

FCPA SETTLEMENT, INTERNAL STRIFE, AND THE “CULTURE OF COMPLIANCE”

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Most enforcement actions brought against firms under the U.S. Foreign Corrupt Practices Act (FCPA) are resolved via a deferred prosecution agreement (DPA) or non-prosecution agreement (NPA). But before federal regulators will consider negotiating over these types of settlement vehicles, they typically weigh a firm’s willingness to cooperate with the underlying investigation and whether it promoted a “culture of compliance.” As this paper shows, these two factors do not always intersect in ways that serve the best interests of firms at risk for FCPA scrutiny. Cooperation often means asking company counsel to identify individual agents responsible for the alleged wrongdoing. If these agents are then disciplined or prosecuted in separate actions, the resulting dynamic can lead to distrust between agents and counsel, a breakdown in internal communications, feelings of unfair treatment, and inappropriate levels of risk aversion—all of which are undesirable from a firm’s perspective and can hinder efforts to maintain a law-abiding culture. These issues are not all new, but they take on particular significance in the FCPA context due to the often expansive way regulators interpret the FCPA, the complexities associated with the transnational nature of the underlying conduct, and the frequently blurry lines between permissible competitive activity and impermissible bribery. Though many firms may ultimately decide that the potentially negative effects of cooperation are worth the upside of settlement, it is essential that they and their counsel remain cognizant of these issues when designing internal compliance programs. Regulators, too, need to be aware of how their enforcement policies could hinder efforts at corporate self-policing.

Introduction	690
I. FCPA Enforcement on the Rise	692
A. Industry-wide Investigations.....	693
B. New Law Enforcement Tactics	694
C. Dodd-Frank	695
II. Framework for FCPA Settlement.....	696
A. Cooperation	699
1. Formal Prosecution.....	700
2. Internal Firm Discipline	704
3. Inducing Employee Cooperation	705

* Associate Professor, University of Iowa College of Law. My thanks go to Dean Gail Agrawal for her generous research support and to the participants at the 2011 *Wisconsin Law Review* Symposium on “The Changing Role and Nature of In-House and General Counsel” for their helpful comments. I am also grateful to John Kastl, Katie Quinnett, and Jiannan Wei for their excellent research assistance.

B. Promoting a Culture of Compliance	706
III. Assessing the Tension between Cooperation and Compliance.....	706
A. Expansive FCPA Interpretation and the Importance of Agent-Counsel Communication.....	708
1. “Instrumentality” of a Foreign Government.....	708
2. Mens Rea	710
3. Territorial Jurisdiction	711
4. Facilitation Payments	712
B. Risk Aversion and Cover-ups	714
C. Stigma and Feelings of Unfair Treatment	714
Conclusion.....	715

INTRODUCTION

When the Justice Department recently settled corruption charges against the Swiss-Swedish engineering firm ABB Ltd., it did so in large part based on the firm’s cooperation with the government’s underlying investigation. The settlement, reached via a deferred prosecution agreement (DPA), resolved allegations that ABB and one of its subsidiaries violated the U.S. Foreign Corrupt Practices Act (FCPA) when their agents paid bribes to foreign officials in Mexico and Jordan to obtain government contracts.¹ Though ABB ultimately paid a \$30 million fine, the company avoided the risk of much higher monetary sanctions by agreeing to the DPA’s terms.

But what exactly was it about this cooperation—described in the DPA as “extraordinary”²—that compelled regulators to give ABB the chance to negotiate a settlement and avoid formal prosecution? As in many other FCPA enforcement actions, a key reason why the firm obtained the benefit of a DPA stemmed from its willingness to assist regulators in the identification of individual agents responsible for the alleged wrongdoing. Indeed, in the case of the ABB settlement, the Justice Department expressly noted that the firm’s cooperation played a significant role in an ABB agent’s guilty plea and the indictment of a former ABB general manager in separate FCPA prosecutions.³ Other recent settlements reward firms for firing employees involved in alleged FCPA violations, for taking disciplinary action against employees still on staff, for promptly reporting potential misconduct by employees,

1. Deferred Prosecution Agreement, *United States v. ABB Ltd.*, No. 10-CR-00665 (S.D. Tex. Sept. 29, 2010).

2. *Id.*

3. Plea Agreement at 13, *United States v. ABB Inc.*, No.10-CR-00664 (S.D. Tex. Sept. 29, 2010).

and for making current and former agents available for interviews with federal prosecutors.⁴

For inside and outside counsel advising firms under FCPA scrutiny, agreeing to cooperate in these ways will often seem eminently reasonable. Firms might not enjoy seeing their agents terminated or prosecuted, but the alternative would be to actively resist the government's demands and put the deferral of prosecution in jeopardy. The usual advice from counsel will therefore be to do whatever is necessary to secure a DPA or other form of settlement. The consequences of indictment, prosecution, and, ultimately, conviction are seen by many firms as being too great to consider doing anything other than settling.

Cooperation, though, is not the only factor that regulators consider when deciding whether to settle with a firm accused of FCPA violations. Regulators remain even more likely to offer leniency to firms that both cooperate *and* possess a strong "culture of compliance"—with the latter consideration designed to encourage firms to adopt robust internal compliance programs and maintain a commitment to self-policing. As this paper shows, however, cooperation and compliance can also come together in ways that run counter to the long-term best interests of a firm under scrutiny.

For example, creating a meaningful culture of compliance within an organization depends on free and open communication between firm agents and their counsel. If agents observe or fear that company counsel might "sacrifice" them to regulators in the name of cooperation, the resulting dynamic can cause agents to approach discussions with counsel with trepidation. Agents may elect to conceal certain information or present it in a less than straightforward way, as existing feelings of trust or loyalty are eroded. The resulting breakdown in communication will make it difficult for compliance personnel to act as monitors, can deter agents from engaging in socially desirable levels of risk taking, and may otherwise generate unhealthy levels of internal strife. Though these concerns can arise in a host of corporate crime investigations,⁵ they become uniquely amplified in the context of the FCPA. This is mainly due to the expansive way regulators frequently interpret the FCPA, the complexities associated with the transnational nature of the underlying conduct, and the often-blurry lines between permissible competitive activity and impermissible bribery.

4. See *infra* Part II.

5. For general discussions of the governance issues raised by cooperation in cases of corporate crime, see Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949 (2009); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311 (2007).

My goal in discussing these issues is twofold. I will first survey the range of effects that cooperation can have on internal relations and the development of FCPA compliance initiatives. From there, and from a larger policy perspective, I hope to shed light on how the relationship between cooperation and compliance should inform the role of firm counsel and the nature of the regulatory encounter that takes place in FCPA enforcement matters. Promoting greater levels of cooperation and collaboration between regulators and firms on the particular subject of foreign corruption is an admirable objective, but for the benefits of this process to be realized, several obstacles must first be overcome.

I. FCPA ENFORCEMENT ON THE RISE

The FCPA prohibits the payment of bribes to foreign officials for the purpose of obtaining or retaining business.⁶ Despite being on the books since 1977, the past decade has borne witness to a new era of FCPA enforcement.⁷ In the statute's first twenty-five to thirty years of existence there were only a few enforcement actions brought each year. This is a far cry from the current enforcement picture. Collectively, the SEC and DOJ charged forty-seven companies with FCPA violations in 2010, leading to over \$1 billion in fines, penalties, and disgorgement.⁸

6. 15 U.S.C. §§ 78dd-1 to -3 (2006).

7. *'Full Regime' of Cooperation Emerging in Anti-Corruption Arena*, DOJ Official Says, SEC. L. DAILY (BNA, Inc.), Aug. 18, 2011 [hereinafter *Full Regime*].

8. SHEARMAN & STERLING LLP, FCPA DIGEST: CASES AND REVIEW RELEASES RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977, at ii (2011), available at <http://www.shearman.com/files/Publication/c32b8f1a-0523-41ae-bee5-7bfbe5a406a7/Presentation/PublicationAttachment/234fc0aa-34a9-4490-96b6-52945477184c/Final%20January%202011%20FCPA%20Digest.pdf>; Greg Andres, Acting Deputy Assistant Att'y Gen., Statement before the Senate Judiciary Subcommittee on Crime and Drugs (Nov. 30, 2010), available at <http://www.justice.gov/criminal/pr/testimony/2010/crm-testimony-101130.html>. For example, in 2010 the SEC and DOJ settled with the Dutch construction firm Snamprogetti Netherlands B.V. for \$365 million; the Swiss shipping company Panalpina Inc. for \$156 million; the French construction firm Technip S.A. for \$338 million; the British defense contractor BAE Systems for \$400 million; and German automaker Daimler AG for \$185 million. See Press Release, U.S. Dep't of Justice, Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay \$93.6 Million in Criminal Penalties (Apr. 1, 2010); 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); Press Release, U.S. Dep't of Justice, Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty (July 7, 2010) (discussing a \$240 million criminal penalty and a disgorgement of profits of \$125 million); Press Release, U.S. Dep't of Justice, Technip S.A. Resolves Foreign Corrupt Practices Act

The increasing pace of enforcement has continued into 2011. This year has already seen almost a dozen actions against corporate groups and over \$300 million in monetary sanctions.⁹ Estimates further suggest that federal regulators have over 200 open FCPA investigations.¹⁰ All of this confirms that DOJ officials are serious when they say that “FCPA enforcement activity is stronger than it’s ever been—and getting stronger.”¹¹

The rise in FCPA enforcement follows initially from increasing globalization and more reliance on international trade. Put simply, a greater number of firms are doing business in foreign markets, and many of those markets are rife with corruption. More specific reasons why firms face increasing FCPA pressure include the prevalence of industry-wide investigations, the use of new investigatory tactics, and the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).

A. Industry-wide Investigations.

The DOJ and SEC continue to enjoy success by focusing their attention on FCPA investigations within particular industries. This tactic has achieved results in the oil and gas, pharmaceutical, medical device, arms, and tobacco industries.¹² In each situation, rather than bringing one or two cases within a particular industry and then moving on, regulators instead use evidence from a few investigations to pursue enforcement actions against similarly situated firms within the same sector. This allows regulators to build up expertise within a particular industry, and from there to use facts learned from one case to examine

Investigation and Agrees to Pay \$240 Million Criminal Penalty (June 28, 2010) (discussing a \$240 million criminal penalty and disgorgement of profits of \$98 million); *see also* Daniel Michaels & Cassell Bryan-Low, *BAE to Settle Bribery Cases for More than \$400 Million*, WALL ST. J., Feb. 6, 2010, at B1; Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Daimler AG with Global Bribery (Apr. 1, 2010).

9. SHEARMAN & STERLING LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 4 (2011), *available at* <http://www.shearman.com/files/Publication/12c8f077-57d6-44b7-99fd-deb0b7e16d01/Presentation/PublicationAttachment/ffcd1214-71db-4cab-a507-926e866ef4de/FCPA-071511-July%202011-Trends-Patterns.pdf>.

10. OECD, UNITED STATES: PHASE 3: REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 11 (2010) [hereinafter OECD PHASE 3 REPORT].

11. GIBSON DUNN, 2010 YEAR-END FCPA UPDATE 1 (2011) (quoting Assistant Attorney General Lanny A. Breuer) (internal quotation marks omitted), *available at* <http://www.gibsondunn.com/publications/Documents/2010YearEndFCPAUpdate.pdf>.

12. *See, e.g.*, SHEARMAN & STERLING LLP, *supra* note 8, at i.

the activities of a target company's competitors, suppliers, or distributors. Regulators also frequently make direct inquiries that ask for voluntary responses from firms about corruption within their competitive sphere. This is meant to encourage firms to "tell on" their competitors out of fear that their competitors will be willing to do the same thing to them.¹³ If firms decline to answer these inquiries—sometimes referred to as "sweep letters"—they may instead find themselves responding to subpoenas for documents or testimony.¹⁴

A related development concerns the relative ease with which the DOJ and SEC can now gain evidence from abroad. Not surprisingly, FCPA investigations often involve documents and witnesses located in foreign countries. This can still be a significant obstacle for regulators acting on limited budgets, but with the increasing use of industry-wide investigations and a greater willingness in some countries to pursue multinational cooperation—prompted in part by the passage of new anti-corruption laws, like the U.K. Bribery Act of 2010, and greater international commitment to the OECD Anti-Bribery Convention—any logistical issues are no longer as debilitating.¹⁵

B. New Law Enforcement Tactics

Another reason why firms may find themselves in the FCPA crosshairs relates to the deployment of "new" investigatory tools in white-collar cases, such as undercover stings and wiretaps.¹⁶ These tactics are obviously not new in the sense of recent discovery, but until recently they were generally only associated with traditional street crimes.

The willingness to apply traditional law enforcement tactics in the FCPA context hit home in January 2010 when the DOJ arrested twenty-two executives in the arms industry while all but one were attending an

13. Peggy Aulino, *Authorities Seen Casting Wide Net in Effort to Stem Bribery, Corruption*, 6 WHITE COLLAR CRIME REP. 1001 (2011).

14. OECD PHASE 3 REPORT, *supra* note 10.

15. See Aulino, *supra* note 13; OECD, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (2011), available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf> (adopted by the negotiating conference in 1997 with thirty-eight signatories). The OECD Anti-Bribery Convention closely tracks the FCPA and requires signatories to pass domestic legislation prohibiting the bribery of foreign public officials in international business transactions. It also includes provisions designed to bolster its effectiveness, including measures on multilateral investigatory cooperation and extradition for bribery offenses.

16. Che Odom, *Undercover Agents, Wiretaps Becoming the Norm in White-Collar Cases, Experts Say*, CORP. ACCOUNTABILITY REP. (BNA, Inc.), Oct. 7, 2011.

international trade show in Las Vegas.¹⁷ The arrests were part of the first undercover sting operation in FCPA history, dubbed “Catch-22” by the law enforcement agencies involved.¹⁸ The operation arose after Armor Holdings, now owned by BAE, disclosed the involvement of one of its employees, Richard Bistrong, during a separate FCPA investigation.¹⁹ The DOJ flipped Bistrong and persuaded him to cooperate in the Catch-22 operation by setting up a meeting between the defendants and two fictional sales representatives from the African nation of Gabon.²⁰ The two sales reps were actually undercover FBI agents who asked for and allegedly received commitments from the defendants to pay bribes for winning Gabonese government weapons contracts.²¹

Furthermore, if they have not already, it is likely that federal law enforcement officers will soon turn to wiretaps in FCPA investigations as a result of recent successes in non-FCPA prosecutions. For example, many commentators note that the conviction of Raj Rajaratnam for his role in the Galleon hedge fund insider-trading scheme this summer came after jurors listened to forty-five different wiretap recordings that spanned hours of conversations over the course of several years.²² Jurors in the case reported that the wiretap evidence was highly persuasive in their deliberations, especially on the issue of intent.²³ Since issues of mens rea are often the most difficult elements in FCPA and other white-collar crime cases to prove, this suggests that prosecutors will likely continue to seek wiretap evidence in future white-collar investigations.

C. Dodd-Frank

Though it is too soon to draw definitive conclusions, the Dodd-Frank law is also expected to generate additional evidence of foreign

17. Diana B. Henriques, *F.B.I. Snares Weapons Executives in Bribery Sting*, N.Y. TIMES, Jan. 21, 2010, at A3.

18. See *2010 Mid-Year FCPA Update*, GIBSON DUNN (July 8, 2010), <http://www.gibsondunn.com/Publications/Pages/2010Mid-YearFCPAUpdate.aspx>.

19. SHEARMAN & STERLING LLP, *supra* note 12, at viii.

20. See *2010 Mid-Year FCPA Update*, *supra* note 18.

21. *Id.*

22. *E.g.*, Edward C. O’Callaghan et al., *Wiretap Evidence Raises the Bar for Insider Trading Cases following Rajaratnam*, 6 WHITE COLLAR CRIME REP. 854 (2011).

23. See *id.* It should be noted, however, that the DOJ suffered a significant setback in the prosecution of the “Catch-22” defendants. Three of the defendants pleaded guilty, but the rest went to trial in four groups. These trials all ended in acquittals or mistrials, and the DOJ eventually opted against retrying any of the defendants. See Robert Wilhelm, *Government Throws in the Towel in Massive FCPA Sting Investigation*, 7 WHITE COLLAR CRIME REP. (2012).

bribery. Under the statute, qualified whistleblowers who provide original information about potential FCPA violations will be awarded between ten and thirty percent of any government-imposed sanctions in excess of \$1 million.²⁴ These whistleblower provisions have only been in force for a few months, but the SEC's Enforcement Division already reports seeing a sharp increase in the number and quality of FCPA tips received.²⁵

II. FRAMEWORK FOR FCPA SETTLEMENT

With the foregoing developments in evidence gathering and enforcement making FCPA scrutiny more likely, many firms try to get out in front of potential violations by voluntarily disclosing them to regulators in the hope of obtaining leniency. Both inside and outside counsel generally advise firms facing an FCPA investigation to work to maximize their chances of obtaining a settlement on the best possible terms rather than pursue litigation and a possible trial on the merits.²⁶ The negative collateral consequences arising from an indictment—let alone conviction—are too great for some firms to risk adopting any strategy other than settlement.²⁷ Even the announcement that a firm is the subject of an FCPA investigation can produce significant reputational harm.²⁸

24. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841-42 (2010).

25. *Full Regime*, *supra* note 7.

26. *E.g.*, SHEARMAN & STERLING LLP, A NEW TOOL AND A TWIST? THE SEC'S FIRST DEFERRED PROSECUTION AGREEMENT AND A NOVEL PUNITIVE MEASURE 1 (2011), *available at* <http://www.shearman.com/files/Publication/20b76673-2736-4a55-840f-1f75d518ca93/Presentation/PublicationAttachment/71ecb942-9eab-4482-b786-41522a71af75/LT-052411-A-New-Tool-and-a-Twist.pdf>.

27. Baer, *supra* note 5, at 973. *But cf.* Darryl K. Brown, *The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement*, 1 OHIO ST. J. CRIM. L. 521 (2004) (describing the various advantages that corporations have in defending criminal charges, including having the resources to match the government in litigation). As Professor Brown notes, "[t]he concern of government oppression is much diminished in the corporate realm with respect to large firms. With large firms, the . . . government may well lack the resources to effectively investigate and litigate against its private opponent." *Id.* at 529.

28. Larry E. Ribstein, *Agents Prosecuting Agents* 10 (Ill. Program in Law, Behavior and Social Sci., Research Paper No. LBSS11-01 2011), *available at* <http://ssrn.com/abstract=1737915>. *But cf.* Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Impact of Anti-Bribery Enforcement Actions on Targeted Firms* (Feb. 27, 2012) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1573222 (finding that firms suffer low reputational costs when prosecuted for bribery only, as opposed to when they are prosecuted for both bribery and misrepresenting financial statements).

Settlement negotiations between firms and government officials thus typically focus on reaching an agreement that bypasses formal adjudication.²⁹ DPAs and NPAs are usually the vehicles chosen to accomplish this result.³⁰ DPAs look similar to probationary penalties in that they are premised on the government's agreement to suspend bringing formal charges in exchange for a firm's agreement to take certain action.³¹ Specifically, under a DPA, the prosecution files a formal charging document with the court but defers actual prosecution if the defendant firm agrees to do things like pay a substantial fine, disgorge profits, implement corporate governance reforms, retain a monitor to oversee the firm's internal compliance program, and cooperate with any ongoing investigations arising out of the conduct that led to the DPA.³² If the firm fulfills its obligations under the agreement the prosecution agrees to dismiss the charges altogether after a period of time (generally between two and four years).³³ NPAs are similar to DPAs but do not involve a formal court filing. Instead, regulators reserve the right to file charges under the NPA but refrain from doing so as long as the defendant firm maintains compliance with the same types of terms usually included in a DPA.³⁴

DPAs and NPAs are not new, but the last decade has seen their usage skyrocket. According to data collected by the Organization on Economic Cooperation and Development (OECD), the average annual number of DPAs and NPAs rose from fewer than five per year in 2004 to over twenty per year today (with a high of thirty-eight in 2007).³⁵ With respect to FCPA matters specifically, DPAs and NPAs were used by the DOJ in resolving approximately seventy-seven percent of all actions initiated since 2004.³⁶ Several commentators note that firms typically approach settlement negotiations with the expectation that they

29. Baer, *supra* note 5, at 973.

30. OECD PHASE 3 REPORT, *supra* note 10, at 31.

31. Griffin, *supra* note 5, at 321.

32. *Id.* at 322

33. Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 934 (2010).

34. OECD PHASE 3 REPORT, *supra* note 10, at 32.

35. *Id.*

36. *Id.* Both the DOJ and SEC are empowered to enter into DPAs, though the first time a DPA was used by the SEC came in May 2011. Rob Khuzami, the newly appointed director of the SEC's Division of Enforcement referred to his agency's use of DPAs as a "potential game changer." SHEARMAN & STERLING LLP, *supra* note 26, at 1-2 (internal quotation marks omitted).

will be offered a DPA or NPA, indicating that these devices represent “the accepted norm” in settling FCPA cases.³⁷

The increasing popularity of DPAs and NPAs stems from the benefits they provide to both firms and regulators. Firms benefit by avoiding formal prosecution and the inherent risks and uncertainties of litigation.³⁸ Regulators benefit from the considerable enforcement flexibility that DPAs and NPAs provide. Just as the Arthur Andersen prosecution and conviction served as a warning sign to firms, federal officials also took heed of the dangers that attend prosecutions against corporate entities. The U.S. Supreme Court ultimately overturned Arthur Andersen’s criminal conviction but the appeal came too late to save the firm from going out of business. The “beauty” of the DPA/NPA is that it affords regulators a way to prevent similar results—and any negative effects on shareholders, employees, or creditors—without altogether declining to sanction firms accused of wrongdoing.³⁹

With these benefits in mind, what does it take for the DOJ or SEC to be willing to offer firms a DPA or NPA in an FCPA case? The answer to this question often seems to boil down to two factors outlined in the Federal Sentencing Guidelines and internal DOJ and SEC charging policies: (1) whether a firm is willing to cooperate in the

37. Koehler, *supra* note 33, at 933 (quoting *Henning on the White Collar Watch*, CORP. CRIME REP., Feb. 7, 2010 (Professor Henning is a former DOJ prosecutor and SEC enforcement officer)) (internal quotation marks omitted).

38. Note that some commentators express concern that firms are not receiving the type of benefit they deserve by cooperating because they must still pay large fines and agree to onerous, and arguably arbitrary, governance reforms. David Hess & Cristie L. Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT’L L.J. 307, 309 (2008).

39. Griffin, *supra* note 5 at 330 (“When DOJ announced the DPA with AOL, for example, it stated that the agreement was designed to ‘achieve[] a result that minimizes the collateral damage to shareholders and employees while imposing an [sic] appropriate punishment and protecting the rights of victims.’” (quoting Press Release, Dep’t of Justice, *America Online Charged with Aiding and Abetting Securities Fraud; Prosecution Deferred for Two Years* (Dec. 15, 2004))). Regulators also benefit from DPAs and NPAs by avoiding the expense and complexities that would be part and parcel with the full-on prosecution of an entity defendant. Private firms—especially large ones—often feature multiple divisions, varying levels of hierarchy, and sophisticated internal computing and communication systems. As Professor Buell notes, “[a]ll of this adds up to a more difficult project for the state than the ‘ordinary’ criminal case. The modern organizational case can easily involve hundreds of witnesses, millions of documents, and years of investigation requiring the labor of dozens of state actors.” Samuel W. Buell, *Criminal Procedure within the Firm*, 59 STAN. L. REV. 1613, 1625 (2007). The settlement of an FCPA action through a DPA or NPA allows regulators to reach a resolution that does not depend on such burdensome processes and fiscal outlays.

underlying investigation and (2) whether the firm promoted a “culture of compliance.”

A. Cooperation

The ability to resolve FCPA actions via a DPA or NPA depends initially on a firm’s willingness to cooperate with investigators. The DOJ begins by evaluating cooperation through the lens of the Federal Sentencing Commission’s Organizational Sentencing Guidelines (OSG) to arrive at a penalty range that will serve as the baseline for any fines or disgorgement included in a settlement. The OSG call for a reduction in the total penalty if the defendant firm “reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct.”⁴⁰ To be sufficient to lower the possible penalty range, cooperation must also be “timely,” meaning that it begins as soon as the firm is officially notified of the investigation, and it must also include the disclosure of information “sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct.”⁴¹

The DOJ and SEC’s internal charging policies draw heavily from the OSG’s treatment of cooperation. The *U.S. Attorney’s Manual* instructs prosecutors considering criminal charges against a firm to weigh “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents.”⁴² Similarly, the SEC’s so-called “Seaboard Report” on the subject of self-policing and cooperation indicates that agency enforcement decisions should be guided by factors such as: “Did the company promptly, completely, and effectively disclose the existence of the misconduct to the public, to regulators, and to self-regulators? Did the company cooperate completely with appropriate regulatory and law enforcement bodies? . . . [And d]id the company identify possible violations and evidence with sufficient precision to facilitate prompt enforcement . . . ?”⁴³

40. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g)(1) (2009).

41. *Id.* § 8C2.5 cmt. n.12

42. U.S. DEP’T OF JUSTICE, U.S. ATTORNEY’S MANUAL 9-28.300(A)(4) (2008), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

43. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation

While it is true that the foregoing demonstrates a multi-faceted view of cooperation, one frequent thread in cases where cooperation has been credited by regulators is a firm's willingness to identify individual agents who may have acted illegally. In looking at recent DPAs and NPAs in FCPA cases, it appears that cooperation of this sort often puts company agents on at least one of three possible tracks: (1) subsequent formal prosecution; (2) internal firm discipline (including termination); or (3) a gray area wherein agents are required to cooperate with regulators in ways that make it unclear whether the agents will face subsequent prosecution or other discipline.⁴⁴

1. FORMAL PROSECUTION

One possible outcome of firm cooperation with regulators includes the subsequent indictment and prosecution of individual agents retained by or associated with the cooperating firm. This is what happened in the ABB case described in the Introduction. Before ABB, the Willbros Group and its wholly owned subsidiary, Willbros International, entered into a DPA under similar circumstances. Willbros Group and Willbros International were accused of bribing officials in Nigeria and Ecuador in connection with securing government contracts for large pipeline construction projects.⁴⁵ In setting the required penalty at \$22 million, the DOJ cited Willbros' extensive cooperation in the underlying investigation.⁴⁶ This cooperation included voluntarily agreeing to a limited waiver of the attorney-client privilege with respect to specific matters of interest to the DOJ and promptly reporting the misconduct of employees. These steps were cited by prosecutors as substantial factors leading to the indictments and guilty pleas of several individual Willbros' agents.⁴⁷

The ABB and Willbros examples aside, the issue of individual prosecutions following a DPA or NPA has been difficult to pin down.

to Agency Enforcement Decisions, Exchange Act Release Nos. 34-44969; AAER-1470, 76 SEC Docket 220, 222 (Oct. 23, 2001).

44. These options are not mutually exclusive. An agent who is terminated could also be indicted in a subsequent criminal proceeding.

45. Deferred Prosecution Agreement 5-10, *United States v. Willbros Group, Inc.*, No. H-08-287 (S.D. Tex. May 14, 2008).

46. Press Release, U.S. Dep't of Justice, Willbros Group Inc. Enters Deferred Prosecution Agreement and Agrees to Pay \$22 Million Penalty for FCPA Violations (May 14, 2008).

47. After this DPA was signed, Willbros employees Paul Novak and James Tillery were indicted on separate FCPA charges. Novak subsequently pleaded guilty, and Tillery is currently being held by authorities in Nigeria pending extradition to the United States. Mike Koehler, *Friday Roundup*, FCPA PROFESSOR (Aug. 20, 2010), <http://www.fcpaprofessor.com/friday-roundup-6>.

On one hand, after receiving criticism that they were focusing too much on firms rather than individual wrongdoers, both the DOJ and SEC publicly vowed to make the prosecution of individuals a priority in FCPA cases. In 2004 the DOJ only prosecuted two individuals under the FCPA, whereas since 2009 the Department has charged over fifty individuals with FCPA violations.⁴⁸ Mark Mendelsohn, the former Deputy Chief of the DOJ's fraud section, believes that the number of individual FCPA prosecutions will continue to rise now that the DOJ and SEC have been handed more resources, both financial and staffing, for that express purpose.⁴⁹ This sentiment is shared by representatives from the FBI's FCPA Squad, who maintain that "[prosecuting individuals] is a very good thing. . . . A corporate fine is great, but putting individuals in jail is really where a good deterrent comes."⁵⁰

Upon closer inspection, however, the actual numbers of individual prosecutions do not reflect the type of shift one might expect. First, most individual FCPA prosecutions have arisen from the same small group of cases.⁵¹ Second, the likelihood that an individual action will arise out of an *entity*-level investigation remains relatively small. Professor Mike Koehler recently published data suggesting that "when the DOJ resolves an FCPA enforcement action via a NPA or DPA, there is only a 15% likelihood that individual criminal charges will be filed against any company employee or those affiliated with the company."⁵² Professor Koehler offers the view that this low percentage could relate to a fundamental difference between entity-level prosecutions and individual prosecutions. He notes that entity defendants may settle FCPA charges regardless of the prosecution's legal theories because they find it safer and more cost efficient than risking formal indictment—even if the prosecution's theory is questionable or subject to valid defenses.⁵³ Individuals, by contrast, may be more prone to hold prosecutors to their burden of proof beyond a reasonable doubt because they face the deprivation of personal

48. Andres, *supra* note 8.

49. Michael Connor, *U.S. Likely to Broaden Anti-Bribery and Corruption Efforts*, BUS. ETHICS (Feb. 24, 2010), <http://business-ethics.com/2010/02/24/1317-u-s-likely-to-broaden-efforts-to-curb-international-bribery-and-corruption/>.

50. Aulino, *supra* note 13 (internal quotation marks omitted).

51. Mike Koehler, *Individual DOJ Prosecutions by the Numbers*, FCPA PROFESSOR (Sept. 20, 2011), <http://www.fcprofessor.com/individual-doj-prosecutions-by-the-numbers>.

52. Mike Koehler, *DOJ Prosecution of Individuals – Are Other Factors at Play?*, FCPA PROFESSOR (Sept. 22, 2011), <http://www.fcprofessor.com/doj-prosecution-of-individuals-are-other-factors-at-play> (emphasis in original removed).

53. Koehler, *supra* note 33, at 939–40.

liberty.⁵⁴ Thus, if a regulator's "weak" case may be enough to secure a firm-level settlement, it may not be enough to convince an individual defendant to forgo her right to test the prosecution's evidence at trial.

While this may be true, it also remains the case that in nearly every action where an individual employee or agent is prosecuted he or she ultimately elects to plead guilty rather than risk the uncertainty of trial. One reason for this, which is not unique to the FCPA, relates to the resources that individuals have available to fund their defenses. Individuals often lack the resources to match the financial strength of the government. Litigating an FCPA case is not cheap. FCPA-defense work tends to be highly specialized and practiced by a relatively small number of attorneys at elite "white shoe" firms—many of whom entered practice after working on FCPA matters for the SEC or DOJ.⁵⁵ These attorneys can command fees commensurate with their experience and consistent with those being charged at their firms.

In addition to the high cost of attorneys' fees, the unique complexities involved in FCPA cases can cause defense costs to escalate in other ways. Many FCPA investigations require obtaining evidence from foreign countries.⁵⁶ Depending on the country involved, defense counsel must spend time researching the jurisdictional and procedural issues associated with securing foreign evidence, identifying the foreign witnesses needed, securing visas, hiring interpreters, and making necessary travel arrangements.⁵⁷ Moreover, some of the countries often implicated in FCPA cases substantially limit the types of discovery activities that can be employed by non-residents.⁵⁸ Resolving these issues is difficult and can add six months to a year to the litigation.

The use of expert witnesses in FCPA cases is another aspect that can add to defense costs. At the 2009 FCPA trial of Frederic Bourke in the Southern District of New York, federal prosecutors called Rajan Menon, Ph.D., to testify about political and economic issues in Azerbaijan. Menon is a chaired professor in international relations and testified about matters such as: the general history of Azerbaijan; the

54. Koehler, *supra* note 52.

55. See Nathan Vardi, *How Federal Crackdown on Bribery Hurts Business and Enriches Insiders*, FORBES.COM (May 24, 2010), <http://www.forbes.com/forbes/2010/0524/business-weatherford-kbr-corruption-bribery-racket.html>.

56. OECD PHASE 3 REPORT, *supra* note 10, at 32.

57. *Taking Depositions in a Foreign Country*, CAL. LITIG. REP. (White & Case LLP, L.A., Cal.), Sept. 22, 2006.

58. In China, for example, the government does not recognize the right to take depositions, and any effort by an American attorney to depose a witness could result in sanctions or detention. Ako S. Williams, *Barristers Tips: Taking Depositions Abroad*, LOS ANGELES LAW., Dec. 2005, at 10, 10.

political careers of Azerbaijan's rulers; American and other foreign policy interests in Azerbaijan; geopolitical and economic concerns in American policy toward Azerbaijan, particularly its oil resources and its conflict with Armenia; and the problems of instability, corruption, and deprivation of human rights and civil liberties in Azerbaijan.⁵⁹ Menon also testified about the vast body of publicly available literature on political corruption in Azerbaijan at the time relevant to the underlying transaction.⁶⁰

As Bourke's defense counsel argued, presumably the DOJ introduced Menon's testimony to show that the defendant should have been aware of widespread bribery and corruption in Azerbaijan, and thus would not have invested in that country "unless he knew the fix was in."⁶¹ Setting aside the merits of the government's position on that issue, it is easy to imagine situations where FCPA defendants, too, might feel compelled to retain an expert. For example, experts could be called to opine on whether a particular employee should be considered an agent of a public entity or instrumentality under foreign law for purposes of the FCPA's jurisdictional provisions.⁶²

In light of these and other costs, individual FCPA defendants with limited resources face strong pressures to plead guilty rather than proceeding to trial and facing the risk of imprisonment.⁶³ This may be

59. Memorandum of Law in Support of Bourke's Motion *In Limine* to Exclude the Testimony of Rajan Menon at 2, *United States v. Kozeny*, No. 05 Crim. 518 (S.D.N.Y. May 18, 2009).

60. *Id.*

61. *Id.* at 13-14.

62. *United States v. Esquenazi*, No. 09-21010 (S.D. Fla. Dec. 4, 2009), presents an example of this situation. Mike Koehler, *Stunning Haiti Teleco Development*, FCPA PROFESSOR (Aug. 29, 2011), <http://www.fcpaprofessor.com/stunning-haiti-teleco-development> ("[T]he Government called its expert witness, Gary Lissade, to testify regarding Haitian law and his opinion as to whether Haiti Teleco was a State owned public entity/instrumentality of the Republic of Haiti and whether its employees were, therefore, government officials. Although Mr. Lissade was unable to review the bylaws or stock certificates of Haiti Teleco, or find any document establishing Haiti Teleco as a 'S.A.M.' entity, he opined that because the Haitian central bank reportedly owned 97 percent of the stock, plus his observations of '[c]ustom and practice' and 'the letterhead of Teleco,' that Teleco was a Haitian government entity/instrumentality. Lissade further opined that because he concluded that Teleco was a public entity, all employees of Teleco were government officials or employees even though no law designated government employees at locations such as Teleco as government employees or agents.").

63. Professor Ribstein provides a stark example of the temptation to plead guilty by individual corporate defendants when he cites the case of Jamie Olis, a minor defendant in a case of accounting fraud. *See* Ribstein, *supra* note 28, at 11. Olis maintained his innocence throughout the case but ultimately could not afford to spend the \$100,000 necessary to print and examine twelve million pages of documents that federal prosecutors were able to analyze through the use of their own computer

true even in cases where the prosecution's theory of liability is debatable.⁶⁴

2. INTERNAL FIRM DISCIPLINE

Employees who are not formally charged as a result of firm-wide FCPA investigations may still face other repercussions. In many DPAs and NPAs used to resolve FCPA charges, firms have been required to terminate employees accused of misconduct and to discipline others who remain with the company.⁶⁵ For example, the DOJ praised Willbros for severing its employment relationship with a senior executive within ten days of learning of the allegations of his involvement in FCPA violations and for taking prompt disciplinary action, "without regard to rank, against eighteen other employees."⁶⁶ Other companies, including Armor Holdings and Omega Advisors, Inc., took similar steps as part of their FCPA settlements with the DOJ.⁶⁷

programs. *Id.* Olis was eventually convicted and sentenced to twenty-four years in prison. *Id.*

64. Consider the options-backdating case against Henry Samueli, the cofounder and former chief technical officer of Broadcom. Samueli pleaded guilty to criminal charges in a plea deal that required him to testify against another Broadcom executive officer. *See* Koehler, *supra* note 33, at 940. After Samueli's testimony went forward, the federal district judge in the case, Judge Carney, vacated Samueli's prior guilty plea and dismissed the charges against him after determining that there "was no evidence at trial to suggest that Dr. Samueli did anything wrong, let alone criminal." *Id.* at 941 (quoting Reporter's Transcript of Proceedings at 5197-98, *United States v. Ruehle*, No. SACR 08-00139-CJC (C.D. Cal. Dec. 15, 2009)). Carney continued: "[T]he government embarked on a campaign of intimidation and other misconduct to embarrass him and bring him down including crafting an unconscionable plea agreement pursuant to which Dr. Samueli would plead guilty to a crime he did not commit" in order to avoid "'getting stuck with a long prison sentence.'" *Id.* (quoting John R. Emshwiller & Nathan Koppel, *Plea Bargains Get Renewed Scrutiny*, WALL ST. J., Dec. 19, 2009, at A4).

65. The fact that firms are willing to discipline agents internally might be one reason for the relatively low percentage of individual FCPA prosecutions following entity-level settlements. Regulators may determine in some cases that internal firm sanctions provide sufficient deterrent value, thereby obviating the need for expensive follow-on litigation against individual wrongdoers.

66. Deferred Prosecution Agreement at 4, *United States v. Willbros Group Inc.*, Crim. No. H-08-287 (S.D. Tex. May 14, 2008).

67. Armor Holdings resolved FCPA charges through an NPA that required the company to terminate the employees involved in the alleged misconduct. Non-Prosecution Agreement between Denis J. McInerney, Deputy Chief, Fraud Section, Dep't of Justice, and Roger M. Whitten & Kimberly A. Parker, Attorney, Armor Holdings, Inc. (July 13, 2011). The Omega Advisors NPA requires the company to "truthfully and completely disclose all information with respect to the activities of Omega, its officers and employees, and others concerning all matters about which these

3. INDUCING EMPLOYEE COOPERATION

Employees who are neither terminated nor immediately indicted following the entry of a firm-level settlement often face pressure from their companies to cooperate with regulators as the underlying investigation continues. Several settling companies promised to continue cooperating with regulators by making current and former agents available for interviews and testimony, as well as by responding promptly to requests for other forms of evidence. For example, Alliance One settled FCPA charges through an NPA that required the company to cooperate fully with any law enforcement agency involved, provide support for any meetings or interviews set up, secure attendance of any employee or officer for any proceeding, and produce all documents, records, or evidence requested by the DOJ.⁶⁸ A DPA signed by Schnitzer Steel required the company to “truthfully disclose all information with respect to the activities of Schnitzer Steel, its officers, employees, agents, consultants, contractors and sub-contractors concerning all matters relating to corrupt payments in connection with its operations, related false books and records, and inadequate internal controls about which Schnitzer Steel has any knowledge or about which the Department shall inquire.”⁶⁹ The agreement went on to say that the company’s cooperation “will include identification of witnesses who, to Schnitzer Steel’s knowledge, may have material information regarding the matters under investigation.”⁷⁰

Employees asked to cooperate along these lines can quickly find themselves in a difficult position. On one hand, if they agree to cooperate they may never again come into contact with the

Offices inquire of it, which information can be used for any purpose, except as limited by the second paragraph of this Agreement.” Non-Prosecution Agreement between Michael J. Garcia, U.S. Attorney and Robert J. Anello, Attorney, Omega Advisors, Inc. (June 19, 2007). The NPA also requires that Omega “shall bring to these Offices’ attention all criminal conduct by, or criminal investigations of, Omega or its respective senior managerial employees that comes to the attention of Omega or its senior management, as well as any administrative proceeding or civil action brought by any governmental authority that alleges fraud by or against Omega.” *Id.*

68. Non-Prosecution Agreement between Denis J. McInerney, Deputy Chief, Fraud Section, Dep’t of Justice, and Edward J. Fuhr, Attorney, Alliance One Int’l (Aug. 6, 2010). Similarly, the Alcatel-Lucent DPA required the company to cooperate with the DOJ in the investigation of the conduct of any and all persons involved in the alleged FCPA violations and to provide such persons for interviews or testimony. Deferred Prosecution Agreement at 2–5, *United States v. Alcatel-Lucent, S.A.*, No. 10-20907 (S.D. Fla. Dec. 20, 2010).

69. Deferred Prosecution Agreement at 4, *United States v. Schnitzer Steel Indus., Inc.* at 4, No. 06-CR-398, (D. Or. Oct. 16, 2006).

70. *Id.* at 6.

investigation. However, another possibility is that any evidence they provide will later expose them to greater scrutiny (including formal indictment) as they move from witness to target. An extra incentive underlying an employee's decision-making process is the risk that if she does not cooperate in the manner desired by her employer she could face internal discipline.⁷¹

B. Promoting a Culture of Compliance

Though cooperation generally remains the prerequisite to obtaining a DPA or NPA, regulators also stress that they are more likely to offer leniency to firms with a strong "culture of compliance."⁷² Like before, this follows from the use of the OSG as a framework for settlement negotiations. The OSG were amended in 2004 in response to the Sarbanes-Oxley Act of 2002 to allow for lower sanctions for firms that have "effective compliance and ethics programs" in place. Programs that meet this requirement will be found in firms that "exercise due diligence to prevent and detect criminal conduct" and "otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."⁷³

For firms looking to minimize their exposure under the FCPA, this suggests that working to maintain a culture of compliance should be a priority. However, as argued in the next Part, significant governance challenges can arise when efforts to reach this goal are combined with the consequences of the types of cooperation discussed so far.

III. ASSESSING THE TENSION BETWEEN COOPERATION AND COMPLIANCE

Academics, regulators, and practitioners continue to debate the importance of developing comprehensive internal compliance programs to minimize fraud and corporate criminal activity. For its part, the DOJ

71. There is also the possibility that an employee will be charged with violations that are unrelated to the government's original investigation. As Professor Griffin notes, "[i]t is increasingly the statements made during an investigation, rather than the alleged misconduct that triggered the investigation, that form the basis for criminal liability." See Griffin, *supra* note 5, at 333-34. If an agent, fearful of future accusations of wrongdoing, decides to hide evidence of questionable behavior or otherwise try to hinder an investigation, she could find herself facing obstruction of justice charges. This is true even if she was innocent of any crimes prior to her attempted cover-up. See *id.*

72. See Aulino, *supra* note 13 (quoting the unofficial statement of Charles E. Cain, Assistant Director of the FCPA Unit in the SEC's Enforcement Division).

73. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a)(1)-(2) (2006).

routinely stresses the importance of corporate self-policing and proclaims a willingness to assist firms in this regard.⁷⁴ Most agree that if federal regulators are sincere about the importance of establishing a culture of compliance, they must demand that firms go beyond making mere cosmetic reforms.⁷⁵ Accordingly, even as the relative merits of compliance programs continue to be scrutinized, it appears undisputed that adopting a “compliance program” in name only means little if it does not incentivize law-abiding conduct on the part of company agents and maximize the likelihood of preventing acts of wrongdoing.

A threshold requirement for promoting a meaningful culture of compliance within an organization is the free and open communication between agents and company counsel. Agents with concerns about the legality of a given course of action depend on the advice of counsel and other compliance personnel when deciding how to proceed. They must feel comfortable approaching counsel for guidance without fear of reprisal—even if it means approaching them after engaging in questionable activity.

This is where cooperation with regulators to settle entity-level charges poses a fundamental organizational problem. If agents fear that company counsel may bring their names to the attention of prosecutors in the name of cooperation—with or without a waiver of privilege—their feelings of trust or loyalty within the firm will be altered.⁷⁶ The same is true if agents fear internal discipline, including termination, as a result of firm-wide settlement efforts. Rational employees may elect to hold information back, present information in a less than truthful way, or decline to speak at all with company counsel.⁷⁷ The resulting breakdown in communication will make it difficult for compliance personnel to carry out their role as monitors and could adversely affect corporate decision-makers as they consider various business alternatives with incomplete or inaccurate information. Though these concerns arise in all cases of corporate crime where firms elect to cooperate with regulators, as shown below they take on particular significance in the context of the FCPA.

74. See Baer, *supra* note 5, at 985.

75. See Hess & Ford, *supra* note 38, at 310–11.

76. Griffin, *supra* note 5, at 335–36 (“A company’s waiver of privilege extends to conversations between employees and corporate counsel that took place before the suspected wrongdoing even occurred. As a result, employees who answer questions of company counsel, about any matter, are effectively building up evidence for unpredictable future criminal cases; waivers are so broad that it is as though employees are ‘speaking to prosecutors’ every time they seek advice.” (footnotes omitted)); see also Baer, *supra* note 5, at 986–87 (discussing other structural issues that make the establishment of a “corporate culture” considerably challenging).

77. See Baer, *supra* note 5, at 985–86; see also Griffin, *supra* note 5, at 334.

A. Expansive FCPA Interpretation and the Importance of Agent-Counsel Communication

The primary reason why a healthy and open relationship between firm agents and counsel is so important for companies that expect to face FCPA scrutiny is because several aspects of the FCPA remain open to multiple interpretations.⁷⁸ The DOJ and SEC often interpret these provisions broadly.⁷⁹ Under these circumstances, if firm agents and counsel are not on the same page and do not feel comfortable sharing confidences and concerns, it will only serve to make compliance increasingly difficult. This is of obvious concern to firms because of respondeat superior liability, but it should also concern regulators hoping to reduce acts of foreign bribery in general.⁸⁰

1. “INSTRUMENTALITY” OF A FOREIGN GOVERNMENT

The FCPA’s definition of foreign official includes individuals who work for an “instrumentality” of a foreign government.⁸¹ The FCPA does not define “instrumentality,” and federal regulators note that the determination of who will be considered a “foreign official” can sometimes be complicated.⁸² As a practical matter, this becomes important because the majority of recent FCPA enforcement actions have involved payments made to employees of state-owned or state-controlled enterprises, which the DOJ and SEC classify as instrumentalities of foreign governments.⁸³

Many seasoned practitioners claim that they cannot always determine with confidence whether bribe requests in countries with a high percentage of state-ownership—such as China—are coming from

78. Koehler, *supra* note 33, at 998–99; Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 503 (2010).

79. See Westbrook, *supra* note 78.

80. Under the principle of respondeat superior liability, as long as an employee acts within the scope of employment and is motivated to serve the interests of her firm, the entity will be held vicariously liable for the employee’s wrongdoing. See Frank C. Razzano & Travis P. Nelson, *The Expanding Criminalization of Transnational Bribery: Global Prosecution Necessitates Global Compliance*, INT’L LAW., Winter 2008, at 1259, 1275–76.

81. 15 U.S.C. § 78dd (2006).

82. See Lanny A. Breuer, Assistant U.S. Attorney General, Prepared Keynote Address to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum (Nov. 12, 2009), available at http://www.ehcca.com/presentations/pharmacongress10/breuer_2.pdf.

83. See Westbrook, *supra* note 78, at 531–33.

foreign officials or not.⁸⁴ One court to consider when a state-owned enterprise qualifies as an instrumentality of a foreign government examined the following non-exclusive factors: (1) whether key officers and directors of the entity are, or are appointed by, the government; (2) whether the entity is financed by the government or through revenues obtained via government-imposed taxes or other fees; (3) whether the entity has exclusive power to exercise its designated functions; (4) whether the entity provides its services to citizens within the country; and (5) whether the entity is widely perceived and understood to be performing governmental functions.⁸⁵ While these factors will help firms gain a better sense of which state-owned enterprises are likely to implicate the FCPA, the definitional question remains highly fact-specific.⁸⁶ Also unclear is the status of state-owned enterprises that are currently in the process of being entirely privatized, companies where the government is a minority shareholder,⁸⁷ and companies that receive public funds in the form of “bail-outs” during the present economic downturn.⁸⁸

I should add that this challenging interpretive issue does not mean there is something inherently wrong with the FCPA’s treatment of the term “foreign official” or with the way regulators often interpret it. Given the ambiguity that surrounds the crime of transnational bribery, a certain level of flexibility in anti-corruption legislation and enforcement policy is crucial.⁸⁹ I only mean to suggest that this is the type of interpretive question where free and open communications between employees, intermediaries, and company counsel can be particularly important for overall compliance efforts.

84. ALEXANDRA ADDISON WRAGE, *BRIBERY AND EXTORTION: UNDERMINING BUSINESS, GOVERNMENTS, AND SECURITY* 12 (2009).

85. *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1115 (C.D. Cal. 2011).

86. In *United States v. Control Components*, No. 09-00162 (C.D. Cal. 2009), the court applied a multifactor test similar to the one used in *Aguilar* but also included jury instructions requiring prosecutors to prove that the defendant executives knew the alleged bribe recipients were government officials. SHEARMAN & STERLING LLP, *supra* note 9, at 12.

87. See Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 821 (2011). The DOJ and SEC maintain the position that even minority state ownership of an entity brings it within the meaning of instrumentality, but the FCPA is silent on this issue. *Id.*

88. SHEARMAN & STERLING LLP, *supra* note 9, at 8.

89. *Id.* at 22–23 (noting position of DOJ and SEC personnel that definition of “foreign official” must be flexible to accommodate different forms of governments around the world).

2. MENS REA

Potential ambiguity in the FCPA comes up again with the statute's mens rea requirements. The FCPA's anti-bribery provisions prohibit payments that are made with a "corrupt[]" intent and for the purpose of "obtaining or retaining business."⁹⁰ Corrupt in this context refers to payments made with the intent to induce the recipient to misuse her official position to wrongfully direct business to the payer.⁹¹ The requirement that a payment is for the purpose of obtaining or retaining business is typically labeled the FCPA's "business nexus" or "business purpose" requirement.⁹²

Both requirements can pose unique challenges for firm agents working abroad. For example, many agents report threats from foreign officials (or employees of state-owned enterprises) that arguably rise to the level of extortion.⁹³ If a payment demand involves a threat of serious bodily harm, the FCPA's legislative history suggests that the payer should be afforded a defense.⁹⁴ In this example the payment would not be "corrupt" because it was not intended to induce the payee to misuse her official position, nor would it be made for the purpose of obtaining or retaining business.

A complication arises, however, when threats are economic rather than physical. Threats of bodily harm remain rare in international business transactions, but threats to a firm's existing financial interests are relatively common in many parts of the world.⁹⁵ This might mean being asked to pay money for something a firm is already entitled to, or it might mean being asked to pay extra compensation to secure a deal on terms that had been previously agreed upon. So far federal regulators maintain that payments made in response to economic extortion can trigger FCPA liability.⁹⁶

90. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2006).

91. *United States v. Kay*, 359 F.3d 738, 749 n.40 (5th Cir. 2004).

92. *Id.* at 740.

93. *See Yockey*, *supra* note 87, at 818-19.

94. S. REP. NO. 95-114, at 10-11 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4108.

95. *See Yockey*, *supra* note 87, at 814.

96. For example, in 2010, the SEC charged Joe Summers, a former employee of Pride International, with violating the FCPA after he paid \$30,000 to Venezuela's state-owned oil company (PDVSA). *SEC v. Summers*, Exchange Act Litigation Release No. 21617, Accounting and Auditing Enforcement Release No. 3169 (Aug. 5, 2010). Summers made the payment after one of PDVSA's mid-level employees demanded it in exchange for releasing funds that Pride was entitled to for services already rendered. *Id.*

The difficulty with economic extortion, though, is that it raises many of the same mens rea issues as physical extortion. When someone responds to economic threats it is not clear that she does so with intent to induce a government employee to “misuse” her official position. It is also unclear how the FCPA’s business nexus/purpose requirement is satisfied in cases of economic extortion. The one court to consider this requirement suggested that a bribe must do more than just increase profitability—it must be tied to a specific business advantage.⁹⁷ With economic extortion, however, money is paid to avoid being put in a worse position, and not to gain a commercial advantage in the sense of getting an unfair leg up on the competition.

Still another issue concerns situations where the lines between bribery and extortion are blurry.⁹⁸ Depending on the context of a particular bribe request, the circumstantial evidence surrounding a defendant’s mental state can be open to multiple interpretations.⁹⁹ An employee may believe that she is the victim of extortion only to find the government arguing that she committed garden-variety bribery. This becomes especially problematic in countries where practices like gift giving in commercial negotiations—which might later be classified as “bribery” by U.S. authorities—do not violate local customs or obvious social norms.¹⁰⁰

3. TERRITORIAL JURISDICTION

Issues of breadth and expansive enforcement arise again as a result of the DOJ and SEC’s approach to territorial jurisdiction under the FCPA. Unlike U.S. companies, which are subject to the FCPA’s extraterritorial jurisdiction, one way that non-U.S. companies can trigger the statute’s jurisdictional requirements is if they, “while in the territory of the United States, corruptly make use of the mails or any

97. *Kay*, 359 F.3d at 759–60.

98. It has long been true that “the same envelope filled with cash can be both a payment extorted under a threat of unfairly negative treatment and a bribe obtained under a promise of unfairly positive treatment.” James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695, 1700 (1993).

99. *See* Ribstein, *supra* note 28, at 10.

100. *See* F. Joseph Warin et al., *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VA. L. & BUS. REV. 34 (2010); Yockey, *supra* note 87, at 816. It is also not enough to argue that the FCPA’s facilitation payment exception will protect payers in these situations. Federal regulators interpret the grounds for the exception so narrowly that most firms find it of little practical value. *See infra* note 110 and accompanying text.

means or instrumentality of interstate commerce, or to do any other act in furtherance” of bribing a foreign official.¹⁰¹

Relying on this language, several years ago federal regulators began to assert FCPA jurisdiction over non-U.S. companies based on U.S. dollar wire transfers through foreign banks. These transfers typically involved the use of “correspondent” accounts held by foreign banks at U.S. banks that were maintained to clear foreign U.S. dollar transactions.¹⁰² However, whenever regulators asserted jurisdiction based on correspondent accounts they also cited other, more concrete jurisdictional facts, such as allegations that conspiratorial acts were committed on American soil.¹⁰³

This approach changed significantly in June 2011 when the DOJ and SEC alleged that the small Luxembourgian company Tenaris made use of the means and instrumentalities of interstate commerce when it transferred approximately \$32,140 through an intermediary bank in the United States to an agent acting on the company’s behalf.¹⁰⁴ Regulators did not cite any other jurisdictional hooks, and every other aspect of the alleged bribery scheme took place outside of U.S. territory. Neither the DOJ nor SEC defined “intermediary,” nor is it clear whether Tenaris controlled the U.S. bank account at issue or whether the account was the type of correspondent account describe above.¹⁰⁵ If the account was a correspondent account, this case would mark the first time that a non-U.S. company’s use of a U.S. correspondent account represented the *sole* basis for territorial jurisdiction under the FCPA.¹⁰⁶ This suggests that almost any contact with the United States, however attenuated, can result in FCPA charges.

4. FACILITATION PAYMENTS

As regulators take an expansive approach toward the FCPA’s mens rea and jurisdictional requirements, they continue to opt for a narrow interpretation of the statute’s few exceptions and affirmative defenses. This becomes particularly apparent with the FCPA’s exception for facilitation (or “grease”) payments. The facilitation payment exception provides that payments made “to expedite or to secure the performance of a routine governmental action” are exempted

101. 15 U.S.C. § 78dd-3(a) (2006).

102. SHEARMAN & STERLING LLP, *supra* note 9, at 9.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

from the FCPA's anti-bribery provisions.¹⁰⁷ The statute defines "routine governmental action" as an action that is "ordinarily and commonly performed by a foreign official."¹⁰⁸ Examples listed in the statute include payments made in connection with granting permits, processing government papers, scheduling inspections, providing power or water service, mail pick-up and delivery, providing police protection, and "actions of a similar nature."¹⁰⁹

Though U.S. domestic anti-bribery laws do not contain a similar exception, Congress found it necessary for the FCPA because certain payments that look like bribery in the United States may be considered perfectly acceptable under the cultural norms of other countries.¹¹⁰ Still, Congress emphasized that the FCPA's facilitation payment exception only applies to non-discretionary actions.¹¹¹ The FCPA's legislative history draws the distinction between permissible facilitation payments and impermissible bribes as follows: payments that "merely move a particular matter toward an eventual act or decision" fall within the exception, whereas those that "cause an official to exercise other than his free will" do not.¹¹²

Drawing this distinction is often difficult in practice,¹¹³ and the uncertainty in this area prompts many firms to adopt strict "zero tolerance" policies.¹¹⁴ However, even taking that step means running the risk that foreign public officials will retaliate in some way.¹¹⁵

107. 15 U.S.C. § 78dd-2(b) (2006).

108. § 78dd-2(h)(4)(A).

109. *Id.*

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

111. *Id.*

112. *Id.*

113. *See* Yockey, *supra* note 87, at 818-19.

114. "An October 2009 TRACE International survey about facilitating payments revealed that approximately 35% of the companies surveyed had policies prohibiting facilitating payments." Warin et al, *supra* note 100, at 64-65 (noting also that firms have also been pressured by international organizations to ban facilitation payments on the grounds that they are "corrosive" on the rule of law and overall economic development).

115. Philip Urofsky, *Extortionate Demands under the Foreign Corrupt Practices Act*, WHITE COLLAR CRIME REP. (BNA, Inc), Dec. 19, 2008, at 1, 3 (noting that such retaliation may include "delaying or even denying . . . applications for permits and licenses for real or imaginary technical noncompliance.").

B. Risk Aversion and Cover-ups

Apart from simply making compliance more difficult, expansive statutory interpretation in the FCPA context raises two other concerns when coupled with the uneasy relationship between cooperation and compliance. The first is risk aversion. If agents are unclear about what conduct will draw scrutiny from regulators, or if they believe that even the slightest contact with U.S. persons or entities could bring them within the FCPA's jurisdiction, they may refrain from pursuing legitimate, value-enhancing transactions due to fear of subsequent personal liability.

One way for firms to address risk aversion is to encourage agents to raise concerns over specific transactions with the people best able to provide guidance: company counsel. Part of any counsel's job is to draw lines, as best as she can, between permissible and impermissible activity, and then advise clients how to proceed. Counsel also has access to any regulatory guidance issued on a particular aspect of the FCPA, and can even utilize a formal mechanism for obtaining advice from the DOJ on specific transactions that may implicate the statute.¹¹⁶ But if agents know that when push comes to shove company counsel will waive privilege and turn over evidence to prosecutors during subsequent FCPA settlement negotiations, they will be less inclined at the outset to seek advice from the people who are best positioned to give it to them.¹¹⁷

A second problem that arises when agents are reluctant to seek the advice of firm counsel is the risk that they may take steps to conceal their activities. This could mean altering financial records or destroying traces of specific deals, even in situations where illegality is far from certain. The resulting lack of transparency should be of concern to firm decision-makers and their shareholders.

C. Stigma and Feelings of Unfair Treatment

The danger that agents will become discouraged from engaging in socially desirable levels of risk taking is not the only downside to cooperation as it relates to compliance. A related concern is that highly qualified agents will begin questioning whether it makes sense to work in industries that generate the most FCPA scrutiny (e.g., the extractive or pharmaceutical industries). Even if they do not flee these industries, high-quality agents will likely demand higher compensation and other

116. Foreign Corrupt Practices Act Opinion Procedure, 28 C.F.R. pt. 80 (2011).

117. See Griffin, *supra* note 5, at 347–48.

benefits, such as indemnification guarantees, to offset the risk of being drawn into an FCPA investigation.

Another, less obvious risk to firm relations is the stigmatizing dichotomy that can follow from FCPA settlements where a firm is given the benefit of a DPA and an individual agent is not. In this situation, the firm largely avoids the stigma and injury to reputation that follows from formal prosecution, but the individual agent who is charged may not if she pleads guilty to FCPA charges in a separate action. This can lead to feelings of resentment from other agents within the firm if they perceive the resulting stigma to be unfair. For instance, these agents may believe that the real reason their associate faced scrutiny was due to undue pressure to perform, and that management should accordingly share responsibility for any alleged violation.¹¹⁸

A similar issue concerns the risk that agents will feel they face arbitrary FCPA enforcement. One widely held view is that there are more FCPA violations than actual enforcement actions; that even with increased regulatory scrutiny, the overall level of bribery has not noticeably declined.¹¹⁹ If agents adopt this belief, they may perceive any scrutiny they receive to be unfair. This is especially likely if an agent believes that her counterparts at competing firms are not being investigated for the same or similar conduct,¹²⁰ or if she believes she did nothing wrong. For example, as mentioned in the context of the FCPA's mens rea requirements, an agent may feel she is the victim of extortion rather than an active bribe payer. In this situation she will likely feel inappropriately singled out if she faces separate prosecution. Other agents might then begin to distrust management if these feelings are allowed to percolate within a department or organization, which will only serve to create additional levels of internal tension.

CONCLUSION

Foreign corruption represents one of the most complex issues facing firms and regulators today. This makes the goal of deterring corruption one that is well suited for cooperation and collaboration between the public and private sectors. Unfortunately, too often "cooperation" in this context only comes under threat of formal indictment and poses the risk of creating discord within an

118. See Ian B. Lee, *Corporate Criminal Responsibility as Team-Member Responsibility*, 31 OXFORD J. LEG. STUD. 755 (2011).

119. See Hess & Ford, *supra* note 38, at 313-14.

120. *Id.* at 313 (citing a survey by Control Risks Group Limited which "found that 32% of respondents at American companies believe that their competitors" use agents who attempt to circumvent anti-bribery laws).

organization. This dynamic should be of immediate concern to regulators tasked with enforcing the FCPA. Monetary sanctions, while potent, can only go so far in addressing the root causes of agent wrongdoing within a firm. As the DOJ and SEC seem to accept, a key component to limiting bribery offenses is corporate self-policing and the establishment of a meaningful culture of compliance. But until regulators come to grips with how their FCPA enforcement posture may actually *impede* the ability of firms to develop ethical and law-abiding cultures, little headway can be made.