



Reforming the Foreign Corrupt Practices Act

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Key Points

- Amend the FCPA to provide clear legislative guidance for vague terms such as “anything of value” and “instrumentality.”
- Add *mens rea* language that clarifies that the “willfulness” standard prevails over the “willful blindness” standard.
- Provide for a compliance defense, which limits liability if a defendant can demonstrate that it has an adequate compliance regime that was simply ignored by an employee.

Introduction

In August 2013, media outlets reported that J.P. Morgan Chase was negotiating a multi-billion dollar settlement with federal prosecutors to avoid litigation over, among other things, accusations that the company had improperly hired children of influential Chinese officials to advance its business interests in China.¹ The story broke just months after Total, the prominent French oil company, announced it would be paying nearly \$400 million to avoid litigation over allegations that it bribed Iranian officials to gain access to oil and gas fields.² Two months before that, the *New York Times* won a Pulitzer Prize for Investigative Reporting for its articles about payments that Wal-Mart made to low-ranking Mexican officials.³

In all these instances, the businesses found themselves accused of violating the Foreign Corrupt Practices Act (FCPA), a federal statute prohibiting international bribery.⁴ Although many Americans may have never heard of the statute, headlines about it are becoming common.

The FCPA has been law since 1977.⁵ FCPA investigations by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) were rare during the first 25 years of the statute’s existence, but the number has begun to grow sharply in the last decade.⁶ A 2010 article from the *Review of Litigation* notes that “FCPA prosecutions brought between 2001 and 2006 numbered more than four times that of the previous five years. Then, 2007 saw the number of FCPA prosecutions double those of 2006.”⁷ FCPA prosecutions reached a zenith in 2008 when the DOJ pursued 20 cases, and the SEC

pursued 13.⁸ Even these unusually high figures, however, were dwarfed in 2010 when the DOJ pursued 48 cases and the SEC pursued 26.⁹ As of this writing, over 150 FCPA investigations are open.¹⁰

Bribery and corruption have a pernicious impact on social and economic development. Corruption may cause individuals to lose trust in institutions. Furthermore, resources that firms direct towards bribery are resources not invested in innovation—a notable opportunity cost. One cannot help but notice a generally inverse correlation between Transparency International’s highly-regarded Corruption Perceptions Index and the Heritage Foundation’s equally well-regarded Economic Freedom Index: the states with the most economic freedom are generally the ones perceived to suffer from the least corruption—and vice-versa.¹¹ The United States should not turn a blind eye to these problems.

The Foreign Corrupt Practices Act, however, is an overly-blunt instrument for fighting corruption. As enforcement of the FCPA has ramped up over the last several years, so has recognition of the problems with the FCPA. The act is emblematic of all the worst aspects of creeping federal overcriminalization, the tendency of Congress to use criminal law to regulate behavior not traditionally considered criminal.¹² The FCPA’s most important terms are vague and provide limited guidance for potential defendants; it is enforced in a way that limits critical *mens rea* protections; and the law does not provide for a “compliance defense” that would allow corporations to demonstrate that violations were a result of rogue employees, rather than inadequate compliance regimes.

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History of the Foreign Corrupt Practices Act and its Current Structure

In the mid-1970s, the federal government was confronted by revelations of widespread bribery of foreign officials by American companies.¹³ The initial response of the Securities and Exchange Commission (SEC) was to advocate for a rule that required the payments to be disclosed to investors—not a rule that outlawed payments altogether.¹⁴ These discussions about disclosure occurred in the midst of the Cold War, and (perhaps unsurprisingly) evolved into discussions about foreign policy, as some believed that bribery “lends credence to the worse suspicions sown by extreme nationalists or Marxists that American businesses operating in their country have a corrupting influence on their political systems.”¹⁵

In 1977, Congress passed and President Jimmy Carter signed the FCPA into law.¹⁶ The FCPA outlaws bribery of foreign officials by corporations or individuals seeking to obtain or retain business.¹⁷ Despite significant minority concerns, the FCPA “adopted a criminalization approach [rather than a disclosure approach] as it was viewed as more effective in deterring improper payments and less burdensome on business.”¹⁸ While the disclosure approach was initially popular in Congress and favored by Gerald Ford’s presidential administration, the criminalization approach was ultimately adopted by Congress after President Carter took office.¹⁹

By passing the FCPA, Congress sought to “reinforce America’s historical association with the virtues of democracy and idealism,” and indeed, many of the early legislative debates over the FCPA discussed not only how bribery undercuts the free-market’s ability to react and adapt to economic changes, but also its corrosive effect on democratic institutions.²⁰

The FCPA addresses international corruption in two ways: anti-bribery provisions and accounting provisions.²¹ The anti-

bribery provisions prohibit individuals and businesses from bribing foreign officials in order to obtain or retain business; the accounting provisions impose record keeping and internal control requirements, prohibit knowing falsification of books and records, and require a system of internal controls.²²

The FCPA outlaws large bribes that are intended to skew decision-making and secure government contracts, but it specifically exempts smaller “facilitating payments.”²³ In other words, payments to speed routine administrative functions, such as basic customs or licensing, are permitted, but bribes that subvert the will of an individual are outlawed. When it was passed, the bill sought primarily to prevent bribes made for the purpose of making sales abroad.²⁴

The FCPA has been expanded twice, in 1988 and 1998.²⁵ The 1998 expansion broadened the FCPA’s scope to include payments to secure any improper advantage, reach certain foreign persons who commit an act in furtherance of a foreign bribe while in the United States, cover public international organizations within the definition of ‘foreign official,’ add an alternative basis for jurisdiction based on nationality, and apply criminal penalties to foreign nationals employed by or acting as agents of U.S. companies.²⁶

Although these expansions further empowered federal prosecutors to launch a broad range of FCPA investigations, these extensive powers largely lay dormant until the Bush and Obama administrations took office.²⁷ Attorney Richard Cassin has suggested that the Bush Administration’s enforcement escalation was driven in part by post-9/11 national security considerations, as “foreign governmental corruption can lead to leaky borders, problems with passport control, immigration issues and corrupt influences which allow foreign governments to release information that it would normally keep reserved.”²⁸ As for the Obama Administration, it has argued that its aggressive enforcement efforts are driven by a desire to preserve American “leverage and . . . credibility” abroad.²⁹

It also seems plausible, however, that the increased FCPA prosecutions are simply part of a more pro-regulation perspective.³⁰ One clear objective of greater FCPA prosecution, for example, is an “increased focus on corporate internal controls caused by Sarbanes-Oxley.” Because the ramp-up in enforcement has occurred under two presidents from two different political parties, it would be hard to call the increase in

FCPA prosecutions a particularly Democratic or Republican phenomenon.³¹ It may simply be a pragmatic response to a perceived demand.³²

Three Problems with the Foreign Corrupt Practices Act—and Three Solutions

Few Americans would support rampant international bribery. “Bribery,” however, is a term with a cultural dimension in addition to a legal dimension. A practice that might be viewed as bribery in the United States might be an ordinary part of business elsewhere—the “tipping” of low-ranking individuals who are not government employees in any sense that an American business person would recognize.³³ Until the FCPA includes language that acknowledges this critical distinction, it remains an unusually stark example of federal overcriminalization. Consider the following three problems with the statute.

The Vagueness of the FCPA’s Terms

The most important language in the FCPA is vague. The law prohibits giving “anything of value” to a “foreign official,” but neither of these terms are clearly defined. It is easy to understand that a judge or a senator is a “foreign official,” but what is the status of a business executive for a state-owned enterprise? In many countries, important energy, media, and health industries are at least partially state-owned. Whether the employees of the companies are “foreign officials” is a question for which very little guidance exists. The FCPA does provide that an “officer or employee of a foreign government or any department, agency, or instrumentality thereof” is a foreign official, but this additional verbiage provides insufficient guidance for individuals seeking to do business overseas.

As of this writing, the Eleventh Circuit Court of Appeals is considering the question of how to define “instrumentality” in the FCPA.³⁴ The case under review concerns two Miami businessmen, Joel Esquenazi and Carlos Rodriguez, both of whom were convicted of bribing a foreign official in Haiti.³⁵ Esquenazi, in fact, received the longest prison sentence in the history of FCPA enforcement.³⁶ Both defendants were convicted of making payments to a representative of Haiti Teleco, a telecommunications company which was privately founded, but in which 97 percent of shares are held by Haiti’s national bank.³⁷ Regardless of the large ownership stake, Teleco is not considered a state enterprise in Haiti, which has

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issued a declaration that “Teleco has never been and until now is not a state enterprise.”³⁸

If Teleco is not considered a state enterprise in Haiti, it is understandable that Esquenazi and Rodriguez would not have considered the company to be an “instrumentality” of the state and would not have believed themselves to be violating U.S. law. To them, the payments likely seemed little more than a “tip” or “facilitating payment,” not customary in American business culture, but perfectly normal in many other business cultures. Without this understanding, as the defendants argue in their appellate brief, any number of U.S. business entities—including businesses in which the federal government has invested, such as AIG or GM—could be considered “instrumentalities” of the American government under certain interpretations of the FCPA.³⁹ Because of the statute’s inadequate guidance, Esquenazi and Rodriguez argue that they received no fair warning that their conduct could be considered criminal.

In such a vacuum, Justice Antonin Scalia has said that courts are inevitably—and problematically—called upon to “make criminal law in Congress’s stead.”⁴⁰

Soon, the Eleventh Circuit will issue its opinion in the Esquenazi appeal, and for the first time, precise guidelines will likely be provided by a federal court as to what does and does not constitute an “instrumentality” under the FCPA. The reach of this opinion, however, will only extend within the circuit (Alabama, Florida, Georgia), and any other federal circuit would still be able to take an alternate interpretation. Regardless of what the Eleventh Circuit decides, Congress

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should return to the FCPA and provide language describing what is and is not an “instrumentality,” in a manner that is sensitive to the “tipping” business culture that exists in some nations. Otherwise, as Justice Scalia counseled, federal courts will be forced to make criminal law when it is in fact the role of Congress to provide fair warning of what the criminal law is.

Mens Rea Concerns with the FCPA

All law students learn on the first day of the introductory criminal law course that “mens rea” is fundamental to criminal law. Criminal law is distinct from civil law, in part, because a criminal must have a guilty state of mind—mens rea—in addition to a guilty act (the actus reus). It is the combination of actus reus and mens rea that result in a “crime.”⁴¹ Generally speaking, an actus reus alone, absent a mens rea, is not a crime.

Although an increasing number of federal offenses disregard the mens rea requirement because it is inconvenient for a speedy prosecution,⁴² Congress did not intend such a fate for the FCPA—the very fate which ensnared Esquenazi and Rodriguez. In fact, Congress was clear about requiring mens rea, and it included a “willfulness” requirement in the statute.⁴³ Nevertheless, this protection is increasingly disregarded by prosecutors who substitute the “willful blindness” doctrine for the standard “willfulness” requirement. As Shana-Tara-Regon of the National Association of Criminal Defense Lawyers described it in testimony before a U.S. House Committee:

[A]lthough the statute contains a “willfulness” requirement in an attempt to limit an individual’s liability for violating the anti-bribery provisions of the FCPA, as in other

areas of white collar law, the government has increasingly relied on the “willful blindness” doctrine as a substitute for proving willfulness and knowledge in FCPA prosecutions. Properly construed, the “willful blindness” doctrine merely allows a finding of “knowledge” and “willfulness” in a situation where the evidence shows the defendant “actually knew but...refrained from obtaining final confirmation...” Nonetheless, both inside and outside the FCPA context, this doctrine has often been extended to cases where “no actual knowledge existed,” but where a jury could determine from the evidence “the defendant had not tried hard enough to learn the truth.” The practical effect of this doctrine is that the CEO of an American company can be held personally, criminally liable for the actions of his employee halfway across the world—whether he knew about them or not.⁴⁴

Unlike most mens rea concerns in modern federal legislation, this problem cannot be blamed on the drafters. Instead, it is prosecutors and compliant judges who have stretched the language of the mens rea standard in the FCPA beyond its reasonable bounds.⁴⁵ Nevertheless, the only solution to the problem is to have Congress return to the statute and provide new language that hems in the breadth of prosecutors.

The Lack of a Compliance Defense

In many instances, FCPA violations are committed by rogue employees or contractors. When doing business in China, in fact, it is estimated that “80 to 90 percent of [FCPA] cases are related to third party intermediaries—agents, vendors, suppliers, distributors—who will be doing business on behalf of a global organization.”⁴⁶

The “Compliance Defense” is an element of the United Kingdom’s anti-bribery law, the U.K. Bribery Act of 2010.⁴⁷ The Compliance Defense essentially allows a defendant to argue that it should not be held liable for individual employees who improperly bribed foreign officials if the defendant has established adequate compliance measures, but the employee simply ignored these measures. The U.K. recognizes such a defense to its anti-bribery statute, but the U.S. does not.⁴⁸ Were such a defense in place, it would have protected Walmart, which by all accounts has a sterling FCPA compliance regime, but nevertheless fell prey to rogue employees who provided improper payments to individuals in Mexico.⁴⁹

Even FCPA-hawk Lanny Breuer, the Obama Administration's former Assistant Attorney General in charge of the Criminal Division of the Department of Justice, has acknowledged this problem: "There will always be rogue employees who decide to take matters into their own hands. They are a fact of life."⁵⁰

It is hard to understand why a compliance defense would not be embraced by regulators. It seems to be connected to little more than the growing trend in the United States towards a vigorous enforcement of corporate criminal liability, which is unusual in the tradition of American criminal law enforcement.⁵¹ Congress would be wise to return to the FCPA and include a basic compliance defense.

Conclusion

There is little question that corruption is a significant international problem. It stunts confidence in the rule of law and other democratic institutions, and it suppresses economic growth. It is not clear, however, that the FCPA has done anything to tackle this problem. Ironically, in fact, there is evidence that the FCPA has had the counter-productive effect of discouraging American firms from investing in im-

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poverished nations.⁵² There is also evidence that the FCPA has stunted the growth of U.S. companies by forcing them to maintain costly compliance regimes.⁵³ Ironically, these regimes may not even be useful because prosecution ultimately depends on how a particular U.S. Attorney will choose to interpret a particular term.

The FCPA is, at its core, a well-intentioned statute. The United States should not ignore international bribery by companies under its jurisdiction. Modest tweaks to the statute, however, would better ensure that the FCPA is fulfilling its mission without unduly infringing on economic liberty and hampering economic growth. ★

Endnotes

- ¹ Joe Palazzolo, Christopher M. Matthews, and Serena Ng, "Nepotism: Is It a Crime?: SEC Probe into J.P. Morgan's Hiring in China Shows Risks of Giving Jobs to the Well Connected," *Wall Street Journal* (19 Aug. 2013); Neil Irwin, "Did JP Morgan Commit Bribery by Hiring the Kids of Chinese Politicians?," *Washington Post* (19 Aug. 2013); Jessica Silver-Greenberg, Ben Protess, and David Barboza, "Hiring in China by JP Morgan Under Scrutiny," *New York Times* (17 Aug. 2013).
- ² Cheryl Palmeri, "Total Settlement of FCPA Charges," *National Law Review* (11 June 2013). At the time, the settlement was the fourth-largest Foreign Corrupt Practices Act settlement to date.
- ³ David Barstow and Alejandra Xanic von Bertrab, "Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle," *New York Times* (21 Apr. 2012); Christine Haughney, "Times Wins Four Pulitzers; Brooklyn Nonprofit is Awarded a Reporting Prize," *New York Times* (15 Apr. 2013).
- ⁴ 15 U.S.C. §§ 78dd-1, et seq.
- ⁵ Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 930 (2012).
- ⁶ "Whereas there were only three open FCPA investigations in 2002, there were 84 open investigations at the end of 2007. The increase in investigations occurred continually over this period. The number of prosecutions has also increased since the beginning of the century: FCPA prosecutions brought between 2001 and 2006 numbered more than four times that of the previous five years. Then, 2007 saw the number of FCPA prosecutions double those of 2006." Cortney C. Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 449 (2010).
- ⁷ *Ibid.*
- ⁸ 2013 Mid-Year FCPA Update, Gibson, Dunn, Crutcher, LLP (8 July 2013).
- ⁹ *Ibid.*
- ¹⁰ George Terwilliger III, Eric Kraeutler, & Benjamin D. Klein, "Senior U.S. Officials Discuss Foreign Corrupt Practices Act (FCPA) Enforcement Trends and Activity," *National Law Review* (22 Nov. 2013).
- ¹¹ *Compare Corruption Perceptions Index*, Transparency International (2013) with *Index of Economic Freedom*, Heritage Foundation (2013).
- ¹² "[H]istory and crime rates provide relevant benchmarks, and they strongly suggest that the criminal sanction is being seriously overused. ...According to a 1998 report issued by an American Bar Association task force, an incredible 40 percent of the thousands of crimes on the federal books were enacted after 1970. ...On average, Congress created fifty-six new crimes every year since 2000, roughly the same rate of criminalization from the two prior decades." Testimony of Stephen F. Smith, Hearing on Reining In Overcriminalization: Assessing the Problems, Proposing Solutions before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 112th Cong. 1 (28 Sept. 2010).
- ¹³ Koehler, *Story of the FCPA*, at 988.
- ¹⁴ *Ibid.*
- ¹⁵ Koehler, *Story of the FCPA*, at 941 (citing Foreign Payments Disclosure: Hearings Before the Subcomm. on Consumer Prot. and Fin. of the H. Comm. on Interstate and Foreign Commerce, 94th Cong. 2 (1976) (statement of Rep. John M. Murphy, Chairman, Subcomm. on Consumer Prot. and Fin., H. Comm. on Interstate and Foreign Commerce)).
- ¹⁶ *Ibid.* at 1002.
- ¹⁷ 15 U.S.C. §§ 78dd-1, et seq.
- ¹⁸ Koehler, *Story of the FCPA*, at 980.
- ¹⁹ *Ibid.* at 1002.
- ²⁰ Paul Enzinna, *The FCPA: Aggressive Enforcement and Lack of Judicial Review Create Uncertain Terrain for Business* (Manhattan Institute for Policy Research 2013), 1; see also Koehler, *Story of the FCPA*, at 946-49.
- ²¹ 15 U.S.C. §§ 78dd-1, et seq.
- ²² *Ibid.*; see also Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012) 10.
- ²³ Enzinna, *The FCPA: Aggressive Enforcement and Lack of Judicial Review*, 1.
- ²⁴ Koehler, *Story of the FCPA*, at 942.
- ²⁵ *Resource Guide to the FCPA*, 3-4.
- ²⁶ *Ibid.*, 4.
- ²⁷ Thomas, *FCPA: A Decade of Rapid Expansion*, 449.
- ²⁸ Thomas R. Fox, "FCPA Enforcement: Why the Increase between the First 25 Years and the Last 5?," *FCPA Compliance and Ethics Blog* (11 Mar. 2011).
- ²⁹ Christopher M. Matthews, "Clinton Defends FCPA, as U.S. Chamber Lobbies for Changes to Law," *Wall Street Journal* (23 Mar. 2012). ("We don't need to lower our standards," she said. "We need to work with other countries to raise theirs. I actually think a race to the bottom would probably disadvantage us. It would not give us the leverage and the credibility that we are seeking.").
- ³⁰ Roger M. Witten, Kimberly A. Parker, Jay Holtmeier & Lillian H. Potter, "The Increased Prosecution of Individuals Under the FCPA: Trends and Implications," 2 *Bloomberg Law Reports* 12 (2009) 1.
- ³¹ Andy Spalding, "The FCPA Isn't Red or Blue," *The FCPA Blog: World's Biggest Anti-Corruption Portal*, blog (7 Nov. 2012).
- ³² Interestingly, Matthew Jacobs, a prominent defense attorney in California, believes that a desire for increased revenue is partly responsible

for the expansion of FCPA prosecution. He argues that “[t]he Department of Justice has figured out that conducting investigations of corporations is a lucrative business. ... We’re talking about literally billions of dollars that the government is able to collect [and] ... generating revenue is a factor in bringing these cases.” See Mike Koehler, “Total’ly Milking the Cash Cow?,” *FCPA Professor: A Forum Devoted the Foreign Corrupt Practices Act*, blog (3 June 2013).

³³ Regarding China, for example, Tamika Tremaglio of Deloitte Financial Advisory has explained that “[i]n some cases, gifts are expected, and companies that are not as well-versed aren’t used to conducting business in that way.” Rich Steeves, “Solving the puzzle of the FCPA in China,” *Inside Counsel* (Nov. 2013) 32.

³⁴ *United States v. Esquenazi*, No. 1:09-cr-21010-JEM (S.D. Fla.: Oct. 26, 2011) at 6. As of the publication of this paper, the 11th Circuit has yet to issue an opinion in *Esquenazi*, but an audio recording of the oral argument before the circuit court, provided by Esquenazi’s legal counsel, Perkins Coie LLP, is available at: *United States v. Esquenazi* Oral Argument before the 11th Cir. (Miami, FL: Oct. 11, 2013).

³⁵ *Ibid.*

³⁶ Jay Shapiro, “*United States v. Esquenazi*: Will the Eleventh Circuit Clarify the FCPA’s Use of “Instrumentality” and “Government Official”?” (LexisNexis Emerging Issues Analysis: Aug. 2012).

³⁷ *Ibid.*

³⁸ See Haitian Ministry of Justice Declaration Re: Haiti Teleco at 5.

³⁹ Brief of Appellants in *United States v. Esquenazi*, No. 1:09-cr-21010-JEM (S.D. Fla.: Oct. 26, 2011) at 28.

⁴⁰ *United States v. Santos*, 553 U.S. 507, 514 (2008) (“[N]o citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed.”).

⁴¹ “[T]he government must prove both ‘an evil-meaning mind’ and ‘an evil-doing hand’ before criminal punishment may be justly imposed. This dual requirement is typically referred to by the Latin terms *mens rea* and *actus reus*, which translate to ‘guilty mind’ and ‘guilty act.’ Whereas the *actus reus* is generally objective and physical in nature, the *mens rea* is generally subjective and psychological. Both are necessary in order to impose criminal punishment; neither alone is sufficient.” Brian Walsh and Tiffany Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (Heritage Foundation and National Association of Criminal Defense Lawyers, May 2010) 3 (italics and citations omitted).

⁴² *Ibid.* at 5-10.

⁴³ “Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than \$100,000 or imprisoned not more than 5 years, or both.” See 15 U.S.C. §§ 78dd-1, et seq. (italics added).

⁴⁴ Shana-Tara Regon, *The Foreign Corrupt Practices Act, Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary*, U.S. House of Representatives (14 Jun. 2011).

⁴⁵ See, e.g., *United States v. Kozeny*, 667 F.3d 122, 136 (2d Cir. N.Y. 2011).

⁴⁶ Steeves, “Solving the puzzle of the FCPA in China,” 33.

⁴⁷ Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 636-37 (2012).

⁴⁸ A 2011 article in *The Economist* explained this problem well. “Unlike the FCPA, [the U.K. law] has a ‘compliance defence’ that allows a company to avoid the harshest penalties if the wrongdoer is a junior employee and the firm otherwise has a strict anti-bribery policy which is clear to all employees and effectively administered. One rogue employee can’t easily cause a crippling probe into an otherwise blameless company. America’s Department of Justice sees no need for such safeguards. And since few cases go to trial, judges have given little guidance as to what the FCPA’s bewildering text actually means. So, for now, it means whatever an aggressive prosecutor says it does.” “A Tale of Two Laws,” *The Economist* (17 Sept. 2011).

⁴⁹ Barstow & Xanic von Bertrab, “Vast Mexico Bribery Case Hushed Up by Wal-Mart.” See also Ammon Simon, “Wal-Mart and the Foreign Corrupt Practices Act,” *National Review Online* (21 Dec. 2012).

⁵⁰ Lanny A. Breuer, Speech at Annual Meeting of the Washington Metropolitan Area Corporate Counsel Association in McLean, VA, (26 Jan. 2011). Breuer continued: “But when the right tone is set at the top—in the executive suite and in the general counsel’s office—you significantly reduce the risk of criminal conduct. And your jobs become easier. We are not interested in prosecuting corporations or executives or lawyers who are working hard to do the right thing.”

⁵¹ See, generally, Jeffrey S. Parker, “Corporate Crime, Overcriminalization, and the Failure of American Public Morality” in *The American Illness: Essays on the Rule of Law* (ed. Frank Buckley) 407-24.

⁵² “A Tale of Two Laws,” *The Economist*.

⁵³ *Ibid.*

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