

REVISITING A FOREIGN CORRUPT PRACTICES ACT COMPLIANCE DEFENSE

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The Foreign Corrupt Practices Act (FCPA) enforcement environment does not adequately recognize a company's good-faith commitment to FCPA compliance and does not provide good corporate citizens a sufficient return on their compliance investments. This Article argues in favor of an FCPA compliance defense meaning that a company's *pre-existing* compliance policies and procedures, and its good-faith efforts to comply with the FCPA, should be relevant *as a matter of law* when a non-executive employee or agent acts contrary to those policies and procedures and in violation of the FCPA. Among other reasons and justifications in support of an FCPA compliance defense, a compliance defense will better incentivize more robust corporate compliance, reduce improper conduct, and thus best advance the FCPA's objective of reducing bribery. An FCPA compliance defense will also increase public confidence in FCPA enforcement actions and allow the Department of Justice to better allocate its limited prosecutorial resources to cases involving corrupt business organizations and the individuals who actually engaged in the improper conduct. The time is right to revisit an FCPA compliance defense.

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The issues covered in this Article assume the reader has sufficient knowledge and understanding of the FCPA and the role of the Department of Justice in enforcing the FCPA. Interested readers can learn more about these and other FCPA topics by reading Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907 (2010), as well as the author's FCPA Professor Blog (www.fcprofessor.com), specifically the FCPA 101 page of the site (<http://www.fcprofessor.com/fcpa-101>).

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*“[N]o compliance program can ever prevent all criminal activity by a corporation’s employees”*¹

*“There will always be rogue employees who decide to take matters into their own hands. They are a fact of life.”*²

INTRODUCTION

The focus of this Article is how best to address this “fact of life” in the context of the Foreign Corrupt Practices Act (FCPA). This Article asserts that the current FCPA enforcement environment does not adequately recognize a company’s good-faith commitment to FCPA compliance and does not provide good corporate citizens a sufficient

1. U.S. DEP’T JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9-28.800 (2008) [hereinafter U.S. ATTORNEYS’ MANUAL], *available at* <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>.

2. Lanny A. Breuer, Assistant Attorney Gen. (Criminal Div.), Remarks at the Annual Meeting of the Washington Metropolitan Area Corporate Counsel Association (Jan. 26, 2011), *available at* <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-110126.html>.

return on their compliance investments. This Article argues in favor of an FCPA compliance defense meaning that a company's *pre-existing* compliance policies and procedures, and its good-faith efforts to comply with the FCPA, should be relevant *as a matter of law* when a non-executive employee or agent acts contrary to those policies and procedures and in violation of the FCPA. This Article further argues that compliance is best incorporated into the FCPA as an element of a bribery offense, the absence of which the Department of Justice (DOJ) must establish to charge a substantive bribery offense.

Part I of this Article contains a case study to demonstrate the type of conduct that would be covered by an FCPA compliance defense. Contrary to the claims of some, an FCPA compliance defense would not eliminate corporate criminal liability under the FCPA or reward "fig leaf" or "purely paper" compliance programs. A compliance defense would not apply to corrupt business organizations, activity engaged in or condoned by executive officers, or activity by any employee if it occurred in the absence of pre-existing compliance policies and procedures.

Part II of this Article places an FCPA compliance defense in the context of the broader issue of corporate criminal liability and acknowledges the work of other scholars and commentators who have called for a general compliance defense to corporate criminal liability. This Part channels that work into the specific context of the FCPA and argues that the unique aspects and challenges of complying with the FCPA in the global marketplace warrant a specific FCPA compliance defense.

Part III of this Article highlights that an FCPA compliance defense is not a new idea or a novel idea. This Part contains an overview of the FCPA legislative history of a compliance defense, most notably the compliance defense passed by the House of Representatives in the 1980s. The justification and rationale for a compliance defense then pales in comparison to now as most U.S. companies engage in international business during an era of aggressive FCPA enforcement. This Part also demonstrates that an FCPA compliance defense is not a novel idea given that the FCPA's internal control provisions (as well as other securities laws provisions) already recognize good-faith compliance efforts as being relevant as a matter of law. Moreover, several countries, like the United States, that are signatories to the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), have a compliance-like defense in their domestic laws.

Against this backdrop, Part IV of this Article details the DOJ's institutional opposition to an FCPA compliance defense, yet argues that

the DOJ already recognizes a de facto FCPA compliance defense albeit in opaque, inconsistent, and unpredictable ways. Thus, an FCPA compliance defense accomplishes, among other things, the policy goal of removing factors relevant to corporate criminal liability from the opaque, inconsistent, and unpredictable world of DOJ decision making towards a more transparent, consistent, and predictable model best accomplished through a compliance defense amendment to the FCPA. This Part concludes by highlighting the growing chorus of former DOJ officials who support an FCPA compliance defense and argues that the DOJ's current opposition to a compliance defense seems grounded less in principle than in an attempt to protect its lucrative FCPA enforcement program.

Part V of this Article concludes by highlighting certain policy objectives advanced by an FCPA compliance defense. This Part argues that an FCPA compliance defense will better incentivize more robust corporate compliance, reduce improper conduct, and thus best advance the FCPA's objective of reducing bribery. An FCPA compliance defense will also increase public confidence in FCPA enforcement actions and allow the DOJ to better allocate its limited prosecutorial resources to cases involving corrupt business organizations and the individuals who actually engaged in the improper conduct.

I. SIEMENS CASE STUDY AND APPLICATION OF A COMPLIANCE DEFENSE

This Article begins with a case study of Siemens, the most egregious FCPA violator in history—yet a company that has also undergone a compliance transformation, to demonstrate the type of conduct that would be covered by an FCPA compliance defense.

In 2008, enforcement agencies alleged that Siemens engaged in a pattern of bribery “unprecedented in scale and geographic reach” and that for much of its operations around the world “bribery was nothing less than standard operating procedure.”³ The conduct at issue involved more than \$1.4 billion in bribes to foreign officials in various countries, and Siemens agreed to pay \$800 million in fines and penalties to resolve the matter.⁴

Should the FCPA be amended to include a compliance defense, such a defense clearly would not have applied to Siemens given that the

3. Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008), *available at* <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>.

4. *Id.*

company had “a corporate culture in which bribery was tolerated and even rewarded at the highest levels of the company.”⁵ According to the DOJ, “[c]ompliance, legal, internal audit, and corporate finance departments were a significant focus of the investigation and were discovered to be areas of the company that played a significant role in the violations.”⁶

Since the 2008 enforcement action, Siemens has undergone a substantial compliance transformation. In its 2008 sentencing memorandum, the DOJ acknowledged that Siemens had “already implemented substantial compliance changes” and a settlement term required the company to further implement “rigorous compliance enhancements.”⁷ The “Remediation Efforts” section of the DOJ’s sentencing memorandum stated, in pertinent part, as follows:

Siemens also overhauled and greatly expanded its compliance organization, which now totals more than 500 full time compliance personnel worldwide. Control and accountability for all compliance matters is vested in a Chief Compliance Officer, who, in turn, reports directly to the General Counsel and the Chief Executive Officer. Siemens has also reorganized its Audit Department, which is headed by a newly appointed Chief Audit Officer who reports directly to Siemens’ Audit Committee. To ensure that auditing personnel throughout the company are competent, the Chief Audit Officer required that every member of his 450 person staff reapply for their jobs.

Siemens also has enacted a series of new anti-corruption compliance policies, including a new anti-corruption handbook, sophisticated web-based tools for due diligence and compliance matters, a confidential communications channel for employees to report irregular business practices, and a corporate disciplinary committee to impose appropriate disciplinary measures for substantiated misconduct.

Siemens has organized a working group devoted to fully implementing the new compliance initiatives, which consists

5. Linda Chatman Thomsen, Dir. of Enforcement Div., U.S. Sec. & Exch. Comm’n, Statement at News Conference Announcing Siemens AG Settlement (Dec. 15, 2008), <http://www.sec.gov/news/speech/2008/spch121508lct.htm>.

6. Department’s Sentencing Memorandum at 2, *United States v. Siemens Aktiengesellschaft*, No. 1:08-cr-00367-RJL (D.D.C. Dec. 12, 2008), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-12-08siemensvenez-sent.pdf>.

7. *Id.* at 11.

of employees from Siemens' Corporate Finance and Corporate Compliance departments, and professionals from PricewaterhouseCoopers ("PwC"). This working group developed a step-by-step guide on the new compliance program and improved financial controls known as the "Anti-Corruption Toolkit." The Anti-Corruption Toolkit and its accompanying guide contain clear steps and timelier required of local management in the various Siemens entities to ensure full implementation of the global anti-corruption program and enhanced controls. Over 150 people, including 75 PwC professionals, provided support in implementing the Anti-Corruption Toolkit at 162 Siemens entities, and dedicated support teams spent six weeks on the ground at 56 of those entities deemed to be "higher risk," assisting management in those locations with all aspects of the implementation. The total external cost to Siemens for the PwC remediation efforts has exceeded \$150 million.⁸

Elsewhere, the DOJ sentencing memorandum stated as follows:

Siemens also significantly enhanced its review and approval procedures for business consultants, in light of the past problems. The new state-of-the-art system requires any employee who wishes to engage a business consultant to enter detailed information into an interactive computer system, which assesses the risk of the engagement and directs the request to the appropriate supervisors for review and approval. Siemens has also increased corporate-level control over company funds and has centralized and reduced the number of company bank accounts and outgoing payments to third parties.⁹

In summary, the DOJ recognized that "[t]he reorganization and remediation efforts of Siemens have been extraordinary and have set a high standard for multi-national companies to follow."¹⁰

More recently, Siemens compliance reports as follows: (1) approximately 600 employees work full time in a single compliance organization managed by a Chief Compliance Officer (of this number approximately eighty work at Siemens' corporate headquarters with the rest deployed evenly around various sectors/divisions and regional

8. *Id.* at 22–23.

9. *Id.* at 24.

10. *Id.*

companies); (2) 300,000 employees worldwide have received compliance training, including 100,000 employees who received face-to-face multi-hour courses; (3) all new compliance officers worldwide are required to take an intensive four-day course; (4) approximately 5,500 top managers worldwide have compliance metrics as an aspect of their compensation; and (5) approximately fifty-five high-risk entities and approximately 105 business units were required to implement over 100 compliance systems controls.¹¹

As a condition of settlement of the 2008 enforcement action, Siemens is subject to a five-year probation period during which it shall not commit any further crimes and comply with the compliance and ethics program set forth in its plea agreement.¹² In short, there is likely no other company in the world today than Siemens that has devoted as many corporate resources towards compliance. Likewise, there is likely no other company in the world today than Siemens that faces as many negative consequences should its compliance efforts fail.

Nevertheless, recent reports suggested “alleged corruption by three [Siemens] company managers working in Kuwait” who allegedly “made payments to high-ranking individuals” in Kuwait’s Energy and Water Ministry.¹³ According to the reports, authorities began investigating the conduct after receiving information directly from Siemens.¹⁴

Under *respondeat superior*, the DOJ could prosecute Siemens for the conduct of its managers to the extent the conduct was within the scope of their employment and was intended to benefit, at least in part, the organization.¹⁵ Such a prosecution would be possible notwithstanding the company’s 600 full-time compliance personnel, its Anti-Corruption Toolkit designed by industry leaders, and its 100-plus compliance systems controls in high-risk jurisdictions. At present, all that matters from an FCPA liability perspective is that someone in Siemens’ organization made payments in violation of the FCPA, even if such payments were contrary to the company’s pre-existing compliance

11. SIEMENS, THE SIEMENS COMPLIANCE SYSTEM: “PREVENT – DETECT – RESPOND AND CONTINUOUS IMPROVEMENT” 5–6, 9–10, 12 (2011) (on file with author).

12. Judgment in a Criminal Case at 3–4, *United States v. Siemens Aktiengesellschaft*, No. 1:08-cr-00367-RJL (D.D.C. Jan. 6, 2009), <http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/01-06-09siemensakt-judgment.pdf>.

13. Richard Connor, *Police Investigate Alleged Corruption by Siemens Staff*, DEUTSCHE WELLE (Oct. 6, 2011), <http://www.dw-world.de/dw/article/0,,15146789,00.html>.

14. *Id.*

15. See U.S. ATTORNEYS’ MANUAL, *supra* note 1.

policies and procedures and even if Siemens in good faith implemented all reasonable steps designed to prevent such conduct.

One of the ironies of this new era of FCPA enforcement is that several companies have resolved FCPA enforcement actions, or are otherwise subject to FCPA scrutiny, during the same general time period as being recognized as one of the “World’s Most Ethical Companies.”¹⁶ Companies in this illogical group include: AstraZeneca, Deere & Company, General Electric, Hewlett-Packard, Novo Nordisk, Oracle Corporation, Rockwell Automation, Sempra Energy, and Statoil.¹⁷

These “World’s Most Ethical” FCPA violators might, just as the reformed Siemens might: (1) benefit from their commitment to compliance and their pre-existing compliance policies and procedures under the DOJ’s Principles of Prosecution of Business Organizations;¹⁸ and (2) receive credit for the same under the advisory U.S. Sentencing Guidelines should the DOJ decide to prosecute and when the DOJ makes its sentencing recommendation.¹⁹ However, the DOJ has no legal

16. Ethisphere’s “World’s Most Ethical Companies” designation “recognizes companies that truly go beyond making statements about doing business ‘ethically’ and translate those words into action.” *2011 World’s Most Ethical Companies*, ETHISPHERE, <http://ethisphere.com/past-wme-honorees/wme2011/> (last visited Jan. 3, 2012). As stated by Ethisphere, the designation is “awarded to those companies that have leading ethics and compliance programs, particularly as compared to their industry peers.” *Id.* A company only earns the designation after a “methodology committee of leading attorneys, professors, government officials and organization leaders[] assist[] Ethisphere in creating the scoring methodology” and after Ethisphere conducts an “in-depth analysis” of the company. *Id.*

17. Mike Koehler, *Oracle – Another World’s Most Ethical FCPA Violator?*, FCPA PROFESSOR (Sept. 1, 2011), <http://www.fcpaprofessor.com/oracle-another-worlds-most-ethical-fcpa-violator>.

18. The DOJ’s Principles of Prosecution of Business Organizations are found in the *U.S. Attorneys’ Manual* and set forth the factors prosecutors “should consider” in determining whether to bring criminal charges against a business organization or negotiate a plea or other agreement (such as a non-prosecution agreement or a deferred prosecution agreement) with an organization to resolve potential criminal charges. *See* U.S. ATTORNEYS’ MANUAL, *supra* note 1. Relevant factors include “the existence and effectiveness of the corporation’s pre-existing compliance program.” *Id.* 9-28.300.

19. The advisory U.S. Sentencing Guidelines are relevant to calculating organizational fines and allow reduced fines if an organization has an “effective compliance and ethics program.” U.S. SENTENCING GUIDELINES MANUAL vol. 1, § 8B2.1 (2011), *available at* http://www.ussc.gov/Guidelines/2011_Guidelines/Manual_PDF/Chapter_8.pdf. Under the guidelines, “to have an effective compliance and ethics program” an organization shall “(1) exercise due diligence to prevent and detect criminal conduct; and (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.” *Id.* The guidelines note that “[s]uch compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal

obligation to take these relevant factors into consideration and, whether it does or not, its decision is “relatively unbound by legal institutions—administrative or legal—that ensure transparency, accountability, and uniformity.”²⁰

The current FCPA enforcement environment thus does not adequately recognize a company’s good-faith commitment to FCPA compliance and does not provide good corporate citizens a sufficient return on their compliance investments.²¹ A company’s pre-existing FCPA compliance efforts and its good-faith efforts to comply should be recognized as a matter of law through a compliance defense amendment to the FCPA.

Contrary to the claims of some, an FCPA compliance defense would not eliminate corporate criminal liability under the FCPA or reward “fig leaf”²² or purely paper compliance programs. A compliance defense would not be relevant to corrupt business organizations, activity engaged in or condoned by executive officers, or activity by any employee if it occurred in the absence of pre-existing compliance policies and procedures.

II. AN FCPA COMPLIANCE DEFENSE IN CONTEXT AND SPECIFIC REASONS WARRANTING A COMPLIANCE DEFENSE

This Part places an FCPA compliance defense in the context of the broader issue of corporate criminal liability and acknowledges the work of other scholars and commentators who have called for a general compliance defense to corporate criminal liability. Such calls are then channeled into the specific context of the FCPA, and this Part argues that the unique aspects and challenges of complying with the FCPA in the global marketplace warrant a specific FCPA compliance defense.

conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.” *Id.*

20. Miriam H. Baer, *Organizational Liability and the Tension between Corporate and Criminal Law*, 19 J.L. & POL’Y 1, 8 (2010).

21. See Lucinda Low on the Current Anti-corruption Landscape, BULLETPROOF BLOG (Apr. 6, 2011), <http://www.bullectproofblog.com/2011/04/06/bullectproof-interview-special-%e2%80%93lucinda-low-on-the-current-anti-corruption-landscape/> (“The cost of maintaining a robust compliance program, it’s a major investment, and compliance officers have to justify that investment. And, in the U.S. system, it’s much harder to isolate what the benefits are of that compliance investment.”).

22. See DAVID KENNEDY & DAN DANIELSEN, BUSTING BRIBERY: SUSTAINING THE GLOBAL MOMENTUM OF THE FOREIGN CORRUPT PRACTICES ACT 31 (2011), http://www.soros.org/initiatives/washington/articles_publications/publications/busting-bribery-20110916/Busting%20Bribery2011September.pdf.

A. A Compliance Defense in Context

Business organizations face a wide variety of criminal law exposure—not just FCPA exposure—based on *respondeat superior* principles notwithstanding the organization’s pre-existing compliance policies and procedures and its good-faith efforts to comply with the law.²³ Indeed scholars and commentators have long argued in favor of a general compliance defense to corporate criminal liability.

Professor Ellen Podgor has called for the “institution of an affirmative defense that corporations would be allowed to use when faced with possible criminal charges” if the entity can “present ‘good faith’ efforts to achieve compliance with the law as demonstrated in their corporate compliance program.”²⁴ Among other things, Professor Podgor highlights how business organizations, consistent with guidance offered by the enforcement agencies and guidance set forth in the Sentencing Guidelines, have “instituted effective compliance programs to ‘prevent and detect criminal conduct.’ But despite the utmost ‘due diligence’ in establishing and maintaining these programs, there is ultimately no truly effective program if there is any transgression from the law.”²⁵ Professor Podgor thus observes that “corporations with the best of motives, with the best of efforts, and with the utmost in ‘due diligence’ can still find themselves the subject of criminal prosecution.”²⁶

Professors Richard Gruner and Louis Brown note that “[l]aw compliance programs in many large firms presently reflect extensive efforts to ensure lawful conduct by corporate employees and agents” and have argued for a “due diligence defense” that could be asserted and shown “if a corporation initiated and maintained an effective law compliance program under which the employee offense under prosecution was a rare and aberrant one.”²⁷ Professor Lucian Dervan similarly has called for revision of the current “de minimis” standard for corporate criminal liability by adding a “moral culpability element” to the existing *respondeat superior* standard whereby the DOJ would also be required to demonstrate that “[t]he corporation is morally

23. Ellen S. Podgor, *A New Corporate World Mandates a “Good Faith” Affirmative Defense*, 44 AM. CRIM. L. REV. 1537, 1539, 1542 (2007).

24. *Id.* at 1538.

25. *Id.* at 1537.

26. *Id.*

27. Richard S. Gruner & Louis M. Brown, *Organizational Justice: Recognizing and Rewarding the Good Citizen Corporation*, 21 J. CORP. L. 731, 735–36, 764 (1996).

culpable for encouraging” the conduct giving rise to the criminal exposure.²⁸

Andrew Weissman, the former director of the DOJ’s Enron Task Force and current FBI general counsel, has also challenged traditional notions of corporate criminal liability and has argued that when the DOJ “seeks to charge a corporation as a defendant, the government should bear the burden of establishing as an additional element that the corporation failed to have reasonably effective policies and procedures to prevent the conduct.”²⁹

Whether a general compliance defense to all corporate criminal liability is warranted is not the focus of this Article. Rather, this Article argues that the unique aspects and challenges of complying with the FCPA in the global marketplace warrant a specific FCPA compliance defense.

B. Specific Reasons Warranting a Compliance Defense

The FCPA’s anti-bribery provisions generally prohibit the payment of money or anything of value to a foreign official in order to assist the payor in obtaining or retaining business.³⁰ These elements are clearly met when a company provides a suitcase full of cash to a foreign government official to obtain or retain a foreign government contract. Yet such facts, or similarly egregious facts such as those at issue in the Siemens enforcement action (i.e., a “corporate culture in which bribery was tolerated or even rewarded at the highest levels of the company”),³¹ are seldom the cause of corporate FCPA enforcement actions.

Joseph Covington, the DOJ’s former FCPA Unit Chief who favors an FCPA compliance defense, has “rarely seen American companies affirmatively offering bribes in the first instance.”³² Rather, Covington observes that companies doing business in international markets are “reacting to a world not of their making” and that “[a]s the world shrinks companies who seek to do the right thing can’t help but confront corrupt officials—as customers, regulators and adjudicators—

28. Lucian E. Dervan, *Re-evaluating Corporate Criminal Liability: The DOJ’s Internal Moral Culpability Standard for Corporate Criminal Liability*, STETSON L. REV. (forthcoming 2012) (manuscript at 1, 4, 8), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1781291.

29. Andrew Weissmann with David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 414 (2007).

30. See 15 U.S.C. §§ 78dd-1 to -3 (2006).

31. See Thomsen, *supra* note 5.

32. Mike Koehler, *Former DOJ FCPA Chief Supports FCPA Compliance Defense*, FCPA PROFESSOR (Oct. 4, 2011), <http://www.fcprofessor.com/former-doj-fcpa-chief-supports-fcpa-compliance-defense>.

and confront them often.”³³ It is this reality that most warrants a specific FCPA compliance defense.

Before turning to specific reasons warranting an FCPA compliance defense, it is worth observing some general truths of doing business in international markets. Doing business in international markets often requires hiring local workers who are products of different cultures and experiences, speak different languages, and are located in different time zones from corporate headquarters. While bribery is prohibited by the written laws of every country and while a suitcase full of cash to a government official to obtain or retain a government contract is a universal wrong regardless of culture, language, or experience, this is where the consensus often ends. Even with gold-standard compliance policies and procedures, the practical reality of monitoring and supervising this vast and diverse network of individuals is difficult and even gold-standard compliance policies and procedures are not foolproof. As Professor Joseph Yockey observes, “Firms are not monoliths. They have multiple moving parts, each with different perspectives and goals.”³⁴

1. BUSINESS CONDITIONS AND BARRIERS

In many countries, particularly high-growth emerging markets, companies subject to the FCPA must navigate challenging environments replete with barriers and other conditions that serve as breeding grounds for payments implicating (at least in the eyes of the enforcement agencies) the FCPA.

Trade barriers common in many countries include customs procedures such as import documentation and inspection requirements; arcane and complex licensing and certification requirements; quality standards that require product testing and inspection visits; and foreign government procurement policies. These barriers are seldom transparent and companies seeking to do business in many foreign countries are often funneled into an arbitrary world of low-paying civil servants who frequently supplement their meager salaries through payments condoned in the host country. Such barriers create the conditions in which harassment bribes flourish, as demonstrated by the following FCPA enforcement actions.

Helmerich & Payne, an oil and gas drilling company, resolved an FCPA enforcement action based on payments made by second-tier subsidiaries to various officials and representatives of the Argentine and

33. *Id.*

34. Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 810 (2012).

Venezuelan customs services in connection with the importation and exportation of goods and equipment related to company operations in those countries.³⁵ As alleged, the payments were made through agents or customs brokers, involved low dollar amounts, and were “made on an infrequent basis.”³⁶ Delta & Pine Land Company, a seed company, resolved an FCPA enforcement action based on payments (or other things of value such as office furniture) made or offered by a subsidiary to officials of the Turkish Ministry of Agricultural and Rural Affairs to obtain government reports and certifications such as farm field inspections that were necessary to operate in Turkey.³⁷ Tyson Foods, a poultry producer, resolved an FCPA enforcement action based on payments made by a subsidiary to Mexican veterinarians.³⁸ As alleged, the veterinarians were required to be on-site at the company’s facility to certify product for export and certain veterinarians were allowed to charge the facility for their work (to supplement their government salary) while certain other veterinarians were not.³⁹ The resolution documents neither give any detail how the payments sought to influence the veterinarians nor suggest that the product at issue was not qualified for export.⁴⁰ Lucent Technologies, a telecommunications company, resolved an FCPA enforcement action based on payments made to employees of Chinese state-owned companies.⁴¹ The conduct at issue, in part, involved factory inspection tours to the United States requested by Chinese customers that morphed into primarily sightseeing and leisure visits.⁴² Alliance International, a tobacco processor, resolved an FCPA enforcement action based, in part, on payments made by a subsidiary to officials of a Kyrgyzstan government-purchasing agency

35. See Letter from Steven A. Tyrell, Chief, Fraud Section, U.S. Dep’t of Justice (Criminal Div.), to Kimberly A. Parker, Attorney for Helmerich & Payne, Inc. (July 29, 2009), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/helmerich-payne/06-29-09helmerich-agree.pdf>.

36. *Id.*

37. Complaint at ¶¶ 2–5, *SEC v. Delta & Pine Land Co.*, No. 1:07-cv-01352 (D.D.C. July 25, 2007), *available at* <http://www.sec.gov/litigation/complaints/2007/comp20214.pdf>.

38. See Information at ¶¶ 9, 13–15, *United States v. Tyson Foods, Inc.*, No. 1:11-cr-00037-RWR (D.D.C. Feb. 10, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/tyson-foods/02-10-11tyson_foods_info.pdf.

39. *Id.* ¶¶ 10–11.

40. *Id. passim.*

41. Letter from Steven A. Tyrell, Chief, Fraud Section, U.S. Dep’t of Justice (Criminal Div.), to Martin J. Weinstein, Attorney for Lucent Technologies, Inc. (Nov. 14, 2007), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/lucent-tech/11-14-07lucent-agree.pdf>.

42. *Id.*

with authority over the sale of tobacco by growers in the region.⁴³ As alleged, the payments were demanded by the Kyrgyz officials to secure the company's continued ability to purchase tobacco from growers in the region the officials controlled.⁴⁴

FCPA enforcement actions based on conduct in high-growth markets like India and Nigeria further demonstrate the many challenging foreign business conditions and barriers companies face and how harassment bribes flourish.

According to Transparency International, fifty-four percent of Indians pay bribes to receive basic services⁴⁵ and India's Chief Economic Advisor acknowledges that "[h]arassment bribery is widespread in India."⁴⁶ Recent FCPA enforcement actions concerning business conduct in India demonstrate that harassment bribery is common and that companies operating in India face—just as locals face—difficult conditions simply to get things done. For instance, Diageo, a spirits company, resolved an FCPA enforcement action based, in part, on improper payments made by a subsidiary in connection with product label registration and securing favorable product placement and promotion.⁴⁷ Wabtec, a brake manufacturer, resolved an FCPA enforcement action based on improper payments made by a subsidiary in connection with scheduling pre-shipment product inspections, issuance of product delivery certificates, and tax audits.⁴⁸ Dow Chemical resolved an FCPA enforcement action based on improper payments made by a subsidiary in connection with registering

43. Letter from Denis J. McInerney, Chief, Fraud Section, U.S. Dep't of Justice (Criminal Div.), to Edward J. Fuhr, Attorney for Alliance One Int'l, Inc. (Aug. 6, 2010), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/alliance-one/08-06-10alliance-one-mpa.pdf>.

44. *Id.*

45. TRANSPARENCY INT'L, GLOBAL CORRUPTION BAROMETER 2010, at 46 (2010), *available at* http://www.transparency.org/policy_research/surveys_indices/gcb/2010/results.

46. Kaushik Basu, *Why, for a Class of Bribes, the Act of Giving a Bribe Should Be Treated as Legal* (Mar. 2011), http://www.kaushikbasu.org/Act_Giving_Bribe_Legal.pdf; *see also* David Kestenbaum, *Bribery in India: A Good Thing?*, NPR.ORG (Apr. 22, 2010), <http://www.npr.org/templates/story/story.php?storyId=126199094> (“[G]etting . . . things done without hassles require[s] a bribe. [India is] famous for paperwork, tangled bureaucracy and the courts are slow. So, often it just makes economic sense to shrug and pay the money. Because when you bribe someone, they can become like your own personal Ganesh, the god who is the remover of obstacles.”).

47. *Diageo plc*, Exchange Act Release No. 64978 (July 27, 2011), *available at* <http://www.sec.gov/litigation/admin/2011/34-64978.pdf>.

48. Complaint at 1, *SEC v. Westinghouse Air Brake Techs. Corp.*, No. 08-cv-706 (E.D. Pa. Feb. 14, 2008), *available at* <http://www.sec.gov/litigation/complaints/2008/comp20457.pdf>.

products.⁴⁹ Baker Hughes, an oilfield services company, resolved an FCPA enforcement action based, in part, on improper payments made by a subsidiary to obtain shipping permits.⁵⁰

In addition to harassment bribes in India, several FCPA enforcement actions have involved the Nigerian Customs Service (NSC). The NCS “is a notoriously corrupt public institution The process of clearing goods through Nigerian ports is very bureaucratic and prone to corruption,” and various customs laws and regulations are applied arbitrarily in order to solicit bribes.⁵¹ Business interactions with NSC officials have been the basis for several FCPA enforcement actions including a coordinated FCPA enforcement action in November 2010 involving several companies (Pride International, Tidewater, Transocean, GlobalSantaFe, Noble Corp., and Royal Dutch Shell) in the oil and gas industry.⁵² The conduct at issue largely involved payments to NCS officials in connection with securing temporary importation permits for oil drilling rigs.⁵³ Other conduct involving NCS officials included indirect payments through a freight forwarder to expedite the importation of goods and equipment into Nigeria and payments to circumvent customs clearance processes with respect to importation of certain tools and materials.⁵⁴

In passing the FCPA, Congress recognized the difficulties companies often encounter in doing business in international markets. For this reason, Congress exempted so-called “grease” or “facilitating” payments from the reach of the FCPA (first through the definition of “foreign official”⁵⁵ and then in 1988 through a stand-alone facilitating payments exception).⁵⁶ The 1977 House Report states, in pertinent part:

49. *Dow Chem. Co.*, Exchange Act Release No. 55287, 89 CCH SEC Docket 3094 (Feb. 13, 2007), available at <http://www.sec.gov/litigation/admin/2007/34-55281.pdf>.

50. Information at 2–3, 6, *United States v. Baker Hughes, Inc.*, No. 4:07-cr-00130 (S.D. Tex. Apr. 11, 2007), <http://www.justice.gov/criminal/fraud/fcpa/cases/baker-hughs/04-11-07bakerhughes-info.pdf>.

51. *Nigeria Country Profile*, BUSINESS ANTI-CORRUPTION PORTAL, <http://www.business-anti-corruption.com/country-profiles/sub-saharan-africa/nigeria/corruption-levels/customs-administration/> (last visited Jan. 5, 2012).

52. Press Release, U.S. Dep’t of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More than \$156 Million in Criminal Penalties (Nov. 4, 2010), <http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html>.

53. *Id.*

54. *Id.*

55. H.R. REP. NO. 95-640, at 8 (1977).

56. Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, sec. 5003, § 30A(b), 102 Stat. 1415, 1416 (codified at 15 U.S.C. § 78dd-1(b) (2006)).

The language of the bill is deliberately cast in terms which differentiate between [corrupt] payments and facilitating payments, sometimes called 'grease payments.'

...

For example, a gratuity paid to a customs official to speed the processing of a customs document would not be reached by the bill. Nor would it reach payments made to secure permits, licenses, or the expeditious performance of similar duties of an essentially ministerial or clerical nature which must of necessity be performed in any event.

While payments made to assure or to speed the proper performance of a foreign official's duties may be reprehensible in the United States, the committee recognizes that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments. As a result, the committee has not attempted to reach such payments.⁵⁷

Few would call what occurs on a daily basis in many foreign markets ethical. However, the issue is whether such conduct represents the type of conduct Congress sought to prohibit when it passed the FCPA in 1977. So long as the DOJ refuses to recognize a facilitating payments exception,⁵⁸ congressional intent on this issue is best advanced through an FCPA compliance defense in which a company can assert as a matter of law that its pre-existing FCPA policies and procedures sought to prevent such payments in foreign markets.

2. FORCED BUSINESS RELATIONSHIPS

Understanding the business landscape in most foreign markets, navigating the maze of rules and regulations, and interacting with the foreign officials who administer many entrenched bureaucracies often require engagement of a foreign agent or representative. In fact, in many foreign countries engaging a local agent or having a local sponsor

57. See H.R. REP. NO. 95-640, at 8.

58. See, e.g., Richard W. Grime & Sara S. Zdeb, *The Illusory Facilitating Payments Exception: Risks Posed by Ongoing FCPA Enforcement Actions and the U.K. Bribery Act*, SEC. L. PRAC. CENTER (May 10, 2011), <http://seclawcenter.pli.edu/wp-content/uploads/2011/05/Grime-Risks-Posed-by-Ongoing-FCPA.pdf> (“[T]he DOJ and the SEC’s narrow interpretation of the facilitating payments exception is making that exception ever more illusory, regardless of whether the federal courts—or Congress—would agree.”).

is a requirement of doing business in the country.⁵⁹ In other countries a company may be required to enter a joint venture with a local entity as a condition of doing business in the country.⁶⁰ In certain industries it is virtually guaranteed that a company will be required to have a foreign partner as a condition of doing business in the country.⁶¹

These forced business relationships often result in FCPA exposure because of the FCPA's third-party payment provisions.⁶² These provisions generally prohibit those subject to the FCPA from providing things of value to "any person, while knowing that all or a portion of . . . [the] thing of value will be . . . given . . . directly or indirectly to [a] foreign official . . . [to] obtain[] or retain[] business."⁶³ Like other FCPA elements, this knowledge requirement is broadly interpreted by the enforcement agencies to include not only when a company has actual knowledge that a third party is providing things of value to a "foreign official" to obtain or retain business, but also when a company is willfully blind or consciously disregards facts which suggest that a third party may provide something of value to a "foreign official" for a business purpose.⁶⁴

Given the frequency in which companies must engage third parties in foreign markets, most corporate FCPA enforcement actions involve the conduct of third parties.⁶⁵ As Professor Yockey observes:

Due to competitive pressures, and in order to serve the interests of their clients who are seeking to operate [in the country], foreign agents and intermediaries are often put in

59. *E.g.*, Lisa Middlekauff, *To Capitalize on a Burgeoning Market? Issues to Consider before Doing Business in the Middle East*, 7 RICH. J. GLOBAL L. & BUS. 159, 170 (2008).

60. *E.g.*, *Catalogue for the Guidance of Foreign Investment Industries*, MINISTRY COMM. PEOPLE'S REPUBLIC CHINA (Oct. 31, 2007), http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=87372.

61. *E.g.*, Talal Al-Emadi, *Joint Venture Contracts (JVCs) among Current Negotiated Petroleum Contracts: A Literature Review of JVC's Development, Concept and Elements*, 1 GEO. J. INT'L L.: THE SUMMIT 1, 4 (2010), http://www.law.georgetown.edu/journals/gjil/pdf/1_1_al_emadi.pdf.

62. *See* 15 U.S.C. § 78dd-1(a)(3) (2006).

63. *Id.*

64. *See, e.g.*, Press Release, U.S. Dep't of Justice, InVision Technologies, Inc. Enters into Agreement with the United States (Dec. 6, 2004), http://www.justice.gov/opa/pr/2004/December/04_crm_780.htm ("InVision, through the conduct of certain employees, was aware of a high probability that its agents or distributors in [Thailand, China, and the Philippines] has paid or offered to pay money to foreign officials . . .").

65. *See* Mike Koehler, *The FCPA, Foreign Agents, and Lessons from the Halliburton Enforcement Action*, 36 OHIO N.U. L. REV. 457, 464-70 (2010).

the position where acquiescence to bribe demands seems like the only option.⁶⁶

To reduce FCPA risk and to negate knowledge under the FCPA's third-party payment provisions, many companies devote considerable time and resources to conducting third-party due diligence and monitoring and supervising third parties.⁶⁷ Yet, as Professor Yockey observes:

[T]hese measures will rarely provide firms with complete protection from liability. Agency costs within firms are never zero because agents' incentives are never perfectly aligned with the interests of their principals . . . often caus[ing] agents to disregard internal firm policies and instructions if doing so will serve their own financial interests.⁶⁸

Against the backdrop of challenging foreign business conditions and forced business relationships, even the most ardent opponents of an FCPA compliance defense acknowledge that “[a]t first blush” such a defense “has some intuitive appeal.”⁶⁹ Nevertheless opponents, led by Professors David Kennedy and Dan Danielson, state that “the creation of an affirmative defense of ‘compliance’ to FCPA corporate criminal liability is actually potentially very dangerous”⁷⁰ and that an FCPA compliance defense “makes no sense when, as under the current FCPA, corporate criminal liability requires proof beyond a reasonable doubt that the company acted with actual knowledge and corrupt intent to influence a foreign government to gain an improper business advantage.”⁷¹ Others simplistically state that “if a company is found to be in violation of the FCPA, then the existence of a company’s compliance program must not have prevented the acts of bribery”⁷²

While it is true that the corrupt intent element must be met in order to convict a company of an FCPA offense, that corrupt intent element can be satisfied, and often is, by singular and isolated acts of any

66. Yockey, *supra* note 34, at 810.

67. *Id.* at 811.

68. *Id.*

69. KENNEDY & DANIELSEN, *supra* note 22, at 29.

70. *Id.* at 6.

71. *Id.*

72. Heather A. Lowe & Sarah Pray, *Concerns about the U.S. Chamber Institute of Legal Reform’s Proposals for Amending the FCPA*, GLOBAL FIN. INTEGRITY, http://www.gfintegrity.org/storage/gfip/documents/Capitol_Hill/fcpa_response_to_us_chamber.pdf (last visited Feb. 3, 2012).

employee, even if the employee's conduct is contrary to pre-existing compliance policies and procedures. However, Professors David Kennedy and Dan Danielsen simply gloss over this fundamental concept in their compliance defense rebuttal and the term (or general concept) *respondeat superior* does not even appear in their analysis. The fact remains that a company can face FCPA liability even if an employee's conduct was not known or condoned by the board, executive officers or other high-ranking executives and, at present, the company's pre-existing compliance policies and procedures are *not* relevant as a matter of law to the organization's criminal liability.⁷³

It is widely recognized, including by those who helped frame the FCPA and by current government officials, that the FCPA is a unique law that demands specific forward-looking solutions to achieve its purpose of reducing bribery.

73. As noted on the *FCPA Professor* blog:

[T]he only time in the FCPA's history that a corporate FCPA charge was presented to a jury was in the Lindsey Manufacturing case [in 2011]. The relevant jury instruction (instruction 16—entity responsibility—entity defendant—agency) stated as follows:

“To sustain the charge of conspiracy to violate the Foreign Corrupt Practices Act (“FCPA”) or violation of the FCPA against Lindsey Manufacturing Company, the government must prove the following propositions:

First, the offense charged was committed by one or more agents or employees of Lindsey Manufacturing Company; Second, in committing the offense, the agent or employee intended, at least in part, to benefit Lindsey Manufacturing Company; and Third, the acts by the agent or employee were committed within the authority or scope of his employment.

For an act to be within the authority of an agent or the scope of the employment of an employee, it must deal with a matter whose performance is generally entrusted to the agent or employee by Lindsey Manufacturing Company. *It is not necessary that the particular act was itself authorized or directed by Lindsey Manufacturing Company.* If an agent or an employee was acting within the authority or scope of his employment, Lindsey Manufacturing Company is not relieved of its responsibility because the act was illegal.”

Mike Koehler, *Off-Target*, FCPA PROFESSOR (Oct. 17, 2011), <http://www.fcpaprofessor.com/off-target>. In December 2011, the Lindsey convictions were vacated and the indictment dismissed because of prosecutorial misconduct. See Mike Koehler, *Milestone Erased: Judge Matz Dismisses Lindsey Convictions, Says that “Dr. Lindsey and Mr. Lee Were Put through a Severe Ordeal” and that Lindsey Manufacturing, A “Small, Once Highly Respected Enterprise . . . Placed in Jeopardy”*, FCPA PROFESSOR (Dec. 1, 2011), <http://www.fcpaprofessor.com/milestone-erased-judge-matz-dismisses-lindsey-convictions-says-that-dr-lindsey-and-mr-lee-were-put-through-a-severe-ordeal-and-that-lindsey-manufacturing-a-small-once-highly-respected-ente>.

Stanley Sporkin was the Director of the SEC's Division of Enforcement in the mid-1970s and played a key role in addressing the foreign corporate payments issue that led to enactment of the FCPA in 1977. In a 2004 speech, Sporkin stated:

[W]e need more than Congress passing new statutes . . . We need a comprehensive assault on the problem. This means we need the assistance of our government and indeed all the countries of the world along with the world business community, to provide a climate which enables our corporations to compete honestly and fairly throughout the world. There is a way to fix this problem if there is a will to do so.⁷⁴

Among other things, Sporkin proposed “[t]he establishment of a country-by-country list of agents that have been properly vetted and have agreed to be examined and audited by an independent international auditing group.”⁷⁵ In a 2006 speech, Sporkin commented that the DOJ and SEC “can do something forward-looking which would be win-win for both the government and the private sector.”⁷⁶ Sporkin proposed an “FCPA Immunization-Inoculation Program” that:

would serve the dual purpose of: (1) creating suitable incentives to compliance-minded companies to adopt and maintain high ethical standards in the conduct of their business; and (2) reducing the case load and investigative burden of governmental agencies that enforce the FCPA while reassuring regulators that companies are taking active steps to limit corruption in their foreign contracting and other activities.⁷⁷

74. Stanley Sporkin, Partner, Weil, Gotshal & Manges LLP, *The Foreign Corrupt Practices Act—Then and Now*, Address at 12th National Foreign Corrupt Practices Act Conference 11 (Nov. 15–16, 2004), *available at* <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=21765&libID>.

75. *Id.* at 11–12.

76. Stanley Sporkin, Partner, Weil, Gotshal & Manges LLP, *Origins of the FCPA*, Address at the ABA National Institute on the Foreign Corrupt Practices Act 6 (Oct. 16, 2006), *available at* <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=21764&libID>.

77. *Id.* at 6, 8. Sporkin stated that “[t]he quasi-amnesty program would consist of” the following: (i) “[a]greement by participating firms to conduct a full and complete review [conducted jointly by a major accounting firm or specialized forensic accounting firm and a law firm] of the company’s compliance with the FCPA for the previous 3 years”; (ii) the company would “agree to disclose the results of the legal-

Sporkin believes that such a program “would provide the right-thinking corporate community with the necessary assurances that it needs to develop a vibrant overseas business without having to defend itself against very costly and time consuming investigations.”⁷⁸

James Doty, writing as a private lawyer before he was appointed by the SEC in 2011 as Chairman of the Public Company Accounting Oversight Board, argued that FCPA “enforcement trends indicate a need for an administrative regime that would enable public companies to achieve a measure of regulatory certainty regarding compliance” given that “[c]ase-by-case enforcement is not a satisfactory substitute for a rule enabling the board and senior management to protect the corporation from vicarious liability for the actions of officers and employees.”⁷⁹ Among other things, Doty highlighted that “current law leaves largely unresolved the central issue of when a company’s compliance system and anti-bribery policy are sufficient, in either design or implementation, to safeguard the corporate enterprise from vicarious responsibility for the actions and omissions of employees.”⁸⁰ Doty’s proposal—so called “Reg. FCPA”—“would provide a measure of regulatory certainty to public companies regarding the elements of good-faith compliance.”⁸¹ At the core of Doty’s proposal is a safe harbor provision whereby public companies would be presumed not to have violated the FCPA if it establishes “an FCPA Compliance Program designed to prevent and detect, insofar as practicable, any violations.”⁸² As envisioned by Doty, a company could avail itself of Reg. FCPA’s safe harbor provision by making a permissive filing with the SEC that would include the following: the company’s code of conduct; joint-venture and agency representations and covenants; a

accounting audit to the SEC, its investors and the public”; (iii) “[i]f any violations turned up in the process of the audit, the participating [company] would agree to take all steps to eliminate the problems and implement the appropriate controls to prevent further violations”; (iv) “participating [companies] would agree to subject themselves to a similar audit on an annual basis for at least 5 years to ensure that compliance was being maintained”; (v) “participating [companies] would be required to create the position of FCPA compliance officer, whose sole responsibility would be to ensure the company’s compliance with the FCPA” and “make an annual certification”; and (vi) “[i]n exchange . . . the SEC and DOJ would give qualified assurances that no actions would be brought for violations exposed by the review.” *Id.* at 7–8. As envisioned by Sporkin, “[t]he limited amnesty would not apply if the violations rose to a flagrant or egregious level.” *Id.*

78. *Id.* at 8–9.

79. James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 *BUS. LAW.* 1233, 1234 (2007).

80. *Id.* at 1235.

81. *Id.* at 1233.

82. *Id.* at 1243–44.

description of the company's communication efforts regarding the code to employees, third parties, and others; and procedures for monitoring and testing the code's effectiveness.⁸³

The above reform proposals demonstrate recognition by experienced individuals that the unique aspects and challenges of complying with the FCPA in the global marketplace warrant specific forward-looking solutions given that the current ad hoc enforcement environment is not adequately advancing the FCPA's objective of reducing bribery.⁸⁴ However, neither Sporkin nor Doty's proposals are the best solution for rewarding good-faith FCPA compliance. Doty's proposal focuses only on public companies and thus would not apply to the various non-public forms of business organizations subject to the FCPA's anti-bribery provisions. Sporkin's proposal would only be triggered after expensive and lengthy engagements of accounting firms and law firms and disclosure of accounting-legal audit results to government agencies.

The best forward-looking solution to advance the FCPA's objective is a compliance defense amendment to the FCPA that would apply to all business organizations subject to the FCPA. Such an amendment is best incorporated into the FCPA as an additional element of a bribery offense as has been done in the FCPA-like laws of certain other peer nations. In other words, to charge a business organization with a substantive bribery offense, the DOJ will have the burden of establishing, as an additional element, that the company failed to have policies and procedures reasonably designed to detect and prevent the improper conduct by non-executive employees or agents.⁸⁵

83. *Id.*

84. *See, e.g., Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary, 111th Cong. 7 (2010)* (statement of Sen. Amy Klobuchar, Member, S. Comm. on the Judiciary) ("As we know, the goal is not just to punish bad actors after a violation is committed, but rather to prohibit actions from happening in the first place. So a lot of my questions are focused on how we can incentivize corporations to make sure they have appropriate compliance procedures in place and that they voluntarily disclose violations when a rogue employee violates the law.").

85. Should the FCPA be amended to include a compliance defense, a related issue obviously becomes—what would the statutory language of a compliance defense actually look like? The goal of this Article is to influence the public debate by arguing that pre-existing FCPA compliance policies and procedures, and a business organization's good-faith efforts to comply, should be relevant as a matter of law when a non-executive employee or agent acts contrary to those policies and procedures. As to the related issue—what would the statutory language of a compliance defense actually look like—although this issue is beyond the scope of this Article, suffice it to say that the specific statutory terms would largely borrow concepts from DOJ FCPA resolution documents as well as concepts from the U.S. Sentencing Guidelines. As discussed *infra* in Part IV, DOJ FCPA non-prosecution and deferred prosecution agreements list

As explained in more detail in Part V of this Article, an FCPA compliance defense will best incentivize more robust corporate compliance, reduce improper conduct, and thus best advance the FCPA's objective of reducing bribery. An FCPA compliance defense will also increase public confidence in FCPA enforcement actions and allow the DOJ to better allocate its limited prosecutorial resources to cases involving corrupt business organizations and the individuals who actually engaged in the improper conduct.

III. AN FCPA COMPLIANCE DEFENSE IS NOT A NEW OR NOVEL IDEA

This Part contains an overview of the FCPA legislative history of a compliance defense, most notably the compliance defense passed by the House of Representatives in the 1980s. This Part also demonstrates that the FCPA's internal control provisions (as well as other securities laws provisions) already recognize good-faith compliance efforts as being relevant as a matter of law and that several countries, like the United States, which are signatories to the OECD Convention, have a compliance-like defense in their domestic laws.

A. A Compliance Defense Is Not a New Idea

Reforming the FCPA to include a compliance defense is not a new idea; rather it has been around for nearly as long as the FCPA itself.⁸⁶

specific elements of an effective FCPA compliance program. Likewise, chapter 8 of the U.S. Sentencing Guidelines discusses elements of an "effective compliance and ethics program" as well as definitions for "high-level personnel" and "substantial authority personnel." See U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (2011), *available at* http://www.ussc.gov/guidelines/2011_Guidelines/Manual_HTML/8b2_1.htm. The OECD also has "Good Practice Guidance" that "is addressed to companies for establishing and ensuring the effectiveness of internal controls, ethics, and compliance programmes or measures for preventing and detecting the bribery of foreign public officials in their international business transactions" See OECD, GOOD PRACTICE GUIDANCE ON INTERNAL CONTROLS, ETHICS, AND COMPLIANCE 2 (2010), *available at* <http://www.oecd.org/dataoecd/5/51/44884389.pdf>. Should the FCPA be amended to include a compliance defense, such a defense will obviously go through, like any new statutory provision, a maturation process and difficult factual issues may arise. However, these issues—which again occur with any new statutory provision—are not reasons in and of themselves not to revisit an FCPA compliance defense and should not detract from the policy objectives that can be achieved through a compliance defense.

86. The first apparent reference to a compliance-like defense in the FCPA's legislative history was in 1983 during a House of Representatives hearing examining legislation to amend the FCPA. Arthur Matthews, a former SEC enforcement official then in private practice, testified at the hearing. Although the FCPA reform bill under consideration did not contain a compliance defense, Matthews stated as follows:

The first FCPA reform bill to include a compliance defense was H.R. 4708 introduced by Rep. Don Bonker (D-Washington) in 1986.⁸⁷ Titled the Export Enhancement Act of 1986, Title IV of the Act stated, in pertinent part:

Due Diligence.—An issuer [or domestic concern] may not be held vicariously liable, either civilly or criminally, for a violation [of the FCPA’s anti-bribery provisions] by its employee, who is not an officer or director, if—

(1) such issuer [or domestic concern] has established procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such employee, and

(2) the officer and employee of the issuer [or domestic concern] with supervisory responsibility for the conduct of the employee used due diligence to prevent the commission of the offense by that employee. Such issuer [or domestic concern] shall have the burden of proving by a preponderance of the evidence that it meets the requirements set forth in paragraphs (1) and (2). The first sentence of this subsection shall be considered an affirmative defense to actions under [the anti-bribery provisions].⁸⁸

The House Report summarizing H.R. 4708 stated that if “a corporation has set up internal controls to avoid illicit payments or has otherwise acted to keep within the law, its ‘due diligence’ can be used as a defense against both civil and criminal liability in cases where its employees have nonetheless engaged in bribery.”⁸⁹ Elsewhere, the House Report stated that “[a] company may not be held vicariously liable if it can show that it had established procedures to prevent its employees from making bribes and that its supervisory employees had

I would also support some type of affirmative due diligence defense that a corporation would be able to prove to avoid criminal responsibility on a reckless disregard theory. Since 1933, in the Securities Act of 1933, there has been a due diligence defense for issuers and their officers and directors with respect to whether or not a registration statement is false. I think comparable language could be placed in the bill so that corporations would have an affirmative due diligence defense.

The Foreign Trade Practices Act: Hearings on H.R. 2157 Before the Subcomm. on Int’l Econ. Policy & Trade of the H. Comm. on Foreign Affairs, 98th Cong. 226 (1983) (statement of Arthur F. Matthews, Partner, Wilmer, Cutler & Pickering).

87. See H.R. REP. NO. 99-580, pt. 1, at 1 (1986).

88. *Id.* at 66.

89. *Id.* at 9.

used ‘due diligence’ to prevent employees or third parties from making bribes.”⁹⁰

Although not all FCPA reform bills during the mid-1980s contained a compliance defense, many other FCPA reform bills did, including H.R. 3 introduced by Rep. Richard Gephardt (D-Missouri) in 1987. Titled the Omnibus Trade and Competiveness Act of 1988, Title V of the Act contained the same compliance provisions as H.R. 4708 discussed above.⁹¹ The House Report summarizing H.R. 3 stated as follows: “The bill also provides incentives for self-policing by business, by setting forth standards of due diligence to prevent and detect violations of the law by employee and agents.”⁹² Elsewhere, the House Report stated, in pertinent part:

The bill establishes . . . a new, “due diligence” defense for civil and criminal liability of issuers and domestic concerns for violations of the FCPA by employees and agents. It provides that if the issuer or domestic concern has established procedures for detecting violations, and if the officers and employees with supervisory responsibility for the employees or agent violating the law have exercised due diligence to prevent the violation, then no vicarious liability will apply. Of course, supervisory responsibility for the actions of a particular employee or agent may be exercised by many officials in an organization and can include, for example, the general supervisory authority of high level corporate officials. The requirements must be established by a preponderance of the evidence.

Although “due diligence” is a familiar concept under the Federal securities laws, the bill does not specifically define the term. It is intended that what would constitute “due diligence” would be factual determination by the trier of fact and would vary depending upon the particular circumstances of the transaction at issue. . . .

. . . In meeting the defense under this section, it must be shown that reasonable steps were taken. It is perhaps most important that firms create an environment which fosters good business practice and compliance with the law. In this connection, employees and agents should be encouraged to

90. *Id.* at 33.

91. *See* H.R. REP. NO. 100-576, at 327–37 (1988) (Conf. Rep.); *see also* H.R. 2150, 100th Cong. tit. 6, § 601 (1987); H.R. 4800, 99th Cong. tit. 7, §§ 701–02 (1986); H.R. 4830, 99th Cong. tit. 5, § 501 (1986).

92. H.R. REP. NO. 100-40, pt. 2, at 53 (1987).

comply with the law and to report factors that may indicate improper behavior.⁹³

H.R. 3 passed the House, but a different bill containing FCPA provisions without a compliance defense passed the Senate and the House receded to the Senate.⁹⁴ After a nearly decade-long debate, FCPA reform occurred in 1988 when President Ronald Reagan signed H.R. 4848, the Omnibus Trade and Competitiveness Act of 1988. However, the FCPA portion of H.R. 4848 (Title V, Subtitle A, Part I) did not contain a compliance defense.⁹⁵

The legislative history of an FCPA compliance defense is instructive and should inform the current debate on the issue. Far from a “dangerous” or “risky” proposal, amending the FCPA to include a compliance defense was recognized long ago as the best way to encourage and reward self-policing by companies doing business abroad.

What is most revealing from the legislative history is that an FCPA compliance defense reached its zenith during a period when relatively few companies engaged in substantial business beyond U.S. borders. It is also instructive that a compliance defense reached its zenith during a period when the DOJ exercised prudence and discipline in enforcing the FCPA. For instance, in 1986 (the year prior to an FCPA reform bill containing a compliance defense passing the House) the DOJ did not bring a single FCPA enforcement action. In 2010, by contrast, the DOJ brought numerous corporate FCPA enforcement actions, often based on strict application of *respondeat superior* principles, and collected approximately \$1 billion in corporate fines and penalties.⁹⁶

In short, the justification and rationale for an FCPA compliance defense in the 1980s pale in comparison to now as most U.S. companies (large and small and in a variety of industry sectors) engage in international business during an era of aggressive FCPA enforcement.⁹⁷

93. *Id.* at 78.

94. H.R. REP. NO. 100-576, at 922-23 (1988) (Conf. Rep.).

95. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 5001-03, 102 Stat. 1107, 1415-25.

96. See Mike Koehler, *DOJ Enforcement of the FCPA—Year in Review*, FCPA PROFESSOR (Jan. 27, 2011), <http://www.fcpaprofessor.com/category/year-in-review-2010>.

97. See, e.g., Bill Nygren & Kevin Grant, *Today's Case For Large Cap Equity*, OAKMARK FUNDS (Sept. 19, 2011), http://www.oakmark.com/opennews.asp?news_id=572&news_from=h (“S&P 500 companies derive close to half of their revenue and profits from outside the U.S.”); see also Nathan Vardi, *The Bribery Racket*, FORBES (June 7, 2010),

B. A Compliance Defense Is Not a Novel Idea

Reforming the FCPA to include a compliance defense is also not a novel idea. As discussed above, the first reference to a compliance-like defense in the FCPA's legislative history recognized the FCPA as part of the securities laws and that other securities law provisions contained good-faith compliance concepts.⁹⁸ Indeed, the FCPA is part of the Securities Exchange Act of 1934 ('34 Act) and other '34 Act provisions excuse liability based on good-faith compliance efforts.⁹⁹ Even the FCPA itself currently contains good-faith compliance concepts in its internal control provisions.¹⁰⁰ In short, amending the FCPA's anti-bribery provisions to incorporate good-faith compliance concepts is not novel given that the FCPA's internal control provisions, as well as other securities law provisions, already recognize good-faith compliance efforts as being relevant as a matter of law.

Reforming the FCPA to include a compliance defense is also not a novel idea given that several peer countries have a compliance-like defense relevant to their "FCPA-like" law.

<http://www.forbes.com/global/2010/0607/companies-payoffs-washington-extortion-mendelsohn-bribery-racket.html> ("The scope of things companies have to worry about is enlarging all the time as the government asserts violations in circumstances where it's unclear if they would prevail in court.").

98. See *supra* note 86.

99. See, for example, section 18 of the '34 Act ("Liability for Misleading Statements"), which excuses liability if the person sued can "prove that he acted in good faith and had no knowledge that such statement was false or misleading," Securities Exchange Act of 1934, ch. 404, § 18(a), 48 Stat. 881, 897-98, and section 20 of the '34 Act ("Liability of Controlling Persons"), which excuses liability if the "controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action," *id.* at 899.

100. See 15 U.S.C. § 78m(b)(6) (2006). The FCPA's internal control provisions generally require that "issuers" "devise and maintain a system of internal accounting controls" sufficient to provide reasonable assurances that: among other things, "transactions are executed in accordance with management's general or specific authorization;" "access to assets is permitted only in accordance with management's general or specific authorization," and "transactions are recorded as necessary . . . to permit a preparation of financial statements in conformity with generally accepted accounting principles . . . and to maintain accountability for assets." § 78m(b)(2), (b)(6). However, the internal control provisions also specifically state as follows: where an issuer "holds 50 per centum or less of the voting power with respect to a domestic or foreign firm" the provisions "require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls . . ." § 78m(b)(6). The provisions then state that "an issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements" of the internal control provisions. *Id.*

The United States is not the only country with a law prohibiting bribery of foreign officials for a business purpose. Thirty-seven other countries (collectively representing two-thirds of the world's exports and ninety percent of foreign direct investment) have also adopted, like the United States, the OECD Convention.¹⁰¹ Pursuant to Article 2 of the OECD Convention, “[e]ach Party shall take such measures as may be necessary, in accordance with its legal principles, to establish liability of legal persons for the bribery of a foreign public official.”¹⁰² Consistent with Article 2, and as demonstrated below, several countries have a compliance-like defense relevant to their “FCPA-like” law. Included in this group is the United Kingdom’s recently enacted Bribery Act, a law hailed as even more stringent than the FCPA.

1. THE U.K.’S ADEQUATE-PROCEDURES DEFENSE

On July 1, 2011, the U.K. Bribery Act came into force.¹⁰³ Unlike the FCPA’s anti-bribery provisions, which focus solely on improper payments to “foreign officials,” the Bribery Act is a comprehensive bribery statute prohibiting improper payments to both domestic officials and “foreign public officials,” as well as bribes and kickbacks in purely commercial contexts.

Under section 7 of the Bribery Act “[a] commercial organisation will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organisation.”¹⁰⁴ However, section 7 also states that a “commercial organisation will have a full defence if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing.”¹⁰⁵

101. See *Country Reports on the Implementation of the OECD Anti-Bribery Convention*, OECD.ORG, http://www.oecd.org/document/24/0,3746,en_2649_37447_1933144_1_1_1_37447,00.html (last visited Jan. 6, 2012).

102. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 2, Nov. 21, 1997, *available at* <http://www.oecd.org/dataoecd/4/18/38028044.pdf>.

103. MINISTRY OF JUSTICE, CRIMINAL LAW POLICY UNIT, CIRCULAR 2011/05, BRIBERY ACT 2010, at 1 (2011), *available at* <http://www.justice.gov.uk/downloads/publications/circulars/bribery-act-2010-circular-2011-5.pdf>.

104. MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE 15 (2011) [hereinafter BRIBERY ACT 2010: GUIDANCE], *available at* <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

105. *Id.*

The U.K. Ministry of Justice recognizes that “[n]o policies or procedures are capable of detecting and preventing all bribery”¹⁰⁶ and that “no bribery prevention regime will be capable of preventing bribery at all times.”¹⁰⁷ According to the Ministry of Justice, “[t]he objective of the [Bribery] Act is not to bring the full force of the criminal law to bear upon well run commercial organisations that experience an isolated incident of bribery on their behalf.”¹⁰⁸ In this regard, the Bribery Act takes a different approach than the FCPA under which a company can be subject to liability under *respondeat superior* principles if an isolated incident of bribery occurs within its organization. In the view of many, the Bribery Act is thus “better crafted” and is a smarter law.¹⁰⁹

According to the Ministry of Justice, the adequate-procedures defense is included in the Bribery Act “to encourage commercial organisations to put procedures in place to prevent bribery by persons associated with them.”¹¹⁰ In its Bribery Act Guidance, the Ministry of Justice details six bribery-prevention procedures (proportionality, top-level commitment, risk assessment, due diligence, communication and training, and monitoring and review) that “are intended to be flexible and outcome focussed, allowing for the huge variety of circumstances that commercial organisations find themselves in.”¹¹¹

In their compliance-defense rebuttal, Professors Kennedy and Danielson suggest that reference to the Bribery Act’s adequate-procedures defense to support an FCPA compliance defense is both “inappropriate and misleading” because the Bribery Act’s compliance defense “is only available with respect to a new and very broad strict criminal liability offense created in the U.K. Act.”¹¹² However, such criticism wholly ignores the reality that “the standard in U.S. law for attributing criminal liability to corporate entities is similar.”¹¹³

106. *Id.* at 7.

107. *Id.* at 8.

108. *Id.*

109. See, e.g., *Bribery Abroad—A Tale of Two Laws*, ECONOMIST (Sept. 17, 2011), <http://www.economist.com/node/21529103>.

110. BRIBERY ACT 2010: GUIDANCE, *supra* note 104, at 8.

111. *Id.* at 20–31.

112. KENNEDY & DANIELSEN, *supra* note 22, at 31.

113. Mark A. Miller, *The U.K. Bribery Act 2010—Enforcement Is the Rest of the Story*, 6 WHITE COLLAR CRIME REP. 350 (2011), available at http://www.bakerbotts.com/file_upload/documents/MillerPDF.pdf; see also Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, in 2 37TH ANNUAL INSTITUTE ON SECURITIES REGULATION 815, 817 (2005) (“On the federal level especially, the sweep of corporate criminal liability could hardly be broader. All of you . . . probably know the law well, but its breathtaking scope always bears repeating: If a

2. OTHER COMPLIANCE DEFENSES IN FCPA-LIKE LAWS AROUND THE WORLD

In addition to the United Kingdom, the following OECD Convention signatory countries also have a compliance-like defense relevant to their “FCPA-like” law: Australia, Chile, Germany, Hungary, Italy, Japan, Korea, Poland, Portugal, Sweden, and Switzerland.¹¹⁴ A brief overview of each country’s compliance-like defense is set forth below.

Australia. Australian law implementing the OECD Convention entered into force in 1999.¹¹⁵ Thereafter, a section of the Criminal Code on corporate criminal liability came into full force establishing an organizational model for the liability of legal persons.¹¹⁶ “‘Bodies corporate’ are liable for offences committed by ‘an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority’ where the body corporate ‘expressly, tacitly, or impliedly authorised or permitted the commission of the offence.’”¹¹⁷ Pursuant to the Criminal Code:

single employee, however low down in the corporate hierarchy, commits a crime in the course of his or her employment, even in part to benefit the corporation, the corporate employer is criminally liable for that employee’s crime. It is essentially absolute liability.”). Ms. White is the former U.S. Attorney for the Southern District of New York.

114. That additional OECD Convention signatory countries are not profiled in this Section does not mean that those countries rejected compliance-like defenses relevant to their “FCPA-like” law. Rather, in many OECD Convention countries the concept of legal person criminal liability (as opposed to natural person criminal liability) is non-existent. Further, in many OECD Convention countries that recognize legal person criminal liability, such legal person liability can only result from the actions of high-level personnel or other so-called “controlling minds” of the legal person. If a foreign country does not provide legal person liability, there is no need for a compliance defense, and the rationale for a compliance defense is less compelling if legal exposure of the legal person can only result from the conduct of high-level executive personnel or other “controlling” minds of the legal person.

115. See OECD, AUSTRALIA: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 1 (1999), available at <http://www.oecd.org/dataoecd/0/29/2378916.pdf>.

116. See OECD WORKING GRP. ON BRIBERY IN INT’L BUS. TRANSACTIONS, AUSTRALIA: PHASE 2: REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 47 (2006), available at <http://www.oecd.org/dataoecd/57/42/35937659.pdf>.

117. *Id.*

authorisation or permission by the body corporate may be established in [the following] ways . . . :

1. The board of directors intentionally, knowingly or recklessly carried out the conduct, or expressly, tacitly or impliedly authorised or permitted it to occur;
2. A high managerial agent intentionally, knowingly or recklessly carried out the conduct, or expressly, tacitly or impliedly authorised or permitted it to occur;
3. A corporate culture existed that directed, encouraged, tolerated or led to the offence; or
4. The body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.¹¹⁸

However, under the Criminal Code, “if a high managerial agent is directly or indirectly involved in the conduct, no offence is committed where the body corporate proves that it ‘exercised due diligence to prevent the conduct, or the authorisation or permission.’”¹¹⁹

Chile. Chilean law implementing the OECD Convention entered into force in 2002.¹²⁰ In 2009, a separate Chilean law entered into force establishing criminal responsibility of legal persons for a limited list of offenses including bribery of foreign public officials.¹²¹ In order for a legal person to be held responsible for a foreign bribery offence, the following “three cumulative requirements” must be satisfied:

1. The offence must be committed by a person acting as a representative, director or manager, a person exercising powers of administration or supervision, or a person under the “direction or supervision” of one of the aforementioned persons;
2. The offence must be committed for the direct and immediate benefit or interest of the legal entity. No offence is committed where the natural person commits the offence

118. *Id.* at 47–48.

119. *Id.* at 48.

120. *See* OECD WORKING GRP. ON BRIBERY IN INT’L BUS. TRANSACTIONS, CHILE: PHASE 1: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 2 (2004), *available at* <http://www.oecd.org/dataoecd/52/45/33742154.pdf>.

121. *See* OECD WORKING GRP. ON BRIBERY IN INT’L BUS. TRANSACTIONS, CHILE: PHASE 1: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 3 (2009), *available at* <http://www.oecd.org/dataoecd/60/12/44254056.pdf>.

exclusively in his/her own interest or in the interest of a third party;

3. The offence must have been made possible as a consequence of a failure of the legal entity to comply with its duties of management and supervision. An entity will have failed to comply with its duties if it violates the obligation to implement a model for the prevention of offences, or when having implemented the model, it was insufficient.¹²²

Under Chilean law:

The failure to comply with duties of management and supervision is an element of the offence rather than a defence. Therefore the burden of proof lies on prosecutors, i.e. it will be up to prosecutors to prove that the entity failed to comply with its duties of management and supervision.¹²³

Germany. German law implementing the OECD Convention entered into force in 1999.¹²⁴ German law establishes the liability of legal persons, including liability for foreign bribery, under an administrative act.¹²⁵ Pursuant to the administrative act:

[T]he liability of legal persons is triggered where any “responsible person” (which includes a broad range of senior managerial stakeholders and not only an authorised representative or manager), acting for the management of the entity commits: i) a criminal offence including bribery; or ii) an administrative offence including a violation of supervisory duties which either violates duties of the legal entity, or by which the legal entity gained or was supposed to gain a ‘profit’.¹²⁶

122. *Id.* at 4–5.

123. *Id.* at 9.

124. See OECD, GERMANY: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 1 (1999), *available at* <http://www.oecd.org/dataoecd/14/1/2386529.pdf>.

125. See OECD WORKING GRP. ON BRIBERY IN INT’L BUS. TRANSACTIONS, GERMANY: 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 21 (2011), *available at* <http://www.oecd.org/dataoecd/5/45/47416623.pdf>.

126. *Id.* at 22.

The OECD report states that “the standards for a violation of supervisory duties include consideration of factors such as whether the company has in place a monitoring system or in-house regulations for employees.”¹²⁷

Hungary. Hungarian law implementing the OECD Convention entered into force in 1999.¹²⁸ In 2001, a separate law was enacted specifying the individuals whose actions can trigger the liability of the legal person.¹²⁹ The OECD report states:

The specific persons and additional conditions for liability are defined as follows: (i) the bribery is committed by one of the members or officers [of the legal entity] entitled to manage or represent it, or a supervisory board member and/or their representatives acting within the legal scope of activity of the legal person . . . ; (ii) the bribery is committed by one of the members of the legal entity or an employee acting within the legal scope of activity of the legal person provided the bribery could have been prevented by the chief executive fulfilling his supervisory or control obligations . . . ; and (iii) the bribery is committed by a third party individual, provided that the legal entity’s member or officer entitled to manage or represent the [sic] it had knowledge of the facts¹³⁰

Italy. Italian law implementing the OECD Convention entered into force in 2000.¹³¹ Under Italian law, “[c]riminal liability cannot be attributed to legal persons,” but “administrative liability may be attributed to legal persons for certain criminal offences (including foreign bribery) committed by a natural person.”¹³² The relevant

127. *Id.* at 23.

128. See OECD, HUNGARY: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 1 (2003), *available at* <http://www.oecd.org/dataoecd/14/54/2386997.pdf>.

129. See OECD WORKING GRP. ON BRIBERY IN INT’L BUS. TRANSACTIONS, HUNGARY: PHASE 2: REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 43 (2005), *available at* <http://www.oecd.org/dataoecd/39/34/34918600.pdf>.

130. *Id.* at 45.

131. See OECD, ITALY: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 1 (2001), *available at* <http://www.oecd.org/dataoecd/39/61/2019055.pdf>.

132. See OECD WORKING GRP. ON BRIBERY IN INT’L BUS. TRANSACTIONS, ITALY: PHASE 2: REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND

administrative decree “provides a ‘defense of organizational models’ to a body which makes reasonable efforts to prevent the commission of an offence.”¹³³ “[T]he defence of organisation models operates as a full defence which completely exculpates a legal person.”¹³⁴

Japan. Japanese law implementing the OECD Convention entered into force in 1999.¹³⁵

Under Japanese law, criminal responsibility of a legal person is based on the principle that the company did not exercise due care in the supervision, selection, etc. of an officer or employee to prevent the culpable act. The burden rests on the legal person to prove that due care was exercised. Where a legal person raises the defence, a person must be identified as having exercised due care, etc., and the court must determine whether it was exercised properly having regard to the nature of the legal person and the circumstances of the case.¹³⁶

Korea. Korean law implementing the OECD Convention entered into force in 1999.¹³⁷ Korean law establishes the criminal responsibility of legal persons for the bribery of a foreign public official; however, a legal person is exempt from liability “where it has paid ‘due attention’ or exercised ‘proper supervision’ to prevent the offence.”¹³⁸

Poland. Polish law implementing the OECD Convention entered into force in 2001.¹³⁹ Polish law provides “a noncriminal form of

THE 1997 REVISED RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 39 (2004), *available at* <http://www.oecd.org/dataoecd/0/50/33995536.pdf>.

133. *Id.* at 43.

134. *Id.*

135. *See* OECD, JAPAN: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 1 (2002), *available at* <http://www.oecd.org/dataoecd/15/21/2387870.pdf>.

136. *Id.* at 7 (footnotes omitted).

137. *See* OECD, KOREA: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 1 (1999), *available at* <http://www.oecd.org/dataoecd/15/6/2388296.pdf>.

138. *See* OECD WORKING GRP. ON BRIBERY IN INT’L BUS. TRANSACTIONS, KOREA: PHASE 2: REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 REVISED RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 35–37 (2004), *available at* <http://www.oecd.org/dataoecd/17/13/33910834.pdf>.

139. *See* OECD, POLAND: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 1 (2001), *available at* <http://www.oecd.org/dataoecd/39/45/2020928.pdf>.

responsibility for collective entities.”¹⁴⁰ Among the requirements for liability is that the offense was committed “in the effect of at least the absence of due diligence in electing the natural person [committing the act], or of at least the absence of due supervision over this person by an authority or a representative of the collective entity.”¹⁴¹

Portugal. Portuguese law implementing the OECD Convention entered into force in 2001.¹⁴² Under Portuguese law, legal persons can be liable for conduct “committed: a) on their behalf and in the collective interest by natural persons occupying a leadership position within the legal person[] structure; or by whoever acts under the authority of the natural persons.”¹⁴³ However, “[t]he liability of legal persons and equivalent entities is excluded when the actor has acted against the orders or express instructions of the person responsible.”¹⁴⁴

Sweden. Swedish law implementing the OECD Convention entered into force in 1999.¹⁴⁵ “Under Swedish Law, only natural persons can commit crimes.”¹⁴⁶ However, pursuant to the Swedish Penal Code, a “kind of quasi-criminal liability is applied to an entrepreneur for a crime committed in the exercise of business activities.”¹⁴⁷ An entrepreneur is a general term meaning “any natural or legal person that professionally runs a business of an economic nature.”¹⁴⁸ However, one requirement under the Penal Code is that “the entrepreneur has not

140. See OECD WORKING GRP. ON BRIBERY IN INT’L BUS. TRANSACTIONS, POLAND: PHASE 2: REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 REVISED RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 52 (2007), available at <http://www.oecd.org/dataoecd/3/54/38030514.pdf>.

141. *Id.* at 54 (internal quotation marks omitted).

142. OECD, PORTUGAL: REVIEW OF IMPLEMENTATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 2 (2002), available at <http://www.oecd.org/dataoecd/51/59/2088284.pdf>.

143. See OECD WORKING GRP. ON BRIBERY IN INT’L BUS. TRANSACTIONS, PORTUGAL: PHASE 2: FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS ON THE APPLICATIONS OF THE CONVENTION AND THE 1997 REVISED RECOMMENDATION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 28 (2009), available at <http://www.oecd.org/dataoecd/31/47/44424102.pdf>.

144. *Id.* at 29.

145. See OECD, SWEDEN: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 1 (1999), available at www.oecd.org/dataoecd/16/1/2389830.pdf.

146. *Id.* at 7.

147. *Id.* (internal quotation marks omitted).

148. *Id.* (internal quotation marks omitted).

done what could reasonably be required of him for prevention of the crime.”¹⁴⁹

Switzerland. Swiss law implementing the OECD Convention entered into force in 2000.¹⁵⁰ The Swiss Criminal Code requires “defective organisation as a condition for corporate criminal liability.”¹⁵¹ In order to incur criminal liability, “the enterprise must not have taken all reasonable and necessary organisational measures to prevent the individual from committing the offence.”¹⁵² Under Swiss law, the burden is on the prosecutor to furnish proof of defective organization.¹⁵³

As the above summaries of OECD Convention peer countries highlight, a compliance-like defense applicable to the offense of bribery of foreign officials is not novel, risky, or dangerous. That numerous peer countries have adopted a compliance-like defense relevant to their “FCPA-like” laws demonstrates, among other things, that amending the FCPA to include a compliance defense would not conflict with U.S. OECD Convention obligations.

IV. THE DOJ AND FCPA COMPLIANCE

This Part highlights the DOJ’s institutional opposition to an FCPA compliance defense, yet argues that the DOJ currently recognizes a de facto FCPA compliance defense, albeit in an opaque, inconsistent, and unpredictable way. Thus, an FCPA compliance defense amendment would accomplish, among other things, the policy goal of removing factors relevant to corporate criminal liability away from the opaque, inconsistent, and unpredictable world of DOJ decision making towards a more transparent, consistent, and predictable model. This Part concludes by highlighting the growing chorus of former DOJ officials who support a compliance defense and argues that the DOJ’s current opposition to a compliance defense seems grounded less in principle than in an attempt to protect its lucrative FCPA enforcement program.

149. *Id.*

150. OECD, SWITZERLAND: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 1 (1999), *available at* <http://www.oecd.org/dataoecd/16/45/2390117.pdf>.

151. OECD WORKING GRP. ON BRIBERY IN INT’L BUS. TRANSACTIONS, SWITZERLAND: PHASE 2: REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 36 (2005), *available at* <http://www.oecd.org/dataoecd/43/16/34350161.pdf>.

152. *Id.* at 37.

153. *Id.* at 39.

A. The DOJ Opposes a Compliance Defense, Yet Currently Recognizes a De Facto Compliance Defense

In connection with a November 2010 Senate FCPA hearing, Senator Christopher Coons asked the DOJ for its “position on adding a formal compliance defense to the FCPA.”¹⁵⁴ The DOJ responded:

The Department opposes the adoption of a formal compliance defense. To begin, in every case, the Department already considers a company’s compliance efforts in making appropriate prosecutorial decisions, and the United States Sentencing Guidelines also appropriately credits a company’s compliance efforts in any sentencing determination. Further, the establishment of a compliance defense would mark a significant departure from traditional principles of corporate criminal liability, one that could detract from effective enforcement of the FCPA. Among other things, the creation of such a defense would transform criminal FCPA trials into a battle of experts over whether the company had established a sufficient compliance mechanism. Against this backdrop, companies may feel the need to implement a purely paper compliance program that could be defended by an ‘expert,’ even if the measures are not effective in stopping bribery. If the FCPA were amended to permit companies to hide behind such programs, it would erect an additional hurdle for prosecutors in what are already difficult and complex cases to prove.¹⁵⁵

Assistant Attorney General Lanny Breuer has likewise flatly rejected the need for an FCPA compliance defense. Speaking in March 2011 at the Dow Jones Global Compliance Symposium, he said “[W]e can’t engage in some sort of formalistic solution from a script that says if you check the following six boxes you’re guaranteed this outcome.”¹⁵⁶

154. *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 26 (2010), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:66921.pdf.

155. *Id.*

156. Joe Palazzolo, *An FCPA Compliance Defense? No Way Breuer Says*, WALL ST. J. (Apr. 1, 2011, 2:11 PM), <http://blogs.wsj.com/corruption-currents/2011/04/01/an-fcpa-compliance-defense-no-way-breuer-says/>. Breuer’s dismissal of an FCPA compliance defense as some sort of “formalistic” check-a-box exercise is interesting given that his former law firm touts its experience in “conducting

Most recently, during a June 2011 House FCPA Hearing, Deputy Assistant Attorney General Greg Andres stated that an FCPA compliance defense was “novel and . . . risky” and that “the time is not right” to consider it.¹⁵⁷

It is difficult to see how an FCPA compliance program, like the one the reformed Siemens has in place, could ever be viewed as a purely paper compliance program or a check-a-box exercise that a company can hide behind. It is further difficult to comprehend how an FCPA compliance defense is novel and risky given that several other peer countries have a compliance-like defense relevant to their “FCPA-like” law. It is even more difficult to distill the logic of the DOJ’s institutional opposition to an FCPA compliance defense given the DOJ’s current recognition of a de facto compliance defense in at least three instances: (i) the DOJ’s declination decisions; (ii) the DOJ’s Opinion Procedure Releases; and (iii) the terms and conditions of DOJ non-prosecution and deferred prosecution agreements.

1. DECLINATION DECISIONS

In connection with the June 2011 House FCPA hearing, Representatives Sandy Adams (R-Florida) and James Sensenbrenner (R-Wisconsin) requested the DOJ provide “information on cases that been brought to the attention of DOJ, but [the DOJ] decided, for one reason or another, not to investigate or pursue prosecution within the last year along with the rationale for those decisions.”¹⁵⁸

Assistant Attorney General Ronald Welch responded by generally referring to the Principles of Prosecution of Business Organizations and also stated:

[D]uring the previous two years, the Department of Justice declined matters in which some or all of the following

company-wide anti-corruption risk assessments and devising tailored anti-corruption compliance programs.” *White Collar Defense & Investigations: Anti-Corruption*, COVINGTON & BURLING LLP, http://www.cov.com/practice/white_collar_and_investigations/anti_corruption/ (last visited June 10, 2011).

157. *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security, H. Comm. on the Judiciary*, 112th Cong. 59 (2011) (statement of Greg Andres, Deputy Assistant Att’y Gen., U.S. Dep’t of Justice), available at http://judiciary.house.gov/hearings/printers/112th/112-47_66886.PDF.

158. Letter from Representatives Sandy Adams & F. James Sensenbrenner to Greg Andres, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice (June 22, 2011), available at <http://www.scribd.com/doc/68419036/DOJ-Declination-Responses-to-Congress>.

circumstances existed: [a] corporation voluntarily and fully self-disclosed potential misconduct; [c]orporate principals voluntarily engaged in interviews with the Department and provided truthful and complete information about their conduct; [a] parent corporation voluntarily and fully self-disclosed information to the Department regarding alleged conduct by subsidiaries; [a] parent company conducted extensive pre-acquisition due diligence of potentially liable subsidiaries, and engaged in significant remediation efforts after acquiring the relevant subsidiaries; [a] company provided information to the Department about the parent's extensive compliance policies, procedures, and internal controls, which the parent had implemented at the relevant subsidiaries; [a] company agreed to a civil resolution with the Securities and Exchange Commission, while also demonstrating that a declination was appropriate for additional reasons; [a] single employee, and no other employee, was involved in the provision of improper payments; and [t]he improper payments involved minimal funds compared to the overall business revenues.¹⁵⁹

As detailed in the DOJ's response, it already declines to prosecute business organizations for FCPA violations under *respondeat superior* principles when, among other reasons, the organization had pre-existing compliance policies and procedures, only a rogue employee was involved in the improper conduct, or the improper conduct was limited in scope. Again, it is difficult to comprehend how an FCPA compliance defense is novel and risky when it would include factors the DOJ already considers in making its internal prosecutorial decisions.

2. OPINION PROCEDURE RELEASES

Another instance in which the DOJ currently recognizes a de facto compliance defense is through its FCPA Opinion Procedure Releases. The FCPA, when enacted, directed the Attorney General to establish a procedure to provide responses to specific inquiries by those subject to the FCPA concerning conformance of their conduct with the DOJ's "present enforcement policy."¹⁶⁰ Pursuant to the governing regulations,

159. Letter from Ronald Welch, Assistant Attorney Gen., Office of Legislative Affairs, to Representative Sandy Adams, U.S. House of Representatives [hereinafter Declination Letter], available at <http://www.scribd.com/doc/68419036/DOJ-Declination-Responses-to-Congress>.

160. 28 C.F.R. § 80.1 (2011).

only “specified, prospective—not hypothetical—conduct” is subject to a DOJ opinion.¹⁶¹ While the DOJ’s opinion has no precedential value, its opinion that contemplated conduct conforms with the FCPA is entitled to a rebuttable presumption should an FCPA enforcement action be brought as a result of the contemplated conduct.¹⁶² The DOJ has published releases on a range of FCPA issues and in nearly every instance the DOJ has stated its intention not to bring an enforcement action with respect to the proposed conduct based on the proactive compliance measures disclosed by the company in seeking the opinion.

For instance, in Opinion Procedure Release 09-01 a designer and manufacturer of medical devices (“Requestor”) was seeking to increase its sales in a foreign country.¹⁶³ In a meeting with a “Senior Official” of the government agency contemplating purchase of the Requestor’s product, the Requestor learned that “the government would only endorse products that it has technically evaluated with favorable results.”¹⁶⁴ “The Senior Official asked [the] Requestor to provide sample devices to government health centers for evaluation,” and “[t]he foreign government and [the] Requestor jointly determined that the optimal sample size for such a study was 100 units [\$19,000 per unit or \$1.9 million for all units] distributed among ten experienced health centers in the country.”¹⁶⁵ Among other things, the Requestor represented that it had “no reason to believe that the Senior Official who suggested providing the devices will personally benefit from the donation of the devices and related items and services.”¹⁶⁶ Based on this and other pre-deal diligence by the Requestor, the DOJ stated that it did “not . . . intend to take any enforcement action with respect to the [proposed conduct].”¹⁶⁷

Likewise, in Opinion Procedure Release 07-01, “a U.S. company (“Requestor”) . . . propose[d] to cover the domestic expenses for a trip to the United States by a six-person delegation of the government of an Asian country for an educational and promotional tour of one of the requestor’s U.S. operations sites.”¹⁶⁸ According to the release, “the

161. *Id.*

162. § 80.10.

163. *See* DEP’T OF JUSTICE, OPINION PROCEDURE RELEASE NO. 09-01, FOREIGN CORRUPT PRACTICES ACT REVIEW (2009), *available at* <http://www.justice.gov/criminal/fraud/fcpa/opinion/2009/0901.pdf>.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. DEP’T OF JUSTICE, OPINION PROCEDURE RELEASE NO. 07-01, FOREIGN CORRUPT PRACTICES ACT REVIEW (2007), *available at* <http://www.justice.gov/criminal/fraud/fcpa/opinion/2007/0701.pdf>.

requestor [was] interested in participating in future operations in the foreign country,” and “[t]he stated purpose of the visit [was] to familiarize the delegates with the nature and extent of the requestor’s operations and capabilities and to help establish the requestor’s business credibility.”¹⁶⁹ Based on a number of pre-trip Requestor representations, such as “it [would] not host any entertainment or leisure activities for the officials, nor [would] it provide the officials with any stipend or spending money,” the DOJ stated that it did not “presently intend to take any enforcement action with respect to the proposal described in [the] request.”¹⁷⁰

In both these instances, and numerous others that could also be cited, the DOJ recognized a Requestor’s good-faith efforts to comply with the FCPA through pro-active compliance measures designed to reduce FCPA liability. Good-faith efforts to comply with the FCPA through pro-active compliance measures should be recognized as a matter of law and not just when an organization decides to engage in the formal FCPA Opinion Procedure Release program.

3. NPAS/DPAS

The third instance in which the DOJ currently recognizes a de facto compliance defense is through its non-prosecution and deferred-prosecution settlement agreements. Most corporate FCPA enforcement actions in this new era of enforcement are resolved through a non-prosecution agreement (NPA) or a deferred-prosecution agreement (DPA).¹⁷¹ In both agreements, the company is not actually prosecuted if the company acknowledges responsibility for the conduct at issue and agrees to a host of compliance undertakings.

The compliance undertakings required pursuant to an NPA or DPA are virtually identical in every enforcement action and have evolved into a compliance template used by companies to tailor their own FCPA compliance policies and procedures.

The DOJ’s 2011 NPA with Comverse Technology, Inc. (CTI) is a representative example.¹⁷² The NPA resolved conduct allegedly engaged

169. *Id.*

170. *Id.*

171. An NPA is not filed with a court, but instead is a privately negotiated agreement between the DOJ and the company. A DPA is technically filed with a court and thus has the same appearance as a criminal indictment or information. However, as negotiated between the DOJ and the company, the DOJ agrees to defer prosecution of the company.

172. See Non-Prosecution Agreement between Denis J. McInerney, Chief, Fraud Section, U.S. Dep’t of Justice, & Loretta E. Lynch, U.S. Attorney, Office for the E. Dist. of N.Y., & Daniel J. Horwitz, Attorney, Comverse Tech., Inc., (Apr. 6,

in by Comverse Ltd., an Israeli company, that was a wholly owned subsidiary of Comverse Inc., a wholly owned subsidiary of CTI.¹⁷³ According to the NPA, Comverse Ltd. paid monthly retainer fees and commissions to an Israeli agent who, in turn, made certain payments to employees of an alleged state-owned entity to obtain purchase orders from those companies for Comverse Ltd.¹⁷⁴ The NPA contained no allegation or suggestion that anyone at Comverse Inc. or CTI had knowledge of, condoned, or participated in the payments at issue.¹⁷⁵ Pursuant to the NPA, the DOJ agreed that it “will not criminally prosecute” CTI for any crimes related to the conduct at issue if, among other things, during the two-year period of the NPA, CTI strengthened its compliance, bookkeeping, and internal controls standards and procedures by, among other things: (1) developing and implementing specific compliance policies and procedures; (2) training individuals associated with the company (including third-parties) on the policies and procedures; (3) devoting corporate resources to ensure that the policies and procedures are effective; and (4) implementing numerous requirements regarding the retention and oversight of third parties.¹⁷⁶

As relevant to an FCPA compliance defense, there seems to be little difference when the DOJ, in the context of an NPA or DPA, agrees not to prosecute a company under *respondeat superior* principles for past conduct if the company adopts and adheres to FCPA compliance best practices, and the DOJ being required, as a matter of law, to assess a company’s pre-existing FCPA policies and procedures should a non-executive employee or agent act contrary to those policies.

In short, even though the DOJ opposes an FCPA compliance defense, it already recognizes a de facto compliance defense in at least three instances even if only in the opaque, inconsistent, and unpredictable world of DOJ decisionmaking. Thus, an FCPA compliance-defense amendment would accomplish, among other things, the policy goal of removing factors relevant to corporate criminal liability away from the opaque, inconsistent, and unpredictable world of DOJ decision making towards a more transparent, consistent, and predictable model.

This Part concludes by highlighting the growing chorus of former DOJ officials who support a compliance defense and asserts that the DOJ’s current opposition to a compliance defense seems grounded less

2011) [hereinafter NPA], available at <http://www.justice.gov/criminal/fraud/fcpa/cases/rae-converse.html>.

173. *Id.*

174. *See id.*

175. *See id.*

176. *See id.*

in principle than in an apparent attempt to protect its lucrative FCPA enforcement program.

B. Former DOJ Officials Support an FCPA Compliance Defense

The DOJ's institutional opposition to an FCPA compliance defense sharply contrasts with the growing chorus of former DOJ officials who support a compliance defense. As detailed below, this group of former officials include, among others, a former Attorney General, a former Deputy Attorney General, a former Chief of the DOJ's FCPA Unit, and a former high-profile corporate crime prosecutor.

Michael Mukasey was the U.S. Attorney General between 2007 and 2009 and testified at the June 2011 House hearing on behalf of the U.S. Chamber of Commerce.¹⁷⁷ In his prepared statement, Mukasey stated:

It is true that the DOJ or SEC may look more favorably on a company with a strong FCPA compliance program when determining whether to charge the company or what settlement terms to offer, and such compliance programs may be taken into account by a court at the sentencing of a corporation convicted of an FCPA violation. However, such benefits are subject to unlimited prosecutorial discretion, are available only after the liability phase of a prosecution, or both. There is also no guarantee that a strong compliance program will be given the weight it deserves.¹⁷⁸

In advocating for a compliance defense, Mukasey noted that “[r]esponsible companies implement and enforce strong compliance measures designed to avoid and promptly address infractions” but that “[t]he absence of a compliance defense tells corporate America, in effect, no compliance effort can be good enough—even if you did everything [the DOJ] required, [the DOJ] still retain[s] the right to prosecute purely as a matter of [its] discretion.”¹⁷⁹ Mukasey questioned “whether that is the appropriate signal to send to the business community and to American shareholders.”¹⁸⁰

177. *See Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security, H. Comm. on the Judiciary*, 112th Cong. 5 (2011), available at http://judiciary.house.gov/hearings/printers/112th/112-47_66886.pdf.

178. *Id.* at 3–4 (written testimony of the Hon. Michael B. Mukasey), available at <http://judiciary.house.gov/hearings/pdf/Mukasey06142011.pdf>.

179. *Id.* at 5.

180. *Id.*

Larry Thompson was the U.S. Deputy Attorney General between 2001 and 2003 and was also a former general counsel at a large multinational company. Thompson, currently a law professor, recently stated:

The Foreign Corrupt Practices Act serves the important goal of discouraging bribery by U.S. companies overseas. But by making firms criminally responsible for even the most uncontrollable acts of low-level employees and agents—and ignoring any efforts to create a culture of ethics and compliance—many U.S. companies withdraw rather than face limitless exposure. As a result, less-scrupulous foreign competitors often step in, harming America’s economic vitality and, ironically, fueling the very misconduct the act was intended to reduce. The solution: make the act apply only to material misconduct and allow companies to assert a “best efforts” defense if they have effective compliance and ethics programs.¹⁸¹

Joseph Covington oversaw DOJ’s enforcement of the FCPA from 1982 to 1985. Currently in private practice, Covington called consideration of an FCPA compliance defense “manifestly reasonable.”¹⁸² According to Covington, an FCPA compliance defense “would recognize and reward strong compliance programs; provide a powerful incentive for companies to develop and enforce such programs; may encourage more companies to come forward with voluntary disclosures; and yet still enable prosecution of the culpable individuals.”¹⁸³

Andrew Weissmann was the Director of the DOJ’s Enron Task Force and is currently FBI general counsel. Long a proponent of “rethinking criminal corporate liability,”¹⁸⁴ Weissman testified at the November 2010 Senate hearing on behalf of the U.S. Chamber of Commerce,¹⁸⁵ saying:

181. Philip K. Howard, *Government Is Broken. These Guys Can Fix It.*, DAILY BEAST (Apr. 10, 2011, 10:00 AM), <http://www.thedailybeast.com/newsweek/2011/04/10/government-is-broken-these-guys-can-fix-it.html>.

182. Koehler, *supra* note 32.

183. *Id.*

184. Weissmann with Newman, *supra* note 29.

185. See *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 86 (2010), (written testimony of Andrew Weissmann), available at

The FCPA should incentivize the company to establish compliance systems that will actively discourage and detect bribery, but should also permit companies that maintain such effective systems to avail themselves of an affirmative defense to charges of FCPA violations. This is so because in such countries even if companies have strong compliance systems in place, a third-party vendor or errant employee may be tempted to engage in unauthorized acts that violate the business's explicit anti-bribery policies.¹⁸⁶

Weissmann observed that “[i]t is unfair to hold a business criminally liable for behavior that was neither sanctioned by or known to the business” and that “[t]he imposition of criminal liability in such a situation does nothing to further the goals of the FCPA; it merely creates the illusion that the problem of bribery is being addressed, while the parties that actually engaged in bribery often continue on, undeterred and unpunished.”¹⁸⁷ Weissmann stated that an FCPA compliance defense “will give corporations some measure of protection from aggressive or misinformed prosecutors, who can exploit the power imbalance inherent in the current FCPA statute—which permits indictment of a corporation even for the acts of a single, low-level rogue employee—to force corporations into deferred prosecution agreements.”¹⁸⁸

Against the backdrop of a growing chorus of former DOJ officials who support an FCPA compliance defense, there seems little principled basis for the DOJ's institutional opposition to such a defense. Rather, the DOJ's opposition to a compliance defense seems motivated by its desire to protect its lucrative FCPA enforcement program which provides maximum leverage against business organizations when a non-executive employee or agent acts contrary to pre-existing FCPA compliance policies and procedures. After all, FCPA enforcement has become so prominent for the DOJ that fifty percent of 2010 total fines and penalties secured by the Criminal Division (a law enforcement agency that enforces a broad array of laws) were in FCPA (or related) enforcement actions.¹⁸⁹ As the DOJ's former Assistant Chief for FCPA

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:66921.pdf.

186. *Id.* at 89.

187. *Id.*

188. *Id.* at 91.

189. *See* Press Release, U.S. Dep't of Justice, Department of Justice Secures More than \$2 Billion in Judgments and Settlements as a Result of Enforcement Actions Led by the Criminal Division (Jan. 21, 2011), *available at* <http://www.justice.gov/opa/pr/2011/January/11-crm-085.html>.

enforcement stated, “The government sees a profitable program, and it’s going to ride that horse until it can’t ride it anymore.”¹⁹⁰

V. POLICY OBJECTIVES ADVANCED BY AN FCPA COMPLIANCE DEFENSE

This Article concludes by highlighting certain policy objectives advanced by an FCPA compliance defense. This Part argues that a compliance defense will better incentivize more robust corporate compliance, reduce improper conduct, and thus best advance the FCPA’s objective of reducing bribery. An FCPA compliance defense will also increase public confidence in FCPA enforcement actions and allow the DOJ to better allocate its limited prosecutorial resources to cases involving corrupt business organizations and the individuals who actually engaged in the improper conduct.

A. A Compliance Defense Will Better Incentivize Corporate Compliance and Reduce Improper Conduct

The goal of the FCPA is to prevent bribery of foreign officials. That goal is best accomplished not solely through ad hoc enforcement actions, but by also better incentivizing corporate compliance designed to prevent improper payments.

At present business organizations have at least two incentives to implement FCPA compliance policies and procedures. First, a factor the DOJ will consider under its Principles of Prosecution in deciding whether to bring criminal charges against an organization is “the existence and effectiveness of the corporation’s pre-existing compliance program.”¹⁹¹ An organization with pre-existing FCPA compliance policies and procedures facing FCPA scrutiny because of *respondeat superior* principles is likely to be treated less harshly by the DOJ than an organization without pre-existing policies and procedures. Second, a factor determining organization fine and penalty amounts under the Sentencing Guidelines is the existence of “an effective compliance and ethics program.”¹⁹² An organization with pre-existing FCPA compliance policies and procedures will likely face a lower fine amount

190. Joseph Rosenbloom, *Here Come the Payoff Police: What’s Behind the New Boom in FCPA Enforcement Activity?*, CORP. COUNS., June 1, 2010, at 14.

191. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL 9-28.300 (2008), available at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>.

192. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (2010), available at http://www.ussc.gov/guidelines/2010_guidelines/Manual_HTML/8b2_1.htm.

when resolving an FCPA enforcement action than an organization without pre-existing policies and procedures.

The above incentives however are not well known by a meaningful segment of the business community, and there are likely few business leaders well versed in the details of the Principles of Prosecution or the Sentencing Guidelines. In addition, despite these incentives business organizations operating in a world of finite resources are not sufficiently implementing comprehensive FCPA policies and procedures. According to a recent survey of senior executives from a broad range of industries, only 27% said their company was “well prepared to comply with the [FCPA]”, only 43% said their company “trained senior management, agents, vendors, and foreign employees” on FCPA compliance, and just 39% said their company assessed FCPA risk.¹⁹³ According to another recent survey of business executives, only 45% said their company has stand-alone anti-corruption policies and procedures,¹⁹⁴ only 41% said “their company regularly conduct[s] due diligence on third parties in foreign countries,”¹⁹⁵ and only 26% “said their company trained third parties on [its] anti-corruption [policies].”¹⁹⁶

Compliance is a cost center within business organizations and expenditure of finite resources on FCPA compliance is an investment best sold if it can *reduce* legal exposure, not merely lessen the *impact* of legal exposure. At present, the incentives organizations have to adopt FCPA compliance policies and procedures are solely to lessen the impact of legal exposure. These present incentives thus represent “baby carrots” when what is needed to better incentivize more robust FCPA compliance are real “carrots.” An FCPA compliance defense is a real “carrot” that will better incentivize compliance across the business landscape. Organizations with existing FCPA compliance policies and procedures will be incentivized to make existing programs better. Likewise, organizations currently without stand-alone FCPA policies and procedures—and the above statistics indicate there are many—will be incentivized to spend finite resources to implement FCPA compliance policies and procedures.

193. KROLL, 2011/2012 GLOBAL FRAUD REPORT SURVEY (the survey findings also reflect responses as to the UK Bribery Act that became effective on July 1, 2011), *available at* http://www.krollconsulting.com/media/pdfs/Kroll_Global_Fraud_Report_Executive_Summary_2011-2012.pdf.

194. DELOITTE, ANTI-CORRUPTION PRACTICES SURVEY 2011: CLOUDY WITH A CHANCE OF PROSECUTION? 1 (June 30, 2011), *available at* http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/FAS_ForensicCenter_us_fas-us_dfc/us_dfc_fcpa%20compliance%20survey%20report_090711.pdf.

195. *Id.* at 3.

196. *Id.* at 13.

By better incentivizing organizations to implement more robust FCPA policies and procedure, an FCPA compliance defense can reduce instances of improper conduct and thereby advance the FCPA's objectives. An analysis of certain FCPA enforcement actions is instructive.

Watts Water Technologies, Inc. ("Watts") resolved an FCPA enforcement action based largely on the conduct of Lessen Chang, the former general manager of the company's wholly owned Chinese subsidiary.¹⁹⁷ As alleged, Chang approved several payments to employees of Chinese state-owned design institutes to influence the institutes to recommend company products for various projects developed, constructed, and owned by state-owned entities.¹⁹⁸ According to the resolution document, "although Watts implemented an FCPA policy in October 2006, Watts failed to conduct adequate FCPA training for its employees in China until July 2009."¹⁹⁹ Chang was also charged with FCPA violations and his lawyer commented that Chang "was never trained by the company on U.S. anti-corruption law."²⁰⁰

Lucent Technologies, Inc. ("Lucent") resolved an FCPA enforcement action based largely on the conduct of Lucent China employees who paid for numerous trips by employees of Chinese state-owned entities that included sightseeing, entertainment, and leisure components.²⁰¹ As alleged, "Lucent's violations occurred because Lucent failed, for years, to properly train its officers and employees to understand and appreciate the nature and status of its customers in China in the context of the FCPA."²⁰²

While the answer will never be known, the question can nevertheless be asked: if there were an FCPA compliance defense that better incentivized Watts and Lucent to implement more robust FCPA compliance policies and procedures, would the companies have properly trained their Chinese employees on the FCPA risks relevant to the Chinese market and would the payments at issue have been prevented?

197. *In re Watts Water Techs., Inc. and Lessen Change*, Order, Administrative Proceeding File No. 3-14585 (Oct. 13, 2011), available at <http://www.sec.gov/litigation/admin/2011/34-65555.pdf>.

198. *Id.* ¶¶ 1-3.

199. *Id.* ¶ 9.

200. Joe Palazzolo, *Watts Water to Pay \$3.8 Million over Bribery Allegations*, WALL ST. J. (Oct. 14, 2011, 4:12 PM), <http://blogs.wsj.com/corruption-currents/2011/10/14/watts-water-to-pay-3-8-million-over-bribery-allegations/>.

201. Complaint ¶¶ 1-2, *SEC v. Lucent Techs., Inc.*, No. 1:07-cv-02301 (D.D.C. Dec. 21, 2007), available at <http://www.sec.gov/litigation/complaints/2007/comp20414.pdf>.

202. *Id.* ¶ 3.

Revisiting the FCPA compliance survey numbers cited above, an FCPA compliance defense surely will not cause the percentages to reach 100%. However, it is reasonable to conclude that an FCPA compliance defense will better incentivize more robust FCPA compliance policies and procedures, reduce improper conduct, and thus best advance the FCPA's objective of reducing bribery.

B. A Compliance Defense Will Increase Public Confidence in Enforcement Actions and Allow the DOJ to Better Allocate Its Enforcement Resources

As previously highlighted, several companies have resolved FCPA enforcement actions, or are otherwise subject to FCPA scrutiny, during the same general time period as being recognized as one of the "World's Most Ethical Companies." This is illogical, yet possible because of *respondeat superior* principles, under which all that matters is that a company employee or agent, within the scope of their employment, and intending to benefit at least in part the company, made payments in violation of the FCPA, even if such payments were contrary to the company's pre-existing compliance policies and procedures and even if the company in good faith engaged in all reasonable steps to prevent such conduct.

Approximately eighty companies are currently under investigation for FCPA violations, a number largely derived from public-company SEC filings and thus an underestimate given that privately held business organizations are also subject to the FCPA.²⁰³ The enforcement agencies are also reportedly conducting FCPA industry sweeps of the pharmaceutical and financial services industries.²⁰⁴

In a non-FCPA context, it was recently observed that "[v]irtually every pharmaceutical company has now been subjected to one or more [health care fraud] investigations."²⁰⁵ The commentator "find[s] it hard to believe that wrongdoing is so rampant in this industry that every company has at least several hundred million dollars worth of it."²⁰⁶

203. See *The Corporate Investigations List (January 2012)*, FCPA BLOG (Jan. 4, 2012, 6:28 AM), available at <http://www.fcpablog.com/blog/2012/1/4/the-corporate-investigations-list-january-2012.html>.

204. See, e.g., Ben Hirschler, *Analysis—Drugmakers See Pressure Points in Emerging Markets*, REUTERS (Oct. 28, 2011, 11:19 AM), <http://www.reuters.com/article/2011/10/28/uk-pharmaceuticals-emerging-idUKTRE79R3ZY20111028>.

205. Mike Koehler, *On Point*, FCPA PROFESSOR (Jan. 14, 2011), <http://www.fcpaprofessor.com/on-point> (discussing comments made by Stephen Jonas in an interview with Law360).

206. *Id.*

Rather, the commentator noted that “[t]he more likely answer is that these settlements often have far more to do with the leverage the government enjoys than the merits of what the company did or didn’t do.”²⁰⁷

The same observation can also be made about FCPA scrutiny in this new era of enforcement. Yet because of *respondeat superior*, the DOJ similarly has tremendous leverage against good corporate citizens doing business in challenging global markets when a non-executive employee or agent acts contrary to the company’s pre-existing FCPA compliance policies and procedures.

The rule of law is best advanced and public confidence in a law is best achieved when law enforcement agencies make transparent, consistent, and predictable decisions. On a number of issues, the DOJ’s FCPA decisions are opaque, inconsistent, and unpredictable. Thus public confidence in the FCPA—a valid and legitimate law that seeks a desirable objective—is not as high as it could or should be. One of the reasons for this is the DOJ’s internal decisions when presented with conduct engaged in by a non-executive employee or agent who acts contrary to an organization’s pre-existing FCPA compliance policies and procedures. As the DOJ’s declination letter clearly demonstrates, sometimes the DOJ declines to prosecute an organization if: (1) it has “extensive compliance policies, procedures, and internal controls;” (2) “[a] single employee, and no other employee, was involved in the provision of improper payments;” or (3) the “improper payments involved minimal funds compared to the overall business revenues.”²⁰⁸ Yet, as FCPA enforcement actions demonstrate, sometimes the DOJ decides to proceed with an FCPA enforcement in similar situations. An FCPA compliance defense would thus accomplish the policy goal of removing factors relevant to corporate criminal liability from the opaque, inconsistent, and unpredictable world of DOJ decision making towards a more transparent, consistent, and predictable model.

At the same time, an FCPA compliance defense would allow the DOJ to better allocate its limited prosecutorial resources to cases involving corrupt business organizations and the individuals who actually engaged in the improper conduct. Key to achieving deterrence in the FCPA context is individual prosecutions. Indeed, during this era of the FCPA’s resurgence, the DOJ has consistently stated that “prosecution of individuals is a cornerstone of [its FCPA] enforcement strategy.”²⁰⁹

207. *Id.*

208. Declination Letter, *supra* note 159.

209. Lanny A. Breuer, Assistant Attorney Gen. (Criminal Div.), U.S. Dep’t of Justice, Address to the 22nd National Forum on the Foreign Corrupt Practices Act

An FCPA compliance defense will better facilitate the DOJ's prosecution of culpable individuals and advance the objectives of its FCPA enforcement program. At present, business organizations that learn through internal reporting mechanisms of rogue employee conduct implicating the FCPA are often hesitant to report such conduct to the enforcement authorities.²¹⁰ In such situations, business organizations are rightfully diffident to submit to the DOJ's opaque, inconsistent, and unpredictable decision-making process and are rightfully concerned that its pre-existing FCPA compliance policies and procedures and its good-faith compliance efforts will not be properly recognized. The end result is that the DOJ often does not become aware of individuals who make improper payments in violation of the FCPA and the individuals are thus not held legally accountable for their actions. An FCPA compliance defense surely will not cause every business organization that learns of rogue employee conduct to disclose such conduct to the enforcement agencies. However, it is reasonable to conclude that an FCPA compliance defense will cause more organizations with robust FCPA compliance policies and procedures to disclose rogue employee conduct to the enforcement agencies. Thus, an FCPA compliance defense can better facilitate DOJ prosecution of culpable individuals and increase the deterrent effect of FCPA enforcement actions.

CONCLUSION

A company's *pre-existing* FCPA compliance policies and procedures and its good-faith efforts to comply with the FCPA should be relevant *as a matter of law*—not merely in the opaque, inconsistent, and unpredictable world of DOJ decision making—when a non-executive employee or agent acts contrary to those policies and procedures. An FCPA compliance defense would not eliminate corporate criminal liability under the FCPA or reward “fig leaf” or “purely paper” compliance. Rather, an FCPA compliance defense, among other things, will better incentivize more robust corporate compliance, reduce improper conduct, and further advance the FCPA's objective of preventing bribery of foreign officials. The time is right to revisit an FCPA compliance defense.

(Nov. 19, 2009), available at <http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf>.

210. See, e.g., Nick Elliott, *Regulators Like Self-Reporting, Some Attorneys Aren't Sure*, WALL ST. J. (Mar. 31, 2011, 3:22 PM), <http://blogs.wsj.com/corruption-currents/2011/03/31/regulators-like-self-reporting-some-attorneys-arent-sure/>.

