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# THE RECENT AND UNUSUAL EVOLUTION OF AN EXPANDING FCPA

JOHN ASHCROFT\* & JOHN RATCLIFFE\*\*

## I. INTRODUCTION

In 1977, the United States Congress passed the U.S. Foreign Corrupt Practices Act (“FCPA”)<sup>1</sup> following a series of corruption scandals highlighted by the Watergate investigation and the resulting resignation of President Richard Nixon.<sup>2</sup> While Watergate itself highlighted political corruption, the investigation shed a corresponding light on corporate corruption and bribery. During its search through records for illegal political contributions, the U.S. Securities and Exchange Commission (“SEC”) uncovered more than 400 American companies engaged in making bribes and other corrupt payments to officials in foreign governments around the world.<sup>3</sup> A morally incensed American public stirred Congress to address corporate governance concerns through FCPA legislation intended “to restore public confidence in the integrity of the American business system.”<sup>4</sup>

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1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78a, 78dd-1 to -3, 78ff, 78m, 78o (2006)). The FCPA of 1977 was subsequently amended by the Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415–25 (amending 15 U.S.C. §§ 78a, 78dd-1 to -2, 78ff, and 78m (2006)) and the International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (amending 15 U.S.C. §§ 78a, 78dd-1 to -3, and 78ff (2006)).

2. See, e.g., Carolyn Lindsey, *More Than You Bargained For: Successor Liability Under the U.S. Foreign Corrupt Practices Act*, 35 OHIO N.U. L. REV. 959, 961 (2009) (“The FCPA arose out of the Watergate scandal in the 1970s. While investigating contributions to Richard Nixon’s re-election campaign, Congress discovered that over 400 U.S. companies had paid bribes in excess of \$300 million through offshore slush funds in order to win contracts overseas.”).

3. *Id.*

4. Fraud Section, U.S. Dep’t. of Justice, *Foreign Corrupt Practices Act; Antibribery Provisions*, <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> (last visited Jan. 9, 2012).

Despite its noble intent, over the first several decades of its existence the FCPA remained a largely unenforced and nearly dormant piece of legislation.<sup>5</sup> In the last few years, however, the number of FCPA prosecutions has skyrocketed and the payment of hundreds of millions of dollars in penalties or fines has been the routine, almost commonplace result of such investigations.<sup>6</sup> Senior officials for the U.S. Department of Justice (“DOJ”) acknowledge that these outcomes are by no means accidental and have gone so far as to declare the FCPA to be second only to the prevention of terrorism as an agency priority.<sup>7</sup> The FCPA’s meteoric rise in prominence now presents perhaps the most imposing challenge—or some argue, menacing threat—to corporate governance in America today.

## II. GENESIS FOR THE RECENT FCPA BOOM

The FCPA, forming part of the Securities Exchange Act of 1934, has two primary components: (1) prohibitions against the bribery of foreign officials and (2) requirements for accounting and recordkeeping provisions.<sup>8</sup> The anti-bribery provisions generally prohibit both U.S. and foreign companies from paying anything of value to a foreign official in order to obtain or retain business.<sup>9</sup> The accounting and recordkeeping provisions require that companies devise and maintain internal controls and procedures that sufficiently monitor accounts and records with “reasonable detail” so that such accounts and records accurately reflect financial transactions.<sup>10</sup>

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5. See Dionne Searcey, *U.S. Cracks Down on Corporate Bribes*, WALL ST. J., May 26, 2009, at A1.

6. See David Elesinmogun et al., *From the Experts: Secret Agents Causing FCPA Violations*, CORPORATE COUNSEL (Oct. 3, 2011), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202517144907> (“In recent years, the number of FCPA prosecutions has skyrocketed, with penalties routinely exceeding \$100 million . . .”).

7. See, e.g., Don Lee, *Doing Sticky Business in China; A Pasadena Firm Gets Caught Up in a Market Rife With Corruption*, L.A. TIMES, Jan. 12, 2009, at A1; Chris Colbridge et al., *New Bumps and Tolls along the Road to FCPA Settlements*, KIRKLAND & ELLIS LLP (Nov. 1, 2009), <http://www.kirkland.com/sitecontent.cfm?contentID=223&itemId=2929>.

8. The FCPA anti-bribery provisions were incorporated into § 30A of the Securities Exchange Act of 1934 (Exchange Act), and the financial reporting and internal controls provisions were incorporated into §§ 13(b)(2)(A) and (B) of the Exchange Act. See Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a – 78kk (2006)).

9. 15 U.S.C. § 78dd-1(a)(1)(A)(i) (2006).

10. 15 U.S.C. § 78m(b)(2)(A)–(B) (2006).

The DOJ and SEC have divided enforcement authority over various aspects of the FCPA.<sup>11</sup> The DOJ is responsible for all criminal enforcement of the FCPA as well as civil enforcement actions brought against entities that are not “issuers” under the statute.<sup>12</sup> Since the SEC has only civil enforcement authority, its jurisdiction is limited to regulating issuers, including their directors, officers, employees, and agents, under the U.S. Exchanges.<sup>13</sup>

From 1977 to 2006, the DOJ and SEC rarely brought more than a few, isolated cases each year.<sup>14</sup> Since that time, however, enforcement of the FCPA has dramatically surged at exponential rates.<sup>15</sup> Illustrative of this point, the total number of FCPA cases brought by the DOJ and SEC from 2007 to 2009 more than doubled the total of all such cases brought in the statute’s first 30 years.<sup>16</sup> In 2010, FCPA prosecutions nearly doubled again.<sup>17</sup> While a discrete number of factors and events likely contributed to the genesis of this stunning increase in FCPA enforcement activity, arguably, the most significant of these occurred during the early years of the George W. Bush Administration.

### III. SEPTEMBER 11 AND THE FCPA

Corporate governance is not a subject typically associated with the terrorist attacks of September 11, 2001 (“9/11”). It was certainly not a consideration at the forefront of DOJ officials’ consciousness as strategies and initiatives aimed at improving the federal government’s ability to prevent future acts of terrorism on U.S. soil were devised in the aftermath of that terrible day.

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11. See S. REP. NO. 95-114, at 11–12 (1977), reprinted in 1977 U.S.C.C.A.N. 4098, 4109–10 (discussing FCPA enforcement duties of the DOJ and SEC).

12. 15 U.S.C. § 78m(b)(2) (2006) (applying accounting provisions to “[e]very issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title.”).

13. *Id.*

14. See Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 495 (2011).

15. Roger M. Witten et al., *Prescriptions for Compliance with the Foreign Corrupt Practices Act: Identifying Bribery Risks and Implementing Anti-Bribery Controls in Pharmaceutical and Life Sciences Companies*, 64 BUS. LAW. 691, 692 (2009) (stating that the number of FCPA enforcement actions have “skyrocketed”).

16. See Westbrook, *supra* note 14, at 495–96.

17. See Melissa Aguilar, *2010 FCPA Enforcement Shatters Records*, COMPLIANCE WEEK (Jan. 4, 2011), <http://www.complianceweek.com/2010-fcpa-enforcement-shatters-records/article/193665/> (citing statistics that 2010 FCPA enforcement nearly doubling 2009 totals against individuals and rose by 85 percent overall).

Accordingly, with the passage of the USA PATRIOT ACT<sup>18</sup> occurring just a few weeks later, the DOJ dramatically changed its enforcement priorities and strategies so as to elevate the prevention of terrorism as its overriding priority.

This seismic shift was not limited to law enforcement activity within the United States. The horrific events of 9/11 quickly led to unprecedented levels of cooperation between and among governments around the globe which understood that coordinated, multinational investigations were likely to be the most effective means of preventing similar acts of terrorism from occurring in other major cities around the world. Prior to 9/11, only four countries had ratified the international treaty on the suppression of terrorism financing.<sup>19</sup> Today, 174 nation-states are signatories to that convention.<sup>20</sup>

These cooperative efforts increased information-sharing and lowered the traditional border-related barriers between law enforcement authorities in different countries. While such international cooperation was originally intended as a means to prevent terrorism, and, more specifically, to control the flow of money to terrorist organizations throughout the world, countries soon began to realize that the extension of these coordinated investigations into other areas of criminal activity could provide significant alternative benefits.

Moreover, U.S. authorities learned that the financing of terrorism was often linked to, and even facilitated by, the corruption of foreign officials.<sup>21</sup> As a result, considerable efforts were dedicated to improving the DOJ's ability to investigate and prosecute corrupt officials on a worldwide basis. In December 2003, the United States became an initial signatory to the United Nations Convention Against Corruption along with the representatives of 96 other countries.<sup>22</sup> Cooperation between DOJ

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18. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT ACT) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 5, 8, 12, 15, 18, 21, 22, 28, 31, 42, 47, 49, and 50 U.S.C.).

19. See International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, U.N. Doc. A/RES/54/109 (Dec. 9, 1999); *Signatory Status of the International Convention for the Suppression of the Financing of Terrorism*, UN, [http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg\\_no=XVIII-11&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=XVIII-11&chapter=18&lang=en) (last visited Jan. 10, 2012).

20. *Id.*

21. See, e.g., Louise I. Shelley & John T. Picarell, *Methods Not Motives: Implications of the Convergence of International Organized Crime and Terrorism*, 3 POLICE PRACTICE & RESEARCH 305, 305-06 (2002).

22. See United Nations Office on Drugs & Crime, *Signatories to the United Nations Convention Against Corruption* (Nov. 25, 2011), <http://www.unodc.org/>

and America's international partners became critical not only to the disruption of terrorist organizations and activities but also to collaboration efforts aimed at reducing other criminal activities.

Due to the very nature of FCPA cases, successful prosecution is difficult, and sometimes impossible, without the kind of international collaboration that evolved after 9/11. Because evidence, documentation, and witnesses necessary to support allegations of bribes or corrupt payments are often physically located on foreign soil, many FCPA violations simply cannot be pursued without the cross-border cooperation between various national authorities.

This continued cooperation in the expansion of FCPA enforcement remains evident today. DOJ has resident advisors in 37 countries that are supported by Federal Bureau of Investigation ("FBI") agents in 75 foreign cities.<sup>23</sup> Similarly, the SEC is a party to an international, multilateral memorandum of understanding with twenty other foreign securities commissions.<sup>24</sup> The result is an increasing trend of FCPA dispositions through the closely coordinated, joint efforts of U.S. and non-U.S. regulators, a development recently acknowledged and praised by the Organization for Economic Cooperation and Development.<sup>25</sup> The recent prosecutions of Siemens AG, BAE Systems PLC, Alcatel-Lucent, Innospec, and others are the result of, and testament to,

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unodc/en/treaties/CAC/signatories.html; Press Release, United Nations Convention Against Corruption (Dec. 10, 2003), <http://www.un.org/webcast/merida/statements/pressrelease2-eng.htm> (quoting United States Attorney General John Ashcroft, "The United Nations Convention against Corruption we are signing today is a permanent enshrinement of the new global attitude toward corruption. Corruption is now unacceptable in any form, and international cooperation is considered a key element of our respective efforts to combat this scourge"); Press Release, Signing of the UN Convention Against Corruption (Dec. 10, 2003), <http://2001-2009.state.gov/r/pa/prs/ps/2003/27056.htm>.

23. Ass't Att'y Gen. Lanny A. Breuer, Address at Columbia Law School: The Global Case for Justice: Protecting Human Rights and Promoting the Rule of Law (Oct. 7, 2009), available at <http://www.justice.gov/criminal/icitap/pr/2009/10-07-09breuer-speech.pdf>; *Legal Attaché Offices*, FBI, [http://www.fbi.gov/contact-us/legat/legal\\_offices](http://www.fbi.gov/contact-us/legat/legal_offices) (last visited Jan. 5, 2012).

24. *Cooperative Agreements with Foreign Regulators*, SEC, [http://www.sec.gov/about/offices/oia/oia\\_cooparrangements.shtml](http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml) (last visited Jan. 5, 2012).

25. See DIRECTORATE FOR FIN. & ENTER. AFFAIRS, ORG. FOR ECON. COOPERATION & DEV., UNITED STATES: PHASE 3; REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 2009 REVISED RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 22 (Oct. 15, 2010), available at <http://www.oecd.org/dataoecd/10/49/46213841.pdf?contentId=46213842>.

the profound impact that 9/11 brought to international cooperation in FCPA enforcement.<sup>26</sup>

#### IV. SARBANES-OXLEY, ARTHUR ANDERSEN, AND DPAs

On the heels of 9/11, the United States was forced to endure another wave of scandals involving corporate America. The American public discovered that many of the companies that enjoyed such astronomical growth in stock value during the “dotcom” boom years of the mid-1990s and into early 2000 had accomplished their unprecedented success by engaging in accounting fraud and stock manipulation at the highest levels of corporate leadership and governance. The highly publicized financial collapses and subsequent prosecutions of senior corporate executives of Enron, WorldCom, and Adelphia highlighted these types of scandals.

The Sarbanes-Oxley Act of 2002 (“SOX”)<sup>27</sup> was enacted by Congress as a direct counter-measure intended to remedy and prevent such types of corporate misbehavior. By requiring, among other things, that companies maintain internal controls for financial reporting and mandating that corporate executives certify the accuracy of such financial reporting and records, SOX has immeasurably influenced most aspects of corporate governance.<sup>28</sup> This is especially true regarding the increasing number of voluntary disclosures of FCPA violations. Because SOX requires officers to disclose to the board of directors “any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer’s internal controls,” there are any number of FCPA violations—including

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26. See *FCPA/Anti-Bribery Spring Alert 2011*, HUGHES HUBBARD & REED L.L.P. 2 (June 2011), [http://www.hugheshubbard.com/files/upload/fcpa\\_anti-bribery\\_alert\\_spring\\_2011.pdf](http://www.hugheshubbard.com/files/upload/fcpa_anti-bribery_alert_spring_2011.pdf) (commenting on increasing international cooperation between U.S. and international regulators on FCPA cases including Siemens AG, BAE Systems PLC, Innospec, and others).

27. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.); see Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 LOY. U. CHI. L.J. 359, 361 (2003) (commenting that “[i]n response to the corporate and accounting scandals that began with Enron, but appear to have no end in sight, the legislature attempted to restore faith in America’s financial markets by enacting new criminal statutes and mandating stiffer penalties for economic crimes”).

28. See Robert Prentice, *Sarbanes-Oxley: The Evidence Regarding the Impact of SOX 404*, 29 CARDOZO L. REV. 703, 706 (2007).

improper payments to foreign officials—which must be disclosed.<sup>29</sup>

However, a still more profound factor in the FCPA's expansive enforcement also originated from these scandals—the proliferation of deferred prosecution agreements (“DPAs”) and other “pretrial diversions” in the wake of Arthur Andersen's demise.<sup>30</sup> As part of regulators' investigation into Enron, the DOJ became aware that the company's accounting firm, Arthur Andersen, ordered the shredding of millions of documents relating to Enron's auditing and accounting records.<sup>31</sup> In March 2002, Arthur Andersen was indicted on charges of obstruction of justice.<sup>32</sup>

As commentators have observed, the indictment of Arthur Andersen proved to be a death sentence for the company.<sup>33</sup> The months subsequent to the charges led to the displacement of 28,000 employees and the eventual shuttering of doors at one of the world's oldest and largest accounting firms. During such time, there was considerable debate within the DOJ as to the legal, practical, and moral consequences of indictments against corporate defendants. Those discussions emphasized that while corporate wrongdoers needed to be brought to justice, regulators also needed to carefully consider the collateral consequences of corporate prosecutions.

One of the bedrock principles of administering justice in America is to avoid causing serious harm to innocent bystanders. In the context of corporate wrongdoing, a DPA can provide an alternate resolution that punishes a company while avoiding the loss of jobs, pensions, and investments of innocent parties who were neither aware of, nor played any role in, the criminal con-

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29. 15 U.S.C. §7241(a)(5)(B) (2006); see Laura E. Kress, Note, *How the Sarbanes-Oxley Act has Knocked the “SOX” off the DOJ and SEC and Kept the FCPA on Its Feet*, 10 U. PITT. J. TECH. L. & POL'Y 2, 3–5 (2009).

30. “[A] deferred prosecution agreement is typically predicated upon the filing of a formal charging document by the government, and the agreement is filed with the appropriate court. In the non-prosecution agreement context, formal charges are not filed and the agreement is maintained by the parties rather than being filed with a court.” Memorandum from Craig S. Morford to the Heads of Dep't Components and United States Attorneys, 1 n.2 (Mar. 7, 2008), available at <http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf>. In this Essay all such diversion agreements are referred to generally as DPAs.

31. See, e.g., Ken Brown et al., *Called to Account: Indictment of Andersen in Shredding Case Puts Its Future in Question*, WALL ST. J., Mar. 15, 2002, at A1, A4.

32. Indictment, at 7, United States v. Arthur Andersen, LLP, No. CRH-02-121 (S.D. Tex. Mar. 7, 2002).

33. See Brown et al., *supra* note 31.



duct, and who could thus do nothing to prevent or minimize it. The harm suffered by so many innocent people in prosecuting the misconduct of so few is the tragedy of the Arthur Andersen experience.

While not new, for most of the history of American jurisprudence, pretrial diversion agreements, like DPAs, were limited to individuals accused of criminal conduct.<sup>34</sup> It was not until the 1990s that such agreements were first utilized, albeit sparingly, by the DOJ in connection with resolving criminal charges against corporate defendants.<sup>35</sup> Further, federal prosecutors did not have the benefit of advisory guidelines to help determine the appropriateness of DPAs until 1999.<sup>36</sup>

In January 2003, DOJ issued the first binding “Principles of Federal Prosecution of Business Organizations” for use by federal prosecutors determining whether to charge corporations with criminal offenses.<sup>37</sup> The “Thompson Memo,” as it is more commonly known, allowed for resolution through DPAs and other pretrial diversion agreements where corporations demonstrated, among other things, authentic cooperation with law enforcement through internal compliance and other corporate governance measures.<sup>38</sup>

After the Arthur Andersen experience, the DOJ viewed DPAs as an effective means of mandating improved corporate governance and, in so doing, restoring confidence in the marketplace without destroying the corporations and jobs that provide a market in the first place. While the Thompson Memo was issued in the wake of securities fraud and accounting fraud scandals, its decision making framework for prosecutors applied to all areas of corporate criminal conduct, including, among others, anti-trust, health care fraud, environmental crimes, and enforcement

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34. Peter Spivack & Sujit Raman, *Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 163 (2008) (noting that deferred prosecution has existed for many decades in the prosecution of individual federal defendants).

35. *Id.* at 164 (discussing that diversion agreements were utilized in only ten corporate cases during the 1990s).

36. See Memorandum from Eric H. Holder, Jr., Deputy Att’y Gen., to All Component Heads & United States Attorneys (June 16, 1999), available at <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF> (“Bringing Criminal Charges Against Corporations”).

37. Memorandum from Larry D. Thompson, Deputy Att’y Gen., to Heads of Dep’t Components & United States Attorneys (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm) (“Principles of Federal Prosecution of Business Organizations”).

38. *Id.* at preface.

of the FCPA. As discussed, *infra*, its impact on the latter of these has been as significant as it has been controversial.

## V. THE UNUSUAL EVOLUTION OF THE FCPA

While it was certainly not written for the express purpose of proliferating FCPA enforcement actions, the impact of the Thompson Memo regarding such enforcements cannot be ignored. Following its issuance in 2003, diversion agreements have been used to resolve the vast majority of FCPA enforcement actions involving corporate defendants.<sup>39</sup> The role that DPAs and other diversion agreements have played in the accelerated expansion of FCPA enforcement activity by both the DOJ and the SEC is appropriately the subject of current debate.

In this regard, some argue that FCPA “law” is improperly developing through the terms and conditions of DPAs, rather than by the jury verdicts and appellate court decisions that shape the majority of criminal prosecutions.<sup>40</sup> There is statistical support for this concern—prior to the *Lindsey Manufacturing* verdict in May 2011,<sup>41</sup> every FCPA enforcement action against a corporate entity since 1991 had been resolved through some type of diversion agreement, plea, or SEC resolution.<sup>42</sup> As a result, some commentators contend that the FCPA, as an area of law being

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39. Spivack & Raman, *supra* note 34, at 176; *see also* Mike Koehler, *DOJ Prosecution of Individuals – Are Other Factors at Play?*, FCPA PROFESSOR (Sept. 22, 2011), <http://www.fcraprofessor.com/doj-prosecution-of-individuals-are-other-factors-at-play> (discussing that since 2004, DPAs and NPAs have been used to resolve 77% of FCPA cases).

40. *See, e.g., The Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 2–3 (June 14, 2011) (written testimony of Michael B. Mukasey) [hereinafter “Mukasey Testimony”], available at <http://judiciary.house.gov/hearings/pdf/Mukasey06142011.pdf>; Justin F. Marceau, *A Little Less Conversation, A Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions under the Foreign Corrupt Practices Act*, 12 FORDHAM J. CORP. & FIN. L. 285, 310 (2007).

41. *See* Press Release, U.S. Dep’t of Justice, California Company, Its Two Executives and Intermediary Convicted by Federal Jury in Los Angeles on All Counts For Their Involvement in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico (May 10, 2011), available at <http://www.justice.gov/opa/pr/2011/May/11-crm-596.html>.

42. *See Corporate Defendant Lindsey Manufacturing Tried and Convicted on FCPA Charges (Along with 3 Other Individuals)*, FED. SEC. LAW BLOG (May 11, 2011), <http://www.fedseclaw.com/2011/05/articles/foreign-corrupt-practices-act-1/corporate-defendant-lindsey-manufacturing-tried-and-convicted-on-fcpa-charges-along-with-3-other-individuals/#axzz1i2Y9Wzse>; Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907, 927 (2010) (stating that “no company has challenged the DOJ in an FCPA enforcement action in the last twenty years”).

created outside of the normal judicial process with little judicial scrutiny, is providing far too much interpretive power to DOJ and SEC prosecutors to set precedents based solely upon unilateral demands on corporate defendants.<sup>43</sup>

According to some, this unbridled power has allowed prosecutors to become corporate governance bullies, forcing corporate defendants to accept the government's interpretation of the FCPA—no matter how unreasonable or dubious it may appear to be.<sup>44</sup> Because protesting such questionable interpretations in a court of law would first require a company to be criminally indicted—thus placing its entire business future at risk—critics contend that the company is left between the proverbial rock and a hard place with no real choice but to accept whatever fines, penalties, or other requirements prosecutors choose to impose upon it.<sup>45</sup>

These are concerns worthy of consideration. Due to the absence of any substantial case law after more than 34 years, even the most basic elements of the FCPA, like what constitutes a “bribe” or who is considered a “foreign official,” remain largely undefined.<sup>46</sup> As a result, it would appear that prosecutors are unfettered in their discretion to extend the boundaries of FCPA interpretation to fit the facts and circumstances of any particular investigation. While it is understood that laws are rarely black and white, our adversarial system of justice is not well served when the roles of prosecutor and judge are combined, and where the resulting law remains perpetually gray. For corporate America, the dilemma is obvious—it is difficult for any company to ensure that its employees and business partners will act ethically and legally when it is unclear which actions will trigger an FCPA violation.

While some commentators and interested parties suggest that Congressional or judicial intervention<sup>47</sup> is the most appro-

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43. Mukasey Testimony, *supra* note 40, at 8–10.

44. Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 412–13 (2010) (discussing various DOJ and SEC legal interpretations of “foreign official” as “tenuous and dubious”).

45. Marceau, *supra* note 40, at 310.

46. See James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233, 1233–38 (2007) (discussing a lack of guidance and interpretation of the FCPA).

47. See, e.g., U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 7 (2010), available at [http://www.instituteforlegalreform.com/sites/default/files/restoringbalance\\_fcpa.pdf](http://www.instituteforlegalreform.com/sites/default/files/restoringbalance_fcpa.pdf) (calling for Congress to adopt various measures to reform the FCPA); Ellen S. Podgor, *If the FCPA is Sick, Judicial Review is the Medicine*, FCPA BLOG (June 15, 2011, 5:36 AM), <http://www.fcpablog.com/blog/2011/>

priate or effective means to remedy the questionable application of FCPA authority, it would be neither unprecedented nor unreasonable to expect the primary initiative for change to come from the enforcement authorities involved. Perhaps ironically, the evolution of the Thompson Memo is instructive on this issue.

While even its harshest critics concede that the Thompson Memo succeeded in achieving its stated objectives of increasing corporate cooperation with law enforcement and improving corporate compliance programs, it nevertheless engendered much criticism in the first years of its application by DOJ prosecutors.<sup>48</sup> These criticisms or concerns involved, among other things, the waiver of attorney-client privileges, the payment of attorneys' fees for culpable employees, and approval of court-appointed federal monitors in the context of diversion agreements.<sup>49</sup>

In response to legitimate concerns regarding the equitable application of federal policy, the DOJ is obligated to "self-police" its own conduct as part of the agency's stated mission "to ensure fair and impartial administration of justice."<sup>50</sup> The Thompson Memo has repeatedly been subjected to such internal scrutiny, as evidenced by subsequent revisions issued in 2006 and 2008, which altered various aspects of corporate charging decisions and authority.<sup>51</sup> With each revision, the DOJ attempted to provide increased clarity, transparency, and fairness to the corporate charging process by adding more restrictions and limitations on prosecutorial discretion and by providing deterrents to potential prosecutorial abuse.

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6/15/if-the-fcpa-is-sick-judicial-review-is-the-medicine.html (recommending judicial review of all FCPA resolutions).

48. See generally Carmen Couden, Note, *The Thompson Memorandum: A Revised Solution or Just a Problem?* 30 J. CORP. L. 405, 415–21 (2005).

49. See, e.g., William R. McLucas, Howard M. Shapiro & Julie J. Song, *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. CRIM. L. & CRIMINOLOGY 621, 622 (2006); Noah D. Stein, Note, *Prosecutorial Ethics and the McNulty Memo: Should the Government Scrutinize an Organization's Payment of Its Employees' Attorneys' Fees?*, 75 FORDHAM L. REV. 3245, 3256–57 (2007); Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar*, 105 MICH. L. REV. 1713, 1724 (2007).

50. *About DOJ*, U.S. DEP'T OF JUSTICE (last updated Aug. 2011), <http://www.justice.gov/about/about.html>.

51. See Memorandum from Paul J. McNulty, Deputy Att'y Gen., to Heads of Dep't Components & United States Attorneys (Dec. 12, 2006), available at [http://www.justice.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf) ("Principles of Federal Prosecution of Business Organizations"); Memorandum from Mark R. Filip, Deputy Att'y Gen., to Heads of Dep't Components & United States Attorneys (Aug. 28, 2008), available at <http://www.justice.gov/dag/readingroom/dag-memo-08282008.pdf> ("Principles of Federal Prosecution of Business Organizations"); Memorandum from Craig S. Morford, *supra* note 30, at 1–2.

For the reasons discussed, the existing version of the DOJ's corporate charging policy is likely contributing to the development of an important law in a manner that is at the very least atypical, if not arguably one-sided. In response, both the DOJ and SEC have an obligation to collaborate with others in evaluating the merits of increasing and sustained complaints that the pendulum of prosecutorial discretion and authority in the context of FCPA enforcement has swung too far.

## VI. FUTURE ENFORCEMENT OF THE FCPA

Not to be lost in this discussion is the fact that when properly enforced, the FCPA is an effective means of protecting competition in a marketplace that becomes increasingly global with each passing day. Any honest examination of the FCPA should not merely identify flaws in its current implementation, but also recognize how FCPA enforcement has played a leading role in reducing corruption throughout the world. Many countries have recently passed—either based upon or in direct response to the FCPA—laws that criminalize bribery and other business corruption.<sup>52</sup> In that respect, the FCPA has inspired a worldwide crackdown on corrupt business practices that have historically put U.S. companies at a competitive disadvantage.

The FCPA prosecution of Siemens AG provides vivid proof that such positive changes have occurred. Until 1999, the German government not only allowed bribery in business transactions, but actually *rewarded* such practices.<sup>53</sup> German corporations like Siemens AG received government subsidies in the form of tax deductions for bribery payments made in furtherance of business transactions.<sup>54</sup> Similar enforcement actions by other foreign governments to reverse their respective stances and punish rather than reward bribery reflects the influence of the FCPA on international business. The notion that the FCPA can help “level the playing field” for American companies in the international marketplace is further evidenced by the fact that

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52. Eugene S. Erbstoesser et al., *The FCPA and Analogous Foreign Anti-bribery Laws—Overview, Recent Developments, and Acquisition Due Diligence*, 2 *CAP. MARKETS L.J.* 381, 395–96 (2007).

53. See Nora M. Rubin, Note, *A Convergence of 1996 and 1997 Global Efforts to Curb Corruption and Bribery in International Business Transactions: the Legal Implications of the OECD Recommendations and Convention for the United States, Germany, and Switzerland*, 14 *AM. U. INT'L L. REV.* 257, 263 (1998).

54. *Id.*

eight out of the ten largest FCPA settlements in history involved non-U.S. companies.<sup>55</sup>

Progress in these respects should provide some measure of relief to the broad range of corporate executives who have no choice but to swim in FCPA waters. With today's technological capabilities, the days of international business being limited to companies in a select few industries, such as energy and finance, are forever gone. Corporations of every size and in every business sector are now pursuing opportunities abroad not always by choice but often out of necessity.

The accompanying risks inherent in conducting such international business, however, also appear to be rising rather than waning, as documented by the sharp increases in FCPA prosecutions over the past few years. With the combined factors of tough global financial conditions, governments struggling to create revenue, the enactment of increased whistleblower rewards,<sup>56</sup> and a public appetite for corporate fraud prosecutions, there is nothing to indicate a decline in this trend anytime soon.

In addition to the raw numbers of FCPA investigations and prosecutions, there is other evidence to support the projection that aggressive and vigorous enforcement by both the DOJ and the SEC will continue. In 2010, the SEC created its own stand-alone FCPA enforcement unit.<sup>57</sup> In addition, both agencies are bolstering their investigative activity through the use of techniques previously limited to fighting organized crime, such as wiretaps, informers, and surveillance.<sup>58</sup> These actions reinforce the view that both the DOJ and the SEC will continue to make FCPA prosecutions a priority long into the future.

## VII. CONCLUSION

The ability of American corporations of integrity not only to compete, but to thrive without corrupt behavior, is enhanced by

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55. See Recent Cases, Foreign Companies Dominate New Top Ten, FCPA BLOG (Jan. 5, 2011, 7:08 AM), <http://www.fcpablog.com/blog/2011/1/5/recent-cases-foreign-companies-dominate-new-top-ten.html>.

56. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, sec. 922(a), § 21F(a)(3)(A)–(a)(3)(B) (2010).

57. See Robert Khuzami, Director, Division of Enforcement, SEC, Remarks Before the New York City Bar (Aug. 5, 2009), <http://www.sec.gov/news/speech/2009/spch080509rk.htm>.

58. See Jeffrey Cramer, *Commentary: The FCPA Game Has Changed: Trends in Enforcement*, MAIN JUSTICE (Apr. 23, 2010, 4:06 PM), <http://www.mainjustice.com/2010/04/23/commentary-the-fcpa-game-has-changed-trends-in-enforcement/>; *Corporate Corruption: A Historic Takedown*, FBI (Jan. 26, 2010), [http://www.fbi.gov/news/stories/2010/january/fcpa\\_012610/corporate-corruption-a-historic-takedown](http://www.fbi.gov/news/stories/2010/january/fcpa_012610/corporate-corruption-a-historic-takedown).

the FCPA. If bribery in international business had been allowed to continue virtually unchecked, as was occurring before the vigorous enforcement of the FCPA, it would likely have impeded the strengthening of governments and free market economies worldwide. If the United States is to maintain its standing as the leader of the world's free market economies, corporate America must endorse the continued enforcement of the FCPA as an effective tool against bribery and corruption. However, U.S. enforcement authorities should constantly be sensitive to the risk of injustice inherent in the enforcement of a law with opaque boundaries. We should avoid fueling a conclusion that the FCPA is a foe, not a friend, to the ability of American corporations to succeed in the global economy.