Federal Trade Commission

U.S. Enforcement of the Foreign Corrupt Practices Act of 1977: Some Observations and Thoughts

Remarks of J. Thomas Rosch*
Commissioner, Federal Trade Commission

before the

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Good afternoon. For this session, I have been asked to say a few words about the United States' enforcement of its Foreign Corrupt Practices Act of 1977 (which I will refer to as the FCPA).[1] At the outset, I should point out that my own agency, the U.S. Federal Trade Commission, has no enforcement

* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. Nor do my views necessarily reflect those of the United States Department of Justice or the United States Securities and Exchange Commission. I am grateful to my attorney advisor, Henry Su, for his invaluable assistance in preparing this paper.

[1] Pub. L. No. 95-213, 91 Stat. 1495 (1977) (codified as amended in scattered sections of 15 U.S.C. ch. 2B (the Securities Exchange Act of 1934)). The FCPA was substantively amended in 1988 and again in 1998. *See* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998); Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, tit. V, subtit. A, pt. 1, 102 Stat. 1415–25 (1988).

jurisdiction—criminal or civil—with respect to the FCPA. The U.S. Department of Justice, acting through the Fraud Section of its Criminal Division (which I will refer to as the DOJ), is the FCPA's chief enforcer.[2] It shares its civil enforcement jurisdiction, however, with the U.S. Securities and Exchange Commission (which I will refer to as the SEC).[3] But there are no express provisions for private enforcement, and courts have held that there is also no implied private right of action.[4]

My remarks today therefore not only don't necessarily reflect the views of my own agency, or any of my fellow Commissioners, but they also don't necessarily reflect the views of the DOJ or the SEC.

I.

The FCPA has two sets of substantive provisions enforced by the DOJ and the SEC: the so-called anti-bribery provisions[5] and accounting provisions.[6] The anti-bribery provisions are the heart of the FCPA—they embody our

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[2] *See Foreign Corrupt Practices Act*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/fraud/fcpa/ (last visited Aug. 17, 2012). The Attorney General and the United States Attorneys are charged by statute as the President's delegates to enforce the Nation's criminal laws—which would include the FCPA. United States v. Armstrong, 517 U.S. 456, 464 (1996) (citing 28 U.S.C. §§ 516, 547).

[3] *See Spotlight on Foreign Corrupt Practices Act*, U.S. SEC. AND EXCH. COMM'N, http://www.sec.gov/spotlight/fcpa.shtml. Not only do the DOJ and the SEC share enforcement responsibilities, but they coordinate their enforcement with the State Department—out of recognition of the potential foreign policy problems arising from such actions. Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 409 (9th Cir. 1983).

[4] *See, e.g.,* Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1024 (6th Cir. 1990), *cert. denied*, 498 U.S. 1086 (1991); McLean v. Int'l Harvester Co., 817 F.2d 1214, 1219 (5th Cir. 1987); J.S. Serv. Ctr. Corp. v. Gen. Elec. Tech. Servs. Co., 937 F. Supp. 216, 225–27 (S.D.N.Y. 1996).

[5] 15 U.S.C. §§ 78dd-1 to 78dd-3 (2011).

[6] 15 U.S.C. § 78m(b)(2) (2011).

Congress' judgment that the payment of bribes to foreign officials is not only immoral and unethical, but it also "erodes public confidence in the integrity of the free market system" and "creates severe foreign policy problems" for the U.S.[7] The anti-bribery provisions therefore make it unlawful for "issuers" of securities registered in the U.S., individuals and firms qualifying as "domestic concerns," and certain other persons[8] to bribe a foreign government or political party official for the purpose of obtaining or retaining business for, or directing business to, any person.[9] The anti-bribery provisions exempt,

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[7] H.R. REP. NO. 95-640, at 4, 5 (1977). *See also* S. REP. NO. 95-114, at 3–4 (1977). The legislation was based in part on a 1976 SEC report to the Senate Committee on Banking, Housing and Urban Affairs, entitled "Report on Questionable and Illegal Corporate Payments and Practices," which described the SEC's investigative and enforcement efforts that uncovered widespread use of questionable foreign payments by publicly traded corporations.

[8] Specifically, the anti-bribery provisions apply to three categories of individuals and firms, as well as their officers, directors, employees, agents, and stockholders: (1) "issuers" that either have securities registered in the U.S. or have reporting obligations to the SEC, 15 U.S.C. § 78dd-1(a); (2) "domestic concerns," a term that broadly covers U.S. citizens, nationals, and residents, and business entities that either have a principal place of business in the U.S. or are organized under the laws of any U.S. state, territory, or possession, 15 U.S.C. § 78dd-2(a); and (3) other persons that are neither "issuers" nor "domestic persons," to the extent they commit an act in furtherance of a corrupt practice while within the territorial jurisdiction of the U.S., 15 U.S.C. § 78dd-3(a). The third category of other persons, added by the 1998 amendments, thus extends FCPA coverage to foreign companies that are not otherwise issuers, as well as foreign nationals, provided that their acts fall within U.S. territorial jurisdiction. By contrast, issuers and domestic persons are covered by the FCPA if they are subject to either U.S. territorial jurisdiction (through their use of the U.S. mails or other means or instrumentality of interstate commerce in furtherance of a corrupt practice) or U.S. nationality jurisdiction (by virtue of being U.S. nationals—in the case of individuals; or issuers or other business entities organized under U.S. law, or the laws of any U.S. state, territory, possession, or political subdivision—in the case of firms). If an issuer or domestic person is subject to nationality jurisdiction, then the FCPA applies even though its alleged acts were taken outside the U.S., 15 U.S.C. §§ 78dd-1(g), 78dd-2(i).

[9] In addition to (*1*) the legal status of the would-be perpetrator as an issuer, domestic concern, other person, or an agent of any of them, a violation of an anti-bribery provision has four other basic elements: (*2*) an act in furtherance of a payment of money or anything of value, including an offer or promise of payment, (*3*) to a foreign governmental or political party official, regardless of rank or position, (*4*) with the corrupt intent of inducing that official to misuse his position, (*5*) in order to wrongfully assist the would-be perpetrator in

however, payments made solely to facilitate or expedite a foreign official's performance of a "routine governmental action," such as the issuance of required permits and licenses for doing business or the processing of required governmental papers like visas and work orders.[10] They also recognize limited affirmative defenses based on proof that the payment in question was either lawful under the written laws and regulations of the foreign official's country; or for a reasonable and bona fide expenditure incurred by or on behalf of that official, and directly related to the promotion or demonstration of a product or service, or the execution or performance of a contract with that official's government or agency.[11]

If the anti-bribery provisions are the heart of the FCPA, then the accounting provisions are its mind.[12] Our Congress designed them to work in

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obtaining or retaining business for, or steering business to, any person. *Id.* §§ 78dd-1(a), 78dd-2(a), 78dd-3(a). The business in question does not have to be with the official's foreign government itself.

[10] *Id.* §§ 78dd-1(b) & (f)(3), 78dd-2(b) & (h)(4), 78dd-3(b) & (f)(4). These payments are sometimes referred to as "grease" payments. H.R. REP. NO. 95-640, at 4 (1977); S. REP. NO. 95-114, at 10 (1977).

[11] 15 U.S.C. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c). The so-called local law and promotional expenses affirmative defenses, both added by the 1988 amendments, have been criticized as unduly limited and hence virtually unavailable to defendants. Kyle P. Sheahen, *I'm Not Going to Disneyland: Illusory Affirmative Defenses Under the Foreign Corrupt Practices Act*, 28 WIS. INT'L L.J. 464 (2010). In particular, the local law defense requires that the exculpatory foreign law be *written down*, *id.* at 470, and even then, that foreign law must be interpreted by a U.S. court—not exactly a straightforward task even with the help of legal experts, *id.* at 471–72. The promotional expenses defense suffers from the fact that it is arguably just a corollary of the prosecution's case-in-chief. To prove an FCPA violation, the prosecution must show that the payment in question was corrupt; it therefore follows that if the payment is indeed a reasonable and bona fide expenditure, then the prosecution would not be able to prove that it is corrupt and violative of the FCPA. *Id.* at 478.

[12] I understand that in Judaism, there is a saying *moach shalit al halev*, which translates as "the mind rules the heart." In the case of the FCPA, Congress took the view that if firms thought carefully about what they would have to disclose in their corporate books, records,

tandem with the anti-bribery provisions—it was thought that by imposing an affirmative obligation on firms to keep their corporate recordkeeping honest, corporate bribery would not be as easily concealed and corporate assets would not be as likely used for corrupt purposes.[13] The accounting provisions therefore require issuers to keep books, records, and accounts that accurately, fairly, and with reasonable detail, reflect their transactions and asset dispositions.[14] They also require issuers to implement a system of internal accounting controls sufficient to ensure that all transactions and dispositions are duly authorized and accounted for.[15] Furthermore, the accounting provisions make it unlawful for any person to knowingly falsify any book, record, or account, or to knowingly circumvent or fail to implement a system of internal accounting controls.[16]

Both the anti-bribery provisions and the accounting provisions carry stiff penalties for criminal violations.[17] Notably, organizational defendants convicted of violating the anti-bribery provisions face up to $2 million in

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and accounts, then that process could act as a check on any desires and temptations to gain an unfair business advantage through the use of bribes.

[13] S. REP. NO. 95-114, at 3, 7 (1977).

[14] 15 U.S.C. § 78m(b)(2)(A) (2011).

[15] *Id.* § 78m(b)(2)(B).

[16] *Id.* § 78m(b)(5).

[17] In the interests of time, I am not going to discuss the statutory penalties for willfully falsifying corporate books and records but they consist of up to $25 million in fines for organizational defendants, and up to $5 million in fines and/or up to 20 years in prison for individual defendants. 15 U.S.C. § 78ff(a) (2011).

statutory fines on paper,[18] but in practice the amount has been much, much higher because of the DOJ's ability to use the Alternative Fines Act[19] to seek a fine equal to twice the pecuniary gain allegedly derived from the corporate bribe. According to a law blog that tracks FCPA developments, Siemens AG's $450 million fine from 2008[20] puts the firm at the head of the top-ten list of organizational defendants based on the amount of the fine and other payments.[21] As the blog poster points out, nine of the top ten defendants are

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[18] 15 U.S.C. §§ 78dd-2(g)(1)(A), 78dd-3(e)(1)(A), 78ff(c)(1)(A) (2011).

[19] 18 U.S.C. § 3571(c)(2) & (d) (2011).

[20] *See* Judgment in a Criminal Case at 7, United States v. Siemens AG, No. 1:08-cr-00367-RJL (D.D.C. filed Jan. 6, 2009), ECF No. 17, *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/01-06-09siemensakt-judgment.pdf; Department's Sentencing Memorandum at 14–15, United States v. Siemens AG, No. 1:08-cr-00367-RJL (D.D.C. Dec. 12, 2008), ECF No. 3, *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-12-08siemensvenez-sent.pdf.

[21] Richard L. Cassin, *Who Will Crack the Top Ten?*, THE FCPA BLOG (Aug. 3, 2012, 11:18 AM), http://www.fcpablog.com/blog/2012/8/3/who-will-crack-the-top-ten.html; Richard L. Cassin, *With Magyar in New Top Ten, It's 90% Non-U.S.*, THE FCPA BLOG (Dec. 29, 2011, 1:28 PM), http://www.fcpablog.com/blog/2011/12/29/with-magyar-in-new-top-ten-its-90-non-us.html. Siemens (Germany) and its related subsidiaries top the list at $800 million in total criminal and civil penalties when one combines the $450 million in criminal fines with the $350 million in civil disgorgement to the SEC. *See also* Richard L. Cassin, *Pfizer Joins Our Top Ten Disgorgement List*, THE FCPA BLOG (Aug. 8, 2012, 8:02 AM), http://www.fcpablog.com/blog/2012/8/8/pfizer-joins-our-top-ten-disgorgement-list.html (listing the top ten defendant firms based on disgorgement amounts).

foreign firms,[22] a fact which rebuts a longstanding view of FCPA critics "that aggressive enforcement of the law has disadvantaged U.S. companies."[23]

Individual defendants convicted of willfully violating the anti-bribery provisions face up to $100,000 in fines and/or five years in prison.[24] As added deterrence, the FCPA provides that if a fine is imposed on an individual defendant who is an officer, director, employee, agent, or stockholder of a corporate issuer, domestic concern, or person, then that fine may not be paid directly or indirectly by that defendant's firm.[25] Individual defendants should not expect to get away with light prison sentences either. In October 2011, the DOJ announced that Joel Esquenazi, the former president of Terra Telecommunications Corp., had been sentenced to 15 years in prison for his role in a scheme to bribe Haitian government officials at Haiti Teleco, a state-owned telecommunications company.[26] According to the DOJ, this was the

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[22] KBR/Halliburton at no. 2 ($579 million, 2009) is the only U.S. firm on the list. Rounding out the top ten are BAE (UK) at no. 3 ($400 million, 2010), Snamprogetti Netherlands B.V./ENI S.p.A. (Holland/Italy) at no. 4 ($365 million, 2010), Technip S.A. (France) at no. 5 ($338 million, 2010), JGC Corp. (Japan) at no. 6 ($218.8 million, 2011), Daimler AG (Germany) at no. 7 ($185 million, 2010), Alcatel–Lucent (France) at no. 8 ($137 million, 2010), Magyar Telekom/Deutsche Telekom (Hungary/Germany) at no. 9 ($95 million, 2011), and Panalpina (Switzerland) at no. 10 ($81.8 million, 2010). Cassin, *Who Will Crack the Top Ten?*, *supra* note 21.

[23] Joe Palazzolo, *Another US Company Bumped Off FCPA Top 10 List*, CORRUPTION CURRENTS, WALL ST. J. (Apr. 6, 2011, 4:37 PM), http://blogs.wsj.com/corruption-currents/2011/04/06/another-us-company-bumped-off-fcpa-top-10-list/ (commenting that JGC Corp.'s settlement with the DOJ bumped Houston-based Pride International Inc. off the top-ten list).

[24] 15 U.S.C. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A) (2011).

[25] *Id.* §§ 78dd-2(g)(3), 78dd-3(e)(3), 78ff(c)(3).

[26] Press Release, U.S. Dep't of Justice, Executive Sentenced to 15 Years in Prison for Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti (Oct. 25, 2011),

longest prison term ever imposed in an FCPA case,[27] and it resulted from the defendant receiving the statutory maximum term of five years for the FCPA counts, and a consecutive term of ten years for the related counts of money laundering.[28]

Organizational and individual defendants may have to make substantial payments in the form of disgorgement or forfeiture as well. For example, as part of its settlement Siemens AG agreed to pay not only a record criminal fine of $450 million but it also agreed with the SEC to disgorge a record $350 million in wrongful profits.[29] The SEC started exercising its equitable disgorgement powers[30] in FCPA cases with its 2004 enforcement action against ABB Ltd.,[31] and since then, it has used that remedy in about three-quarters of its FCPA-related enforcement actions, according to *The*

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http://www.justice.gov/opa/pr/2011/October/11-crm-1407.html. The formal name of Haiti Teleco is Telecommunications D'Haiti S.A.M.

[27] *Id.*

[28] *See* Amended Judgment in a Criminal Case at 4, United States v. Esquenazi, No. 1:09-cr-21010-JEM (S.D. Fla. filed Nov. 3, 2011), ECF No. 638, *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/esquenazij/2011-11-03-esquenazij-amended-judgment.pdf.

[29] Litigation Release No. 20829, Sec. & Exch. Comm'n, SEC Files Settled Foreign Corrupt Practices Act Charges Against Siemens AG for Engaging in Worldwide Bribery with Total Disgorgement and Criminal Fines of Over $1.6 Billion (July 6, 2004), http://www.sec.gov/litigation/litreleases/2008/lr20829.htm (*SEC v. Siemens Aktiengesellschaft*, No. 08-cv-02167 (D.D.C.)). *See also* Cassin, *Pfizer Joins Our Top Ten Disgorgement List*, *supra* note 21 (listing the top ten defendant firms based on disgorgement amounts).

[30] 15 U.S.C. §§ 78u-2(e), 78u-3(e) (2011). The SEC's authority to seek disgorgement orders applies generally to administrative actions and cease-and-desist proceedings that it brings under the Securities Exchange Act of 1934, and is not specific to FCPA enforcement.

[31] Litigation Release No. 18775, Sec. & Exch. Comm'n, SEC Sues ABB Ltd. in Foreign Bribery Case; ABB Settles Federal Court Action and Agrees to Disgorge $5.9 Million in Illicit Profits (July 6, 2004), http://www.sec.gov/litigation/litreleases/lr18775.htm (*SEC v. ABB Ltd*, No. 1:04-cv-1141 (D.D.C.)).

FCPA Blog.[32] A notable example of forfeiture by an individual defendant is a record amount of $149 million held in Swiss and Israeli bank accounts, which Jeffrey Tesler—a U.K. solicitor charged with participating in a scheme to bribe Nigerian government officials in order to obtain engineering, procurement, and construction contracts—agreed were "proceeds traceable" to his FCPA violations.[33]

II.

As recent cases illustrate, it would be an understatement to say that FCPA enforcement by the DOJ and the SEC is alive and well—and arguably has never been better. What are some overarching principles that we can glean from their enforcement of the FCPA? Here again, I am offering my views only, and I don't purport to speak for either the DOJ or the SEC in this regard.[34] Also, much has been said and written about the FCPA since the

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[32] Cassin, *Pfizer Joins Our Top Ten Disgorgement List*, *supra* note 21. *See also* Marc Alain Bohn, *What Exactly Is Disgorgement?*, THE FCPA BLOG (Mar. 17, 2011, 7:10 AM), http://www.fcpablog.com/blog/2011/3/17/what-exactly-is-disgorgement.html; Sasha Kalb & Marc Alain Bohn, *Disgorgement: The Devil You Don't Know*, CORPORATE COMPLIANCE INSIGHTS (Apr. 12, 2010), http://www.corporatecomplianceinsights.com/disgorgement-fcpa-how-applied-calculated/.

[33] Plea Agreement at 4–5, United States v. Tesler, No. 4:09-cr-00098 (S.D. Tex. Mar. 11, 2011), ECF No. 34, *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/tesler/tesler_plea_agmt.pdf; Press Release, U.S. Dep't of Justice, UK Solicitor Pleads Guilty for Role in Bribing Nigerian Government Officials as Part of KBR Joint Venture Scheme (Mar. 11, 2011), http://www.justice.gov/opa/pr/2011/March/11-crm-313.html. *See also* Richard L. Cassin, *Hey, Tesler Belongs in Top Ten*, THE FCPA BLOG (Apr. 8, 2011, 8:09 AM), http://www.fcpablog.com/blog/2011/4/8/hey-tesler-belongs-in-top-ten.html (noting that Tesler's forfeiture amount alone would put him in the infamous top-ten list of defendants based on total settlement amount).

[34] "When the Department seeks to enforce the FCPA against corporate entities, it does so pursuant to internal procedures set forth in the Department's United States Attorney's Manual. These rules, also known as the *Principles of Federal Prosecution of Business Organizations*, represent official Department policy that all federal prosecutors must follow." *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and*

uptick in enforcement of the previous decade,[35] and so all I can do with the time I have remaining is to highlight a couple of principles that are of particular interest to me as a result of my own role as an antitrust enforcer—namely, achieving deterrence and promoting compliance.

In enacting the FCPA, our Congress concluded that criminalization—as opposed to legalization and disclosure—would be the "most effective deterrent" for foreign bribery, and would duly treat foreign bribery—no differently than domestic bribery—as "clearly illegal."[36] In particular, Congress embraced the view that "disclosure can never be an effective deterrent because the anticipated benefit of making a bribe, such as winning a multimillion dollar contract, generally exceeds the adverse effect, if any, of

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Homeland Security of the H. Comm. on the Judiciary, 112th Cong. 11 (2011) (prepared statement of Greg Andres, Acting Deputy Ass't Att'y Gen., Crim. Div., U.S. Dep't of Justice), *available at* http://judiciary.house.gov/hearings/printers/112th/112-47_66886.pdf [hereinafter *FCPA Hearing*]. *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, tit. 9, chs. 9-28.000–.1300 (Principles of Federal Prosecution of Business Organizations) (1997 rev., as amended), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm [hereinafter USAM].

[35] *See, e.g.,* Mike Koehler, *Symposium: The Changing Role and Nature of In-House and General Counsel: Revisiting a Foreign Corrupt Practices Act Defense*, 2012 WIS. L. REV. 609 (2012); Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389 (2010); Blake Puckett, *Clans and the Foreign Corrupt Practices Act: Individualized Corruption Prosecution in Situations of Systemic Corruption*, 41 GEO. J. INT'L L. 815 (2010); Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351 (2010); Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489 (2011).

[36] H.R. REP. NO. 95-640, at 6 (1977). At the time, the Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce considered competing legislative approaches for dealing with foreign bribery. One approach was to legalize such payments by requiring only their public disclosure and imposing criminal penalties only for failures to disclose. The other approach was to criminalize the payments themselves. After receiving extensive testimony on the wisdom of both approaches, Congress chose the latter, based on the emergence of "a clear consensus that foreign bribery is a reprehensible activity and that action must be taken to proscribe it." *Id.*

disclosing [one] year later a lump sum figure without names, amounts or even countries."[37] Simply put, the proposed legislation needed to send a clear and strong message that "crime doesn't pay," and Congress did not think that the public opprobrium alone that comes with disclosure would be enough to convey that message.

In my view, Congress' stated goal of deterrence, coupled with the very fact that would-be offenders stand to reap enormous financial gains if their bribes succeed, means that we as enforcers should prosecute foreign bribery the same way we have been prosecuting price-fixing cartels—with significant prison terms for individual actors, as well as heavy fines and penalties.[38] Although the FCPA primarily targets firms that are either issuers or domestic concerns, the fact remains that firms which bribe foreign officials can only do so through the actions of their individual agents.[39] That is why

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[37] *Id.*

[38] J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Faster, Leaner, Meaner: A Prescription Diet for U.S. Antitrust Enforcement?, Remarks Before the Chatham House Conference on Competition Policy in Global Markets 22–23 (June 22, 2012), http://www.ftc.gov/speeches/rosch/120622chathamhouse.pdf. *See* Scott D. Hammond, Deputy Asst. Att'y Gen. for Crim. Enforcement, Antitrust Div., U.S. Dep't of Justice, Ten Strategies for Winning the Fight Against Hardcore Cartels, Remarks Before the OECD Competition Committee, Working Party No. 3 Prosecutors Program slide no. 3 (Oct. 18, 2005), http://www.justice.gov/atr/public/speeches/212270.pdf ("In our experience, individual accountability through the imposition of jail sentences is the single greatest deterrent."); Gregory J. Werden, Senior Econ. Counsel, U.S. Dep't of Justice, et al., Recidivism Eliminated: Cartel Enforcement in the United States Since 1999, Remarks Before the Georgetown Global Antitrust Enforcement Symposium 7 (Sept. 22, 2011), http://www.justice.gov/atr/public/speeches/275388.pdf ("Meaningful prison terms for both U.S. and non-U.S. citizens eliminated cartel recidivism within the United States.").

[39] *See, e.g.,* United States v. Lov-It Creamery, Inc., 895 F.2d 410, 411–12 (7th Cir. 1990) (questioning whether the penalty for stealing butter from the Commodity Credit Corporation was "preposterously small" when the individual defendant, through whom the corporate defendant acted, received a three-year prison term).

the anti-bribery provisions expressly—and in my view, appropriately—proscribe the corrupt acts of officers, directors, employees, agents, and stockholders of issuers, domestic concerns, and other corporate persons,[40] and subject those individuals not only to prison terms of up to five years,[41] but also to fines that cannot be paid directly or indirectly by their corporate principals.[42] Recent cases reflect the DOJ's resolve in seeking substantial prison sentences against individual defendants and taking those defendants to trial, if necessary.[43]

In its prosecution of firms for foreign bribery, however, the DOJ has taken a different approach—one that arguably may not further Congress' goal of deterrence. Specifically, the DOJ has reportedly settled a significant number of FCPA cases with organizational defendants through the use of so-called deferred prosecution agreements (which I will refer to as DPAs) and

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[40] 15 U.S.C. §§ 78dd-1(a) & (g)(1), 78dd-2(a) & (i)(1), 78dd-3(a) (2011).

[41] 15 U.S.C. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A) (2011).

[42] *Id.* §§ 78dd-2(g)(3), 78dd-3(e)(3), 78ff(c)(3).

[43] *See, e.g.,* Judgment in a Criminal Case, United States v. Bourke, No. 1:05-cr-00518-SAS (S.D.N.Y. filed Nov. 12, 2009), ECF No. 253 (one year and one day although the DOJ sought 120 months for the FCPA and false statement counts combined), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/kozenyv/11-12-09bourke-judgment.pdf; Amended Judgment in a Criminal Case at 4, United States v. Esquenazi, No. 1:09-cr-21010-JEM (S.D. Fla. filed Nov. 3, 2011), ECF No. 638 (60 months on FCPA counts and a consecutive 120 months on money laundering counts), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/esquenazij/2011-11-03-esquenazij-amended-judgment.pdf; Amended Judgment in a Criminal Case at 4, United States v. Rodriguez, No. 1:09-cr-21010-JEM (S.D. Fla. filed Nov. 3, 2011), ECF No. 637 (60 months on FCPA counts and a consecutive 24 months on money laundering counts), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/esquenazij/2011-11-03-rodriguez-amended-judgment.pdf.

non-prosecution agreements (which I will refer to as NPAs).[44] These agreements allow the firms in question to avoid a potentially crippling criminal conviction or indictment that might result had they instead entered into a plea agreement or gone to trial.[45] Indeed, of the top-ten organizational defendants based on the size of fines,[46] the firms in number three to nine positions have all settled with DPAs or NPAs.[47]

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[44] According to the DOJ, deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) provide the prosecution with "a powerful alternative to outright prosecution or declination." *Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreements: Hearing Before the H. Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 78 (2009) (prepared statement of Gary G. Grindler, Deputy Ass't Att'y Gen., Crim. Div., U.S. Dep't of Justice), *available at* http://judiciary.house.gov/hearings/printers/111th/111-52_50593.pdf [hereinafter *Accountability Hearing*]. DPAs are settlement agreements that typically involve the filing of a criminal information or complaint containing the charged offenses, and an accompanying statement of facts describing the charged conduct. Although the charges are thus pending against a settling organizational defendant, the DOJ agrees to defer prosecution for a specified period of time, during which the settling defendant pays an agreed-upon fine, and takes certain remedial and compliance actions. If the defendant fulfills its obligations under the DPA, then the pending charges are dismissed. If the defendant breaches its obligations, however, then the DOJ may prosecute the pending charges, file additional charges, and use the statement of facts as an admission by the defendant. *Id.* at 79. NPAs are also settlement agreements between the DOJ and a defendant that entail obligations of cooperation, remediation, and compliance, but unlike DPAs, they do not involve the filing of formal charges and reflect instead a decision on the part of the DOJ not to prosecute. *Id.*

[45] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 15 (Report No. GAO-10-110, 2009) (referring to FCPA cases, "for which the Criminal Division has entered into DPAs to improve companies' compliance[,]" as one reason why the Criminal Division has pursued 1.2 times more DPAs and NPAs than prosecutions), *available at* http://www.gao.gov/new.items/d10110.pdf [hereinafter GAO REPORT]; Mike Koehler, *NPAs, DPAs, and the FCPA*, CORPORATE COMPLIANCE INSIGHTS (Feb. 10, 2010), http://www.corporatecomplianceinsights.com/nda-dpa-and-the-fcpa/ (commenting on the GAO report's mention of "the FCPA as being one area where NPAs and DPAs are frequently utilized, and as readers well know, most FCPA enforcement actions against companies are resolved through DPAs or NPAs").

[46] *See* Cassin, *Who Will Crack the Top Ten?*, *supra* notes 21–22 and accompanying text.

[47] The top three, Siemens, KBR/Halliburton, and BAE, all entered into plea agreements, as did Panalpina at number ten.

The DOJ has defended its frequent use of DPAs and NPAs in FCPA cases on the ground that criminal convictions, when imposed on organizational defendants, can have far-reaching, collateral consequences for innocent third parties who had no part in the alleged criminal conduct, had no knowledge of it, or were powerless to prevent it, such as employees, shareholders, creditors, and customers of a defendant firm.[48] Exemplifying this concern is the agency's much-publicized prosecution of Arthur Andersen LLP for its role in the Enron scandal.[49] Furthermore, the DOJ has asserted that collateral consequences such as debarment from doing business with the government would be unjustified in cases where the organizational defendant has fully cooperated with the criminal investigation, disciplined any culpable individuals, instituted compliance programs and other remedial measures, and provided restitution to victims, if any.[50] The agency will continue to pursue criminal convictions, however, against organizations "where the criminal conduct is egregious, pervasive and systemic, or when [an]

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[48] *Accountability Hearing*, *supra* note 44, at 73, 77 (testimony and prepared statement of Gary G. Grindler, Deputy Ass't Att'y Gen., Crim. Div., U.S. Dep't of Justice). The DOJ testified before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee, in opposition to House Bill 1947, entitled The Accountability in Deferred Prosecution Act of 2009, on the ground that the proposed legislation would "diminish the ability of Federal prosecutors to fully exercise their prosecutorial judgment and discretion which is a core prerogative of the executive branch." *Id.* at 74 (testimony of Gary G. Grindler).

[49] *See* Arthur Andersen LLP v. United States, 544 U.S. 696 (2005) (reversing Arthur Andersen's criminal conviction based on erroneous jury instructions—but too late to save the company from going out of business, or its many innocent employees from losing their jobs).

[50] *Accountability Hearing*, *supra* note 44, at 73, 77 (testimony and prepared statement of Gary G. Grindler, Deputy Ass't Att'y Gen., Crim. Div., U.S. Dep't of Justice).

organization is incapable or refuses to discipline culpable individuals or reform its culture and practices to prevent recidivism."[51]

Critics like Harry First of New York University School of Law are concerned, however, that in taking this prosecutorial stance, the DOJ has implicitly narrowed the range of cases in which corporate criminal liability would be appropriate.[52] According to Professor First, the DOJ has evidently decided that most organizational defendants are entitled to a "fix-it-after" approach, under which they "are allowed to violate the law one time, so long as they promise to assist in investigating individual wrongdoers and then fix the problem by undertaking a variety of internal reforms, paying restitution, and, often, but not always, paying a fine."[53] In his view, this "fix-it-after" approach undermines the law's ex ante deterrent effect, at least as to first-time offenses.[54]

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[51] *Id.* at 77 (prepared statement of Gary G. Grindler).

[52] Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N.C. L. REV. 23, 82 (2010) ("The unspoken implication of this view may be that corporate criminal liability is inappropriate outside of this small range of cases.") (reacting to former Corporate Fraud Task Force head James Comey's statement that the DOJ is prepared to put out of business those corporations that "have a profoundly screwed-up culture" and are deemed "bad in [their] own right").

[53] *Id.* at 91–92.

[54] *Id.* at 92–93. *See also id.* at 98 ("For one, the fix-it-after quality of agency agreements reduces the cost of the first violation, which might be the most important business crime violation to deter."). According to Professor First, the use of DPAs and NPAs—as opposed to the pursuit of criminal indictments and convictions—reduces the cost of illegal behavior to a corporation, thereby making such behavior more profitable and more likely to be undertaken in the first place. *Id.* at 92. Furthermore, DPAs and NPAs have provided an easier and less costly option for prosecutors to resolve high profile cases; as their incentives to employ such agreements increase, the deterrent effect of such agreements decreases because corporations and their defense counsel will discount the risk of actual prosecution. *Id.* at 93.

I agree with Professor First that deterrence under business crime statutes like the FCPA should arguably be concerned with the conduct of both individuals and organizations.[55] Although there are some business crimes that may be the isolated acts of a few unscrupulous individuals within a firm, it is hard to imagine that a crime such as foreign bribery (or for that matter, price-fixing)—from which a firm stands to make millions of dollars in business—is one for which the organization itself should not be held criminally responsible for the acts of its agents. Indeed, our Supreme Court endorsed this theory of corporate criminal responsibility in *New York Central and Hudson River Railroad Company v. United States*,[56] decided back in 1909. Recall, also, that our Congress enacted the FCPA in the face of reports that foreign bribery was a "widespread" practice among publicly traded corporations,[57] thus belying any notion that the offense is one that would be confined to the misdeeds of a few "rotten apples" within a given organization.

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[55] *Id.* at 88.

[56] 221 U.S. 481, 495 (1909) ("We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act in the subject-matter . . ., and whose knowledge and purposes may well be attributed to the corporation for which the agents act.").

[57] H.R. REP. NO. 95-640, at 4 (1977) ("More than 400 corporations have admitted making questionable or illegal payments. . . . These corporations have included some of the largest and most widely held public companies in the United States; over 117 of them rank in the top Fortune 500 industries."); S. REP. NO. 95-114, at 3 (1977) ("Recent investigations by the SEC have revealed corrupt foreign payments by over 300 U.S. companies involving hundreds of millions of dollars. . . . Confidence in the financial integrity of our corporations has been impaired.").

Apart from the question whether the use of DPAs and NPAs conflicts with Congress' express goal of deterring foreign bribery, there is also arguably a concern that these "agency agreements"[58] are not subject to any judicial oversight or approval to ensure that they are in the public interest[59]—even if they do represent a legitimate exercise of prosecutorial discretion.[60] I have previously expressed a similar concern that there is no mechanism for judicial oversight or approval of the Federal Trade Commission's consent decrees to ensure that they are in the public interest, as I believe Section 5(b) of the Federal Trade Commission Act[61] requires.[62] In my prior remarks, I contrasted our consent decree procedure[63] with that of

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[58] Professor First refers to these agreements as "agency agreements" because "they create an agency relationship between the government and the corporation, under which the corporation assumes certain continuing efforts on behalf of the prosecution[.]" First, *supra* note 52, at 47. In essence, the corporation shifts from being an enforcement target in the prosecution's eyes to being a "branch-office" prosecutorial agent. *Id.* at 48.

[59] *See* GAO REPORT, *supra* note 45, at 25 & n.46 (finding that federal judges (*1*) generally had little or no involvement with DPAs apart from the Speedy Trial Act, 18 U.S.C. § 3161(h)(2), which allows a court to approve the deferral of prosecution pursuant to a written agreement between the prosecution and the defendant, for the purpose of allowing the defendant to demonstrate its good conduct; and (*2*) had no involvement with NPAs because these settlements typically do not involve any court filings). *See also* Koehler, *supra* note 45 (expressing the concern that the DOJ is telling firms and their counsel to look to its DPAs and NPAs as a source of guidance on FCPA issues even though these agreements are privately negotiated and subject to little or no judicial review).

[60] *See Accountability Hearing*, *supra* note 44, at 74, 86 (testimony and prepared statement of Gary G. Grindler, Deputy Ass't Att'y Gen., Crim. Div., U.S. Dep't of Justice).

[61] 15 U.S.C. § 45(b) (2011).

[62] *See generally* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Consent Decrees: Is the Public Getting Its Money's Worth?, Remarks Before the XVIIIth St. Gallen International Competition Law Forum (Apr. 7, 2011), http://www.ftc.gov/speeches/rosch/110407roschconsentdecrees.pdf.

[63] 16 C.F.R. §§ 2.34(e), 3.25(f) (2012).

the DOJ's Antitrust Division for consent judgments under the Tunney Act[64] and plea agreements under the Federal Rules of Criminal Procedure and the Crime Victims' Rights Act.[65]

Unlike the Antitrust Division, the Criminal Division's Fraud Section has no parallel to the Tunney Act to ensure that DPAs and NPAs resolving FCPA charges are in the public interest. Moreover, DPAs and NPAs are not plea agreements so they are not subject to Rule 11 of the Federal Rules of Criminal Procedure or the Crime Victims' Rights Act. Instead, the public must count on the DOJ's judicious use of DPAs and NPAs in accordance with the *Principles of Federal Prosecution of Business Organizations*,[66] balancing the potential collateral consequences of a criminal conviction or indictment of an organizational defendant against other equally important considerations such as the need for deterrence.[67]

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[64] 15 U.S.C. § 16(e)–(f) (2011).

[65] FED. R. CRIM. P. 11(c); 18 U.S.C. § 3771 (2011).

[66] *Accountability Hearing*, *supra* note 44, at 78 (prepared statement of Gary G. Grindler, Deputy Ass't Att'y Gen., Crim. Div., U.S. Dep't of Justice) ("All Federal prosecutors are required to follow these principles in determining whether a DPA or NPA is appropriately used in a particular case, a complex decision which requires a careful analysis of a variety of factors. These agreements are subject to multiple levels of review in the Department and, in most instances, are made available to the public to ensure transparency."). The *Principles* make clear, however, that they "provide only internal Department of Justice guidance . . . [and] are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." USAM, *supra* note 34, ch. 9-28.1300.B cmt.

[67] *See* USAM, *supra* note 34, ch. 9-28.1000.B cmt. ("Ultimately, the appropriateness of a criminal charge against a corporation, or some lesser alternative, must be evaluated in a pragmatic and reasoned way that produces a fair outcome, taking into consideration, among other things, the Department's need to promote and ensure respect for the law."). *See also* First, *supra* note 52, at 97 ("Although prosecutors might worry about the collateral consequences of corporate prosecutions, prosecutors also need to be worried about not bringing such cases. As Arthur Andersen's conduct shows, the consequence to the public of

Let me now turn to a second principle of enforcement, which is promoting compliance. As a threshold matter, deterrence and compliance are not synonymous concepts in my mind. Deterrence focuses on developing an appreciation of the legal risks and consequences of violating the criminal law, as happens when organizations and individual actors are indicted for criminal misconduct.[68] By contrast, compliance focuses on developing a system of preventing and detecting violations of law. It principally advances a different goal of criminal law, namely, rehabilitation.[69]

In defending its frequent use of DPAs and NPAs in FCPA cases, the DOJ has stressed the rehabilitative aspects of these agreements—that is, the compliance program and other remediation steps that an organizational defendant must commit to implement.[70] In appropriate cases, the DOJ may even require that the firm retain an independent compliance monitor, jointly selected by the DOJ and the firm, to oversee the firm's implementation of,

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lost deterrence from not bringing a case can be far greater than the consequence to the stakeholders from going forward with a criminal prosecution against the enterprise.").

[68] *See* USAM, *supra* note 34, ch. 9-28-200.B cmt. ("For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal misconduct that is pervasive throughout a particular industry, and thus an indictment can provide a unique opportunity for deterrence on a broad scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees.").

[69] *See id.*, ch. 9-28-1300.B cmt. ("Rehabilitation, of course, requires that the corporation undertake to be law-abiding in the future. It is, therefore, appropriate to require the corporation, as a condition of probation, to implement a compliance program or to reform an existing one.").

[70] *Accountability Hearing*, *supra* note 44, at 80–81 (prepared statement of Gary G. Grindler, Deputy Ass't Att'y Gen., Crim. Div., U.S. Dep't of Justice) ("The agreements help ensure that going forward, the business organization roots out illegal and unethical conduct, appropriately disciplines culpable employees, prevents recidivism, and adheres to business practices that meet or exceed applicable legal and regulatory mandates.").

and compliance with, the terms of the compliance program and other obligations under the DPA or NPA.[71] In December 2009, our Government Accountability Office recommended that the DOJ develop performance measures to evaluate the contribution of DPAs and NPAs towards its overall objective of combating public and corporate corruption, and the DOJ agreed with that recommendation.[72]

Even as a tool for promoting compliance, however, DPAs and NPAs have their critics. For example, Joseph Yockey of the University of Iowa College of Law argues that there is an inherent tension between a "meaningful culture of compliance" within an organization, on the one hand, which "depends on free and open communication between firm agents and their counsel,"[73] and an organization's full cooperation with the DOJ's investigation, on the other hand, which may include disciplining or firing employees for established misconduct, promptly reporting potential misconduct, and making current and former firm agents available for prosecutorial interviews.[74] Because DPAs and NPAs also require an organizational defendant to cooperate with the DOJ's investigation and to assist with the prosecution of culpable

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[71] *Id.* at 83–85 (prepared statement of Gary G. Grindler). *See also* GAO REPORT, *supra* note 45, at 1.

[72] GAO REPORT, *supra* note 45, at 29.

[73] Joseph W. Yockey, *Symposium: The Changing Role and Nature of In-House and General Counsel: FCPA Settlement, Internal Strife, and the "Culture of Compliance"*, 2012 WIS. L. REV. 689, 691 (2012).

[74] *Id.* at 690–91.

individuals,[75] the compliance program that the organizational defendant is expected to implement may not be worth the paper it is written on—if employees and other agents fear either that firm counsel will turn them over to the prosecutor, or that firm management will impose internal discipline (including possibly termination), on the slightest whiff of misconduct.[76]

I agree with Professor Yockey that the tension between cooperation and compliance may arguably pose a roadblock to meaningful compliance, full rehabilitation, and elimination of recidivism within an organizational defendant. Indeed, that tension may be especially acute as the DOJ pursues more and more foreign firms for FCPA violations. As I have previously observed, we should be wary of trying to "export" our amnesty or leniency programs—and this would include DPAs and NPAs—to firms and individuals in other cultures.[77] Both cooperation and compliance require that firms and

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[75] *See Accountability Hearing*, *supra* note 44, at 80 (prepared statement of Gary G. Grindler, Deputy Ass't Att'y Gen., Crim. Div., U.S. Dep't of Justice):

> Second, DPAs and NPAs promote the public interest in ferreting out crime more quickly by requiring corporate cooperation. DPAs and NPAs require companies to cooperate with the government in obtaining evidence necessary to prosecute individuals and other corporations who have engaged in misconduct, including culpable individual corporate executives and employees. Notably, prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals, and corporate cooperation has proved to be invaluable in a variety of corporate and financial fraud cases against individual defendants.

[76] Yockey, *supra* note 73, at 707.

[77] *See* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Theoretical and Practical Observations on Cartel and Merger Enforcement at the Federal Trade Commission, Remarks Before the George Mason Law Review's 14th Annual Symposium on Antitrust Law 4 (Feb. 9, 2011), http://www.ftc.gov/speeches/rosch/110209georgemasoncartelsmergers.pdf. For example, in some cultures, individuals may fear being labeled as turncoats more than they

individuals adopt a particular mindset (for example, a willingness to turn others in, or a willingness to trust others for advice and counsel) that may not be achievable as a practical matter, given differing cultural norms.[78]

Another critique of DPAs and NPAs as a tool for promoting compliance focuses on the fact that different divisions within the DOJ may have different attitudes towards the value and significance of corporate compliance programs. Notably, unlike the Criminal Division that prosecutes FCPA violations, the Antitrust Division has traditionally taken a dim view of the existence of compliance programs in deciding whether to prosecute a firm,[79] and views the threat of prison sentences, along with monetary sanctions, as the "stick" needed to "make compliance programs effective."[80] Thus, when

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fear the consequences of a fine or incarceration. *See also* Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1868 (2011) ("Even if foreign enforcement increases and foreign standards come to mirror U.S. standards, U.S. prosecutors may continue to view prosecutions of foreign firms as a way to level the playing field for U.S. firms, obtain structural reforms that foreign prosecutors do not pursue, and promote U.S. norms.").

[78] *See* D. Daniel Sokol, *Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement*, 78 ANTITRUST L.J. 201, 223, 236 (2012) ("Social norms create controls on behaviors within organizations. Undesirable socialization may allow people to overlook ethical issues.") (concluding from a survey that "a strong compliance culture does not seem to be well embedded within most firms").

[79] *See, e.g.,* USAM, *supra* note 34, chs. 9-28.400.B cmt. (cautioning that "the Antitrust Division has established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government"), 9-28.800.A ("In addition, the nature of some crimes, *e.g.*, antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program."); Sokol, *supra* note 78, at 225 (finding through a qualitative study that "practitioners believe that the DOJ treats any compliance program that does not halt all cartel activity as a failed compliance program" and commenting that "[t]he problem with such a policy is that it creates incentive for under-investment in compliance").

[80] Gregory J. Werden, Scott D. Hammond & Belinda A. Barnett, *Deterrence and Detection of Cartels: Using All the Tools and Sanctions*, 56 ANTITRUST BULL. 207, 214 & n.26, 234 (2011).

Bridgestone Corporation entered into a plea agreement with the DOJ in October 2011 on charges of both foreign bribery and price-fixing in the sale of marine hose,[81] it agreed to implement a corporate compliance program "to address deficiencies in its internal controls, policies, and procedures regarding [FCPA] compliance," but the compliance program said nothing about preventing or detecting violations of price-fixing.[82]

This aspect of the Bridgestone plea agreement has struck me and other commentators as an example of an apparent "split personality" within the DOJ on the role of compliance programs.[83] And it arguably makes no sense, from the standpoint of law enforcement, to take different approaches.[84] More than a decade ago, Gary Spratling, then the Deputy Assistant Attorney General for Criminal Enforcement at the Antitrust Division, flagged a potential connection between foreign bribery and cartel conduct—that corrupt payments to foreign officials may be in furtherance of a bid-rigging or

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[81] Plea Agreement, United States v. Bridgestone Corp., No. 4:11-cr-00651 (S.D. Tex. Oct. 5, 2011), ECF No. 21, *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/bridgestone/10-05-11bridgestone-plea.pdf.

[82] *Id.*, Attachment B (Corporate Compliance Program).

[83] *See* Jeffrey M. Kaplan, *The Justice Department, Miss Havisham, and a Wish for the New Year*, THE FCPA BLOG (Dec. 28, 2011, 7:28 AM), http://www.fcpablog.com/blog/2011/12/28/the-justice-department-miss-havisham-and-a-wish-for-the-new.html ("In other words, the Department of Justice seemed to believe that it was important for the company to have, among other things, risk assessments, clearly articulated policies, procedures, training, certifications, reporting protocols, self-assessments and many other measures to prevent the recurrence of corruption—but *none* of these steps to prevent the recurrence of antitrust violations. Is this really the message the Department wants to send?").

[84] *See id.* ("E.g., if it makes sense to require a company to assign one or more senior executives the responsibility for ensuring anti-corruption compliance—executives with the requisite level of authority, autonomy and resources to do that job—why *wouldn't* the government do the same for antitrust?").

project-allocation scheme.[85] Mr. Spratling therefore suggested that firms use their corporate compliance programs to prevent, or at least to detect early, the existence of corrupt payments, so as to maximize the chances of qualifying for the Antitrust Division's amnesty program.[86] In my view, that advice seems as valid today as it was in 1999. The DOJ should be encouraging organizational defendants to comply with the law generally in their business operations and dealings, not just with the FCPA, because corruption in one aspect of business often breeds corruption in other aspects of business.

So there you have it—a whirlwind tour through recent developments in U.S. enforcement of the FCPA. I hope I have given you plenty to think and talk about during the open discussion segment of this session. Thank you.

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[85] Gary R. Spratling, Deputy Ass't Att'y Gen. for Crim. Enforcement, Antitrust Div., U.S. Dep't of Justice, International Cartels: The Intersection Between FCPA Violations and Antitrust Violations, Speech to the American Conference Institute 7th National Conference on the Foreign Corrupt Practices Act 7, 14 (Dec. 9, 1999), http://www.justice.gov/atr/public/speeches/3981.htm.

[86] *Id.* at 14.