Triple-Barrelled Critique of U.S. Foreign Anti-Corruption Efforts

— But is there Cause for Concern?

By T. Markus Funk and Caryn Lara Trombino

Following swiftly on the footsteps of the Organization for Economic Cooperation and Development's (OECD's) laudatory October 15, 2010, Phase 3 Report evaluating the effectiveness of U.S. global anti-bribery efforts—which concurrently flagged discrete areas in need of reform—the U.S. Chamber of Commerce, as well as global anti-corruption watchdog Transparency International (TI), joined the chorus to launch criticism at U.S. anti-corruption efforts. While TI's critique is generalized and short on substance, the Chamber of Commerce and OECD reports serve up nuanced examinations of the Foreign Corrupt Practices Act's (FCPA's) shortcomings, and offer proposals for improvement. These findings, despite some arguable flaws, are not easily dismissed.

OECD, While Generally Praising U.S. Anti-Corruption Efforts, Also Recommends Reform

The historic 1997 OECD "Convention of Combating Bribery of Foreign Public Officials in International Business Transactions" has been adopted by some 38 countries. The Convention was the first to announce standards criminalizing foreign bribery.

And the OECD's efforts to encourage compliance are bona fide. Instead, the OECD carefully conducts an all-things-considered review of each signatory county's anti-bribery performance. OECD's "Phase 3" review assesses the progress made by member countries to the Convention, focusing on efforts made to correct weaknesses that were identified in Phase 2, to evaluate issues raised by changes in legislation, and to report on enforcement initiatives and results. The U.S. and Finland represent the first two countries to undergo the Phase 3 review. Having conducted this review, the OECD report rather vigorously lauds U.S. anti-corruption efforts as a model to be followed by other countries. This undoubtedly pleases DOJ officials.

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That said, the report also recognizes that businesses—and their legal advisors—face significant uncertainly due to the FCPA's lack of clarity regarding the scope and application of certain key provisions, as well as because of distinct enforcement realities. Specifically, the OECD's reform proposals advise the U.S. government to:

1. Boost efforts to raise FCPA awareness, and increase deterrence and bribery detection, among small-to-medium-size businesses.
2. Increase attentiveness to need to pursue books and records violations under the FCPA, including offense of misreporting facilitation payments.
3. Spell out that state-owned or state-controlled enterprises, persons holding judicial offices in a foreign country, and persons or institutions — such as state-controlled or state-owned enterprises exercising a public function for a foreign country — qualify as "foreign officials" for FCPA purposes.
4. Subject deferred prosecution agreements to greater judicial scrutiny.
5. Provide mechanisms for judicial screening of non-prosecution agreements.
6. Amplify transnational law enforcement cooperation and evidence sharing to enhance transnational gains in the global anti-bribery fight.
7. Extend the FCPA's statute of limitations to 10 years to permit adequate time for investigation and prosecution of these complex financial cases.
8. Lessen business and legal community uncertainty by more clearly defining what qualifies as a "facilitation payment."
9. Enhance transparency, public understanding, and compliance by explaining when, how, and why DOJ and SEC use plea agreements, deferred prosecution agreements and non-prosecution agreements and what circumstances trigger the decision to require corporate monitors.
10. Increase use of debarment and arms export license denials for companies engaging in foreign fraud.
11. Consolidate, summarize, and make publicly available information on the real-world charging decisions concerning the FCPA, as well

as the affirmative defense of reasonable, *bona fide* expenses.

12. Revise Criminal Resource Manual to explicitly state that the "business nexus test" includes bribes to foreign public officials to (1) obtain or retain business and (2) gain some other improper advantage in the conduct of international business.

The OECD report concludes that "FCPA enforcement figures are expected to increase in the near future." Considering this prognosis, the time to address these concerns is now.

TI's Corruption Perceptions Index Drops U.S. Out of Top 20 …But Offers No Explanation

Some ten days after the publication of the OECD Phase 3 report, TI released its annual Corruption Perceptions Index. The Index, first issued in 1995, ranks 178 countries based on independent surveys on corruption. It is an aggregate indicator, ranking countries in terms of the degree to which corruption is *perceived* to exist among public officials and politicians. In compiling its rankings, TI relied on 13 surveys, published by 11 separate institutions in 2009 and 2010.

The 2010 Index heralds Demark as the least corrupt, and Somalia as the most corrupt—but global headlines immediately narrowed in on the U.S.'s three-level decline. The U.S. ranking fell from 19th to 22nd place, marking the first time since the Index's inception that the U.S. has not been ranked in the "top 20" of least corrupt nations.

But does this drop in the rankings signal a cause for alarm? Although the media tends to imbue TI's Index with a quasi-scientific legitimacy, in reality, the Index relies on non-standardized and frequently imprecise surveys, many of which vary dramatically in terms of completeness and methodology. TI's fine print reflects an appreciation of the index's shortcomings: "Year-to-year changes in a country/territory's score can result from a change in the perceptions of a country's performance, a change in the ranking provided by original sources or changes in the methodology resulting from TI's efforts to improve the index."

Stated simply, the global media spotlight on TI's rankings belies the Index's more limited corresponding substantive support. When viewed with greater scrutiny, TI's reduction of the U.S. ranking offers little, if any, commentary about the pace, earnestness, or effectiveness of U.S. domestic or international anti-corruption efforts. While the OECD report points to specific areas needing reconsideration and reform, the TI report provides little more than relative rankings that rely on generalized data and an unreliable methodology.

Chamber of Commerce's Highly-Critical Report Calls for Improved Clarity and Fairness of FCPA Enforcement

Additional criticism of the FCPA is brought to the fore by a report issued shortly after the TI Index. Two days after the release of the 2010 TI rankings, the Chamber of Commerce released a paper proposing five discrete amendments to the FCPA. The paper, "Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act," forcefully argues that the FCPA's textual ambiguity, coupled with overly-expansive U.S. enforcement authority interpretation, have spawned an enforcement environment overly hostile to U.S. businesses. And although the Chamber of Commerce takes a decidedly stronger "pro-business" stance on enforcement than the OECD report, in several instances both entities recommended markedly similar areas for improvement or amendment of the FCPA.

The central theme of the Chamber of Commerce's paper flows from a frequently-cited problem—namely, that despite the explosive rise in FCPA enforcement, there is minimal *judicial* oversight and rulings on the meaning of the FCPA's provisions. The argument is that the primary statutory interpretive function of the FCPA's provisions is being performed almost exclusively by the DOJ Fraud Section and the SEC—which effectively means that U.S. regulators worryingly serve as both prosecutor and judge for FCPA matters, given that they often control case disposition.

The Chamber of Commerce argues further that U.S. enforcement agencies are overly aggressive in their reading of the law and in their DOJ opinion releases, as well as in their exercise of prosecutorial discretion; DOJ, for example, has recently expanded its definition of criminal FCPA *mens rea* to encompass culpability based on "conscious avoidance," and has also begun to expand its jurisdictional nexus. Many critics agree with the Chamber of Commerce's position that the FCPA's ambiguity is chilling to U.S. business. Indeed, several companies have opted to cease foreign operations in the face of uncertain FCPA enforcement.

The modifications proposed by the Chamber of Commerce are calculated to provide businesses with a clearer roadmap to what is—and what is not—a violation, and to introduce clarity to the often murky

local environments in which it is not immediately apparent whether an individual is a "foreign official" under the Act. The Chamber of Commerce calls on members of Congress to make several improvements to the FCPA, to better enable companies that *want* to be compliant to be able to do so.

The five chief recommendations can be summarized as follows:

1. *Add a compliance defense*. The FCPA—unlike Britain's Bribery Act of 2010—does *not* provide a defense to criminal liability when a company's employees or agents circumvented compliance measures to commit FCPA violations. The adoption of such a defense will increase compliance by providing companies an incentive to deter, identify, and self-report potential violations, and will also protect corporations from liability based on the actions of a rogue employee. A defense for a robust and rigorous FCPA compliance and ethics program will provide companies a measure of protection from overly-aggressive prosecutors.
2. *Limit liability for prior acts of an acquired company*. Companies may be held criminally liable under the FCPA for the actions of a company that it acquired or is associated with through merger, even when the acts took place prior to the combination and without the knowledge of the acquirer. The proposed "legislative fix" for successor liability is to not hold a company criminally liable for such historical violations—regardless of whether or not it conducted reasonable due diligence before and/or after an acquisition or merger—based on the basic criminal law principle that the company did not act in concert with the bad actor. Furthermore, companies conducting reasonable due diligence should not, *as a matter law*, be subject to liability; under the current regime, a company may not be deemed liable as a matter of DOJ or SEC *discretion*. To that end, guidance should be issued to clearly delineate what constitutes sufficient investigatory due diligence, allowing for differences based on the risk, size and complexity of the deal.
3. *Add "willfulness" requirement for corporate criminal liability*. As the FCPA currently stands, a company can face criminal penalties when it (and its employees) did not know that the conduct was unlawful or wrong. Corporations should be held to at least the same *mens rea* standard as individuals under the Act—and individual liability requires willful conduct.
4. *Limit liability for acts of 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 is entirely ignorant of the acts. The SEC has not identified the basis on which it is authorized to do so, particularly when the improper acts were undertaken without the parent's knowledge, consent, assistance or approval. Although the SEC has brought such charges, the legal theory has not been tested by the courts, due to resolution through settlement agreements. The scope of this potential liability should be definitively established.
5. *Define "foreign official" under the statute*. The FCPA does not define what types of entities constitute "instrumentalities" of a foreign government, although officers or employees of such fall entities within the definition of "foreign official." DOJ and the SEC have provided no specific guidance regarding what entities qualify as instrumentalities, but their enforcement actions indicate that the term is interpreted broadly to include payments to companies that are state-owned or controlled. The FCPA should be modified to clearly define (i) what percentage of ownership by a foreign government is necessary, (ii) whether ownership by a foreign official qualifies a corporation as an "instrumentality" (and, if so, must the official be of a certain rank, or must ownership reach a certain percentage), and (iii) to what extent "control" by a foreign government or official will qualify an entity as an "instrumentality."

Final Analysis: TI Rankings Offer Limited Substantive Value, But OECD and Chamber of Commerce's Reports Deliver Welcomed Analytical Punch

Both the OECD report and the Chamber of Commerce's paper emphasize that, despite the precipitous increase in FCPA enforcement, the judiciary has been only minimally called on to provide oversight of deferred prosecution agreements, or to issue rulings clarifying the meaning of the FCPA's murkier provisions. A basic tenet of the criminal law is that the proscription should be as comprehensible as possible, offering a clear the path to compliance. The modifications proposed by the OECD and the Chamber of Commerce are designed to, at bottom, identify for businesses what is legal and what is illegal. While one can certainly argue over the particulars of the

recommendations, FCPA reform is a virtual certainty– and for good reason. The OECD and Chamber of Commerce recommendations offer a sound starting point for this discussion.

Full text of the OECD Phase 3 report: www.oecd.org/dataoecd/10/49/46213841.pdf
Full text of the Chamber of Commerce Report: http://www.instituteforlegalreform.com/images/stories/documents/pdf/research/restoringbalance_fcpa.pdf
Full text of the TI report:http://www.transparency.org/content/download/55725/890310/CPI_report_ForWeb.pdf

Roundtables, *continued from page 1*

papers were presented and discussed at each participating law school.

Topics ranged from the fundamental question of "The Role of the Standards" addressed in Ellen Podgor's paper to their specific application with respect to the "Lawyers' Role in Specialized Courts" addressed in Ben Kempinen's.

"Roundtable" discussions at the American University, organized by Angela Davis, Cynthia Jones and Jenny Roberts.

Several authors wrote about disclosure: Kevin McMunigal on "Candor and Disclosure," Cecilia Klingele on "Confidentiality and Disclosure," and Ellen Yaroshefsky on "Pretrial and Trial Disclosure of Evidence and Information to the Defense."

Others addressed ethical aspects of lawyers' relations and interactions with each other or with third parties: Stacy Caplow and Lissa Griffin on "Relations with Opposing Counsel," Andrew Taslitz on "Relations with the Media," and Melanie Wilson on "Providing Advice or Information to Third Parties."

Ethics questions pertaining to specific tactical issues were addressed in Ben Gershman's "Exercising Charging Discretion and Maintaining Charges," in Bobbi Flowers' "Witness Interviewing, Preparation and Presentation of Testimony," in Rod Uphoff's "Dealing with Incriminating Physical Evidence," and in Dan Medwed's "Summations." Troublesome questions involving "Excessive Caseloads" were examined by Norman Lefstein, "Waivers of or Agreements to Forgo Rights" by Jane Moriarty, "Conflicts of Interest" by Laurie Levenson, and "Preventing and Rectifying Wrongful Convictions" by Jim Moliterno.

The discussions were organized by faculty at each of the 14 participating law schools. The faculty organizers invited local state and federal prosecutors, defense lawyers and judges to participate. The conversations were free-wheeling, seminar-style conversations, except at University of California, Hastings, where Task Force Reporter Rory Little convened a public symposium. Other host schools and the academics in charge were: American University (Angela Davis, Cynthia Jones and Jenny Roberts); Boston College (Michael Cassidy); Case Western (Kevin McMunigal); Cardozo (Ellen Yaroshefsky); Loyola of Los Angeles (Laurie Levenson); Pace (Lissa Griffin and Ben Gershman); Roger Williams (Peter Margulies); Stetson (Bobbi Flowers); Vanderbilt (Christopher Slobogin); University of Oklahoma (Cheryl Wattley); University of Texas (Jennifer Laurin); University of Wisconsin (Cecilia Klingele and Ben Kempinen), and Washington and Lee (Jim Moliterno).

Rory Little has arranged for the academics' papers to be published in simultaneous issues of the *Hastings Law Journal* and the *Hastings Constitutional Law Quarterly*. Summaries of the discussions at each of the schools are being prepared by attendees who served as "reporters," and will be posted on the Section's website.

By all accounts, the roundtable discussions were a success on many levels. Local practitioners and judges welcomed the opportunity to get together for civil discussion on challenging questions of mutual interest. Both the academics' papers and the roundtable discussions, to be captured in the reporters' summaries, will inform future deliberations regarding the revisions to the Standards and provide a source of additional learning for students, academics and practitioners who are interested in the underlying ethical and professional questions. After attending several of the roundtables and speaking with the organizers of others, Prof. Green observed, "These roundtables truly captured what the Criminal Justice Section strives to accomplish, namely, to bring together knowledgeable lawyers, judges and academics with varied perspectives to seek common ground and develop the best thinking about practices and policies in the field of criminal justice. I hope that future chairs will see these discussions as one possible model for future fruitful collaborations between the bar and the legal academy."