Written Testimony
United States Senate Subcommittee on Crime and Drugs of the Committee on the Judiciary
"Examining Enforcement of the Foreign Corrupt Practices Act"
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Good morning Chairman Specter, Ranking Member Graham, and members of the Committee and staff. I am Andrew Weissmann, a partner at the law firm of Jenner & Block in New York. I served for 15 years as an Assistant United States Attorney in the Eastern District of New York and had the privilege to represent the United States as the Director of the Department of Justice's Enron Task Force and Special Counsel to the Director of the FBI. I also am an adjunct Professor of Law at Fordham Law School, where I teach Criminal Procedure. I am here testifying today on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform. The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of 3 million businesses and organizations of every size, sector, and region. The U.S. Chamber Institute for Legal Reform was founded in 1998, to make the nation's legal system simpler, fairer and faster for everyone.

Over three decades after the Foreign Corrupt Practices Act ("FCPA") was enacted the justifications for the FCPA still ring true: Corrupt business transactions are unethical and undermine public confidence in the free market system, both here and abroad. When Congress proposed the bills that would become the FCPA in 1977, it repeatedly made the case that strong anti-bribery legislation would benefit the business community. The House Report listed a host of ways in which foreign bribery harms American businesses -- it erodes public confidence in the integrity of the free market system, rewards corruption instead of efficiency, and creates foreign policy problems.[1] The report posited that a strong anti-bribery law "would actually help U.S. corporations resist corrupt demands."[2]

I am here today not to take issue with the basic premise of the FCPA, as I believe such statements are as true now as they were when the FCPA was first introduced. Instead, I wish to suggest a number of concrete improvements to the statute, which was enacted quickly, that will allow businesses operating in today's environment to have a clear understanding of what is and is not a violation of the FCPA. In short, the experience with the FCPA for the past 30 years has revealed ways in which it can be improved.

It is clear that the FCPA has recently become a favored tool of law enforcement. While there were only three open FCPA investigations in 2002, there were 120 such

[1] *See* H.R. Rep. No. 95-640, at 4-5 (1977).

[2] *Id.*

investigations pending at the end of 2009 -- a forty-fold increase.[3] The increased attention has even led this past year to the use of a "sting" operation to capture 22 company executives allegedly agreeing to pay bribes to an FBI undercover agent posing as a foreign official.[4] Such an operation is part of the government's devoting significant new resources to FCPA enforcement actions. In 2009, for example, the Securities and Exchange Commission ("SEC") created a new Foreign Corrupt Practices Unit,[5] and the Department of Justice's ("DOJ") top anti-corruption prosecutor recently stated that it planned to continue to focus on FCPA enforcement and that the DOJ Fraud Section "could grow by as much as 50%" in 2010 and 2011.[6]

In spite of this rise in enforcement and investigatory action, judicial oversight and rulings on the meaning of the provisions of the FCPA are still minimal.[7] Commercial organizations are rarely positioned to litigate an FCPA enforcement action to its conclusion, and the risk of serious jail time for individual defendants has led most to plead. Thus, the primary statutory interpretive function is still being performed almost exclusively by the DOJ Fraud Section and the SEC. Many commentators have expressed concern that the DOJ thus effectively serves as both prosecutor and judge in the FCPA context, because the Department both brings FCPA charges and effectively controls the

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[3] *See* Russell Gold & David Crawford, U.S., *Other Nations Step Up Bribery Battle*, WALL ST. J., Sep. 12, 2008, at B1; Dionne Searcey, *U.S. Cracks Down on Corporate Bribes*, WALL ST. J., May 26, 2009, at A1.

[4] *See* Press Release, Department of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme, (January 19, 2010), *available at* http://www.justice.gov/opa/pr/2010/January/10-crm-048.html.

[5] *See* Robert Khuzami, Director, Division of Enforcement, Securities and Exchange Commission, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (August 5, 2009), *available at* http://www.sec.gov/news/speech/2009/spch080509rk.htm ("The Foreign Corrupt Practices Act unit will focus on new and proactive approaches to identifying violations of the Foreign Corrupt Practice Act … While we have been active in this area, more needs to be done, including being more proactive in investigations, working more closely with our foreign counterparts, and taking a more global approach to these violations.")

[6] David Hechler, *DOJ UNIT That Prosecutes FCPA to Bulk Up 'Substantially,'* CORPORATE COUNSEL (February 26, 2010), http://www.law.com/jsp/article.jsp?id=1202444612530&pos=ataglance&src=EMC-Email&et=editorial&bu=Law.com&pt=LAWCOM%20Newswire&cn=NW_20100226&kw=DOJ%20Unit%20That%20Prosecutes%20FCPA%20to%20Bulk%20Up%20%27Substantially%27.

[7] James C. Morgan, *Deferred Prosecution Agreements: Recent Justice Department Guidance*, Manufacturers Alliance/MAPI e-Alert E-466, Apr. 2, 2008.

disposition of the FCPA cases it initiates.[8] Or, as my fellow panelist has stated, "the FCPA means what the enforcement agencies say it means."[9]

The FCPA had been tailored to balance various competing interests, but that balance has been altered, at times, by aggressive application and interpretations of the statute by the government. Instead of serving the original intent of the statute, which was to punish companies that participate in foreign bribery, actions taken under more expansive interpretations of the statute may ultimately punish corporations whose connection to improper acts is attenuated at best and nonexistent at worst.

The result is that the FCPA, as it currently written and implemented, leaves corporations vulnerable to civil and criminal penalties for a wide variety of conduct that is in many cases beyond their control and sometimes even their knowledge. It also exposes businesses to predatory follow-on civil suits that often get filed in the wake of a FCPA enforcement action.[10] In fact, there is reason to believe that the FCPA has made U.S. businesses less competitive than their foreign counterparts who do not have significant FCPA exposure.[11] Critics of the FCPA have also argued that ambiguous areas of the law, where what is permitted may not be clear, have had a chilling effect on U.S. business because many companies have ceased foreign operations rather than face the uncertainties of FCPA enforcement.[12]

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[8] Kevin M. King and William M. Sullivan, *Vigorous FCPA Enforcement Reflects Pursuit of Foreign Bribery*, 5(3) ATLANTIC COAST IN-HOUSE 19, March 2008 (discussing how in 2007, of the 11 enforcement actions the DOJ took against corporations, seven were resolved entirely through either a deferred prosecution agreement or a non-prosecution agreement).

[9] Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 Ind. L. Rev. 389, 410 (2010).

[10] Hanna Hasl-Kelchner, *International Business: How a FCPA Violation Can Morph Criminal Liability into Civil Liability,* ALL BUSINESS, Aug. 28, 2009.

[11] *See* P. Beck et al., *The Impact of the Foreign Corrupt Practices Act on US Exports*, 12 MANAGERIAL AND DECISION ECON. 295 (1991); Scott P. Boylan, *Organized Crime in Russia: Implications for U.S. and International Law*, 19 FORDHAM INT'L L.J. 1999, 2015-2022 (1996); John Bray, *International Business Attitudes Toward Corruption*, GLOBAL CORRUPTION REPORT 316 (2004). In a 1999 report to Congress authored by the Congressional Research Service ("CRS"), a division of the Library of Congress that provides nonpartisan analysis on current legislative issues, it was estimated that the FCPA's anti-bribery provisions have cost up to $1 billion annually in lost U.S. export trade. Michael V. Seitzinger, Cong. Research Serv., RL 30079, Foreign Corrupt Practices Act (Mar. 3, 1999).

[12] *Id*.

Of course, the solution to this problem is not to do away with the FCPA. Rather, the FCPA should be modified to make clear what is and what is not a violation. The statute should take into account the realities that confront businesses that operate in countries with endemic corruption (e.g., Russia, which is consistently ranked by Transparency International as among the most corrupt in the world) or in countries where many companies are state-owned (e.g., China) and it therefore may not be immediately apparent whether an individual is considered a "foreign official" within the meaning of the act. As the U.S. government has not prohibited U.S. companies from engaging in business in such countries, a company that chooses to engage in such business faces unique hurdles. The FCPA should incentivize the company to establish compliance systems that will actively discourage and detect bribery, but should also permit companies that maintain such effective systems to avail themselves of an affirmative defense to charges of FCPA violations. This is so because in such countries even if companies have strong compliance systems in place, a third-party vendor or errant employee may be tempted to engage in unauthorized acts that violate the business's explicit anti-bribery policies.

It is unfair to hold a business criminally liable for behavior that was neither sanctioned by or known to the business. The imposition of criminal liability in such a situation does nothing to further the goals of the FCPA; it merely creates the illusion that the problem of bribery is being addressed, while the parties that actually engaged in bribery often continue on, undeterred and unpunished. The FCPA should instead encourage businesses to be vigilant and compliant.

For this reason, and given the current state of enforcement, the FCPA is ripe for much needed clarification and reform through improvements to the existing statute. Today I will discuss five improvements that are aimed at providing more certainty to the business community when trying to comply with the FCPA, while promoting efficiency, and enhancing public confidence in the integrity of the free market system as well as the underlying principles of our criminal justice system. They are:

(1) Adding a compliance defense;

(2) Defining a "foreign official" under the statute.

(3) Adding a "willfulness" requirement for corporate criminal liability;

(4) Limiting a company's liability for the prior actions of a company it has acquired; and

(5) Limiting a company's liability for acts of a subsidiary.

1. Adding The Compliance Defense Recognized By The United Kingdom And Others

The FCPA does not currently provide a compliance defense; that is, a defense that would permit companies to fight the imposition of criminal liability for FCPA violations, if the individual employees or agents had circumvented compliance measures that were

otherwise reasonable in identifying and preventing such violations. A company can therefore currently be held liable for FCPA violations committed by its employees or subsidiaries even if the company has a first-rate FCPA compliance program. Certain benefits may currently accrue to companies that have strong FCPA compliance programs – the DOJ or SEC may decide to enter a non-prosecution or deferred prosecution agreement with such companies if violations are uncovered, for example,[13] and such compliance systems can be taken into account at sentencing.[14] However, such benefits are subject to unlimited prosecutorial discretion, are available only after the liability phase of a FCPA prosecution, or both.

By contrast, the comprehensive Bribery Act of 2010 recently passed by the British Parliament – Section 6 of which addresses bribes of foreign officials and closely tracks the FCPA – provides a specific defense to liability if a corporate entity can show that it has "adequate procedures" in place to detect and deter improper conduct.[15] In September 2010, U.K.'s Ministry of Justice provided initial guidance on what may constitute such "adequate procedures"[16] sufficient to qualify for the defense.[17]

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[13] *See* Principles of Federal Prosecution of Business Organizations, Title 9, Chapter 9-28.000, UNITED STATES ATTORNEY'S MANUAL, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm (decision whether to charge). While evidence of a strong compliance program may help a corporation reach a non-prosecution or deferred prosecution agreement in connection with FCPA charges, the government has complete discretion as to how much credit to give for such a program. Thus, a corporation may still find that it is pressured to give up certain rights or to accept certain punishments in order to achieve what is not only a desired, but a fair, outcome. *See, e.g.,* Gerald E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct,* 60 LAW & CONTEMP. PROBS. 23, 59 (1997).

[14] *See* U.S.S.G. § 8B2.1.

[15] *See* Bribery Act of 2010, ch. 23, § 7(2) (U.K.).

[16] Section 9 of the Act requires the Secretary of State to publish and then solicit comments on such guidance. Bribery Act of 2010, ch. 23 § 9 (U.K.). The comment period runs until November 8, 2010.

[17] While this feature of the Bribery Act is laudable, other aspects of the Act are more troubling. For example, unlike the FCPA, the Act does not permit any exception for facilitation payments. *See* Iris E. Bennett, Jessie K. Liu and Cynthia J. Robertson, *U.K. Enacts Bribery Act 2010 As A Major Foreign Bribery Legislative Reform*, Jenner & Block White Collar Defense and Investigations Practice Advisory, May 20, 2010, *available at* http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C2998%5CU%20K%20%20Enacts%20Bribery%20Act%202010%20As%20A%20Major%20Foreign%20Bribery%20Legislative%20Reform_05-20-10.pdf. It also criminalizes "commercial bribery" – that is, payments not to a foreign official, but to a business

In 2001, the Italian government also passed a statute that proscribes foreign bribery.[18] Like the UK Anti-Bribery bill, it contains a compliance defense. Articles 6 and 7 of the statute permit a company to avoid liability if it can demonstrate that, before employees of the company engaged in a specific crime (*e.g.*, bribery), it (1) adopted and implemented a model of organization, management and control (the "Organizational Model") designed to prevent that crime, (2) engaged an autonomous body to supervise and approve the model, and (3) the autonomous body adequately exercised its duties.[19]

The principles embodied in the British and Italian laws closely track the factors currently taken into consideration by courts in the United States only at a very different phase of the criminal process, namely when considering whether a corporation should have a slight reduction in its culpability score when sentencing it for FCPA or other violations.[20] These principles – which Congress and the Sentencing Commission have already identified as key indicators of a strong and effective compliance program – should be considered instead during the liability phase of an FCPA prosecution.[21] The adoption of such a compliance defense will not only increase compliance with the FCPA by providing businesses with an incentive to deter, identify, and self-report potential and existing violations, but will also protect corporations from employees who commit crimes despite a corporation's diligence. And it will give corporations some measure of protection from aggressive or misinformed prosecutors, who can exploit the power imbalance inherent in the current FCPA statute – which permits indictment of a corporation even for the acts of a single, low-level rogue employee – to force corporations into deferred prosecution agreements.[22]

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partner or associate for "financial or other advantage" – without clearly defining what "financial or other advantage" means. Bribery Act of 2010, ch. 23 § 1, 2 (U.K.).

[18] Legislative Decree no. 231 of 8 June 2001; *see also Italian Law No. 231/2001: Avoiding Liability for Crimes Committed by a Company's Representatives*, McDermott, Will & Emery, April 27, 2009, *available at* http://www.mwe.com/info/news/wp0409f.pdf. The statute proscribes a variety of criminal activity, including foreign bribery.

[19] *See id.*

[20] *See* U.S.S.G. § 8B2.1.

[21] There is evidence that Congress may be open to such a proposal. In 1988, the United States House of Representatives proposed adding a similar "safe harbor" to the FCPA, which would have shielded companies that established procedures that were "reasonabl[y] expected to prevent and detect" FCPA violations from vicarious liability for FCPA violations of employees. *See* H.R. Conf. Rep. on H.R. 3, 100th Cong., 2d Sess. 916, 922 (1988).

[22] *See* Andrew Weissmann, Richard Ziegler, Luke McLoughlin & Joseph McFadden, *Reforming Corporate Criminal Liability to Promote Responsible Corporate Behavior*,

In addition, institution of a compliance defense will bring enforcement of the FCPA in line with Supreme Court precedent, which has recognized that it is appropriate and fair to limit *respondeat superior* liability where a company can demonstrate that it took specific steps to prevent the offending employee's actions. *See, e.g., Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999). The Court concluded in *Kolstad* that, in the punitive damages context, "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.'" *Id.* at 545. This holding was motivated by a concern that the existing standard was "dissuading employers from implementing programs or policies to" comply with Title VII for fear that such programs would bring to light violations for which a company would ultimately be liable, no matter what steps it had undertaken to prevent such violations. *Id.* at 544-45. Here, companies may similarly be dissuaded from instituting a rigorous FCPA compliance program for fear that such a program will serve only to expose the company to increased liability, and will do little to actually protect the company. An FCPA compliance defense will help blunt some of these existing "perverse incentives." *Id.* at 545.[23]

U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (Oct. 2008), *available at* http://www.instituteforlegalreform.com/component/ilr_issues/29.html.

[23] *See also* Andrew Weissmann with David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L. J. 411, 432-33 (2007) (describing the lack of incentive for corporations "to implement effective compliance programs" given that "[u]nder the current legal regime, a corporation is given no benefit at all under the law for even the best internal compliance program if such crime nevertheless occurs"). Numerous judges, former and current prosecutors, and legislative counsel have criticized the current system. *See, e.g.*, Preet Bharara, *Corporations Cry Uncle and their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53 (2007); Edwin Meese III, *Closing Commentary on Corporate Criminal Liability: Legal, Ethical, and Managerial Implications*, AM. CRIM. L. REV. 1545 (2007); George J. Terwilliger III, *Under-Breaded Shrimp and Other High-Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 AM. CRIM. L. REV. 1417 (2007); Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes*, AM. CRIM. L. REV. 1279 (2007); Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319 (2007); Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23 (1997); Hon. Lewis A. Kaplan, Remarks to the New York State Bar Association: Should We Reconsider Corporate Criminal Liability? (Jan. 24, 2007), *available at* http://nysbar.com/blogs/comfed/2007/06/should_we_reconsider_corporate.html.

The critique from scholars and practitioners has also been persistent and compelling. *See, e.g.*, Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994); Kathleen F. Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593 (1988); H. Lowell Brown, *Vicarious Criminal Liability of Corporations for the Acts of Their*

2. Clarifying the Definition of "Foreign Official"

Another ambiguity in the FCPA that requires clarity is the definition of "foreign official" in the anti-bribery provisions. The statute defines – unhelpfully – a "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization,[24] or any person acting in an official capacity for or on behalf of any such government or department, agency, or

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Employees and Agents, 41 LOY. L. REV. 279, 324 (1995); Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Criminal Liability*, 75 MINN. L. REV. 1095 (1991); Pamela H. Bucy, *Trends in Corporate Criminal Prosecutions*, 44 AM. CRIM. L. REV. 1287 (2007); John C. Coffee, Jr., *"No Soul To Damn: No Body To Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996); Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY L. REV. 468 (1988); Richard S. Gruner & Louis M. Brown, *Organizational Justice: Recognizing and Rewarding the Good Citizen Corporation*, 21 J. CORP. L. 731 (1996); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996); V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355 (1999); Bruce H. Kobayashi, *Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, 69 GEO. WASH. L. REV. 715 (2001); William S. Laufer & Alan Strudler, *Corporate Crime and Making Amends*, AM. CRIM. L. REV. 1307 (2007); Craig S. Lerner & Moin A. Yahya, *Left Behind After Sarbanes-Oxley*, 44 AM. CRIM. L. REV. 1383 (2007); Geraldine Szott Moohr, *Of Bad Apples and Bad Trees: Considering Fault-Based Liability for the Complicit Corporation*, 44 AM. CRIM. L. REV. 1343 (2007); Ellen S. Podgor, *A New Corporate World Mandates a "Good Faith" Affirmative Defense*, AM. CRIM. L. REV. 1537 (2007); Paul H. Robinson, *The Practice of Restorative Justice: The Virtues of Restorative Process, the Vices of "Restorative Justice,"* 2003 UTAH L. REV. 375, 384-85; Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Shield to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS L. REV. 605, 689 (1995); Bruce Coleman, Comment, *Is Corporate Criminal Liability Really Necessary?*, 29 SW. L.J. 908, 927 (1975); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction*, 92 HARV. L. REV. 1227 (1979); John Baker, *Corporations Aren't Criminals*, WALL ST. J., Apr. 22, 2002, at A3.

[24] A "public international organization" is "(i) an organization that has been designated by Executive Order pursuant to Section 1 of the International Organizations Immunities Act (22 U.S.C. § 288), or (ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register." 15 U.S.C. §§ 78dd-1(f)(1)(B), 2(h)(2)(B), 3(f)(2).

instrumentality, or for or on behalf of any such public international organization."[25] The text of the statute does not, however, define "instrumentality"; it is therefore unclear what types of entities are "instrumentalit[ies]" of a foreign government such that their employees will be considered "foreign officials" for purposes of the FCPA.

Consider this: is a payment to a professor to speak at a conference for prospective clients an FCPA violation? What if the professor works at a university that receives public grants or is state run? What if the professor works for a Chinese company that is owned in part by the state? Since the FCPA statute on its face does not indicate that these situations are beyond its reach, and there is no requirement that the company know it is violating the FCPA or even acting wrongly, the DOJ or the SEC could prosecute a company for engaging in such actions. Are these far-fetched examples? The real life examples below suggest not.

The DOJ and SEC have provided no specific guidance on what sorts of entities they believe qualify as "instrumentalities" under the FCPA. However, their enforcement of the statute makes it clear that they interpret the term extremely broadly, and that this interpretation sweeps in payments to companies that are state-owned or state-controlled. Once an entity is defined as an "instrumentality", all employees of the entity – regardless of rank, title or position – are considered "foreign officials." And although the government's expansive interpretation of "instrumentality" has not yet been tested in the courts and is unlikely to be tested in the near future, this interpretation has served as a component in the majority of current FCPA enforcement actions; by one estimate, nearly fully two-thirds of enforcement actions brought against corporations in 2009 involved the enforcement agencies' interpretation of the "foreign official" element to include employees of state-owned entities.[26]

The following are examples of instances where the government has pursued FCPA violations predicated on an expansive reading of what sorts of entities are "instrumentalities" of a foreign government:

- **Control Components, Inc.** - In 2009, the DOJ and SEC brought actions against Control Components, Inc. for payments totaling approximately $4.9 million over four years to a variety of entities in China, Malaysia, South Korea and the United Arab Emirates. Among those entities were companies that the government defined as Chinese "state-owned customers."[27] In the criminal information filed against Control Components, the DOJ stated summarily that "[t]he officers and

[25] 15 U.S.C. §§ 78dd-1(f)(1), 78dd-2(h)(2)(A), 78dd-3(f)(2).

[26] *See* Koehler, 43 IND. L. REV. at 411-13.

[27] Criminal Information, *United States v. Control Components Inc.*, No. SACR09-00162 (C.D. Cal. Jul. 28, 2009), *available at* http://www.justice.gov/criminal/pr/press_releases/2009/07/07-31-09control-guilty-information.pdf.

employees of these entities, including but not limited to the Vice-Presidents, Engineering Managers, General Managers, Procurement Managers, and Purchasing Officers, were 'foreign officials' within the meaning of the FCPA."[28]

- **Lucent Technologies** – In 2007, the SEC charged Lucent with violations of the books-and-records and internal control provisions of the FCPA in connection with hundreds of trips that Lucent had financed for employees of some of its Chinese customers.[29] The SEC alleged that financing the trips constituted improper conduct under the FCPA because "many of Lucent's Chinese customers were state-owned or state-controlled companies that constituted instrumentalities of the government of China and whose employees, consequently, were foreign officials under the FCPA."[30]

- **Baker Hughes** – In 2007, the SEC and DOJ brought actions against Baker Hughes and its subsidiaries for, *inter alia*, payments made to a company called Kazakhoil. The government claimed that the payments constituted violations of the FCPA because Kazakhoil was an "instrumentality" of a foreign government as it was "controlled by officials of the Government of Kazakhstan," making its officers and employees "foreign officials."[31]

As these examples illustrate, the government has interpreted "instrumentality" in the FCPA to encompass entities that are directly owned or controlled by a foreign government (the Lucent Technologies and Control Components cases) and entities that are controlled by members of a foreign government (the Baker Hughes case). The latter effectively sweeps in entities that are only tangentially related to a foreign government, with sometimes absurd results. Taken to its logical conclusion, the government's position means that – if the United States were a foreign government – employees of General Motors or AIG could be considered "foreign officials" of the United States government, because the government owns portions of the company; so could employees of Bloomberg Media, 85% of which is owned by a government official (the Mayor of New York City, Mike Bloomberg).

The government's approach to what companies qualify as "instrumentalities" of foreign governments injects uncertainty and raises U.S. government barriers against American businesses seeking to sell their goods and services abroad in an ever-increasing global marketplace. Without an understanding of what companies are considered

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[28] *Id.*

[29] *See* Complaint, *S.E.C. v. Lucent Technologies*, C.A. No. 07-2301, (D.D.C. Dec. 21, 2007), *available at* http://www.sec.gov/litigation/complaints/2007/comp20414.pdf.

[30] *Id.*

[31] Criminal Information, *United States v. Baker Hughes Inc.*, No. H-07-129 (S.D. Tex. Apr. 11, 2007).

"instrumentalities," companies have no way of knowing whether the FCPA applies to a particular transaction or business relationship, particularly in countries like China where most if not all companies are either partially or entirely owned or controlled by the state. The FCPA should therefore be modified to include a clear definition of "instrumentality." Such a definition could indicate the percentage ownership by a foreign government that will qualify a corporation as an "instrumentality"; whether ownership by a foreign official necessarily qualifies a company as an instrumentality and, if so, whether the foreign official must be of a particular rank or the ownership must reach a certain percentage threshold; and to what extent "control" by a foreign government or official will qualify a company as an "instrumentality."

3. Adding a "Willfulness" Requirement for Corporate Criminal Liability

There is an anomaly in the current FCPA statute: although the language of the FCPA limits an individual's liability for violations of the anti-bribery provisions to situations in which she has violated the act "willfully," it does not contain any similar limitation for corporations.[32] This omission substantially extends the scope of corporate criminal liability – as opposed to individual liability – since it means that a company can face criminal penalties for a violation of the FCPA even if it (and its employees) did not know that its conduct was unlawful or even wrong. *See, e.g., Bryan v. United States*, 524 U.S. 184, 191-92 (1998) (under a "willfulness" standard, the government must "prove that the defendant acted with knowledge that his conduct was unlawful") (internal citation and quotation omitted). In other words, the absence of a "willful" requirement opens the door for the government to threaten corporations – but not individuals through whom they act – with what is tantamount to strict liability for improper payments under the anti-bribery provisions of the act. Given that corporations are by their very nature at least one step removed from conduct that runs afoul of the anti-bribery provisions than the individuals who actually commit improper acts, it is only fair to - at the very least - hold the corporate entity to the same level of *mens rea* as individuals for such acts. Indeed, since the corporation can only be liable if an individual for whom the corporation is liable (typically an employee) has committed the criminal act, it should not be possible to convict a corporation unless the employee is liable. Such individual liability requires willful conduct; so should corporate liability.

[32] 15 U.S.C. §78dd-3(a)(2). The anti-bribery provisions do contain a requirement that conduct in furtherance of an improper payment must be "corrupt" in order to constitute an FCPA violation, and this requirement applies to both corporate entities and to individuals. *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a). The statute does not define the word "corruptly," but courts have consistently interpreted it to mean an act that is done "voluntarily and intentionally, and with a bad purpose." *See, e.g., United States v. Kay*, 513 F.3d 461, 463 (5th Cir. 2008). However, the requirement that an individual's conduct be "willful" in addition to "corrupt" adds another layer of intent; namely, it requires a showing that not only was the act in question made with a bad purpose, but with the knowledge that conduct was unlawful. *Id.* at 449-50; *see also* Jenner FCPA Treatise at 1-20.

Adding a willfulness requirement will also ameliorate another unfairness in the FCPA statute. Permitting a corporation to be criminally punished for improper acts of its subsidiaries that it has no knowledge of runs counter to the intent of the drafters of the FCPA. Nothing in the legislative history suggests that the statute was intended to allow a parent corporation to be charged with criminal violations of the anti-bribery provisions by another company, even a subsidiary, if it had no knowledge of improper payments. At most, the drafters indicated that if a parent company's ignorance of the actions of a foreign subsidiary was a result of conscious avoidance, or "looking the other way," that such parent "could be in violation of section 102 requiring companies to devise and maintain adequate accounting controls."[33]

Furthermore, because the federal government has construed its FCPA jurisdiction to cover acts that have nothing more than a tangential connection to the United States,[34] the lack of a "willful" requirement means that corporations can potentially be held criminally liable for anti-bribery violations in situations where they not only do not have knowledge of the improper payments, but also do not even know that American law is applicable to the actions in question. In such a case, the parent corporation could be charged with violations of the anti-bribery provisions, even if it was unaware that the FCPA could reach such payments. For example, in connection with the Siemens case, the DOJ separately charged a Siemens subsidiary in Bangladesh with conspiracy to violate the FCPA, predicated in part on payments that occurred outside of the United States and that solely involved foreign entities; the DOJ's jurisdictional hook for those payments was that some of the money connected to the transactions had passed at some point through

[33] *See* S. Rep. No. 95-114, at 11 (1977).

[34] The government's increasingly broad interpretation of the jurisdictional reach of the FCPA is another example of how the DOJ and SEC have aggressively pushed enforcement of the FCPA. In addition to the Siemens case discussed *supra*, the government charged BAE Systems, a British company, with FCPA violations based on the possible use of U.S. bank accounts to make improper payments; against DPC Tianjin, a Chinese subsidiary of an American company, because certain improper payments were reflected in a budget that was at one point emailed to the American parent; and against SSI International Far East ("SSIFE"), a Korean subsidiary of an American company, and individual employees of SSIFE who were foreign citizens, because requests related to certain improper payments were "transmitted" to people located in the United States. *See* Press Release, Department of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (Mar. 1, 2010), *available at* http://www.justice.gov/opa/pr/2010/March/10-crm-209.html; Press Release, Department of Justice, DPC (Tianjin) Ltd. Charged With Violating the Foreign Corrupt Practices Act (May 20, 2005), *available at* http://www.justice.gov/opa/pr/2005/May/05_crm_282.htm*;* and Press Release, Department of Justice, Former Senior Officer of Schnitzer Steel Industries Inc. Subsidiary Pleads Guilty to Foreign Bribes (Jun. 29, 2007), *available at* http://www.justice.gov/opa/pr/2007/June/07_crm_474.html.

American bank accounts.[35] But given that any back-office wire that crosses into the United States can be cited by the United States as a basis for application of the FCPA, a defendant can been convicted although completely unaware that her conduct would or could violate American law.[36]

For all these reasons, the "willfulness" requirement should be extended to corporate liability, at the very least to the anti-bribery provisions. This statutory modification would significantly reduce the potential for American companies to be criminally sanctioned for anti-bribery violations, particularly those of which the company had no direct knowledge or for which the company could not have anticipated that American law would apply. The statute should also preclude unknowing *de minimus* contact with the United States as a predicate for jurisdiction: the defendant should either have to know of such contact or the contact, if unknown, should have to be substantial and meaningful to the bribery charged (and thus foreseeable).

4. Limiting a Company's Successor Criminal FCPA Liability for Prior Acts of a Company it Has Acquired

Under the current enforcement regime, a company may be held criminally liable under the FCPA not only for its own actions, but for the actions of a company that it acquires or becomes associated with via a merger – even if those acts took place prior to the acquisition or merger and were entirely unknown to the acquiring company.[37] Such a standard of criminal liability is generally antithetical to the goals of the criminal law, including punishing culpable conduct or deterring offending behavior. While a company may mitigate its risk by conducting due diligence prior to an acquisition or merger (or, in

[35] *See* Criminal Information, *United States v. Siemens Bangladesh Limited*, Cr. No. 08-369-RJL (D.D.C Dec. 12, 2008), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/docs/siemensbangla-info.pdf.

[36] This is problematic because it is another way a corporation may be held liable without the government needing to prove that the corporation acted with the requisite criminal intent. *See, e.g.*, Brian Walsh and Tiffany Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*, THE HERITAGE FOUNDATION AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (May 5, 2010), *available at* http://s3.amazonaws.com/thf_media/2010/pdf/WithoutIntent_lo-res.pdf (advocating for meaningful *mens rea* requirements as an essential protection against unjust convictions).

[37] *See, e.g.*, Department of Justice FCPA Opinion Procedure Release No. 03-01 (Jan. 15, 2003), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2003/0301.pdf (advising that a company that conducted due diligence on a target company and self-reported any violations that took place pre-acquisition may be able to escape criminal and/or civil successor liability, thereby suggesting that successor liability was a viable theory of liability under the FCPA).

certain circumstances, immediately following an acquisition or merger),[38] that does not constitute a legal defense if a matter nevertheless arises that was not detected. Thus, even when an acquiring company has conducted exhaustive due diligence and immediately self-reported the suspected violations of the target company, it is still currently legally susceptible to criminal prosecution and severe penalties.

A. The Problem of Successor Liability

The DOJ appears to have first stated its position that a company can be subject to criminal successor liability under the FCPA in an opinion published in 2003.[39] In the years since, the government has continually reiterated that the one way companies can appeal to the government to exercise its discretion not to seek to impose criminal successor FCPA liability for pre-acquisition or pre-merger actions by a target company is rigorous due diligence accompanied by disclosure of any violations. For instance, in a 2006 speech given by then-Assistant Attorney General Alice Fisher, Fisher stressed that any company seeking to acquire a target company with overseas dealings should include as a component of its due diligence a search for indicators of FCPA violations, and that disregard of such indicators could lead to "successor liability" for the prior conduct of a target's actions.[40]

The uncertainty about how much due diligence is sufficient, coupled with the threat of successor liability even if thorough due diligence is undertaken, have in recent years had a significant chilling effect on mergers and acquisitions. For example, Lockheed Martin terminated its acquisition of Titan Corporation when it learned about certain bribes paid by Titan's African subsidiary that were uncovered during pre-closing due diligence; Lockheed Martin was simply unwilling to take on the risk of FCPA successor liability for those bribes.[41]

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[38] *See* Department of Justice FCPA Opinion Procedure Release No. 08-02 (Jun. 13, 2008), *available at* http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0802.html (providing advice on proper post-acquisition due diligence in the rare situation where it was impossible for the acquiring company to perform due diligence on the target prior to acquisition).

[39] *See* Department of Justice FCPA Opinion Procedure Release No. 03-01 (Jan. 15, 2003).

[40] Alice S. Fisher, Assistant Attorney General, United States Department of Justice, Prepared Remarks at the American Bar Association National Institute on the Foreign Corrupt Practices Act (October 16, 2006), *available at* http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf.

[41] *See* Margaret M. Ayres and Bethany K. Hipp, *FCPA Considerations in Mergers and Acquisitions*, 1619 PLI/CORP 241, 249 (Sept. 17, 2007); *see also* SEC Litig. Rel. No. 19107, 2005 WL 474238 (Mar. 1, 2005), *available at* http://404.gov/litigation/litreleases/lr19107.htm.

Recent FCPA enforcement actions indicate that the government has moved beyond simply asking companies to look for FCPA violations of a target company during due diligence if those companies want to escape successor liability. For proof, one need only look to the DOJ's Opinion Procedure Release No. 08-02 ("Opinion 08-02"), in which the DOJ provided advice to a company inquiring about the necessary amount of post-acquisition due diligence on a target company required in a situation where pre-acquisition due diligence could not be undertaken. The DOJ required the company to conduct due diligence on a scale equivalent to a vast internal investigation in order to avoid prosecution by the DOJ for any FCPA violations previously committed by the target company.[42]

That potential for so-called criminal successor liability which animated Opinion 08-02 is real.

- **Alliance One** – Alliance One is an American tobacco company that was formed in 2005 with the merger of Dimon Incorporated ("Dimon") and Standard Commercial Corporation ("SCC"). Employees and agents of two foreign subsidiaries of Dimon and SCC committed FCPA violations before the merger.[43] In 2010, the DOJ brought a criminal case against Alliance One on a successor liability theory.[44] The DOJ ultimately entered a non-prosecution agreement with Alliance One, which requires Alliance One to cooperate with the DOJ's ongoing investigation and to retain an independent compliance monitor for a minimum of three years. (Alliance One also settled a related civil complaint brought by the SEC, and agreed to disgorge approximately $10 million in profits).

- **Snamprogetti** – Snamprogetti was a wholly-owned Dutch subsidiary of a company called ENI S.p.A. From approximately 1994 to 2004, Snamprogetti

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[42] *See* Department of Justice FCPA Opinion Procedure Release No. 08-02 (Jun. 13, 2008), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf.

[43] *See* Press Release, Department of Justice, Alliance One International Inc. and Universal Corporation Resolve Related FCPA Matters Involving Bribes Paid to Foreign Government Officials (Aug. 6, 2010), *available at* http://www.justice.gov/opa/pr/2010/August/10-crm-903.html; *see* Press Release, Securities and Exchange Commission, SEC Files Anti-Bribery Charges Against Two Global Tobacco Companies (Aug. 6, 2010), *available at* http://www.sec.gov/litigation/litreleases/2010/lr21618.htm.

[44] *See, e.g.*, Complaint, *Securities and Exchange Commission v. Alliance One International, Inc.*, Civil Action No. 01:10-cv-01319 (RMU) (D.D.C. Aug. 6, 2010), *available at* http://www.sec.gov/litigation/complaints/2010/comp21618-alliance-one.pdf (describing the merger in ¶ 1 of the Complaint, and then detailing the actions taken by the Dimon and SCC subsidiaries, which formed the basis for the charges against Alliance One).

> participated in a complex and far-reaching bribery scheme.[45] In 2006, after the then-completed conduct was under investigation, ENI sold Snamprogetti to another company, Saipem S.p.A. Snamprogetti was charged with criminal violations of the FCPA in connection with the scheme in July 2010.[46] The DOJ ultimately reached a deferred prosecution agreement in connection with these charges; that agreement was between the DOJ, Snamprogetti, ENI *and* Saipem.[47] The agreement provides that Snamprogetti pay a $240 million fine, for which ENI and Saipem are jointly and severally liable; that ENI, Snamprogetti and Saipem institute a corporate compliance program; and that the statute of limitations for any action against Snamprogetti, ENI and Saipem connected to the underlying facts in the matter will be tolled for the duration of the agreement. Saipem's inclusion in the deferred prosecution agreement clearly indicates that it is being held criminally liable for Snamprogetti's actions on a theory of successor liability.

These cases illustrate the purest form of FCPA successor liability, where the conduct that constituted an FCPA violation or violations was complete *prior* to a merger or acquisition that connected that conduct to the corporate entity that was ultimately charged or held liable for that conduct. The conduct underlying the violations in the Alliance One case predated the very existence of the corporate entity that was charged with the violations; the conduct in the Saipem case predated the company's acquisition of the subsidiary that had committed the violations. Regardless, both companies were held accountable as if they themselves had engaged in the improper conduct.

B. Federal Successor Liability Law

Successor liability law in the United States is complex; it originated in state law as "an equitable remedy against formalistic attempts to circumvent contractual or statutory liability rules."[48] Though it varies from state to state, the question of whether successor liability can be imposed generally requires a complex analysis of various factors, including whether the successor company expressly agreed to assume the liability, or if a merger or acquisition was fraudulently entered into to escape liability.[49] Courts may also look to whether it is in the public interest to impose such liability. *See, e.g., United States v. Cigarette Merchandisers Ass'n, Inc.*, 136 F. Supp. 214 (S.D.N.Y. 1955).

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[45] *See* Criminal Information, *United States v. Snamprogetti Netherlands B.V.*, Crim. No. H-10-460, (S.D. Tex. Jul. 7, 2010), ECF No. 1.

[46] *See id*.

[47] *See* Deferred Prosecution Agreement, *United States v. Snamprogetti Netherlands B.V.*, Crim. No. H-10-460, (S.D. Tex. Jul. 7, 2010), ECF No. 3.

[48] Aaron Xavier Fellmeth, *Cure Without A Disease: The Emerging Doctrine Of Successor Liability In International Trade Regulation*, 31 YALE J. INT'L L. 127, 136 (2006).

[49] *See* Carolyn Lindsay, *More Than You Bargained For: Successor Liability Under the U.S. Foreign Corrupt Practices Act*, 35 OHIO N.U.L. REV. 959, 965-68 (2009).

A federal court considering a question of successor liability in the context of a state law claim will clearly look to the law of the relevant state for the proper analysis. But, as there is no relevant federal corporate law, there is no clear avenue for determining whether corporate criminal successor liability is appropriate in a federal action brought by the government. Thus federal courts have had to make the determination of whether to impose successor liability on a case-by-case, statute-by-statute basis. In the majority of cases where a federal court has imposed successor liability, the enforcement action has involved civil penalties and has arisen in connection with regulatory laws, such as environmental remediation statutes (particularly the Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA) and labor statutes (particularly the National Labor Relations Act, or NLRA).[50]

There are only a few cases in which a federal court has had to consider the question of criminal successor liability, and in most of them, courts have declined to permit such liability for a corporation with no knowledge of the prior bad acts. For example, in *Rodriguez v. Banco Central*, 777 F. Supp. 1043, 1064 (D.P.R. 1991), *aff'd*, 990 F.2d 7 (1st Cir. 1993), the court declined to permit successor liability in connection with a RICO action, finding that "successor liability should be found only sparingly and in extreme cases due to the requirement that RICO liability only attaches to knowing affirmatively willing participants." Similarly, in *R.C.M. Executive Gallery Corp. v. Rols Capital Co.*, 901 F. Supp. 630, 635 (S.D.N.Y. 1995), the court concluded that it is possible for a corporation to be found liable as a successor only if there is a showing that the purchaser had knowledge of the RICO Act violation at the time of purchase.[51]

Because the issue of criminal successor liability under the FCPA has never been raised in court, no corporation charged on the basis of such a theory of liability has ever put the government to a test of whether such liability is appropriate for that specific corporation; nor has it considered the broader question of whether criminal successor liability is appropriate for the FCPA as a general matter. I contend that it is not.

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[50] Fellmeth, 31 YALE J. INT'L L. at 142; *see, e.g., Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 92 (3d Cir. 1988) (finding successor liability in connection with a CERCLA enforcement action); *Golden State Bottling Co. v. Nat'l Labor Relations Bd.*, 414 U.S. 168, 176 (1973) (finding successor liability in connection with a NLRA enforcement action).

[51] There are some exceptions. In *United States v. Alamo Bank of Texas*, 880 F.2d 828 (5th Cir. 1989), Alamo Bank ("Alamo") was prosecuted for violations of the Bank Secrecy Act that had been committed by a company called Central National Bank ("CNB"), several years prior to its merger with Alamo Bank. The court concluded that Alamo could be charged with the criminal violations because "CNB continues to exist, albeit now as part of Alamo...Thus, Alamo is CNB, and it is CNB now named Alamo which is responsible for CNB's actions and liabilities. This includes criminal responsibility." *Id.* at 830. Alamo's ignorance of the acts committed by CNB did not persuade the court that it should escape successor liability. *Id.*

C. The Legislative Fix

Clear parameters need to be placed on successor liability in the FCPA context. At a minimum, a corporation, irrespective of whether or not it conducts reasonable due diligence prior to and/or immediately after an acquisition or merger, should not be held criminally liable for such historical violations. Under the criminal law, a company (just like a person) should not be held liable for the actions of another company it did not act in concert with. Yet in the FCPA context that is just what is happening. Of course if the successor company inherits employees who continue to commit an FCPA violation, that new conduct can rightfully be imputed to the new company, but that is not a limitation that is currently being applied by the government. Simply put, the DOJ should not be able to impute criminal actions of employees of another company, to a current company. That would extend *respondeat superior* (imputation of current employee conduct to an employer) beyond its already vast bounds. Certainly, if a company does conduct reasonable due diligence, the company should not as a matter of law (not as a matter of mere DOJ or SEC discretion) be subject to liability, for much the same reason that a compliance defense is a shield to corporate liability in the U.K. and Italy.

In addition, it is important to more clearly delineate what constitutes "sufficient due diligence." Obviously, what is considered "sufficient" diligence will vary depending on the inherent risks in a given merger or acquisition - e.g., whether the target company does significant business in regions that are known for corruption - and the size and complexity of the deal. But it is important to dispel the notion that adequate due diligence requires a full-blown internal investigation and the expenditure of extraordinary resources. Instead, guidance could be created, akin to Section 8 of the United States Sentencing Guidelines, that spells out the general due diligence steps that are warranted.

5. Limiting a Parent Company's Civil Liability for the Acts of a Subsidiary

While the DOJ has not yet taken such action, the SEC routinely charges parent companies with civil violations of the anti-bribery provisions based on actions taken by foreign subsidiaries of which the parent is entirely ignorant. This approach is contrary to the statutory language of the anti-bribery provisions, which – even if they do not require evidence of "willfulness" – do require evidence of knowledge and intent for liability.[52] It is contrary to the position taken by the drafters of the FCPA, who recognized the "inherent jurisdictional, enforcement and diplomatic difficulties raised by the inclusion of foreign subsidiaries of U.S. companies in the direct prohibitions of the bill" and who made clear that an issuer or domestic concern should only be liable for the actions of a foreign subsidiary if the issuer or domestic concern engaged in bribery by acting "through" the subsidiary.[53] And it appears to be out of step with the government's stated

[52] *See infra* footnote 32.

[53] *See* H.R. Conf. Rep. 95-831, at 14 (1977). *See also supra* fn 33 and accompanying text (the drafters intended that actions of a foreign subsidiary unknown to a parent company could constitute FCPA liability only under the books-and-records and internal controls provisions, and not under the anti-bribery provisions).

position that a parent corporation "may be held liable for the acts of [a] foreign subsidiary[y] [only] where they authorized, directed, or controlled the activity in question."[54]

The following are two examples:

- **United Industrial Corporation ("UIC")** – The SEC charged UIC, an American aerospace and defense systems contractor, with violations of the FCPA's anti-bribery provisions based on allegations that a UIC subsidiary – ACL Technologies, Inc. – made more than $100,000 in improper payments to a third-party.[55] The SEC did not, however, allege that UIC had any direct knowledge of the fact that its subsidiary violated the anti-bribery provisions of the FCPA by making these payments.[56] Thus the SEC's unspoken theory was that UIC could be held liable for violating the anti-bribery provisions of the FCPA – separate and apart from UIC's failure to institute proper controls – even if it had no knowledge of the improper payments or therefore their unlawfulness. The complaint was silent as to whether the subsidiary's employees knew the payments were either illegal or wrongful under the local law.
- **Diagnostics Product Company ("DPC")** – In 2005, the SEC alleged that a Chinese subsidiary of Diagnostics Products Company ("DPC"), an American company, had violated the anti-bribery provisions of the FCPA by routinely making improper commission payments to doctors at state-controlled hospitals between 1991 and 2002.[57] The SEC charged that "as a result" of the payments made by the subsidiary, DPC itself could be charged with a violation of the anti-bribery provisions.[58] There was no allegation that DPC had any knowledge of these payments; in fact, the SEC's Complaint clearly stated that DPC only learned of the payments in November 2002. It also acknowledged that DPC put a halt to the payments immediately upon learning of them.[59]

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[54] *See* DEPARTMENT OF JUSTICE, LAYPERSON'S GUIDE TO FCPA, *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf.

[55] *See* United Industrial Corp., Exchange Act Release No. 60005, 2009 WL 1507586 (May 29, 2009), *available at* http://www.sec.gov/litigation/admin/2009/34-60005.pdf; SEC Litig. Rel. No. 21063, 2009 WL 1507590 (May 29, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr21063.htm.

[56] *See id.*

[57] *See* Diagnostics Products Corp., Exchange Act Release No. 51724, 2005 WL 1211548 (May 20, 2005), *available at* http://www.sec.gov/litigation/admin/34-51724.pdf.

[58] *Id.*

[59] *See id.*

To date, the SEC has provided no explanation for how it supports the theory espoused in these cases – that a parent company may be liable for a subsidiary's violations of the anti-bribery provisions where the activity was not "authorized, directed or controlled" by the parent or where the parent did not itself act "through" the subsidiary, but, to the contrary, where the subsidiary's improper acts were undertaken without the parent's knowledge, consent, assistance or approval. Nor has the theory been put to the test in court.

As the scope of this potential liability is not definitively established, it is a source of significant concern for American companies with foreign subsidiaries. A parent's control of the corporate actions of a foreign subsidiary should not expose the company to liability under the anti-bribery provisions where it neither directed, authorized nor even knew about the improper payments in question.

IV. CONCLUSION

The recent dramatic increase in FCPA enforcement, coupled with the lack of judicial oversight, has created significant uncertainty among the American business community about the scope of the statute. In addition, some of the enforcement actions brought by the SEC and DOJ are not commensurate with the original goals of the FCPA, in that they fail to reach the true bad actors and instead assign criminal liability to corporate entities with attenuated or non-existent connections to potential FCPA violations. The reforms I have outlined here are in line with similar reforms in other countries, such as the new limitation on corporate liability for bribery in Britain and new corporate statutes in Italy, and will help the statute become more equitable, its criminal strictures clearer, and its effect on American business no more onerous than warranted.