

A FOREIGN CORRUPT PRACTICES ACT NARRATIVE

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This article, part of an annual series, weaves together Foreign Corrupt Practices Act and related developments from 2013 into a coherent narrative of value to anyone who seeks an informed base of knowledge regarding the FCPA, its enforcement, and related legal and policy issues. Specifically, this article uses FCPA enforcement action data to highlight perennial issues associated with this new era of enforcement and otherwise discusses top FCPA or related developments from 2013. Although this article focuses on one statute and its enforcement, reference is made throughout to other significant developments in 2013 relevant to the FCPA as such references best facilitate an appreciation for many of the controversial aspects of FCPA enforcement.

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This article is part of a continuing series by the author of yearly analysis of FCPA enforcement data and related issues. See Mike Koehler, *An Examination of Foreign Corrupt Practices Act Issues*, 12 RICH. J. GLOBAL L. & BUS. 317 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298644, Mike Koehler, *The Foreign Corrupt Practices Act Under the Microscope*, 15 U. PA. J. BUS. L. 1 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191149, Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. TOL. L. REV. 99 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1971021, Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1599725.

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INTRODUCTION

This article, part of an annual series, weaves together Foreign Corrupt Practices Act and related developments from 2013 into a coherent narrative of value to anyone who seeks an informed base of knowledge regarding the FCPA, its enforcement, and related legal and policy issues. Specifically, this article uses FCPA enforcement action data to highlight perennial issues associated with this new era of FCPA enforcement and otherwise discusses top FCPA or related developments from 2013. Although this article focuses on one statute and its enforcement, reference is made throughout to other significant developments in 2013 relevant to the FCPA as such references best facilitate an appreciation for many of the controversial aspects of FCPA enforcement.

Part I of this article highlights various FCPA enforcement statistics from 2013 and places the statistics in a proper and historical perspective.

Part II of this article uses certain statistics to highlight perennial issues associated with this new era of FCPA enforcement. The following issues will be discussed: (i) the prominent role non-prosecution, deferred prosecution agreements, and administrative settlements have in corporate FCPA enforcement and how criticism of these resolution vehicles continues to mount; (ii) the wide gap between corporate and individual FCPA enforcement actions and a relevant data point that helps explain the gap; and (iii) how the financial consequences of corporate FCPA scrutiny and FCPA enforcement continue to rise, how FCPA settlement amounts have come a long way in a short amount of time, and how certain excesses have come to define FCPA scrutiny.

Part III of this article highlights other top FCPA or related developments from 2013 and uses these developments to spotlight the following issues: (i) certain alarming enforcement actions and why anyone who values the rule of law should be concerned by these actions; (ii) actual judicial scrutiny of FCPA

enforcement agency theories as well as how non-FCPA legal developments should cause pause as to certain FCPA enforcement theories; (iii) FCPA enforcement agency speeches and policy positions; and (iv) certain uncomfortable truths and double standards regarding the U.S. fight against bribery and corruption.

I. 2013 FCPA ENFORCEMENT OVERVIEW

Part I of this article highlights various FCPA enforcement statistics from 2013 and places the statistics in a proper and historical perspective.

This section begins by highlighting various corporate FCPA enforcement statistics from 2013.

A. DOJ Corporate FCPA Enforcement

As demonstrated in Table I, in seven corporate FCPA enforcement actions¹ in 2013, the DOJ collected approximately \$420 million in settlement amounts.

1. Corporate FCPA enforcement statistics in this article use the “core” approach. The core approach focuses on unique instances of corporate conduct regardless of whether the conduct at issue involves a DOJ or SEC enforcement action or both (as is frequently the case), regardless of whether the corporate enforcement action involves a parent company, a subsidiary or both (as is frequently the case), and regardless of whether the DOJ and/or SEC bring any related individual enforcement actions (as is occasionally the case). For additional information on this method of quantifying FCPA enforcement, see *What is an FCPA Enforcement Action?*, FCPA PROFESSOR (Jan. 7, 2013), <http://www.fcpaprofessor.com/what-is-an-fcpa-enforcement-action>. This method of computing FCPA statistics is consistent with the DOJ’s approach, and it is a commonly accepted method used by other scholars in other areas. See *Friday Roundup*, FCPA PROFESSOR (Mar. 22, 2013), <http://www.fcpaprofessor.com/friday-roundup-72> (quoting DOJ’s FCPA Unit Chief). See, e.g., Michael Klausner & Jason Hegland, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION, *SEC Practice In Targeting and Penalizing Individual Defendants* (Sept. 3, 2013), <http://blogs.law.harvard.edu/corpgov/2013/09/03/sec-practice-in-targeting-and-penalizing-individual-defendants/>.

Table I
2013 DOJ Corporate FCPA Enforcement Actions

Company	Fine	Resolution Vehicle ²	Origin ³	Related Individual Action ⁴
Arthur Daniels Midland ⁵	\$17.7 million	Plea / NPA ⁶	Voluntary Disclosure	No
Bilfinger ⁷	\$32 million	DPA	Voluntary Disclosure ⁸	No

2. DPA refers to a deferred prosecution agreement and NPA refers to a non-prosecution agreement. To learn more about these agreements in the FCPA context, see *The Façade*, *supra* note *.

3. Refers to the event or events that initially prompted the scrutiny that resulted in the FCPA enforcement action.

4. Refers to employees of the corporate entity resolving the FCPA enforcement action.

5. Press Release, *ADM Subsidiary Pleads Guilty to Conspiracy to Violate the Foreign Corrupt Practices Act*, U.S. DEP'T OF JUSTICE (Dec. 20, 2013), <http://www.justice.gov/opa/pr/2013/December/13-crm-1356.html>.

6. *Id.* (the enforcement action involved a criminal information against Alfred Toepfler International Ukraine, an indirectly owned subsidiary of ADM, as well as an NPA with ADM).

7. Press Release, *German Engineering Firm Bilfinger Resolves Foreign Corrupt Practices Act Charges and Agrees to Pay \$32 Million Criminal Penalty*, U.S. DEP'T OF JUSTICE (Dec. 11, 2013), <http://www.justice.gov/opa/pr/2013/December/13-crm-1297.html>.

8. The enforcement action was the direct result of the 2008 Willbros enforcement action, which was the result of a voluntary disclosure. See *German Company Resolves FCPA Enforcement Action Based On Conduct From "Distant Past,"* FCPA PROFESSOR (Dec. 10, 2013), <http://www.fcprofessor.com/german-company-resolves-fcpa-enforcement-action-based-on-conduct-from-the-distant-past>.

Weatherford ⁹ International	\$87.2 million	Plea / DPA ¹⁰	Iraq Oil for Food Action ¹¹	No
Diebold ¹²	\$25.2 million	DPA	Voluntary Disclosure	No
Total ¹³	\$245.2 million	DPA	Industry Sweep ¹⁴	No
Ralph Lauren ¹⁵	\$882,000	NPA	Voluntary Disclosure	No

9. Press Release, *Three Subsidiaries of Weatherford International Limited Agree to Plead Guilty to FCPA and Export Control Violations*, U.S. DEP'T OF JUSTICE (Nov. 26, 2013), <http://www.justice.gov/opa/pr/2013/November/13-crm-1260.html>.

10. *Id.* The enforcement action involved a criminal information against Weatherford Services Ltd, a subsidiary of Weatherford International, as well as a DPA with Weatherford International.

11. In 2005, the so-called Volcker Report on the United Nations Iraq Oil for Food Program was published and it served as a ready-made list of FCPA enforcement actions. Among other things, the Volcker report detailed illicit payments in connection with oil transactions under the Oil for Food Program and illicit payments in connection with humanitarian goods under the Program. See INDEP. INQUIRY COMM. INTO THE UNITED NATIONS OIL-FOR-FOOD PROGRAMME, MANIPULATION OF THE OIL-FOR-FOOD PROGRAMME BY THE IRAQI REGIME (Oct. 27, 2005), available at http://www.foxnews.com/projects/pdf/final_off_report.pdf.

12. Press Release, *Diebold Incorporated Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$25.2 Million Criminal Penalty*, U.S. DEP'T OF JUSTICE (Oct. 22, 2013), <http://www.justice.gov/opa/pr/2013/October/13-crm-1118.html>.

13. Press Release, *French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme*, U.S. DEP'T OF JUSTICE (May 29, 2013), <http://www.justice.gov/opa/pr/2013/May/13-crm-613.html>.

14. Prior to the enforcement action, Total disclosed: "In 2003, the SEC followed by the DOJ issued a formal order directing an investigation in connection with the pursuit of business in Iran by certain oil companies, including among others, total." Total S.A., Form 20-F, <http://www.sec.gov/Archives/edgar/data/879764/000119312513131274/d480565d20f.htm>.

15. Press Release, *Ralph Lauren Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$882,000 Monetary Penalty*, U.S. DEP'T OF JUSTICE (Apr. 22, 2013), <http://www.justice.gov/opa/pr/2013/April/13-crm-456.html>.

Parker Drilling ¹⁶	\$11.8 million	DPA	Industry Sweep ¹⁷	No
<u>TOTAL</u>	\$420 million			

B. SEC Corporate FCPA Enforcement

As demonstrated in Table II, in eight corporate FCPA enforcement actions in 2013, the SEC collected approximately \$300 million in settlement amounts.

Table II
2013 SEC Corporate FCPA Enforcement Actions

Company	Settlement Amount	Resolution Vehicle	Origin	Related Individual Action
Archer Daniels Midland ¹⁸	\$36.5 million	Settled Civil Complaint	Voluntary Disclosure	No
Weatherford International ¹⁹	\$65.6 million	Settled Civil Complaint	Iraq Oil for Food Action	No

16. Press Release, *Parker Drilling Company Resolves FCPA Investigation and Agrees to Pay \$11.76 Million Penalty*, U.S. DEP'T OF JUSTICE (Apr. 16, 2013), <http://www.justice.gov/opa/pr/2013/April/13-crm-431.html>.

17. *Id.* In 2010, several oil and gas companies that utilized the services of freight-forwarder Panalpina resolved an FCPA enforcement action which focused, in large part, on payments made by Panalpina to Nigerian customs officials on behalf of the companies. The Parker Drilling enforcement action was connected to this enforcement action. *Id.*

18. Press Release, *SEC Charges Archer-Daniels-Midland Co. With FCPA Violations*, U.S. SEC. & EXCH. COMM'N (Dec. 20, 2013), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540535139>.

19. Press Release, *SEC Charges Weatherford Int'l With FCPA Violations*, U.S. SEC. & EXCH. COMM'N (Nov. 26, 2013), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540415694>.

Stryker ²⁰	\$13.2 million	Administrative Cease and Desist Order	Industry Sweep ²¹	No
Diebold ²²	\$22.9 million	Settled Civil Complaint	Voluntary Disclosure	No
Total ²³	\$153 million	Administrative Cease and Desist Order	Industry Sweep	No
Ralph Lauren ²⁴	\$735,000	NPA	Voluntary Disclosure	No
Parker Drilling ²⁵	\$4 million	Settled Civil Complaint	Industry Sweep	No

20. Press Release, *SEC Charges Stryker Corp. With FCPA Violations*, U.S. SEC. & EXCH. COMM'N (Oct. 24, 2013), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540044262>.

21. The company had previously disclosed: "In October 2007, the company disclosed that the SEC has made an informal inquiry of the Company regarding possible violations of the FCPA in connection with the sale of medical devices in certain foreign countries." *SEC Enforcement Of The FCPA – Year In Review*, FCPA PROFESSOR (Jan 6, 2014) <http://www.fcprofessor.com/sec-enforcement-of-the-fcpa-year-in-review-3>. This inquiry is commonly associated with the FCPA scrutiny of other healthcare-related companies, scrutiny that has resulted in several other FCPA enforcements. *See, e.g., Year In Review Roundups*, FCPA PROFESSOR (Jan. 11, 2013), <http://www.fcprofessor.com/year-in-review-roundups> (noting that in 2012, 50% of corporate FCPA enforcement actions were against pharmaceutical or health care related companies).

22. Press Release, *SEC Charges Diebold With FCPA Violations*, U.S. SEC. & EXCH. COMM'N (Oct. 22, 2013), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539977273>.

23. Press Release, *SEC Charges Total S.A. for Illegal Payments to Iranian Official*, U.S. SEC. & EXCH. COMM'N (May 29, 2013), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171575006>.

24. Press Release, *SEC Announces Non-Prosecution Agreement With Ralph Lauren Corp. Involving FCPA Misconduct*, U.S. SEC. & EXCH. COMM'N (Apr. 22, 2013), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514780>.

25. Litigation Release, *SEC Charges Parker Drilling Co. with Violating the Foreign Corrupt Practices Act*, U.S. SEC. & EXCH. COMM'N (Apr. 16, 2013), <http://www.sec.gov/litigation/litreleases/2013/lr22672.htm>.

Philips Electronics ²⁶	\$4.5 million	Administrative Cease and Desist Order	Foreign Law Enforcement Investigation ²⁷	No
TOTAL	\$300 million			

Analyzing DOJ and SEC FCPA enforcement data separately in Tables I and II above is useful and informative given that the DOJ and SEC are separate law enforcement agencies and different issues may arise in DOJ and SEC FCPA enforcement actions.²⁸ On the other hand, analyzing DOJ and SEC FCPA

26. *Koninklijke Philips Electronics N.V.*, S.E.C. 3-15265 (Apr. 5, 2013), available at <http://www.sec.gov/litigation/admin/2013/34-69327.pdf>.

27. As disclosed by the company, a Polish law enforcement investigation prompted the company to conduct an internal investigation, which it then disclosed to the DOJ and SEC.

28. As evident from Tables I and II, there is substantial overlap between DOJ's and SEC's FCPA enforcement programs. FCPA enforcement actions against issuers typically involve related and coordinated enforcement actions by the DOJ for criminal FCPA violations (whether anti-bribery violations or books and records and internal control violations) and by the SEC for civil FCPA violations (whether anti-bribery violations or books and records and internal control violations). Enforcement actions from 2013 fitting this pattern include: ADM, Weatherford Int'l, Diebold, Total, Ralph Lauren, and Parker Drilling. The overlap, however, between DOJ's and SEC's FCPA enforcement programs is not complete. As a general matter, the SEC has jurisdiction over "issuers" (companies – domestic and foreign – with shares registered on a U.S. exchange or otherwise required to make filings with the SEC). In other words, the SEC generally does not have jurisdiction over private companies or foreign companies that are not issuers. Thus, certain FCPA enforcement actions from 2013, such as Bilfinger, did not have an SEC component. As a general matter, the DOJ has criminal jurisdiction over "issuers," "domestic concerns," (i.e. any business entity with a principal place of business in the U.S. or organized under U.S. law), and non-U.S. companies and persons to the extent a bribery scheme involved conduct "while in the territory of the U.S." In addition, the DOJ has a higher burden of proof in a criminal prosecution. As a result, and given the DOJ's prosecutorial discretion, certain FCPA enforcement actions in 2013 such as Stryker and Philips Electronics only included an SEC component. As to the DOJ's discretion, the DOJ has stated that it "has declined to prosecute both individuals and corporate entities in numerous cases based on the particular facts and circumstances presented in those matters, taking into account the available evidence." *See* THE

enforcement data in the aggregate is also useful and informative in that it provides a comprehensive view of FCPA enforcement.

C. Aggregate Corporate FCPA Enforcement

In 2013, the DOJ and SEC jointly collected approximately \$720 million in nine corporate enforcement actions. The average settlement amount was approximately \$80 million and the median was approximately \$32 million. The range of settlements was, on the high end, \$398 million (Total), and on the low end, \$1.6 million (Ralph Lauren).

As in most years, certain FCPA enforcement actions significantly skewed yearly enforcement statistics. For instance, one enforcement action (Total) represented approximately 55% of the total settlement amount and two enforcement actions (Total and Weatherford Int'l) represented approximately 77% of the total settlement amount.

A popular issue, or so it seems, is to analyze whether FCPA enforcement is up or down in any given year. Such year-to-year FCPA enforcement statistics, and the arbitrary cutoffs associated with them, are of marginal value however given that many non-substantive factors can influence the timing of an actual corporate FCPA enforcement action.²⁹

CRIMINAL DIV. OF THE U.S. DEP'T OF JUSTICE & THE ENFORCEMENT DIV. OF THE U.S. SEC. AND EXCHANGE COMM'N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 75 (Nov. 14, 2012), *available at* <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>. Based on information in the DOJ and SEC authored Guide, it appears that factors motivating a so-called declination include voluntary disclosure and cooperation, effective remedial measures, and small improper payments. *Id.* at 77-79. In addition, the DOJ has separately stated that it has declined prosecutions when, among other things, a single employee, and no other employee, was involved in the improper payments at issue; and the improper payments at issue involved minimal funds compared to the overall business revenues. *See DOJ Declines to Get Specific in Declination Responses*, FCPA PROFESSOR (Oct. 12, 2011), <http://www.fcpaprofessor.com/doj-declines-to-get-specific-in-declination-responses>.

29. Because FCPA enforcement actions that involve both a DOJ and SEC component are typically announced on the same day, and because the DOJ and SEC are separate enforcement agencies, it is common for FCPA

Nevertheless and accepting year-to-year FCPA statistics for what they are, the issue remains: how best to analyze and interpret FCPA statistics over time? As demonstrated by the below tables, arguments can be made that corporate FCPA enforcement was down and up in 2013 compared to 2012 and prior years.

The below tables use the “core” approach and demonstrate that both DOJ and SEC corporate enforcement in 2013 was down from historical averages.³⁰

Table III
Corporate DOJ FCPA Enforcement Actions (2010 – 2013)

Year	Core Actions
2013	7
2012	9
2011	11
2010	17

Table IV
Corporate SEC FCPA Enforcement Actions (2010 – 2013)

Year	Core Actions
2013	8
2012	8

enforcement actions to be delayed while one agency waits for the other to finish its investigation of the conduct at issue and to finish its negotiation of a resolution with a company. Additional non-substantive factors that can influence the timing of an FCPA enforcement action, although far from an exclusive list, include DOJ and SEC staffing issues (including employee departures or leaves), as well as securing corporate board approval for resolving an FCPA enforcement action.

30. *Corporate FCPA Enforcement Was Down In 2013, Or Was It Up, Or Was It Down?* FCPA PROFESSOR (Jan. 9, 2014), <http://www.fcpa-professor.com/corporate-fcpa-enforcement-was-down-in-2013-or-was-it-up-or-was-it-down>.

2011	13
2010	19

However, if one analyzes corporate FCPA enforcement statistics based on settlement amounts, corporate FCPA enforcement was up in 2013 compared to the two previous years.

Table V
Corporate DOJ FCPA Enforcement Action Settlement Amounts
(2010 – 2013)

Year	Settlement Amounts
2013	\$420 million
2012	\$142 million
2011	\$355 million
2010	\$870 million

Table VI
SEC FCPA Enforcement Action Settlement Amounts
(2010 – 2013)

Year	Settlement Amounts
2013	\$300 million
2012	\$118 million
2011	\$148 million
2010	\$530 million

What is the best way to analyze and interpret these statistics? Consider the following analogy. In year 1, a city issues 100 speeding tickets and collects \$20,000 in fines on those tickets. In year 2, a city issues 90 speeding tickets; however, because certain drivers were going really fast, the city collects \$25,000 in fines on those tickets. Was there less enforcement in year 2 compared to year 1? Most, it is assumed, would say that

enforcement in year 2 was less than in year 1 even though in year 2 the city collected more money from speeding tickets.

The same logic applies to year-to-year FCPA statistics and for this reason it is more accurate and reliable to analyze FCPA enforcement statistics by focusing on unique instances of FCPA scrutiny (and not settlement amounts) and tracking enforcement actions using the “core” approach. Using this approach, corporate FCPA enforcement in 2013 was down compared to historical averages, and indeed, 2013 saw the lowest number of core enforcement actions since 2007.

This point is best demonstrated by the below table which aggregates DOJ and SEC enforcement statistics over time and highlights notable circumstances which significantly skewed enforcement data statistics in any particular year.

Table VII
Corporate FCPA Enforcement Actions (2007 – 2013)

Year	Core Actions	Settlement Amounts	Of Note
2007	15	\$149 million	Six enforcement actions involved Iraq Oil for Food conduct and these enforcement actions comprised 40% of all enforcement actions and approximately 50% of the \$149 million amount.
2008	10	\$885 million	The \$800 million Siemens enforcement action comprised approximately 90% of the \$885 million amount.
2009	11	\$645 million	The \$579 million KBR / Halliburton Bonny Island, Nigeria enforcement action comprised approximately 90% of the \$645 million amount.
2010	21	\$1.4 billion	Six enforcement actions, all resolved on the same day,

			<p>involved various oil and gas companies use of Panalpina in Nigeria. Panalpina also resolved an enforcement action on the same day.</p> <p>Two enforcement actions (Technip and Eni / Snamprogetti) involved Bonny Island conduct.</p> <p>In other words, there were 14 unique corporate enforcement actions in 2010. Of further note, the two Bonny Island enforcement actions, Technip (\$338 million) and Eni/Snamprogetti (\$365 million) comprised approximately 50% of the \$1.4 billion amount.</p>
2011	16	\$503 million	The \$219 million JGC Corp. enforcement action involved Bonny Island conduct and comprised approximately 44% of the \$503 million amount.
2012	12	\$260 million	No enforcement actions significantly skewed the statistics.
2013	9	\$720 million	The \$398 million Total enforcement action comprised approximately 55% of the \$720 million amount.
TOTALS	94	\$4.63 billion	

D. Individual FCPA Enforcement

In 2013 the DOJ filed or announced FCPA criminal charges against 12 individuals as demonstrated in Table VII. In 2013, the SEC did not bring any FCPA civil charges against individuals.

Table VII
2013 Individual FCPA Enforcement Actions

Individual	Employer / Former Employer	Related Corporate Enforcement Action
Alain Riedo ³¹	Maxwell Technologies	Yes, in 2011 Maxwell Technologies resolved an FCPA enforcement action based on the same core conduct. ³²
Lawrence Hoskins Frederic Pierucci David Rothschild William Pomponi ³³	Alstom, S.A.	No, although Alstom remains the subject of FCPA scrutiny.
Tomas Clark Alejandro Hurtado Lujana Ernesto ³⁴	Direct Access Partners	No

31. Indictment, United States v. Riedo, No. 13CR3789JM (S. D. Cal. Oct. 15, 2013), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/reidoa/Riedo_Indictment.pdf.

32. *Maxwell Technologies is the First Corporate Enforcement Action of 2011*, FCPA PROFESSOR (Feb. 2, 2011), <http://www.fcpaprofessor.com/maxwell-technologies-is-the-first-corporate-enforcement-action-of-2011>.

33. Press Release, *Former Senior Executive of French Power Company Charged in Connection with Foreign Bribery Scheme*, U.S. DEP'T OF JUSTICE (July 30, 2013), <http://www.justice.gov/opa/pr/2013/July/13-crm-862.html>.

Bernd Kowalewski Jald Jensen Peter DuBois Neal Uhl ³⁵	BizJet International	Yes, in 2012 BizJet resolved an FCPA enforcement action based on the same core conduct. ³⁶
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Tables VIII and IV provide a historical overview of DOJ and SEC individual FCPA enforcement actions between 2007 and 2013. As indicated in the tables, DOJ individual FCPA enforcement actions in 2013 were up from the previous two years, yet below the number of individual actions in 2010, 2009, and 2008. SEC individual FCPA enforcement actions in 2013 were down from the previous year and significantly below historical averages.

Table VIII
 DOJ Individual FCPA Enforcement Actions³⁷

Year	Individuals Charged With Criminal FCPA Offenses
2013	12
2012	2
2011	10
2010	33

34. Press Release, *Managing Partner of U.S. Broker-Dealer Charged in Manhattan Federal Court with Participating in Massive International Bribery Scheme*, U.S. DEP'T OF JUSTICE (June 12, 2013), <http://www.justice.gov/opa/pr/2013/June/13-crm-670.html>.

35. Press Release, *Four Former Executives of Lufthansa Subsidiary Bizjet Charged with Foreign Bribery*, U.S. DEP'T OF JUSTICE (Apr. 5, 2013), <http://www.justice.gov/opa/pr/2013/April/13-crm-388.html>.

36. *BizJet FCPA Enforcement Action Involves Executive Conduct*, FCPA PROFESSOR (Mar. 15, 2012), <http://www.fcpaprofessor.com/bizjet-fcpa-enforcement-action-involves-executive-conduct>.

37. *A Focus On DOJ FCPA Individual Prosecutions*, FCPA PROFESSOR (Jan. 20, 2014), <http://www.fcpaprofessor.com/a-focus-on-doj-fcpa-individual-prosecutions-2>.

	(including 22 in the Africa Sting case)
2009	18
2008	14
2007	7

Table IX
SEC Individual FCPA Enforcement Actions³⁸

Year	Individuals Charged With Civil FCPA Offenses
2013	0
2012	4
2011	12
2010	7
2009	5
2008	5
2007	7

With a proper foundation in FCPA statistics, both in 2013 and over time, this article next uses certain statistics to highlight perennial issues associated with this new era of FCPA enforcement.

II. ISSUES HIGHLIGHTED BY THE STATISTICS

Part II of this article uses certain FCPA statistics from 2013 to highlight perennial issues associated with this new era of FCPA enforcement. The following issues are discussed: (i) the prominent role non-prosecution and deferred prosecution agreements, as well as administrative settlements, have in corporate FCPA enforcement and how criticism of these resolution vehicles continues to mount; (ii) the wide gap between

38. *A Focus On SEC FCPA Individual Prosecutions*, FCPA PROFESSOR (Jan. 22, 2014), <http://www.fcprofessor.com/a-focus-on-sec-fcpa-individual-actions-2>.

corporate and individual FCPA enforcement actions and a relevant data point that helps explain the gap; and (iii) how the financial consequences of corporate FCPA scrutiny and FCPA enforcement continue to rise, how FCPA settlement amounts have come a long way in short amount of time, and how certain excesses have come to define FCPA scrutiny.

A. NPAs / DPAs, Administrative Settlements, and Mounting Criticism

As indicated in Table I, in 2013 100% of corporate DOJ enforcement actions involved, in whole or in part, an NPA or a DPA. As indicated in Table II, in 2013 the SEC also used an NPA for the first time in the FCPA context, and several other enforcement actions were resolved through administrative cease and desist orders. The common thread in all of these resolution vehicles was the absence of meaningful judicial scrutiny of FCPA enforcement theories and in 2013 criticism of such resolution vehicles continued to mount.

1. DOJ Resolution Vehicles

For most of the FCPA's history, the DOJ had two choices when faced with conduct that might implicate the FCPA: prosecute or do not prosecute. In 2004, the DOJ used, for the first time in the FCPA context, a third option – an NPA.³⁹ NPAs and related DPAs (together “alternative resolution vehicles”) are now a prominent feature of corporate FCPA enforcement.⁴⁰

NPAs and DPAs are used in other areas of law, but the most prominent use of such resolution vehicles is in FCPA enforcement actions. According to the law firm Gibson Dunn, of

39. Press Release, *Invision Technologies, Inc. Enters Into Agreement with the United States*, U.S. DEP'T OF JUSTICE (Dec. 6, 2004), http://www.justice.gov/opa/pr/2004/December/04_crm_780.htm.

40. For an extensive description of NPAs and DPAs and the controversial issues associated with them, see, e.g., *The Facade*, *supra* note *; *Corrupt Practices*, *supra* note *.

the 28 NPAs or DPAs the DOJ (or SEC) entered into in 2013, 8 (28%) were in FCPA enforcement actions and the FCPA was the single largest source of NPAs and DPAs in 2013 in terms of primary allegation.⁴¹

Criticism of NPAs and DPAs mounted in 2013. For instance, Judge Jed Rakoff, an influential judge in the Southern District of New York, criticized various common aspects of corporate criminal law enforcement, including DPAs, as “both technically and morally suspect.”⁴² Although Judge Rakoff’s comments were not FCPA specific, his concerns apply equally to the FCPA context.

In a speech titled “Why Have No High Level Executives Been Prosecuted in Connection with the Financial Crisis,” Judge Rakoff hit on many issues relevant to FCPA enforcement actions resolved through alternative resolution vehicles.⁴³ In answering his own question, Judge Rakoff offered that “one possibility ... is that no fraud was committed. This possibility should not be discounted.”⁴⁴

Rhetorically asking “so ... what’s really going on here,” Judge Rakoff offered various “influences” which “have had the effect of limiting such [individual] prosecutions” including the “most important” which he said was the “shift that has occurred

41. GIBSON DUNN, *2013 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, (Jan. 7, 2014), <http://www.gibsondunn.com/publications/Pages/2013-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx>. According to previous Gibson Dunn reports on this subject, in 2012 (a year which saw a large number of trade sanctions, export controls, and money laundering enforcement actions resolved via NPAs or DPAs) 23% of all NPAs and DPAs were in FCPA enforcement actions; in 2011, approximately 40% of DOJ NPAs or DPAs were in FCPA enforcement actions; and in 2010, approximately 50% of DOJ NPAs or DPAs were in FCPA enforcement actions.

42. Hon. Jed S. Rakoff, *Why Have No High Level Executives Been Prosecuted In Connection With The Financial Crisis?*, at 13 (Nov. 12, 2013), <http://im.ft-static.com/content/images/cb1e43f2-4be6-11e3-8203-00144feabdc0.pdf>.

43. *Id.*

44. *Id.* at 3.

over the past 30 years or more from focusing on prosecuting high-level individuals to focusing on prosecuting companies and other institutions.”⁴⁵

Judge Rakoff stated:

It is true that prosecutors have brought criminal charges against companies for well over a hundred years, but, until recently, such prosecutions were the exception, and prosecutions of companies without simultaneous prosecutions of their managerial agents were even rarer. These reasons were obvious. Companies do not commit crimes; only their agents do [...] so why not prosecute the agent who actually committed the crime?

In recent decades, however, prosecutors have been increasingly attracted to prosecuting companies, often even without indicting a single individual. This shift has often been rationalized as part of an attempt to transform ‘corporate cultures,’ so as to prevent future such crimes; and, as a result, it has taken the form of ‘deferred prosecution agreements; or even ‘non-prosecution agreements,’ in which the company, under threat of criminal prosecution, agrees to take various prophylactic measures to prevent future wrongdoing. But in practice, I suggest, it has led to some lax and dubious behavior on the part of prosecutors, with deleterious results.⁴⁶

In contrast to a situation in which a prosecutor attempts to discover the individuals responsible for alleged misconduct, Judge Rakoff stated that if a prosecutor’s “priority is prosecuting a company,” the following scenario occurs.

Early in the investigation, [the prosecutor] invites in counsel to the company and explains to him why [the prosecutor] suspects fraud. [Counsel] responds by assuring [the prosecutor] that the company wants to cooperate and do the right thing, and to that end the company has hired a former Assistant U.S. Attorney, now a partner at a respected law firm,

45. *Id.* at 9, 10, 14.

46. *Id.* at 14-15.

to do an internal investigation. The company's counsel asks [the prosecutor] to defer [the prosecutor's] investigation until the company's own internal investigation is completed, on the condition that the company will share its results with [the prosecutor]. In order to save time and resources, [the prosecutor] agrees. Six months later the company's counsel returns, with a detailed report showing that mistakes were made but that the company is now intent on correcting them. [The prosecutor] and the company then agree that the company will enter into a deferred prosecution agreement that couples some immediate fines with the imposition of expensive but internal prophylactic measures. For all practical purposes the case is now over. [The prosecutor] is happy because [he/she] believes that [he/she] has helped prevent future crimes; the company is happy because it has avoided a devastating indictment; and perhaps the happiest of all are the executives, or former executives, who actually committed the underlying misconduct, for they are left untouched.

I suggest that this is not the best way to proceed. Although it is supposedly justified in terms of preventing future crimes, I suggest that the future deterrent value of successfully prosecuting individuals far outweighs the prophylactic benefits of imposing internal compliance measures that are often little more than window-dressing. Just going after the company is also both technically and morally suspect. It is technically suspect because, under the law, you should not indict or threaten to indict a company unless you can prove beyond a reasonable doubt that some managerial agent of the company committed the alleged crime; and if you can prove that, why not indict the manager? And from a moral standpoint, punishing a company and its many innocent employees and shareholders for the crimes committed by some unprosecuted individuals seems contrary to elementary notions of moral responsibility.⁴⁷

In addition to Judge Rakoff's valid criticisms of various common aspects of corporate criminal law enforcement

47. *Id.* at 16-18.

including DPAs, 2013 also witnessed much needed development of the contested issue of whether the judiciary has any actual authority over the approval or rejection of such alternative resolution vehicles.

In a notable case, albeit outside the FCPA context, U.S. District Court Judge John Gleeson (E.D.N.Y) stated that a pending federal criminal case is “not window dressing” nor is the court “a potted plant” in concluding that a federal court does indeed have supervisory authority over the DPA process.

By way of background, the DOJ filed a criminal information charging HSBC Bank USA with violations of the Bank Secrecy Act for willfully failing to maintain an effective anti-money laundering program as well as willfully facilitating financial transactions on behalf of sanctioned entities in violation of the International Emergency Economic Powers Act and the Trading with the Enemy Act.⁴⁸ The charges were resolved via a DPA in which HSBC agreed to forfeit approximately \$1.3 billion and the company further agreed to pay \$665 million in civil penalties.⁴⁹

Soon thereafter, Judge Gleeson noted at a status conference that the court had authority to accept or reject the DPA and requested that the parties respond to the question of whether the DPA would yield a result consistent with the goals of the federal sentencing scheme.

Judge Gleeson approved the DPA, but that is not what is notable from this case.⁵⁰ What is notable is that Judge Gleeson rejected the DOJ’s position (and HSBC’s position) that the court lacked authority to approve of the DPA. Judge Gleeson stated:

This Court has authority to approve or reject the DPA pursuant to its supervisory power. The supervisory power . . . permits federal courts to supervise ‘the administration of

48. Press Release, *HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit \$1.256 Billion in Deferred Prosecution Agreement*, U.S. DEP’T OF JUSTICE (Dec. 11, 2012), <http://www.justice.gov/opa/pr/2012/December/12-crm-1478.html>.

49. *Id.*

50. U.S. v. HSBC Bank, No. 12-CR-763 (E.D.N.Y. 2012), <http://www.wlrk.com/docs/HSBC.PDF>.

criminal justice’ among the parties before the bar. [...] One of the primary purposes of the supervisory power is to protect the integrity of judicial proceedings. [...] Both parties assert that the Court lacks any inherent authority over the approval or implementation of the DPA. They argue that the Court’s authority is limited to deciding, in the present, whether to invoke an exclusion of time under the Speedy Trial Act and, in the distant future, whether to dismiss the charges against HSBC. I conclude that the Court’s authority in this setting is not nearly as cabined as the parties contend it is.

The government has absolute discretion to decide not to prosecute. Even a formal, written agreement to that effect, which is often referred to as a ‘non-prosecution agreement,’ is not the business of the courts. In addition, the government has near-absolute power under Fed. R. Crim. P. 48(a) to extinguish a case that it has brought. In my view, if the government were now moving to dismiss this case, it would be an abuse of discretion to deny that motion.

The government has chosen neither of those paths. Rather, it has built into the DPA with HSBC a criminal prosecution that will remain pending (assuming all goes well) for at least five years. Just as a non-prosecution agreement is perceived as a public relations benefit to a company, perhaps the filing and maintenance of criminal charges was intended to produce a public relations benefit for the government. But for whatever reason or reasons, the contracting parties have chosen to implicate the Court in their resolution of this matter. There is nothing wrong with that, but a pending federal criminal case is not window dressing. Nor is the Court, to borrow a famous phrase, a potted plant. By placing a criminal matter on the docket of a federal court, the parties have subjected their DPA to the legitimate exercise of that court’s authority.

The courts ‘are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement.’ The inherent supervisory power serves to ensure that the courts do not lend a judicial imprimatur to any aspect of a criminal proceeding that smacks of lawlessness or impropriety. ‘The court protects itself.’ The parties have asked the Court to lend precisely such a judicial imprimatur to the

DPA, by arranging for its implementation within the confines of a pending case. The Court will therefore exercise its supervisory authority over the DPA.

I recognize that the exercise of supervisory power in this context is novel. In the typical supervisory power case, the defendant raises a purported impropriety in the federal criminal proceeding and seeks the court's redress of that impropriety. In the deferred prosecution context, the defendant is presented with the opportunity for diversion from the criminal proceeding altogether. For obvious reasons, a defendant in these circumstances is less likely to raise a purported impropriety with the process, let alone seek the court's aid in redressing it, given the risk of derailing the deferral of prosecution.

Nevertheless, it is easy to imagine circumstances in which a deferred prosecution agreement, or the implementation of such an agreement, so transgresses the bounds of lawfulness or propriety as to warrant judicial intervention to protect the integrity of the Court.

[...]

I do not intend to catalog all of the possible situations that might implicate the Court's supervisory power in this case. I couldn't even if I wanted to; the exercise would amount to looking through a glass, darkly, at five years of potential future developments in the case. What I can say with certainty is that by placing the DPA on the Court's radar screen in the form of a pending criminal matter, the parties have submitted to far more judicial authority than they claim exists.⁵¹

Judge Gleeson's conclusion that courts have inherent supervisory authority over the DPA process was welcome and time will tell whether his analysis will be followed by other federal court judges who have DPAs placed on their dockets.

51. *Id.* at 6-13.

At the same time, Judge Gleeson's observation that NPAs are "not the business of the courts" was disappointing. It elevated form over substance and gives the DOJ a green light – indeed a further incentive – to use NPAs to resolve alleged instances of corporate criminal liability and thereby bypass the judicial system altogether and insulate its enforcement theories from judicial scrutiny. At the very least, Judge Gleeson's order, along with Judge Rakoff's comments, started a conversation as to the judiciary's role in the alternate reality that the DOJ has created and championed through its use of alternative resolution vehicles.

To be sure, it is an important legal and policy conversation to have. Use of alternative resolution vehicles to resolve alleged corporate criminal liability in the FCPA context presents two distinct, yet equally problematic, public policy issues. The first is that such vehicles, because they do not result in any actual charges filed against a company – and thus do not require the company to plead guilty to any charges – allow egregious instances of corporate conduct to be resolved too lightly without adequate sanctions and without achieving maximum deterrence. The second is that such vehicles, because of the same factors discussed above, nudge companies to agree to the vehicles for reasons of risk-aversion and efficiency and not necessarily because the conduct at issue actually violates the FCPA.⁵²

Use of alternative resolution vehicles in the FCPA context thus contribute both to "over-prosecution" of business conduct while at the same time allowing "under-prosecution" of egregious instances of corporate bribery." Moreover, NPAs and DPAs insulate DOJ's FCPA enforcement theories from judicial scrutiny in all but the rarest of circumstances and allow the DOJ to play prosecutor, judge, and jury all at the same time.

Indeed, in 2013 former U.S. Attorney General Alberto Gonzales openly criticized various aspects of DOJ FCPA enforcement. Asked whether the original motivations Congress had in passing the FCPA are being served by the current

52. *See infra*, sec. IIB & IIIA.

enforcement environment or whether the current enforcement environment has “lost sight of the [FCPA’s] end point,” Gonzales said that it is “hard to tell quite frankly” because many FCPA enforcement actions are resolved via NPAs and DPAs and that these resolution vehicles do not necessarily reflect instances of companies violating the FCPA, but rather companies feel compelled to agree to the agreements.⁵³ Equally problematic, Gonzales said, is that enforcement actions resolved via NPAs and DPAs mean that “legitimate wrongdoing is not being prosecuted as it should.”⁵⁴ “Gonzales said it is ‘easy, much easier quite frankly’ for the DOJ to resolve FCPA inquiries with NPAs and DPAs, that such resolution vehicles have ‘less of a toll’ on the DOJ’s budget and that such agreements ‘provide revenue’ to the DOJ.”⁵⁵ As Gonzales stated, it is all “unfortunate.”⁵⁶

Despite the increasing controversy surrounding the use of alternative resolution vehicles, the DOJ continues to champion use of the vehicles to resolve alleged instances of corporate crime. Among other unpersuasive defenses, in 2013 the DOJ’s Deputy Assistant Attorney General Denis McInerney stated that NPAs and DPAs are “a product of the reasoned judgment developed over time by prosecutors.”⁵⁷ However, as Professor David Uhlmann (a former DOJ prosecutor) stated, the DOJ’s defense of NPAs and DPAs in a “policy is search of a rationale”⁵⁸ and “the widespread use of deferred prosecution and

53. *Former Attorney General Alberto Gonzales Criticizes Various Aspects of DOJ FCPA Enforcement*, FCPA PROFESSOR (Apr. 4, 2013), <http://www.fcprofessor.com/former-attorney-general-alberto-gonzales-criticizes-various-aspects-of-doj-fcpa-enforcement>.

54. *Id.*

55. *Id.*

56. *Id.*

57. *McInerney Defends Deferred and Non Prosecution Agreements*, CORP. CRIME REP. (May 7, 2013), <http://www.corporatecrimereporter.com/news/200/mcinerneydefendsdpas05072013/>.

58. “*Our Stellar FCPA Unit Continues To Go Gangbusters, Bringing Case After Case*,” FCPA PROFESSOR (May 6, 2013), <http://www.fcprofessor.com/our-stellar-fcpa-unit-continues-to-go-gangbusters-bringing-case-after-case>.

non-prosecution agreements erodes corporate criminal liability and undermines the rule of law.”⁵⁹

Indeed, for the reasons stated above, NPAs and DPAs do undermine the rule of law on both ends of the spectrum and there is no data to suggest that they achieve any deterrent effect.⁶⁰ For these reasons, NPAs and DPAs ought to be abolished in the FCPA context because they contribute to a “façade” of FCPA enforcement.⁶¹

So too do certain SEC FCPA resolution vehicles as highlighted next.

2. SEC Resolution Vehicles

In recent years, the SEC has had some notable struggles in the FCPA context and otherwise when put to its burden of proof in litigated actions or otherwise having to defend its settlement policies to federal court judges.

For instance, Judge Shira Scheindlin (S.D.N.Y.) dismissed the SEC’s FCPA enforcement against former Siemens executive Herbert Steffen.⁶² In another FCPA enforcement action, Judge Keith Ellison (S.D.Tex.) granted without prejudice Mark Jackson and James Ruehlen’s motion to dismiss the SEC’s claims that

59. David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1301-02 (2013).

60. *Do NPAs And DPAs Deter?*, FCPA PROFESSOR (Mar. 12, 2013), <http://www.fcprofessor.com/do-npas-and-dpas-deter> (quoting U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 20 (2009)).

61. *See The Façade*, *supra* note *.

62. *“Far Too Attenuated” – Judge Grants Herbert Steffen’s Motion To Dismiss In SEC FCPA Enforcement Action*, FCPA PROFESSOR (Feb. 20, 2013), <http://www.fcprofessor.com/far-too-attenuated-judge-grants-herbert-steffens-motion-to-dismiss-in-sec-fcpa-enforcement-action> (citing SEC v. Sharef, 924 F.Supp.2d 539, 549 (S.D.N.Y. 2013) (this case is discussed in more detail in Section IIIB)).

sought monetary damages.⁶³ In *Gabelli*, the Supreme Court unanimously rejected the SEC's statute of limitations position.⁶⁴ In FCPA enforcement actions against Tyco and IBM, Judge Richard Leon (D.D.C.) expressed concerns regarding the terms of the SEC's settlement and approved the settlements only after imposing additional reporting requirements on the companies.⁶⁵ In addition, the SEC's neither admit nor deny settlement policy has been questioned by several judges (most notably Judge Jed Rakoff) and the merits of this policy is currently before the Second Circuit.⁶⁶

The SEC's response to this judicial scrutiny has been, as strange as it may sound, to bypass the judicial system altogether when resolving many of its enforcement actions including in the FCPA context.

By way of background, in 2010 the SEC announced a series of measures including introduction of NPAs and DPAs "to further strengthen its enforcement program by encouraging greater cooperation from individuals and companies in the

63. *Judge Grants Jackson and Ruehlen's Motion to Dismiss SEC's Monetary Claims*, FCPA PROFESSOR (Dec. 12, 2012), <http://www.fcprofessor.com/judge-grants-jackson-and-ruehlens-motion-to-dismiss-secs-monetary-claims-finds-that-sec-was-not-diligent-in-bringing-case-and-that-sec-failed-to-negate-facilitation-payments-exception-however> (citing *SEC v. Jackson*, 908 F. Supp. 2d 834, 874-75 (S.D. Tex. 2012)).

64. *Supreme Court Unanimously Rejects SEC's Statute Of Limitations Position*, FCPA PROFESSOR (Feb. 28, 2013), <http://www.fcprofessor.com/supreme-court-unanimously-rejects-secs-statute-of-limitations-position> (citing *Gabelli v. SEC*, 133 S. Ct. 1216, 1224 (U.S. 2013) (this case is discussed in more detail in Section IIIB)).

65. Christopher M. Matthews, *Judge Inserts Court Into SEC Deals*, WALL ST. (July 26, 2013), http://blogs.wsj.com/riskandcompliance/2013/07/26/judge-inserts-court-into-sec-settlements/?mod=wsj_rhomer_rreport.

66. *Second Circuit As To SEC Settlement Policy – "It Is Not ... The Proper Function Of Federal Courts To Dictate Policy To Executive Administrative Agencies"*, FCPA PROFESSOR (Mar. 16, 2012), <http://www.fcprofessor.com/second-circuit-as-to-sec-settlement-policy-it-is-not-the-proper-function-of-federal-courts-to-dictate-policy-to-executive-administrative-agencies>.

agency's investigations and enforcement actions."⁶⁷ This development was a blow to the rule of law which values enforcement of the law in an open, transparent matter and in the context of an adversarial proceeding.

The SEC previously used a DPA in 2011 to resolve a corporate FCPA enforcement action,⁶⁸ but 2013 saw the SEC's first use of an NPA to resolve a corporate FCPA enforcement action. The enforcement action involved Ralph Lauren Corp. ("RLC") and this action is discussed more substantively in Section IIIA below. What made the RLC enforcement action notable was not only the SEC's first use of an NPA in the FCPA context, but the enforcement action also involved a DOJ NPA as well.⁶⁹ It was thus the first "double NPA" in the history of FCPA enforcement.

As to the NPA, the SEC's release stated:

The SEC has determined not to charge [RLC] with violations of the [FCPA] due to the company's prompt reporting of the violations on its own initiative, the completeness of the information it provided, and its extensive, thorough, and real-time cooperation with the SEC's investigation. [RLC's] cooperation saved the agency substantial time and resources ordinarily consumed in investigations of comparable conduct.⁷⁰

67. Press Release, *SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations*, U.S. SEC. & EXCHANGE COMM'N (Jan. 23, 2010), <http://www.sec.gov/news/press/2010/2010-6.htm>.

68. *Tenaris Resolves FCPA Enforcement – SEC Uses a DPA For the First Time*, FCPA PROFESSOR (May 18, 2011), <http://www.fcprofessor.com/tenaris-resolves-fcpa-enforcement-sec-uses-a-dpa-for-the-first-time>.

69. *Ralph Lauren Resolves FCPA Enforcement Action Via Double NPAs Based On Subsidiary Conduct In Argentina*, FCPA PROFESSOR (Apr. 23, 2013), <http://www.fcprofessor.com/ralph-lauren-resolves-fcpa-enforcement-action-via-double-npas-based-on-subsidiary-conduct-in-argentina>.

70. Press Release, *SEC Announces Non-Prosecution Agreement With Ralph Lauren Corporation Involving FCPA Misconduct*, U.S. SEC. & EXCHANGE COMM'N (Apr. 22, 2013), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514780>.

The factors the SEC identified however were hardly distinguishing factors as many SEC FCPA enforcement actions are the result of corporate voluntary disclosures in which companies are likewise commended on the information and cooperation provided.

In the SEC's NPA, RLC agreed to resolve the enforcement action without admitting or denying liability. At the same time, the NPA states as follows. "This agreement should not ... be deemed exoneration of RLC or to be construed as a finding by the Commission that no violations of the federal securities laws have occurred."⁷¹ Elsewhere, the NPA states that the "facts set forth are made pursuant to settlement negotiations and are not binding against RLC or its directors, officers or employees, or any other person or entity in any other legal proceeding."⁷² Like DOJ NPAs and DPAs, the SEC NPA also contained a so-called "muzzle clause" in which RLC agreed "not to take any action or to make or permit any public statement through present or future attorneys, employees, agents, or other persons authorized to speak for it, except in legal proceedings in which the Commission is not a party, denying, directly or indirectly, the factual basis of any aspect of this Agreement."⁷³

Notwithstanding the alarming features of the RLC enforcement action discussed in Section IIIA below, the SEC's NPA received praise in some circles. A Society of Corporate Compliance & Ethics representative released a statement praising the DOJ and SEC for its handling of the RLC action. It stated:

[T]he government has made it clear that companies who take compliance seriously and are committed to finding, fixing, and solving legal and regulatory problems are in a far better position than those who do not invest in real, robust, and effective compliance programs. I can think of no better proof

71. Press Release, *Non-Prosecution Agreement*, U.S. SEC. & EXCHANGE COMM'N (2013), <http://www.sec.gov/news/press/2013/2013-65-npa.pdf>.

72. *Id.*

73. *Id.* For more on "muzzle clauses," see *The "Muzzle" Clause*, FCPA PROFESSOR (Apr. 23, 2013), <http://www.fcprofessor.com/the-muzzle-clause>.

of the value of strong compliance and ethics programs than the DOJ's and SEC's recent actions' 'When the government visibly acknowledges and credits internal compliance efforts, Boards and management take note of their tangible value and are reminded of the need to support empowered, independent compliance officers and functions.⁷⁴

However, when the SEC and DOJ use resolution vehicles that are not subjected to one ounce of judicial scrutiny, this is not something to praise, it is something to lament. When the DOJ and SEC bring an enforcement action against a company (one of the world's most admired companies)⁷⁵ that had an isolated instance of alleged misconduct within one of its many subsidiaries and holds the parent corporation liable for such alleged misconduct on a theory contrary to black-letter law (see section IIIA below), this is not something to praise, it is something to lament. When the DOJ and SEC extract approximately \$1.6 million from a company that acted like a responsible corporate citizen upon learning of an issue, and then imposes annual government reporting obligations on that company, and otherwise "muzzles" the company, this is not something to praise, it is something to lament.

The RLC enforcement action was not the only SEC corporate enforcement action from 2013 that bypassed the judicial system. As highlighted in Table II above, another notable feature from 2013 SEC FCPA enforcement is that three of the eight corporate enforcement actions (38%) were resolved through administrative

74. *SCCE Chief Executive Officer Praises US Securities & Exchange Commission, SOCIETY OF CORP. COMPLIANCE & ETHICS* (April 24, 2013, 2:45:31 PM), <http://www.corporatecompliance.org/Resources/View/ArticleId/935/SCCE-Chief-Executive-Officer-praises-U-S-Securities-Exchange-Commission-and-Department-of-Justice-re.aspx>.<http://www.corporatecompliance.org/Resources/View/ArticleId/935/SCCE-Chief-Executive-Officer-praises-U-S-Securities-Exchange-Commission-and-Department-of-Justice-re.aspx>.

75. *See World's Most Admired Companies*, CNN MONEY, <http://money.cnn.com/magazines/fortune/most-admired/2013/list/> (last visited Feb. 25, 2014).

cease and desist orders likewise not subjected to any judicial scrutiny.

As noted by FCPA practitioners:

The use of administrative proceedings is noteworthy in an environment in which federal judges are increasingly questioning the merits of proposed settlements submitted by the SEC and defendants for approval. . . . As judicial review continues to inject uncertainty into the once perfunctory settlement approval process, the use of administrative proceedings to resolve FCPA violations may become a preferred forum for SEC settlements.⁷⁶

As noted, among other concerns with the increase in SEC administrative settlements is that SEC administrative law judges “are full-time Commission employees, and, as a result, are perceived by some to be less independent than federal judges” and thus the “Commission is conducting a proceeding that, had it been brought in federal court, would have been protected by the right to a jury trial.”⁷⁷

SEC administrative settlements in the FCPA context were rare prior to 2010 largely because the SEC could not impose monetary penalties in such proceedings absent certain exceptions. However, the Dodd-Frank Wall Street Reform Act granted the SEC broad authority to impose civil monetary penalties in administrative proceedings in which the SEC staff seeks a cease-and-desist order.⁷⁸ However, Congress’ grant of

76. *The Total S.A. Action: Are Administrative Orders the SEC’s FCPA Resolution of Choice for the Future?*, DEBEVOISE & PLIMPTON LLP FCPA UPDATE, July, 2013, at 2-3, available at http://www.debevoise.com/files/Publication/3e511c8c-de2b-414d-91e1-f2efbf339f0a/Presentation/PublicationAttachment/0fe134c8-4fd1-4061-b22d-00bdc48bceb9/FCPA_Update_July_2013.pdf.

77. *Id.* at 6.

78. Kenneth Winer & Manda Sertich, *Assessing the Power of the SEC to Impose Monetary Penalties In Administrative Proceedings Charging Violations of the FCPA*, FCPA PROFESSOR (July 13, 2011), <http://www.fcpaprofessor.com/assessing-the-power-of-the-sec-to-impose->

such authority to the SEC – no doubt politically popular in the aftermath of the so-called financial crisis – has directly resulted in less judicial scrutiny of SEC enforcement theories including in the FCPA context.

In short, SEC administrative settlements, as well as SEC DPAs and NPAs, place the SEC in the role of regulator, prosecutor, judge and jury all at the same time and a notable feature from 2013 SEC FCPA corporate enforcement is that 4 (1 NPA and 3 administrative orders) of the 8 corporate enforcement actions (50%) were not subjected to one ounce of judicial scrutiny. Like DOJ NPAs and DPAs, the SEC's use of such vehicles, as well as administrative orders, in FCPA enforcement actions often nudge companies to agree to the vehicles for reasons of risk-aversion and efficiency and not necessarily because the conduct at issue actually violates the FCPA.

Indeed, new SEC Chairman Mary Jo White commented early in her tenure that she “realized just how much leverage the SEC has[]”⁷⁹ and that many public companies acquiescence to various SEC demands rather than engage in a long-running dispute with the SEC.⁷⁹ As White stated: “[y]ou don't want to be at war with your main regulator.”⁸⁰

The irony of the SEC's increased use of resolution vehicles that bypass the judicial system is that they have occurred early in Chairman White's tenure. As a private practitioner, White was a vocal critic of the DOJ's use of such alternative resolution vehicles and stated that: the “deferred prosecution trend may be sweeping too broadly” that DPAs are becoming almost “an automatic reaction in many cases beyond those where it should be used; and that “prosecutors are thinking – before we close out

monetary-penalties-in-administrative-proceedings-charging-violations-of-the-fcpa.

79. Andrew Ackerman, *Revolving Door Helps SEC, Chairman says*, WALL ST. J MONEY BEAT (Oct. 3, 2013, 11:41 AM), http://blogs.wsj.com/moneybeat/2013/10/03/revolving-door-helps-sec-chairman-says/?mod=wsj_nview_latest.

80. *Id.*

this case that involves any kind of corporate crime, we should get something from the companies.”⁸¹

In short, White stated, “[p]rosecutors are like anybody else – when they devote a lot of time and effort to a case, they want something to show for it. And so I fear the deferred prosecution is becoming a vehicle to show results.”⁸²

A further irony is that even as SEC Chairman, White has extolled the virtue of trials and the adversarial system. In a speech titled “The Importance of Trials to the Law and Public Accountability,” White stated that trials “put our system of justice ... on display for all to see” and observed: “The public airing of facts, literally in open court, creates accountability for both defendants and the government. How we resolve disputes and how we decide the guilt or innocence of an accused are the true measure of our democracy.”⁸³

In the speech, White noted that trials are the “‘crown jewel’ of our system of justice” and she focused on two “of the [more] important roles that trials play in our administration of justice: how they foster development of the law, and perhaps even more importantly how they create public accountability for both defendants and the government through the public airing of charges and evidence.”⁸⁴

As to the former, White stated that “[t]rials allow for more thoughtful and nuanced interpretations of the law in a way that settlements and summary judgments cannot.”⁸⁵

As to the later, White stated:

81. *An Informed And Forceful Critique of NPA's and DPA's by ... Guess Who?*, FCPA PROFESSOR (April 25, 2013), <http://www.fcprofessor.com/an-informed-and-forceful-critique-of-npas-and-dpas-by-guess-who>.

82. *Id.*

83. Mary Jo White, *The Importance of Trials to the Law and Public Accountability*, U.S. SEC. & EXCHANGE COMMISSION (Nov. 14, 2013), <http://www.sec.gov/News/Speech/Detail/Speech/1370540374908>.

84. *Id.*

85. *Id.*

The death of trials would ... remove a source of disciplined information about matters of public significance. ... It would mean the end of an irreplaceable public forum and would mean that more of the legal order would proceed behind closed doors. And it would deprive us, as American citizens, of an important source of knowledge about ourselves and key issues of public concern.⁸⁶

Although White's speech was general in nature, the topics addressed are obviously relevant to FCPA enforcement in a year in which 50% of SEC corporate FCPA enforcement were not subjected to one ounce of judicial scrutiny. As White rightly noted, such a system of justice "deprives us, as American citizens, of an important source of knowledge about ourselves and key issues of public concern."

B. The Gap Between Corporate and Individual FCPA Enforcement

FCPA enforcement in 2013 once again demonstrated the wide gap between corporate and individual FCPA enforcement actions. This section highlights the gap, how individual enforcement actions in 2013 followed the historical cluster approach, and spotlights a relevant data point that helps explain the gap between corporate and individual FCPA enforcement.

Key to achieving deterrence in the FCPA context is prosecuting individuals to the extent the individual's conduct legitimately satisfies the elements of an FCPA violation. For a corporate employee with job duties that provide an opportunity to violate the FCPA, it is easy to dismiss corporate money being used to pay corporate FCPA fines and penalties. On the other hand, it is not easy to dismiss hearing of an individual with a similar background and job duties being criminally indicted and sent to federal prison for violating the FCPA.

The enforcement agencies have long recognized that an FCPA enforcement program based solely on corporate fines is

86. *Id.*

not effective and does not adequately deter future FCPA violations.⁸⁷ For instance in 2013, Daniel Suleiman (DOJ Deputy Chief of Staff, Criminal Division) stated, consistent with prior enforcement agency statements, that “[t]here is no greater deterrent to corporate crime that the prospect of prison time . . . if people don’t go to prison, then enforcement can come to be seen as merely the cost of doing business.”⁸⁸ Likewise, SEC Chairman White stated that a “core principle of any strong enforcement program is to pursue responsible individuals wherever possible [and that] is something our enforcement division has always done and will continue to do.”⁸⁹

However, despite enforcement agency rhetoric about the importance of individual enforcement actions, FCPA enforcement in this new era is largely corporate enforcement only. For instance, in 2013 0 of 8 DOJ corporate FCPA enforcement actions (0%) have resulted (at least yet) in any related charges against company employees.⁹⁰ Going back to 2012, only 1 of 9 DOJ corporate FCPA enforcement actions (11%) in 2012 have resulted (at least yet) in any related charges against company employees.⁹¹ Likewise, in 2013 0 of 8 SEC corporate FCPA enforcement actions (0%) have resulted (at least yet) in any related charges against company employees.⁹² Going back to 2012, 0 of 8 (0%) of SEC corporate FCPA enforcement

87. See *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the S. Comm. on Crime and Drugs, 111th Cong. 14 (2010)* (prepared statement of Mike Koehler, Assistant Professor of Business Law at Butler Univ.), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1739134.

88. Daniel Suleiman, Deputy Chief of Staff for the Criminal Div., Remarks to the Minnesota State Bar Association’s 37th Annual Internal Business Law Institute (May 9, 2013), available at <http://www.justice.gov/criminal/pr/speeches/2013/crm-speech-1305091.html>.

89. Mary Jo White, Chairman, Council of Institutional Investors, Address at fall conference in Chicago, Illinois: Deploying the Full Enforcement Arsenal (Sept. 26, 2013), available at <http://www.sec.gov/News/Speech/Detail/Speech/1370539841202>.

90. *A Focus On DOJ FCPA Individual Prosecutions*, *supra* note 37.

91. *Id.*

92. *SEC Enforcement Of The FCPA – Year In Review*, *supra* note 21.

actions have resulted (at least yet) in any related charges against company employees.⁹³

A key qualifier in the above analysis of corporate FCPA enforcement actions compared to related individual enforcement actions is “at least yet” as history instructs that there can be a lag time between resolution of a corporate enforcement action and any related individual enforcement actions. Indeed, as highlighted in Table VII, 5 of the 12 individual FCPA enforcement actions from 2013 relate back to corporate FCPA enforcement actions from 2012 or 2011. Nevertheless, the statistics are what they are at the present moment and certain facts and figures concerning the DOJ’s prosecution of individuals for FCPA offenses are presented below.

Since 2000, the DOJ has charged 123 individuals with FCPA criminal offenses. The breakdown is as follows.

- 2000 – 0 individuals
- 2001 – 8 individuals
- 2002 – 4 individuals
- 2003 – 4 individuals
- 2004 – 2 individuals
- 2005 – 3 individuals
- 2006 – 6 individuals
- 2007 – 7 individuals
- 2008 – 14 individuals
- 2009 – 18 individuals

93. *Id.*

- 2010 – 33 individuals (including 22 in the Africa Sting case)
- 2011 – 10 individuals
- 2012 – 2 individuals
- 2013 – 12 individuals⁹⁴

An analysis of the numbers reveals some interesting points. Most of the individuals – 89 (or 72%) were charged since 2008. Thus, on one level the DOJ is correct when it states that individual prosecutions are a hallmark of its FCPA enforcement program at least as measured against the historical average given that between 1978 and 1999, the DOJ charged 38 individuals with FCPA criminal offenses.

Yet on another level, a more meaningful level given that there was much less overall enforcement of the FCPA between 1978 and 1999, DOJ statements about its focus on individuals represents hollow rhetoric as demonstrated by the below figures.

Of the 89 individuals criminally charged with FCPA offenses by the DOJ since 2008:

- 22 individuals were in the Africa Sting case;
- 9 individuals (minus the “foreign officials” charged) were in the Haiti Teleco case;
- 8 individuals were in the Control Components case;
- 8 individuals were in the Siemens case;
- 4 individuals were in the Lindsey Manufacturing case;
- 4 individuals were in the LatinNode / Hondutel case;

94. *A Focus On DOJ FCPA Individual Prosecutions, supra* note 37.

- 4 individuals were in the Nexus Technologies case;
- 4 individuals were in the BizJet case; and
- 4 individuals were associated with Alstom (the company's FCPA scrutiny is still ongoing).⁹⁵

When there are individual FCPA enforcement actions related to a corporate enforcement action, 2013 witnessed a continuation of the above clustering phenomenon as Table VII indicates that 11 of the 12 individual enforcement actions (92%) were in just three cases. In short, 53% of the individuals charged by the DOJ with FCPA criminal offenses since 2008 have been in just four cases and 75 of the individuals charged by the DOJ since 2008 have been in just nine cases.⁹⁶

Considering that there have been 60 core corporate DOJ FCPA enforcement actions since 2008, this is a rather remarkable statistic. Of the 60 corporate DOJ FCPA enforcement actions, 44 (or 73%) have not (at least yet) resulted in *any* DOJ charges against company employees.⁹⁷

A very interesting and significant picture also emerges when analyzing DOJ individual prosecution data based on whether the corporate entity employing or otherwise involved with the individual charged was a public or private entity. For instance, of the 12 individuals criminally charged with FCPA offenses in 2008, 7 (58%) were employed by private entities.⁹⁸ This is consistent with the historical average. Of the 89 individuals charged by the DOJ with FCPA criminal offenses since 2008, 61 of the individuals (69%) were employees or otherwise affiliated with *private business entities*.⁹⁹ This is a striking statistic given that 48 of the 60 corporate DOJ FCPA enforcement actions since

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

2008 (80%) were against *publicly traded corporations*.¹⁰⁰ In the 12 private entity DOJ FCPA enforcement actions since 2008, individuals were charged in connection with 7 of those cases (58%).¹⁰¹ In contrast, in the 48 public entity DOJ FCPA enforcement actions since 2008, individuals were charged in connection with 9 of those cases (19%).¹⁰² In short, and based on the data, a private entity DOJ FCPA enforcement is approximately three times more likely to have a related DOJ FCPA criminal prosecution of an individual than a public entity DOJ FCPA enforcement action.

Next, certain facts and figures concerning the SEC's prosecution of individuals for FCPA offenses are presented below. Since 2000, the SEC has charged 59 individuals with FCPA civil offenses. The breakdown is as follows.

- 2000 - 0 individuals
- 2001 - 3 individuals
- 2002 - 3 individuals
- 2003 - 4 individuals
- 2004 - 0 individuals
- 2005 - 1 individual
- 2006 - 8 individuals
- 2007 - 7 individuals
- 2008 - 5 individuals
- 2009 - 5 individuals

100. *Id.*

101. *Id.*

102. *Id.*

- 2010 – 7 individuals
- 2011 – 12 individuals
- 2012 - 4 individuals
- 2013 - 0 individuals¹⁰³

Similar to the DOJ figures, most of the individuals charged – 33 (or 56%) were charged since 2008. Thus, on one level the SEC is correct when it states that individual prosecutions are a focus of its FCPA enforcement program at least as measured against the historical average given that between 1978 and 1999 the SEC charged 22 individuals with FCPA civil offenses.

Yet on another level, a more meaningful level given that there was much less overall enforcement of the FCPA between 1978 and 1999, the SEC's statements (like the DOJ's statements about its focus on individuals) represent hollow rhetoric as demonstrated by the below figures.

Of the 33 individuals charged with civil FCPA offenses by the SEC since 2008:

- 7 individuals were in the Siemens case;
- 4 individuals were in the Willbros Group case;
- 4 individuals were in the Alliance One case;
- 3 individuals were in the Maygar Telekom case; and
- 3 individuals were in the Noble Corp. case.¹⁰⁴

In other words, 64% of the individuals charged by the SEC with FCPA civil offenses since 2008 have been in just five cases.

103. *A Focus on SEC FCPA Individual Actions*, FCPA PROFESSOR (Jan. 22, 2014), <http://www.fcpaprofessor.com/a-focus-on-sec-fcpa-individual-actions-2>.

104. *Id.*

Considering that there have been 65 core corporate SEC FCPA enforcement actions since 2008, this is a rather remarkable statistic. Of the 65 corporate SEC FCPA enforcement actions, 53 (or 82%) have not (at least yet) resulted in *any* SEC charges against company employees.¹⁰⁵ This figure is thus higher than the 73% figure regarding the DOJ, a notable statistic given that the SEC, as a civil law enforcement agency, has a lower burden of proof in an enforcement action.

The above statistics regarding the gap between corporate FCPA enforcement and related individual enforcement action should cause alarm, including at the enforcement agencies, given the DOJ and SEC policy positions highlighted above. During the Senate's 2010 FCPA hearing, it was noted that the absence of individual FCPA charges in most corporate FCPA enforcement actions causes one to legitimately wonder whether the conduct giving rise to the corporate enforcement action was engaged in by ghosts.¹⁰⁶ However, it was also noted that there is an equally plausible reason why no individuals have been charged in connection with many corporate FCPA enforcement actions. The reason has to do with the quality and legitimacy of the corporate enforcement action in the first place.

The prevalence of NPAs and DPAs in the FCPA context was highlighted above, including how these agreements, not subjected to any meaningful judicial scrutiny, are often agreed to by companies for reasons of ease and efficiency, and not necessarily because the conduct at issue violates the FCPA. Individuals, on the other hand, face a deprivation of personal liberty, and are more likely to force the DOJ to satisfy its high burden of proof as to all FCPA elements. In other words, perhaps the more appropriate question is not "but nobody was charged," but rather do NPA and DPAs always represent provable FCPA violations?

105. *Id.*

106. *Examining Enforcement of the Foreign Corrupt Practice Act Before the S. Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 111th Cong. 16 (2010) (statement of Mike Koehler), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1739134.

Consider the following working hypothesis.

- Instances in which the DOJ brings actual criminal charges against a company or otherwise insists in the resolution process that the corporate entity pleads guilty to FCPA violations, represent a higher quality FCPA enforcement action (in the eyes of the DOJ) and is thus more likely to result in related FCPA criminal charges against company employees.
- Instances in which the DOJ resolves an FCPA enforcement action solely with an NPA or DPA, represent a lower quality FCPA enforcement action and is thus less likely to result in related FCPA criminal charges against company employees given that an individual is more likely to put the DOJ to its high burden of proof.

The below statistics provide a compelling datapoint concerning the quality and legitimacy of many corporate DOJ FCPA enforcement actions. Since NPAs and DPAs were first introduced to the FCPA in 2004, there have been 76 core corporate DOJ FCPA enforcement actions.¹⁰⁷

- 12 of these corporate enforcement actions were the result of a criminal indictment or resulted in a guilty plea by the corporate entity to FCPA violations. 10 of these corporate enforcement actions – 83% – resulted in related criminal charges of company employees.¹⁰⁸
- 51 of these corporate enforcement actions were resolved solely with an NPA or DPA. In only 5 instances – 9.8% – was there related criminal charges of company employees.¹⁰⁹
- A third type of corporate FCPA enforcement action is where the resolution includes a guilty plea by some entity in

107. *DOJ Prosecution of Individuals- Are Other Plays at Factor?*, FCPA PROFESSOR (Jan. 21, 2014), <http://www.fcprofessor.com/a-focus-on-sec-fcpa-individual-actions-2>.

108. *Id.*

109. *Id.*

the corporate family – usually a foreign subsidiary – and an NPA or DPA against the parent company. Since the introduction of NPAs and DPAs to the FCPA context, there have been 13 such corporate enforcement actions. In 4 of these actions - 31% - there was related criminal charges of company employees.¹¹⁰ This percentage is what one might expect compared to the two types of corporate FCPA enforcement actions discussed above, although it is interesting to note the following regarding 3 of these 4 instances. The DOJ ended up dismissing the charges against Si Chan Wooh (Schnitzer Steel), John O'Shea (ABB) was not found not guilty, and Bobby Elkin (Alliance One) received a probation sentence after the sentencing judge questioned many aspects of the enforcement action.¹¹¹

If the above statistics do not cause one to question the quality and legitimacy of many corporate FCPA enforcement actions, no empirical data ever will. For those who believe NPAs and DPAs always represent provable FCPA violations, the ball is now in your court to offer credible explanations for the following datapoints.

- If a corporate DOJ FCPA enforcement action is the result of a criminal indictment or resulted in a guilty plea by the corporate entity to FCPA violations, there is a 83% chance that related criminal charges will be brought against a company employee. If a corporate DOJ FCPA enforcement action is resolved solely with an NPA or DPA, there is only a 9.8% chance that criminal charges will be brought against a company employee.

In 2013, then-current numbers concerning the above gap were presented to Denis McInerney (DOJ, Deputy Assistant Attorney General) at a public conference and he was asked to explain the

110. *Id.*

111. *Id.*

gap.¹¹² McInerney described two enforcement actions resolved via an NPA or DPA in which there were indeed related individual prosecutions, but otherwise said that he did not know where the numbers are coming from.¹¹³ As described above, it is really quite easy to calculate the numbers. One simply takes all DOJ corporate enforcement actions since 2004, tracks how those enforcement actions were resolved, and then looks to see if there have been related individual actions against company employees.

Regarding the gap between corporate FCPA enforcement actions and related individual enforcement actions, it is also tempting to ask the “but nobody was charged” question in connection with the above SEC statistics. Yet, like with the DOJ figures, there is an equally plausible reason why so few individuals have been charged in connection with most corporate SEC FCPA enforcement actions. The reason likewise has to do with the quality and legitimacy of the corporate enforcement action in the first place.

With the SEC, the issue is not so much NPAs or DPAs (although in the two instances in which the SEC has used such vehicles to resolve corporate FCPA enforcement actions there have not yet been any related individual actions), but rather the SEC’s neither admit nor deny settlement policy, including the SEC’s frank admission that a settled SEC enforcement action “do[es] not necessarily reflect the triumph of one party’s [] position over the other.”¹¹⁴ Individuals in an SEC FCPA enforcement, even if only a civil action, and even if allowed to settle on similar neither admit nor deny terms, have their personal reputation at stake and are thus more likely than corporate entities to challenge the SEC and force it satisfy its burden of proof at trial as to all FCPA elements.

112. “*Our Stellar FCPA Unit Continues To Go Gangbusters, Bringing Case After Case*,” FCPA PROFESSOR (May 6, 2013), <http://www.fcprofessor.com/our-stellar-fcpa-unit-continues-to-go-gangbusters-bringing-case-after-case>.

113. *Id.*

114. See *The Façade*, *supra* note *, at 925.

More recently, as highlighted above, the SEC has been keen on resolving corporate FCPA enforcement in the absence of any judicial scrutiny and a notable statistic from 2013 is that 50% of SEC corporate enforcement actions were not subjected to one ounce of judicial scrutiny either because the action was resolved via a NPA or through an administrative order.

In other words, and like in the DOJ context, perhaps the more appropriate question is not “but nobody was charged,” but rather do SEC corporate FCPA settlements necessarily represent provable FCPA violations.

C. The Financial Consequences of Corporate FCPA Scrutiny and Certain Excesses

This section uses certain 2013 FCPA enforcement actions and related instances of FCPA scrutiny to highlight the growing financial consequences of FCPA scrutiny as well as to spotlight certain excesses that have come to define FCPA scrutiny in this new era.

With each passing year, FCPA settlement amounts seem to grow bigger and bigger for no apparent reason other than just because. This a significant public policy issue as even alleged wrongdoers have due process rights and fine and penalty amounts ought to be transparent and bear a direct relationship to the severity of the conduct alleged. While settlement amounts in an actual FCPA enforcement action tend to get the most public attention, pre-enforcement action professional fees and expenses are often the most expensive aspect of FCPA scrutiny and enforcement in this new era. Here too, with each passing year, pre-enforcement action professional fees and expenses seem to grow bigger and bigger for no apparent reason other than just because. While such fees and expenses are of course welcomed by FCPA Inc., the industry needs to exhibit greater restraint in investigating instances of FCPA scrutiny. In this regard, a welcome development from 2013 was various industry participants calling attention to certain excesses associated with FCPA scrutiny.

1. *FCPA Settlements Amounts Have Come A Long Way In a Short Amount of Time*

Two corporate FCPA enforcement actions from 2013 (Total - \$398 million and Weatherford International - \$153 million) joined the list of the top ten FCPA settlements of all-time.¹¹⁵ However, this in-and-of-itself is not notable. What is notable is that in 2013 seemingly routine FCPA enforcement actions were resolved for amounts that were record-setting just a few years ago. Indeed, as FCPA practitioners from Gibson Dunn rightly observed: “[a]n unmistakable characteristic of [2013] FCPA enforcement is that the market rate for resolving a corporate FCPA enforcement action spiked precipitously in 2013.”¹¹⁶

Indeed, FCPA settlement amounts have come a long way in a short amount of time. Consider that in 2007 Baker Hughes resolved the *largest* FCPA enforcement action of all-time by agreeing to pay a combined \$44 million in DOJ and SEC enforcement actions.¹¹⁷ According to the DOJ criminal information, the company made approximately \$4.1 million in improper payments – via an agent – in connection with the Karachaganak Project in Kazakhstan, a “giant gas and oil field” according to the DOJ.¹¹⁸ The DOJ’s sentencing guidelines

115. For the complete top ten list, see *FCPA 101*, FCPA PROFESSOR <http://www.fcraprofessor.com/fcpa-101#q17> (last visited Feb. 17, 2014).

116. *2013 Year-End FCPA Update*, GIBSON DUNN (Jan. 6, 2014), <http://www.gibsondunn.com/publications/Pages/2013-Year-End-FCPA-Update.aspx>.

117. *Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay \$11 Million Criminal Fine as Part of Largest Combined Sanction Ever Imposed in FCPA Case*, U.S. DEP’T JUST. (Apr. 26, 2007), http://www.justice.gov/opa/pr/2007/April/07_crm_296.html; *SEC Charges Baker Hughes with Foreign Bribery and with Violating 2001 Commission Cease-and-Desist Order*, U.S. SEC. & EXCH. COMM’N, <http://www.sec.gov/news/press/2007/2007-77.htm> (last updated Apr. 26, 2007) [hereinafter *SEC Charges Baker Hughes*].

118. Information at 7, 19-20, *United States v. Baker Hughes Servs. Int’l, Inc.*, No. H-07-129 (S.D. Tex. Apr. 11, 2007), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/baker-hughs/04-11-07bakerhughesintl-info.pdf>.

calculation stated that the “benefit received or to be received [from the alleged improper conduct was] approximately \$19 million.”¹¹⁹

The SEC enforcement action against Baker Hughes was based on the same core conduct and the SEC’s release stated:

Baker Hughes paid approximately \$5.2 million to two agents while knowing that some or all of the money was intended to bribe government officials, specifically officials of State-owned companies, in Kazakhstan. . . . Baker Hughes engaged the agent and was awarded an oil services contract in the Karachaganak oil field in Kazakhstan that generated more than \$219 million in gross revenues from 2001 through 2006.¹²⁰

In addition, the SEC release stated:

- from 1998 to 2004, Baker Hughes authorized commission payments of nearly \$5.3 million to an agent (who worked in Kazakhstan, Russia and Uzbekistan) under circumstances in which the company failed to determine whether such payments were, in part, to be funneled to government officials in violation of the FCPA;
- in Indonesia, between 2000 and 2003, Baker Hughes paid certain freight forwarders to import equipment into Indonesia using a “door-to-door” process under circumstances in which the company failed to adequately assure itself that such payments were not being passed on, in part, to Indonesian customs officials;
- in Nigeria, between at least 2001 and 2005, Baker Hughes authorized payments to certain customs brokers to facilitate the resolution of alleged customs deficiencies under

119. Plea Agreement at 9, *United States v. Baker Hughes Servs. Int’l, Inc.*, No. H-07-129 (S.D. Tex. April 11, 2007), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/baker-hughs/04-11-07bakerhughes-plea.pdf>.

120. *SEC Charges Baker Hughes*, *supra* note 117.

circumstances in which the company failed to adequately assure itself that such payments were not being passed on, in part, to Nigerian customs officials; and

- in Angola, from 1998 to 2003, Baker Hughes paid an agent more than \$10.3 million in commissions under circumstances in which the company failed to adequately assure itself that such payments were not being passed on to employees of Sonangol, Angola's state-owned oil company, to obtain or retain business in Angola.¹²¹

In 2013, comparatively minor FCPA enforcement actions – per the enforcement agencies' own allegations – were resolved for amounts larger than what was a record-setting amount just a few years ago.

For instance, the Diebold enforcement action focused primarily on excessive travel and entertainment and the DOJ alleged that company subsidiaries provided various things of value (such as Las Vegas sightseeing, a dance show, a Grand Canyon tour, a Universal Studios tour and a Napa Valley tour) totaling approximately \$1.75 million to alleged Chinese and Indonesian “foreign officials” at state-owned banks over a five year period.¹²² As to the core conduct, the DOJ's sentencing guidelines calculation referenced a “value of benefit received [from the alleged improper conduct] more than \$7 million.”¹²³

The SEC enforcement action against Diebold was based on the same core conduct and alleged that Diebold subsidiaries in

121. *Id.*

122. Information at 3-4, *United States v. Diebold, Inc.*, No. 5:13CR464 (N.D. Ohio Oct. 22, 2013), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/diebold/information.pdf>. The enforcement action also contained non-specific monetary allegations concerning relationships with private business customers in Russia. However, the DOJ's sentencing guidelines calculation makes clear that the Russia conduct was a minor factor in determining the fine and penalty amount. *See* Deferred Prosecution Agreement at 5-7, *United States v. Diebold, Inc.* No. 513:CR464 (N.D. Ohio Oct. 22, 2013), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/diebold/combined_dpa.pdf.

123. *Id.* Deferred Prosecution Agreement, *supra* note 122, at 5-7; *Id.*

China and Indonesia spent approximately \$1.8 million on travel, entertainment, and other improper gifts for senior officials with the ability to influence the alleged state-owned bank purchasing decisions.¹²⁴

Thus, per the enforcement agencies' own allegations, the Diebold enforcement action involved *significantly less egregious* conduct than the Baker Hughes enforcement action. Yet, the combined fine and penalty amount in the Diebold action (\$48 million) was more than the record-setting \$44 million Baker Hughes enforcement action from just a few years ago.¹²⁵

The \$32 million DOJ enforcement action against German engineering company Bilfinger S.E. is another instructive example from 2013 that demonstrates how FCPA settlement amounts have come a long way in a short amount of time. The DOJ criminal information alleged, in pertinent part, that Bilfinger conspired with others to obtain and retain contracts related to the Eastern Gas Gathering System (EGGS) project in Nigeria through the promise and payment of over \$6 million in bribes to officials of the Nigerian National Petroleum Corporation (NNPC), National Petroleum Investment Management Services - a subsidiary of NNPC, the dominant political party in Nigeria, an official in the executive branch of the Government of Nigeria, and others.¹²⁶ As noted in the DOJ's release, the enforcement action was directly related to a prior

124. Complaint at 2, *SEC v. Diebold, Inc.* (D.D.C. Oct. 22, 2013), available at <http://www.sec.gov/litigation/complaints/2013/comp-pr2013-225.pdf>. The SEC further alleged that Diebold falsified books and records to hide approximately \$1.2 million of bribes paid to employees at privately owned banks in Russia.

125. Of course, factors beyond the core conduct at issue – such as voluntary disclosure, cooperation and a company's past history – can influence settlement amounts in an FCPA enforcement action. However, the Baker Hughes and Diebold enforcement actions were substantively identical in these regards (i.e. both companies had a past history, both companies voluntarily disclosed and both companies cooperated).

126. Information at 7, *United States v. Bilfinger SE* (S.D. Tex. Dec. 9, 2013), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/bilfinger/bilfinger-information.pdf>.

2008 FCPA enforcement against Willbros Group, Bilfinger's joint venture partner in connection with the EGGS project.¹²⁷

The DOJ's DPA in the previous Willbros enforcement action did not set forth a detailed advisory Sentencing Guidelines calculation as is the norm in most current FCPA DPAs including the Bilfinger DPA. Nevertheless, the DOJ settlement amount in the Willbros enforcement action was \$22 million.¹²⁸ This \$22 million settlement amount was in connection with not only the EGGS project, but *also* DOJ allegations that "certain Willbros employees based in South America agreed to make approximately \$300,000 in corrupt payments to Ecuadoran government officials of the state-owned oil company PetroEcuador and its subsidiary, PetroComercial, to assist in obtaining a gas pipeline project."¹²⁹

In short, the Bilfinger enforcement action involved the same EGGS project at issue in the Willbros enforcement. Moreover, the Willbros enforcement action was broader in scope than the Bilfinger action as it involved alleged corrupt payments in connection with other projects in other countries. Yet, the 2013 Bilfinger enforcement action was resolved for \$32 million whereas the 2008 Willbros enforcement action was resolved for \$22 million. The key difference between the two enforcement actions seems to be merely the passage of time.

The above examples demonstrate how FCPA settlement amounts have come a long way in a short amount of time and raise the question: have FCPA settlement amounts increased just because? To be sure, the escalation in DOJ and/or SEC

127. *German Engineering Firm Bilfinger Resolves Foreign Corrupt Practices Act Charges and Agrees to Pay \$32 Million Criminal Penalty*, U.S. DEP'T JUST. (Dec. 11, 2013), <http://www.justice.gov/opa/pr/2013/December/13-crm-1297.html>.

128. Deferred Prosecution Agreement at 9, *United States v. Willbros Group, Inc.*, No. H-08-287 (S.D. Tex. May 14, 2008), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/willbros-group/05-14-08willbros-deferred.pdf>.

129. *Willbros Group Inc. Enters Deferred Prosecution Agreement and Agrees to Pay \$22 Million Penalty for FCPA Violations*, U.S. DEP'T JUST. (May 14, 2008), http://www.justice.gov/opa/pr/2008/May/08_crm_417.html.

settlement amounts is not FCPA specific as 2013 also saw SAC Capital resolve an insider trading enforcement action for \$1.2 billion; Johnson & Johnson resolve an off-label marketing enforcement action for \$2.2 billion; and JPMorgan resolve a mortgage lending enforcement action for \$13 billion.¹³⁰

Such settlement amounts have been questioned even by the regulators. In a speech, SEC Commissioner Daniel Gallagher noted:

“[T]he amounts of the penalties that the SEC imposes against corporations today are eye-popping and likely would have shocked the legislators who voted for the Remedies Act and the Commission that sought penalty authority from Congress.”¹³¹

As to the JPMorgan action, the company’s top lawyer asked at a public event “[a]t what point does this [record-setting fines] stop.”¹³² At the same event, a government official acknowledged

130. Brady Dennis, *Johnson & Johnson Agrees to Pay \$2.2 Billion in Drug-Marketing Settlement*, WASH. POST (Nov. 4, 2013), http://www.washingtonpost.com/national/health-science/johnson-and-johnson-agrees-to-pay-22-billion-in-drug-marketing-settlement/2013/11/04/a7092342-456a-11e3-b6f8-3782ff6cb769_story.html; Neil Irwin, *Everything You Need to Know About JPMorgan’s \$13 Billion Settlement*, WASH. POST (Nov. 19, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/10/21/everything-you-need-to-know-about-jpmorgans-13-billion-settlement/>; Peter Lattman & Ben Protess, *SAC Capital Agrees to Plead Guilty to Insider Trading*, N.Y. TIMES (Nov. 4, 2013), http://dealbook.nytimes.com/2013/11/04/sac-capital-agrees-to-plead-guilty-to-insider-trading/?_php=true&_type=blogs&_php=true&_type=blogs&r=1.

131. Daniel M. Gallagher, *Remarks at Columbia Law School Conference (Hot Topics: Leading Current Issues in Securities Regulation and Enforcement)*, U.S. SEC. & EXCHANGE COMMISSION (Nov. 15, 2013), <http://www.sec.gov/News/Speech/Detail/Speech/1370540386071>.

132. Dan Fitzpatrick & Devlin Barrett, *J.P. Morgan Lawyer Criticizes Big Bank Fines*, WALL ST. J. (Nov. 24, 2013), <http://online.wsj.com/news/articles/SB10001424052702304281004579218342039403918>.

that the government's application of fines in legal settlements "is more art than science."¹³³

Against this backdrop, Professor Peter Henning rightly noted:

A standard part of enforcement actions against companies these days is the multimillion-dollar – or even multibillion-dollar – penalty. What can be perplexing is figuring out how those penalties were determined, and whether they have much if any direct relationship to either the gains realized from the violations or the harm inflicted.¹³⁴

Indeed, in many corporate FCPA enforcement actions there appears to be little rhyme or reason to how FCPA settlement amounts are calculated. For instance, certain SEC FCPA settlements include a civil penalty, disgorgement and prejudgment interest; whereas other enforcement actions include only disgorgement and prejudgment interest; whereas other enforcement actions include only disgorgement and a civil penalty; whereas other enforcement actions include only disgorgement; whereas other enforcement actions include only a civil penalty.¹³⁵

When a NPA is used to resolve an FCPA enforcement action, the ultimate fine amount and how it is calculated is not transparent.¹³⁶ Even with corporate DPAs and plea agreements, there remains little transparency regarding FCPA criminal fine amounts, particularly as to the value of the benefit allegedly received through the improper payment. The DOJ simply cites a number.

133. *Id.*

134. Peter J. Henning, *Fines, Without Explaining How They Were Calculated*, N.Y. TIMES (Dec. 2, 2013), http://dealbook.nytimes.com/2013/12/02/a-fine-without-explaining-how-it-was-calculated/?_r=0.

135. *SEC Enforcement Of The FCPA – Year In Review*, *supra* note 21.

136. *See, e.g.*, Letter from U.S. Dep't of Justice Criminal Div. to Thomas A. Hanusik, White Collar & Regulatory Enforcement Group, Crowell & Moring LLP (Apr. 22, 2013), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/ralph-lauren/Ralph-Lauren.-NPA-Executed.pdf>.

Moreover, double-dipping is also a common feature of corporate FCPA enforcement actions and this dynamic further increases settlement amounts. Double-dipping refers to an issuer company repaying an alleged improper benefit amount twice – first to the DOJ in a criminal enforcement action and then again to the SEC in a civil enforcement action.

For instance, the \$398 million Total enforcement action involved a DOJ component (\$245 million) and an SEC component (\$153 million). It is clear from the enforcement agency documents that approximately \$150 million of the aggregate \$398 million settlement amount represented a double-dip. The DOJ DPA set forth the Sentencing Guidelines calculation and noted that the base fine was \$147 million “which corresponds to the value of the benefit received in return for the unlawful payments.”¹³⁷ This base fine amount is the most significant factor determining the fine amount after the culpability score multiplier is added to it. The SEC’s order stated that Total’s improper payments “netted Total approximately \$150 million in profits.”¹³⁸ Based on this figure, the SEC ordered Total to pay \$153 million in disgorgement and prejudgment interest. In other words, Total repaid the approximate \$150 million benefit it received from the alleged improper payments twice – first to the DOJ and then to the SEC. This dynamic is not unique to the Total enforcement action. Nearly every FCPA enforcement action in this new era that involves a DOJ and SEC component, in which the SEC seeks disgorgement, involves the same dynamic.

Among the most vocal critics of this common feature of FCPA enforcement actions is Philip Urofsky (a former high-

137. Deferred Prosecution Agreement at 5, *United States v. Total, S.A.*, No. 1:13CR239, (E.D. Va. 2013), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/totalsa/2013-05-29-total-dpa-filed.pdf>.

138. *Total, S.A.*, Exchange Act Release No. 69654, para. 19 (May 29, 2013), *available at* <http://www.sec.gov/litigation/admin/2013/34-69654.pdf>.

ranking DOJ FCPA enforcement attorney) who has argued that the SEC “get out of the anti-bribery business.”¹³⁹ Urofsky stated:

The SEC’s enforcement of the anti-bribery provisions raises a fundamental matter of fairness. Take two companies, one public and one private, and assume that both violate the FCPA and realize the same illicit gain from the violation. The private company will be subject only to DOJ’s jurisdiction and will therefore be exposed to a criminal fine of up to twice its gain. The public company, on the other hand, will be subject both to that criminal fine and to a civil fine and disgorgement of the illicit proceeds, thus potentially paying a third more in fines than the private company for the same conduct.¹⁴⁰

Should the SEC be removed from enforcing the FCPA’s anti-bribery provisions, it could be called “granting the wish” because the SEC never wanted any part in enforcing the FCPA’s anti-bribery provisions.¹⁴¹

The largest FCPA enforcement action of all time in terms of aggregate DOJ and SEC settlement amount is the \$800 million action against Siemens in 2008.¹⁴² With “market rates” for resolving FCPA enforcement actions trending higher with each passing year, it is only a matter of time before there is an FCPA enforcement action in the billions. If a billion dollar FCPA enforcement action is what the conduct at issue warrants, this is acceptable. However, if a billion dollar FCPA enforcement

139. Philip Urofsky et. al, *How Should We Measure the Effectiveness of the Foreign Corrupt Practices Act? Don’t Break What Isn’t Broken—The Fallacies of Reform*, 73 OHIO ST. L.J. 1145, 1177 (2012); See also Barbara Black, *The SEC and the Foreign Corrupt Practices Act: Fighting Global Corruption is Not Part of the SEC’s Mission*, 73 OHIO ST. L.J. 1093, 1095 (2012), <http://moritzlaw.osu.edu/students/groups/oslj/files/2013/02/73.5.Urofsky.pdf>.

140. *Id.*

141. See Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929 (2012).

142. Press Release, 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>.

action happens just because, and because of double-dipping, this a significant public policy issue as even alleged wrongdoers have due process rights and fine and penalty amounts ought to be transparent and bear a direct relationship to the severity of the conduct alleged.

While settlement amounts in an actual FCPA enforcement action tend to get the most public attention, pre-enforcement action professional fees and expenses are often the most expensive aspect of FCPA scrutiny and enforcement in this new era. Here too, with each passing year, pre-enforcement action professional fees and expenses seem to grow bigger and bigger for no apparent reason other than just because.

2. *Escalating Pre-Enforcement Professional Fees and Expenses*

Wal-Mart has been under intense FCPA scrutiny for several years, most notably after a 2012 *New York Times* article suggested that Wal-Mart Mexico “orchestrated a campaign of bribery to win market dominance” and that the entity “paid bribes to obtain permits in virtually every corner” of Mexico.¹⁴³ Following the article, Wal-Mart’s FCPA scrutiny has followed a typical pattern in that the company’s internal review expanded beyond Mexico and the company’s pre-enforcement action professional fees and expenses began to skyrocket.

During 2013, the company made various disclosures regarding its FCPA scrutiny including the following.

On FCPA, we continue to work closely with anticorruption compliance experts to review and to assess our programs and help us implement concrete steps for each particular market.

143. David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 21, 2012, available at http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?_r=1&hp.

In the various markets, these experts have spent tens of thousands of hours on anti-corruption support and training.¹⁴⁴

Each quarter of 2013 Wal-Mart disclosed its pre-enforcement action professional fees and expenses and quarterly totals equated to the company spending approximately \$1.25 million *per working day* on its FCPA scrutiny.¹⁴⁵ It is not just large multinationals the subject of high-profile FCPA scrutiny that are spending millions of dollars in pre-enforcement action professional fees and expenses every year. For instance, beverage company Beam Inc. disclosed approximately \$4.2 million in one year for “legal, forensic accounting, and other fees related to [its] internal investigation into FCPA compliance in [its] India operations.”¹⁴⁶

The question ought to be asked – does it really need to cost this much or has FCPA scrutiny turned into a boondoggle for many involved? An article titled “Lawyers Need to Brake Their Bribe-Case Gravy Train” observed:

Lawyers need to pull the brake on their bribery-probe gravy train. Wal-Mart Stores shelled out about \$80 million last quarter alone – some \$1.25 million per working day – on an internal corruption investigation. [...] Wasteful scorched-earth legal tactics inflate costs, while potentially ruinous U.S. penalties make companies scared to skimp. Smarter lawyering could slow the runaway spending. Scrutiny under the FCPA typically throws multinationals into attorney-hiring overdrive. Having legal eagles delve into corporate innards helps a company look cooperative and thereby win leniency from the government. [...] There is a better way. A records search at a multinational’s headquarters can quickly reveal how and,

144. Fourth Quarter Fiscal Year 2013 Earnings Call, WAL-MART, 30 (Feb. 21, 2013), <http://cdn.corporate.walmart.com/63/1a/461d1fa2470fa596b46198e72886/management-earnings-call-transcript.pdf>.

145. *Further To Wal-Mart’s Pre-Enforcement Action Professional Fees And Expenses*, FCPA PROFESSOR (Aug. 28, 2013), <http://www.fcproffessor.com/further-to-wal-marts-pre-enforcement-action-professional-fees-and-expenses>.

146. Beam Inc., Annual Report (Form 10-K), at 74-75 (Feb. 26, 2013).

generally, where and to whom bribes are being paid, according to veterans of the Siemens case and others. Investigations in just a few countries can then ferret out the details of a global scheme. That's often enough to reach a reasonable settlement with Uncle Sam. Yet unnecessarily far-flung and costly probes persist. Not only does the prospect of enormous fees encourage lawyers running an investigation to engage in overkill. A company's officers also don't want to be seen to cut corners or get in the attorneys' way. The usual healthy corporate tendency to police costs carefully doesn't apply. For big companies the waste may not show, either. Even a legal bill of, say, \$500 million is a drop in the bucket for a company like Wal-Mart with revenue nearly 1,000 times that figure every year. That shouldn't, however, let lawyers off the hook. Ethics rules require their fees to be reasonable. In bribery cases, that standard is at risk of becoming corrupted.¹⁴⁷

Not surprisingly, certain FCPA Inc. participants took offense to criticism of Wal-Mart's pre-enforcement professional fees and expenses. Writing on an industry sponsored site, a commentator stated:

[Wal-Mart's] FCPA compliance costs are less than one third of one percent of its sales. And with profits last year of about \$17 billion, Wal-Mart will survive its FCPA spending spree. The world's largest retailer is finally investing in FCPA compliance in proportion to its size. It's playing catch up for a decade of what appears to be FCPA neglect.¹⁴⁸

The implication by the commentator seemed to be that the necessity and legitimacy of FCPA pre-enforcement action professional fees and expenses ought to be measured by a company's profitability or overall sales, and that a large company with large profits ought to spend more on FCPA compliance than a smaller company with smaller profits.

147. Koehler, *supra* note 141.

148. Michael Scher, *Wal-Mart is no numbers game (Part Two)*, FCPA BLOG (Aug. 22, 2013, 3:08 AM), <http://www.fcpcbog.com/blog/2013/8/22/wal-mart-is-no-numbers-game-part-two.html>.

However, FCPA risk is unique to specific industries, and even within the same industry, often to specific companies and it is not hard to imagine a small company with smaller profits having a higher FCPA risk profile than a large company with larger profits.

The commentator further stated that Wal-Mart's pre-enforcement action professional fees and expenses can "be looked at like accumulated liability for a toxic waste site: First a determination of the origin, size and places of the contamination, then the costs of the clean up and damages."¹⁴⁹ This analogy was particularly inept as Superfund and other environment clean-up costs frequently turn into boondoggles as well.¹⁵⁰

A root cause that contributes to eye-popping pre-FCPA enforcement action professional fees and expenses is the "where else" question. The "where else" question generally works as follows. A company voluntarily discloses to the enforcement agencies specific conduct that occurred in country x that could implicate the FCPA. Before the enforcement agencies will agree to resolve any enforcement action concerning conduct in country x, the enforcement agencies will often ask "where else." In other words, if the conduct giving rise to FCPA scrutiny occurred in country x, how do the enforcement agencies know that similar conduct did not also occur in countries a, b, c, d, etc. In short, the "where else" question asked in instances of FCPA scrutiny often results in a company conducting a world-wide compliance review of its entire operations.

Because cooperation with the government's investigation is an important factor the enforcement agencies weigh in deciding whether to bring an enforcement action, business organizations invariably, yet reluctantly, accept FCPA counsel's recommendation to broaden the internal investigation to demonstrate cooperation to the enforcement agencies. The next thing the company knows, it is paying for a team of lawyers

149. *Id.*

150. *See, e.g.*, OFFICE OF TECH. ASSESSMENT, OTA-BP-ITE-51, ASSESSING CONTRACTOR USE IN SUPERFUND—A BACKGROUND PAPER 39-44 (1989), available at <http://www.princeton.edu/~ota/disk1/1989/8903/890309.PDF>.

(accompanied by forensic accountants and other specialists) to travel around the world to answer the “where else” question even though the voluntary disclosure that got the whole process started involved only specific conduct in a specific country.

Where an instance of FCPA scrutiny is prompted by board of director or senior executive conduct that raises the possibility of a culture of corruption within a company, the “where else” question would seem like a legitimate law enforcement question. However, the “where else” question is asked in nearly every instance of FCPA scrutiny as evidenced by FCPA resolution documents.¹⁵¹ That the “where else” question is asked in the absence of any meaningful check or judicial oversight raises a host of problematic issues. For instance, FCPA attorneys to whom the “where else” question is posed have little incentive to pushback as the question often leads to multi-year, multi-country billing bonanzas.

In this regard, it was notable that in 2013 Charles Duross (at the time the DOJ’s FCPA Unit Chief) called out the industry at an American Bar Association event.

As to the “where else” question, Duross suggested that often company lawyers are seeking to over-do-it through a global search of operations for FCPA issues. He discussed a case in which a company and its professional advisors came to a meeting with a global search plan and he said “no, no, no, that is not what I want.” He indicated that the lawyers and other professional advisors in the room ‘looked unhappy,’ but that the general counsel of the company was happy.¹⁵²

151. *A Q&A With Claudius Sokenu On “Where Else,”* FCPA PROFESSOR (April 4, 2012), <http://www.fcprofessor.com/a-qa-with-claudius-sokenu-on-where-else>.

152. *Friday Roundup,* FCPA PROFESSOR (Sept. 20, 2013), <http://www.fcprofessor.com/fridayfriday-a-qa-with-claudius-sokenu-on-where-elsefriday>.

3. *A Call For Greater Restraint From the Industry Itself*

While eye-popping pre-enforcement action professional fees and expenses are welcomed by FCPA Inc., the industry needs to exhibit greater restraint in investigating instances of FCPA scrutiny. In this regard, a welcome development from 2013 was various industry participants calling attention to certain excesses associated with FCPA scrutiny.

Citing, among other examples Wal-Mart's pre-enforcement action investigative fees and expenses, Homer Moyer (a dean of the FCPA bar) noted that "such reports raise the question whether the cost of FCPA investigations should become an issue for companies' boards of directors."¹⁵³ Likewise, FCPA practitioner David Simon stated:

While I understand that each case is different and that it is often necessary for investigating counsel to respond to outside forces that drive up costs, some of the eye-popping numbers can't help but make one question the FCPA investigation/compliance value proposition. This dynamic is especially troubling because, I fear, it drives the perception among many smaller and mid-sized companies that anti-bribery compliance is simply out of reach financially.¹⁵⁴

Both practitioners offered sound, practical advice for containing excessive pre-enforcement professional fees and expenses including the following:

153. *Costs of FCPA Investigations – A Board Issue?*, FCPA PROFESSOR (Dec. 9, 2013), <http://www.fcprofessor.com/costs-of-fcpa-investigations-a-board-issue>.

154. *Can We Bring Quality FCPA Compliance and Investigative Services to the Underserved Middle Market?*, FCPA PROFESSOR (May 21, 2013), <http://www.fcprofessor.com/can-we-bring-quality-fcpa-compliance-and-investigative-services-to-the-underserved-middle-market>.

- Retain an efficient law firm as a firm with “limited [FCPA] experience may innocently over-staff, over-investigate, and charge for steep learning curves;”
- Be cautious when hiring forensic accounts as they often “come in teams” and can “sometimes [be] unnecessary” because “some payment schemes, once exposed, can readily be understood and remediated without a separate forensics teams, or with a small one;”
- Know when to stop because a credible FCPA investigation “may not require turning over every proverbial rock;”
- Give strong but practical compliance advice and not allow “perfect [to be] the enemy of the good;”
- Disaggregate services in an internal investigation because “it is not necessary to have high-priced lawyers conduct every aspect of every investigation”¹⁵⁵

The above industry calls for greater restraint may not be well-received in some FCPA Inc. circles, but they were nevertheless a welcome and needed development in 2013.

III. OTHER TOP FCPA OR RELATED DEVELOPMENTS FROM 2013

Part III of this article highlights other top FCPA or related developments from 2013 and uses these developments to spotlight the following issues: (i) certain alarming enforcement actions and why anyone who values the rule of law should be alarmed by these actions; (ii) actual judicial scrutiny of FCPA enforcement agency theories as well as how non-FCPA legal developments should cause pause as to certain FCPA enforcement theories; (iii) FCPA enforcement agency speeches and policy positions; and (iv) certain uncomfortable truths and double standards regarding the U.S. fight against bribery and corruption.

155. *Id.*; See also *Friday Roundup*, *supra* note 152.

A. Alarming Enforcement Actions

Given the extensive use of NPAs, DPAs and administrative settlements in the FCPA context, few enforcement theories are ever subject to any meaningful judicial scrutiny. Yet just because such resolution vehicles are used, it remains incumbent upon the enforcement agencies to plead or describe facts to establish every element of the FCPA violation at issue.

Indeed, like all statutes, the FCPA has specific elements that must be met in order for there to be a violation. Moreover, general black-letter legal principles such as regard for the corporate form and its limited liability are also relevant to FCPA enforcement. However, with increasing frequency in this new era of FCPA enforcement, it appears that the DOJ and SEC have transformed FCPA enforcement into a free-for-all in which any conduct the enforcement agencies find objectionable is fair game to extract a multi-million dollar settlement from a risk-averse corporation.

This section spotlights four such enforcement actions from 2013 and analyzes actual legal authority relevant to these enforcement actions. Although such an exercise seems old-fashioned in this new era of FCPA enforcement, the rule of law demands such an analysis. Before highlighting the details of these enforcement actions, a brief overview of FCPA legal authority relevant to the enforcement theories in these actions is set forth below.

1. Anti-Bribery Provisions

Corruptly

As noted in the FCPA's legislative history, "the word 'corruptly' connotes an evil motive or purpose."¹⁵⁶

156. H.R. Rep. No. 95-640, sec. 2, at 4 (1977).

“Obtain or Retain Business”

The FCPA states that a payment to a foreign official must be “in order to assist ... in obtaining or retaining business for or with, or directing business to, any person.”¹⁵⁷ Although in the FCPA Guidance the enforcement agencies, consistent with its prior enforcement theories, literally re-wrote the FCPA’s text to include payments made to “foreign officials” to secure “any improper advantage,” the notion that the anti-bribery provisions cover payments to “foreign officials” to secure “any improper advantage” has been rejected by courts. For instance, in *U.S. v. Kay*, the Fifth Circuit specifically rejected the DOJ’s broad interpretation of the “obtain or retain business” element and stated:

When Congress amended the language of the FCPA ... rather than inserting ‘any improper advantage’ immediately following ‘obtaining or retaining business’ within the business nexus requirement (as does the [OECD] Convention), it chose to add the ‘improper advantage’ provision to the original list of abuses of discretion in consideration for bribes that the statute proscribes.¹⁵⁸

The *Kay* court did conclude that payments outside the context of foreign government procurement “could” violate the FCPA, but only if the payments were intended to lower a company’s cost of doing business enough to assist the company in “obtaining or retaining” business. Specifically, the court stated:

[I]f the government is correct that anytime operating costs are reduced the beneficiary of such advantage is assisted in getting or keeping business, the FCPA’s language that expresses the necessary element of assisting i[n] obtaining . . . business

157. 15 U.S.C. § 78dd-1(a) (2010).

158. *United States v. Kay*, 359 F.3d 738, 754 (5th Cir. 2004).

would be unnecessary, and thus surplusage – a conclusion that we are forbidden to reach.¹⁵⁹

Facilitating Payments

Even if all of the substantive elements of the FCPA’s anti-bribery provisions are met, the final step in analyzing the FCPA’s anti-bribery provisions is determining whether the FCPA’s facilitating payment exception applies.

The FCPA’s anti-bribery provisions “shall not apply to any facilitating or expediting payment to a foreign official ... the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official.”¹⁶⁰ In a case of first impression in an FCPA enforcement action in 2012, a court rejected the SEC’s position that a defendant had the burden of pleading the inapplicability of the exception.¹⁶¹ Rather, the court concluded that the enforcement agency “must bear the burden of negating the ‘facilitating’ payments exception” and that the “exception is best understood as a threshold requirement to pleading that a defendant acted ‘corruptly.’”¹⁶²

2. Internal Controls Provisions

As to the FCPA’s internal controls provisions, while it again may seem old-fashioned, the rule of law likewise demands an analysis of actual legal authority. The internal controls provisions are specifically qualified through concepts of reasonableness and good faith.¹⁶³ This statutory standard is consistent with Congressional intent in enacting the provisions and relevant legislative history states:

While management should observe every reasonable prudence in satisfying the objectives called for [in the books and records

159. *Id.* at 760.

160. 15 U.S.C. § 78dd-1(b).

161. SEC. v. Jackson, 908 F.Supp. 2d 834, 869 (S.D. Tex. 2012).

162. *Id.* at 857.

163. 15 U.S.C. § 78m(b) (2012).

and internal controls provisions] ... management must necessarily estimate and evaluate the cost/benefit relationships of the steps to be taken in fulfillment of its responsibilities The size of the business, diversity of operations, degree of centralization of financial and operating management, amount of contact by top management with day-to-day operations, and numerous other circumstances are factors which management must consider in establishing and maintaining an internal accounting controls system.¹⁶⁴

Judicial decisions are also another form of actual legal authority concerning the internal control provisions, and the only judicial decision to directly address the substance of the internal controls provisions states, in pertinent part, as follows:

The definition of accounting controls does comprehend reasonable, but not absolute, assurances that the objectives expressed in it will be accomplished by the system. The concept of 'reasonable assurances' contained in [the internal control provisions] recognizes that the costs of internal controls should not exceed the benefits expected to be derived. It does not appear that either the SEC or Congress, which adopted the SEC's recommendations, intended that the statute should require that each affected issuer install a fail-safe accounting control system at all costs. It appears that Congress was fully cognizant of the cost-effective considerations which confront companies as they consider the institution of accounting controls and of the subjective elements which may lead reasonable individuals to arrive at different conclusions. Congress has demanded only that judgment be exercised in applying the standard of reasonableness.¹⁶⁵

In addition, various courts have held – in the context of civil derivative actions in which shareholders seek to hold company directors liable for breach of fiduciary duties due to the company's alleged FCPA violations – that just because improper

164. S. Rep. No. 95-114 at 5 (1977).

165. SEC v. World-Wide Coin Invs., 567 F. Supp. 724, 751 (N.D. Ga. 1983).

conduct allegedly occurred somewhere within a corporate hierarchy does not mean that internal controls must have been deficient.¹⁶⁶

While lacking the status of legal authority, it is nevertheless notable that the SEC's most extensive guidance on the internal controls provisions state, in pertinent part, as follows:

The Act does not mandate any particular kind of internal controls system. The test is whether a system, taken as a whole, reasonably meets the statute's specified objectives. 'Reasonableness,' a familiar legal concept, depends on an evaluation of all the facts and circumstances.

[...]

Private sector decisions implementing these statutory objectives are business decisions. And, reasonable business decisions should be afforded deference. This means that the issuer need not always select the best or the most effective control measure. However, the one selected must be reasonable under all the circumstances.

[...]

The accounting provisions principal objective is to reaching knowing or reckless conduct.

[...]

Inherent in this concept [of reasonableness] is a toleration of deviations from the absolute. One measure of the reasonableness of a system relates to whether the expected benefits from improving it would be significantly greater than the anticipated costs of doing so. Thousands of dollars ordinarily should not be spent conserving hundreds. Further, not every procedure which may be individually cost-justifiable

166. See *Midwestern Teamsters Pension Trust Fund v. Baker Hughes Inc.*, No. H-08-1809, 2009 WL 6799492 (S.D. Tex. May 7, 2009); *Freuler v. Parker*, 803 F. Supp. 2d 630 (S.D. Tex. 2011).

need be implemented; the Act allows a range of reasonable judgments.

[...]

The test of a company's internal control system is not whether occasional failings can occur. Those will happen in the most ideally managed company. But, an adequate system of internal controls means that, when such breaches do arise, they will be isolated rather than systemic, and they will be subject to a reasonable likelihood of being uncovered in a timely manner and then remedied promptly. Barring, of course, the participation or complicity of senior company officials in the deed, when discovery and correction expeditiously follow, no failing in the company's internal accounting system would have existed. To the contrary, routine discovery and correction would evidence its effectiveness.¹⁶⁷

It is against this backdrop that all FCPA enforcement action should be judged including the following corporate enforcement actions from 2013: ADM, Stryker and Philips Electronics.

3. *ADM*

The ADM enforcement action (the 17th largest settlement amount in FCPA history) involved a \$17.8 million DOJ enforcement action and a \$36.5 million SEC enforcement action focused on value-added tax (VAT) refunds in Ukraine. In the words of the DOJ, "the Ukrainian government did not have the money to pay [VAT] refunds that it owed to companies that sold Ukrainian goods outside of Ukraine."¹⁶⁸ Likewise, the SEC acknowledged that "the Ukrainian government determined to delay paying the VAT refunds owed or did not make any refund

167. Foreign Corrupt Practices Act of 1977: Statement of Policy, SEC Release No. 34-17500 (Jan. 29, 1981).

168. Information at 1, *United States v. Alfred C. Toepfer International Ltd.*, No. 13-20062, (C.D. Ill. Dec. 23, 2013), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/alfred-c-toepfer-international/acti-information.pdf>.

payments at all.”¹⁶⁹ Accordingly, Alfred C. Toepfer, International (Ukraine) Ltd. (“ACTI Ukraine”), an indirectly owned subsidiary of ADM whose operations “were largely independent from ADM’s operations,” accumulated tens of millions in receivables for VAT refunds.

Before detailing the DOJ and SEC’s allegations how ACTI Ukraine sought to obtain the VAT refunds it was owed by the Ukrainian government, it is important to understand how the Ukraine government’s retention of VAT refunds were a “lucrative aspect of Ukraine’s endemic corruption.”¹⁷⁰

For instance, a report from the Office of the U.S. Trade Representative noted that “delays in the payment of VAT refunds to exporters [has] been a problem” and that “some companies received reduced refunds or were refused refunds for arbitrary reasons.”¹⁷¹ The report specifically noted that “U.S. grain traders in particular claim several hundred million dollars in VAT arrears” and that “the [Ukraine State Tax Administration] instituted an automated system for VAT refunds, but nontransparent criteria have prevented most firms from participating in the system and receiving their refunds.”¹⁷²

Likewise, the Agribusiness Working Group of the U.S. – Ukraine Business Council in Washington, D.C., noted:

VAT tax refunds due [to] businesses are presently paid by the government of Ukraine with lag times that range from months to over a year, and in some cases with an ultimate bureaucratic denial of valid refund claims. The size of the refunds due private businesses and the time it takes to pay them in Ukraine

169. Complaint at 4-5, *SEC v. Archer-Daniels-Midland Co.*, No. 2:13-cv-2279 (C.D. Ill. Dec. 20, 2013), <http://www.sec.gov/litigation/complaints/2013/comp-pr2013-271.pdf>.

170. Mark Rachkevych, *US Prosecutors Expose Ukraine’s Corruption in VAT-refund Payments*, KYIV POST (Dec. 26, 2013, 4:35 PM), <http://www.kyivpost.com/content/business/us-prosecutors-expose-ukraines-corruption-in-vat-refund-payments-2-334308.html>.

171. Ukraine Report, OFFICE OF THE U.S. TRADE REPRESENTATIVE, 6, <http://www.ustr.gov/sites/default/files/Ukraine.pdf>.

172. *Id.*

... represents the worst record in the world by any government.¹⁷³

4. *ACTI Ukraine Enforcement Action*

It is against this relevant backdrop that the alleged conduct at issue in the ADM enforcement action occurred. According to the DOJ, “in order to obtain VAT refunds from the Ukrainian government, ACTI Ukraine, with the help of its affiliate, Alfred C. Toepfer International G.m.b.H. (“ACTI Hamburg”) [likewise an indirect subsidiary of ADM], paid third party vendors to pass on nearly all of that money as bribes to government officials [...] in exchange for those officials’ assistance in obtaining VAT refunds for and on behalf of ACTI-Ukraine.”

The DOJ alleged that the “VAT refunds gave ACTI Ukraine a business advantage resulting in a benefit to ACTI Ukraine and ACTI Hamburg of roughly \$41 million.” The SEC alleged that the payments allowed ACTI Ukraine to obtain the “VAT refunds earlier than they otherwise would have” and that “getting these VAT refunds earlier – before Ukraine endured a brief period of hyperinflation – gave ACTI Ukraine a business advantage resulting in a benefit to ADM of roughly \$33 million.”

Based on these allegations, the DOJ charged ACTI Ukraine with conspiracy to violate the FCPA’s anti-bribery provisions.

As highlighted above, the FCPA’s anti-bribery provisions of course have specific elements including corrupt intent and obtain or retain business. Moreover, even if these statutory elements have been met, the DOJ has the burden of rebutting the FCPA’s facilitation payments exception. It is difficult to see how the corrupt intent element was met in the ATCI Ukraine enforcement action given that the DOJ itself alleged that VAT refunds were “owed” to ADM entities. Equally problematic is application of the FCPA’s required “obtain or retain business” element to the ATCI Ukraine criminal information as it is

173. *VAT Refunding Remains a Major Issue*, US-UKRAINE BUS. COUNCIL (Feb. 25, 2008), http://www.usubc.org/keyissues/vat_refunding_022508.php.

difficult to see how this required element would have been met had the DOJ been put to its burden of proof given that the DOJ itself alleged that VAT refunds were “owed” to ADM entities. Indeed, as noted by Philip Urofsky (a former high-ranking DOJ FCPA enforcement attorney) “the linkage to obtain or retain specific or even general business” in the ADM action seems “so tenuous as to be nonexistent.”¹⁷⁴

Even if all of the substantive elements of the FCPA’s anti-bribery provisions were met based on the facts alleged in the ATCI Ukraine information, it is further difficult to see how the DOJ would have satisfied its pleading burden under the facilitating payments exception given that the DOJ itself alleged that VAT refunds were “owed” to ADM entities. As Richard Grime (a former high-ranking SEC FCPA enforcement attorney) observed prior to the ADM action: “the fact that the FCPA’s twin enforcement agencies have treated certain payments as prohibited despite their possible categorization as facilitating payments does not mean that a federal court would agree.”¹⁷⁵

In short, it is difficult to square existing legal authority regarding the FCPA’s anti-bribery provisions with the facts alleged in the ATCI Ukraine information and anyone who values the rule of law should be alarmed by it.

5. *ADM Enforcement Action*

In addition to the ACTI Ukraine criminal information and plea agreement, the DOJ also entered into an NPA with ADM

174. SHEARMAN & STERLING LLP, FCPA DIGEST: RECENT TRENDS IN PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 13 (2014) [hereinafter *Enforcement of the FCPA*], available at http://www.shearman.com/~media/Files/Services/FCPA/2014/FCPADigestTP_FCPA010614.pdf.

175. Richard Grime and Sara Zdeb, “The Illusory Facilitating Payments Exception: Risks Posed By Ongoing FCPA Enforcement Actions And The U.K. Bribery Act,” in THE FOREIGN CORRUPT PRACTICES ACT 2011: Coping With Heightened Enforcement Risks (PLI 2011).

based principally on the same Ukraine allegations.¹⁷⁶ In addition, the SEC brought a settled civil complaint against ADM based on the same Ukraine allegations. The SEC complaint charged ADM with civil violations of the FCPA's books and records and internal controls provisions. Because the DOJ's resolution vehicle was a NPA, it did not charge any technical violations of law, but it does reference how the DOJ "will not criminally prosecute ADM ... for any crimes ... related to violations of the internal controls provisions of the FCPA and arising from or related to improper payments by the Company's subsidiaries, affiliates, or joint ventures."

The principal basis for ADM's alleged liability is that ADM failed to prevent alleged bribes at its indirect subsidiaries.

With the typical after-the-fact perfect hindsight the SEC tends to view conduct that took place many years ago, the SEC alleged that "ACTI's conduct went unchecked by ADM" and that "ADM's anti-bribery compliance controls in existence at the time were insufficient in that they did not deter and detect these payments." The SEC further stated that "ADM's anti-corruption policies and procedures relating to ACTI were decentralized and did not prevent improper payments by ACTI to third-party vendors in the Ukraine or ensure that these transactions were properly recorded by ACTI." The SEC's release also states that ADM failed "to prevent illicit payments made by foreign subsidiaries to Ukrainian government officials in violation of the FCPA." Likewise, the DOJ asserted that ADM "failed to implement sufficient policies and procedures to prevent the bribe payments."

Although the ADM action was certainly not the first FCPA enforcement action to assert a standard akin to issuer strict liability for the alleged activities of subsidiaries, the enforcement

176. The NPA's Statement of Facts also contain additional allegations regarding "Conduct Relating to Venezuela" including how a "high level executive" of an ADM joint venture circumvented ADM's internal controls in making alleged payments to alleged Venezuela officials as well as engaging in self-dealing. Given the terms of the NPA, this alleged Venezuela conduct did not factor into \$17.8 million DOJ settlement amount.

agencies' reference to a "failure to prevent" standard is alarming because such a standard does not even exist in the FCPA and is inconsistent with actual legal authority. Moreover, such a standard is inconsistent with even enforcement agency guidance relevant to the internal controls provisions.

While there is reference in the ADM enforcement actions to certain ADM tax professionals having knowledge of ACTI Ukraine's VAT refund struggles, this is hardly surprising and does not suggest participation or complicity of senior company officials in the alleged bribe payments. Indeed, the allegations suggest that ADM executives frequently questioned ACTI Ukraine and ACTI Hamburg about the VAT refunds and the SEC alleged that ACTI Hamburg and ACTI Ukraine "structured payments to avoid detection, and created fictitious insurance contracts to hide from ADM and others the payments to third-parties to secure VAT refunds in Ukraine."

Wholly apart from the internal controls theory of enforcement in the ADM enforcement action, it is also alarming that the SEC's \$36.4 million settlement amount consisted entirely of disgorgement and prejudgment interest, even though the SEC did not charge ADM with violating the FCPA's anti-bribery provisions. This is yet another example of what has been called no-charged bribery disgorgement and one of the more vocal critics of this typical SEC resolution feature in corporate FCPA enforcement actions has been Paul Berger (a former Associate Director of the SEC's Division of Enforcement) who stated:

Settlements invoking disgorgement but charging no primary anti-bribery violations push the law's boundaries, as disgorgement is predicated on the common-sense notion that an actual, jurisdictionally-cognizable bribe was paid to procure the revenue identified by the SEC in its complaint 'No-charged bribery disgorgement' settlements appear designed to inflict punishment rather than achieve the goals of equity Given the bedrock principle that a court's equitable power to order such disgorgement goes only as far as the scope of the violation, it is difficult to determine how a court could lawfully allow disgorgement of profits for

uncharged violations without the remedy crossing the line into ‘punishment’ for the violations actually charged.¹⁷⁷

The SEC claims that its FCPA enforcement program is designed, in part, to “protect investors.”¹⁷⁸ It is difficult to see how this mission was accomplished in the ADM enforcement action by requiring ADM (or more accurately its shareholders) to disgorge approximately \$36 million in money that it was legitimately owed in VAT refunds by the Ukraine government. In this regard, a 2010 *Forbes* article titled “The Bribery Racket” is instructive in that it observed that “companies can find themselves getting extorted in foreign lands, only to get extorted again by Washington.”¹⁷⁹

6. *Stryker*

The SEC’s “failure to prevent” standard was also the basis of a \$13.2 million FCPA enforcement action against Stryker Corporation in 2013. The conduct at issue focused on various Stryker subsidiaries and alleged payments by the subsidiaries to various alleged government employees, including public health care professionals in Mexico, Poland, Romania, Argentina, and Greece.¹⁸⁰ Stryker agreed to resolve the enforcement action via an administrative cease and desist order in which the company neither admitted nor denied the SEC’s allegations. The SEC’s

177. Debevoise & Plimpton, LLP, Do FCPA Remedies Follow FCPA Wrongs? “Disgorgement” in Internal Controls and Books and Records Cases, 3.1 FCPA UPDATE 1, 1-4 (2011).

178. See CRIMINAL DIV. OF THE U.S. DEPARTMENT OF JUSTICE & THE ENFORCEMENT DIV. OF THE U.S. SEC. & EXCH. COMM’N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012), available at <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.

179. Nathan Vardi, The Bribery Racket, *FORBES* (June 7, 2010), available at <http://www.forbes.com/global/2010/0607/companies-payoffs-washington-extortion-mendelsohn-bribery-racket.html>.

180. Press Release, Sec. & Exch. Comm’n, *SEC Charges Stryker Corporation With FCPA Violations* (Oct. 24, 2013), available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540044262>.

order contains no allegation as to Stryker itself other than the following.

The financial results of all of the Stryker subsidiaries discussed herein were consolidated into Stryker's financial statements. Stryker's foreign subsidiaries were organized in a decentralized, country-based structure, wherein a manager of a particular country's operations had primary responsibility for all business within a given country. During the relevant period, each of Stryker's foreign subsidiaries operated pursuant to individual policies and directives implemented by country or regional management. Stryker had corporate policies addressing anti-corruption, but these policies were inadequate and insufficiently implemented on the regional and country level.¹⁸¹

Based on the above findings, the SEC found that Stryker violated the FCPA's books and records and internal controls provisions. Similar to the ADM enforcement action discussed above, the SEC settlement required Stryker to pay approximately \$9.7 million in disgorgement and prejudgment interest even though there was no finding or charging of FCPA's anti-bribery violations.

7. Philips

Also in 2013, Netherlands-based Philips Electronics, a company with shares listed on the New York Stock Exchange, agreed to pay approximately \$4.5 million to resolve an FCPA enforcement action.¹⁸² The administrative cease and desist order found that Philips's Polish subsidiary made improper payments to alleged public officials of Polish healthcare facilities to increase the likelihood that public tenders for the sale of medical equipment would be awarded to the subsidiary.¹⁸³ There is no

181. Stryker Corp., Exchange Act Release No. 70751 (Oct. 24, 2013).

182. Koninklijke Philips Elec. N.V., Exchange Act Release No. 69327, Accounting & Auditing Release No. 2451 (Apr. 5, 2013).

183. *Id.* at 2.

allegation or suggestion in the SEC's order of Philips's knowledge or approval of the alleged improper payments. In fact, the SEC found that certain of the alleged improper payments "were supported by false documentation created by Philips Poland employees and/or third parties."

Nevertheless, the SEC found that Philips violated the FCPA's books and records and internal control provisions. The SEC's order stated:

Philips's internal controls failed to detect or prevent the improper payments and false recordings of those transactions during that time. As a result, Philips failed to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions were properly recorded by Philips in its books and records. Philips also failed to implement an FCPA compliance and training program commensurate with the extent of its international operations. Accordingly, Philips violated [the internal control provisions].¹⁸⁴

Similar to the above ADM and Stryker enforcement actions, the SEC settlement required Philips to pay approximately \$4.5 million in disgorgement and prejudgment interest even though there was no finding or charging of FCPA anti-bribery violations.

Legal authority—and even enforcement agency guidance—regarding the FCPA's internal control provisions stand for the following: internal controls are not held to a standard of absolute assurances, inherent in the concept of reasonableness is a toleration of deviations from the absolute, and occasional failings may occur in even the most ideally managed company. It is difficult to square this authority and information with the facts alleged in the ADM, Stryker, and Philips enforcement actions, and anyone who values the rule of law should be alarmed by it.

Moreover, general black-letter legal principles such as regard for the corporate form and its limited liability are also relevant to

184. *Id.*

FCPA enforcement actions. In this regard, the 2013 FCPA enforcement action against RLC was also alarming in that the enforcement agencies seemingly advanced a theory that legal liability can hop, skip, and jump around a multinational company in the absence of an “alter ego” / “veil piercing” analysis.

8. *RLC*

As previously discussed in Section IIA, in 2013 RLC agreed to resolve DOJ and SEC enforcement actions by paying approximately \$1.6 million via NPAs – the first instance in FCPA history involving both a DOJ and SEC NPA as noted above.

The enforcement action can be summarized as follows:

RLC has approximately 95 foreign subsidiaries. One subsidiary, PRL S.R.L, an indirectly wholly-owned subsidiary of RLC headquartered and incorporated in Argentina, had a General Manager who conspired with a customs clearance agency to make improper payments to assist in improperly obtaining paperwork necessary for goods to clear customs, to permit clearance of items without the necessary paperwork, to permit the clearance of prohibited items, and to avoid inspection.¹⁸⁵

There is no allegation or suggestion that RLC was aware of, or participated in, the alleged conduct. The resolution documents merely say that “in the five years that General Manager A, Agent 1, and others at PRL S.R.L carried out this scheme, RLC did not have an anti-corruption program and did not provide any anti-corruption training or oversight with respect to PRL S.R.L.”¹⁸⁶

185. *Ralph Lauren Resolves FCPA Enforcement Action Via Double NPAs Based On Subsidiary Conduct in Argentina*, FCPA PROFESSOR (April 23, 2013), <http://www.fcraprofessor.com/ralph-lauren-resolves-fcpa-enforcement-action-via-double-npas-based-on-subsidiary-conduct-in-argentina>.

186. *Id.* Letter from U.S. Dep’t. of Justice to Thomas A. Hanusik (April 22, 2013), attachment A ¶ 15 [hereinafter Hanusik Letter]. *available at* <http://www.sec.gov/Archives/edgar/data/1037038/000095014213000973/eh130>

The simplistic inference would seem to be that General Manager A would not have engaged in the improper conduct had RLC had an anti-corruption program and provided anti-corruption training. However, this notion would seem to be undermined by reference to RLC's worldwide FCPA compliance review which "identified no further violations."¹⁸⁷

Notwithstanding the fact that there was no allegation or suggestion that RLC was aware of, or participated in, the alleged improper conduct, the DOJ NPA stated that the DOJ "will not criminally prosecute RLC . . . related to violations of the anti-bribery provisions of the FCPA . . . arising from and related to improper payments in Argentina" ¹⁸⁸ Likewise, the SEC NPA release stated that the SEC "has determined not to charge Ralph Lauren Corporation with violations of the Foreign Corrupt Practices Act."¹⁸⁹

Respondeat superior corporate liability is broad, but not as broad as advanced by the DOJ in the RLC enforcement action. Absent an "alter ego" / "piercing the veil" analysis, legal liability of any kind does not ordinary hop, skip, and jump around a multinational enterprise as the DOJ or SEC see fit.

Indeed, in an article titled, "The Ralph Lauren FCPA Case: Are There Any Limits to Parent Corporation Liability?," Philip Urofsky (a former high-ranking DOJ FCPA enforcement attorney) and his co-author state, in pertinent part:

The facts of the case . . . point to the steady entrenchment of a more ominous prosecution theory: an approach that appears to

0614_ex9902.htm. *Id.*

187. *Id.* U.S. Sec. & Exch. Comm., Ralph Lauren Corporation Non-Prosecution Agreement, Exhibit A ¶ 12, available at <http://www.sec.gov/news/press/2013/2013-65-npa.pdf>. *Id.*

188. *Id.* Hanusik Letter, *supra* note 186, at 1. *Id.*

189. Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Non-Prosecution Agreement With Ralph Lauren Corporation Involving FCPA Misconduct, U.S. Exchange and Securities Commission (April 22, 2013) (on file with the U.S. Sec. & Exch. Comm'n), available at <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514780#.UxDoQIW5G9Q>.

approximate strict criminal and civil liability of parent corporations for their subsidiaries' corrupt acts. Although this disregard of corporate structures has been hinted at in previous SEC matters--and the theoretical underpinnings discussed in last year's DOJ/SEC Resource Guide--the RLC case puts both agencies firmly in the camp of this aggressive and unprecedented expansion of corporate liability.

This approach, however, fails to honor the corporate form and the black-letter rule that to 'pierce the corporate veil' the government and other litigants must show that the parent operated the subsidiary as an alter ego, and itself paid no attention to the corporate form. Moreover, it is contrary to the language of the [FCPA's] original history.¹⁹⁰

In conclusion, the article stated:

It is disquieting [that in the RLC case] the DOJ appears to have jumped on the charge-the-parent bandwagon, bringing a bribery case against a parent without alleging any involvement by the parent in those violations. One can only speculate that it did so because it had no jurisdiction over the foreign subsidiary itself, given that it also did not allege any act by the subsidiary in U.S. territory.

However, as always, the maxim that bad facts make bad law applies, and evidentiary weaknesses cannot excuse the distortion of the statute's previously clear and reasonable allocation of responsibility.¹⁹¹

Urofsky further noted as to the RLC enforcement action as follows.

The fact that the *Ralph Lauren* case was resolved through an NPA rather than a DPA (or a guilty plea) does not excuse this

190. Philip Urofsky, *The Ralph Lauren FCPA Case: Are there any Limits to Parent Corporation Liability?*, BLOOMBERG LAW (Mar. 3, 2014, 11:21 AM), <http://about.bloomberglaw.com/practitioner-contributions/the-ralph-lauren-fcpa-case-are-there-any-limits-to-parent-corporation-liability/>.

191. *Id.*

approach—when the DOJ announces it will not prosecute but requires the company to *admit* to facts establishing a criminal violation of the law, it is stating, as a fact, that the company committed a crime. In such case, it is obligated to demonstrate, through the pleadings, in whatever form they are presented, that it could, in fact, prove each and every element of the offense.¹⁹²

In short, the theory of liability advanced by the DOJ in the RLC enforcement action would be inconceivable in other areas of law such as contract liability or tort liability for the simple reason that absent an “alter ego” / “piercing the veil” analysis, legal liability of any kind does not ordinary hop, skip, and jump around a multinational enterprise.

However, in this new era of FCPA enforcement any theory of liability, no matter how dubious, seems to be fair game for the DOJ or SEC to extract a multi-million dollar settlement from a risk-averse corporation.

So why if the ADM, Stryker, Philips, and RLC enforcement actions were based on dubious theories of liability did the companies resolve alleged FCPA scrutiny for approximately \$75 million in combined fines and penalties?

As highlighted in “The Façade of FCPA Enforcement,” because of the “carrots” and “sticks” relevant to resolving a government enforcement action, companies under FCPA scrutiny are often nudged to accept resolution vehicles notwithstanding the enforcement agencies’ dubious enforcement theories or the existence of valid and legitimate defenses.¹⁹³ Settlement of a corporate FCPA enforcement action does not necessarily reflect the triumph of one party’s legal position, but rather it reflects a risk-based decision primarily grounded in issues other than facts or the law.

Consider the following – using the ADM enforcement action as an example. If ADM wanted to put the enforcement agencies to their burdens of proof, it would have required the company to

192. *Enforcement of the FCPA*, *supra* note 174, at 12.

193. *See The Façade*, *supra* note *.

first be criminally indicted by the DOJ or face long protracted civil litigation with the SEC. If either route were chosen, ADM's stock price would surely have fallen. Even if the drop were small – say 3% and even if short-lived – the hit to ADM's market capitalization, an important data point for investors and an important metric by which business manager performance is judged, would have been approximately \$850 million. Compared to this figure, resolving an FCPA enforcement action for approximately \$56 million seems like a rationale corporate decision in the best interest of shareholders.

Yet what are the long-term effects of ADM's decision and those of other similarly situated companies, not just to the companies, but other business organizations subject to increasingly aggressive FCPA enforcement theories while trying to compete in good faith in the global marketplace where – in the words of Joseph Covington (the DOJ's former FCPA Unit chief) – they “can't help but confront corrupt officials – as customers, regulator and adjudicators – and confront them often”?¹⁹⁴

As Neil Eggleston, a former DOJ prosecutor, stated:

Most [corporate FCPA enforcement actions] have been settled. When that occurs, defendants have little incentive to refuse to agree to novel Department of Justice theories of prosecution or jurisdiction, so long as the penalty is acceptable. The department then cites its prior settlement as precedent when settling later ones. But no court approved the earlier settlement, and the prior settlement should have no precedential value in favor of the DOJ in later settlements.¹⁹⁵

Likewise, former Attorney General Alberto Gonzales rightly noted:

194. *Former DOJ FCPA Chief Supports FCPA Compliance Defense*, FCPA PROFESSOR (Oct. 4, 2011), <http://www.fcprofessor.com/former-doj-fepa-chef-supports-fepa-compliance-defense>.

195. *Friday Roundup*, FCPA PROFESSOR (Mar. 1, 2013), <http://www.fcprofessor.com/friday-roundup-69>.

In an ironic twist, the more that American companies elect to settle and not force the DOJ to defend its aggressive interpretation of the [FCPA], the more aggressive DOJ has become in its interpretation of the law and its prosecution decisions.¹⁹⁶

In this regard, the alarming enforcement actions highlighted above should serve as a reminder that the business community is, at least in part, responsible for the current aggressive FCPA enforcement climate. Indeed, as Homer Moyer (a dean of the FCPA bar) observed:

One reality is the enforcement agencies' [FCPA] views on issues and enforcement policies, positions on which they are rarely challenged in court. The other is what knowledgeable counsel believe the government could sustain in court, should their interpretations or positions be challenged. The two may not be the same. The operative rules of the game are the agencies' views unless a company is prepared to go to court or to mount a serious challenge within the agencies.¹⁹⁷

There are many who cheer more FCPA enforcement regardless of the enforcement theories. For these cheerleaders, there is much to cheer in the ADM, Stryker, Philips, and RCL enforcement actions and the combined \$75 million in settlement amounts will be blindly inserted into FCPA enforcement statistics and trotted out at every available opportunity to demonstrate how the U.S. is the leader in anti-bribery enforcement.

Yet for those who value the rule of law, there is much to lament in these enforcement actions. In 2010, the DOJ's

196. *Add Alberto Gonzalez To The List Of Former High-Ranking DOJ Officials Who Support An FCPA Compliance Defense*, FCPA PROFESSOR (Sept. 11, 2012), <http://www.fcprofessor.com/add-alberto-gonzalez-to-the-list-of-former-high-ranking-doj-officials-who-support-an-fcpa-compliance-defense>.

197. Homer E Moyer, Jr. et al., *Becoming an FCPA-Savvy Director*, NYSE GOVERNANCE SERVICES CORPORATE BOARD MEMBER (Jan. 03, 2014), https://www.boardmember.com/Article_DetailsDetailsDetailsPrintDetails.aspx?id=10857.

Assistant Attorney General (“AAG”) delivered a speech before the Council on Foreign Relations titled “International Criminal Law Enforcement: Rule of Law, Anti-Corruption and Beyond.”¹⁹⁸ As suggested by the title of the speech, the AAG spoke about FCPA enforcement and how the increase in FCPA enforcement was consistent with the U.S.’s global approach to promote the rule of law. The AAG began his speech by asking two rhetorical questions: is the rule of law “more than [just] a catch phrase” and “does [the rule of law] have any real meaning.”¹⁹⁹

In light of the above enforcement actions, these are great questions.

B. Judicial Scrutiny of Enforcement Theories

This section provides a comprehensive analysis of judicial scrutiny of FCPA enforcement theories in 2013 as well as how non-FCPA legal developments in 2013 should cause pause as to certain FCPA enforcement theories.

1. FCPA Enforcement Theories

As previously highlighted, NPAs and DPAs are the dominant resolution vehicle used to resolve corporate FCPA enforcement actions. In addition, few corporate FCPA enforcement actions result in related enforcement actions against company employees. The combined effect of these two dynamics of FCPA enforcement means there is little judicial scrutiny regarding the FCPA’s provisions.

Yet, in the rare instances in which individuals are prosecuted for FCPA offenses by the DOJ or SEC, such defendants – unlike

198. Lanny A. Breuer, Assistant Attorney Gen. for the Criminal Div. of the U.S. Dep’t of Justice, Address to the Council on Foreign Relations: International Criminal Law Enforcement: Rule of Law, Anti-Corruption and Beyond (May 4, 2010), available at <http://www.justice.gov/criminal/icitap/pr/2010/05-04-10AAG-breuer-remarks.pdf>.

199. *Id.*

business organizations – are more likely to put the enforcement agencies to its burden of proof as their personal liberty, assets, and reputation are at stake. Indeed, without individual FCPA defendants there would be no FCPA case law.²⁰⁰ Because certain individual defendants have chosen not to take the path of least resistance, the contours of FCPA jurisprudence have begun to take shape and discussed below are FCPA legal developments from 2013 regarding the FCPA’s “foreign official” element as well as jurisdictional and statute of limitations issues.

2. “Foreign Official” Oral Argument

In this new era of FCPA enforcement, a prominent enforcement agency theory has been that employees of alleged state-owned or state-controlled enterprises (SOEs) are “foreign officials” under the FCPA and thus occupy a status equal to traditional bona fide government officials such as a president or prime minister. As highlighted in Table X below, 5 of the 9 corporate FCPA enforcement actions in 2013 (56%) involved, in whole or in part, employees of SOEs ranging from oil and gas companies to banks.

200. *Without Individual FCPA Defendants, There Would Be No FCPA Case Law*, FCPA PROFESSOR (July 24, 2013), <http://www.fcprofessor.com/without-individual-fcpa-defendants-there-would-be-no-fcpa-case-law>.

Table X
Alleged “Foreign Officials” in 2013 Corporate Enforcement
Actions²⁰¹

<u>Enforcement Action</u>	<u>Alleged “Foreign Officials”</u>
ADM	<p><i>DOJ</i></p> <p>Ukrainian government officials in exchange for those officials’ assistance in obtaining VAT refunds</p> <p>An employee of Industrias Diana (an oil company headquartered in Venezuela that was wholly owned by Petroleos de Venezuela, Venezuela’s state-owned and controlled national oil company)</p> <p><i>SEC</i></p> <p>Ukrainian government officials in exchange for obtaining VAT refunds</p>
Bilfinger	<p><i>DOJ</i></p> <p>Employees of the Nigerian National Petroleum Corporation (NNPC), employees of National</p>

201. *From Healthcare Providers to Customs Officials to SOE Employees – The “Foreign Officials” of 2013*, FCPA PROFESSOR (Jan. 13, 2014), <http://www.fcprofessor.com/from-healthcare-providers-to-customs-officials-to-soe-employees-the-alleged-foreign-officials-of-2013>. As apparent from the descriptions, in certain instances the enforcement agencies describe the “foreign official” with reasonable specificity; in other instances with virtually no specificity. Certain of the enforcement actions in the table technically involved only FCPA books and records and internal control charges. However, actual charges in most corporate FCPA enforcement actions hinge on voluntary disclosure, cooperation, collateral consequences, and other non-legal issues. Thus, even if an FCPA enforcement action is resolved without formal FCPA anti-bribery charges, the actions remain very much about the alleged “foreign officials” involved. *Id.*

	<p>Petroleum Investment Management Services (a subsidiary of NNPC), the dominant political party in Nigeria, and an official in the executive branch of the Government of Nigeria</p>
Weatherford	<p><i>DOJ</i></p> <p>Employees of Sonangol, a company wholly owned, controlled, and managed by the Angolan government</p> <p>Angolan Officials 1, 2, and 3 (described as “high-level, senior officials of Sonangol” with influence over contracts), a “relative of Angolan Official 4 (described as a “high-level, senior official of Angola’s Ministry of Petroleum” with influence over contracts entered into by the Angolan government), Angolan Official 5 (described as “a Sonangol official with decision-making authority in Angola’s Cabinda region”), Angolan Official 3’s wife, Angolan Official 4’s daughter and son-in-law.”</p> <p>“Decision makers at the national oil company” in the Middle East</p> <p><i>SEC</i></p> <p>A Sonangol Drilling Manager, Sonangol officials</p> <p>“Decision makers at the national oil company” in the Middle East</p> <p>Employees of Sonatrach, an Algerian state-owned company Albanian tax auditors</p> <p>The tax director and two members of Albania’s National Petroleum Agency</p>
Stryker	<i>SEC</i>

	<p>“Various government employees including public health care professionals in Mexico, Poland, Romania, Argentina, and Greece”</p> <p>“Foreign officials employed by a Mexican governmental agency responsible for providing social security for government employees”</p> <p>“Foreign official then employed as the director of a public hospital in Poland,” “a state-employed healthcare professional” in Poland</p> <p>A person “waiting to be confirmed as chief physician” at a public hospital in Romania</p> <p>“Physicians employed in the public healthcare system” of Argentina</p> <p>“A foreign official who served as a prominent professor at the Greek University, and was the director of medical clinics at two public hospitals affiliated with the Greek University”</p>
Diebold	<p><i>DOJ</i></p> <p>Employees of Bank 1 and Bank 2 described as follows. “[The Banks] were controlled and approximately 70% owned by the [Chinese government] ... and were [two] of several state-owned banks in [China] that together maintained a monopoly over the banking system in [China] and provided core support for the government’s projects and economic goals. The government retained a controlling right in [the Banks], including appointing or nominating a majority of board of directors and top managers at the bank. [The Banks] were an ‘instrumentality’ of a foreign government [under the FCPA].”</p> <p>Inferences to employees of banks owned or controlled by the government of Indonesia</p>

	<p><i>SEC</i></p> <p>Employees of banks owned or controlled by the government of China</p> <p>Employees of banks owned or controlled by the government of Indonesia</p>
Total	<p><i>DOJ</i></p> <p>An Iranian Official described as “the Chairman of an Iranian engineering company that was more than 90% owned by the Government of Iran and substantially controlled by the Government of Iran” and also described as follows. “The Iranian Official was [also] the head of an Iranian organization concerned with fuel consumption, which was a wholly owned subsidiary of the National Iranian Oil Company (“NIOC”), and was a government advisor to a high-ranking Iranian official.” NIOC is described as a “government-owned corporation operating under the direction and control of the Ministry of Petroleum of Iran.”</p> <p><i>SEC</i></p> <p>An Iranian Official described as follows. “Between 1995 and 2004 the Iranian Official was first the head of one wholly owned subsidiary of NIOC and later the head of another NIOC wholly owned subsidiary. The Iranian Official was also a government advisor to a high-ranking Iranian official.”</p>
Ralph Lauren	<p><i>DOJ</i></p> <p>“Customs and other government officials [in Argentina] to assist in improperly obtaining paperwork necessary for goods to clear customs, to permit clearance of items without the necessary</p>

	<p>paperwork, to permit the clearance of prohibited items, and to avoid inspection”</p> <p><i>SEC</i></p> <p>“Argentine customs officials to secure the importation of RLC’s products into Argentina” “Argentine government officials to improperly secure the importation of RLC’s products into Argentina”</p>
Parker Drilling	<p><i>DOJ</i></p> <p>Employees of the Nigerian Customs Service (“NCS”)</p> <p>Employees of the “Panel of Inquiry for the Investigation of All Cases of Temporary Import Permits Issued Between 1984 to Year 2000 (the “TI Panel”) (a board empanelled for the purpose of examining certain duties and tariffs that the NCS collected or failed to collect; the TI Panel was presidentially appointed, operated under the auspices of the Nigerian President’s office, and possessed the power to issue subpoenas and levy fines)”</p> <p>Employees of “Nigeria’s State Security Service, a Nigerian intelligence and law enforcement agency that operated as a department within the Nigerian government’s executive”</p> <p><i>SEC</i></p> <p>Employees of the Nigerian Customs Service (“NCS”)</p> <p>Employees of the “Panel of Inquiry for the Investigation of All Cases of Temporary Import Permits Issued Between 1984 to Year 2000 (the “TI Panel”) (a board empanelled for the purpose of examining certain duties and tariffs that the NCS</p>

	<p>collected or failed to collect; the TI Panel was presidentially appointed, operated under the auspices of the Nigerian President’s office, and possessed the power to issue subpoenas and levy fines)”</p> <p>Employees of “Nigeria’s State Security Service, a Nigerian intelligence and law enforcement agency that operated as a department within the Nigerian government’s executive”</p>
Philips	<p><i>SEC</i> “Public officials of Polish healthcare facilities”</p>

The prominence of the SOE employee “foreign official” theory was not unique to 2013. Rather, it was consistent with prior years as 42% of corporate enforcement actions in 2012 involved, in whole or in part, employees of alleged SOEs; 81% of corporate enforcement actions in 2011 involved, in whole or in part, employees of alleged SOEs; 60% of corporate enforcement actions in 2010 involved, in whole or in part, employees of alleged SOEs; and 66% of corporate enforcement actions in 2009 involved, in whole or in part, employees of alleged SOEs.²⁰²

There is no case law precedent regarding this prominent FCPA enforcement theory.²⁰³ However, the issue of whether

202. *Id.*

203. For a discussion of trial court decisions regarding this enforcement theory see Mike Koehler, *The Foreign Corrupt Practices Act Under the Microscope*, 15 U. PA. J. BUS. L. 1, 1-2 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191149. These trial court challenges relied in part on the author’s declaration which detailed the FCPA’s extensive legislative history relevant to the “foreign official” issue. See Declaration of Professor Michael Koehler, available at <http://www.scribd.com/doc/49310598/U-S-v-Stuart-Carson-el-al-Declaration-of-Professor-Michael-Koehler>. In sum, the declaration states as follows, “There is no express statement or information in the FCPA’s legislative history describing the ‘any department, agency, or instrumentality’ portion of the ‘foreign official’ definition. Further, there is no express statement or

employees of alleged SOEs are “foreign officials” under the FCPA is currently the focus of an appeal pending in the Eleventh Circuit and oral argument in *U.S. v. Joel Esquenazi and Carlos Rodriguez* occurred in October 2013.²⁰⁴

By way of background, in 2011 a federal jury convicted Esquenazi and Rodriguez of various counts for their alleged roles in a scheme to pay bribes to alleged “foreign officials” at Haiti Telecom, an alleged SOE.²⁰⁵ On appeal, defendants are challenging, among other things, the trial court’s “foreign official” jury instruction and the issue presented to the 11th Circuit is as follows.

Whether [defendants are] entitled to an acquittal because employees of Haiti Teleco were not “foreign officials” within

information in the FCPA’s legislative history to support the DOJ’s expansive legal interpretation that alleged SOEs are ‘instrumentalities’ (or ‘departments’ or ‘agencies’) of a foreign government and that employees of SOEs are therefore ‘foreign officials’ under the FCPA’s anti-bribery provisions. However, there are several statements, events, and information in the FCPA’s legislative history that demonstrate that Congress did not intend the ‘foreign official’ definition to include employees of SOEs. Among other things, during its multi-year investigation of foreign corporate payments that preceded enactment of the FCPA, Congress was aware of the existence of SOEs and that some of the questionable payments uncovered or disclosed may have involved such entities. In certain of the competing bills introduced in Congress to address foreign corporate payments, the definition of ‘foreign government’ expressly included SOEs,” and Congress was provided a more precise definition of “foreign government” to include SOEs. However, despite being aware of SOEs, despite exhibiting a capability for drafting a definition that expressly included SOEs in other bills, and despite being provided a more precise way to describe SOEs, Congress chose not to include such definitions or concepts in the bill that ultimately became the FCPA.”

204. *Oral Arguments Heard In Historic “Foreign Official” Challenge*, FCPA PROFESSOR (Oct. 14, 2013), <http://www.fcraprofessor.com/oral-arguments-heard-in-historic-foreign-official-challenge>.

205. See Press Release, U.S. Dept. of Justice Office of Pub. Affairs, Two Telecommunications Executives Convicted by Miami Jury on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti, (Aug. 5, 2011) (on file with the Dept. of Justice, available at <http://www.justice.gov/opa/pr/2011/August/11-crm-1020.html>).

the meaning of FCPA simply because the National Bank of Haiti owned shares of Haiti Teleco and the Haitian government appoints board members and directors.²⁰⁶

The appeal is historic in that it is the first time in FCPA history an appellate court has the opportunity to weigh in on the prominent enforcement theory that employees of alleged SOEs are “foreign officials” under the FCPA.²⁰⁷

3. *Jurisdiction and Related Issues in Straub and Steffen*

In 2013, the SEC was put to its initial burden of proof in two individual FCPA enforcement actions involving foreign national defendants. The results were mixed for the SEC as one case was allowed to proceed past the motion to dismiss stage while the other case was dismissed. This section provides a comprehensive analysis of *SEC v. Straub* and *SEC v. Steffen*.

Straub

SEC v. Straub involved allegations that Hungarian nationals (Elek Straub, Andras Balogh, and Tamas Morvai employed by issuer Magyar Telecom) violated the FCPA’s anti-bribery provisions in connection with a bribery scheme involving Macedonian “foreign officials.”²⁰⁸ The defendants moved to dismiss the SEC’s complaint on three principal grounds: (i) the court lacked personal jurisdiction over them; (ii) the SEC’s claims were time-barred; and (iii) the complaint failed to state claims for certain causes of action.

206. *Historic “Foreign Official” Appeals Filed*, FCPA PROFESSOR (May 10, 2012), <http://www.fcprofessor.com/historic-foreign-official-appeals-filed>.

207. For a summary of the oral arguments, as well as an audio clip, see FCPA PROFESSOR, *supra* note 204.

208. See Complaint, *S.E.C. v. Straub*, 921 F. Supp. 2d 244 (S.D.N.Y. Dec. 29, 2011) (No. 11 CIV. 9645 RJS).

U.S. District Court Judge Richard Sullivan (S.D.N.Y.) denied defendants' motion in its entirety and highlighted below is a summary of the decision as to the following issues: personal jurisdiction, statute of limitations, the jurisdictional element of the FCPA's anti-bribery provisions and "foreign official" issues.²⁰⁹

Personal Jurisdiction

Judge Sullivan's decision began with a discussion of personal jurisdiction issues including the pleading standard on a motion to dismiss for lack of personal jurisdiction – that is, the SEC bears the burden of establishing that the court has jurisdiction over the defendants which can be met by pleading in good faith legally sufficient allegations of jurisdiction. Judged against the due process standards of "minimum contacts" and "reasonableness," Judge Sullivan concluded that the SEC established that defendants have minimum contacts with the United States and that the exercise of personal jurisdiction over the defendants would not be unreasonable. Accordingly, Judge Sullivan concluded that "the SEC has met its burden at this stage of establishing a prima facie case of personal jurisdiction over defendants."

As to "minimum contacts" Judge Sullivan stated as follows.

[T]he Defendants here allegedly engaged in conduct that was designed to violate United States securities regulations and was thus necessarily directed toward the United States, even if not principally directed there. [...] [D]uring and before the time of the alleged violations, both Magyar's and Deutsche Telekom's securities were publicly traded through ADRs listed on the NYSE and were registered with the SEC [...] Because these companies made regular quarterly and annual consolidated filings during that time, Defendants knew or had reason to know that any false or misleading financial reports

209. See *S.E.C. v. Straub*, 921 F. Supp. 2d 244 (S.D.N.Y. 2013).

would be given to prospective American purchasers of those securities.

Indeed, during the period of the alleged violations, Straub allegedly signed false management representation letters to Magyar's auditors, and Balogh and Morvai signed allegedly false management subrepresentation letters for quarterly and annual reporting periods in 2005. Therefore, it is not only that Magyar traded securities through ADRs listed on the NYSE that satisfies the minimum contacts standard but also that Defendants allegedly engaged in a cover-up through their statements to Magyar's auditors knowing that the company traded ADRs on an American exchange, and that prospective purchasers would likely be influenced by any false financial statements and filings. The court thus has little trouble inferring from the SEC's detailed allegations that, even if Defendants' alleged primary intent was not to cause a tangible injury in the United States, it was nonetheless their intent, which is sufficient to confer jurisdiction.

In discussing "minimum contacts," Judge Sullivan rejected Defendants' assertion that their contact must "proximately cause" a "substantial injury" in the forum.

As to Defendants' argument that, should the Court exercise jurisdiction over them, "it would automatically imply that 'any individual director, officer, or employee of an issuer in any FCPA case' would also be subject to personal jurisdiction," Judge Sullivan called Defendants' concerns "overblown" and stated:

In holding that Defendants have met their burden of demonstrating a prima facie case for jurisdiction at this early stage, the Court does not create a per se rule regarding employees of an issuer but rather bases its decision on a fact-based inquiry – namely, an analysis of the SEC's specific allegations regarding the Defendants' bribery scheme, Defendants' falsification of Magyar's books and records, and Defendants' personal involvement in making representations and subrepresentations with respect to and in anticipation of Magyar's SEC filings. Although Defendants' alleged bribes may have taken place outside of the United States (as is

typically true in cases brought under the FCPA), their concealment of those bribes, in conjunction with Magyar's SEC filings, was allegedly directed toward the United States. [...]Accordingly, the Court finds that the SEC has established a prima facie case that Defendants had the requisite minimum contacts with the United States to support personal jurisdiction.

As to the "reasonableness" prong of the due process analysis, Judge Sullivan cited other authority for the proposition that "the reasonableness inquiry is largely academic in non-diversity cases brought under federal law which provides for nationwide service of process because of the strong federal interests involved."

Judge Sullivan then stated:

Like each and every court in this Circuit to have applied the reasonableness standard after determining that a given defendant has the requisite minimum contacts, this Court finds that this is not the rare case where the reasonableness analysis defeats the exercise of personal jurisdiction. Although it might not be convenient for Defendants to defend this action in the United States, Defendants have not made a particular showing that the burden on them would be "severe" or "gravely difficult." Indeed, as the SEC rightly notes, unlike in a private diversity action, here there is no alternative forum available for the government. Thus, if the SEC could not enforce the FCPA against Defendants in federal courts in the United States, Defendants could potentially evade liability altogether. Additionally, because this case was brought under federal law, the judicial system has a strong federal interest in resolving this issue here. The Court therefore finds that the exercise of personal jurisdiction over Defendants is not unreasonable.

Statute of Limitations

The FCPA does not have a specific statute of limitations. Rather, the five year "catch-all" provisions in 18 USC § 3282 (for criminal actions) and 28 USC §2462 (for civil actions) apply to FCPA enforcement actions.

Judge Sullivan began by setting forth the applicable limitations period found in §2462.

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced from the date when the claim first accrued if, *within the same period, the offender or the property is found within the United States in order that proper service be made thereon.* (emphasis added).

Judge Sullivan began by noting that it was “undisputed that more than five years have elapsed since the SEC’s claims first accrued,” but that the parties disagreed as to the plain meaning of section 2642 and, given that Defendants were not physically located within the United States during the limitations period, whether the statute of limitations has run on the SEC’s claims.

Judge Sullivan stated:

The SEC argues that the statute of limitations has not run because the statute applies only ‘if within the same period, the offender . . . is found within the United States. Thus, according to the SEC, because Defendants were not ‘found’ in this country at any point during the limitations period in question, the Court’s inquiry should end. The Court agrees.

Judge Sullivan then stated:

Here, the operative language in § 2462 requires, by its plain terms, that an offender must be physically present in the United States for the statute of limitations to run. In arguing otherwise, Defendants essentially seek to amend the statute to run against a defendant if he is *either* ‘found within the United States’ *or* subject to service of process elsewhere by some alternative means. Such a reading would be a dramatic restatement of the statutory language and would render the clause ‘if . . . found within the United States’ mere surplusage.’

“Additionally, reading the statute to require a defendant’s physical presence in the United States is not inconsistent with § 2462’s statement of purpose, as was originally understood.

[...]

Accordingly, the Court finds that the statute of limitations within § 2462 has not run on the SEC’s claims.

In addition to the above jurisdiction and statute of limitations challenges, the Defendants also argued that the SEC’s complaint should be dismissed for, among other reasons, failure to state a claim as to: (i) whether the complaint adequately alleged that Defendants made use of U.S. interstate commerce; and (ii) whether the complaint adequately alleged the involvement of “foreign officials.”

Jurisdictional Element of an FCPA Anti-Bribery Violation

Judge Sullivan began by noting that the complaint alleged that “Balogh used e-mails in furtherance of the bribe scheme by attaching [various documents] all of which were the alleged means by which Defendants concealed the true nature of the payments offered to the Macedonian government officials” and “that the e-mails were sent from locations outside the United States but were routed through and/or stored on network services located within the United States.”

As stated by Judge Sullivan, “according to the Defendants, because the SEC fails to allege that Defendants personally knew that their e-mails would be routed through and/or stored on servers within the United States, the SEC’s allegations cannot state a claim under the FCPA’s bribery provision.”

Judge Sullivan then stated:

The issue of whether § 78dd-1(a) requires that a defendant intend to use “the mails or any means or instrumentality of interstate commerce” is a matter of first impression in the FCPA context. Section 78dd-1(a) is not a model of precision in legislative drafting: its text does not make immediately

clear whether “corruptly” modifies the phrase “make use of the mails or any means or instrumentality of interstate commerce” or the phrase “any offer, payment, promise to pay, or authorization of the payment of any money . . . or . . . anything of value.” The use of the adverb “corruptly” appears to modify the verb “use,” but the word’s delayed placement in the statutory text appears to reflect a legislative choice to modify the grouping of words that follows: “offer, payment, promise to pay, or authorization of the payment of any money . . . or . . . anything of value.” Because the plain language of the provision is ambiguous, even when read in context and after applying traditional canons of statutory construction, the Court turns to the legislative history, which is instructive: The word “corruptly” is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or a favorable regulation. The word “corruptly” connotes an evil motive or purpose, an intent to wrongfully influence the recipient.

Thus, the legislative history reveals that, although Congress intended to make an “intent” or mens rea requirement for the underlying bribery, it expressed no corresponding intent to make such a requirement for the “make use of . . . any means or instrumentality of interstate commerce” element.

Such a reading is consistent with the way that courts have interpreted similar provisions in other statutes. For instance, courts have held that the use of interstate commerce in furtherance of violations of the securities laws, the mail and wire fraud statutes, and money laundering statutes is a jurisdictional element of those offenses. [...] As such, defendants need not have formed the particularized mens rea with respect to the instrumentalities of commerce.” [...] Although no court appears to have addressed whether the use of interstate commerce is also a jurisdictional element of an FCPA violation, the similarity of the language in § 78dd-1(a) [...] weighs in favor of finding that Congress intended a similar application of the requirement in the FCPA context. [...] [T]he mere fact that § 78dd-1(a) does not include the phrase ‘directly or indirectly’ does not indicate that the

requirement ‘make use’ implies that a defendant must have made direct use. Therefore, the Court finds that the Complaint sufficiently pleads that Defendants used the means or instrumentality of interstate commerce, pursuant to the FCPA.

As to the disputed jurisdictional issues, Judge Sullivan stated:

The Court also rejects two of Defendants’ additional arguments. First, the Court rejects Defendants’ argument that the SEC has failed to allege that there was any ‘use’ whatsoever of the instrumentalities of interstate commerce. As noted above, the Complaint specifically alleges that Balogh emailed, on behalf of Defendants, drafts of the Protocols, the Letter of Intent, and copies of consulting contracts to third-party intermediaries, and that the e-mails were ‘routed through and/or stored on network servers located within the United States. The mere fact that Defendants may not have had personal knowledge that their emails would be routed through or stored in the United States does not mean that they did not, in fact, use an instrument of interstate commerce sufficient for purposes of conferring jurisdiction. Second, the Court rejects Defendants’ argument that it was not foreseeable that emails sent over the Internet in a foreign country would touch servers located elsewhere. The Court does not disagree with Defendants that “the internet is a huge, complex, gossamer web ,” but that is all the more reason why it should be foreseeable to a defendant that Internet traffic will not necessarily be entirely local in nature.

Defendants also assert that the Complaint fails to sufficiently allege that Defendants used the means or instrumentalities of interstate commerce “in furtherance” of their FCPA violations. Specifically, they argue that the Complaint alleges only that Defendants executed a “scheme” to bribe Macedonian government officials and not that they made an “offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value.” However, Defendants ignore the fact that the Complaint specifically alleges that Defendants sent the Protocols and Letter of Intent, which were essentially their offers to pay or promises to pay the alleged bribes, to Macedonian government officials. These e-mails also included

reference to the alleged ‘sham’ contracts used to conceal the true nature of Defendants’ bribes. Accordingly, such allegations are sufficient to satisfy the ‘in furtherance’ language of § 78dd-1.

Identity of “Foreign Officials”

Judge Sullivan agreed with a 2012 decision in *SEC v. Jackson*²¹⁰ that “the language of the statute does not appear to require that the identity of the foreign official involved be pled with specificity.”

Judge Sullivan stated:

Such a requirement would be at odds with the statutory scheme, which targets actions (such as making an “offer” or “promise”) without requiring that the “foreign official” accept the offer or reveal his specific identity to the payor. Indeed, the fact that the FCPA prohibits using “any person” or an intermediary to facilitate the bribe to any “foreign official” or “any foreign political party” suggests that the statute contemplates situations in which the payor knows that a “foreign official” will ultimately receive a bribe but only the intermediary knows the foreign official’s specific identity.

While obviously important to the case, Judge Sullivan’s personal jurisdiction conclusion was case-specific and the least important conclusion from the standpoint of FCPA case law.²¹¹ Even though Judge Sullivan’s decision was a non-binding trial

210. *Judge Grants Jackson And Ruehlen’s Motion To Dismiss SEC’s Monetary Claims – Finds That SEC Was Not Diligent In Bringing Case And That SEC Failed To Negate Facilitation Payments Exception – However Judge Allows SEC To File An Amended Complaint*, FCPA PROFESSOR (Dec. 12, 2012), <http://www.fcprofessor.com/judge-grants-jackson-and-ruehlens-motion-to-dismiss-secs-monetary-claims-finds-that-sec-was-not-diligent-in-bringing-case-and-that-sec-failed-to-negate-facilitation-payments-exception-however>.

211. Whether a court can exercise personal jurisdiction over a specific defendant is a separate and distinct question from whether the jurisdictional element of an FCPA anti-bribery violation has been met.

court decision, the two most important aspects of his decision concern statute of limitations and the jurisdictional element of an FCPA anti-bribery violation – both of which present an uphill battle for foreign nationals charged with FCPA offenses based on sparse jurisdictional allegations and/or not being physically present in the U.S.

As noted above, Judge Sullivan’s decision in *SEC v. Straub* was in connection with the Defendants’ pre-trial motion to dismiss and the case remains pending. While *SEC v. Straub* was allowed to proceed, the SEC’s FCPA enforcement action against Herbert Steffen was dismissed when subjected to judicial scrutiny.

Steffen

Issues similar to those presented in *SEC v. Straub* were also at issue in the SEC’s FCPA enforcement action against former Siemens executive Herbert Steffen.

Judge Shira Scheindlin (a federal court judge also in the S.D. of N.Y. and well versed in FCPA issues) granted Steffen’s motion to dismiss the SEC’s complaint a few weeks after the *Straub* decision.²¹² Because Judge Scheindlin concluded, as an initial threshold matter, that personal jurisdiction over Steffen exceeded the limits of due process, she did not address Steffen’s other challenges including as to similar statute of limitations issues at issue in *Straub*. Unlike the defendants in *Straub*, Steffen was not alleged to have signed any management representation letters used in connection with financial reporting.²¹³

Rather, the SEC’s complaint against Steffen, and several other foreign Siemens executives, concerned an alleged bribery scheme in Argentina concerning a national identity card

212. *SEC v. Sharef*, 924 F. Supp.2d 539 (S.D.N.Y. 2013).2013 WL 603135 (S.D.N.Y. 2013).

213. Like Magyar Telekom in *Straub*, Siemens, a German company, also had shares listed on U.S. exchanges during the time period relevant to the action.

contract.²¹⁴ As to Steffen (the former CEO of Siemens S.A. Argentina who retired in 2003), Judge Scheindlin summarized the allegations as follows.

The Complaint alleged that [Defendant] Sharef recruited Steffen ‘to facilitate the payment of bribes’ to officials in Argentina because of his longstanding connections in Argentina, which he acquired during his tenure at Siemens Argentina. Following the cancellation of the contract, beginning in December 2000, Steffen and Sharef began renegotiating with the Argentine government, including the newly elected President, which demanded that Siemens paid it bribes in order to reinstate the contract. In order to facilitate payment of bribes to the Argentine officials, Steffen met several times with [Defendant] Regendantz, who become the Chief Financial Officer of [Siemens Business Services - SBS] in February 2002, and ‘pressured’ Regendantz to authorize bribes from SBS to Argentine officials. In April 2002, Steffen told Regendantz that SBS had a ‘moral duty’ to make at least an ‘advance payment’ of ten million dollars to the individuals who had previously handled the bribes because he and other individuals were being threatened as a result of the unpaid bribes. Once Regendantz authorized the bribes, the allegations against Steffen are limited to participation in a phone call initiated by Sharef from the United States in connection with the bribery scheme, and that in the first half of 2003, defendants including Steffen ‘urged Sharef to meet the demands [of Argentine officials] and make the additional payments.

Judge Scheindlin next addressed whether the SEC’s complaint alleged sufficient facts to establish the two components of due process – minimum contacts and reasonableness. Judge Scheindlin noted that because the SEC alleged specific jurisdiction over Steffen, this required that he

214. SEC. & EXCH. COMM’N, SEC CHARGES SEVEN FORMER SIEMENS EXECUTIVES WITH BRIBING LEADERS IN ARGENTINA, (Dec. 19, 2011), *available at* <http://www.sec.gov/news/press/2011/2011-263.htm>.

“purposefully directed his activities towards [the U.S.] and the litigation arises out of or is related to [Steffen’s] contact with the forum.”

Judge Scheindlin then stated:

It is well-established that a court may exercise personal jurisdiction over a foreign defendant who causes an effect in the forum by an act committed elsewhere. However, ‘this is a principle that must be applied with caution, particularly in an international context.’ ‘Foreseeability’ alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause. Rather defendants must have ‘followed a course of conduct directed at ... the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning the conduct. The effects in the United States must ‘occur as a direct and foreseeable result of the conduct outside the territory’ and defendant ‘must know, or have good reason to know, that his conduct will have effects in the [forum] seeking to assert jurisdiction over him.

After noting the legal standards for “reasonableness,” Judge Scheindlin concluded that the court lacked personal jurisdiction over Steffen in that the SEC did not establish minimum contacts and that the exercise of jurisdiction over Steffen was not reasonable.

As to minimum contacts, Judge Scheindlin stated:

The SEC’s allegations are premised on Steffen’s role in encouraging Regendantz to authorize bribes to Argentine officials that ultimately resulted in falsified filings. While Steffen’s actions may have been a proximate cause of the false filings – and that is a matter of some doubt – Steffen’s actions are far too attenuated from the resulting harm to establish minimum contacts. Steffen was brought into the alleged scheme based solely on his connections with Argentine officials. In furtherance of his negotiations with those officials, Steffen ‘urged’ and ‘pressured’ Regendantz to make certain bribes. However, Regendantz did not agree to make the bribes until he communicated with several ‘higher ups’ whose responses he perceived to be instructions to make the bribes. Once Regendantz agreed to make the bribes – following

receipt of instructions from Siemens' management rather than Steffen – Steffen's alleged role was tangential at best. Steffen did not actually authorize the bribes. The SEC does not allege that he directed, ordered or even had awareness of the cover ups that occurred at SBS much less that he had any involvement in the falsification of SEC filings in furtherance of those cover ups.

In a footnote, Judge Scheindlin then stated:

Neither Sharef's call to Steffen from the United States nor the fact that a portion of the bribery payments were deposited in a New York bank provide sufficient evidence of conduct directed towards the United States to establish minimum contacts. First, Steffen did not place the calls to Sharef. Further, Steffen did not direct that the funds be routed through a New York bank. . . . His conduct was focused solely on ensuring the continuation of the Siemens contract in Argentina.

Judge Scheindlin then noted that in *Straub* the defendants not only orchestrated a bribery scheme aimed at the Macedonia government, but also as part of the bribery scheme, "signed off on misleading management representations to the company's auditors and signed false SEC filings."

Judge Scheindlin next stated:

If this Court were to hold that Steffen's support for the bribery scheme satisfied the minimum contacts analysis, even though he neither authorized the bribe, nor directed the cover up, much less played any role in the falsified filings, minimum contacts would be boundless. Illegal corporate action almost always requires cover ups, which to be successful must be reflected in financial statements. Thus, under the SEC's theory, *every* participant in illegal action taken by a foreign company subject to U.S. securities laws would be subject to the jurisdiction of U.S. courts no matter how attenuated their connection with the falsified financial statements. This would be akin to a tort-like foreseeability requirement, which has long been held to be insufficient. The allegations against Steffen fall far short of the requirement that he 'follow a

course of conduct directed to . . . the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct. Absent any alleged role in the cover ups themselves, let alone any role in preparing false financial statements the exercise of jurisdiction here exceeds the limits of due process, as articulated by the Supreme Court and the Second Circuit.

As to reasonableness, Judge Scheindlin stated:

The decision not to exercise jurisdiction in this case is bolstered by my conclusion that requiring Steffen to defend this case in the United States would be unreasonable. [...] When a defendant is not located in the United States, ‘great care and reserve should be exercised when extending our notions of personal jurisdiction into the international context. Steffen’s lack of geographic ties to the United States, his age, his poor proficiency in English, and the forum’s diminished interest in adjudicating the matter, all weight against personal jurisdiction. [...] [I]t would be a heavy burden on this seventy-four year old defendant to journey to the United States to defend against this suit. Further, the SEC and the Department of Justice have already obtained comprehensive remedies against Siemens and Germany has resolved an action against Steffen individually. The SEC’s interest in ensuring that this type of conduct does not go unpublished will not be furthered by continuing the suit against Steffen, in light of his age, the burden on him to defend this suit, and the previous adjudications.

Given the general lack of FCPA case law, the *Straub* and *Steffen* decisions generated much commentary.²¹⁵ While there were many “hits,” there were also some “misses.” For instance, the headline of one law firm alert read “District Court Decision Limits the Extraterritorial Reach of the FCPA,” another headline of a law firm alert read “Court Sets Limits on Extraterritorial FCPA Reach; Dismisses Case Against Foreign Siemens

215. *Friday Roundup*, FCPA PROFESSOR (Mar. 1, 2013), <http://www.fcprofessor.com/friday-roundup-69>.

Executive.²¹⁶ However, neither the *Straub* nor *Steffen* decisions concerned extraterritorial application of the FCPA. In fact, there is no extraterritorial reach of the FCPA as to foreign actors.²¹⁷ Rather, the *Straub* decision concerned the scope of territorial jurisdiction under 78dd-1(a), specifically the meaning of “use of the mails or any means or instrumentality of interstate commerce” The *Steffen* decision did not even reach this issue as the judge found the initial threshold issue of personal jurisdiction lacking.

While the judicial decisions in *Straub* and *Steffen* occurred in the context of civil SEC FCPA enforcement actions, FCPA practitioners have correctly noted that the decisions “rightly raise the question of the jurisdictional limits that apply as a matter of due process in the criminal FCPA arena” as “the DOJ pursues aggressive jurisdictional theories against individual foreign nationals.”²¹⁸

Notwithstanding the above non-binding trial court decisions in *Straub* and *Steffen* in 2013, development of actual FCPA legal authority remains in an infant state for the reasons discussed in Section II above. Accordingly, those who seek a better understanding of many of the controversial aspects of FCPA enforcement in this new era must look to other legal authority for guidance. As highlighted below, 2013 witnessed several non-FCPA legal developments and these developments, including two Supreme Court cases, should cause pause as to certain enforcement theories relevant to the FCPA.

216. *Id.*

217. The FCPA was amended in 1998 to provide for alternative “nationality” jurisdiction (i.e. extraterritorial jurisdiction) over U.S. persons (both legal and natural). However, 78dd-1(g) and 78dd-2(i) are strictly limited to U.S. persons.

218. Sean Hecker, et al., “*Due Process*” *Limits on Criminal Enforcement of the FCPA Against Non-U.S. Nationals Based on Extraterritorial Conduct*, FCPA PROFESSOR (May 14, 2013), <http://www.fcprofessor.com/due-process-limits-on-criminal-enforcement-of-the-fcpa-against-non-u-s-nationals-based-on-extraterritorial-conduct>.

4. *Non-FCPA Legal Developments*

Most corporate FCPA enforcement actions concern conduct that occurred a long time ago and most FCPA enforcement actions against foreign companies are based on expansive jurisdictional theories. Thus, two Supreme Court decisions in non-FCPA cases from 2013 should cause pause as to certain enforcement theories relevant to the FCPA.

Statute of Limitations

Despite the general five-year limitations period applicable to FCPA violations highlighted above, most corporate FCPA enforcement actions concern alleged conduct that occurred 5-7 years, 7-10 years, and in some instances 10-20 years prior to the enforcement action. For instance, the \$398 million enforcement action against Total in 2013 (the third-largest settlement amount in FCPA history) alleged conduct that went back to 1995. So old was the conduct giving rise to the enforcement action that the DOJ made the unusual statement in the DPA that “evidentiary challenges” were present for both parties given that “most of the underlying conduct occurred in the 1990s and early 2000s.”²¹⁹ Likewise, the \$32 million enforcement action against Bilfinger in 2013 focused on conduct that allegedly occurred between 2003 and 2005.²²⁰ In a press release (which the company had to consult with the DOJ before releasing), Bilfinger’s CEO stated: “we are pleased that we have now been able to put these events from the distant past behind us.”²²¹

219. Total S.A., Crim. No. 1:13 CR 239 (E.D.V.A. May 29, 2013), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/totalsa/2013-05-29-total-dpa-filed.pdf>.

220. *German Company Resolves FCPA Enforcement Action Based on Conduct From “The Distant Past,”* FCPA PROFESSOR (Dec. 10, 2013), <http://www.fcpaprofessor.com/german-company-resolves-fcpa-enforcement-action-based-on-conduct-from-the-distant-past>.

221. Press Release, Bilfinger, Bilfinger Reaches Settlement with US Department of Justice (Dec. 9, 2013), available at <http://www.bilfinger.com/>

Against this backdrop, in 2013 the Supreme Court, in an unanimous decision authored by Chief Justice Roberts, rejected the SEC's expansive statute of limitations position in an enforcement action against Bruce Alpert and Marc Gabelli under the Investment Advisors Act.²²² The SEC's complaint in *SEC v. Gabelli* alleged that from 1999 to 2002, Alpert and Gabelli allowed an investor to engage in "market timing" in an investment fund they operated. The defendants moved to dismiss, arguing in part, that the SEC's claim was untimely under § 2462. "The trial court agreed and dismissed the SEC's civil penalty claim as time barred." The Second Circuit reversed and accepted the SEC's argument that "because the underlying violations sounded in fraud, the 'discovery rule' applied to the statute of limitations." As explained by the Second Circuit, "under the discovery rule, the statute of limitations or a particular claim does not accrue until that claim is discovered, or could have been discovered with reasonably diligence, by the plaintiff."

On appeal to the Supreme Court, the defendants argued that a "claim based on fraud accrues – and the five year clock begins to tick – when a defendants' allegedly fraudulent conduct occurs." The Supreme Court found that this position "is the most natural reading of the statute" and declined to read a discovery rule into § 2462.

In pertinent part, the Supreme Court stated:

Statute of limitations are intended to 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. They provide 'security and stability to human affairs. [They] are 'vital to the welfare of society [and] 'even wrongdoers are

fileadmin/corporate_webseite/Presse/presenotizen/2013/1-DPA-Nigeria-PN_eng.pdf.

222. *Gabelli v. SEC*, 133 S. Ct. 1216 (2013). The Act makes it illegal for investment advisors to defraud their clients and authorizes the SEC to seek civil penalties. The Act makes it illegal for investment advisors to defraud their clients and authorizes the SEC to seek civil penalties.

entitled to assume that their sins may be forgotten.’ . . . It ‘would be utterly repugnant to the genius of our laws if actions for penalties could ‘be brought at any distance of time.’

The Supreme Court further stated that statute of limitations are even more important in a government enforcement action compared to a case brought by a private plaintiff.

There are good reasons why the fraud discovery rule has not been extended to Government enforcement actions for civil penalties. . . . The SEC, for example, is not like an individual victim who relies on apparent injury to learn of a wrong. Rather, a central ‘mission’ of the Commission is to ‘investigate potential violations of the federal securities laws.’ Unlike the private party who has no reason to suspect fraud, the SEC’s very purpose is to root it out, and it has many legal tools at hand to aid in that pursuit. . . . Charged with this mission and armed with these weapons, the SEC as enforcer is a far cry from the defrauded victim the discovery rule evolved to protect. In a civil penalty action, the Government is not only a different kind of plaintiff, it seeks a different kind of relief. The discovery rule helps to ensure that the injured receive recompense. But this case involves penalties, which go beyond compensation, and are intended to punish, and label defendants wrongdoers.

Why, despite the importance of statute of limitations to our legal system and Supreme Court recognition in *Gabelli* that it “‘would be utterly repugnant to the genius of our laws’ if actions for penalties could be brought at any distance of time,” do most corporate FCPA enforcement actions concern conduct well beyond the statute of limitations?

Simply put, it is because in corporate FCPA enforcement actions the fundamental black letter legal principle of statute of limitations seems not to matter. Granted, counsel for a company under FCPA scrutiny based on conduct beyond the limitations period can argue about statute of limitation defenses around conference room tables behind closed doors in Washington, D.C. However, like with other FCPA issues, to truly challenge the enforcement agencies first requires that the company be

criminally or civilly charged, something few corporate leaders are willing to let happen.

In short, and as generally described in Sections IIA and IIIA above, cooperation is the name of the game in corporate FCPA inquiries and to raise bona fide legal arguments such as statute of limitations is not cooperating in an investigation. Indeed, given the “carrots” and “sticks” relevant to resolving corporate FCPA enforcement actions, one of the first steps a company the subject of FCPA scrutiny often does to demonstrate its cooperation is agree to toll the statute of limitations or waive any statute of limitations defenses.

A former DOJ enforcement attorney noted:

As a practical matter, companies, especially publicly held companies . . . typically make a strategic decision to fully cooperate with a DOJ investigation. Despite the potential success of a statute of limitations defense, a company will often make the judgment that the negative press of a protracted investigation and the uncertainty of the outcome at trial make cooperation the more prudent business judgment. The company’s hope is that it will be given credit for the cooperation and it will achieve a better outcome than if it went to trial (i.e., avoid charges, a DPA, or a reduced fine).²²³

Given this dynamic, the enforcement agencies face little or no time pressure in bringing corporate FCPA enforcement actions. The end result is that the gray cloud of FCPA scrutiny often hangs over a company far too long. For instance, Total’s FCPA scrutiny began in 2003 but was not resolved until a 2013 enforcement action.

Regarding the typical long periods of corporate FCPA scrutiny, an FCPA commentator rightly noted:

223. Breon S. Peace et al., *The FCPA Statute of Limitations – A Way Out for Wal-Mart?*, BLOOMBERG LAW, <http://about.bloomberglaw.com/practitioner-contributions/the-fcpa-statute-of-limitations—a-way-out-for-wal-mart/> (last visited Feb. 18, 2014).

[Companies under FCPA scrutiny are] routinely asked to waive the statute of limitations. They could refuse but none do; refusal might trigger an instant enforcement action against the company or its people. So the waiver gives the feds limitless time to investigate, deliberate, or procrastinate. And no one can force the DOJ or SEC to move on, either with an enforcement action or a declination. The result? Companies [under FCPA scrutiny] get stuck in FCPA limbo. . . . But the DOJ and SEC should always keep one eye on the calendar. The threat of FCPA enforcement . . . casts a long shadow. It darkens the future for management, shareholders, lenders, customers, and suppliers. Exactly the problem the statute of limitations was supposed to fix.²²⁴

In addition to often alleging conduct that occurred a long time ago, most FCPA enforcement actions against foreign companies are based on expansive jurisdictional theories. Here too, a Supreme Court decision from 2013, as well as other legal developments, should cause pause as to certain enforcement theories relevant to the FCPA.

Jurisdictional Issues

The FCPA is explicit as to its jurisdictional scope and provides as follows depending on the category of person (legal or natural) subject to the anti-bribery provisions.

- As to U.S. persons (legal or natural) the FCPA provides for two types of jurisdiction. The original statutory standard was (and is still part of the law) “use of the mails or any means of instrumentality of interstate commerce corruptly in furtherance” of a bribery scheme. However, in 1998 Congress amended the FCPA to also provide for so-called nationality jurisdiction as to U.S. persons. 15 U.S.C. 78dd-1(g) and 78dd-2(i) specifically state, in pertinent part, as follows: “It shall also be unlawful for [any issuer organized under the laws of

224. Richard L. Cassin, *The FCPA’s Long Shadow*, THE FCPA BLOG (Aug. 6, 2012), <http://www.fcpablog.com/blog/2012/8/6/the-fcpas-long-shadow.html>.

the United States or for any United States person] to corruptly do any act outside the United States in furtherance [of a bribery scheme] irrespective of whether such [U.S. person] makes uses of the mails or any means or instrumentality of interstate commerce in furtherance [of the bribery scheme].”

- As to foreign “issuers,” the FCPA’s anti-bribery provisions apply only to the extent there is territorial jurisdiction, in other words, “use of the mails or any means of instrumentality of interstate commerce” in furtherance of an improper payment scheme. The 1998 amendment discussed above does not apply to such companies.
- As to persons other than U.S. persons (legal or natural) or foreign issuers, the FCPA was also amended in 1998 to create an entire new category of “person” subject to the FCPA’s anti-bribery provisions. This category applies to non-U.S. actors and non-foreign issuers such as foreign private companies and foreign nationals. This FCPA prong has explicit jurisdictional provisions, and states, in pertinent part, that it shall be unlawful for “any person” other than an issuer or domestic concern (that is a U.S. “person”) “while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance” of an improper payment scheme.

Despite the above jurisdictional provisions clearly set forth in the FCPA, in recent years the DOJ has advanced broad jurisdictional theories in enforcement actions against foreign entities and foreign nationals. For instance, in 2006, the DOJ brought its first criminal FCPA enforcement action against a foreign company, Norway-based Statoil, for engaging in a bribery scheme in Iran.²²⁵ The sole jurisdictional allegation the DOJ hung its hat on was that Statoil received an invoice from a U.K. consulting company instructing that money “be routed through a U.S. bank account in New York to a bank account in

225. Complaint, *United States v. Statoil* No. 06 Crim. 960 (S.D.N.Y. Oct. 13, 2006), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/statoil-asa-inc/10-13-09statoil-information.pdf>.

Switzerland” which the company paid. In announcing the \$21 million enforcement action, the DOJ stated:

Although Statoil is a foreign issuer, the [FCPA] applies to foreign and domestic public companies alike, where the company’s stock trades on American exchanges. . . . This prosecution demonstrates the [DOJ’s] commitment vigorously to enforce the FCPA against all international businesses whose conduct falls within its scope.²²⁶

Many DOJ enforcement actions against foreign companies have since been brought on expansive jurisdictional theories. In fact, the majority of enforcement actions in the FCPA’s “Top Ten” in terms of fine and penalty amounts are against foreign companies including the Bonny Island, Nigeria enforcement actions in which the DOJ (and SEC) alleged that Dutch, French, and Japanese companies bribed Nigerian foreign officials.²²⁷ The jurisdictional allegations in these cases, which resulted in approximately \$1.1 billion flowing into the U.S. Treasury, all hinged on wire transfers through New York based accounts and faxes and e-mails to the U.S. Likewise, the sole jurisdictional basis for the 2013 Total enforcement was a 1995 wire transfer of \$500,000 (representing less than 1% of the alleged bribe payments at issue) from a New York based account.

The above FCPA enforcement actions against foreign actors (and several other examples could also be cited) did not rely on extraterritorial jurisdiction – because indeed there is none under the FCPA as to foreign actors. However, the enforcement action did invoke seeming *de facto* extraterritorial jurisdiction given the scant connection the bribery schemes had to the U.S.

Against this backdrop, in 2013 the Supreme Court issued its long-awaited opinion in *Kiobel v. Royal Dutch Shell*

226. Press Release, U.S. DOJ, U.S. Resolves Probe Against Oil Company that Bribed Iranian Official (Oct. 13, 2006), available at http://www.justice.gov/opa/pr/2006/October/06_crm_700.html.

227. *Bonny Island Bribery Statistics*, FCPA PROFESSOR (Jan. 26, 2012), <http://www.fcprofessor.com/bonny-island-bribery-statistics>.

Petroleum.²²⁸ The precise issue before the court was “whether and under what circumstances courts may recognize a cause of action under the Alien Tort Statute (“ATS”), for violations of the law of nations occurring within the territory of a sovereign other than the United States.”²²⁹ The opinion, authored by Chief Justice Roberts, held that “the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.” Accordingly, the court in a unanimous opinion (several justices authored concurring opinions) affirmed the Second Circuit’s dismissal of a lawsuit brought by a group of Nigerian nationals residing in the United State who filed suit in federal court against certain Dutch, British, and Nigerian corporations, alleging that the corporations aided and abetted the Nigerian government in committing violations of the law of nations in Nigeria.

The jurisdictional issue the Supreme Court addressed in *Kiobel* - whether the canon of statutory interpretation known as the presumption against extraterritorial application - was necessitated because the ATS was silent on the jurisdiction issue. Indeed, Chief Justice Roberts stated that the canon “provides that when a statute *gives no clear indication of an extraterritorial application* it has none” (emphasis added).

Given the FCPA’s above-described jurisdictional scope, the canon of statutory interpretation at issue in *Kiobel* is not directly applicable in an FCPA enforcement action against foreign actors. However, the logic and rationale of many justices in *Kiobel* has direct bearing on certain aspects of FCPA enforcement and indeed can be viewed as Supreme Court disapproval of certain aspects of FCPA enforcement.

228. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1662 (2013).

229. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663, 185 L. Ed. 2d 671 (2013) (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012)). While the ATS and FCPA are separated by 188 years in terms of enactment, the statutes have often being viewed by some as siblings, or at least distant cousins within the same family.

For starters, Chief Justice Roberts recognized the delicate foreign policy consequences of expansive jurisdiction – an issue that is present when the U.S. government alleges that foreign companies are bribing foreign officials on foreign lands. Likewise, the concurring opinion of Justice Alito, joined by Justice Thomas, is also instructive in that it states when ATS “claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritoriality.” Applying this to the FCPA context, can it truly be said that the above FCPA enforcement actions against foreign actors touched and concerned the territory of the U.S. with “sufficient force”?

Even the concurring opinion of Justice Breyer, joined by Justices Ginsburg, Sotomayor and Kagan, is instructive. This opinion did not invoke the presumption against extraterritoriality in concluding that the claims should be dismissed, but rather found that jurisdiction was lacking for another reason. Namely, that the foreign corporations, while having shares traded on U.S. exchanges, had an insufficient presence in the U.S. such that it would be “farfetched to believe, based solely upon the defendants’ minimal and indirect American presence, that this legal action helps to vindicate a distinct American interest.” The parallels are obvious to FCPA enforcement actions against foreign actors for allegedly bribing foreign officials in foreign lands.

Similar to the above analysis in connection with statute of limitations issues, if FCPA enforcement actions against foreign actors are based on aggressive and dubious jurisdictional theories – why don’t the companies aggressively litigate?

This question highlights a key difference between the ATS and the FCPA. Likely the only reason the *Kiobel* case made it to the Supreme Court is because the plaintiffs in ATS cases have little leverage against corporate defendants. ATS actions are civil actions brought by private plaintiffs and are thus often litigated.

In contrast, certain courts have held (although by no means is the argument that the FCPA ought to have a private right of

action a *fait accompli*) that the FCPA does not have a private right of action.²³⁰ The FCPA is thus only enforced by the DOJ (or the SEC as to issuers). These government enforcement agencies, unlike ATS plaintiffs, have big and sharp sticks that corporate defendants (and individuals as well) are mindful of in deciding how to proceed when subject to FCPA scrutiny.

Indeed, in the FCPA context, when a Japanese company was under FCPA scrutiny for making alleged bribe payments to Nigerian officials, the company raised jurisdictional issues in its negotiations with the DOJ. The DOJ's response was that the company was not cooperating.²³¹ Specifically, the resolution document stated: "after initially declining to cooperate with the Department based on jurisdictional arguments, [the company] began to cooperate."

Simply put, for a company that doesn't cooperate with the DOJ in an FCPA enforcement, the chances are higher that the company will be indicted as opposed to being offered an NPA or DPA. Moreover, to challenge a "plaintiff" in an FCPA enforcement action, a company first needs to be criminally indicted by the DOJ, or in the SEC context to be charged by the company's primary government regulator. As noted in Section IIIA above, the impact on the company's market capitalization upon indictment or civil charging is likely to be much greater than the FCPA fines or penalties the DOJ and/or SEC are seeking. Indeed, in the FCPA's 36 year history only two companies have put the DOJ to its burden of proof at trial and both companies ultimately prevailed.²³² Add to this calculus the

230. *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1980).

231. *Does DOJ Expect FCPA Counsel To Roll Over And Play Dead?*, FCPA PROFESSOR (Apr. 27, 2011), <http://www.fcpaprofessor.com/does-doj-expect-fcpa-counsel-to-roll-over-and-play-dead>.

232. The first instance, involving an issuer, occurred in 1991 and the second instance, involving a private company, occurred in 2011. *See One Win, One Loss*, FCPA PROFESSOR (May 16, 2011), <http://www.fcpaprofessor.com/one-win-one-loss>; *see also 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),

prominence of NPAs and DPAs in the FCPA context and the practical effect of these cumulative dynamics is to insulate FCPA enforcement theories in corporate enforcement actions from meaningful judicial scrutiny in all but the rarest of cases.

These dynamics of FCPA enforcement are simply not present in ATS cases and for this very simple reason the ATS, unlike the FCPA, has been the subject of much litigation over the past decade, including multiple Supreme Court cases and many appellate court decisions.

Thus, while the judicial logic and rationale of the Supreme Court in *Kiobel* should cause pause as to certain enforcement theories relevant to the FCPA, it likely will not as the judiciary rarely gets to play a role in FCPA enforcement.

The *Kiobel* decision is not the only legal development from 2013 relevant to jurisdictional issues in FCPA enforcement actions against foreign actors. Similar to *Kiobel*, in *U.S. v. Vilar* the Second Circuit held, in a case concerning liability under Section 10(b) of the Securities Exchange Act, that Section 10(b) does not apply to extraterritorial conduct, “regardless of whether liability is sought criminally or civilly.”²³³ In reaching its conclusion, the Second Circuit gutted the DOJ’s arguments and noted:

[T]he government is incorrect when it asserts that ‘the presumption against extraterritoriality for civil statutes . . . simply does not apply in the criminal context.

The government contends, relying on [a 1922 Supreme Court case - *U.S. v. Bowman*], that the presumption against extraterritoriality has no place in our reading of criminal

<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>.

233. *Second Circuit Concludes That Presumption Against Extraterritoriality Applies To Criminal Liability Under The Securities Law*, FCPA PROFESSOR (Sept. 10, 2013), <http://www.fcpaprofessor.com/second-circuit-concludes-that-presumption-against-extraterritoriality-applies-to-criminal-liability-under-the-securities-law>.

statutes. To the contrary, no plausible interpretation of *Bowman* supports this broad proposition; fairly read, *Bowman* stands for quite the opposite.

[T]he government provides little reason, beyond its misplaced reliance on *Bowman*, for why the presumption against extraterritoriality should not apply to criminal statutes.

The presumption against extraterritoriality is a method of interpreting a statute, which has the same meaning in every case. The presumption against extraterritoriality is not a rule to be applied to the specific facts of a case. A statute either applies extraterritorially or it does not, and once it is determined that a statute does not apply extraterritorially, the only question we must answer in the individual case is whether the relevant conduct occurred in the territory of a foreign sovereign.

Once again, given the FCPA's explicit jurisdictional scope, the presumption against extraterritoriality is not needed in FCPA enforcement actions against foreign actors. Yet, the logic and rationale of the Second Circuit in *Vilar* should also cause pause as to certain theories relevant to the FCPA.

C. Enforcement Agency Speeches and Policy Positions

The DOJ's Criminal Division enforces nearly nine-hundred federal statutes and the SEC enforces numerous securities law statutes. However, as once again highlighted in 2013, enforcement agency officials seem to devote a disproportionate amount of time talking about the FCPA. On one level, such focus and aggressive talk about the FCPA may serve a deterrent effect, yet on another level the focus and aggressive talk is odd and often seems misplaced. Perhaps it is because FCPA Inc. is where the enforcement agency officials often end up after government service, a trend that continued in 2013.²³⁴

234. *Former Assistant Attorney General Lanny Breuer Joins FCPA Inc.*, FCPA PROFESSOR (Mar. 29, 2013), <http://www.fcprofessor.com/former->

Regardless of the cause or motivation, DOJ and SEC officials, employing much of the same lofty and hollow rhetoric from prior years, made numerous FCPA speeches in 2013 and this section analyzes these speeches and policy positions. This section concludes by spotlighting the following irony: notwithstanding continued aggressive rhetoric concerning FCPA enforcement, expansive and controversial enforcement theories forming the basis for most enforcement actions resolved in the absence of meaningful judicial scrutiny, and escalating fine and penalty amounts, in 2013 an SEC FCPA enforcement official candidly stated that “FCPA law ... is not well developed.”

5. *Notable and Quotable*

DOJ and SEC FCPA speeches in 2013 were once again defined by the following themes: the FCPA remains an enforcement priority for the agencies; lofty and hollow rhetoric; and a distorted view of “success.”

Enforcement Priority

Regardless of whether actual FCPA enforcement statistics support such a position, the DOJ and SEC in 2013 continued to remind the business community that FCPA enforcement is a top law enforcement priority.

DOJ Acting Assistant Attorney General Mythili Raman stated:

- The DOJ’s “efforts to combat corruption around the world” is one “of the [DOJ’s] most important enforcement priorities.”²³⁵

assistant-attorney-general-lanny-breuer-joins-fcpa-inc; *Friday Roundup*, FCPA PROFESSOR (Mar. 15, 2013), <http://www.fcpaprofessor.com/friday-roundup-71>.

235. Mythili Raman, Acting Assistant Attorney General, Keynote Address at the Global Anti-Corruption Congress (June 17, 2013), *available at* <http://www.justice.gov/criminal/pr/speeches/2013/crm-speech-130617.html>.

- “[F]ighting global corruption is, and always will be, a core priority of the Department of Justice.”²³⁶
- “Simply put, our global anti-corruption mission is now ingrained in the Criminal Division’s DNA, and the FCPA is now a reality that companies know they must live with and adjust to; and this nation, and the world, are better off for it.”²³⁷

Likewise, the DOJ’s Deputy Chief of Staff for the Criminal Division stated that “we are as active today in this area [the FCPA] as we have ever been.”²³⁸

Similar to the DOJ, SEC enforcement officials also struck a similar theme in 2013. For instance, SEC Chairman Mary Jo White stated that “strong and fair enforcement of the [FCPA] . . . has been and will continue to be a priority” for the SEC.²³⁹ Likewise, Co-Director of SEC Enforcement Andrew Ceresney warned the business community that the SEC “will remain the vigilant cop on the beat when it comes to the FCPA” and that the SEC will “remain aggressive and proactive in enforcing the FCPA.”²⁴⁰

236. *Id.*

237. *Id.*

238. Daniel Suleiman, Deputy Chief of Staff for the Criminal Division of The U.S. Dep’t of Justice, Remarks to the Minnesota State Bar Association’s 37th Annual International Business Law Institute (May 8, 2013), *available at* <http://www.justice.gov/criminal/pr/speeches/2013/crm-speech-1305091.html>.

239. Mary Jo White, Chairperson of U.S. Sec. & Exchange Comm’n, Regulation in a Global Financial System at Investment Company Institute (ICI) General Membership Meeting (May 1, 2013), *available at* <http://www.sec.gov/News/Speech/Detail/Speech/1365171515952>.

240. Andrew Ceresney, Co-Director of the Division of Enforcement of the U.S. Sec. & Exchange Comm’n, Keynote Address at the International Conference on the Foreign Corrupt Practices Act, (Nov. 19, 2013), *available at* <http://www.sec.gov/News/Speech/Detail/Speech/1370540392284>.

Lofty and Hollow Rhetoric

In this new era of FCPA enforcement, the enforcement agencies frequently speak in lofty terms regarding FCPA enforcement. For instance, in previous years, the DOJ's Assistant Attorney General stated that "we in the United States are in a unique position to spread the gospel of anti-corruption, because there is no country that enforces its anti-bribery laws more vigorously than we do."²⁴¹ Likewise, the Assistant Attorney General stated that enforcement of the FCPA "is our way of ensuring not only that the Justice Department is on the right side of history, but also that it has a hand in advancing that history."²⁴²

This lofty rhetoric continued in 2013 as DOJ Deputy Attorney General James Cole stated before an FCPA audience that "the modern world has begun to embrace our fight against foreign bribery" and that the "tide of history has turned and is now on our side."²⁴³ "Embrace" and "on our side" are certainly interesting words to use in connection with the DOJ's FCPA enforcement efforts. In the most recent instances of judicial scrutiny of DOJ FCPA enforcement, federal court judges have stated, in three separate cases, as follows.

- This appears to be the end of a long and sad chapter in the annals of white collar criminal enforcement.
- The instances of misconduct [by DOJ prosecutors] were so varied and occurred over such a long period of time "that they

241. Lanny A. Breuer, Assistant Attorney General at the U.S. Dep't of Justice, Speech at American Conference Institute's 28th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2012), *available at* <http://www.justice.gov/criminal/pr/speeches/2012/crmspeech-1211161.html>.

242. *Id.*

243. James M. Cole, Deputy Attorney General at the U.S. Dep't of Justice, Speech at the Foreign Corrupt Practices Act Conference (Nov. 19, 2013), *available at* <http://www.justice.gov/iso/opa/dag/speeches/2013/dag-speech-131119.html>.

add up to an unusual and extreme picture of a prosecution gone badly awry.”

- “The problem here is that the principal witness against [the FCPA defendant] . . . knows almost nothing.” [...] [The DOJ] shouldn’t indict people on stuff [they] can’t prove.”²⁴⁴

Despite such end results when DOJ FCPA enforcement is subjected to judicial scrutiny, the DOJ continues to say the following: “our *stellar* FCPA Unit continues to go gangbusters, bringing case after case” and “our recent string of *successful* prosecutions of corporate executives is worth highlighting.”²⁴⁵ Indeed, as highlighted below, the enforcement agencies seem to have a distorted view of “success” when it comes to FCPA enforcement.

Moreover, the DOJ continues to link its FCPA enforcement program to such classical notions of bribery such as “the hospitals left unbuilt, the roads still unpaved, [and] the medicine undelivered.”²⁴⁶ While it is certainly easy to imagine payment schemes in violation of the FCPA resulting in such broad societal damage, the reality of most actual FCPA enforcement actions is something entirely different. For instance, as

244. *Id.* at 827 (quoting Trial Transcript at 248, *United States v. O’Shea*, No. H-09-629 (S.D. Tex. Jan. 16, 2012)).

245. “*Our Stellar FCPA Unit Continues to Go Gangbusters, Bringing Case After Case*,” FCPA PROFESSOR (May 6, 2013), <http://www.fcraprofessor.com/our-stellar-fcpa-unit-continues-to-go-gangbusters-bringing-case-after-case> (emphasis added) (quoting Mythili Raman, Acting Assistant Att’y Gen., Remarks at the Corporate Crime Reporter Conference (May 3, 2013)); “*We Are Not Going away . . . Our Efforts to Fight Foreign Bribery Are More Robust than Ever*,” FCPA PROFESSOR (June 19, 2013), <http://www.fcraprofessor.com/we-are-not-going-away-our-efforts-to-fight-foreign-bribery-are-more-robust-than-ever> (emphasis added) (quoting Mythili Raman, Acting Assistant Att’y Gen., Keynote Address at the Global Anti-Corruption Congress (June 17, 2013) [hereinafter *Anti-Corruption Keynote Address*], available at <http://www.justice.gov/criminal/pr/speeches/2013/crm-speech-130617.html>).

246. James M. Cole, Deputy Att’y Gen., Address at the Foreign Corrupt Practices Act Conference (Nov. 19, 2013), available at <http://www.justice.gov/iso/opa/dag/speeches/2013/dag-speech-131119.html>.

previously highlighted in Section IIIA, the \$54 million ADM enforcement action concerned VAT refunds that even the DOJ and SEC acknowledged were owed to the company. Regardless of the specific allegations in FCPA enforcement actions, the fact remains that most corporate FCPA enforcement actions involve companies that are widely viewed as industry leaders that sell the best product for the best price with several such companies winning awards for being among the “world’s most ethical” during the same general time period relevant to the FCPA enforcement action.²⁴⁷

Not only is enforcement agency lofty rhetoric undercut when one studies the details of actual FCPA enforcement actions, but enforcement agency rhetoric also proves hollow in many instances. For instance, regarding individual FCPA enforcement actions, the DOJ has stated “we are now – more than ever – holding individual wrongdoers to account,”²⁴⁸ and the SEC has likewise stated:

Another area of focus, and recent progress, has been our efforts to bring FCPA cases against individuals. To better root out corruption, we have ramped up our pursuit not just of companies, but of the individuals responsible for the corporate malfeasance.²⁴⁹

However, as noted in Section II.B above, the reality is that FCPA enforcement in this new era is largely corporate enforcement only. As previously highlighted, in 2013 0 of 7 DOJ corporate FCPA enforcement actions (0%) have resulted (at least yet) in any related charges against company employees and going back to 2012, only 1 of 9 DOJ corporate FCPA

247. *Oracle – Another World’s Most Ethical FCPA Violator?*, FCPA PROFESSOR (Sept. 1, 2011), <http://www.justice.gov/iso/opa/dag/speeches/2013/dag-speech-131119.html>.

248. Anti-Corruption Keynote Address, *supra* note 245.

249. Andrew Ceresney, Co-Dir. of the Div. of Enforcement, SEC, Keynote Address at the International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2013) [hereinafter SEC Keynote Address], *available at* <http://www.sec.gov/News/Speech/Detail/Speech/1370540392284>.

enforcement actions (11%) have resulted (at least yet) in any related charges against company employees. In short, between 2008 and 2013 there have been 60 core corporate DOJ FCPA enforcement actions and in 44 of these actions (73%) there have not (at least yet) been any DOJ charges against company employees.

Likewise, in 2013 0 of 8 SEC corporate FCPA enforcement actions (0%) have resulted (at least yet) in any related charges against company employees and going back to 2012, 0 of 8 (0%) of SEC corporate FCPA enforcement actions have resulted (at least yet) in any related charges against company employees. In short, between 2008 and 2013 there have been 65 core corporate SEC FCPA enforcement actions and in 53 of these actions (82%) there have not (at least yet) been any SEC charges against company employees.

Distorted View of “Success”

A final issue when it comes to analyzing FCPA enforcement agency speeches and policy positions from 2013 is how the enforcement agencies define “success.” For instance, the enforcement agencies frequently cite statistics in FCPA speeches, such as the following from DOJ Acting Assistant General Mythili Raman:

Since 2005, the Department has secured close to three dozen corporate guilty pleas in FCPA cases. And just since 2009, the Department has entered into over 40 corporate resolutions, including nine of the top 10 biggest resolutions ever in terms of penalties, resulting in approximately \$2.5 billion in monetary fines.²⁵⁰

Certainly, the DOJ and SEC have had “success” in this new era of FCPA enforcement exercising leverage and securing large corporate FCPA settlements against risk-averse corporations through resolution vehicles often not subjected to any

250. Anti-Corruption Keynote Address, *supra* note 245.

meaningful judicial scrutiny. However, by focusing on the quantity of FCPA enforcement, the quality of that enforcement is, as highlighted in Section III.A, often left unexplored. The simplistic notion advanced by the enforcement agencies seems to be that more FCPA enforcement is an inherent good regardless of enforcement theories, regardless of resolution vehicles, and regardless of actual outcomes when put to its burden of proof. This logic is troubling and ought to be rejected.

In a legal system founded on the rule of law, a more meaningful form of government enforcement agency success is prevailing in the context of an adversarial system when put to the burden of proof. As to this form of success, in both 2013 and more broadly during this new era of FCPA enforcement, the DOJ and SEC have had far less “success” in enforcing the FCPA.

6. *“FCPA Law ... Is Not Well Developed”*

This section on 2013 enforcement agency speeches and policy positions concludes by highlighting the following irony: notwithstanding continued aggressive rhetoric concerning FCPA enforcement, expansive and controversial enforcement theories forming the basis for most enforcement actions resolved in the absence of meaningful judicial scrutiny, and escalating fine and penalty amounts, in 2013 an SEC FCPA enforcement official made a candid statement about the FCPA.

Speaking before an FCPA audience, Co-Director of SEC Enforcement Andrew Ceresney stated:

“FCPA law . . . is not well developed. Companies typically enter settlements in FCPA cases, leading to a paucity of case law.”²⁵¹

It was an obvious statement known and understood by many in this new era of FCPA enforcement. Yet, what made the statement noteworthy is that it came from an FCPA enforcement

251. SEC Keynote Address, *supra* note 249.

official. Indeed, the statement was arguably the most notable - and candid - statement by an FCPA enforcement official during this new era of FCPA enforcement and it speaks volumes to the disconnect that often defines this new era.

D. Certain Uncomfortable Truths and Double Standards

In 2010, the DOJ declared a “new era of FCPA enforcement; and we are here to stay”²⁵² and, as highlighted above, the enforcement agency officials continue to speak in lofty rhetoric concerning its FCPA enforcement program. Yet, when one peels away the layers of the U.S. fight against foreign bribery and corruption, certain uncomfortable truths and double standards emerge.

1. Uncomfortable Truths

The U.S. fight against foreign bribery and corruption is defined by certain uncomfortable truths. In most years, including 2013, FCPA enforcement actions have included allegations of the following things of value being given to alleged foreign officials: wine, watches, perfume, handbags, cameras, kitchen appliances, business suits and dresses, television sets, laptops, tea sets and office furniture.²⁵³

Against this backdrop, it was reported in 2013, regarding the U.S. government’s relationship with Afghan President Hamid Karzai, as follows:

For more than a decade, wads of American dollars packed into suitcases, backpacks and, on occasion, plastic shopping bags

252. Lanny A. Breuer, Assistant Att’y Gen., Address at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>.

253. *Do Lanny Breuer and Robert Khuzami Actually Read FCPA Enforcement Actions?* FCPA PROFESSOR (Dec. 13, 2012), <http://www.fcprofessor.com/do-lanny-breuer-and-robert-khuzami-actually-read-fcpa-enforcement-actions>.

have been dropped off every month or so at the offices of Afghanistan's president — courtesy of the Central Intelligence Agency. All told, tens of millions of dollars have flowed from the C.I.A. to the office of President Hamid Karzai, according to current and former advisers to the Afghan leader. . . . The C.I.A. . . . has long been known to support some relatives and close aides of Mr. Karzai. But the new accounts of off-the-books cash delivered directly to his office show payments on a vaster scale, and with a far greater impact on everyday governing. . . . The cash does not appear to be subject to the oversight and restrictions placed on official American aid to the country or even the C.I.A.'s formal assistance programs, like financing Afghan intelligence agencies.²⁵⁴

Can it truly be said, as DOJ FCPA enforcement officials have stated, that “we in the United States are in a unique position to spread the gospel of anti-corruption” and that the “tide of history has turned and is now on our side”? The conduct at issue in the above article pales in comparison to many FCPA enforcement actions and is made even more egregious given that FCPA enforcement actions invariably involve use of private shareholder/owner funds, whereas the CIA's campaign of bribery in Afghan is using public funds.

One of the best statements found in the FCPA's extensive legislative history concerning certain uncomfortable truths regarding “bribery” was from Theodore Sorensen.²⁵⁵ As to the basic issue of defining bribery, Sorensen observed:

[T]here will be countless situations in which a fair-minded investigator or judge will be hard-put to determine whether a particular payment or practice is a legitimate and permissible business activity or a means of improper influence. . . . Reasonable men and even angels will differ on the answers to

254. Matthew Rosenberg, *With Bags of Cash, C.I.A. Seeks Influence in Afghanistan*, N.Y. TIMES, Apr. 28, 2013, http://www.nytimes.com/2013/04/29/world/asia/cia-delivers-cash-to-afghan-leaders-office.html?pagewanted=all&_r=0.

255. Sorensen testified at a Congressional hearing as a private lawyer, but previously served as President John F. Kennedy's speechwriter.

these and similar questions. At the very least such distinctions should make us less sweeping in our judgments and less confident of our solutions.²⁵⁶

Sorensen's insight was spot-on when made and still holds true today in this new era of FCPA enforcement. In short, when the U.S. government sanctions bribery using public funds, we really ought to pause and reflect on much in the bribery and corruption space.²⁵⁷

2. *Double Standard*

Pause and reflection is also warranted given the glaring gap between enforcement of the FCPA – a U.S. law governing business interactions with “foreign officials” – and 18 U.S.C. § 201, a U.S. law pre-dating the FCPA that governs various interactions with U.S. public officials.

In this regard, a notable development from 2013 was the FCPA scrutiny of JPMorgan for its alleged hiring practices in China. The *New York Times* reported that “federal authorities have opened a bribery investigation into whether JPMorgan Chase hired the children of powerful Chinese officials to help the bank win lucrative business.”²⁵⁸ The article stated, in pertinent part:

256. Theodore C. Sorensen, *Improper Payments Abroad: Perspectives and Proposals*, 54 FOREIGN AFF. 719, 723-24 (1976).

257. Indeed, in sentencing an FCPA defendant in 2010, a federal court judge stated that given the CIA's bribing of warlords in Afghanistan that this conduct “sort of goes to the morality of the situation.” The judge rejected the DOJ's approximate three-year sentencing recommendation and sentenced the defendant to probation. *Judge (Again) Significantly Rejects DOJ's Recommendation in Sentencing Bobby Elkins*, FCPA PROFESSOR (Oct. 25, 2010), <http://www.fcpaprofessor.com/judge-again-significantly-rejects-doj-recommendation-in-sentencing-bobby-elkins>.

258. Jessica Silver-Greensberg et al., *Hiring in China by JPMorgan Under Scrutiny*, N.Y. TIMES, Aug. 17, 2013, <http://dealbook.nytimes.com/2013/08/17/hiring-in-china-by-jpmorgan-under-scrutiny/?hp>.

In one instance, the bank hired the son of a former Chinese banking regulator who is now the chairman of the China Everbright Group, a state-controlled financial conglomerate . . . [after] the chairman's son came on board, JPMorgan secured multiple coveted assignments from the Chinese conglomerate, including advising a subsidiary of the company on a stock offering, records show. The Hong Kong office of JPMorgan also hired the daughter of a Chinese railway official. That official was later detained on accusations of doling out government contracts in exchange for cash bribes, the government document and public records show. The former official's daughter came to JPMorgan at an opportune time for the New York-based bank: The China Railway Group, a state-controlled construction company that builds railways for the Chinese government, was in the process of selecting JPMorgan to advise on its plans to become a public company, a common move in China for businesses affiliated with the government. With JPMorgan's help, China Railway raised more than \$5 billion when it went public in 2007.²⁵⁹

As to a potential cause and effect relationship between JPMorgan's alleged hiring of children of alleged foreign officials, the article noted:

Before hiring [the son of the chairman of the China Everbright Group], JPMorgan appeared to do little if any business with China Everbright, based on a review of securities filings and news reports. Since then, though, China Everbright has emerged as one of its prized Asian clients.²⁶⁰

The Ministry of Railways has never hired JPMorgan directly, securities filings and news reports suggest. But those records indicate that the China Railway Group, the construction company whose largest customer is thought to be the Chinese government, hired JPMorgan to take it public in 2007. [The daughter of the former deputy chief engineer of China's railway ministry] was hired around this time. About four years

259. *Id.*

260. *Id.*

later, when [the daughter] was an associate at the bank, JPMorgan won out again. This time, according to media reports, the operator of a high-speed railway from Beijing to Shanghai picked the bank to steer it through its own public offering.²⁶¹

As often occurs in this new era of FCPA enforcement when one company is the subject of FCPA scrutiny, JPMorgan's scrutiny caused the DOJ and SEC to launch a full-fledged industry sweep of the financial services industry and it was soon reported:

U.S. authorities are questioning numerous banks and hedge funds on their international hiring practices for interns and other employees, according to people with knowledge of the situation. The Justice Department and Securities and Exchange Commission are seeking information to determine if there have been any violations of the [FCPA]²⁶²

The FCPA scrutiny of JPMorgan and the financial services industry spawned extensive commentary much of it focusing on double standard issues. For instance, an article in the *Economist* observed:

Connections also count in the West, of course. Following initial reports of the SEC's investigation in the New York Times, a flood of stories have noted the jobs held in politically sensitive American firms by the sprogs of American politicians. Even when offspring are not involved, the revolving door between the public and private sectors raises questions about why people are hired. . . . If the regulators genuinely fret about why firms make hiring decisions, they

261. *Id.*

262. Robin Sidel & Cynthia Koons, *U.S. Overseas Hiring Probe Has Wide Net*, WALL ST. J., Aug. 29, 2013, <http://online.wsj.com/news/articles/SB10001424127887324324404579043382418965094>.

may want to extend their inquiries to Washington, DC, and New York as well.²⁶³

A *New York Times* columnist observed:

But hiring the sons and daughters of powerful executives and politicians is hardly just the province of banks doing business in China: it has been a time-tested practice here in the United States.²⁶⁴

Perhaps most notably, former SEC Commissioner Arthur Levitt stated in a *Wall Street Journal* opinion piece as follows.

[A]ccording to financial regulators now looking into the hiring practices of major U.S. banks and multinationals in China—some of which have employed members of influential Chinese families—anyone who once hired me [Levitt’s father was the New York state comptroller] might have been violating ethical and legal standards. [SEC] regulators now suggest that such hiring overseas is a form of untoward influence, akin to bribing foreign officials to win business. The accusation is scurrilous and hypocritical. If you walk the halls of any institution in the U.S.—Congress, federal courthouses, large corporations, the White House, American embassies and even the offices of the SEC—you are likely to run into friends and family members of powerful and wealthy people. . . . Whether this is right or wrong, unfair or fair, is not the point. It is hypocritical of financial regulators to criticize—even penalize—practices abroad that are commonplace in Washington, New York and other seats of political and economic power. Were the SEC to be completely consistent in its approach, it would have to come down hard on the same practices here in the U.S. And the agency would have a field day. Members of Congress and the executive branch regularly

263. *Blood and Money*, ECONOMIST, Aug. 24, 2013, available at <http://www.economist.com/news/finance-and-economics/21584033-american-regulators-investigate-jpmorgan-chases-hiring-china-blood-and-money>.

264. Andrew Ross Sorkin, *Hiring the Well-Connected Isn’t Always a Scandal*, N.Y. TIMES, Aug. 19, 2013, http://dealbook.nytimes.com/2013/08/19/hiring-the-well-connected-isnt-always-a-scandal/?ref=business&_r=0.

hire the children of major donors. Regulators would find scores of examples of men and women, occupying internships and entry-level positions in U.S. corporations, who were hired on the say-so of someone much higher up in the organization.²⁶⁵

Commenting on JPMorgan's FCPA scrutiny, former Labor Secretary Robert Reich observed:

But let's get real. How different is bribing China's "princelings," as they're called there, from Wall Street's ongoing program of hiring departing U.S. Treasury officials, presumably in order to grease the wheels of official Washington. . . ?[...]Or, for that matter, how different is what JP Morgan did in China from Wall Street's habit of hiring the children of powerful American politicians . . . ?[...]And how much worse is JP Morgan's putative offense in China than the torrent of money JP Morgan and every other major Wall Street bank is pouring into the campaign coffers of American politicians — making the Street one of the major backers of Democrats as well as Republicans?²⁶⁶

Reich concluded by asking:

"The Foreign Corrupt Practices Act is important, and JP Morgan should be nailed for bribing Chinese officials. But, if you'll pardon me for asking, why isn't there a Domestic Corrupt Practices Act?"

As highlighted above, there is of course a "Domestic Corrupt Practices Act" — 18 U.S.C. § 201. However, as highlighted by JPMorgan's FCPA scrutiny in 2013 and numerous other

265. Arthur Levitt, *'Influence Peddling' Makes the World Go Round*, WALL ST. J., Dec. 25, 2013, http://online.wsj.com/news/articles/SB10001424052702304858104579262624243252560?mod=WSJ_Opinion_LEFTTopOpinion.

266. Robert Reich, *JP Morgan Chase, the Foreign Corrupt Practice Act, and the Corruption of America*, HUFFPOST POL. BLOG (Dec. 8, 2013, 10:32 PM), http://www.huffingtonpost.com/robert-reich/jp-morgan-corrupt-practice-act_b_4410253.html.

examples,²⁶⁷ there is little intellectual and moral consistency between enforcement of these two laws. In this regard, a notable statement in 2013 was made by President Jimmy Carter, the same person who signed the FCPA into law in 1977. President Carter called out a form of bribery and called unchecked political contributions in the U.S. “legal bribery of candidates.”²⁶⁸

As President Carter’s statement highlights, why should corporate interaction with a “foreign official” be subject to greater scrutiny and different standards of enforcement than corporate interaction with a U.S. official? Why do we reflexively label a “foreign official” who receives “things of value” from private business interests as corrupt, yet generally turn a blind eye when it happens here at home? The short answer, of course, is that there should not be any difference and the questions deserve greater attention in this new era of FCPA enforcement.

Indeed, while the U.S. government aggressively expands its FCPA enforcement program and enforcement theories, the U.S. remains far from the top of lists such as Transparency International’s Corruption Perceptions Index (“CPI”), which ranks countries on how corrupt their public sector is perceived.²⁶⁹ In this regard, FCPA practitioners shared the following spot-on observation from the field:

The paradigm of international anti-corruption enforcement is frequently viewed, at least in the United States, through the prism of U.S. enforcers determined to root out the illicit dealings of corrupt foreign officials. We speak of sovereign nations as “risky neighborhoods” in which to do business,

267. See, e.g., *Archive for The ‘Double Standard’ Category*, FCPA PROFESSOR (Dec. 27, 2013), <http://www.fcprofessor.com/category/double-standard>.

268. Ray Henry, *Jimmy Carter: Unchecked Political Contributions Are ‘Legal Bribery’*, HUFFPOST POL. BLOG (July 17, 2013, 12:52 PM), http://www.huffingtonpost.com/2013/07/17/jimmy-carter-bribery_n_3611882.html.

269. For instance, in the most recent CPI, the U.S. ranked 19th out of 177 countries and below many peer nations such as Canada, Australia, Germany and the U.K. TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX (2013), available at <http://cpi.transparency.org/cpi2013/results/>.

denoted by dark shades of red on the ubiquitous Transparency International Corruption Perceptions Index (“CPI”). So the authors frequently note the quizzical looks on the faces of audience members in training sessions when we reveal that the United States barely qualifies as a Top 20 country on the CPI, tied at 19 with South America’s Uruguay. To be sure, the less-than-stellar CPI ranking of the United States has as much to do with an unparalleled domestic enforcement regime as any other factor, but the sad truth is that corruption is not a problem unique to government officials outside our borders.²⁷⁰

CONCLUSION

This article captured a moment in time by weaving together FCPA and related developments from 2013 into a coherent narrative of value to anyone who seeks an informed base of knowledge regarding the FCPA, its enforcement, and related legal and policy issues. The FCPA is one of the most important laws governing business conduct in the global marketplace. For this reason, and whether the specific issue is:

- the use of NPAs, DPAs and other means to resolve FCPA enforcement actions in the absence of meaningful judicial scrutiny;
- the wide gap between corporate and individual FCPA enforcement actions and a relevant data point concerning the quality and legitimacy of most corporate enforcement actions;
- various excesses that have come to define this new era of FCPA enforcement; or
- certain uncomfortable truths and double standards regarding the U.S. fight against bribery and corruption in this new era of enforcement.

The FCPA narrative told in this article matters.

270. GIBSON DUNN, 2013 YEAR-END FCPA UPDATE (2014), *available at* <http://www.gibsondunn.com/publications/Documents/2013-Year-End-FCPA-Update.pdf>.