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THE FOREIGN CORRUPT PRACTICES ACT: Aggressive Enforcement and Lack of Judicial Review Create Uncertain Terrain for Businesses

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The American multinational retailer Wal-Mart is one of an increasing number of businesses that are alleged to have violated the federal Foreign Corrupt Practices Act (FCPA),[2] which creates civil and criminal penalties for businesses and individuals who pay bribes to foreign officials.[3] Enacted in 1977, the FCPA seeks to ensure that Americans do not engage in bribery and other corrupt practices while conducting international business. At its most basic level, the FCPA is intended to reinforce America's historical association with the virtues of democracy and idealism, and there is good reason to believe that encouraging such virtues is good for American business and the countries where Americans do business.

Notwithstanding these noble goals, modern FCPA enforcement is increasingly being called into question.[4] The FCPA explicitly exempts "facilitating payments" made "to expedite or secure the performance of a routine governmental action by a foreign official"[5]—signaling Congress's recognition that, in certain countries, small cash payments to officials are routinely made to facilitate basic entry, customs, and licensing. Thus, the FCPA appears intended to focus on large bribes whose purpose is to skew decision making and secure government contracts—a prudent limit, given scarce government resources and Congress's desire to promote the competitiveness of American businesses. Moreover, on its face, the FCPA evinces no evidence that Congress intended for the statute to be used by U.S. regulators, including the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC), to curtail foreign bribes by foreign companies

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solely on the basis of attenuated connections such as a transaction denominated in dollars or e-mails sent through U.S. companies' Internet servers.

In the past decade, however, FCPA enforcement has exploded, based on just such expansive interpretations by DOJ and the SEC. The number of FCPA investigations and enforcement actions has ballooned and criminal penalties have skyrocketed, with several companies paying hundreds of millions of dollars in fines and penalties. Although the ever-widening interpretations of the FCPA seem to go beyond a commonsense understanding of the statute and its purpose, these interpretations are not being subjected to adequate judicial review because the high costs associated with potential criminal conviction have generally led targeted corporations to resolve cases without trial through "deferred-prosecution agreements" (DPAs) or "non-prosecution agreements" (NPAs).[6]

Recent court decisions in the few FCPA cases that have gone to trial have rejected some of DOJ's more aggressive positions. But such rulings, as well as November 2012 guidance issued by DOJ and the SEC that was intended to provide "helpful information to enterprises of all sizes from small businesses doing their first transactions abroad to multi-national corporations with subsidiaries around the world,"[7] are insufficient to improve the uncertain landscape for businesses consistent with the statute's salutary purposes. This paper briefly explores the FCPA, the aggressive DOJ interpretations leading to its expansion, and the problems inherent in the DPA/NPA enforcement mechanism, and it argues for legislative reforms to clarify the law.

THE FCPA: AN OVERVIEW

The FCPA's "anti-bribery provisions" prohibit the offer, promise, or payment of "anything of value" to a "foreign official" in order to "obtain or retain business."[8] The statute also provides civil and criminal penalties for companies that fail to maintain accurate books (the "books and records" provisions).[9]

As originally enacted, the FCPA claimed jurisdiction over U.S. companies and individuals who used the mail or other instrumentalities of interstate commerce to further a bribe. A 1998 amendment, however, expanded the statute's jurisdictional reach to include "issuers" of securities listed on U.S. exchanges (including foreign companies so listed), "domestic concerns" (U.S. citizens, nationals, and residents, as well as businesses organized in the U.S.), and any person or entity (U.S. or foreign) who takes any "act in furtherance" of a bribe within U.S. territory.[10]

DOJ'S AGGRESSIVE EXPANSION OF THE FCPA

Recent administrations have made combating global corruption an enforcement priority, with the current assistant attorney general proclaiming this a "new era in FCPA enforcement."[11] While aggressive expansion of FCPA enforcement has been predicated in part upon foreign nations' new anticorruption legislation and increasing cooperation with U.S. efforts, it has been fueled also by U.S. prosecutors' use of ever more expansive theories to bring business conduct within the statute's ambit. Prosecutors have pressed broad interpretations of the FCPA in terms of the law's jurisdiction, its definition of "foreign official," and its requirement that bribes be paid to "obtain" or "retain" business.

Jurisdiction

DOJ and the SEC have adopted an extremely broad interpretation of the 1998 amendment establishing FCPA anti-bribery jurisdiction over acts in furtherance of a bribe by foreign persons or entities within U.S. territory. In essence, the current position of the federal government is that it can use the FCPA to police bribery of foreign officials by foreign businesses or individuals for transactions bearing the most tenuous relationship to the United States.

For example, several foreign corporations have been charged with FCPA violations for conduct occurring entirely outside the U.S., on the theory of "correspon-

dent account liability." When foreign corporations engage in dollar-denominated transactions, their banks effectuate the transfer of funds through "correspondent" banks in the United States. Although a foreign corporation may be entirely unaware of the involvement of such a "correspondent" bank, DOJ and the SEC have taken the position that these transactions may constitute an "act in furtherance" of an FCPA violation undertaken within the United States. This jurisdictional theory has never been challenged in court.

In 2011, DOJ and the SEC further expanded the statute's reach, in enforcement actions against European companies and individuals for a bribery scheme occurring in Macedonia and Montenegro. The U.S. agencies took the position that e-mails transmitted through or stored on servers located in the U.S. constituted acts taken within the U.S. "in furtherance" of the bribery scheme. This new jurisdictional theory—which could effectively give U.S. authorities worldwide jurisdiction—has also never been tested in court.

Foreign Official

The FCPA defines a "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof."[12] The statue does not define the term "instrumentality" or make any specific reference to state-owned entities,[13] but DOJ has taken the position that state-owned enterprises (including enterprises indirectly owned by the state) are "instrumentalities" of foreign governments and, therefore, that employees of those enterprises are "foreign officials" under the statute.[14] Some federal district courts have recently agreed.[15] This interpretation of the statute makes "foreign officials" of thousands of individuals in countries such as China, where many enterprises are state-owned. Many recent FCPA cases have involved payments to such "foreign officials."[16]

Unfortunately, DOJ has made it difficult for businesses to parse the statutory term "foreign official" by issuing contradictory statements. In a recent Opinion Procedure Release, DOJ wrote that a member of the royal family of a foreign country was not a "foreign official" because he "does not directly or indirectly represent that he is acting on behalf of" or "in his capacity as a member of" the foreign government.[17] It is highly unlikely that the thousands of employees of businesses affiliated with foreign governments (notably, China)—whom DOJ considers to be "foreign officials"—represent that they are acting on behalf of, or in their capacity as, members of the government. Nevertheless, DOJ's past practice suggests that it will continue to bring FCPA cases for payments to these employees. Continued confusion over the meaning of "foreign official" has led to repeated calls for a more detailed statutory definition.[18]

To Obtain or Retain Business

Corrupt low-level bureaucrats are a fact of commercial life in many countries, and most businesses operating internationally have been solicited for payments to obtain permits, licenses, customs clearances, and the like. The FCPA contains an express exemption for "facilitating payments," the purpose of which is "to expedite or secure the performance of a routine governmental action by a foreign official."[19]

The "facilitating payments" exception and the FCPA's requirement that payments be made to "obtain or retain business" appear to establish a line between small payments to low-level officials to "expedite or secure the performance of a routine governmental action" and direct, quid pro quo payments in exchange for government contracts. That line, however, has been blurred by DOJ's interpretation of the "obtain or retain business" element to include payments intended to obtain licenses or permits, lower taxes, avoid duties, or otherwise give the payer a competitive advantage.

In 2004, a U.S. appellate court agreed, in part, with this interpretation. It reasoned that this kind of payment may give the payer a competitive advantage and thereby satisfy this element of the FCPA because, by lowering the cost of doing business, such corrupt payments assist the payer in keeping or expanding its business.[20] However, the court stopped short of

holding that *all* payments that increase profitability satisfy the standard, finding instead that the question of whether these are payments made to "obtain or retain business" is inherently fact-specific.[21] Nevertheless, since 2004, there has been an explosion in FCPA cases based on this kind of payment.[22]

CASES WITHOUT TRIALS: THE FCPA ENFORCEMENT REGIME

Potential FCPA violators face significant pressure to cooperate with DOJ and SEC investigations. In particular, businesses targeted under the FCPA face significant pressure on stock prices and impairment in obtaining credit; moreover, "businesses in some industries can be debarred from government contracting or denied government licenses upon an indictment or conviction."[23] As a result, few FCPA cases go to trial. To date, a single corporate defendant has been tried on FCPA charges, and although the company was convicted, the conviction was later vacated for "flagrant" prosecutorial misconduct.[24] Jury trials of individuals are less rare, but DOJ has lost several high-profile cases against individuals, and these cases have resulted in little judicial consideration of the difficult issues of interpretation discussed above.

Corporate FCPA investigations are generally resolved by means of a DPA or an NPA with DOJ and/or a civil settlement with the SEC. DPAs and NPAs are agreements between companies and prosecutors, in which the company agrees to comply with a set of terms for a specific period, in exchange for an agreement not to prosecute.

According to DOJ, these agreements may be appropriate to "restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct" while "preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement."[25] There is no doubt that NPAs and DPAs can be valuable prosecutorial tools. They can lead to necessary corporate reforms without endangering the financial health of a corporation and the jobs of its employees.[26] As the assistant attorney general for DOJ's criminal division recently said, DPAs and NPAs allow a business to avoid "the disaster scenario of an indictment" while preserving accountability and allow businesses to "prove … that they are serious about compliance."[27]

But some have argued that corporations faced with severe financial consequences and even the "corporate death penalty" enter into these agreements "under duress,"[28] and because of the absence of judicial oversight, "the FCPA often means what the enforcement agencies say it means," giving prosecutors "unchecked power subject to abuse."[29] The terms of DPAs and NPAs can be severe, including: monetary payments (restitution, disgorgement of profits, and penalties); a requirement that the company enhance its compliance procedures; and, in some cases, a requirement that the company hire, at its own expense, an independent monitor to oversee compliance and internal controls and determine whether the company meets the agreement's requirements.[30] NPAs typically are not filed with a court. DPAs may be filed with a court, but they generally receive little judicial oversight.[31]

A CASE FOR REFORM

Although FCPA allegations very rarely go to trial, some that have been tried in recent years have resulted in courts rejecting expansive prosecution theories. For example, in what became known as the "SHOT Show" debacle,[32] the court rejected DOJ's attempt to stretch "act in furtherance" jurisdiction under the FCPA to reach a defendant who sent a courier package *from* the United Kingdom *into* the United States. And the conviction of the first corporate FCPA defendant to go to trial was vacated for prosecutorial misconduct.[33]

Nevertheless, the enforcement agencies continue to be aggressive: witness the 2011 resolution of charges against Magyar Telekom and Deutsche Telekom (via a DPA and an NPA, respectively), in which DOJ asserted that FCPA jurisdiction could be based on e-

mails transmitted through or stored on servers located in the United States. On November 14, 2012, DOJ and the SEC issued a "resource guide" intended to clarify the government's position on the FCPA.[34] The resource guide is largely inadequate. Although it is a useful compendium of existing materials (including court decisions, enforcement actions, DOJ Opinion Procedure Releases, and law review articles), the resource guide breaks no new ground, provides no bright-line rules or clear policy pronouncements, and offers little practical advice. Moreover, by restating as settled law expansive positions that the agencies have taken in the past, the guide implies that DOJ and the SEC will remain aggressive in their interpretation of the statute.

DOJ's expansive readings of the FCPA, along with the lack of judicial review over the department's interpretations, are problematic. Invoking the statute to prosecute payments intended to help obtain licenses or permits is clearly at odds with Congress's express facilitating-payments exception. If Congress wishes to broaden the FCPA's scope over such activities or limit or eliminate the long-standing exemption in the statute, it should say so. At a minimum, DOJ's interpretations of such questions—and those pertaining to the definition of "foreign official" and the extraterritorial application of the statute to foreign companies bribing foreign officials based on attenuated ties to the United States—should be subject to judicial oversight.

In its current guise, the FCPA has helped generate an essentially unaccountable DOJ bureaucracy enforcing business conduct abroad, even among foreign entities. There is a strong case for reforming the FCPA through legislation, in order to continue to uphold the statute's historical commitment to maintain the integrity of American businesses' dealings abroad while limiting the ability of federal enforcement agencies to police business conduct worldwide and gain broad, quasi-regulatory powers over global businesses absent judicial oversight. Congress should take up the cause of FCPA reform, clarifying the statute's reach in the areas in which DOJ and the SEC have aggressively sought its expansion:

1. *Jurisdiction*. Congress should clarify the reach of the FCPA's "in furtherance of" jurisdiction. Specifically, Congress should decide whether to limit the FCPA's application against foreign businesses bribing foreign officials. The Justice Department's broad interpretation of the FCPA, predicated upon transactions denominated in dollars and those messages that may pass through U.S.-based e-mail servers, potentially affects U.S. diplomacy and finance- and technology-sector competitiveness.

2. *Foreign official*. Congress should specify the extent to which the FCPA applies to low-level employees of state-owned enterprises. The economic emergence of formerly Communist countries and of the still formally Communist China has led to a proliferation of state-owned enterprises with which American companies must do business in order to compete globally.

3. *To obtain or retain business*. Congress should clarify the "routine government actions" covered by the FCPA's express exemption for "facilitating payments" not covered by its prohibition on payments to officials to "obtain" or "retain" business. DOJ's broad interpretation of this element to include payments intended to obtain licenses or permits and other low-level bribes seems in conflict with the statute's express preemption and has fueled the growth in FCPA enforcement actions.

DOJ's aggressive enforcement posture creates a great deal of uncertainty for business, but in today's economy, companies cannot afford to allow this uncertainty to prevent them from competing globally. Until reform comes, U.S. companies operating overseas can—and must—protect themselves only by adopting robust compliance programs, training their personnel, and, if and when potential FCPA violations are discovered, making careful and informed decisions about voluntary disclosure and cooperation.

ENDNOTES

[1] The author wishes to thank Aidan Delgado for his research assistance in the preparation of this report.

[2] Stephanie Clifford & David Barstow, *Wal-Mart Inquiry Reflects Alarm on Corruption*, N.Y. TIMES, Nov. 15, 2012, http://www.nytimes.com/2012/11/16/business/wal-mart-expands-foreign-bribery-investigation.html?pagewanted=all&_r=0.

[3] 15 U.S.C. § 78dd-1.

[4] *E.g.*, P. Georgis, *Settling with Your Hands Tied: Why Judicial Intervention Is Necessary to Curb an Expansive Interpretation of the Foreign Corrupt Practices Act*, 42 Golden Gate U. L. Rev. 243 (2012); P. Jeydel, *Yoking the Bull: How to Make the FCPA Work for U.S. Business*, 43 Geo. J. Int'l. L. 523 (2012); J. Ashcroft & J. Ratcliffe, *The Recent and Unusual Evolution of an Expansive* FCPA, 26 ND J. L. Ethics & Pub Pol'y 25 (2012); M. Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. Toledo L. Rev. 99 (2011); M. Koehler, *The Façade of FCPA Enforcement*, 41 Geo. J. Int'l. L. 907 (2010).

[5] *See* 15 U.S.C. § 78dd-1(b), 78dd-2(b), 78dd-3(b).

[6] *See generally* James R. Copland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements*, 14 Manh. Inst. Civ. J. Rpt. 1 (2012).

[7] SEC and DOJ release, FCPA Guide (Nov. 14, 2012), http://www.sec.gov/news/press/2012/2012-225.htm.

[8] 15 U.S.C. § 78dd-1(a)(1)(B), (2)(B), 3(B).

[9] 15 U.S.C. § 78m(b).

[10] The FCPA's books and records provisions apply only to "issuers" of securities listed on U.S. exchanges.

[11] Press Release, U.S. Dep't of Justice, Assistant Attorney General Lanny A. Breuer Speaks at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html.

[12] 15 U.S.C. § 78dd-2(h)(2)(A).

[13] *See* 15 U.S.C. § 78dd-2(h).

[14] *See, e.g.*, Foreign Corrupt Practices Act Review, Opinion Procedure Release, No. 94-01 (May 13, 1994) (general director of a state-owned enterprise was a foreign official under the statute, whether or not he would be considered a government employee or public official under that nation's law); Foreign Corrupt Practices Act Review, Opinion Procedure Release, No. 08-03 (July 11, 2008) (journalists of state-owned media company are foreign officials); Foreign Corrupt Practices Act Review, Opinion Procedure Release, No. 08-01 (Jan. 15, 2008) (general manager of a joint venture whose majority owner was a state-controlled company is a foreign official for the purposes of the FCPA).

[15] *See United States v. Aguilar*, No. 10-cr-01031-AHM (C.D. Cal. Apr. 20, 2011); *United States v. O'Shea*, No. 09-cr-00629 (S.D. Tex. Jan. 3, 2012); *United States v. Esquenazi*, No. 09-CR-21010-JEM, ECF No. 309 (S.D. Fla. Nov. 19, 2010). The *Aguilar* court accepted the government's argument that the 1998 amendments to the FCPA were intended to bring the FCPA into conformity with treaty obligations under Economic Cooperation and Development Convention (OECD), which defines "foreign public official" to include functionaries of any "enterprise, regardless of its legal form, over which a government or governments may, directly or indirectly, exercise a dominant influence."

[16] *See, e.g.*, Press Release, U.S. Dept. of Justice, 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), http://www.justice.gov/opa/pr/2011/August/11-crm-1020.html; Press Release, U.S. Dept. of Justice, Subsidiary of Tyco International Ltd. Pleads Guilty, Is Sentenced for Conspiracy to Violate Foreign Corrupt Practices Act (Sept. 24, 2012), http://www.justice.gov/opa/pr/2012/September/12-crm-1149.html.

[17] DOJ Opinion Procedure Release, No. 12-01 (Sept. 18, 2012), http://www.justice.gov/criminal/fraud/fcpa/opinion/2012/1201.pdf.

[18] *See, e.g.*, Peter J. Henning, *Taking Aim at the Foreign Corrupt Practices Act*, Dealbook, N.Y. Times, Apr. 30, 2012.
[19] *See* 15 U.S.C. § 78dd-1(b), 78dd-2(b), 78dd-3(b).
[20] *United States v. Kay*, 359 F.3d 738, 759-60 (5th Cir. 2004).
[21] *See id.* at 760.
[22] *Voluntary Disclosures and the Role of FCPA Counsel* (Dec. 1, 2009), http://fcpaprofessor.blogspot.com/2009/12/voluntary-disclosures-and-role-of-fcpa.html.
[23] Copland, *supra* note 6, at 1.
[24] *See* Order Granting Motion to Dismiss, *United States v. Aguilar, et al.*, No. 2:10-cr-01031-AHM (Dec. 1, 2011).
[25] U.S. Attorneys' Manual § 9-28.000 (Aug. 28, 2008), at 18.
[26] *See, e.g.*, *Andersen Died in Vain*, Chi. Trib., Mar. 14, 2012, http://articles.chicagotribune.com/2012-03-14/news/ct-edit-andersen-20120314_1_andersen-s-professional-standards-group-andersen-case-founder-arthur-andersen.
[27] *See* James Lydon, *Justice Department Defends the Role of Deferred-Prosecution Agreements in Corporate Crime Enforcement*, White Collar Blog (Oct. 17, 2012), http://www.thewhitecollarblog.com/2012/10/17/justice-department-defends-the-role-of-deferred-prosecution-agreements-in-corporate-crime-enforcement.
[28] Candice Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 Ky. L.J. 1, 38–40 (2007).
[29] Koehler, *supra* note 4.
[30] For a fuller assessment of how DPAs and NPAs work in practice, see generally Copland, *supra* note 6.
[31] GAO Report 10-110, *DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness* (Dec. 2008), at 25–27.
[32] In January 2010, in what it termed a "turning point" for FCPA enforcement, DOJ charged 22 defendants with FCPA violations. The charges arose from a sting operation that resulted in hundreds of audio and video recordings, but after three defendants pled guilty, two trials resulted in two acquittals and the dismissal of the indictments against the remaining defendants. *See* Del Quentin Wilber, *Charges Dismissed Against 16 Accused of Bribing Foreign Official in Sting*, Wash. Post, Feb. 21, 2012, http://www.washingtonpost.com/local/crime/charges-dismissed-against-16-accused-of-bribing-foreign-official-in-sting/2012/02/21/gIQAOhU5RR_story.html.
[33] *See* Richard L. Cassin, *Feds Drop Lindsey Appeal, Case Closed*, FCPA Blog (May 26, 2012), http://www.fcpablog.com/blog/2012/5/26/feds-drop-lindsey-appeal-case-closed.html.
[34] U.S. Dep't of Justice & Enforcement Div. of the U.S. Securities & Exchange Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Nov. 14, 2012), http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf.