Senate Committee on the Judiciary, Subcommittee on Crime and Drugs
Hearing on
"Examining Enforcement of the Foreign Corrupt Practices Act"

Questions for the Record by Senator Christopher A. Coons

Questions for Greg Andres

1. What steps could Congress take to help ensure broader application of anti-bribery laws, as exemplified by the FCPA and the UK's Bribery Act, to all companies engaged in transnational business?

   ***RESPONSE:** We believe that the Department of Justice's criminal enforcement of the FCPA has had a significant impact in preventing and deterring transnational bribery. To help ensure this continued level of enforcement, we believe that Congress could do three things: first, continue its support for existing criminal enforcement mechanisms; second, continue its support of the Working Group on Bribery of the Organisation for Economic Co-operation and Development (OECD), which encourages other OECD member countries to enforce their transnational bribery laws, and of the G20 Anticorruption Working Group; and third, support the Administration's efforts to engage in bilateral negotiations with key trading partners to encourage them to pass and enforce transnational bribery laws.*

2. Would a mandatory, conduct-based, debarment remedy for companies that engage in egregious bribery further the deterrent effect of the FCPA?

   ***RESPONSE:** While it is possible that a mandatory, conduct-based debarment remedy for companies that engage in egregious bribery might have some deterrent effect, that remedy would likely be outweighed by the accompanying decrease in incentives for companies to make voluntary disclosures, remediate problems, and improve their compliance systems. As such, mandatory debarment would likely be counterproductive, as it would reduce the number of voluntary disclosures and concomitantly limit corporate remediation and the implementation of enhanced compliance programs.*

3. Would a mandatory, conduct-based, debarment remedy for companies that engage in egregious bribery curtail prosecutorial discretion in a manner that would be damaging to the Department's enforcement of the FCPA?

   ***RESPONSE:** As noted above, a mandatory conduct-based debarment remedy for companies could well have a negative impact on the Government's ability to investigate and prosecute transnational corruption effectively. The purpose of debarment proceedings historically has been to protect the public fisc, not to deter or punish wrongdoing. Linking mandatory debarment to a criminal resolution would fundamentally alter the incentives of a contractor-company to reach an FCPA resolution because such a resolution would likely lead to the cessation of revenues for a government contractor – a virtual death knell for the contractor-company. Similarly, mandatory debarment would impinge negatively on*

prosecutorial discretion. If every criminal FCPA resolution were to carry with it mandatory debarment consequences, then prosecutors would lose the necessary flexibility to tailor an appropriate resolution given the facts and circumstances of each individual case.

4. Does some aspect of either the FCPA or the nature of corporate bribery schemes make it more difficult to establish personal criminal liability against executives at larger companies, as compared to executives at smaller companies?

   RESPONSE: The challenges in establishing personal criminal liability vary substantially from case to case. In certain cases, it may be that senior executives at a large company may not be as directly involved in obtaining business for the company as senior executives at a smaller one. Consequently, in such cases, it may be that the senior executives were not involved in the foreign bribery. As a general matter, the more removed an executive is from the bribery, the more difficult it can be to establish the executive's criminal liability. Furthermore, there are other challenges to prosecuting small and large companies' corporate officials, including the need to secure evidence of wrongdoing in foreign countries that necessarily requires the cooperation of foreign law enforcement authorities. To be sure, foreign bribery schemes are often complex and they present a range of challenges for prosecutors.

5. What is the Department's position on adding a formal compliance defense to the FCPA?

   RESPONSE: The Department opposes the adoption of a formal compliance defense. To begin, in every case, the Department already considers a company's compliance efforts in making appropriate prosecutorial decisions, and the United States Sentencing Guidelines also appropriately credits a company's compliance efforts in any sentencing determination. Further, the establishment of a compliance defense would mark a significant departure from traditional principles of corporate criminal liability, one that could detract from effective enforcement of the FCPA. Among other things, the creation of such a defense would transform criminal FCPA trials into a battle of experts over whether the company had established a sufficient compliance mechanism. Against this backdrop, companies may feel the need to implement a purely paper compliance program that could be defended by an "expert," even if the measures are not effective in stopping bribery. If the FCPA were amended to permit companies to hide behind such programs, it would erect an additional hurdle for prosecutors in what are already difficult and complex cases to prove.

6. What is the Department's position on adding an amnesty program, similar to the one proposed by Mr. Volkov and Judge Sporkin?

   RESPONSE: The Department does not support the idea of an FCPA amnesty program. Amnesty programs, such as the one used in antitrust enforcement, are typically established to assist law enforcement to identify and prosecute criminal behavior that would otherwise be undetected. Because antitrust crimes by definition involve some form of collusion, those crimes are often not disclosed or

revealed without the cooperation of at least one party involved in the criminal activity. For that reason, an antitrust amnesty program provides meaningful benefits to law enforcement, not just corporate wrongdoers. The challenges in FCPA investigations and prosecutions are different, and an amnesty program is not warranted, or preferable, to a system that is already driven by significant incentives for self-disclosure. Indeed, numerous mechanisms already exist to ensure that FCPA violations are brought to the Department's attention, including required disclosures to the market pursuant to Sarbanes Oxley, international law enforcement cooperation, reporting from U.S. embassy personnel, reporting by civil society, the newly established Dodd-Frank SEC whistleblower program, and voluntary disclosures by companies. As the beneficiary of these established sources of information, the Department does not presently face difficulty in identifying sources of information of FCPA criminal violations. Consequently, an amnesty program would provide protection for corporations who violate the law without providing accompanying meaningful benefits to law enforcement. Finally, consistent with the United States Sentencing Guidelines and the Department's Principles of Federal Prosecution of Business Organizations, the Department already provides meaningful credit for voluntary self-disclosures, extraordinary cooperation, and substantial remediation by corporations where appropriate and deserved.

7. In the absence of a compliance and/or amnesty program, do you agree that well-meaning businesses are faced with significant uncertainty as to their potential exposure to civil and criminal penalties under the FCPA? Why or why not?

   RESPONSE: The Department believes it provides clear guidance to companies with respect to FCPA enforcement through a variety of means. To begin, the Department has published a "Lay Person's Guide to the FCPA," a plain-language explanation of the FCPA, which is available on the Department's FCPA website: http://www.justice.gov/criminal/fraud/fcpa/. That website also includes documents related to more than 140 FCPA prosecutions dating back to 1998, charging documents, plea agreements, deferred prosecution and non-prosecution agreements, press releases, and relevant pleadings and orders. These documents are lengthy and detailed.

   Moreover, to the extent that a company is uncertain as to whether a contemplated action is lawful, it can avail itself of the FCPA opinion procedure set forth in 15 U.S.C. § § 78dd-1(e) and 78dd-2(f)– a unique feature of the FCPA. This procedure allows the company to request a determination in advance as to whether its proposed conduct would constitute a violation of the FCPA. The opinions, which are also available on the Department's FCPA website, provide significant additional guidance on the Department's interpretation of the FCPA. In the end, a review of the Department's FCPA enforcement actions makes clear that companies have never been charged for minor or incidental issues. By contrast, the Department's prosecutions involved extensive and often widespread corruption over significant periods of time.

8. Does the Department agree that statutory clarification of "foreign official" would help clarify to businesses which of their transactions could be subject to the FCPA?

   ***RESPONSE:** The term "foreign official" has been defined in relevant case law and opinion releases. Some defense attorneys have attempted to argue that the definition of "foreign official" does not extend to the employees of state-owned or state-controlled enterprises. But courts that have considered the matter have rejected this argument. For instance, in a November 2010 decision denying a defendant's motion to dismiss an FCPA indictment, a federal district court in Miami rejected the defendant's claim that a foreign state-owned telecommunications company "cannot be an instrumentality under the FCPA's definition of foreign official." In doing so, the court explained that the "plain language of this statute and the plain meaning of this term show that [the telecommunications company] could be an instrumentality . . . ." United States v. Esquenazi, et al., 1:09-cr-21010-JEM, Dkt. No. 309 at 3 (S.D. Fla. Nov. 19, 2010). In agreeing with the Department, the court went on to state that "persons of common intelligence would have fair notice of the statute's prohibitions." Id. A similar motion was also rejected by a federal district court in Philadelphia, after which the court accepted guilty pleas from all of the defendants, including a corporation. See United States v. Nguyen, et al., 2:08-cr-00522-TJS, Dkt. No. 144 (E.D. Pa. Dec. 30, 2009).*

   In addition, the OECD Anti-Bribery Convention requires that such employees be included in the definition of "foreign official." In the end, any company with questions concerning the term's definition can seek an opinion from the Department under the FCPA opinion release procedure.

9. In the absence of statutory clarification, what generally-applicable guidance has the Department provided with respect to the definition of "foreign official", specifically as to what qualifies an organization or entity as an "instrumentality" of a foreign government?

   ***RESPONSE:** The Department has provided significant guidance regarding the definition of a "foreign official." The Department has issued at least five publicly available advisory opinions concerning whether a party fit within the definition of "foreign official," all of which are available on the Department's FCPA website. For example, the Department issued such an opinion on September 1, 2010. In addition, the Department has made publicly available numerous charging documents that clearly identify whom the Department views as foreign officials. Similarly, the Department has been consistent and clear for many years in its charging documents that state-owned and state-controlled enterprises constitute "agencies" and/or "instrumentalities" under the FCPA.*

10. What definition of "instrumentality" of a foreign government does the Department use when applying the FCPA?

   ***RESPONSE:** The Department employs the plain meaning of the term "instrumentality" of a foreign government. An "instrumentality" of a foreign government includes not only a department, agency, or bureau of the government* *itself, but also state-owned and state-controlled enterprises. As explained in response to question 8 above, in a November 2010 decision denying a defendant's motion to dismiss an FCPA indictment, a federal district court in Miami rejected the defendant's claim that a foreign state-owned telecommunications company "cannot be an instrumentality under the FCPA's definition of foreign official." In doing so, the court explained that the "plain language of this statute and the plain meaning of this term show that [the telecommunications company] could be an instrumentality . . . ." United States v. Esquenazi, et al., 1:09-cr-21010-JEM, Dkt. No. 309 at 3 (S.D. Fla. Nov. 19, 2010). In agreeing with the Department, the court went on to state that "persons of common intelligence would have fair notice of the statute's prohibitions." Id. A similar motion was also rejected by a federal district court in Philadelphia, after which the court accepted guilty pleas from all of the defendants, including a corporation. See United States v. Nguyen, et al., 2:08-cr-00522-TJS, Dkt. No. 144 (E.D. Pa. Dec. 30, 2009).*

11. Under what circumstances might criminal liability for a successor company, based purely on undiscovered and not reasonably discoverable past acts committed by a company that it has acquired, be justified?

RESPONSE: Successor liability is a well-established principle of corporate criminal liability. The Department seeks to impose successor liability on a company only when supported by the particular facts and circumstances of the case and the law. The Department does not hold acquirers strictly liable for the acts of their predecessors. Rather, the Department decides whether to seek to impose successor liability on a case-by-case basis after making an evaluation of all the relevant facts and circumstances.

For example, during 2010, the Department formally declined to prosecute a parent corporation arising out of its subsidiaries' alleged potential FCPA violations. The Department did so for a number of reasons related to the specific facts and circumstances of the case, including because: (a) the parent corporation voluntarily provided information to the Department; and (b) the parent conducted extensive post-acquisition due-diligence and training that gave rise to its discovery of the potential FCPA violations.

Questions for the Record

Senate Committee on the Judiciary, Subcommittee on Crime and Drugs
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Questions for the Record by Senator Amy Klobuchar

1. Do you believe companies could comply with more certainty with the FCPA if they were provided with more generally-applicable guidance from the Department in regards to situations covered by the FCPA that are not clear cut or fall into "gray" areas?

RESPONSE: The Department believes it provides clear guidance to companies with respect to FCPA enforcement through a variety of means. To begin, the Department has published a "Lay Person's Guide to the FCPA," a plain-language explanation of the FCPA, which is available on the Department's FCPA website: http://www.justice.gov/criminal/fraud/fcpa/. That website also includes documents related to more than 140 FCPA prosecutions dating back to 1998, including charging documents, plea agreements, deferred prosecution and non-prosecution agreements, press releases, and relevant pleadings and orders. These documents are lengthy and detailed. Moreover, to the extent that a company is uncertain as to whether a contemplated action is lawful, it can avail itself of the FCPA opinion procedure set forth in 15 U.S.C. §§ 78dd-1(e) and 78dd-2(f) – a unique feature of the FCPA. This procedure allows the company to request a determination in advance as to whether its proposed conduct would constitute a violation of the FCPA. The opinions, which are also available on the Department's FCPA website, provide significant additional guidance on the Department's interpretation of the FCPA. In the end, a review of the Department's FCPA enforcement actions makes clear that companies have never been charged for minor or incidental issues. By contrast, the Department's prosecutions involved extensive and often widespread corruption over significant periods of time.

2. What would be the most helpful steps our government could take in the area of anti-bribery to create a more level playing field for U.S. companies competing overseas?

RESPONSE: The United States should continue to engage with foreign governments and multi-national organizations to ensure that they encourage, adopt and fully enforce anti-bribery laws. The Department has played a lead role in that effort and continues to do so. For example, the Department, along with the Commerce and State Departments, helped lead the negotiations for a treaty to combat transnational bribery of foreign public officials with many of our major trading partners at the Organisation for Economic Co-operation and Development. More recently, the USG was a leading proponent and negotiator of a new 2009 recommendation for further combating such bribery, as well as good practice guidance for preventing and detecting such bribery, a document agreed upon by the 38 parties to the OECD Anti-Bribery Convention aimed at assisting business with compliance efforts. Today the Departments of Commerce, Justice, and State and the SEC send representatives to the Anti-Bribery Working Group, which oversees the implementation of the treaty, as well as to the G20 Anticorruption Working Group.

To be clear, the United States has consistently encouraged other nations to seek greater enforcement of foreign bribery violations. In addition, the United States frequently engages in bilateral and multilateral discussions with key trading partners, in which we encourage other countries to adopt and enforce transnational bribery laws, as well as seeking anti-corruption commitments in recent trade agreements. The Departments of Justice, Commerce, and State are also working to ensure that other countries fulfill their treaty obligations, such as the OECD Anti-Bribery Convention and the U.N. Convention Against Corruption, to enact and enforce laws that criminalize foreign bribery. Finally, the Department does not focus its FCPA enforcement efforts only upon United States companies. To the contrary, in 2010, the Department resolved FCPA-related actions against numerous foreign companies, including companies based in France, Germany, the Netherlands, Switzerland and the United Kingdom.

3. What is the Department's position on creating a rebuttable presumption that small gifts such as meals are not undertaken for the purpose of obtaining business improperly?

RESPONSE: While it is difficult to evaluate the impact of any proposed statutory change without a specific legislative proposal, the Department opposes the creation of such a rebuttable presumption. Congress recognized in passing the FCPA that corruption can be accomplished through the provision of anything of value, including gifts and meals, when that thing of value is offered in exchange for assistance in obtaining or retaining business. In the Department's experience, in some countries and in some industries, the most damaging corruption takes the form of small "gifts" or payments, which are repeated over time. By way of comparison, in a number of recent, high-profile domestic corruption cases, American public officials have acknowledged that they were corrupted by a stream of benefits that included small gifts and meals. Furthermore, a review of FCPA enforcement actions demonstrates that small gifts such as meals have never been, and are not, the primary basis for FCPA actions brought by the Department. Where meals and entertainment have been the basis for FCPA enforcement actions, they have typically been part of a large scheme in which gifts, travel, and entertainment -- amounting to many thousands or millions of dollars in the aggregate -- have been used to corrupt public officials in order to obtain business, or have been one aspect of a broader foreign bribery scheme. Accordingly, we believe that such a change is not necessary.

4. What is the Department's position on amending the FCPA to bring the intent standard for corporations in line with the current "willfulness" standard that applies to individuals?

RESPONSE: At this time, the Department does not believe that it is necessary or appropriate to amend the FCPA's intent standard with respect to corporations. The Principles of Federal Prosecution of Business Organizations already governs the Department's decisions regarding whether to charge corporations for federal crimes, including under the FCPA. When evaluating whether to charge a corporation, the Principles require the Department to consider "the nature and seriousness of the offense," the "pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management," as well as a host of other important factors. Furthermore, the Department is

not prosecuting FCPA matters where a corporation engaged in something less than willful criminal conduct.