEC

have acted in a legislative capacity to unlawfully expand the definitions of key statutory terms and enforce the FCPA in ways that may exceed Congress's intent"). Note also the George Soros Foundation-sponsored Open Society Foundations' must-read response to these arguments, authored by two law professors. See David Kennedy and Dan Danielsen, *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act* (Sept. 2011).

³ Lanny A. Breuer, Assistant Attorney General, *Address to the 22nd National Forum on the Foreign Corrupt Practices Act* (Nov. 17, 2009).

⁴ Lanny A. Breuer, Assistant Attorney General, *Address to the 24th National Conference on the Foreign Corrupt Practices Act* (Nov. 16, 2010).

⁵ Lanny A. Breuer, Assistant Attorney General, *Remarks at the Annual Meeting of the Washington Metropolitan Area Corporate Counsel Association* (Jan. 26, 2011).

⁶ SEC, *OECD Commends U.S. Regulators for Efforts to Fight Transnational Bribery*, Press Release No. 2010-200 (Oct. 20, 2010).

⁷ See DOJ, *Executive Sentenced to 15 Years in Prison for Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti (Longest Prison Term Ever Imposed in an FCPA Case)*, Press Release No. 11-1407 (Oct. 25, 2011).

⁸ See DOJ, *UK Solicitor Pleads Guilty for Role in Bribing Nigerian Government Officials as Part of KBR Joint Venture Scheme*, Press Release No. 11-313 (Mar. 11, 2011).

⁹ See Bloomberg Law Reports®—White Collar Crime, *JGC Corporation Pays \$218.8 Million to Settle FCPA Charges* (Apr. 15, 2011).

¹⁰ See Bloomberg Law Reports®—Risk & Compliance, *Johnson & Johnson Fined for FCPA Violations Involving Payments to Public Doctors* (Apr. 26, 2011).

¹¹ See generally, *The Globalization of Anti-Corruption Law*, FCPA Professor Blog (Aug. 16, 2011) (describing panel at the ABA's 2011 Annual Meeting in Toronto: "[AUSA Andrew S.] Boutros also pointed out an increased trend in what he termed 'carbon copy' prosecutions, a phenomenon where foreign authorities rely on the factual findings emerging out of U.S. enforcement actions to vindicate the local laws of their own jurisdiction—often the site of the bribe payment or bribe receipt").

¹² On May 25, 2011, the SEC issued its final rules to establish a new whistleblower program, as required by Section 922 of the Dodd-Frank Act, paying awards to whistleblowers who voluntarily provide the SEC with original information about a violation of the securities laws, including the FCPA. The amount of the award is required to equal 10 to 30 percent of the monetary sanction. See generally T. Markus Funk, *Meeting (and Exceeding) Our Obligations: Will OECD's Anti-Bribery Convention Cause the Dodd-Frank Act's "Whistleblower Bounty" Incentives to Go Global?*, 5 BNA White Collar Crime Report (Oct. 8, 2010).

¹³ See *To require the proposal for debarment from contracting with the Federal Government of persons violating the Foreign Corrupt Practices Act of 1977*, H.R. 3588, 112th Cong.

¹⁴ TRACE Global Enforcement Report 2011.

¹⁵ German law, for example, rather usefully distinguishes between "Strafrecht" and "Straftaten" (criminal law and crimes) and "Ordnungswidrigkeitenrecht" and "Ordnungswidrigkeiten" (regulations and violations). The American Law Institute's Model Penal Code, likewise, distinguishes between "crimes" and "violations."

¹⁶ American Bar Association, *Resolution* (calling for review of sentencing guidelines for economic crimes) (Feb. 14, 2011).

¹⁷ To the contrary, and perhaps because one of the authors himself for a decade served as a federal prosecutor, we frankly have a bias *in favor* of the view that the instances of purported DOJ or SEC "abuses" are notable outliers.

¹⁸ Note that on February 15, 1999, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and its implementing legislation went into force in Germany.

¹⁹ However, acts of commercial bribery may trigger U.S. *Travel Act* liability, as well as books and records liability under the FCPA if there are record-keeping problems.

²⁰ Indian law focuses on the recipient of a bribe. A briber, however, can be held criminally liable as an abettor to a public official's criminal acceptance of a bribe.

²¹ The test of whether a person intended to induce another to perform improperly is what a reasonable person in the UK would expect another to do in relation to the performance of that particular function or activity. See UK Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)* (Guidance), at 10.

²² Guidance at 15.

²³ See 15 U.S.C. §§ 78m & 78dd-1.

²⁴ Guidance at 12 (emphasis added).

²⁵ TRACE Global Enforcement Report 2011, *supra* n.14.

²⁶ *Id.* at 2-3 ("Just 24 countries have pursued enforcement of their foreign bribery laws and just 40 have pursued enforcement of their domestic bribery laws against foreign citizens or companies in the last 34 years. There is considerable overlap in the countries that have pursued both.")

²⁷ See generally, *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999) ("An employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good faith efforts to comply with Title VII.'" (citation and quotation omitted)); see also DOJ revised *Principles of Federal Prosecution of Business Organizations*, announced by Deputy Attorney General Mark R. Filip on August 28, 2008 (making existence of a bona fide compliance program a factor in the government's decision whether to charge a corporation).

²⁸ See *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act*, *supra* n.2.

²⁹ See generally, *More on Alliance One and Universal*, FCPA Professor Blog (Aug. 25, 2010).

³⁰ See generally, *Statement on Signing S. 305 Into Law* (Dec. 20, 1977, statement by President Jimmy Carter) ("Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments . . .").

³¹ See *Noriega*, Criminal Minutes – General (filed Apr. 20, 2011). Although a jury convicted Lindsey Manufacturing and the individual defendants on all counts, Judge Matz recently threw out the convictions and dismissed the indictment due to prosecutorial misconduct. See *Noriega*, Order Granting Motion to Dismiss (filed Dec. 1, 2011) and Order Granting Application for Order on Stipulation re Defendant Angela Maria Gomez Aguilar (filed Dec. 13, 2011).

³² See *U.S. v. Carson*, No. 09-cr-00077, Criminal Minutes – General (C.D. Cal. filed May 18, 2011).