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"Examining Enforcement of the Foreign Corrupt Practices Act"

My name is Mike Koehler and I am an Assistant Professor of Business Law at Butler University in Indianapolis, Indiana. Prior to entering academia last year, I was an attorney in private practice for approximately ten years at an international law firm. A substantial portion of my practice during that time focused on the Foreign Corrupt Practices Act ("FCPA") and I conducted numerous FCPA internal investigations around the world, negotiated resolutions to FCPA enforcement actions with government enforcement agencies, and advised clients on FCPA compliance and risk assessment.

The FCPA is the predominate area of my scholarship and public engagement. My FCPA scholarship has appeared in numerous law reviews and journals and my most recent scholarship "The Façade of FCPA Enforcement" was recently published by the Georgetown Journal of International Law.[1] I manage the site FCPA Professor, a forum devoted to the FCPA and related topics, and my mission statement is to cover not only the "who, what, and where" of FCPA enforcement actions, news, and legislative initiatives, but also and most importantly, to explore the "why" questions increasingly present in this area of aggressive FCPA enforcement."[2] Given this mission, I commend Chairman Specter for calling this hearing, "Examining Enforcement of the Foreign Corrupt Practices Act," and I am grateful for the opportunity to participate.

Congressional Intent in Enacting the FCPA

The FCPA is a fundamentally sound statute that was passed by Congress in 1977 for a specific reason. The mid-1970's witnessed admissions by U.S. companies of making what could only be called bribe payments to foreign government officials to advance business interests. The recipients of such payments included the Japanese Prime Minister, members of the Dutch Royal Family, the Honduran head of state, the President of Gabon, Saudi Generals, and Italian political parties. Congress was surprised to learn that there was no direct U.S. statute that prohibited such improper payments to foreign government officials. For approximately three years, Congress considered various bills to address such payments mindful of the difficult foreign policy questions presented by such payments. The end result was the FCPA, a pioneering statute at the time, the first ever domestic statute governing the conduct of domestic companies in their interactions, both direct and indirect, with foreign government officials in foreign markets. In enacting the FCPA in 1977, Congress specifically intended for its anti-bribery provisions to be narrow in scope and Congress further recognized and accepted that the FCPA would not cover every type of questionable payment uncovered or disclosed during the mid-1970's.[3]

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[1] "The Façade of FCPA Enforcement," 41 Georgetown Journal of International Law 907 (2010).

[2] See http://fcpaprofessor.blogspot.com/

[3] See e.g., Senate Report 95-114 as to S. 305 (May 1977) and House Report 85-640 as to H.R. 3815 (September 1977).

That the FCPA is a fundamentally sound statute does not mean that the FCPA could not be improved by a future Congress consistent with the original intent of the 95th Congress in enacting the FCPA. On this issue, it is unfortunate that recent FCPA reform proposals[4] (such as amending the FCPA to include a viable compliance defense like that found in the United Kingdom's recently enacted Bribery Act) have been assailed by some as "pro-bribery" proposals or akin to paving the way for business to go on a bribery binge.[5] In certain respects, this hearing and perhaps others that may follow, bring us bring back to the 1980's when Congress held extensive hearings on the then recently enacted FCPA. In 1981, Senator Alfonse D'Amato opened Senate hearings on a bill to amend the FCPA as follows:

> "The discussion which takes place during these hearings is not a debate between those who oppose bribery and those who support it. I see the major issue before us to be whether the law, including both its antibribery and accounting provisions, is the best approach, or whether it has created unnecessary costs and burdens out of proportion to the purposes for which it was enacted, and whether it serves our national interests."[6]

Senator John Chafee, a leader in the FCPA reform movement, similarly stated as follows:

> "We've learned a great deal about the Foreign Corrupt Practices Act [since it was enacted]. We've learned that the best of intentions can go awry and create confusion and great cost to our economy."[7]

The words of Congressional leaders on the subject back then should serve as guiding words now. What is perhaps most notable about the above comments is that they occurred during an era when the DOJ exercised prudent restraint in enforcing the FCPA consistent with the narrow objective of Congress in enacting the law.

Why Has FCPA Enforcement Changed?

That the FCPA is a fundamentally sound statute does not mean that FCPA enforcement is always fundamentally sound. FCPA enforcement has materially and dramatically changed during the past six years. As has been widely reported, there have been more FCPA enforcement actions during the past six years than between 1977 and 2005. Earlier this month in a speech before an FCPA audience Assistant Attorney General Lanny Breuer noted that in the past year the DOJ "has imposed the most criminal

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[4] See e.g., Andrew Weissmann and Alixandra Smith, "Restoring Balance – Proposed Amendments to the Foreign Corrupt Practices Act," U.S. Chamber Institute for Legal Reform (October 2010).
[5] See e.g., Keith Olbermann, MSNBC Countdown (October 27, 2010).
[6] "Business Accounting and Foreign Trade Simplification Act," Joint Hearings Before the Subcommittee on Securities and the Subcommittee on International Finance and Monetary Policy of the Committee on Banking, Housing, and Urban Affairs, United States Senate, 97th Congress, First Session, on S. 708 (May 20 and 21, June 16, July 23 and 24, 1981).
[7] Id.

penalties in FCPA-related cases in any single 12-month period – well over $1 billion."[8] In his speech, Assistant Attorney General Breuer empathically stated "we are in a new era of FCPA enforcement; and we are here to stay."[9]

However the question must be asked, why are we in a new era of FCPA enforcement and why has FCPA enforcement materially and dramatically changed during the past six years? The FCPA's provisions have not changed over the last decade. There has not been, I submit, any court decision that has legitimized certain of the enforcement theories which yield the highest quantity of FCPA enforcement actions.

The individual perhaps most qualified to answer the question of why we are in a new era of FCPA enforcement and why FCPA enforcement has materially changed during the past six years is Mark Mendelsohn. Between 2005 and April 2010, Mendelsohn was the Deputy Chief of the DOJ Fraud Section and the person "responsible for overseeing all DOJ investigations and prosecutions under the FCPA" during the period of its resurgence.[10] Like most DOJ FCPA enforcement attorneys, Mendelsohn, after his government service, became a partner at a major law firm where he now provides FCPA defense and compliance services. In a recent interview with "The Boardroom Channel" Mendelsohn was asked about the increase in FCPA enforcement actions and candidly stated that "what's really changed is not so much the legislation, but the enforcement and approach to enforcement by U.S. authorities."[11]

It is this new approach to FCPA enforcement that is most in need of examination. As I highlight in the "Façade of FCPA Enforcement" in most instances there is no judicial scrutiny of FCPA enforcement theories and the end result is that the FCPA often means what the DOJ says it means. In many cases, what the DOJ says the FCPA means is contrary to Congressional intent.[12]

Two trends during this "new era of FCPA enforcement" are most instructive. The first involves the DOJ's interpretation of the FCPA's key "foreign official" element. The second involves the DOJ's interpretation of the FCPA's key "obtain or retain business" element coupled with the DOJ's seeming unwillingness to recognize the FCPA's express exception for so-called facilitating or expediting payments.

It surprises most people upon learning, and rightfully so, that most recent FCPA enforcement actions have absolutely nothing to do with foreign government officials. Rather, the alleged "foreign official" is an employee of an alleged state-owned or state-controlled enterprise ("SOE") who is deemed a "foreign official" by the DOJ. This designation rests on the theory that the "foreign official's" employer (even if a company with publicly traded stock and other attributes of a private business) is an

[8] See Comments of Assistant Attorney General Breuer at the 24th National Conference on the Foreign Corrupt Practices Act (November 16, 2010).
[9] Id.
[10] See http://www.paulweiss.com/mark-f-mendelsohn/
[11] See http://www.boardmember.com/BRC.aspx?taxid=1040&id=5647
[12] The same statement also applies to many of the SEC's FCPA enforcement theories.

"instrumentality" of a foreign government. The DOJ's interpretation in the FCPA context is the functional equivalent of the DOJ alleging that General Motors Co. ("GM") or American International Group Inc. ("AIG") are "instrumentalities" of the U.S. government and that GM and AIG employees are therefore U.S. "officials" occupying the same status as members of this committee or others in government.[13]

As I note in the "Façade of FCPA Enforcement" this legal interpretation is at the core of the majority of recent FCPA enforcement actions even though this interpretation has never been fully examined by a court. More importantly, this central feature of FCPA enforcement contradicts the intent of Congress in enacting the FCPA. The salient facts are as follows. (1) During its multi-year investigation of foreign corporate payments, Congress was aware of the existence of SOEs and that some of the questionable payments uncovered or disclosed may have involved such entities. (2) In certain of the bills introduced in Congress to address foreign corporate payments, the definition of "foreign government" expressly included SOE entities. These bills were introduced in both the Senate and the House during both the 94th and 95th Congress. (3) Despite being aware of SOEs and despite exhibiting a capability for drafting a definition that expressly included SOEs in other bills, Congress chose not to include such definitions or concepts in what ultimately become the FCPA in 1977.

The second questionable feature defining this "new era of FCPA enforcement" involves the DOJ's interpretation of the FCPA's key "obtain or retain business" element coupled with the DOJ's seeming unwillingness to recognize the FCPA's express exception for so-called facilitating and expediting payments.

The 95th Congress specifically excluded from the FCPA's "foreign official" definition any employee of a foreign government "whose duties are essentially ministerial or clerical." The relevant Senate Report states, in pertinent part, as follows. "The statute does not […] cover so-called 'grease' payments such as payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties."[14] Similarly, the relevant House Report states, in pertinent part, as follows.

> "The language of the bill is deliberately cast in terms which differentiate between [corrupt payments] and facilitating payments, sometimes called 'grease payments.' […] For example, a gratuity paid to a customs official to speed the processing of a customs document would not be reached by this bill. Nor would it reach payments made to secure permits, licenses, or

[13] On November 18, 2010, GM completed an initial public offering thereby reducing the U.S. government's ownership of GM to less than a majority stake. However, in the FCPA context, the DOJ has taken the position that even minority ownership by a foreign government in a commercial enterprise can still render employees of that enterprise "foreign officials" under the FCPA. See U.S. v. Kellogg Brown & Root LLC, Case No. H-09-071 (S.D. Tex. February 6, 2009) (alleging that employees of Nigeria LNG Limited ("NLNG") were "foreign officials" despite the fact that NLNG is owned 51% by a consortium of private multinational oil companies).

[14] See Senate Report No. 95-114 (May 2, 1977).

> the expeditious performance of similar duties of an essentially ministerial or clerical nature which must of necessity be performed in any event. While payments made to assure or to speed the proper performance of a foreign official's duties may be reprehensible in the United States, the committee recognizes that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments. As a result, the committee has not attempted to reach such payments."[15]

The 100th Congress that amended the FCPA in 1988 removed this exception from the "foreign official" definition and created an express stand-alone exception for facilitating and expediting payments in connection with "routine governmental action" – an exception currently found in the FCPA. The relevant Conference Report states that the intent of the Congress is that the term "routine governmental action" shall apply to, for instance, obtaining permits, licenses, or other governmental approvals to qualify a person to do business in a foreign country and "actions of a similar nature."[16] The Conference Report further states that "ordinarily and commonly performed" actions with respect to permits or licenses "would not include those governmental approvals involving an exercise of discretion by a government official where the actions are the functional equivalent of 'obtaining or retaining business'…".

As I highlight in the "Façade of FCPA Enforcement" several FCPA enforcement actions during this era of resurgence concern payments made to secure foreign licenses, permits, applications, certificates or in connection with customs and tax duties. For instance, earlier this month the DOJ announced resolution of coordinated FCPA enforcement actions involving numerous companies in the oil and gas industry. The allegations centered on payments made indirectly to Nigerian Customs Service employees in connection with securing or renewing temporary importation permits so that rigs could remain in Nigerian waters.[17] In resolving the matters largely through non-prosecution or deferred prosecution agreements, the companies collectively agreed to pay approximately $236 million in combined fines, penalties and disgorgement.

The Impact of the "New Era of FCPA Enforcement"

In a recent Bloomberg article regarding the increase in FCPA enforcement actions and the questionable legal theories many enforcement actions are based on, Denis McInerney (DOJ Fraud Section Chief) said that "the courts are available to companies if they dispute the [DOJ's] interpretation of the law."[18] While a true statement, such a response ignores the fact that the DOJ has made it so easy for companies subject to an FCPA inquiry to resolve the matter via a resolution vehicle such as a non-prosecution agreement ("NPA")

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[15] See House Report No. 95-640 (September 28, 1977).
[16] See Conference Report 100-576 (April 20, 1987).
[17] See DOJ Release, "Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties," (November 4, 2010).
[18] See David Voreacos, "Swiss Shipper Finds Resistance Futile in U.S. Bribery Probe," Bloomberg (November 13, 2010).

or a deferred prosecution agreement ("DPA") neither of which results in the company being prosecuted for anything. These resolution vehicles are subject to little or no judicial scrutiny.[19] Thus, whether intentional or not, the DOJ has created the conditions by which many of its FCPA enforcement theories are insulated from judicial scrutiny in all but the rarest of circumstances.

Why would a company settle an FCPA enforcement action that is based on questionable enforcement theories, including those seemingly in direct conflict with the FCPA's statutory provisions and the FCPA's legislative history? Simply put, because of the "carrots" and "sticks" relevant to resolving a DOJ enforcement action.

As I highlight in "The Façade of FCPA Enforcement" application of the DOJ's Principles of Federal Prosecution of Business Organization ("Principles of Prosecution") and the U.S. Sentencing Guidelines in the FCPA context routinely nudge corporate defendants to resolve FCPA matters regardless of the DOJ's legal theories or the existence of valid and legitimate defenses. To challenge the DOJ's theories, its interpretation of facts, or to raise valid and legitimate FCPA defenses is failure to cooperate in the DOJ's investigation and failure to acknowledge acceptance of responsibility – both factors under the Principles of Prosecution and the Sentencing Guidelines that will result in significant adverse consequences to the company.

Not surprisingly, no company subject to an FCPA inquiry in this "new era of FCPA enforcement" has challenged the DOJ in any meaningful way. It is simply easier, more cost efficient, and more certain for a company to agree to an NPA or DPA, and thereby agree to the DOJ's version of the facts and its FCPA interpretations, than it is to be criminally indicted and mount a valid legal defense.

Lost in this entire exercise however is the salient question of whether the conduct at issue, in most cases, even violated the FCPA. Indeed, in a September 2010 interview with Corporate Crime Reporter, Mark Mendelsohn stated that a "danger" with NPAs and DPAs "is that it is tempting" for the DOJ "to seek to resolve cases through DPAs or NPAs that don't actually constitute violations of the law."[20] Asked directly – if the DOJ "did not have the choice of deferred or non prosecution agreements, what would happen to the number of FCPA settlements every year," Mendelsohn stated as follows: "if the Department only had the option of bringing a criminal case or declining to bring a case, you would certainly bring fewer cases."[21]

Against this backdrop there has been increased criticism of FCPA enforcement and rightfully so. A recent Forbes article titled "The Bribery Racket" quotes an FCPA practitioner as saying "the scope of things companies have to worry about is enlarging all the time as the government asserts violations in circumstances where it's unclear if they

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[19] See U.S. Government Accountability Office, Corporate Crime: DOJ Has Taken Steps to Better Track It Use of Deferred and Non-Prosecution Agreements, But Should Evaluate Effectiveness (2009).
[20] See http://www.corporatecrimereporter.com/mendelsohn091010.htm (September 13, 2010 print edition).
[21] Id.

would prevail in court."[22] A former DOJ FCPA enforcement attorney, who prosecuted Lockheed for FCPA violations in the mid-1990's, was recently asked whether "FCPA enforcement, during the last decade, morph[ed] into something other than what Congress intended the FCPA to address when passed in 1977" and stated as follows:

> "The last decade of FCPA enforcement has seen extraordinary evolution, and I think you have to say that when Congress passed the law in 1977, they did not envision the wide reach of enforcement today and the types of things that the government gets involved in, such as transactions, joint ventures, and successor liability. I do think that the DOJ and the SEC have stayed generally true to the vision of the FCPA, which focuses on things of value, primarily money, going to foreign government officials in exchange for business."[23]

The above quotes are representative of a growing chorus questioning this "new era of FCPA enforcement." While this new era has spawned a "thriving and lucrative anti-bribery complex"[24] and while this new era has, in the words of the former head of the DOJ's FCPA enforcement program for a portion of the 1980's, been "good business for law firms, good business for accounting firms, good business for consulting firms, and DOJ lawyers who create the marketplace and then get a job,"[25] whether this new era is good for those subject to the FCPA (both companies and individuals) is another question and I submit the answer is no.

As I argue in "The Façade of FCPA Enforcement" the façade matters for a number of reasons. To those subject to the FCPA, the façade of FCPA enforcement matters because it breeds overcompliance by risk-averse companies mindful of the consequences of a DOJ FCPA inquiry – even if that inquiry is not based on viable legal theories.

The over-compliance I discuss in "The Façade of FCPA Enforcement" includes mundane matters like companies engaging high-priced lawyers to analyze FCPA compliance risk for inviting certain foreign customers to trade shows, company golf outings, or providing various cultural versions of fruit baskets during holidays. The overcompliance includes, to use the cliché, "spending a million bucks to catch a dollar" when a facilitating or expediting payment is perhaps made to a foreign customs agent demanding a "grease" payment to supplement his meager government salary to do what he is otherwise required to do.

In examining FCPA enforcement it would be useful for this committee to perhaps hear first-hand from those within corporate organizations who can directly speak to how this "new era of FCPA enforcement" has unnecessarily increased compliance costs out of proportion to the goals of the FCPA. Compliance based on the law is wise and cost-effective from the standpoint of reducing legal exposure. However, compliance based on

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[22] Nathan Vardi, "The Bribery Racket," Forbes (June 7, 2010).
[23] FCPA Professor, "A Q&A With Martin Weinstein," (May 18, 2010).
[24] Nathan Vardi, "The Bribery Racket," Forbes (June 7, 2010).
[25] Id. quoting Joseph Covington.

the DOJ's frequent untested or dubious FCPA interpretations is wasteful and diverts limited corporate resources from other value-added endeavors.

In his speech earlier this month to an FCPA audience, Assistant Attorney General Breuer analogized the "FCPA enforcement is 'bad for business'" suggestion to saying that "public corruption prosecutions are 'bad for government'" – both suggestions he called "exactly upside down."[26] His dismissive remarks again reflect the mindset that considering FCPA reform or examining FCPA enforcement is a "pro-bribery" exercise or akin to paving the way for business to go on a bribery binge.

The issue is not whether FCPA enforcement is "bad for business," but whether the DOJ is enforcing, in many instances, the FCPA consistent with its provisions and consistent with Congressional intent. This is not an "upside down" suggestion, but rather a suggestion anchored in fundamental principles of U.S. law.

Bribery, Yet No Bribery and Continued U.S. Government Contracts Do Not Deter

There are many pillars to the "The Façade of FCPA Enforcement" I describe and one is the frequent instances where seemingly clear cases of corporate bribery, per the DOJ's own allegations, are resolved *without* FCPA anti-bribery charges.

In numerous public statements during this era of the FCPA's resurgence the DOJ has consistently portrayed an FCPA enforcement program containing the following attributes: sending the message that "paying of bribes to get foreign contracts … is illegal … and will not be tolerated;"[27] holding "accountable those who corrupt foreign officials;"[28] "vigorously" pursuing violations of the FCPA;[29] and applying a "consistent, principled approach" in prosecuting cases to "provide clarity, consistency, and certainty in outcomes."[30]

The DOJ's rhetoric is not consistent with its conduct in the most egregious cases of corporate bribery as the below enforcement actions demonstrate.

In December 2008, the DOJ announced the filing of a criminal information against Siemens Aktiengesellschaft ("Siemens AG").[31] According to the DOJ release, over a six-year period:

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[26] See Comments of Assistant Attorney General Breuer at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010).

[27] See Comments of Assistant Attorney General Lanny Breuer, 22nd National Forum on the Foreign Corrupt Practices Act (November 19, 2009).

[28] See Comments of Assistant Attorney General Breuer at the 24th National Conference on the Foreign Corrupt Practices Act (November 16, 2010).

[29] See Comments of Assistant Attorney General Breuer at the National Association of Criminal Defense Lawyers (Oct. 1, 2009).

[30] See Comments of Assistant Attorney General Lanny Breuer, 22nd National Forum on the Foreign Corrupt Practices Act (November 19, 2009).

[31] See DOJ Release, "Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines" (Dec. 15, 2008). Despite being a German company with principal offices in Berlin and Munich, Siemens became subject to the FCPA

> "Siemens AG made payments totaling approximately $1.36 billion through various mechanisms. Of this amount, approximately $554.5 million was paid for unknown purposes, including approximately $341 million in direct payments to business consultants for unknown purposes. The remaining $805.5 million of this amount was intended in whole or in part as corrupt payments to foreign officials through the payment mechanisms, which included cash desks and slush funds."[32]

The DOJ's Acting Assistant Attorney General stated that the charges "make clear that for much of its operations across the globe, bribery was nothing less than standard operating procedure for Siemens." The Director of the SEC's Division of Enforcement stated that the "pattern of bribery by Siemens was unprecedented in scale and geographic reach and the "[t]he corruption involved more than $1.4 billion in bribes to government officials in Asia, Africa, Europe, the Middle East and the Americas." Other senior U.S. enforcement officials noted that there existed a "corporate culture in which bribery was tolerated and even rewarded at the highest levels of the company."

As to the amount of business Siemens gained because of the corrupt payments, the DOJ's sentencing memorandum states that calculating a traditional loss figure under the Sentencing Guidelines "would be overly burdensome, if not impossible" given the "literally thousands of contracts over many years."

Siemens bribery scheme would seem to be a clear case of an FCPA anti-bribery violation. Yet, the DOJ's criminal information against Siemens did not contain any FCPA anti-bribery charges.[33]

According to the DOJ's sentencing memorandum it considered a "number of factors" in its disposition of the enforcement action including "Siemens' cooperation" and "collateral consequences" including "consideration of the risk of debarment and exclusion from government contracts." The fine range under the sentencing guidelines for Siemens conduct was $1.35 billion - $2.70 billion. However, the DOJ and Siemens agreed to resolve the case for approximately $450 million – 67% below the minimum penalty pursuant to the Sentencing Guidelines.[34]

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because, since March 2001, its shares have been listed on the New York Stock Exchange, making it an "issuer" for purposes of the FCPA. Furthermore, certain Siemens subsidiary companies with offices in the U.S. participated in the bribery scheme, thus providing an independent U.S. nexus for FCPA anti-bribery charges.

[32] Id.

[33] While the DOJ also did charge Siemens S.A. – Argentina, Siemens Bangladesh Limited and Siemens S.A. – Venezuela with conspiracy to violate the FCPA's anti-bribery provisions and/or violating the FCPA's books and records and internal control provisions. Siemens, the entity that orchestrated the entire bribery scheme according to the DOJ's allegations, escaped FCPA anti-bribery charges.

[34] Siemens also settled a related SEC enforcement action in which it agreed to pay $350 million in disgorgement.

The DOJ gave Siemens cooperation credit, which helped reduce the sentencing guidelines range, even though Siemens began cooperating only *after* German law enforcement agencies raided its offices and the homes of certain of its employees.

In an interview with the International Bar Association, Mark Mendelsohn, while still a DOJ official, defended the DOJ enforcement action and said that it sends a "very, very strong … deterrent message."[35]

It is difficult to comprehend what "deterrent message" is sent when a company that engages in bribery "unprecedented in scale and geographic scope," and where bribery was "nothing less than standard operating procedure," is not charged with FCPA anti-bribery violations and is allowed to pay a criminal fine in an amount less than the business gained because of the improper payments.

Further, it is difficult to reconcile frequent DOJ statements such as "paying bribes to get foreign contracts … will not be tolerated" and those who bribe will be held "accountable" when one analyzes the extent of U.S. government business Siemens entities were awarded in the twelve month period following resolution of the December 2008 bribery scandal. Using www.recovery.gov (a U.S. government website detailing listing entities that receive money from the $787 billion American Recovery and Reinvestment Act stimulus bill signed by President Obama in February 2009), one finds that Siemens entities were awarded numerous U.S. government contracts funded by U.S. taxpayer stimulus dollars including by the following government departments: Department of Defense, Department of the Air Force, Department of the Army, Department of Transportation, Department of Health and Human Services, Department of Energy, Department of Commerce, Department of Housing and Urban Development, and the General Services Administration. Even the DOJ awarded a Siemens entity a contract funded with stimulus dollars.

The chief executive of a Siemens business unit was recently quoted as saying, "one of the beauties of the federal government spending is it didn't drop off during the recession."[36] Apparently one the beauties of engaging in bribery "unprecedented in scale and geographic scope" is also not being charged with FCPA anti-bribery violations and experiencing no slow down in U.S. government contracts in the immediate aftermath of the bribery scandal.

The Siemens enforcement action is not the only recent enforcement action that contributes to the façade of FCPA enforcement.

In February 2010, the DOJ announced the filing of a criminal information against BAE Systems Plc ("BAE"). Among other allegations, the information charges that BAE served as the "prime contractor to the U.K. government following the conclusion of a Formal Understanding between the U.K. and the Kingdom of Saudi Arabia ("KSA")" in

[35] See http://www.ibanet.org/Article/Detail.aspx?ArticleUid=21F61C45-0318-41F6-89F8-3E8C01EC57B1.
[36] Paul Glader, "Siemens Seeks More U.S. Orders," The Wall Street Journal (August 10, 2010).

which BAE sold several Tornado and Hawk aircraft, "along with other military hardware, training and services," to the U.K. government, which sold the material and services to the Saudi government. The information refers to these frequent arrangements as the "KSA Fighter Deals." In connection with these deals the information alleges that "BAE provided substantial benefits to one KSA public official, who was in a position of influence regarding the KSA Fighter Deals (the "KSA Official"), and to the KSA Official's associates."

According to the indictment, BAE "provided these benefits through various payment mechanisms both in the territorial jurisdiction of the U.S. and elsewhere." This allegation is important because the FCPA only applies to a company like BAE (a foreign company with no shares listed on a U.S. exchange) if conduct in furtherance of the bribery scheme has a U.S. nexus. The information contains additional allegations that clearly demonstrate that BAE's bribery scheme had a U.S. nexus. For instance, the information alleges that BAE "provided support services to [the] KSA Official while in the territory of the U.S." and that these benefits "included the purchase of travel and accommodations, security services, real estate, automobiles and personal items." The information alleges that a single BAE employee during one year submitted over $5 million in invoices for benefits provided to the KSA Official.

BAE's bribery scheme would seem to be another clear case of an FCPA anti-bribery violation. Yet, the DOJ's criminal information against BAE likewise did not contain any FCPA anti-bribery charges. Rather, BAE was charged with one count of conspiracy for "making certain false, inaccurate and incomplete statements to the U.S. government and failing to honor certain undertakings given to the U.S. government, thereby defrauding the United States …". Among the false statements BAE made to the U.S. government was its commitment to not knowingly violate the FCPA. BAE settled the enforcement action by agreeing to pay a $400 million criminal fine.[37]

The DOJ's sentencing memorandum begins by noting that BAE "is the world's largest defense contractor, and the fifth largest provider of defense materials to the United States government." According to the sentencing memorandum it considered a "number of factors" in its disposition of the enforcement action including applicable debarment provisions providing "that companies convicted of corruption offenses shall be mandatorily excluded from government contracts" while also stating that BAE's business "is primarily from government contracts."

As in the Siemens matter, it is likewise difficult to reconcile frequent DOJ statements such as "paying bribes to get foreign contracts … will not be tolerated" and those who bribe will be held "accountable" when one analyzes the extent of U.S. government business BAE entities have been awarded since resolution of the February 2010 enforcement action. A quick glance at BAE's press releases will evidence numerous multi-million U.S. government contracts since February 2010, including approximately $50 million in U.S. government contracts this month alone. Perhaps most alarming is

[37] See DOJ Release, "BAE Systems Plc Pleads Guilty and Ordered to Pay $400 Million Criminal Fine," (March 1, 2010).

that in September 2010, the FBI, the same agency that assisted in the investigation of BAE's conduct giving rise to the February 2010 enforcement action, awarded a $40 million information security contract to a BAE entity.[38]

Deterrence is not achieved when companies and individuals that bribe are not charged with FCPA anti-bribery violations nor is deterrence achieved when U.S. government agencies continue to award multi-million dollar contracts to companies in the immediate aftermath of bribery scandals.

In order for the DOJ's deterrence message to be completely heard and understood egregious instances of corporate bribery that legitimately satisfy the elements of an FCPA anti-bribery violation involving high-level executives and/or board participation should be followed with debarment proceedings against the offender. The U.S. government currently has the power to suspend a contractor from public contracting upon indictment of an FCPA anti-bribery offense and to debar the contractor upon conviction of an FCPA anti-bribery offense.[39] However this remedy has apparently never been used in the FCPA context and specific charges are often structured, as in the Siemens and BAE matters, to avoid potential application of various debarment provisions.

Relevant to the debarment remedy, in September 2010 the House unanimously passed H.R. 5366, the "Overseas Contractor Reform Act" (the "Act"). The Act generally provides that a corporation "found to be in violation of the [FCPA's anti-bribery provisions] shall be proposed for debarment from any contract or grant awarded by the Federal Government within 30 days after a final judgment of such a violation."

However, because of the façade of FCPA enforcement, the Act represents impotent legislation. The Act's trigger term for debarment consideration – "found to be in violation" of the FCPA's anti-bribery provisions – is a trigger that is *not* reached in nearly every FCPA enforcement action. Again, Siemens and BAE were not charged with FCPA anti-bribery violations. Further, because of the prevalence of NPAs and DPAs in the FCPA context, a company entering into such an agreement with the DOJ is never "found to be in violation" of the FCPA's anti-bribery provisions.

The Act has been referred to the Senate Committee on Homeland Security and Governmental Affairs. If the Senate concludes that imposing a debarment penalty on companies that commit FCPA anti-bribery violations represents sound public policy, which I believe it does in egregious instances of corporate bribery that legitimately satisfy the elements of an FCPA anti-bribery violation involving high-level executives and/or board participation, the Senate must first understand the façade of FCPA enforcement and draft a bill that can actually accomplish its stated purpose.

The manner in which the Siemens and BAE enforcement actions were resolved significantly undermines numerous DOJ public statements regarding its FCPA enforcement program. Further, the extent of Siemens and BAE business with the U.S.

[38] BAE release, "BAE Systems to Provide Cyber Security to FBI in $40 Million Order, (Sept. 21, 2010).
[39] See 48 CFR 9.406.

government in the immediate aftermath of the bribery scandals legitimately raises the question of whether, aside from the fines and penalties of getting caught, it even matters if a company engages in conduct that violates the FCPA. Although DOJ Fraud Section Chief Denis McInerney recently rejected such an assertion,[40] one is certainly justified in concluding that violating the FCPA may merely be a cost of business for certain companies in certain industries.

As mentioned above, the DOJ has publicly stated that "paying of bribes to get foreign contracts … will not be tolerated." However, the message sent in the Siemens and BAE enforcement actions is that bribery will be "tolerated" if the violator is a certain company, in a certain industry, that sells certain products, to certain customers. These enforcement actions thus not only contribute to the "façade of FCPA enforcement," but more broadly undermine the rule of law and the notion that facts are to be applied to the law and the law is to be applied equally to all those subject to the law.

Legitimate Individual Prosecutions Deter, Yet Are Infrequent

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

The DOJ has long recognized that a corporate fine-only enforcement program is not effective and does not adequately deter future FCPA violations. In 1986, John Keeney (Deputy Assistant Attorney General, Criminal Division, DOJ) submitted written responses in the context of Senate Hearings concerning a bill to amend the FCPA. He stated as follows:

> "If the risk of conduct in violation of the statute becomes merely monetary, the fine will simply become a cost of doing business, payable only upon being caught and in many instances, it will be only a fraction of the profit acquired from the corrupt activity. Absent the threat of incarceration, there may no longer be any compelling need to resist the urge to acquire business in any way possible."[41]

[40] See, "DOJ Official Touts Positive OECD Report on U.S. Foreign Bribery Law," Inside U.S. Trade (October 22, 2010) (covering McInerney's October 21st speech to an American Bar Association meeting).

[41] See Response to Written Questions of Senator D'Amato From John C. Keeney, Business Accounting and Foreign Trade Simplification Act, Joint Hearing Before the Subcommittee on International Finance and Monetary Policy and the Subcommittee on Securities of the Committee on Banking, Housing, and Urban Affairs, United States Senate, 99th Congress, Second Session, on S. 430 (June 10, 1986).

Thus, recent comments such as those by Hank Walther (Deputy Chief Fraud Section) that a corporate fine-only FCPA enforcement program allows companies to calculate FCPA settlements as the cost of doing business are not new.[42]

During this era of the FCPA's resurgence, the DOJ has consistently stated that prosecution of individuals is a "cornerstone" of its FCPA enforcement strategy."[43] Yet, here again a "why" question must be asked. If the DOJ has long recognized that a corporate fine-only FCPA enforcement program is not effective and does not adequately deter future FCPA violations, and if prosecution of individuals is a "cornerstone" of the DOJ's FCPA enforcement program, then why is DOJ's FCPA enforcement program largely a corporate fine-only program devoid of individual prosecutions?

The DOJ's sentencing memorandum in Siemens states that compliance, legal, internal audit, and corporate finance departments all "played a significant role" in the conduct. Yet, no individuals have been charged. In May 2010, Senator Specter asked Assistant Attorney General Breuer about the lack of individual prosecutions in the Siemens matter and Breuer stated that the DOJ has not "closed out nor have we claimed to have closed out investigations with respect to individuals."[44] Six months have since passed and the largest FCPA enforcement action involving bribery "unprecedented in scale and geographic scope" has yet to result in any individual prosecution. Similarly, no individuals have been charged in connection with the BAE enforcement action.

The lack of individual prosecutions in the Siemens and BAE matters is hardly unique, rather it is another trend that defines this "new era of FCPA enforcement."

For instance, in March 2010, the DOJ charged Daimler AG with engaging in a "long-standing practice of paying bribes" to foreign officials. The criminal information alleges that "between 1998 and January 2008, Daimler made hundreds of improper payments worth tens of millions of dollars to foreign officials in at least 22 countries […] to assist in securing contracts with government customers for the purchase of Daimler vehicles valued at hundreds of millions of dollars." According to the information, "in some cases, Daimler wired these improper payments to U.S. bank accounts or to the foreign bank accounts of U.S. shell companies in order to transmit the bribes" and "in total, the corrupt transactions with a territorial connection to the United States resulted in over $50,000,000 in pre-tax profits for Daimler." No individuals have been charged in this case either.

The Daimler enforcement action also contributes to the façade of FCPA enforcement in that, like Siemens and BAE, it was not charged with FCPA anti-bribery violations despite the above allegations. Further, Daimler was allowed to settle the enforcement

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[42] See Aruna Viswanatha, "Targeting Executives in FCPA Cases Can Lead to Industry-Wide Probes," Main Justice (June 23, 2010).

[43] See Comments of Assistant Attorney General Lanny Breuer, 22nd National Forum on the Foreign Corrupt Practices Act (November 19, 2009).

[44] See Hearings Before the Senate Judiciary Committee, Subcommittee on Crimes and Drugs (May 4, 2010).

action via a DPA by which it was not required to plead guilty to anything (at least Siemens and BAE pleaded guilty to something – even if it was not an FCPA anti-bribery violation). According to the DOJ's sentencing memorandum, it considered a "number of factors" in its disposition of the enforcement action including applicable debarment provisions providing "that companies convicted of corruption offenses shall be mandatorily excluded from government contracts." Even though the sentencing memorandum states that the U.S. government's investigation of Daimler's conduct began with a "whistleblower complaint" to the U.S. Department of Labor pursuant to Sarbanes-Oxley, the DOJ nevertheless gave Daimler cooperation credit, which helped reduce the sentencing guidelines range. The fine range under the sentencing guidelines for Daimler's conduct was $116 - $232 million. However, the DOJ and Daimler agreed to resolve the case for approximately $94 million – 20% below the minimum penalty pursuant to the sentencing guidelines.

The lack of individual prosecutions in the most high-profile egregious instances of corporate bribery causes one to legitimately wonder whether the conduct was engaged in by ghosts.

It also causes one to legitimately wonder whether there are two tiers of justice when it comes to FCPA enforcement.

One tier is that major corporate bribery schemes are not even charged as FCPA anti-bribery offenses, the companies are awarded multi-million U.S. government contracts in the immediate aftermath of the enforcement actions (including by the same agencies that investigated and prosecuted the conduct at issue) and no individuals are charged.

The other tier includes cases like Charles Paul Edward Jumet. In April 2010, Jumet was sentenced to approximately seven years in federal prison.[45] His crime was conspiring to violate the same law that Siemens, BAE, and Daimler (and other corporations) are apparently immune from violating – the FCPA's anti-bribery provisions. Jumet's conduct can only be described as minor compared to the hundreds of millions of dollars of bribe payments the DOJ alleged in Siemens, BAE and Daimler. According to the DOJ, Jumet and others paid Panamanian officials approximately $200,000 to receive lighthouse and buoy contracts along the waterways of the Panama Canal. In the DOJ's post-sentencing release, Assistant Attorney General Breuer stated that the sentence, "the longest ever imposed for violating the FCPA – is an important milestone in our effort to deter foreign bribery."[46] Other government officials stated that the sentence "makes clear" that bribery "is a serious crime that the U.S. government is intent on enforcing" and that those "who intentionally bribe" will be "prosecuted to the maximum extent."

[45] Jumet's "FCPA" sentence was 67 months, he was also sentenced 20 months for making false statements in connection with the DOJ's investigation.

[46] See DOJ Release, "Virginia Resident Sentenced to 87 Months in Prison for Bribing Government Officials," (April 19, 2010).

The question to be asked though is the DOJ "intent on enforcing" and "prosecuting to the maximum extent" all FCPA anti-bribery violations or just certain violations?

In addition to this high-profile egregious instances of corporate bribery there have also been numerous other instances in which a company settles an FCPA anti-bribery enforcement action without any related individual prosecutions. For instance, in December 2009, the DOJ announced that California-based telecommunications company, UTStarcom, Inc., entered into an NPA and agreed to pay a "$1.5 million fine for violations of the [FCPA] by providing travel and other things of value to foreign officials, specifically employees at state-owned telecommunications firms" in China."[47] The NPA states that "Executive A" (a U.S. citizen) approved the contracts at issue that included a provision by which the company would pay for purported overseas training trips that were mostly leisure trips for the customers. Likewise, in June 2008, the DOJ announced that Minnesota-based medical device company, AGA Medical Corp., entered into a DPA and agreed to pay a $2 million fine based on allegations that it made "corrupt payments to doctors in China who were employed by government-owned hospitals" so that the "Chinese doctors [could direct] the government-owned hospitals to purchase AGA's products rather than those of the company's competitors."[48] According to the DPA "Officer A," "Employee B," and "Employee C" (all U.S. citizens) were key participants in the alleged conduct.

No individuals have been prosecuted in connection with the UTStarcom, Inc. and AGA Medical Corp. enforcement actions and these are just two examples of numerous other instances that could also be cited. However, a reason no individuals have been charged in these enforcement actions may have more to do with the quality of the corporate enforcement action than any other factor. As previously described, given the prevalence of NPAs and DPAs in the FCPA context and the ease in which DOJ offers these alternative resolution vehicles to companies subject to an FCPA inquiry, companies agree to enter into such resolution vehicles regardless of the DOJ's legal theories or the existence of valid and legitimate defenses. It is simply easier, more cost efficient, and more certain for a company (such as UTStarcom, Inc. or AGA Medical Corp.) to agree to a NPA or DPA than it is to be criminally indicted and mount a valid legal defense – even if the DOJ's theory of prosecution is questionable as it was in both of these cases. Again, no company subject to an FCPA inquiry in this era of the FCPA's resurgence has challenged the DOJ in any meaningful way. Individuals, on the other hand, face a deprivation of personal liberty, and are more likely to force the DOJ to satisfy its high burden of proof as to all FCPA elements.

In his November 2010 speech, Assistant Attorney General Breuer provided the following

[47] See DOJ Release, "UTStarcom, Inc. Agrees to Pay $1.5 Million Penalty for Acts of Foreign Bribery in China," (December 31, 2009).

[48] DOJ Release, ""AGA Medical Corporation Agrees to Pay $2 Million Penalty and Enter Deferred Prosecution Agreement for FCPA Violations," (June 3, 2008).

statistics as to individual FCPA prosecutions: in 2004 the DOJ charged two individuals under the FCPA; in 2005 the DOJ charged five individuals; and last year and this year combined the DOJ has charged over 50 individuals.[49]

However, an analysis of these figures reveals interesting results. The approximate 50 individuals charged in recent FCPA cases break down as follows:

> Twenty-two individuals have been in one case, the so-called Africa Sting case, in which FBI agents (posing as representatives of the President of Gabon with the assistance of an individual who had already pleaded guilty to unrelated FCPA violations) facilitated fictitious business transactions largely involving owners and employees of military and law enforcement products companies; and
>
> Twenty-four individuals are or were in cases where the recipient of the alleged payments was not a bona fide foreign government officials. Rather the DOJ's theory of prosecution was or is based on the above-mentioned theory that employees of alleged SOEs are "foreign officials" under the FCPA – an interpretation that is contrary to Congressional intent. (These prosecutions are: Control Components Inc. employees/agents (8 individuals); Haiti Teleco related cases (6 individuals); Mexico Comisión Federal de Electricidad related-cases (6 individuals); and Nexus Technology employees/agents (4 individuals).

Prosecuting individuals is a key to achieving deterrence in the FCPA context and should thus be a "cornerstone" of the DOJ's FCPA enforcement program. However, the answer is not to manufacture cases or to prosecute individuals based on legal interpretations contrary to the intent of Congress in enacting the FCPA while at the same time failing to prosecute individuals in connection with the most egregious cases of corporate bribery.

A final trend relevant to "Examining Enforcement of the Foreign Corrupt Practices Act" is that during this "new era of FCPA enforcement" federal court judges sentencing individual FCPA defendants are undeniably seeing the conduct at issue materially different than the DOJ. The sentencing of individual defendants in FCPA cases is one of the only areas of FCPA enforcement when someone other than the DOJ analyzes the conduct at issue. Thus, the following sentences and remarks are highly instructive.

> In October 2010, Judge Jackson Kiser (W.D.Va.) rejected the approximate three year sentence requested by the DOJ and sentenced Bobby Jay Elkin, Jr. to probation. Elkin, an employee in the tobacco industry, previously pleaded guilty to conspiracy to violate the FCPA by paying or authorizing payments to certain Kyrgyzstan government agencies to obtain licenses or approvals in connection with tobacco purchases. In rejecting the DOJ's

[49] See Comments of Assistant Attorney General Breuer at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010).

sentencing recommendation, Judge Kiser stated that the CIA routinely bribes Afghan warlords and that this "sort of goes to the morality of the situation."[50] Moreover, Judge Kiser "said he would waive the usual travel restrictions of probation and allow Elkin to return to Kyrgyzstan and resume his job" in the tobacco industry.

In September 2010, Judge Timothy Savage (E.D.Pa.) rejected the 14-17 year sentence requested by the DOJ and sentenced Nam Nguyen to 16 months in prison (plus two years of supervised release). Nguyen previously pleaded guilty to a conspiracy to bribe officials of alleged Vietnamese government owned or controlled agencies in connection with equipment and technology contracts. In its sentencing brief, the DOJ stated that its sentencing recommendation should be accepted "to promote general deterrence" and that such conduct "will hardly be deterred by sending the message that the consequences of such conduct is at worst several months of imprisonment." Judge Savage also rejected multi-year sentences requested by the DOJ for other defendants in the case and sentenced those defendants to probation.

In August 2010, Judge George Wu (C.D.Cal.) rejected the 10 year sentence requested by the DOJ and sentenced Gerald and Patricia Green to six months in prison (followed by three years of probation). The Greens were previously found guilty by a jury of, among other things, making improper payments to a Thailand Tourism Minister to secure contracts for a Bangkok Film Festival.

In November 2009, Judge Shira Scheindin (S.D.N.Y.) rejected the 10 year sentence requested by the DOJ and sentenced Frederic Bourke to 366 days in prison (followed by three years probation). Bourke previously was found guilty by a jury of conspiring to bribe senior government officials in Azerbaijan in what the DOJ termed a "massive bribery scheme" to ensure privatization of the State Oil Company of the Azerbaijan Republic in a rigged auction. In sentencing Bourke, Judge Scheindin stated - "after years of supervising this case, it's still not entirely clear to me whether Mr. Bourke is a victim or a crook or little bit of both."[51]

Conclusion

Despite being a fundamentally sound statute, the FCPA is being enforced in this "new era of FCPA enforcement" in many fundamentally unsound ways. The issue is not whether FCPA enforcement is good or bad for any one constituency, but whether the DOJ is enforcing, in many instances, the FCPA consistent with its provisions and consistent with

[50] Mike Gangloff, "Judge Gives Tobacco Exec Probation, Fine for Bribery," The Roanoke Times (Oct. 22, 2010).
[51] David Glovin, "Bourke Gets One Year in Prison in Azerbaijan Bribery Case," Bloomberg (Nov. 11, 2009).

Congressional intent. The issue is also whether the DOJ's rhetoric is consistent with its conduct in prosecuting the most egregious instances of corporate bribery so that FCPA enforcement deters and not yield inconsistent results and two tiers of justice. These are the issues that need to be examined and the time to examine these issues is now.

Thank you for providing me the opportunity to participate in this important hearing.