Criminal Law & Procedure

Can Someone Please Turn on the Lights? Bringing Transparency to the Foreign Corrupt Practices Act

*By Michael B. Mukasey and James C. Dunlop**

Note from the Editor:

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- Statement of Greg Andres, Acting Deputy Assistant Attorney General, Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, on the "Foreign Corrupt Practices Act," June 14, 2011: http://judiciary.house.gov/hearings/pdf/Andres06142011.pdf
- Statement of George Terwilliger, White & Case LLP, Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, on the "Foreign Corrupt Practices Act," June 14, 2011: http://judiciary.house.gov/hearings/pdf/Terwilliger06142011.pdf
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Passed in 1977, the Foreign Corrupt Practices Act ("FCPA") set out to achieve a laudable goal: to prevent U.S. companies and persons, when conducting business abroad, from corrupting the governments and people they meet. And who can argue with the notion that U.S. companies should not corrupt the governments of countries where they do business or worsen the prospects for citizens of countries whose governments are already corrupt?

Unfortunately, that unobjectionable vision has virtually disappeared in a miasma of aggressive prosecutions by the Justice Department—with $2.95 billion in penalties collected since 2009.[1] The FCPA is almost never litigated in court. Public companies are the typical FCPA target, and such defendants are rarely positioned to litigate criminal charges,[2] or even risk indictment, given (among other things) the substantial risk of federal contract debarment in many industries.[3] The same is often true for individuals, most of whom face substantial prison time if convicted and who are thus unwilling to hang their hopes on uncertain interpretive arguments. As a result, the FCPA has had almost no judicial oversight, with the result that corporations trying to comply with its mandates find they are fighting corruption in the dark, their quest for standards confined to making mitigation arguments in prosecutors' offices.

This has enabled the FCPA's enforcers, the Justice Department, and the Securities and Exchange Commission, to "win" most FCPA cases through plea bargains or settlements, in which regulators set the terms, and into which regulators import their capacious constructions of the FCPA. This regulatory latitude has, in turn, transformed the FCPA into a catch-all for illicit conduct abroad, no matter how removed the target of the enforcement action is from the underlying offense. As Professor Mike Koehler has put it, "the FCPA means what the enforcement agencies say it means."[4] This expansion in statutory scope has led to an explosion in FCPA enforcement by DOJ and the SEC, with an 85% jump in 2010 over the previous year.[5] The statute has truly become the twenty-first century weapon of choice in the prosecutor's arsenal, converting DOJ and the SEC into world-wide "roving commission[s]" that "inquire into evils"—wherever they may be—"and, upon discovery, correct them."[6] And rove they do. Of the ten highest FCPA

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fines since the statute was enacted, *nine* were imposed on non-U.S. companies.[7]

In our view, these expansive interpretations and aggressive FCPA enforcement actions stray far from the FCPA's basic purpose: preventing corruption and bribery. It is largely pointless to punish corporations whose executives, for example, had no knowledge of misconduct occurring at a subsidiary, perhaps prior to its acquisition, or that had programs and policies designed to prevent the very conduct that took place. Such enforcement actions do not deter because a corporation cannot be deterred from doing something it did not set out to do in the first place. Instead, such enforcement punishes companies' management for not correctly anticipating the prosecutor's latest theory about the reach of the FCPA. This places U.S. corporations at unease by subjecting them to the possibility of large, unforeseen civil and criminal penalties for conduct they are often powerless to define and therefore powerless to prevent.

We believe, however, that these problems could be mitigated, and the FCPA strengthened, by a few relatively simple fixes. Because the FCPA will never be heavily litigated—thus depriving the courts of the opportunity to clarify its murky text—Congress must speak clearly about what conduct does and does not violate the FCPA. To make the FCPA stronger and fairer, Congress should:

1. Provide a compliance defense;
2. Clarify the meaning of "foreign official";
3. Improve the procedures for guidance and advisory opinions from DOJ, and generally enable businesses to obtain guidance more easily;
4. Eliminate criminal successor liability for acquiring companies;
5. Add a "willfulness" requirement for corporate criminal liability; and
6. Limit a company's liability for acts of a subsidiary not known to the parent.

We believe that these fixes would serve the interests of business and regulators alike. Increasing clarity would, among other things, promote DOJ's stated goal of promoting corporate self-policing, and therefore self-reporting, in matters of corruption.[8]

1. ADDING A COMPLIANCE DEFENSE

Currently, it is no defense to corporate liability under the FCPA that a company maintains a program, no matter how rigorous, aimed at ensuring FCPA compliance. This means that even if a company has extensive safeguards in place to prevent bribery abroad by its subsidiaries, its agents, and its subsidiaries' agents, prosecutors can still hold the corporation liable if one of its agents evades those safeguards. We believe this adds unnecessary uncertainty and opens corporations to massive, largely unavoidable, liability, with few offsetting benefits. A statutory compliance defense would eliminate this uncertainty and, in our view, strengthen the FCPA's regulatory effect.

It is true that regulators will "consider" the existence of compliance programs when negotiating penalties if an FCPA violation occurs despite the programs. As one senior DOJ official recently explained, "[w]e take it into consideration and review it, and it is a serious consideration. Over the last 20 years the Department has developed a series of broader factors that we consider that includes compliance, that includes cooperation and self-disclosure."[9] But the scope and significance of that "consideration" varies from program to program and prosecutor to prosecutor, and provides no guaranty to the well-meaning corporation.[10] It is thus not clear "how to design a compliance program,"[11] or what value the program provides as a shield against liability. Such uncertainty leaves companies unsure how to manage corporate risk, with little offsetting benefit. While it is clear from the settlements reached in *Siemens*[12] and *Daimler*[13] that having little or no FCPA compliance programs puts companies at severe risk of prosecution, what about cases like *Johnson & Johnson*[14] in which an existing compliance program warranted "leniency" but not enough to avoid millions in fines and the forced adoption of even stronger compliance procedures?

Creating a compliance defense would help eliminate this uncertainty and concomitantly strengthen the incentive to adopt a robust program. Such programs could, in turn, ensure that corporations prevent bribery more effectively, and achieve the FCPA's goal—eliminating bribery—with far fewer prosecutions and less expenditure of the government's limited resources.[15] It is not unreasonable to require the government to prove as part of its case against a corporation that the corporation's compliance mechanism was defective. The existence of an illegal transaction may well go a long way toward showing that. But if the act in question was committed by a rogue employee who evaded an otherwise well-crafted compliance mechanism, there is no good reason to punish the corporation.

Adding a compliance defense would also bring the United States in line with other countries. Both the United Kingdom and Italy have included compliance defenses in their respective bribery acts. The U.K. Bribery Act ("UKBA"), while making bribery by companies a strict liability offense, also includes an affirmative defense based on a company's having in place "adequate procedures" to detect and deter bribery.[16] In 2011, the Secretary of State for Justice released a 43-page document listing the six guiding principles that a company must consider if it wishes to invoke the defense.[17] The six principles are 1) proportionate procedures; 2) top-level commitment; 3) risk-assessment; 4) due diligence; 5) communication (including training); and 6) monitoring and review. The Guidance further includes eleven case studies and suggestions for how to comply with each principle, and was accompanied by a Quick Start Guide to assist companies in structuring their compliance programs.[18] The Guidance is thus relatively comprehensive and helps enable corporations to protect themselves from anti-bribery liability in the U.K.

Italy affords a similar compliance defense. It enables a company to avoid liability if the company can demonstrate that, prior to the bribery, 1) it had an appropriate organizational and management program designed to prevent the underlying offense; 2) it created an autonomous body to supervise, enforce and upgrade the program; and 3) that autonomous body sufficiently performed its duties.[19]

U.S. sentencing law already applies similar considerations to companies, but only upon conviction. The U.S. Sentencing Commission has promulgated factors based on a company's compliance efforts to consider in mitigation at sentencing for crimes committed under many statutes, including the FCPA.[20] These factors include consideration of whether a company has installed a program that 1) promotes diligent investigation into whether criminal conduct has occurred, 2) establishes set standards and procedures to prevent criminal conduct, 3) dedicates staff to ensure compliance with the program, 4) publicizes the program, and 5) imposes penalties. These guidelines provide a useful starting point for crafting a compliance defense to liability.[21]

Such a defense could be implemented in a variety of ways, but the most definitive would be for Congress to add the defense to the statute's text, followed by the issuance of DOJ regulations to establish its contours. This would create a clear framework in which DOJ could develop a set of best practices, with assurance that all well-meaning companies would implement those practices. Rather than the current ad hoc system—in which companies try to come up with their own compliance programs from scratch and are left guessing about how those programs will be judged by law enforcement should a problem ever arise—DOJ could standardize prevention programs through regulation, and thus improve the quality of such programs everywhere. And besides, it should not be impossible for businesses to follow the law. Little is gained from imposing substantial fines on corporations for conduct they tried to prevent.[22] Requiring DOJ to determine what works best to prevent bribery and then promulgate regulations codifying that determination will ensure that best practices are widely adopted and that corruption is in fact curtailed. It will also align American law more with that of the UK and EU members such as Italy, ensuring more consistent application of anti-corruption laws to multinational corporations. Such a system would yield better outcomes for all.

2. CLARIFY THE MEANING OF "FOREIGN OFFICIAL"

The FCPA prohibits bribing foreign officials. But it is often difficult to determine who constitutes a foreign official. In many countries, the biggest businesses are wholly or partly owned and operated by the government. A recurring question under the FCPA is when executives and employees at these foreign corporations are "officials" within the scope of the statute.

The FCPA defines "Foreign Official" to include "any officer or employee of. . . [an] agency, or instrumentality thereof."[23] So far, there has been agreement among the courts and DOJ that "instrumentality thereof" includes at least some state-owned entities.[24]

That agreement has not extended, however, to the crucial question of how much state ownership is enough to constitute an "instrumentality." DOJ appears to have taken the position that minority ownership, and possibly any ownership, is sufficient. For example, in *Kellogg Brown & Root*, DOJ alleged that a development company was an "instrumentality" of the Nigerian government because a state-owned oil and gas company held 49% of the stock in that development company—thus making it a partially-owned subsidiary of a separate state-owned enterprise.[25] Lowering the bar further, in *Comverse Technology*, DOJ took the position that a Greek telecom company was a government instrumentality because the Greek government was its largest shareholder, possessing a third of the issued share capital.[26]

Recently, courts that have considered the question of instrumentality have taken a less expansive view than DOJ. In *United States v. Carson*, the district court ruled on a motion to dismiss that whether state-owned companies qualify as instrumentalities under the FCPA is a question of fact, and looked to objective factors beyond monetary investment that might indicate that an entity is carrying out government objectives.[27] Similarly, in *United States v. Aguilar*, the court, recognizing that "instrumentality" is not defined in the FCPA, looked to characteristics that fulfilled common definitions of "instrumentality" to determine whether the entity in question fulfilled the meaning of the statute.[28] Together, the factors and characteristics set forth in these opinions should help DOJ and Congress draft guidance and amendments that would clarify the meaning of "instrumentality."

In addition to taking a broad view of instrumentality, regulators likewise take an expansive view of who is an "official." Both DOJ and the SEC consider all employees of an instrumentality—regardless of their position—"foreign officials."[29] This means that, in theory, payments to low-level employees (such as clerks, purchasing staff, spec writers) at an entity in which a foreign government has partial—even minimal—ownership could result in FCPA liability.

DOJ's public statements on this point have been aggressive or smug, or both. An Assistant Chief of DOJ's Fraud Section recently stated that "[i]t's not necessarily the wisest move for a company" to challenge the definition of "foreign official," and that "[q]uibbling over the percentage ownership or control of a company is not going to be particularly helpful as a defense."[30] Other DOJ officials have suggested that the solution is easy: just don't pay bribes—a formulation more clever than intelligent that overlooks normal business expectations relating, for example, to arranging travel for customers to visit plants in aid of sales and to have moderate and reasonable entertainment upon their arrival, or to customs such as gift-giving to mark such personal events as births and weddings and the like. Even if this glib formulation were taken at face value, a company would be faced with the task of focusing its auditing resources so as to assure compliance, a task that cannot be waved off with the equally unhelpful suggestion to audit everything.

This is a problem that will only increase with the recent escalation in sovereign wealth investment,[31] and it is thus ripe for a fix.[32]

In our view, Congress could remedy the problem relatively easily by amending the statute. This would require no more than specifying a percentage ownership by a foreign government that qualifies a corporation as an "instrumentality" of that government.[33] We believe that majority ownership is the most sensible threshold, but any bright-line rule would be an improvement. Likewise, Congress needs to define the term "official" to make clear who counts and who does not. The Head

Janitor is not the same as the Head of Global Purchasing, and the FCPA ought to reflect that reality. Corporations need to know when they are in FCPA terrain so they can structure their interactions and their oversight accordingly.

3. IMPROVE THE PROCEDURES FOR GUIDANCE AND ADVISORY OPINIONS FROM DOJ, AND GENERALLY ENABLE BUSINESSES TO OBTAIN GUIDANCE

The 1988 amendments to the FCPA required DOJ to consult with other public agencies and to hold a notice-and-comment period to determine whether further clarification of the statute was necessary for the business community.[34] DOJ did hold a notice-and-comment period,[35] but opted not to issue any guidelines.[36] This decision may have been reasonable at the time, when the FCPA was, relatively speaking, dormant. But now that enforcement has exploded, guidelines are essential. As one author has put it, "[t]he lack of guidance to the regulated community is especially important now that the law has, in practical terms, changed."[37]

We are not the first to criticize this deficiency and, perhaps in response to such criticisms, DOJ has signaled plans to issue an FCPA guidance statement in 2012.[38] Time will tell whether this "guidance statement" will be a comprehensive guide to complying with the FCPA that addresses the myriad deficiencies highlighted here, or simply a rehash of DOJ's prior, vague pronouncements.[39]

The 1988 amendments also require the Attorney General to answer within 30 days requests for opinions as to whether prospective conduct conforms with DOJ's enforcement policy.[40] If a favorable opinion is obtained, it entitles the opinion-seeker to a rebuttable presumption in any enforcement action that the conduct described in the request complies with the FCPA.[41] But the procedure is cumbersome and untimely – many companies can ill afford the 30 days it might take DOJ to evaluate a transaction or other commercial venture, during which crucial efforts to negotiate and structure the transaction may need to take place. For this reason, and because companies fear the implications of a negative opinion for their future dealings with DOJ, the procedure is rarely used. To date, DOJ has issued only thirty-four opinions,[42] and only eight in the last four years, despite increasing numbers of enforcement actions by the Department.[43]

Apart from any guidance that DOJ might issue to explain its enforcement policy, Congress should provide a means for expedited review of DOJ opinions where commercial or operational circumstances warrant doing so, with a presumption that they do. We believe this is necessary for companies to be able to evaluate the viability of transactions in real time, and not be left guessing as to the outcome of concerns they have already identified and brought to DOJ's attention. Such a process will make compliance easier for businesses and, in doing so, will avert future violations and enforcement actions.

4. ELIMINATE CRIMINAL SUCCESSOR LIABILITY FOR ACQUIRING COMPANIES

Currently, a company can be held criminally liable under the FCPA for actions by a company it acquires even if those actions took place before the acquisition and were entirely unknown to the acquiring company.[44] Examples abound. For instance, in *Snamprogetti Netherlands B.V.*, Snamprogetti, a wholly-owned Dutch subsidiary of ENI S.p.A., engaged in bribery over a ten-year period ending in 2004.[45] Then, in 2006, two years after the bribery had ended, ENI sold Snamprogetti to Saipem S.p.A. In 2010, Snamprogetti, ENI, and Saipem entered a deferred prosecution agreement based on Snamprogetti's bribery. The agreement held Saipem—the non-culpable acquiring company—jointly and severally liable for the $240 million fine imposed on Snamprogetti.[46] By including Saipem in the deferred prosecution agreement, DOJ made clear that it was holding Saipem criminally liable for Snamprogetti's conduct on the basis of successor liability.[47]

There is no statutory basis in the FCPA for criminal successor liability. DOJ's theory thus appears to be based in common law successor liability theory, but successor liability's common law foundation is murky.[48] As one commentator has explained, "[t]he concept of successor liability has not been generally accepted in criminal prosecutions. It is the equivalent of creating a non-*mens rea*, strict liability offense, without criminal intent."[49] Precedent supporting such liability has, so far, generally been limited to the merger context where the bad actor has simply transformed itself into a new corporate entity.[50]

In addition to having only a shaky foundation in common law, successor liability is in tension with the plain terms of the FCPA. The FCPA speaks in terms of *current* action. For example, "[i]t shall *be unlawful* for a domestic concern . . . *to make use* of the mails or any means or instrumentality of interstate commerce . . . ."[51] The statute gives no indication that any discrete FCPA violation is necessarily an ongoing offense, attachable to a successor.

This makes sense, of course, because criminal law exists to punish bad actors. It is a basic tenet of criminal law—embodied by the *mens rea* requirement fundamental to all but the most technical of criminal statutes—that companies, like people, should not be held criminally liable for the actions of others who act independently.[52] But that principle does not currently apply to the FCPA. Indeed, DOJ's strong position on successor liability likely exceeds even the bounds of civil successor liability, which turns on a complex analysis of a variety of factors, including whether the successor company agreed to assume the liability, whether a merger or acquisition simply veiled a fraudulent effort to escape liability, and whether it is actually in the public interest to impose such liability.[53]

DOJ may argue that successor liability is necessary and appropriate 1) to avoid circumstances where FCPA violation might go unpunished due to a corporate merger takeover or reorganization, and 2) because the gain to the prior company from illegal conduct is part of the value of the acquisition or the new relationship. With respect to the former, there may be some validity to DOJ's argument in cases where a corporate restructuring results in the same company, run by the same management, with substantially the same shareholders or owners, and doing the same business under a different form. It has no validity when a merger or takeover results in a new board, new procedures, new management and even new shareholders who are unconnected to the prior company's conduct. It is an affront to due process to punish a non-culprit—an innocent party—simply to ensure that "no one goes unpunished."

With respect to the second argument—that an acquirer somehow participates in, or ratifies, illegal conduct by a target merely by acquiring it—there may be some validity to the theory in individual cases, where the gain derived from bribes by the target formed the basis of the bargain between it and its acquisition or merger partner. It cannot be the basis of a general theory of successor liability, short of an impact on the transaction itself, where the acquirer had nothing to do with the prior conduct and the target may not even have been subject to the FCPA at the time.

The time has thus come for Congress to step in and set clear parameters. Major transactions are collapsing in the void.[54] Congress should make clear that companies cannot be held criminally liable for the pre-acquisition conduct of an acquired company. If an acquiring company conducts reasonable due diligence,[55] the acquiring company should be exempt as a matter of law—rather than through the gauzy and unpredictable standard of prosecutorial discretion—from criminal liability under the FCPA. In addition to eliminating instances where innocent companies are held liable for the crimes of others, eliminating successor liability will encourage acquiring companies to detect and self-report pre-acquisition violations by the acquired company.[56] DOJ could then prosecute the actual wrongdoers.[57]

5. ADD A "WILLFULNESS" REQUIREMENT FOR CORPORATE CRIMINAL LIABILITY

Individual defendants are criminally liable under the FCPA only if they act "willfully."[58] This requires the Government to prove that the "defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful."[59] But no such limitation exists for companies.[60] As it stands now, a company may be liable under the FCPA whenever an employee or subsidiary, or a subsidiary's employee, violates the statute, regardless of whether executives of the company even know about the conduct, and contrary to evidence (compliance programs, training edicts, direct prohibitions) that the company may have <u>opposed</u> such conduct.

In addition to being in tension with the same basic principles we discussed above, this inconsistency compounds the other problems attendant to DOJ's expansive interpretations of the FCPA. For example, DOJ has taken an aggressive view of the FCPA's territorial reach. In addition to reaching U.S. companies or companies with stock traded on American exchanges, the FCPA extends to any person who "while in the territory of the United States, corruptly [makes] use of . . . any means or instrumentality of interstate commerce or [does] any other act in furtherance of" a bribery scheme.[61] On its face, this provision appears to require that a person be physically present in the United States when using a means of interstate commerce in furtherance of the bribery scheme.[62] But DOJ has rejected this interpretation. It instead maintains that "[a]lthough this section has not yet been interpreted by any court, the Department interprets it as conferring jurisdiction whenever a foreign company or national *causes* an act to be done within the territory of the United States by any person acting as that company's or national's agent."[63] DOJ has enforced the provision on that basis,[64] which means that FCPA liability attaches whenever, for example, a person working for a non-U.S. subsidiary bribes a foreign official by wiring money through or from a bank account located in the United States.

DOJ's view that the FCPA applies to anyone, anywhere, at any time, so long as there is even a tangential connection to the United States, and regardless of the intent of the parent company, demonstrates the dangers posed to U.S. and non-U.S. corporate parents by the absence of a willfulness element. A U.S. company or a non-U.S. company listed on a U.S. exchange is exposed to potential FCPA liability for, say, bribes made outside the United States by the non-U.S. agents of a tertiary subsidiary, in violation of the parent's clear policies, and of which the parent had no knowledge. Indeed, the various actors in our hypothetical probably would not have even realized that U.S. law applied to their conduct. Nothing in the FCPA's text or legislative history suggest that it was intended to have such sweeping application,[65]which contradicts the DOJ's own stated policy. That policy states that a parent is "liable for the acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question."[66]

Congress should therefore extend the "willfulness" element to corporate liability. Doing so would ensure that innocent companies that were unaware of the offending conduct taking place, and that did not ratify it, avoid unnecessary liability, while giving corporate parents a stronger incentive to report wrongdoers at their subsidiaries. Under the current regime, even the most blame-free corporate parent would be leery of reporting misconduct by employees of a subsidiary. If non-willful companies were not liable, such reporting would likely increase, enabling regulators to better pursue the actual wrongdoers and to be more fully aware of patterns of actual wrongdoing.

6. LIMIT A COMPANY'S CIVIL LIABILITY FOR ACTS OF A SUBSIDIARY NOT KNOWN TO THE PARENT

Beyond a willfulness requirement for criminal liability, companies should no longer be held civilly liable for books and records misstatements about which they had no knowledge. The SEC currently enforces the FCPA as if it were a strict liability statute. Companies are held liable for the conduct of subsidiaries and subsidiaries' employees even if the company had no idea that the conduct was happening.[67]

Such enforcement actions are contrary to the language of the anti-bribery provisions, which require that a person act "corruptly" and give something of value "knowing" that all or part of it will result in a bribe.[68] They are contrary to the intent of the FCPA's drafters.[69] And they are also contrary to the 1988 amendments, which tightened the mens rea requirement from "while knowing or having reason to know" to simply "while knowing."[70]

In effect, the current practice operates as a massive expansion of respondeat superior liability under the law of agency. Historically, a parent could not be held liable pursuant to respondeat superior unless it exerted such pervasive control over the subsidiary that the difference between the two entities was purely formal,[71] or unless the parent exercised control over the subsidiary's specific activity giving rise to the litigation.[72] The current practice of charging nearly every company connected to nearly every bribe—regardless of control, involvement, or even knowledge—completely ignores these long-established limitations on liability. It is one thing to assume that a corporate affiliate, joint venture partner, or subsidiary acts as an agent of a U.S. company in the conduct of their joint business. It is quite another to assume that such a related company acts as an agent when paying unauthorized, and secret, bribes.

Here too, we believe Congress could make a quick fix. The simplest solution would be to add a subsection to the statute titled "respondeat superior" clearly explaining that liability does not attach to a corporate parent absent evidence that the parent's officers knew about its subsidiary's misconduct. Such a provision would make clear that the SEC cannot hold every entity in the corporate chain liable for unknown misconduct at a lower level. It would also, like many of our suggested reforms, eliminate the current disincentive on parent corporations to root out and report corrupt practices by their subsidiaries.

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These suggestions are not meant to be exhaustive. The FCPA, while an important statute that has reduced corruption and helped improve business practices abroad, creates a complex regulatory framework, and there are many ways to improve it. What is clear, though, is that the FCPA is not going away anytime soon. It is an extremely broad, extremely powerful statute that enables DOJ and the SEC to extract billions of dollars in fines in well publicized cases against high profile defendants, many with no incentive or ability to fight back. When, such as here, the incentive to prosecute is so strong, regulators hold all the cards, and the standards they apply are not transparent, it is imperative that Congress set clear boundaries. Such boundaries, and such clarity, will make the statute more predictable, will allow corporations an opportunity to comply, and will give corporations a clear framework for alerting regulators to misconduct abroad. Right now, corporations are fighting corruption in the dark, and it is up to Congress to shed a little light. We hope Congress acts soon.

Endnotes

1 In 2011, the financial penalties totaled $508.6 million. *See 2011 Enforcement Index*, The FCPA Blog (Jan. 2, 2012), http://www.fcpablog.com/blog/2012/1/2/2011-enforcement-index.html. In 2010, the government levied a record $1.8 billion in FCPA-related penalties. *See 2010 Enforcement Index*, The FCPA Blog (Jan. 3, 2011), http://www.fcpablog.com/blog/2011/1/3/2010-fcpa-enforcement-index.html. In 2009, the government issued $641 million in penalties. *Id.* In 2008, the government issued $890 million in penalties; however, that number includes the single largest fine to date—an $800 million settlement by Siemens AG with the DOJ and SEC. *Id.*

2 The literature on the inability of public companies to litigate criminal charges is extensive. The Arthur Andersen adventure, in which the company ultimately won its case, but was nonetheless destroyed, effectively captures the dilemma facing corporations. *See, e.g.*, Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 Ind. L. Rev. 389, 414 (2010) ("Simply put, businesses are not in the business of setting legal precedent and to challenge this interpretation would first require a business to be criminally indicted—something no board of director member is going to allow to happen in this post-Arthur [Andersen] world . . . ."); Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 Am. Crim. L. Rev. 107 (2006).

3 *See* David E. Dworsky, *Foreign Corrupt Practices Act*, 46 Am. Crim. L. Rev. 671, 690 (2009). Disgorgement is also a possible sanction. *See* Sasha Kalb and Marc Alain Bohn, *Disgorgement: The Devil You Don't Know*, Corporate Compliance Insights (Apr. 12, 2010), http://www.corporatecomplianceinsights.com/2010/disgorgement-fcpa-how-applied-calculated/.

4 Koehler, *supra* note 2, at 410.

5 *See* Melissa Aguilar, *2010 FCPA Enforcement Shatters Records*, Compliance Week (Jan. 4, 2011), *available at* http://www.complianceweek.com/2010-fcpa-enforcement-shatters-records/article/193665/ (noting that "FCPA enforcement actions jumped 85 percent in 2010, shattering the prior record set in 2009 . . . ."). Indeed, prior to 2007, FCPA enforcement actions were comparatively rare. *See, e.g.*, F. Joseph Warin et al., *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. Pa. J. Bus. L. 321, 325 (2011); Daniel J. Grimm, *The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Successor Liability and Its Consequences*, 7 N.Y.U. J.L. & Bus. 247, 249-50 (2010).

6 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring).

7 *With Magyar in New Top Ten, It's 90% Non-U.S.*, The FCPA Blog (Dec. 29, 2011), http://www.fcpablog.com/blog/2011/12/29/with-magyar-in-new-top-ten-its-90-non-us.html.

8 *See, e.g.,* Alice S. Fisher, Assistant Att'y Gen., Dep't of Justice, Prepared Remarks for the American Bar Association National Institute on Foreign Corrupt Practices Act at 6 (Oct. 16, 2006), *available at* http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf.

9 *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 58 (2011) (statement made by Greg Andres, Acting Deputy Assistant Att'y Gen.); *see also* Principles of Federal Prosecution of Business Organizations, Title 9, Chapter 9-28.000, United States Attorneys' Manual, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm (decision whether to charge).

10 *See, e.g.*, Criminal Information ¶ 39, United States v. Siemens Aktiengesellschaft, No. 1:08-CR-367 (D.D.C. Dec. 12, 2008), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-12-08siemensakt-info.pdf (FCPA circulars and policies insufficient as a FCPA compliance program).

11 Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 Ga. L. Rev. 489, 561 (2011).

12 Department's Sentencing Memorandum, United States v. Siemens Aktiengesellschaft, No. 08-CR-00367, *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-12-08siemensvenez-sent.pdf (D.D.C. Dec. 12, 2008).

13 Plea Agreement, United States v. Daimler Export & Trade Finance GmbH, No. 10-CR-065 (D.D.C. Mar. 24, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/daimler/03-24-10daimlerexp-plea.pdf.

14 Deferred Prosecution Agreement at 3, Dep't. of Justice, United States v. Johnson & Johnson (DePuy) (*Johnson & Johnson DPA*), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/depuy-inc/04-08-11depuy-dpa.pdf (Jan. 14, 2011) ("J&J had a pre-existing compliance and ethics program that was effective and the majority of problematic operations globally resulted from insufficient implementation of the J&J compliance and ethics program in acquired companies.").

15 *See, e.g.*, Walter Ricciardi, Deputy Dir., Div. of Enforcement, Sec. & Exch. Comm'n, Remarks at the PricewaterhouseCoopers Roundtable Discussion, Navigating Dangerous Waters: FCPA: Managing International Business and Acquisition Compliance Risk at 7 (2008), *available at* http://www.pwc.com/us/en/foreign-corrupt-practices-act/assets/fcpa_managing_risk.pdf; Susan F. Friedman, *Mission Possible: Developing in-House Counsel's Role in the Fight Against Global Corruption*, N.Y. L.J. (June 19, 2008), *available at* http://www.law.com/cs/ContentServer?pagename=pubs/nylj_07/

wrapper&childpagename=NY/Article_C/pubs/nylj_07/pubarticlePrinterFriendly&cid=1202422367291&hubtype=FeaturedContent (quoting a speech given by FBI Director Robert Mueller).

16 *See* Bribery Act of 2010, ch. 23, § 7(2) (U.K.). A strict liability regime such as the UKBA's would upend standard attributes of U.S. criminal law such as mens rea requirements in all but regulatory offenses and constitutional presumptions of innocence. *See* discussion at sections 4-6 *infra*.

17 Ministry of Justice, The Bribery Act of 2010, Guidance, March 2011 (U.K.).

18 Ministry of Justice, The Bribery Act of 2010, Quick Start Guide 2011 (U.K.).

19 Legislative Decree no. 231 of 8 June 2001; *see also, e.g.*, Mike Koehler, *The Compliance Defense Around the World*, Corporate Compliance Insights (June 30, 2011), http://www.corporatecomplianceinsights.com/the-compliance-defense-around-the-world/; McDermott, Will & Emery, *Italian Law No. 231/2001: Avoiding Liability for Crimes Committed by a Company's Representatives* (Apr. 27, 2009), *available at* http://www.mwe.com/info/news/wp0409f.pdf.

20 U.S. Sentencing Guidelines Manual § 8B2.1 (2011).

21 The Sentencing Commission's Guidelines are not, by themselves, sufficient because they apply only after conviction. What is crucial is for companies to have a means of avoiding criminal charges up front, at the negotiating stage with prosecutors, when a statutory compliance defense would prevent companies being charged for conduct of which they were unaware.

22 It is widely accepted that at large, complex institutions, no system of internal controls could possibly prevent all forms of willful deceit by employees or agents. The SEC itself has recognized as much. *See* SEC Div. of Corp. Fin., Staff Statement on Management's Report on Internal Controls Over Financial Reporting (2005) ("[D]ue to their inherent limitations, internal controls cannot prevent or detect every instance of fraud. Controls are susceptible to manipulation, especially in instances of fraud caused by the collusion of two or more people including senior management.").

23 15 U.S.C. § 788dd-1(f)(1)(A); § 78dd-2(h)(2)(A); § 78dd-3(f)(2)(A).

24 *See* United States v. Aguilar, 783 F. Supp. 2d 1108, 1118 (C.D. Cal. 2011) (stating that the FCPA did not intend to include or exclude all state-owned entities); United States v. Carson, No. SACR 09-00077-JVS, 2011 U.S. Dist. Lexis 88853, at *10-12 (C.D. Cal. May 18, 2011) (stating that determining whether a state-owned entity is an "instrumentality" is a fact question for the jury); Criminal Information ¶ 14, United States v. Kellogg Brown & Root LLC, No. 09-CR-071 (S.D. Tex. Feb. 6, 2009) *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/kelloggb/02-06-09kbr-info.pdf (*Kellogg Brown & Root*).

25 *Kellogg Brown & Root*, No. 09-CR-071 at ¶ 14; *see also* Deferred Prosecution Agreement, Attachment A ¶13, United States v. JGC Corporation, No. 11-CR-260 (S.D. Tex. Apr. 6, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/jgc-corp/04-6-11jgc-corp-dpa.pdf (same Nigerian development company).

26 Non-Prosecution Agreement, Attachment A ¶12, Dep't of Justice, *In re* Comverse Technology, Inc. (Apr. 7, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/rae-comverse/04-06-11comverse-npa.pdf.

27 *See Carson*, 2011 U.S. Dist. Lexis 88853, at *11-12. The several factors relied on by the court to analyze whether a business entity constitutes a government instrumentality include:

- The foreign state's characterization of the entity and its employees;
- The foreign state's degree of control over the entity;
- The purpose of the entity's activities;
- The entity's obligations and privileges under the foreign state's law;
- The circumstances surrounding the entity's creation; and
- The foreign state's extent of ownership of the entity, including the level of financial support by the state.

Id.

28 *See Aguilar*, 783 F. Supp. 2d at 1115. The characteristics relied upon by the court to determine whether a state-owned corporation is an "instrumentality" of the government include whether

- The entity provides a service to the citizens of the jurisdiction;
- The key officers and directors of the entity are government officials, or are appointed by them;
- The entity is financed in large measure through governmental appropriations or through revenues obtained through taxes, licenses, fees, etc.;
- The entity is vested with and exercises exclusive or controlling power to administer its designated functions; and
- The entity is widely perceived and understood to be performing official functions.

Id.

29 *See* Dep't of Justice, Laypersons Guide to FCPA at 3, *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf.

30 Christopher M. Matthews, *DOJ Official Warns Against Challenging Foreign Official Definition in FCPA Cases*, mainjustice.com (May 4, 2011), http://www.mainjustice.com/justanticorruption.

31 *See*, *e.g.*, Westbrook, *supra* note 11, at 535-36.

32 To illustrate the breadth of this 1/3 standard, the United States government owned a 27% stake in General Motors following GM's emergence from bankruptcy. *See* Ben Klayman & Deepa Seetharaman, *GM Outlook Disappoints, Shares Tumble*, Reuters (Nov. 9, 2011), http://www.reuters.com/article/2011/11/09/us-gm-idUSTRE7A83GQ20111109. Similarly, following the bailout of AIG, the U.S. government owned a 79.9% equity stake in the company. *See* Matthew Karnitsching et al., *U.S. to Take Over AIG in $85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up*, Wall St. J., Sept. 16, 2008. Thus, by DOJ's standard, every single employee at GM and AIG were, at least for a while, "officials" of the United States government.

33 Doing so would require no more than simply adopting the definition of "instrumentality" in the Foreign Sovereign Immunities Act for the FCPA. *See* 28 U.S.C. § 1603(b)(2) (defining instrumentality as "an organ of a foreign state" or an entity "a majority of whose shares or other ownership interest is owned by a foreign state").

34 *See* § 78dd-1(d).

35 54 Fed. Reg. 40, 918 (Oct. 4, 1989).

36 55 Fed. Reg. 28, 694 (July 12, 1990).

37 Westbrook, *supra* note 11, at 497.

38 *See* Samuel Rubenfeld, *U.S. Chamber Cheers Upcoming DOJ Guidance on FCPA*, Wall St. J., Nov. 9, 2011, *available at* http://blogs.wsj.com/corruption-currents/2011/11/09/u-s-chamber-cheers-upcoming-doj-guidance-on-fcpa/.

39 To date, many have been skeptical. *See, e.g.*, Mike Koehler, *DOJ Guidance—Better Late Than Never, But Will It Matter?*, FCPA Professor (Nov. 10, 2011), http://www.fcpaprofessor.com/doj-guidance-better-late-than-never-but-will-it-matter (stating that he believes the guidance will "be little more than a compilation in one document of information that is already in the public domain for those who know where to look"); Mike Emmick, *Don't Expect Too Much From DOJ's Upcoming New FCPA Guidance*, Boardmember.com, http://www.boardmember.com/Article_Details.aspx?id=7189&ekfxmen_noscript=1&ekfxmensel=eeb11f83b_30_494 (arguing that DOJ's guidance will likely fall well short of that issued by the UK). Indeed, in response to DOJ's announcement of its plans to release a guidance statement, Senator Charles Grassley sent a letter to DOJ inquiring whether the guidance would address the following concerns:

> Will the guidance offer only the Department's interpretation of the Act's enforcement provisions or will the guidance set forth the Department's enforcement policies? i. Will the guidance include the Department's interpretations of ambiguous statutory terms such as "foreign official" and "government instrumentality"? ii. Will the guidance clarify when a company may be held liable for the actions of an independent subsidiary? iii. Will the guidance clarify the extent to which one company may be held liable the pre-acquisition or pre-merger conduct of another? iv. Will the guidance include an enforcement safe harbor for gifts and hospitality of a de minimis value provided to foreign officials?

Mike Koehler, *Senator Grassley Seeks Guidance as to DOJ's Upcoming FCPA Guidance*, FCPA Professor (Nov. 21, 2011), http://www.fcpaprofessor.com/senator-grassley-seeks-guidance-as-to-dojs-upcoming-fcpa-guidance.

40 *See* § 78dd-1(e)(1); *see also* Foreign Corrupt Practices Opinion Procedure, 28 C.F.R. §§ 80.1-80.16 (2012).

41 *Id.*

42 *See* Dep't of Justice, Opinion Procedure Release, *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/.

43 The SEC has never issued an advisory opinion on FCPA-related inquiries and has no procedure in place to do so.

44 *See, e.g.*, Dep't 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 a company that if it conducted due diligence on a target and self-reported any violations that it may escape FCPA liability, thereby implying that the DOJ and SEC view successor liability as a viable FCPA theory).

45 *See* Criminal Information, United States v. Snamprogetti Netherlands B.V., Crim. No. 10-CR-460, (S.D. Tex. July 7, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/snamprogetti/07-07-10snamprogetti-info.pdf; *see also* Press Release, Dep't of Justice, Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty (July 7, 2010), *available at* http://www.justice.gov/opa/pr/2010/July/10-crm-780.html.

46 *See* Deferred Prosecution Agreement, United States v. Snamprogetti Netherlands B.V., Crim. No. 10-CR-460 (S.D. Tex. Jul. 7, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/snamprogetti/07-07-10snamprogetti-dpa.pdf ("*Snamprogetti DPA*").

47 Another example is the Alliance One prosecution. Alliance One was formed in 2005 by the merger of Dimon Incorporated ("Dimon") and Standard Commercial Corporation ("SCC"). *See* Press Release, Dep't 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. Employees and agents of two foreign subsidiaries of Dimon and SCC allegedly committed FCPA violations prior to the merger. In 2010, DOJ brought a criminal case against Alliance One based on successor liability, and ultimately entered into a non-prosecution agreement. Or in *Latin Node*, DOJ forced eLandia to pay for alleged FCPA violations committed by Latin Node, Inc. before eLandia took possession of Latin Node. *See* Press Release, Dep't of Justice, Latin Node Inc., Pleads Guilty to Foreign Corrupt Practices Act Violation and Agrees to Pay $2 Million Criminal Fine (Apr. 7, 2009), *available at* http://www.justice.gov/opa/pr/2009/April/09-crm-318.html (*Latin Node*). The DOJ levied these fines even though eLandia self reported the incident once it took control of the company. Similarly, in *El Paso*, the SEC held El Paso liable for illegal payments made by its predecessor-in-interest, the Coastal Corporation, prior to the acquisition (though, in the SEC's defense, El Paso did allow the payments to continue post-acquisition). Complaint ¶¶ 1,8, 20, SEC v. El Paso Corp. (S.D.N.Y. 2007), *available at* http://www.sec.gov/litigation/complaints/2007/comp19991.pdf; *see also* Andrew Weissman & Alixandra Smith, U.S. Chamber Institute for Legal Reform, Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act 17-18 (Oct. 2010), *available at* http://www.instituteforlegalreform.com/sites/default/files/restoringbalance_fcpa.pdf (summarizing instances where the DOJ imposed criminal successor liability).

48 Grimm, *supra* note 5, at 286; *see also* F. Joseph Warin & Andrew S. Boutros, *Deferred Prosecution Agreements: A View from the Trenches and a Proposal for Reform*, 93 Va. L. Rev. in Brief 121, 131 n.34 (2007) ("To be sure, whether successor liability includes criminal liability is a matter of some dispute . . . ."); Brian R. Becker, *Notes*, *Corporate Successor Criminal Liability: The Real Crime*, 19 Am. J. Crim. L. 435, 469-70 (1992) (explaining why corporate successor criminal liability is inappropriate for Texas).

49 1 Joel M. Androphy, White Collar Crime § 3.18 (2011).

50 *See* Grimm, *supra* note 5, at 287 ("Where ownership structure is unchanged despite a morphing corporate structure, imposing criminal successor liability may be necessary to prevent business entities from escaping 'their responsibility by dying paper deaths, only to rise phoenix-like from the ashes, transformed but free of their formal liabilities.'") (quoting United States v. Mexico Feed & Seed Co., 980 F.2d 478, 487 (8th Cir. 1992)). For example, in *Melrose Distillers, Inc. v. United States*, two corporations indicted for Sherman Act violations merged with their parent and dissolved. 359 U.S. 271 (1959). The companies moved to dismiss the complaint on the ground that the corporations no longer existed. *Id.* at 272. The Court applied Maryland law to hold that the corporations still existed for purposes of the Sherman Act. *Id.* at 273-74. The Court explained: "Petitioners were wholly owned subsidiaries [of the parent]. After dissolution they simply became divisions of a new corporation under the same ultimate ownership. In this situation there is no more reason for allowing them to escape criminal penalties than damages in civil suits." *Id.* at 274.

In *United States v. Alamo Bank*, the Fifth Circuit upheld Alamo Bank's criminal conviction for Bank Secrecy Act violations committed by a bank that it had merged with. 880 F.2d 828, 829 (5th Cir. 1989). The violations had occurred three or four years prior to the merger. *Id.* In upholding the conviction, the court wrote that the predecessor "cannot escape punishment by merging with Alamo and taking Alamo's corporate persona. Neither the pre nor post merger Alamo as a separate legal entity is being forced to pay for the wrongs of CNB." *Id.* at 830.

51 *See, e.g.,* § 78dd-2(a).

52 For example, long-established Supreme Court precedent requires mens rea for felonies. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 500 (1951) ("The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."); Staples v. United States, 511 U.S. 600, 616-19 (1994) (discussing the imposition of mens rea in felony offenses generally). For example, in *United States v. United States Gypsum Co.*, the Court held that although the Sherman Act makes no reference to intent or state of mind, 438 U.S. 422, 438 (1978), "intent is a necessary element of a criminal antitrust violation." *Id.* at 443-44. We note that the UKBA's strict liability approach is inconsistent with these bedrock principles of U.S. criminal law and constitutional law regarding due process in criminal cases.

53 *See, e.g.,* United States v. Cigarette Merchandisers Ass'n, Inc., 136 F. Supp. 214 (S.D.N.Y. 1955).

54 For example, a few years ago, Lockheed Martin backed away from a deal to acquire Titan Corporation after it discovered bribes paid by a Titan subsidiary in Africa during its pre-closing due diligence because it did not want to risk FCPA liability. *See* Margaret M. Ayres & 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://www.sec.gov/litigation/litreleases/lr19107.htm.

55 What "reasonable due diligence" means is something that Congress should require DOJ to specify in regulations after holding a notice-and-comment period.

56 *See Latin Node*, *supra* note 47.

57 These circumstances are analogous to the long-standing practice of granting limited immunity to obtain information from a witness. Such grants shift the witness' incentive in favor of disclosing as much as possible to fit it within the immunity granted.

58 § 78dd-2(g)(2).

59 Bryan v. United States, 524 U.S. 184, 193 (1998).

60 *See* § 78dd-2(g)(1)(A).

61 § 78dd-3(a).

62 *See also* H.R. Rep. No. 105-802 (Oct. 8, 1998) ("[T]he offense created under this section requires that an act in furtherance of the bribe be taken within the territory of the United States."). The report went on to state: "[T]his section limits jurisdiction over foreign nationals and companies to instances in which the foreign national or company takes some action while physically present within the territory of the United States." *Id.*

63 *See also* Prohibited Foreign Corrupt Practices, Title 9, Chapter 9-1018, United States Attorneys' Manual, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01018.htm (emphasis original). A court has, in fact, ruled. In June 2011, in one of the *Shot Show* cases, Judge Richard Leon of the U.S. District Court for the District of Columbia granted a defendant's Rule 29 motion discussing an FCPA count that was based solely upon the sending of a DHL package from London to the U.S. as not satisfying the extraterritorial jurisdiction requirement of

the FCPA that the foreign person undertake an act within the territory of the United States. *Significant dd-3 Development in Africa Sting Case*, FCPA Professor (June 9, 2011), http://www.fcpaprofessor.com/significant-dd-3-development-in-africa-sting-case.

64 For example:

• In 2005, DOJ entered into a plea agreement with DPC Tianjin Co. Ltd. on the basis of illicit payments made by that company—a wholly-owned Chinese subsidiary of Diagnostic Products Corporation, a United States "issuer"—to various Chinese officials. Plea Agreement, United States v. DPC (Tianjin) Ltd., No. 05-CR-482 (C.D. Cal. May 20, 2005), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/dpc-tianjin/05-19-05dpc-tianjin-plea-agree.pdf (DPC Plea Agreement). The Information is unclear about the connection between the offending subsidiary's conduct and the United States, simply labeling the subsidiary as the United States parent's "agent." Criminal Information ¶1, United States v. DPC (Tianjin) Ltd., No. 05-CR-482, *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/dpc-tianjin/05-20-05dpc-tianjin-info.pdf (C.D. Cal. May 20, 2005). The only United States conduct specified in the plea agreement is the subsidiary's mailing, e-mailing, and faxing of various reports and financial statements to the parent in the United States. *DPC Plea Agreement*, Exhibit 2, ¶¶4-6.

• In 2010, DOJ entered into a plea agreement with Alcatel and a variety of its foreign subsidiaries. While employees of some of those subsidiaries allegedly had meetings in the United States to discuss the payments, most subsidiaries' only connections to the United States were telephone, fax, or e-mail communications with United States-based employees of the United States entity. DOJ nonetheless charged everyone under section 78dd-3. *See* Plea Agreement, Exhibit 3, United States v. Alcatel Centroamerica, *S.A.*, No. 10-CR-20906 (S.D. Fla. Feb. 22, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-lucent-sa-etal/02-22-11alcatel-centroamerica-plea-agmt.pdf.

• In 2010, DOJ entered into a deferred prosecution agreement with Snamprogetti Netherlands, a wholly-owned subsidiary of Snamprogetti S.p.A., an Italian engineering, procurement and construction ("EPC") company in which Snamprogetti agreed to pay a $240 million criminal penalty (it also paid $125 to resolve parallel charges filed by the SEC). Snamprogetti was part of a four-company joint venture formed for the purposes of bidding on and performing EPC contracts to design a liquefied natural gas plan in Nigeria. The Joint Venture operated through three Portuguese special-purpose corporations based in Madeira, one of which was 25%-owned by Snamprogetti. The only connection between Snamprogetti and the United States was that officers, employees, and agents of Snamprogetti caused wire transfers to be sent from the Madeira company's bank account in Amsterdam to bank accounts in New York and Japan for use in the bribes. *See Snamprogetti DPA*, *supra* note 46, at Attachment A.

• In 2010, DOJ secured a guilty plea and $4.4 million fine from Universal Brazil, a wholly-owned Brazilian subsidiary of the Universal Corporation, a United States issuer headquartered in Virginia. The only connection between Universal Brazil's conduct and the United States was that Universal Brazil caused United States-based employees of its United States parent to wire funds to a bank account in Thailand for what was described as a "commission payment" to an agent, although the account was not in the agent's name or associated with the agent's business, which funds were then used to bribe a Thai official. *See* Plea Agreement, Appendix B, United States v. Universal Leaf Tabacos LTDA., No. 10-CR-225 (E.D. Va. Apr. 6, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/universal-leaf/08-06-10universal-leaf-plea-agmt.pdf.

• In 2011, DOJ entered into a deferred prosecution agreement with Magyar Telekom, Plc., a Hungarian corporation and foreign issuer whose American Depository Receipts traded on the New York Stock Exchange during the relevant period. The sole alleged connection between the conduct at issue and the United States is that two e-mails sent from and to Macedonian individuals "passed through, [were] stored on, and [were] transmitted [from or to] servers located in the United States." *See* Deferred Prosecution Agreement, Attachment A, ¶¶ 23, 25(c), United States v. Magyar Telekom, Plc., No. 11-CR-597 (E.D. Va. Dec. 29, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/magyar-telekom/2011-12-29-dpa-magyar.pdf.

65 At most, the drafters suggested that a parent could be liable if it consciously avoided learning about FCPA violations by a subsidiary. *See* S. Rep. No. 95-114, at 11 (1977) (explaining that such conduct "could be in violation of section 102 requiring companies to devise and maintain adequate accounting controls").

66 Dep't of Justice, Laypersons Guide, *supra* note 29.

67 For example:

• Johnson & Johnson settled an enforcement action with the DOJ and SEC related to actions taken by domestic and foreign subsidiaries that violated the FCPA's anti-bribery and accounting provisions. *See* Press Release, Dep't of Justice, Johnson & Johnson Agrees to Pay $21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations: Company to Pay Total Penalties of $70 Million in Resolutions with Justice Department and U.S. Securities and Exchange Commission (Apr. 8, 2011), *available at* http://www.justice.gov/opa/pr/2011/April/11-crm-446.html. There were no allegations in the Information or the Deferred Prosecution Agreement asserting that Johnson & Johnson had any knowledge of the acts of their subsidiaries. *See* Criminal Information, United States v. DePuy, Inc., No. 11-CR-099 (D.D.C. Apr. 8, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/depuy-inc/04-08-11depuy-info.pdf; *Johnson & Johnson DPA*, *supra* note 14.

• The SEC charged United Industrial Corporation (UIC), an American aerospace and defense contractor, with violating the FCPA's anti-bribery provisions for actions taken by its subsidiary. *See* Sec. & Exch. Comm'n, United Industrial Corp., Exchange Act Release No. 60005 (May 29, 2009), *available at* http://www.sec.gov/litigation/admin/2009/34-60005.pdf. There is no indication that UIC possessed any knowledge of these alleged acts.

• The SEC charged Diagnostics Product Company (DPC), an American company, with violating the FCPA's anti-bribery provisions for bribes paid by a Chinese subsidiary to doctors at foreign, state-owned hospitals. *See* Sec. & Exch. Comm'n, Diagnostics Products Corp., Exchange Act Release No. 51724 (May 20, 2005), *available at* http://www.sec.gov/litigation/admin/34-51724.pdf. Nothing in the release indicates that DPC had any knowledge of its subsidiary's bribery. Indeed, DPC halted such illegal payments once it uncovered them. *Id*. at 2.

68 §78dd-1(a)(3); § 78dd-2(a)(3); § 78dd-3(a)(3).

69 *See* H.R. Rep. No. 94-831, at 14 (1977) (Conf. Report) (implying that the company will be liable for the acts of a foreign subsidiary where the U.S. person or company directs such actions).

70 *See* § 78dd-2(a)(3); *see also, e.g.*, Kenneth Winer & Gregory Husisian, *The 'Knowledge' Requirement of the FCPA Anti-Bribery Provisions: Effectuating or Frustrating Congressional Intent?* White Collar Crime, Andrews Litig. Reporter, at 3-8 (October 2009), *available at* http://www.foley.com/files/Publication/a1d4aa39-1324-4018-bd8a-1cbddfc15e02/Presentation/PublicationAttachment/7e8b814e-446b-411d-8722-1e747b29b303/FCPAWinerHusisian2009.pdf.

71 *See, e.g.*, Nat'l Dairy Products Corp. v. United States, 350 F.2d 321, 327 (8th Cir. 1965) (a parent cannot be held responsible for the actions of its subsidiary unless the parent exerts such a level of control over the subsidiary that the difference between the two entities is only a matter of form); Robert W. Tarun, The Foreign Corrupt Practices Act Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners 46 (2010) (stating that "a U.S. company may be held liable under the principles *of respondeat superior* where its corporate veil can be pierced").

72 *See, e.g.,* Phoenix Canada Oil Co., Ltd. v. Texaco, 842 F.2d 1466, 1477 (3d Cir. 1988) ("[A]n arrangement must exist between the [parent and subsidiary] so that one acts on behalf of the other and within usual agency principles, but the arrangement must be relevant to the plaintiff's claim of wrongdoing.").