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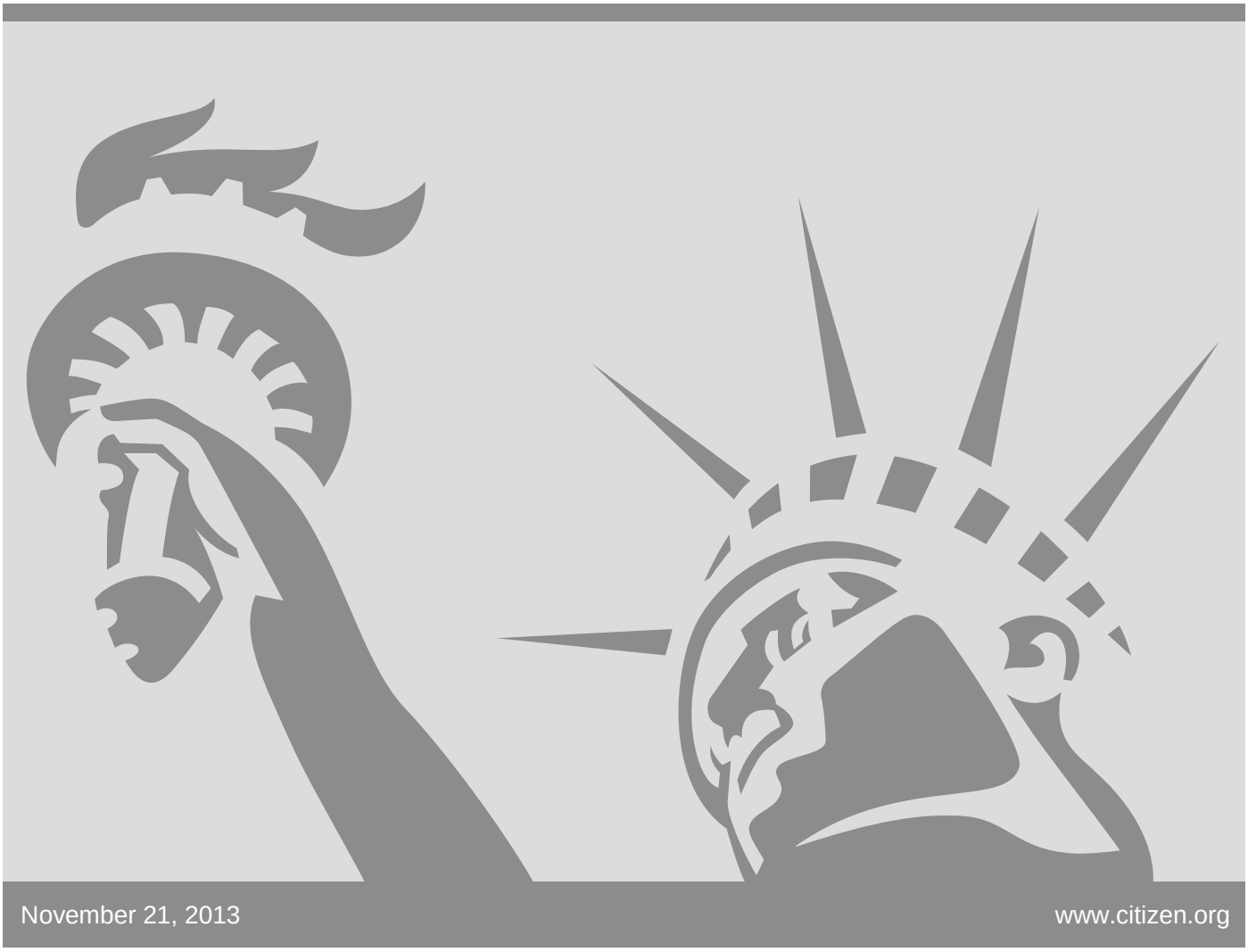

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License to Bribe

How the U.S. Chamber of Commerce's Fight to Weaken Anti-Corruption Law Threatens the Global Economy, Small Business and Democracy

Acknowledgments

This report was written by Jake Parent, Coordinator of Public Citizen's U.S. Chamber Watch project. It was edited by Congress Watch Director Lisa Gilbert.

About Public Citizen

Public Citizen is a national non-profit organization with more than 300,000 members and supporters. We represent consumer interests through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues including consumer rights in the marketplace, product safety, financial regulation, worker safety, safe and affordable health care, campaign finance reform and government ethics, fair trade, climate change, and corporate and government accountability.

Public Citizen's Congress Watch
215 Pennsylvania Ave. S.E
Washington, D.C. 20003
P: 202-546-4996
F: 202-547-7392
http://www.citizen.org

Contents

I. Introduction

> "Corporate bribery of foreign officials takes place primarily to assist corporations in gaining business. Thus foreign corporate bribery affects the very stability of overseas business. Foreign corporate bribes also affect our domestic competitive climate when domestic firms engage in such practices as a substitute for healthy competition for foreign business."[1]
>
> *— U.S. Senate report (1977)*

Too often, success in the global economy is influenced by a company's ability to pay off decision makers instead of by how well the firm fulfills its customers' needs.[2] According to estimates by the World Bank, more than $1 trillion in bribes is paid each year,[3] representing 2 to 3 percent of the entire world economy. In an era of spreading globalization, this corrupt activity is a growing danger that may threaten economic stability.

Fortunately for businesses and consumers alike, the Foreign Corrupt Practices Act (FCPA) has made the United States a leader in the fight against corruption for more than 30 years. This statute prohibits companies and individuals from trading anything of value to government officials in exchange for favorable business treatment. Although imperfect at stemming corruption, the law helps level the playing field and ensures fair competition for American businesses competing against foreign companies, as well as for small businesses competing against giant multi-national corporations.[4]

Beyond imposing economic costs, corruption also has negative ramifications for democracy as it may make government officials more concerned with the interests of the few over those of the people they are elected to serve. When citizens perceive corruption to be

[1] S. Rep. No. 95-114, at 4 (1977), http://bit.ly/1cKb8Y0.
[2] *See* Carter Stewart, *The FCPA Is Just as Relevant and Necessary Today as Thirty-Five Years Ago*, 73 OHIO STATE LAW REVIEW 1042 (2012), http://bit.ly/13R0LuA.
[3] *The Costs of Corruption*, THE WORLD BANK (April 8, 2004), http://bit.ly/17AbY3S.
[4] DAVID KENNEDY & DAN DANIELSEN, OPEN SOCIETY FOUNDATION, BUSTING BRIBERY, at 17 (September 2011), http://osf.to/14yQ6el.

present in their governing institutions, they are less likely to believe in the ability of those institutions to meet society's challenges—as is the case in many nations around the world.[5]

Since the FCPA was made law, countries across the globe have adopted similar legislation and signed on to international trade agreements, such as the Organization for Economic Cooperation and Development's (OECD) Anti-Bribery Convention and the United Nations' Convention Against Corruption.[6]

Despite the global recognition of corruption as a serious issue, in 2010 groups[7] purporting to support American enterprise began a concerted attack on the FCPA, demanding changes to the law that would harm American businesses.[8] One of the most vocal of these groups has been the U.S. Chamber of Commerce (U.S. Chamber) – a trade association supported financially by large corporations.[9] In 2010, the U.S. Chamber released a report through its Institute for Legal Reform that listed five specific changes it believed should be made to the FCPA. It claimed that these changes were aimed at "providing more certainty to the business community when trying to comply with the FCPA, while promoting efficiency and enhancing public confidence in the integrity of the free market system as well as the underlying principles of our criminal justice system."[10]

The primary purpose of this report is to examine these recommendations and to argue that, far from helping American businesses and the economy at large, weakening the FCPA would hurt American businesses and consumers, threaten economic stability domestically and internationally, and damage our credibility in the international community.

This report first lays out a brief explanation of the history of the FCPA. It then provides examples of violations being prosecuted by FCPA enforcing bodies. The report then examines the U.S. Chamber of Commerce's proposed amendments, including criticisms that have been made against them and clarifications made by enforcement agencies.

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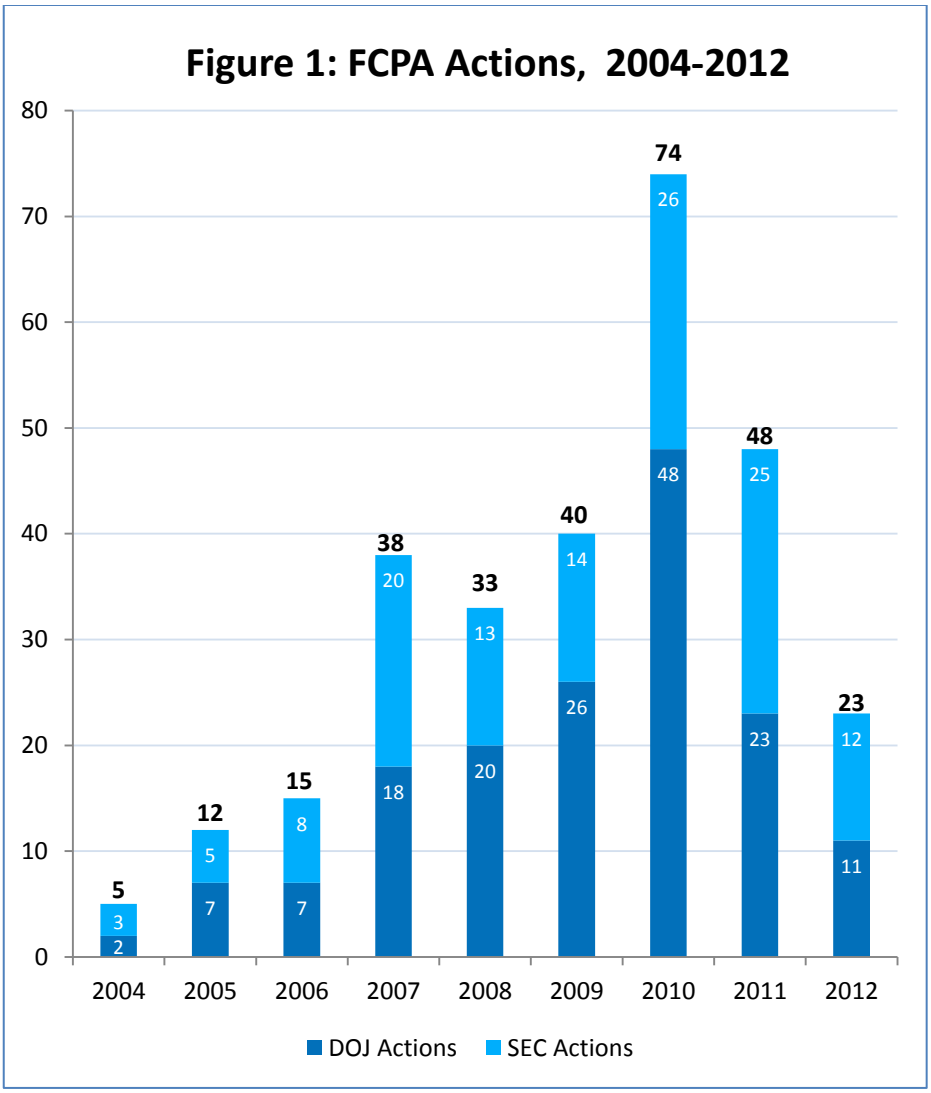
[5] GLOBAL CORRUPTION BAROMETER, TRANSPARENCY INTERNATIONAL, 3-4 (2013) http://bit.ly/144NKwE.
[6] Frank C. Razzano & Travis P. Nelson, *The Expanding Criminalization of Transnational Bribery: Global Prosecution Necessitates Global Compliance*, 42 INT'L LAW 1259 (2008) as cited in DAVID KENNEDY & DAN DANIELSEN, OPEN SOCIETY FOUNDATION, BUSTING BRIBERY, 11 (September 2011), http://osf.to/14yQ6el.
[7] Groups that have put their support behind the U.S. Chamber's proposed changes include the National Association of Manufacturers, Pharmaceutical Research and Manufacturers of America, The Financial Services Roundtable, United States Council for International Business, and others.
[8] DAVID KENNEDY & DAN DANIELSEN, BUSTING BRIBERY, OPEN SOCIETY FOUNDATION 27 (2011), http://osf.to/14yQ6el.
[9] ECHO CHAMBER: HOW THE U.S. CHAMBER OF COMMERCE'S TOP CORPORATE FUNDERS DICTATE THE AGENDA FOR THE 112TH CONGRESS, U.S. CHAMBER WATCH, 2 (2011), http://bit.ly/13J6EOc.
[10] ANDREW WEISSMANN & ALIXANDRA SMITH, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM , 7 (2010). http://bit.ly/1augINV.

II. From Watergate to Present Day: A Brief History of the FCPA

Although the Watergate scandal is usually best remembered for prompting the resignation of President Richard Nixon, it also served to open the window into a previously unseen world of corruption. The scandal brought to light millions of dollars that were being kept in "slush funds" and other secret accounts that were being used to influence politics and the global business environment.[11] Following these revelations, the U.S. Congress faced stiff pressure to act. One piece of legislation passed during this time was the Foreign Corrupt Practices Act of 1977, a law that officially prohibits American businesses from bribing foreign officials in exchange for favorable business treatment.[12]

In its first two decades, the FCPA saw a varying level of enforcement.[13] But over the last 10 years, enforcement of the law has skyrocketed.[14] While 2004 saw just 5 cases, that number increased to 74 in 2009. [See Figure 1] The most active year in the law's history occurred in 2010, with a total of 74 cases.

[11] John Blake, *Forgetting a key lesson from Watergate?*, CNN (Feb. 4, 2012), http://bit.ly/13fvXDZ.
[12] *See* Ciara Torres-Spelliscy, *How Much is an Ambassadorship? And the Tale of How Watergate Led to a Strong Foreign Corrupt Practices Act and a Weak Federal Election Campaign Act*, 16 CHAPMAN LAW REVIEW 5 (2012), http://bit.ly/194Glq3
[13] Sherman & Sterling LLP., *FCPA Digest: Cases and Review Releases Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977*, 427-435 (2009) for chronological listing of FCPA cases, http://bit.ly/18b9gEn.
[14] Dionne Searcey, *U.S. Cracks Down on Corporate Bribes*, WALL STREET JOURNAL (May 26, 2009), at A1, http://on.wsj.com/HjS32U.



Source: Harvard Law School Forum on Corporate Governance and Financial Regulation.[15]

Amendments to FCPA

The FCPA has undergone two major legislative changes since being originally signed into law. In 1988, Congress added the right for companies and individuals to use the presence of local laws that allow bribery as a defense in American courts, and also allowed for a defense based on "reasonable and bona fide promotional expenses."[16] This set of amendments also asked the executive branch to pursue a treaty with OECD members,

[15] Noam Noked, *2013 Mid-Year FCPA Update,* THE HARVARD LAW SCHOOL FORUM ON FINANCIAL REGULATION (July 27, 2013), http://hvrd.me/16vycXI.

[16] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107, 1415-25 (1988); *see also* H.R. Rep. No. 100-576, at 916-24 (1988) as cited in SECURITIES AND EXCHANGE COMMISSION & DEPARTMENT OF JUSTICE, RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, 3 (November 2012).

which eventually lead to an agreement – the Convention on Combating Bribery of Foreign Officials in International Business Transactions (also called the Anti-Bribery Convention) – that made bribing government officials illegal by international law.[17]

Ten years later, the FCPA was amended again to be in line with the Anti-Bribery Convention. This latter expansion meant that the FCPA would apply to specific foreign nationals and foreign companies that participated in activities that are prohibited by the FCPA.[18]

How it's Enforced

There are two primary bodies in charge of enforcing the FCPA.[19] The first is the U.S. Securities and Exchange Commission. This agency has the power to investigate and bring civil charges against companies and individuals found to be in violation of the law. The second agency with jurisdiction in FCPA cases is the U.S. Department of Justice. Like the SEC, it can levy civil penalties on companies and individuals in violation of the FCPA. However, it also has the authority to bring criminal charges.

The Department of Justice also plays a key role in helping companies understand the law and adopt strong enforcement mechanisms and procedures. The agency allows companies to submit questions, concerns, and hypothetical scenarios to which the DOJ responds and offers opinions on how companies can meet FCPA requirements.[20]

III. Selected FCPA Violations

While FCPA skeptics attempt to frame the law as overreaching, it's important to understand that the vast majority of violations being prosecuted are quite severe. Especially in recent times, major companies – both foreign and domestic – as well as individuals from around the world have been caught taking part in corrupt behavior. In order to understand the importance of continuing strong FCPA enforcement, one must understand the gravity of violations the law is used to prosecute.

[17] *See* Omnibus Trade and Competitiveness Act of 1988, § 5003(d) as cited in SECURITIES AND EXCHANGE COMMISSION & DEPARTMENT OF JUSTICE, RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, 3 (November 2012).
[18] *See* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105-366, 112 Stat. 3302 (1998); *see also* S. Rep. No. 105-277, at 2-3 as cited in SECURITIES AND EXCHANGE COMMISSION & DEPARTMENT OF JUSTICE, RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, 4 (November 2012).
[19] In addition to these two agencies, many other federal bodies play a supporting role in ensuring strong enforcement of the FCPA. These include: the Federal Bureau of Investigation, the Department of Homeland Security, the Internal Revenue Service, the Department of Treasury, the Department of Commerce, the Department of State, and the U.S. Agency for International Development.
[20] *See* DOJ memo, *Foreign Corrupt Practices Act Opinion Procedure,* http://1.usa.gov/1cfJXGT.

The six examples below are a small sample of the infractions companies and individuals have been prosecuted for over the past few years.[21]

Total S.A.[22]

This French oil and gas company was charged in May 2013 with paying $60 million in bribes to "intermediaries of an Iranian government official who then exercised his influence to help the company obtain valuable contracts to develop significant oil and gas fields." The company allegedly made more than $150 million through the scheme, and tried to cover it up by creating phony "consulting agreements."

The SEC ordered Total S.A. to pay $153 million in fines and retain an independent consultant to review and report on the firm's FCPA compliance. Total agreed to pay an additional $245.2 million penalty to settle criminal charges as part of a deferred prosecution agreement.

Eli Lily and Company[23]

In December 2012, the Eli Lilly and Company was charged with improper payments made by its subsidiaries to foreign government officials in Russia, Brazil, China, and Poland. The company agreed to pay $29.3 million in fines.

- In Russia, Eli Lilly's subsidiary made more than $7 million in payments to government officials (including a person close to members of the Russian parliament) and disguised them as "marketing services." These payments were made with the intent of securing business and apparently were allowed to go on for years, despite knowledge of the activity by Eli Lilly.

- Employees at Eli Lilly's Chinese subsidiary were found to have falsified expense reports in order to hide improper gifts and cash payments to doctors who worked for the government.

- The Brazilian subsidiary allowed a distributor to pay bribes to government health officials in order to secure $1.2 million in sales to government institutions.

- In Poland, a subsidiary made improper payments to a charitable foundation that was founded by a high-ranking government health authority. The payments were

[21] For a full list, *see SEC Enforcement Actions: FCPA Cases*, http://1.usa.gov/14jolEe.
[22] *See* Press Release, U.S. Securities and Exchange Commission, *SEC Charges Total S.A. for Illegal Payments to Iranian Official* (May 29, 2013) http://1.usa.gov/1enA7Uu.
[23] *See* Press Release, U.S. Securities and Exchange Commission, *SEC Charges Eli Lilly and Company With FCPA Violations* (December 20, 2012), http://1.usa.gov/16nKHVA.

found to have been made in order to facilitate the official's support for placing Eli Lilly products on the government reimbursement list.

Pfizer Inc.[24]

In August 2012, the SEC charged Pfizer with allowing its subsidiaries to bribe doctors and other health care professionals employed by foreign governments in order to win business. The practice had been going on since as far back as 2001 and was widespread, with alleged violations taking place in Bulgaria, China, Croatia, Czech Republic, Italy, Kazakhstan, Russia and Serbia.

The subsidiaries attempted to hide the bribes by disguising them in accounting records as "promotional expenses, marketing, training, travel and entertainment, clinical trials, freight, conferences, and advertising. At the same time the charges were announced, the SEC announced that Pfizer had agreed to pay more than $26 million to settle the case. This is in addition to $15 million agreed to by its subsidiary Pfizer H.C.P. Corporation.

In the same announcement, the SEC revealed charges that another company owned by Pfizer (Wyeth LLC) had bribed officials in China, India, and Pakistan in order to receive business. The announcement was included news that Pfizer/Wyeth had agreed to pay more nearly $19 million to settle these charges.

Siemens AG[25]

Seven former executives with the German company Siemens were charged in December 2011 with being part of a "decade-long bribery scheme to retain a $1 billion government contract to produce national identity cards for Argentine citizens."

The executives included those working for the parent company and the regional affiliate – one of whom had left Siemens to act as an intermediary in the process. In total, Siemens paid more than $100 million in bribes to government officials, including "two former Argentine presidents and former cabinet members." The executives were forced to pay fines in varying amounts.

In 2008, the SEC charged Siemens itself with FCPA violations for its participation in widespread bribery schemes around the world, including in Venezuela, Israel, Mexico,

[24] *See* Press Release, U.S. Securities and Exchange Commission, *SEC Charges Pfizer With FCPA Violations*, (August 7, 2012), http://1.usa.gov/1e6Sqw9.
[25] *See* Press Release, U.S. Securities and Exchange Commission, *SEC Charges Seven Former Siemens Executives With Bribing Leaders in Argentina* (Dec. 13, 2011), http://1.usa.gov/1d8uCVu.

Bangladesh, Vietnam, China, Russia, and Iraq. The company paid more than $1.6 billion to settle the case.[26]

Johnson and Johnson[27]

The SEC announced in April 2011 that pharmaceutical company Johnson & Johnson paid approximately $70 million to settle charges that it had been participating in bribery schemes since at least 1998.

These include paying "bribes to public doctors in Greece who selected Johnson & Johnson surgical implants, public doctors and hospital administrators in Poland who awarded contracts to Johnson & Johnson, and public doctors in Romania to prescribe Johnson & Johnson pharmaceutical products. Johnson & Johnson subsidiaries also paid kickbacks to Iraq to obtain 19 contracts under the United Nations Oil for Food Program."

Alcatel-Lucent S.A[28]

The France based telecommunications firm was charged in December 2010 with paying bribes to foreign government officials to obtain business in Costa Rica, Honduras, Malaysia and Taiwan.

Alcatel's subsidiaries allegedly used phony consultants to "funnel more than "$8 million in bribes to government officials in order to obtain or retain lucrative telecommunications contracts and other contracts." The company paid more than $137 million to settle the charges.

General Electric Co.[29]

General Electric was charged with FCPA violations in July, 2010 for being involved in a scheme to provide $3.6 million to Iraqi government agencies in order to win business supplying medical and water purification equipment. General Electric agreed to pay $23.4 million to settle the charges.

The payments were made "in the form of cash, computer equipment, medical supplies, and services to the Iraqi Health Ministry or the Iraqi Oil Ministry in order to obtain valuable contracts under the U.N. Oil for Food Program."

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[26] *See* Press Release, U.S. Securities and Exchange Commission, *SEC Charges Siemens AG for Engaging in Worldwide Bribery* (Dec. 15, 2008) http://1.usa.gov/18TGfN1.
[27] *See* Press Release, U.S. Securities and Exchange Commission, *SEC Charges Johnson & Johnson With Foreign Bribery* (April 7, 2011), http://1.usa.gov/186paNI.
[28] *See* Press Release, U.S. Securities and Exchange Commission, *SEC Charges Alcatel-Lucent with FCPA Violations* (Dec. 27, 2010), http://1.usa.gov/15XDWGQ.
[29] *See* Press Release, U.S. Securities and Exchange Commission, *SEC Charges General Electric and Two Subsidiaries with FCPA Violations* (July 27, 2010), http://1.usa.gov/186riFf.

> "Under the misleadingly innocuous title 'Restoring Balance,' the U.S. Chamber Institute for Legal Reform has proposed… far-reaching amendments to the FCPA that each would significantly reduce the scope and efficacy of the FCPA…
>
> —*David Kennedy, Harvard Law School & Dan Danielsen, Northeastern University School of Law*[30]

IV. The U.S. Chamber of Commerce Says FCPA Bad for Business

While maintaining that it supports anti-corruption measures in principle, the U.S. Chamber has argued that the particular approach taken by the FCPA to combat corruption produces an unhealthy burden on businesses.[31] In October 2010, it released a report that included five changes to the law it says would "provide more certainty to the business community when trying to comply with the FCPA, while promoting efficiency and enhancing public confidence in the integrity of the free market system as well as the underlying principles of our criminal justice system."[32]

These 5 suggested amendments are:[33]

1) Adding a compliance defense;
2) Limiting a company's liability for the prior actions of a company it has acquired;
3) Adding a "willfulness" requirement for corporate criminal liability;
4) Limiting a company's liability for acts of a subsidiary; and
5) Defining a "foreign official" under the statute.

FCPA legal experts rebuked the U.S. Chamber document. Some critics even suggested that the U.S. Chamber's requests show that the organization either greatly misunderstands many of the FCPA's enforcement realities, or that it is purposefully oversimplifying how the law is enforced (or both). [34]

[30] DAVID KENNEDY & DAN DANIELSEN, BUSTING BRIBERY, OPEN SOCIETY FOUNDATION 27 (2011), http://osf.to/14yQ6el.
[31] ANDREW WEISSMANN & ALIXANDRA SMITH, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM , 5-6 (2010), http://bit.ly/1augINV.
[32] *Id.,* at 7.
[33] *Id.*
[34] DAVID KENNEDY & DAN DANIELSEN, BUSTING BRIBERY, OPEN SOCIETY FOUNDATION 27-29 (September 2011), http://osf.to/14yQ6el.

In what may have been a response to the U.S. Chamber document, the SEC and DOJ in 2012 released a 120-page FCPA guidance document,[35] which clearly explained not only the law's primary enforcement statutes, but also the reasoning that guides the agency in enforcement decisions. The document was heralded by experts as a comprehensive resource that, if followed, would allow companies to maintain "effective compliance programs and mitigate their exposure to FCPA liability."[36]

The following section examines the U.S. Chamber's requested amendments, and documents criticism of them, as well as clarifications made by the DOJ and SEC guidance.

1. Adding a Compliance Defense

U.S. Chamber Request: The U.S. Chamber asserts that the FCPA does not take into consideration a company's dedication to compliance when evaluating whether or not to bring charges. It says this leaves companies vulnerable to actions by employees "who commit crimes despite a corporation's diligence." [37]

Although the U.S. Chamber did not offer specific changes to the FCPA language, it used compliance defense criteria found in two other anti-bribery laws – British and Italian – as suggested examples. These criteria provide grounds for a company to defend itself based on its having a program that makes regular assessment of its risk of engaging in bribery, and that its top-level management clearly communicates a desire of preventing bribery. The U.S. Chamber acknowledged in its report that criteria such as these are taken into account in the enforcement of the U.S. law. However, the U.S. Chamber claimed such factors are only considered at the sentencing phase.

Response: The request to add a compliance defense raised eyebrows among FCPA experts because the DOJ and SEC already take into account a company's dedication to compliance.[38] As the DOJ and SEC explain in their guidance, such consideration is made not just at the sentencing phase, but at all stages of FCPA proceedings, including at the stage in which the government decides whether to proceed with a case.[39] Not only is intent taken into account, but prosecutors are required by the FCPA to prove that violations by a company

[35] SECURITIES AND EXCHANGE COMMISSION & DEPARTMENT OF JUSTICE, RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012), http://1.usa.gov176uzWu.
[36] Marc Rosenberg, *DOJ and SEC Issue FCPA Guidance*, THE HARVARD LAW SCHOOL FORUM ON FINANCIAL REGULATION (Nov. 28, 2012), http://hvrd.me/18dG4wk.
[37] ANDREW WEISSMANN & ALIXANDRA SMITH, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM ,11 (October 2010), http://bit.ly/1augINV.
[38] DAVID KENNEDY & DAN DANIELSEN, BUSTING BRIBERY, OPEN SOCIETY FOUNDATION 29 (September 2011), http://osf.to/14yQ6el.
[39] SECURITIES AND EXCHANGE COMMISSION & DEPARTMENT OF JUSTICE, RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, 52-62 (November 2012), http://1.usa.gov/176uzWu.

were undertaken by means that are both "knowing" and "corruptly" undertaken with intent to do something illegal.[40]

Although it would be ideal to have a specific set of standards that would qualify every compliance program in existence as being sufficient or not, such a universal approach is not possible given the nuanced differences in compliance needs across myriad companies and industries.[41] In its guidance, the DOJ and SEC state clearly that the agencies "understand that no compliance program can ever prevent all criminal activity by a corporation's employees" and that companies are not held to a standard of perfection.[42] The guidance suggests the use of three simple questions as a gauge for compliance program compatibility with FCPA standards: [43]

1.) Is the company's compliance program well designed?

2.) Is it being applied in good faith?

3.) Does it work?

The enumeration of these three guiding questions by the DOJ and SEC suggest that the agencies believe that the sort of compliance criteria the U.S. Chamber requests already are in place.

The compliance criteria that the U.S. Chamber lauds, such as used in the United Kingdom and Italy, are more specific than the FCPA. But they may not reduce the resources companies need to put into their compliance programs. As long as compliance criteria are well crafted, companies would need to maintain at least the same effort to compliance as they currently do. Poorly crafted compliance criteria, meanwhile, would run the risk of providing companies with safe harbors from which to dodge the intent of the anti-corruption law.[44]

[40] *See* Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1, http://1.usa.gov/1gzPmW2.
[41] SECURITIES AND EXCHANGE COMMISSION & DEPARTMENT OF JUSTICE, RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, 57 (November 2012), http://1.usa.gov/176uzWu.
[42] *Id.,* at 56
[43] *Id.*
[44] DAVID KENNEDY & DAN DANIELSEN, BUSTING BRIBERY, OPEN SOCIETY FOUNDATION 32 (September 2011), http://osf.to/14yQ6el.

2. Limiting a Company's Liability for the Prior Actions of a Company It Has Acquired

U.S. Chamber Request: The U.S. Chamber would like to allow companies that conduct due diligence prior to an acquisition or a merger to be able to use such diligence as a legal defense if the company being acquired is subsequently found guilty of FCPA violations.[45] It requests that the law be changed so that, "at a minimum, a corporation, irrespective of whether or not it conducts reasonable due diligence prior to and/or immediately after an acquisition or merger, should not be held criminally liable for ... historical violations."[46]

Response: Eliminating the liability of a parent company for FCPA violations made by a firm it acquires would create a perverse incentive for companies to avoid the degree of due diligence procedures that help ensure FCPA compliance. This incentive also could deter a company from conducting the sort of due diligence to ensure that the company it is acquiring is otherwise sound.[47] For example, a seemingly successful company may in fact be unstable if its success were based on the use of corrupt practices instead of structurally sound business practices.

Although the U.S. Chamber's report seems to suggest that companies are left stranded to find their own way in these kinds of acquisitions, a helpful mechanism is built into the FCPA enforcement structure to help companies successfully navigate the process of FCPA compliance. Through the DOJ's Opinion Procedure process, companies can make inquiries into the legality of specific situations and receive guidance from DOJ.[48]

3. Adding a "Willfulness" Requirement for Corporate Criminal Liability

U.S. Chamber Request: The U.S. Chamber asks that the FCPA be rewritten to require that prosecutors prove corporations acted "willfully" in order for them to be found guilty. Although not defined in the FCPA (and subject to various definitions and interpretations in other aspect of federal law and case law), "willful" generally refers to an intent to violate a specific law – as opposed to simply knowing that the act itself is illegal.

Response: While the FCPA does not apply the willful standard to prosecution of companies (as opposed to individuals), it does take intent into account. In addition, case law interpretations of the statute have required prosecutors to demonstrate that corporate

[45] ANDREW WEISSMANN & ALIXANDRA SMITH, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM , 14-20 (October 2010) http://bit.ly/1augINV.
[46] *Id.,* at *19*
[47] DAVID KENNEDY & DAN DANIELSEN, OPEN SOCIETY FOUNDATION, BUSTING BRIBERY, 27 (September 2011), http://osf.to/14yQ6el.
[48] *See* DOJ memo, *Foreign Corrupt Practices Act Opinion Procedure,* http://1.usa.gov/1cfJXGT.

"Defendants acted corruptly, with an 'unlawful end or result,' and committed 'intentional' and 'knowing' acts with a bad motive."[49]

The U.S. Chamber complains that a corporation could be "charged with violations of the anti-bribery provisions, even if it was unaware that the FCPA could reach such payments." This suggests an understanding that only defendants who are aware they are violating the FCPA itself can or should be found guilty of violating the statute under the willfulness standard.

But this does not reflect the intent of the law. At present, individuals are subject to being found guilty of violating the FCPA if they are aware that they have violated another country's anti-bribery laws. They need not be aware that such actions are prohibited by the FCPA itself.[50] Corporations should likewise be held liable for violating bribery laws, not for knowingly violating the FCPA.

With this in mind, FCPA experts have said that the U.S. Chamber is seeking to "raise the criminal liability standard for corporations and individuals under the FCPA," effectively making it easier for them to get away with corrupt behavior.[51]

4. Limiting a Company's Liability for Acts of a Subsidiary

U.S. Chamber Request: The U.S. Chamber argues that parent companies should not be charged with violations of the FCPA's "anti-bribery provisions based on actions taken by foreign subsidiaries of which the parent is entirely ignorant."[52]

Response: This change could allow companies to avoid FCPA prosecution by creating subsidiaries for the sole purpose of committing such acts. Such a clause would create a disincentive for a corporation to accept accountability for its subsidiaries' activities. Congress clearly did not intend such a result. In its initial discussion on the FCPA in 1977, Congress discussed the necessity of parent liability as a means of preventing the formation of loopholes in the law.[53] When adopting the 1988 amendments, Congress again made clear that this rule was a crucial piece of strong FCPA enforcement:

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[49] DAVID KENNEDY & DAN DANIELSEN, OPEN SOCIETY FOUNDATION, BUSTING BRIBERY, 38-39 (September 2011), http://osf.to/14yQ6el.

[50] ANDREW WEISSMANN & ALIXANDRA SMITH, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM , 37-39 (October 2010). http://bit.ly/1augINV.

[51] *Id*, at 39.

[52] ANDREW WEISSMANN & ALIXANDRA SMITH, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM , 22 (October 2010). http://bit.ly/1augINV.

[53] Unlawful Corporate Payments Act of 1977, H.R. Rep. No. 95–640, 95th Cong., 1st Sess., at 12 (Sept. 28, 1977). http://1.usa.gov/1esRKkU.

> Management officials [can't] take refuge from the Act's prohibitions by their unwarranted obliviousness to any action (or inaction), language or other "signaling" device that should reasonably alert them on the "high probability" of an FCPA violation.[54]

As shown in several of the cases highlighted in the FCPA violations above (Section III), subsidiaries are one of the most prevalent vehicles for companies to carry out corrupt behaviors. Therefore, limiting the liability of a parent company when its subsidiary commits an FCPA violation would seem to effectively grant immunity for a reoccurring pattern of illegal behavior.

Further, decreasing the liability parent companies have for the actions of their subsidiaries could carry with it broad implications for policies outside of FCPA enforcement as well. It would likely be seen as an invitation for companies to ignore the actions of their subsidiaries in order to gain safe-harbor from bad behavior in any number of areas.

5. Defining a "Foreign Official" Under the Statute[55]

U.S. Chamber Request: The U.S. Chamber report asks for clarity in the definition of a "foreign official," and of the term "instrumentality" (having authority in the decision making process of government) as it relates to defining a foreign official under the FCPA. To make its case, the report cites "examples of instances where the government has pursued FCPA violations predicated on an expansive reading of what sort of entities are 'instrumentalities' of a foreign government.[56]

Response: As with the issue posed by creating a bright line compliance defense, establishing narrowly prescribed definitions of what constitutes a public official would run the risk of creating harbors that permit corporations to violate the spirit of the FCPA with impunity. This also would go against the trend of worldwide anti-corruption enforcement, which is increasingly moving toward a stricter standard of what kind of actor should be considered to have agency within the processes of government.[57]

For example, the UK Bribery Act of 2010 prohibits the "offer, promise, or [giving of] a financial or other advantage to another person."[58] With this trend in place, it is unclear how

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[54] *See* Foreign Corrupt Practices Act Amendments, H.R. Rep. No. 100–576, at 920–921 (1988), (Conf. Rep.) reprinted in 1988 U.S. Code Cong. & Admin. News, 1547, 1950.
[55] ANDREW WEISSMANN & ALIXANDRA SMITH, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM , 24-27 (2010). http://bit.ly/1augINV.
[56] *Id.,* at 25.
[57] THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, COMMENTARIES ON THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, 14-16 (2011). http://bit.ly/1f8djWO
[58] *Bribery Act* (2010) §§ 1(1–3), http://bit.ly/19BC754.

a move in the other direction by FCPA regulators would decrease the level of compliance work required by companies, which the U.S. Chamber states is its purpose in asking for this addition.

Notably, the above-mentioned case involving Pfizer appears to illustrate the danger of creating strict definitions of public officials. In that case, Pfizer had made illicit payments to a third-party contractor that had been hired by Russia to certify pharmaceuticals coming into the country. Although not part of the government per se, this company clearly possessed the agency to corrupt a government process.

U.S. Chamber Responds to DOJ/SEC Guidance / Chamber Undeterred

Despite the thoroughness of the DOJ and SEC guidance – a document praised by FCPA and business experts around the globe – the U.S. Chamber responded with a letter to those agencies. In the letter, the U.S. Chamber praised the time spent by the government on creating the guidance, but criticized it as insufficient.[59] It went on to essentially list the same five suggested changes to the FCPA, and to add a sixth, that prosecution declinations be made more easily accessible.[60] So far, neither the DOJ nor the SEC has made any public comment on the letter from the U.S. Chamber or hinted at further guidance.

V. Conclusion and Policy Options

Like in any regulatory effort, it's important that affected interests play a role in formation and implementation of rules. However, the U.S. Chamber of Commerce is clearly not considering the full ramifications of a weakened FCPA on the corporations it purports to represent. Given that corruption is so demonstrably harmful to both business and democracy, it is disturbing to see an organization as powerful as the U.S. Chamber weighing in on the side of weakening one of our premier methods for combating it.

For more than three decades, the FCPA has been a shining star in the worldwide fight to keep international markets clean, and allow businesses to compete on the merits. As our globalizing world continues to grow more complicated and entwined, it is crucial that the United States continues to lead the way. Other countries have followed in our footsteps, and they will be watching us to figure out where to go next.

In order to keep this leadership position, the SEC and DOJ should reject the U.S. Chamber's insistence on changing how the FCPA is enforced and instead continue its strong enforcement of the law.

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[59] *See* U.S. Chamber letter to DOJ/SEC, February 19, 2013, http://bit.ly/18QrhH1.
[60] Marc Rosenberg, *2013 Mid-Year FCPA Update,* THE HARVARD LAW SCHOOL FORUM ON FINANCIAL REGULATION (July 27, 2013), http://hvrd.me/16vycXI.

Appendix: What is the FCPA?

How the Law Works?

The FCPA discourages companies from participating in bribery of foreign officials primarily through the use of two complementary methods – the anti-bribery provisions and the accounting provisions. Both are listed below, as described in *A Resource guide to the U.S. Foreign Corrupt Practices Act* released jointly by the DOJ and the SEC in 2012.

Anti-bribery provisions

> In general, the FCPA prohibits offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business.[61]

Accounting provisions

> The accounting provisions consist of two primary components. First, under the "books and records" provision, issuers must make and keep books records, and accounts that, in reasonable detail, accurately and fairly reflect an issuer's transactions and dispositions of an issuer's assets. Second, under the "internal controls" provision, issuers must devise and maintain a system of internal accounting controls sufficient to assure management's control, authority, and responsibility over the firm's assets. ..Although the accounting provisions were originally enacted as part of the FCPA, they do not apply only to bribery-related violations. Rather, the accounting provisions ensure that all public companies account for all of their assets and liabilities accurately and in reasonable detail, and they form the backbone for most accounting fraud and issuer disclosure cases brought by DOJ and SEC.[62]

Who Is Covered?

These provisions cover a wide scope of American and foreign businesses. Each is listed below with descriptions taken from *A Resource Guide to the U.S. Foreign Corrupt Practices Act,* released jointly by SEC and DOJ in 2011.

<u>Anti-bribery provisions</u>

[61] SECURITIES AND EXCHANGE COMMISSION & DEPARTMENT OF JUSTICE, RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, 10-36 (November 2012), http://1.usa.gov/176uzWu.
[62] *Id., at* 38-45

Issuers[63]

A Company is an "issuer" under the FCPA if it has a class of securities registered under Section 12 of the Securities and Exchange Act or is required to file periodic and other reports with SEC under Section 15(d) of the Exchange Act. In practice, this means that any company with a class of securities listed on a national securities exchange in the United States, or any company with a class of securities quoted in the over-the-counter market in the United States and required to file periodic reports with SEC, is an issuer.[64]

Domestic Concerns[65]

A domestic concern is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that is organized under the laws of the Unites States or its states, territories , possessions, or commonwealths or that has its principal place of business in the United States. Officers, directors, employees, agents, or stockholders acting on behalf of a domestic concern, including foreign nationals or companies, are also covered.[66]

Territorial Jurisdiction[67]

The FCPA also applies to certain foreign nationals or entities that are not issuers or domestic concerns. Since 1998, the FCPA's anti-bribery provisions have applied to foreign persons and foreign non-issuer entities that, either directly or through an agent, engage in *any* act in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in the territory of the United States. Also, officers, directors, employees, agents, or stockholders acting on behalf of such person or entities may be subject to the FCPA's anti-bribery prohibitions.[68]

[63] 15 U.S.C.§ 78dd-1.
[64] SECURITIES AND EXCHANGE COMMISSION & DEPARTMENT OF JUSTICE, RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, *10*-11, (November 2012), http://1.usa.gov/176uzWu.
[65] 15 U.S.C.§ 78dd-2.
[66] SECURITIES AND EXCHANGE COMMISSION & DEPARTMENT OF JUSTICE, RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, 11, (November 2012), http://1.usa.gov/176uzWu.
[67] 15 U.S.C.§ 78dd-3.
[68] SECURITIES AND EXCHANGE COMMISSION & DEPARTMENT OF JUSTICE, RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, 11-12, (November 2012), http://1.usa.gov/176uzWu.

Accounting provisions

> The FCPA's accounting provisions apply to every issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act or that is required to file annual or other periodic reports pursuant to Section 15(d) of the Exchange Act. These provisions apply to any issuer whose securities trade on a national securities exchange in the United States, including foreign issuers with exchange-traded American Depository Receipts. They also apply to companies whose stock trades in the over-the-counter market in the United States and which file periodic reports with the Commission, such as annual and quarterly reports. Unlike the FCPA's anti-bribery provisions, the accounting provisions do not apply to private companies. Although the FCPA's accounting requirements are directed at "issuers," an issuer's books and records include those of its consolidated subsidiaries and affiliates. An issuer's responsibility thus extends to ensuring that subsidiaries or affiliates under its control, including foreign subsidiaries and joint ventures, comply with the accounting provisions.[69]

How the FCPA Is Enforced

There are two primary bodies in charge of enforcing the FCPA. The first is the Securities and Exchange Commission. This agency has the power to investigate and bring civil charges against companies and individuals found to be in violation of the law. The second agency with jurisdiction in FCPA cases is the Department of Justice. Like the SEC, it can levy civil penalties on companies and individuals in violation of the FCPA. However, it also has the authority to bring criminal charges.

The Department of Justice also plays a key role in helping companies understand the law and adopt strong enforcement mechanisms and procedures. The agency allows companies to submit questions, concerns, and hypothetical scenarios to which the DOJ responds and offers opinions on how companies can meet FCPA requirements.[70]

In addition to these two agencies, many other federal bodies play a supporting role in ensuring strong enforcement of the FCPA. These include: the Federal Bureau of Investigation, the Department of Homeland Security, the Internal Revenue Service, the

[69] SECURITIES AND EXCHANGE COMMISSION & DEPARTMENT OF JUSTICE, RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, 42-43, (November 2012), http://1.usa.gov/176uzWu.
[70] See DOJ memo, *Foreign Corrupt Practices Act Opinion Procedure, http://1.usa.gov/1cfJXGT*.

Department of Treasury, the Department of Commerce, the Department of State, and the U.S. Agency for International Development.[71]

[71] SECURITIES AND EXCHANGE COMMISSION & DEPARTMENT OF JUSTICE, RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, 5-7, (November 2012), http://1.usa.gov/176uzWu.