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Amending the Foreign Corrupt Practices Act: Who Is a "Foreign Official"?

ROMAN DARMER

In this article, the author discusses the issue of who is considered a "foreign official" for purposes of the Foreign Corrupt Practices Act. With the courts unlikely to flesh out the limits of who constitutes a "foreign official" under the Act, the author believes that Congress should clarify the meaning of the term and provide as much precision in its definition as possible.

Could tipping an attendant for better service at a Citgo gas station be a violation of the Foreign Corrupt Practices Act ("FCPA")? It would seem far-fetched, but defendants in a recent FCPA prosecution posited that this scenario is the logical end of the Department of Justice's ("DOJ") position on who constitutes a "foreign official" — and who therefore cannot legally be given gifts or payments — under the FCPA. Citgo is the U.S. subsidiary of Venezuela's state-owned oil company, and the DOJ has insisted that employees of foreign, state-owned enterprises may be considered "foreign officials" under the statute.[1] In 2011, two federal courts in California considered the definition of who may constitute a foreign official under the FCPA. Their opinions, the first to scrutinize this question in detail, both concluded that whether employees of state-owned enterprises were foreign officials is a matter of fact for the jury to decide.[2] A jury in one of those cases found defendants guilty of bribing employees

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of a state-owned enterprise; the other, at the time of press, had not gone to trial.[3]

These district court decisions establish a framework for the DOJ to argue to juries its broad view of who is a foreign official under the FCPA, a view that may stretch well beyond what Congress intended when it passed the statute in 1977. The ability of the government to bring FCPA cases based on the theory that employees of state-owned enterprises may be "foreign officials" under the FCPA increases the risk of potential criminal liability for companies conducting business in markets such as China and other countries with a large number of state-owned businesses. These favorable rulings for the government come at a time when the DOJ has substantially stepped up enforcement of the FCPA, and the Attorney General has identified the fight against corruption as one of the DOJ's highest priorities.[4] In response, the U.S. Chamber of Commerce has proposed to amend the FCPA to clarify what the term "foreign official" means.[5] The proposal has caught the attention of the House Judiciary Committee, which held a hearing on the proposed amendments on June 14, 2011.[6] The Chamber's proposal is a good first step. With the courts unlikely to flesh out the limits of who constitutes a "foreign official" under the FCPA and the DOJ likely to push that definition to its outer limit, Congress should provide greater clarity so companies operating abroad can devise effective compliance programs. The success of such compliance programs is critical considering the limited resources available to the government and the practical problems involved in cross-border law enforcement efforts.

THE FCPA: STRUCTURE, ORIGINS, AND TRENDS

The 95th Congress passed the FCPA by an overwhelming margin, and President Jimmy Carter signed the bill into law on December 19, 1977.[7] The statute, as it now reads, prohibits certain actions by any "issuer" of certain registered securities, as well as "any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer." These persons and the issuer may not "corruptly" make "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 to … any foreign official….” The payment or offer must have been given for certain improper purposes, such as “influencing any act or decision of such foreign official in his official capacity” or “inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official.” Moreover, the payment must be made to assist the company in “obtaining or retaining business for or with, or directing business to, any person.” The FCPA contains similar provisions for payments to political parties, candidates for foreign political office, and, as amended in 1998, officials of public international organizations.[8]

The FCPA includes important limitations. First, the statute provides an exception for “routine government action.” The FCPA does not criminalize “payment[s] to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.” The statute also provides two affirmative defenses. First, a defendant may show that the payment, gift, etc. “was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country.” Second, a defendant may show that the payment, gift, etc. “was a reasonable and bona fide expenditure, such as travel and lodging expenses,” and that such expenses were directly related to the “the promotion, demonstration, or explanation of products or services[,] or [] the execution or performance of a contract with a foreign government or agency thereof.”[9]

The FCPA also contains books and records and internal controls provisions.[10] These accounting provisions are enforced by the Securities and Exchange Commission (“SEC”). As a practical matter, these provisions only apply to public companies registered on U.S. exchanges.[11]

LEGISLATIVE PURPOSE

At least three main purposes for the FCPA can be traced in the legislative history of the statute. Congress’s purpose in enacting the statute is important both to assess whether the FCPA is fulfilling its mandate, as its defenders argue, or has taken on a new life divorced from what it drafters intended. Legislative purpose has become a key battleground for deter-

mining the meaning of the term "foreign official," as described below, particularly in the *Carson* case.[12]

The first purpose expressed in the legislative history is a moral argument. The Report of the House Judiciary Committee that drafted and approved the bill that became the FCPA asserts categorically that "[t]he payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical." Such practices were therefore "counter to the moral expectations of the American public."[13]

The second reason is an economic rationale. As the House Report explains, bribery of foreign officials "short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products."[14]

While the DOJ has often emphasized these first two rationales for the FCPA, defendants facing FCPA claims have emphasized a third purpose for the original legislation that was the result of the political — or more accurately, geopolitical — atmosphere prevailing at the time of its passage. Michael Koehler, Assistant Professor of Law at Butler University, and creator of the Web site www.fcpaprofessor.com, has argued that the FCPA had its roots in various scandals that emerged in the mid-1970s in which American defense and oil companies were alleged to have paid bribes to the Prime Minister of Japan, high-ranking officials in the Dutch and Saudi militaries, and various Italian political parties.[15] Koehler notes that the same House Report emphasized the "severe foreign policy problems" that bribery caused for the United States abroad because it "len[t] credence to the suspicion sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political process of their nations." The House Report noted that the revelation of the payment of bribes by an American defense contractor to the Prime Minister of Japan in 1976 "shook the Government of Japan to its political foundation and gave opponents of close ties between the United States and Japan an effective weapon with which to drive a wedge between the two nations." In Italy, where at the time there was considerable support for the Communist Party, bribes by American defense and oil companies threatened to give

a black eye to the cooperation of the Italian government with the United States through its membership in NATO, and thereby threaten U.S. strategic interests in the Mediterranean.[16] This view emphasizes that the FCPA was devised to protect U.S. foreign policy from the unwanted interference that bribery scandals could cause.

By 2011 the definition of the term "foreign official" has become one of the key issues in FCPA prosecutions and thus identifying what weight, if any, should be placed on each of these three rationales for the statute has become a battleground between the DOJ and defendants.[17] If the FCPA's principal concern is combating the economic inefficiencies created by bribery, the argument for interpreting the FCPA as a general anti-commercial bribery statute is stronger. Bribes to employees of state-owned enterprises reward inefficient economic behavior just as bribes to government officials in charge of contracting decisions do. On the other hand, if the FCPA's purpose is to prevent American companies from undermining U.S. foreign policy objectives by bribing foreign politicians, a narrower reading of a term such as "foreign official" would seem warranted.

THE OECD CONVENTION AND STEPPED UP ENFORCEMENT

Whatever its original purpose, the FCPA's standing with the government has evolved considerably in three-and-a-half decades. At the time of its enactment, the FCPA was the only such law of its kind in the world. By the 1990s, however, it had become something of a model for other nations. In 1997, under the auspices of the Organisation for Economic Co-operation and Development ("OECD"), a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was concluded. All 38 member of the OECD, including the United States, have now agreed to the Convention.[18] Some of the anti-corruption laws enacted since 1997 by OECD members, such as the United Kingdom's Bribery Act, which went into effect on July 1, 2011, are even more stringent than the FCPA. To implement the anti-bribery convention, Congress amended the FCPA in 1998. The definition of "foreign official" was expanded to include officials of public international organizations.[19]

For many years after the enactment of the FCPA in 1977, the DOJ and

the SEC, which enforce the statute's criminal and civil provisions, respectively, did not focus enforcement resources on the statute. The government's interest in FCPA enforcement has changed dramatically in recent years, as "during the past decade, enforcement agencies resurrected the FCPA from near legal extinction."[20] In May 2010, Attorney General Eric Holder told a meeting of the OECD that, "I have made combating corruption one of the highest priorities of the Department of Justice."[21] The statistics have borne this out. Eight of the 10 largest FCPA settlements in history were concluded in 2010 and 2011, and all the top 10 have occurred since 2008. These 10 settlements averaged more than $322 million.[22] The number of individuals charged with criminal violations of the FCPA also increased in every year between 2005 and 2010.[23] Moreover, the SEC's FY2010 Performance and Accountability report emphasizes the Commission's "renewed focus" on combating bribery through the FCPA.[24]

THE MEANING OF "FOREIGN OFFICIAL" BECOMES A JURY QUESTION

Until recently, case law, especially from the appellate courts, concerning many of the key terms within the FCPA has been sparse or nonexistent. At the June 14, 2011 hearing of the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security, the Chairman identified one likely reason for this dearth of judicial interpretation: "Because of the risk of million-dollar fines and jail time, many corporate defendants would rather settle with the DOJ than go to trial." The Chairman observed that, "[t]he result is a shortage of court decisions determining the limits of the law."[25]

Less than two months before the House Judiciary Subcommittee hearing, the first published opinion regarding the meaning of "foreign official" had just been issued, *United States v. Aguilar*,[26] followed shortly thereafter by *United States v. Carson*,[27] a thorough, although unpublished, discussion of the same issue. Previous courts had considered the issue of what constitutes a "foreign official" but only in passing in terse, unpublished orders.[28] *Aguilar* and *Carson* are the first opinions to provide a detailed explanation of who can be considered a "foreign official" and the proper

framework for that analysis. Regardless of whether these opinions are ultimately affirmed as a matter of statutory interpretation, *Aguilar* and *Carson* offer little guidance to compliance officers and counsel devising FCPA compliance programs or conducting internal investigations in terms of assessing whether a particular payment might have been to a "foreign official." Neither adopts bright-line rules. *Carson*, in particular, would have the jury apply a vague, six-factor test to determine if an individual is a foreign official, making it very difficult to assess in many cases whether the employee of a particular enterprise, whose status may not be transparent, could be considered a foreign official.

United States v. Aguilar

In *United States v. Aguilar*, a grand jury indicted the Lindsey Manufacturing Company, a company headquartered in Azusa, California, that manufactured equipment used by electrical utility companies, as well as the company's President and Vice President/Chief Financial Officer (collectively "Lindsey"). Many of Lindsey's clients were foreign, state-owned utilities, including the Comisión Federal de Electricidad ("CFE"), which supplied electricity to all of Mexico other than the capital and was wholly owned by the Mexican government. The DOJ charged that Lindsey agreed to pay its Mexican sales representative a 30 percent commission on any goods and services Lindsey sold to CFE. The government alleged that Lindsey knew that some or all of this commission would be used to pay bribes to high-ranking CFE employees.[29]

The defendants moved to dismiss the indictment, arguing that the material facts concerning CFE's status were not disputed, and that as a matter of law CFE employees could not be considered foreign officials under the FCPA.[30] The FCPA defines a "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization."[31] Notably, the statute does not define "instrumentality." Thus, the key question for the court was whether a state-owned utility can be considered an "instrumentality" of the govern-

ment that owns it. In resolving this question, the *Aguilar* court focused on three arguments.

The first was a textual analysis. The parties agreed that the term "instrumentality" should be interpreted in light of the two words preceding it in the list — "department" and "agency." Defendants contended that that "instrumentality" must be interpreted in terms of what is consistent between and what defines "departments" and "agencies." Governments create departments and agencies, which exist for the purpose of carrying out government policies. But a state-owned utility is not such an instrument of state policy. The court disagreed, pointing out that the state utility shared many characteristics of a department or agency, most prominently in that it provided services for the benefit of the citizenry.[32]

Second, the DOJ argued that the court should adopt a broad reading of the term "instrumentality" under the *Charming Betsy*[33] doctrine: that is, that a statute should be interpreted as much as possible so as not to conflict with international law. The OECD anti-bribery provision, to which the United States assented, defined "foreign official" more broadly than the FCPA, so as to encompass employees of "public enterprises," whatever their precise legal status. However, Congress did not adopt this definition in the 1978 amendments to the FCPA that implemented the OECD convention. But, the DOJ argued, absent a clear statement from Congress rejecting such language, the OECD definition should be preferred to the extent an ambiguity exists. Although declining to rest its opinion on this ground, the court endorsed the DOJ's reading as "persuasive."[34]

Third, the court considered more broadly the legislative history of the FCPA. The defendants pointed out that bills that had been introduced in the 94th Congress — *i.e.*, the Congress before that which passed the FCPA — specifically included language that would have covered state-owned enterprises. The defendants argued that the fact that the final version of the FCPA rejected such a definition showed that Congress did not intend to include state-owned enterprises within the reach of the FCPA. The DOJ turned the logic of this argument on its head, contending that Congress's failure to include language specifically referring to state-owned enterprises in the final version of the FCPA could just as plausibly be interpreted to mean that Congress believed that its version already covered such entities.

The DOJ argued that the legislative history of the FCPA does not contain any clear intent to exclude employees of state-owned enterprises from the reach of the statute. The court ultimately ruled that the legislative history was inconclusive.[35] Based on its conclusion that a broad reading of the text of the statute was controlling, the court denied the motion to dismiss the indictment.

United States v. Carson

Less than a month after the *Aguilar* decision, the District Court for the Central District of California was presented with the same issue. Controlled Components, Inc. ("CCI") manufactured control valves for use in the nuclear, oil and gas, and power generation industries. Like Lindsey's, CCI's customers included a number of state-owned utility companies. The DOJ charged four CCI employees with having made $4.9 million in bribes to officers and employees of the company's foreign, state-owned customers between 2003 and 2007, principally Chinese and Korean state-owned utilities. Defendants moved to dismiss the indictment on the grounds that such state-owned utilities could not be considered "instrumentalities" and thus their employees could not be "foreign officials," as a matter of law.[36] The court denied the motion. It provided a non-exhaustive list of six factors that should be considered by the finder of fact in deciding whether an entity is an "instrumentality" of a foreign government:

- The foreign state's characterization of the entity and its employees;
- The foreign state's degree of control over the entity;
- The purpose of the entity's activities;
- The entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designated functions;
- The circumstances surrounding the entity's creation; and
- The foreign state's extent of ownership of the entity, including the level of financial support by the state (*e.g.*, subsidies, special tax treatment, and loans).

The court concluded that the analysis was fact-intensive and the issue had to be submitted to a jury along with the other evidence at trial.[37]

As in *Aguilar*, the *Carson* court rejected defendants' argument that a state-owned enterprise could not fall within the definition of an "instrumentality" as a matter of law. The *Carson* court ruled that the text of the statute was clear on this point because a government could achieve important policy objectives through state-owned or -controlled corporations, even if the corporations were not wholly owned. The court cited as examples various state-owned corporations that the U.S. government has used to achieve policy ends — the First and Second Banks of the United States and the Panama Railroad Companies. The court noted that the term "instrumentality" as used in other statutes had therefore been found to include government-owned corporations as well. The court concluded that it was certain enough that a state-owned enterprise could be considered an instrumentality of the government that no resort to the legislative history of the FCPA was even necessary.[38]

PROPOSALS TO REFORM THE FCPA

The *Aguilar* and *Carson* decisions may have accelerated a movement for reform of the FCPA that was already underway in the fall of 2010. Given these new cases holding that whether an employee of a state-owned enterprise is a foreign official is a question for the jury and the government's stated FCPA enforcement priorities, it is unlikely that other cases testing the outer limits of this definition will be forthcoming. Faced with increasing risk of criminal liability and a lack of a "bright line" as to key definitions under the statute such as who constitutes a foreign official, the business community has turned to Congress for a legislative fix. Among other developments, the Chamber of Commerce has proposed amendments to the FCPA in an effort to limit or at least define the reach of the statute. The House and Senate Judiciary Committees have held hearings on the issue. Although at the time of press, no legislation has been introduced in this Congress to reform the FCPA, members of both committees are reportedly drafting legislation that may include some of these reform proposals, which are discussed below.[39]

The Chamber of Commerce Proposal

In October 2010, the U.S. Chamber of Commerce's Institute for Legal Reform released a detailed report titled *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, co-authored by former Director of the DOJ's Enron Task Force Andrew Weissmann, now in private practice. The Chamber's report asserts that "the last five years has seen nothing short of a boom in FCPA." The Chamber asserts that FCPA compliance has become excessively costly for American business. In particular it argues that because of recent trends in dealing with potential FCPA violations, the government now enjoys "the best of both worlds[:] The costs of investigating FCPA violations are borne by the company and any resulting fines or penalties accrue entirely to the government." The Chamber therefore concludes that "the FCPA should be modified to make clear what is and what is not a violation." Moreover, the

> statute should take into account the realities that confront businesses that operate in countries with endemic corruption (*e.g.*, Russia, which is consistently ranked by Transparency International as among the most corrupt in the world) or in countries where many companies are state-owned (*e.g.*, China) and it therefore may not immediately be apparent whether an individual is considered a 'foreign official' within the meaning of the act.[40]

The Chamber proposed five amendments to the FCPA. First, a compliance defense, much like the United Kingdom adopted in its Bribery Act, would be added for corporations that put reasonable mechanisms in place for identifying and preventing FCPA violations. Second, the Chamber would eliminate successor liability in the FCPA context for corporations that have acquired another entity that might have been guilty of bribing foreign officials. Third, the Chamber would add a "willfulness requirement" for corporate criminal liability so as to harmonize the *mens rea* requirements for corporate and individual liability. Fourth, the Chamber would eliminate liability for a parent company for the acts of its subsidiary. Finally, a clearer definition of what constitutes a "foreign official" would be added.[41]

In September 2011, Professors David Kennedy and Dan Danielsen authored a response on behalf of the Open Society Institute to the Chamber's proposal, titled *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act*. Kennedy and Danielsen assert that "the Chamber proposes to change the Act in ways that would substantially undermine the possibility for successful enforcement of America's anti-bribery commitments." They write that the idea that the DOJ is engaging in "prosecutorial overreach … is a myth." Kennedy and Danielsen argue that statistics often cited to show a huge uptick in fines collected for FCPA violations are skewed by a few very large settlements since 2008. They also stress the global leadership role of the U.S. in implementing anti-bribery legislation. They argue that

> [a]t the very moment when U.S.-championed cries for a global level playing field based on competitive merit and corruption-free governance are sweeping the world … , Congressional action substantially weakening the FCPA would send a dangerous and destabilizing message to our trading partners, foreign companies, foreign officials and emerging democratic movements around the world while undermining the crucial role the FCPA plays in helping U.S. companies to resist demands for bribes abroad as the price of access to foreign markets and opportunities.[42]

Congressional Hearings

As *The Economist* observed, "Firms are increasingly fed up with the way [the FCPA] is written (confusingly) and applied (vigorously)."[43] Recent FCPA prosecutions and nine-figure settlements have led business groups such as the Chamber to demand reform of the law from Congress. On November 30, 2010, the Senate Judiciary Committee's Subcommittee on Crime and Drugs conducted a hearing on the enforcement of the FCPA. Greg Andres, Deputy Assistant Attorney General, testified on behalf of the DOJ. Weissmann, co-author of the Chamber proposal, Koehler, and former DOJ prosecutor Michael Volkov, now in private practice, also testified.[44]

Andres emphasized the aggressive stance the government has taken toward bribery and the large settlements the DOJ had secured. Andres also

noted the DOJ's increased focus on prosecutions of individuals and deferred prosecution and non-prosecution agreements to encourage compliance.[45]

Both ex-DOJ prosecutors criticized the manner in which the FCPA has been enforced. Weissmann said that the DOJ and SEC should offer more public guidance about what they believe qualifies as an instrumentality under the FCPA, and called the current statutory definition of "foreign official" in the FCPA "unhelpful[]."[46] Volkov stated that in its FCPA enforcement actions, the DOJ has used heavy-handed tactics "typically reserved for prosecutions of violent gangs and organized crime." He argued for a more "balanced approach" to increase the incentives for companies to comply with the law and distinguish between corporations that engage in flagrant FCPA violations and those that seek to comply in good faith with the law but can be held liable for the bad acts of a few employees.[47]

Koehler highlighted the lack of judicial oversight of some of the DOJ's charging decisions. He singled out the DOJ's expansive theory of who counts as a foreign official, noting that "[i]t surprises most people upon learning, and rightfully so, that most recent FCPA enforcement actions have absolutely nothing to do with foreign government officials." Koehler stated that the DOJ's theory that state-owned enterprises could be considered instrumentalities of the government "contradicts the intent of Congress in enacting the FCPA."[48]

On June 14, 2011, the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security held its own hearing. Andres and Koehler again testified. So too did Michael Mukasey, former federal district court judge in the Southern District of New York and Attorney General of the United States, on behalf of the Chamber. The public statements of the members of the subcommittee showed both areas of agreement and rifts. For example, Ranking Member Bobby Scott appeared to express support for limiting successor liability, as the Chamber had proposed. But his fellow Democrat John Conyers stated he was opposed to such an amendment. On the critical issue of clarifying who may be considered a "foreign official," however, support for clarification appeared much more broad-based. Chairman Sensenbrenner lamented that "there is no clear rule on what qualifies as a foreign official, nor what percentage of state ownership qualifies a company as an instrumentality of the state."[49]

REDEFINING "FOREIGN OFFICIAL"

Proposals for reform of the FCPA have focused in part on the definition of the term "foreign official." The Chamber wants more clarity as to who can be considered a "foreign official." In the Chamber's view, the definition the DOJ has employed could have "absurd" results. It offers its own entry in the contest to devise the most far-fetched hypothetical of who could be a government official under the FCPA — any employee of Bloomberg Media could be a government official because a public official, the Mayor of New York City, owns 85 percent of the company.[50]

The Chamber proposes that the text of the FCPA be amended to specify:

- the percentage of government ownership that qualifies an entity as an "instrumentality;"
- whether ownership by a foreign official necessarily qualifies a company as an instrumentality;
- whether the foreign official in question must hold a particular rank or have a certain percentage interest; and
- to what extent a foreign government's "control" will qualify a company as an instrumentality.[51]

Some effort to clarify who is a "foreign official" under the FCPA would appear to have considerable support in the House Judiciary Committee. Chairman Sensenbrenner specifically identified the lack of a "clear rule on wh[o] qualifies as a foreign official," and questioned Andres aggressively on the need for such an amendment. Rep. Conyers, who was noticeably cool to most of the Chamber's proposed amendments, stated that "[w]ithout a clear understanding of who is a foreign official, this could create a problem, and I think I can support that" proposed amendment.[52]

However, the proposal to clarify the definition of "foreign official" has met with resistance from Kennedy and Danielsen, as well as the DOJ. Kennedy and Danielsen argue that a more precise definition of what is an instrumentality would necessarily lead to a narrowing of the FCPA's reach. They point out that government power is organized in different ways in

different countries, and the FCPA must be flexible if it is to be effective to combat bribery.[53] Andres touched on this point in his testimony before the House Subcommittee, noting that a one-size-fits-all approach to who constitutes a foreign official may not work for countries with as diverse government structures as China, Brazil, and France.[54]

When proposals to reform the definition of "foreign official" are considered, the practical effect on compliance must also be considered. For example, some foreign anti-corruption laws are broader than the FCPA. (As noted above, the OECD's definition of "foreign official" is broader than the FCPA's). Multinational companies must take into account that their conduct will be scrutinized under the laws of various jurisdictions. Thus, it may not be advisable for any company to focus its compliance strategy too much on fine distinctions in the law of a single jurisdiction.[55] The DOJ has adopted a similar view. As Andres testified before the House Judiciary Subcommittee, "with respect to whether or not a company could bribe a commercial entity versus bribing a foreign official, the Department's position would be that if companies aren't paying bribes, they have nothing to fear with respect to enforcement."[56]

A GOOD START

Congress should take up the Chamber's invitation to clarify the meaning of the term "foreign official" and provide as much precision in its definition as possible. The *Aguilar* and *Carson* decisions have done little to identify the limits of this term in the context of a state-owned enterprise, leaving the question to juries that are ill-equipped to balance the various policy issues at stake. Mounting a defense to FCPA claims is expensive and risky. It is unlikely that many cases will produce verdicts that can be appealed, and thus judicial clarification of the meaning of the term is unlikely to come from the appellate courts in the near term. Corporate compliance programs implemented to ensure FCPA compliance and limit liability in the event of a government investigation need this clarification to be effective. Such programs are largely self-regulating, and complicated six-factor tests that require fact-specific determinations about the precise legal and political status of enterprises in economies that lack transparency

do not assist in the task of devising effective compliance programs. The best way for the government to enable effective FCPA compliance programs — which are the first line of defense in the fight against corruption given the increasingly global nature of business and limited government resources — is to provide as much clarity as possible about the essential terms of the statute that could lead to a potential violation given the severe consequences for companies and their personnel who face FCPA charges.

NOTES

[1] *United States v. Carson*, No. SACR 09-00077-JVS (C.D. Cal.), Defendants' Motion to Dismiss Indictment (Dkt. No. 304, filed Feb. 21, 2011), at 20.

[2] *United States v. Aguilar*, --- F. Supp. 2d ---, No. CR10–01031–AHM, 2011 WL 1792564 (C.D. Cal. Apr. 20, 2011); *United States v. Carson*, No. SACR 09-00077-JVS (C.D. Cal.), Order on Defendants' Motion to Dismiss Indictment (Dkt. No. 373, entered May 18, 2011).

[3] *See Aguilar*, No. CR 10-01031-AHM, Verdict (Dkt. No. 514, entered May 10, 2011).

[4] *See* Attorney General Holder Delivers Remarks at the Organisation for Economic Co-Operation and Development, May 31, 2010, *available at* http://www.justice.gov/ag/speeches/2010/ag-speech-100531.html.

[5] *See Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, U.S. Chamber Institute for Legal Reform (October 2010), *available at* http://www.instituteforlegalreform.com/images/stories/documents/pdf/research/restoringbalance_fcpa.pdf (hereafter "*Restoring Balance*").

[6] Committee on the Judiciary, House of Representatives, Subcommittee on Crime, Terrorism & Homeland, Hearing on Foreign Corrupt Practices Act, June 14, 2011 (hereafter "Judiciary Subcommittee Hearing").

[7] *See* http://thomas.loc.gov/cgi-bin/bdquery/z?d095:SN00305:@@@S.

[8] 15 U.S.C. § 78dd-1.

[9] *Id.*

[10] 15 U.S.C. § 78m(b)(2)(A)-(B).

[11] Koehler, Mike, *The Foreign Corrupt Practices Act in the Ultimate Year Of Its Decade of Resurgence*, 43 Ind. L. Rev. 389, 395 (2010).

[12] *United States v. Carson*, No. SACR 09-00077-JVS (C.D. Cal.).

[13] H.R. 95-640, Unlawful Corporate Payments Act of 1977 (95th Cong.), at 4.

[14] *Id.*
[15] *See* Declaration of Michael Koehler in Support of Defendants' Motion to Dismiss Indictment, No. SACR 09-00077-JVS, Dkt. No. 305, filed Feb. 2, 2011 (C.D. Cal.) (hereafter "Koehler Declaration"), ¶ 16(a).
[16] H. Rep. 95-640, at 5.
[17] *See, e.g., United States v. Carson*, No. SACR 09-00077-JVS (C.D. Cal.), Order on Defendants' Motion to Dismiss Indictment (Dkt. No. 373, entered May 18, 2011); *United States v. Aguilar*, --- F. Supp. 2d ----, No. CR10–01031–AHM, 2011 WL 1792564 (C.D. Cal. Apr. 20, 2011); *United States v. Esquenazi*, 09-21010-CR (S.D. Fla.), Order on Motion to Dismiss Indictment (Dkt. No. 309, entered Nov. 19, 2010); *United States v. Nguyen*, 08-cv-522 (E.D. Pa.), Order on Motion to Dismiss Indictment (Dkt. No. 131, entered Dec. 3, 2009).
[18] *Busting Bribery*, at 20.
[19] *United States v. Aguilar*, --- F. Supp. 2d ---, No. CR10–01031–AHM, 2011 WL 1792564 (C.D. Cal. Apr. 20, 2011).
[20] Koehler, *Foreign Corrupt Practices Act*, at 389.
[21] *See* Attorney General Holder Delivers Remarks at the Organisation for Economic Co-Operation and Development, May 31, 2010, *available at* http://www.justice.gov/ag/speeches/2010/ag-speech-100531.html.
[22] Kennedy, David & Dan Danielsen, *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act*, Open Society Foundations (September 2011), *available at* http://www.soros.org/initiatives/washington/articles_publications/publications/busting-bribery-20110916 (hereafter "*Busting Bribery*"), 12.
[23] *See* Individual DOJ Prosecutions By The Numbers (Sept. 20, 2011), *available at* www.fcpaprofessor.com/individual-doj-prosecutions-by-the-numbers.
[24] U.S. Securities & Exchange Commission, FY 2010 Performance & Accountability Report, *available at* http://www.sec.gov/about/secpar/secpar2010.pdf.
[25] Judiciary Subcommittee Hearing, at 2.
[26] *Aguilar*, 2011 WL 1792564.
[27] *Carson*, No. SACR 09-00077-JVS (C.D. Cal.).
[28] *United States v. Esquenazi*, 09-21010-CR (S.D. Fla.), Order on Motion to Dismiss Indictment (Dkt. No. 309, entered Nov. 19, 2010); *United States v. Nguyen*, 08-cv-522 (E.D. Pa.), Order on Motion to Dismiss Indictment (Dkt.

No. 131, entered Dec. 3, 2009).
[29] *Aguilar*, 2011 WL 1792564, at *1-*2.
[30] *Id.* at *3-*4.
[31] 15 U.S.C. § 78dd–2(h)(2)(A).
[32] *Aguilar*, 2011 WL 1792564, at *5-*6.
[33] *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).
[34] *Aguilar*, 2011 WL 1792564, at *7-*8.
[35] *Id.* at *8-*10.
[36] *Carson*, SACR 09-00077-JVS, Dkt. No. 373, at 2-4.
[37] *Id.* at 5.
[38] *Id.* at 7, 8-9, 11.
[39] Matthews, Christopher M., *Senators Working on FCPA Leniency Program*, Main Justice (Sept. 13, 2011), *available at* www.mainjustice.com/justanticorruption.
[40] *Restoring Balance*, at 2, 6.
[41] *Id.* at 11, 19-20, 22-24, 27.
[42] *Busting Bribery*, at 5, 6, 15, 27-28.
[43] *Bribery abroad, A tale of two laws: America's anti-corruption law deters foreign investment. Britain's is smarter*, The Economist (Sept. 17, 2011).
[44] *See* http://judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da164f9be.
[45] Statement of Greg Andres, 2010 WL 4913928.
[46] Statement of Andrew Weissmann, 2010 WL 4913925.
[47] Statement of Michael Volkov, 2010 WL 4913927.
[48] Statement of Mike Koehler, 2010 WL 4913916.
[49] Judiciary Subcommittee Hearing, at 2-5.
[50] *Restoring Balance*, at 27.
[51] *Id.*
[52] Judiciary Subcommittee Hearing, at 2, 5, 74-75.
[53] *Busting Bribery*, at 50.
[54] Judiciary Subcommittee Hearing, at 74-75.
[55] *Busting Bribery*, at 49.
[56] Judiciary Subcommittee Hearing, at 75.